



CITE BY TITLE AND SECTION

Thus

61 C.J.S. Motor Vehicles § 484

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE
AMERICAN LAW

AS DEVELOPED BY
ALL REPORTED CASES

By
FRANCIS J. LUDS
Editor in-Chief
and
EROLD J. GILBERT
Managing Editor

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REPORTS AND TEXTBOOKS

A

A.
A.2d
Abb
Abb Adm.
Abb App.Dec.
Abb Dec.
Abb N.Cas.
Abb Pr.
Abb Pr.N.S.
A'Beck.Res.
Judgm.
[1917]A.C.
[1918]A.C.
Acton
Adams
Add
Add Eccl.
A & E
A.&E. Enc.L.
A & E. Enc L & Pr.
Aik.
A.K.Marsh.
Ala.
Ala App.
Alaska
Alb. L.J.
A.L.C.
Alc & N.
Alc Reg Cas.
Aleyn
Alison Pr.
Allen
Allen (N.B.)
Alta L.
A.L.It.
Am Bankr.
Ambl
A.M.C.
Am Corp.Cas.
Am.Cr.
Am D.
Am & E.Corp.Cas.
Am & E.Corp.Cas.
N.S.
Am & Eng. Ency.
Law
Am & E. Eq. D.
Am & Eng. Pat.
Cas.
Am & Eng. R.R.
Cas.
Am. Electr. Cas.
Am & E R. Cas.
Am & E. R. Cas. N.
S.
Am.J.Int.L.
Am.L.J.
Am.L.J.N.S.

Atlantic Reporter
Atlantic Reporter Second Series
Abbott (U.S.)
Abbott's Admiralty (U.S.)
Abbott's Appeals Decisions (N.Y.)
Abbott's Decisions (N.Y.)
Abbott's New Cases (N.Y.)
Abbott's Practice (N.Y.)
Abbott's Practice New Series (N.Y.)
A'Beckett's Reserved Judgments
(Vt.)
[1917] Appeal Cases (Can.)
Law Reports [1918] Appeal Cases
(Eng.)
Acton (Eng.)
Adams Reports (N.H.)
Addison (Pa.)
Adams' Ecclesiastical (Eng.)
Adolphus & Ellis (Eng.)
American & English Encyclopedia of
Law
American & English Encyclopedia of
Law & Practice
Aikens (Vt.)
A.K. Marshall (Ky.)
Alabama
Alabama Appellate Court
Alaska
Albany Law Journal
American Leading Cases
Alcott & Napier (Eng.)
Aleock's Registry Cases (Eng.)
Aleyn (Eng.)
Alison's Practice (Sc.)
Allen (Mass.)
Allen, New Brunswick
Alberta Law
American Law Reports
American Bankruptcy (U.S.)
Ambler (Eng.)
American Maritime Cases
American Corporation Cases
American Criminal
Decisions
American & English Corporation
Cases
American & English Corporation
Cases New Series
American and English Encyclopedia of
Law
American & English Decisions in Equi-
ty
American and English Patent Cases
American and English Railroad Cases
American Electrical Cases
American & English Railroad Cases
American & English Railroad Cases
New Series
American Journal of International
Law
American Law Journal (Pa.)
American Law Journal New Series
(Pa.)

Am L. Rec.
Am L. Reg.
Am L. Reg N.S.
Am Law Reg. O.S.
Am L. Rev.
Am L.T. Bankr.

Am. Law Inst.

Am. Negl. Cas.
Am Negl R.
A.M.&O.
Am Prob.
Am Prob N.S.
Am Pr.
Am R.
Am R & Corp.
Am R Rep.
Am S.R.
Am St R.D.
And.
Andr.
Ann Cas.
Ann Cas 1912A

Anstr.
Anth N.P.
App D.C.
App Cas.
App Div.
Ariz.
Ark.
Ark Just.
Arn.
Arn & H.
Ashm.
Aspin.
Atk.
Austr C.L.R.

Austr Jur.
Austr L.T.

American Law Record (Ohio)
American Law Register
American Law Register New Series
American Law Register Old Series
American Law Review
American Law Times Bankruptcy Re-
ports
American Law Institute,
Restatement of the Law
American Negligence Cases
American Negligence Reports
Armstrong, Macartney & Ogle (Ir.)
American Probate
American Probate New Series
American Practice
American Reports
American Railroad & Corporation
American Railway Reports
American State Reports
American Street Railway Decisions
Anderson (Eng.)
Andrews (Eng.)
American & English Annotated Cases
American Annotated Cases 1912A, et
seq
Anstruther (Eng.)
Anthony's Nest Prius (N.Y.)
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Law Reports Appeal Cases (Eng.)
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Arizona
Arkansas
Arkley's Justiciary (Sc.)
Arnold (Eng.)
Arnold & Hodges (Eng.)
Ashmead (Pa.)
Aspinall's Maritime Cases (Eng.)
Atkin (Eng.)
Commonwealth Law Reports, Aus-
tralia
Australian Jurist
Australian Law Times

B

Bacon Abr.
Bail Eq.
Bailey
B & Ad.
B & Ald.
Baldw.
Baldwin (U.S.)
Ball Pr.
Ball & B.
Bank & Ins.R.
Bann.
Baum & A.
Barb.
Barb Ch.
B & A. in.
Barn
Barn.Ch.
Barnes
Barnes Notes
Batty
B & A. Aust.
Baxt.
Bay
B & B.
B.C.
Bacon's Abridgment (Eng.)
Bailey's Equity (S.C.)
Bailey's Law (S.C.)
Barnwell & Adolphus (Eng.)
Barnwell & Alderson (Eng.)
Baldwin (U.S.)
Baldwin's Practice (Sc.)
Ball & Beatty (Ir.)
Bankruptcy and Insolvency Reports
(Eng.)
Bannister (Eng.)
Banning & Arden (U.S.)
Barbour (N.Y.)
Barbour's Chancery (N.Y.)
Barron & Arnold (Eng.)
Barnardiston King's Bench (Eng.)
Barnardiston Chancery (Eng.)
Barnes' Practice Cases (Eng.)
Barnes' Notes (Eng.)
Batty (Ir.)
Baron & Austin (Eng.)
Baxter (Tenn.)
Bay (S.C.)
Broderip & Bingham (Eng.)
British Columbia

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)	Crabbe	Crabbe (U.S.)
C.J.	Corpus Juris	Cranch	Cranch (U.S.)
C.J. Ann.	Corpus Juris Annotations	Cranch C.C.	Cranch's Circuit Court (U.S.)
C.J.S.	Corpus Juris Secundum	Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
C.&K.	Carrington & Kirwan (Eng.)	Cr.App.	Criminal Appeals (Eng.)
C.&L.	Connor & Lawson (Ir.)	Crawf.&D.	Crawford & Dix (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)	Crawf.&D.Abr.	Crawford & Dix's Abridged Cases (Ir.)
Cl.Ch.	Clarke's Chancery (N.Y.)	Cas.	
Clark & F.	Clark & Finnelly (Eng.)	Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Clark & Fin.N.S.	Clark's House of Lords Cases (Eng.)	Cr.L.Mag.	Criminal Law Magazine
Clarke	Clarke's Chancery (N.Y.)	Cr.&Ph.	Craig & Phillips (Eng.)
Clarke & S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)	C.Rob.	Christopher Robinson's Admiralty (Eng.)
Clarke Ch.	Clarke's Chancery (N.Y.)	Cro.Car.	Croke (Charles) (Eng.)
Clayt.	Clayton's Reports, York Assizes (Eng.)	Cro.Eliz.	Croke Elizabeth (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)	Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Clev.L.Itc.	Cleveland Law Record (Oh.)	Cromptp.&J.	Crompton & Jervis (Eng.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)	Cromptp.&M.	Crompton & Meeson (Eng.)
Cl.&F.	Clark & Finnelly (Eng.)	Crow.Pat.Cas.	Crowell's Collection of Patent Cases (U.S.)
Cliff.El.Cas.	Clifford's Northwick Election Cases	C.&Ph.	Craig & Phillips (Eng.)
Cliff.	Clifford (U.S.)	Ct.Cl.	Court of Claims (U.S.)
C.L.R.	Common Law Reports (Eng.)	Ct.Cust.&Pat.	Court of Customs and Patent Appeals
C.M.	Carrington & Marshman (Eng.)	App.	
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)	Cunn.	Cunningham (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases	Curt.	Curtis (U.S.)
Code Rep.	Code Reporter (N.Y.)	Curt.Eccl.	Curtis Ecclesiastical (Eng.)
Code Rep.N.S.	Code Reports New Series (N.Y.)	Cush.	Cushing (Mass.)
Coff.Prob.	Coffey's Probate (Cal.)	Cust.A.	United States Customs Appeals
Co.Inst.	Coke's Institutes	Cyc.	Cyclopedia of Law & Procedure
Coke	Coke (Eng.)	Cyc.Ann.	Cyclopedia of Law & Procedure Annotations
Col.Cas.	Coleman's Cases (N.Y.)		
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)		
Col.C.C.	Collyer's Chancery Cases (Eng.)		
Coldw.	Coldwell (Tenn.)		
Coll.	Collyer (Eng.)		
Col.L.Rep.	Colorado Law Reporter		
Col.Law Review	Columbia Law Review		
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports		
Colles	Colles' Cases in Parliament (Eng.)	Dak.	Dakota
Colo.	Colorado	Dal.C.P.	Dalson's Common Pleas (Eng.)
Colo.App.	Colorado Appeals	Dall.	Dallaman's Decisions (Tex.)
Colq.	Colquit	Dall.	Dallas (Pa.)
Coltm.	Coltman (Eng.)	Dall.	Dallas (U.S.)
Comb.	Comberbach (Eng.)	Dalr.Dec.	Dalrymple's Decisions (Sc.)
Com.Cas.	Commercial Cases (Eng.)	Daly	Daly (N.Y.)
Com.L.	Commercial Law (Can.)	Dan.	Daniell (Eng.)
Comptr.Treas.	Comptroller Treasury Decisions	Dana	Dana (Ky.)
Dec.		Dane Abr.	Dane's Abridgment
Comst.	Comstock (N.Y.)	Dans.&L.	Danson & Lloyd (Eng.)
Comyns	Comyns (Eng.)	D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Comyns Dig.	Comyns Digest (Eng.)	Dauph.Co.	Dauphin County (Pa.)
Con.&Law.	Connor & Lawson (Ir.)	Dav.&M.	Davison & Merivale (Eng.)
Conf.	Conference Reports (N.C.)	Davys	Davys (Ir.)
Conn.	Connecticut	Day	Day (Conn.)
Conn.Surr.	Connolly's Surrogate (N.Y.)	D.B.&M.	Dunlop, Bell & Murray (Sc.)
Const.	Constitutional Reports (N.C.)	D.C.	District of Columbia
Cooke	Cooke (Eng.)	D.Chipm.	D. Chipman (Vt.)
Cooke	Cooke (Tenn.)	Deac.	Deacon (Eng.)
Cooke & A.	Cooke & Alcock (Ir.)	Deac.&C.	Deacon & Chitty (Eng.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)	Deady	Deady (U.S.)
Coop.	Cooper's Chancery (Eng.)	Dears.&B.	Dearsley & Bell (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)	Dears.C.C.	Dearsley's Crown Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)	Deas & A.	Deas & Anderson (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)	De Gex	De Gex (Eng.)
Coop.t.Eld.	Cooper's Cases tempore Eldon (Eng.)	De G.F.&J.	De Gex, Fisher & Jones (Eng.)
Co.P.C.	Coke's Reports (Eng.)	De G.J.&S.	De Gex, Jones & Smith (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)	De G.&J.	De Gex & Jones (Eng.)
Court.&Macl.	Courtney & Maclean (Sc.)	De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
Cow.	Cowen (N.Y.)	De G.&Sm.	De Gex & Smale (Eng.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)	Del.	Delaware
Cowp.	Cowper (Eng.)	Del.Ch.	Delaware Chancery
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases	Del.Co.	Delaware County (Pa.)
Cox C.O.	Cox's Criminal Cases (Eng.)	Dem.Surr.	Demarest's Surrogate (N.Y.)
Cox Ch.	Cox's Chancery (Eng.)	Den.	Denio (N.Y.)
Cox & Atk.	Cox & Atkinson (Eng.)	Den.C.C.	Denison's Crown Cases (Eng.)
C.&P.	Carrington & Payne (Eng.)	Desaus.Fq.	Desaussure (S.C.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)	Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
C.P.D.	Law Reports Common Pleas Division (Eng.)	Dev.L.	Devereux (N.C.)
		Dev.&Bat.	Devereux & Battle (N.C.)
		Dick.	Dickens (Sc.)
		Dill.	Dillon (U.S.)
		Diri.Dec.	Dirleton's Decisions (Sc.)
		Disn.	Disney (Oh.)

D.&L. Dowling & Lowndes (Eng.)
Dods. Dodson's Admiralty (Eng.)
Dom.L.R. Dominion Law Reports (Can.)
Donnelly Donnelly (Eng.)
Dorion Dorion (L.C.)
Dougl. Douglas (Eng.)
Dougl. Douglass (Mich.)
Dougl.El.Cas. Douglas' Election Cases (Eng.)
Dow Dow (Eng.)
Dow & Cl. Dow & Clark (Eng.)
Dow.&L. Dowling & Lowndes (Eng.)
Dow.N.S. Dowling, New Series (Eng.)
Dowl. Dowling's English Bail Court (Practice) Cases
Dowl.P.C. Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S. Dowling's Practice Cases New Series (Eng.)
D.&R. Dowling & Ryland (Eng.)
Draper Draper (U.C.)
Drew. Drewry (Eng.)
Drinkw. Drinkwater (Eng.)
D.&R.Mag.Cas. Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P. Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm. Drewry & Smale (Eng.)
Drury Drury (Ir.)
Dr.&Wal. Drury & Walsh (Ir.)
Dr.&War. Drury & Warren (Ir.)
D.&Sw. Deane & Swabey (Eng.)
Dud.Eg. Dudley (S.C.)
Dudl. Dudley (Ga.)
Duer Duer's Superior Court (N.Y.)
Dunl.B.&M. Dunlop, Bell & Murray (Sc.)
Dunlop Dunlop (Sc.)
Dunn. Dunning (Eng.)
Durie Durie (Sc.)
Durn.&E. Durnford & East (Eng.)
Duv. Duval (Ky.)
Dyer Dyer (Eng.)

E

East East (Eng.)
East.L.R. Eastern Law Reporter (Can.)
East P.C. East's Pleas of the Crown (Eng.)
East.T. Eastern Term (Eng.)
E.&B. Ellis & Blackburn (Eng.)
E.B.&E. Ellis, Blackburn & Ellis (Eng.)
E.B.&S. Ellis, Best & Smith (Eng.)
E.C.L. English Common Law
Eden Eden (Eng.)
Edgar Edgar (Sc.)
Edm.Sel.Cas. Edmond's Select Cases (N.Y.)
E. D. Smith E. D. Smith (N.Y.)
Edw. Edwards (Eng.)
Edw. Edwards' Chancery (N.Y.)
Edw.Abr. Edwards' Abridgment of Prerogative Court Cases
Edw.Adm. Edwards' Admiralty (Eng.)
E.&E. Ellis & Ellis (Eng.)
Enc Pl.&Pr. Encyclopedia of Pleading & Practice
Ency.Law. American and English Encyclopedia of Law
Eng.Ad. English Admiralty
Eng.C.C. English Crown Cases
Eng.Ch. English Chancery
Eng.Eccl. English Ecclesiastical Reports
Eng.Ecc.R. English Ecclesiastical Reports
Eng.Exch. English Exchequer Reports
Eng.L.&Eq. English Law & Equity
Eng.Rep.R. English Reports, Full Reprint
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Eng.&Ir.App. Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr. Equity Cases Abridged (Eng.)
Eq.Rep. Equity Reports (Eng.)
E.R.O. English Ruling Cases
Esp. Espinasse's Nisi Prius (Eng.)
Euer Euer (Eng.)
Exch. Exchequer (Eng.)
Exch.Cas. Exchequer Cases (Sc.)

Ex.D.

Eyre

Falc. Falconer's Court of Sessions (Sc.)
Falc.&F. Falconer & Fitzherbert (Eng.)
Far. Farresley (Eng.)
F.Cas.No. Federal Cases (U.S.)
F.(Ct.Sess.) Fraser's Court of Sessions Cases (Sc.)
F. Federal Reporter (U.S.)
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F.R.D. Federal Rules Decisions
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Ferg.Cons. Ferguson's Consistory (Eng.)
F.&F. Foster & Finlason (Eng.)
Fish.Pat.Cas. Fisher's Patent Cases (U.S.)
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Fitzh.N.Br. Fitzherbert's Natura Brevium (Eng.)
Fla. Florida
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Fonh.Eq. Foublanque's Equity (Eng.)
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Forr. Forrest (Eng.)
Forrester Forrester's Cases (Eng.)
Fortesc. Fortescue (Eng.)
Fost. Foster (Eng.)
Fost. Foster (N.H.)
Fost.&Fin. Foster & Finlason (Eng.)
Fount.Dec. Fountainhall's Decisions (Sc.)
Fox Fox Reports (Eng.)
Fox & S. Fox & Smith (Ir.)
Freem. Freeman's Chancery (Eng.)
Freem. Freeman's Chancery (Miss.)
Freem.K.B. Freeman's King's Bench (Eng.)

Law Reports Exchequer Division
 (Eng.)
Eyre's Reports (Eng.)

F

Falc. Falconer's Court of Sessions (Sc.)
Falc.&F. Falconer & Fitzherbert (Eng.)
Far. Farresley (Eng.)
F.Cas.No. Federal Cases (U.S.)
F.(Ct.Sess.) Fraser's Court of Sessions Cases (Sc.)
F. Federal Reporter (U.S.)
F.2d Federal Reporter Second Series
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Ferg.Cons. Ferguson's Consistory (Eng.)
F.&F. Foster & Finlason (Eng.)
Fish.Pat.Cas. Fisher's Patent Cases (U.S.)
Fish.Pat.It. Fisher's Patent Reports (U.S.)
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Fl.&K. Flanagan & Kelly (Ir.)
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Fonbl. Foublanque (Eng.)
Fonbl.R. Foublanque's English Cases
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Forr. Forrest (Eng.)
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Fortesc. Fortescue (Eng.)
Fost. Foster (Eng.)
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Fost.&Fin. Foster & Finlason (Eng.)
Fount.Dec. Fountainhall's Decisions (Sc.)
Fox Fox Reports (Eng.)
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Freem. Freeman's Chancery (Eng.)
Freem. Freeman's Chancery (Miss.)
Freem.K.B. Freeman's King's Bench (Eng.)

G

Ga. Georgia
Ga.App. Georgia Appeals
Ga.Dec. Georgia Decisions
Gale Gale (Eng.)
Gal. Gallison (U.S.)
G.Coop. G. Cooper (Eng.)
G.&D. Gale & Davidson (Eng.)
Geld.&M. Geldart & Maddock (Eng.)
Gibb.Surr. Gibbon's Surrogate (N.Y.)
Giffard Giffard (Eng.)
Giff.&H. Giffard and Hemming (Eng.)
Gil. Gillfillan's Edition (Minn.)
Gilb. Gilbert's (Eng.)
Gilb.Cas. Gilbert's Cases (Eng.)
Gilb.C.P. Gilbert's Common Pleas (Eng.)
Gilb.Exch. Gilbert's Exchequer (Eng.)
Gill Gill (Md.)
Gill.&J. Gill & Johnson (Md.)
Gilm. Gilmer (Va.)
Gilm.&Falc. Gilmour & Falconer (Sc.)
Gilp. Gilpin (U.S.)
Glasc. Glascock (Ir.)
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Godb. Godbolt (Eng.)
Godo. Godolphin's Abridgment of Ecclesiastical Law
Goeb. Goebel's Probate Court Cases
Gosf. Gosford (Eng.)
Gouldsb. Gouldsborough (Eng.)
Gow Gow (Eng.)
Gow N.P. Gow's English Nisi Prius Cases
Grant Grant's Cases (Pa.)
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Grant Err.&App. Grant's Error & Appeal (U.C.)
Gratt. Grattan (Va.)
Gray Gray (Mass.)

Green Cr.
Greene
Gwillt.C.Cas.

Green's Criminal Law (Eng.)
Greene (Iowa)
Gwillim's Tithe Cases (Eng.)

H

Hadd.
Hagg. Adm.
Hagg. Cons.
Hagg. Eccl.
Hailes Dec.
Hale
Hale Eccl.
Hale P.C.
Hall
Hall & T.
Halsbury L. Eng.
Handy
Han. (N.B.)
Hard.
Hardres
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Harr. Mich.
Harr. & G.
Harr. Ch.
Harr. & H.
Harr. & J.
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Harr. & R.
Harr. & W.
Hask.
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Hawk. P.C.
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Hempst.
Hen. & M.
Het.
Het. C.P.
H. & H.
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Hill S.C.
Hill & Den.
Hill & Den. Supp.
Hilt.
Hil. T.
H. L. Cas.
H. & N.
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Hopk.
Hopk. Dec.

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Hale's Ecclesiastical (Eng.)
Hale's Pleas of the Crown (Eng.)
Hall's Superior Court (N.Y.)
Hall & Twells (Eng.)
Halsbury's Law of England
Handy (Oh.)
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Harrington (Del.)
Harrington's Michigan Chancery Reports
Harris & Gill (Md.)
Harrison's Chancery (Eng.)
Harrison & Hodgins (U.C.)
Harris & Johnson (Md.)
Harris & McHenry (Md.)
Harrison & Rutherford (Eng.)
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CORPUS JURIS SECUNDUM

VOLUME SIXTY-ONE

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This Title includes regulation of motor vehicles, public and private, and contractual rights and obligations affected thereby; indemnity bonds or other security of owners or operators, and liability thereon; rights in, and use of, highways and other public places; injuries to highways; injuries to motor vehicles; injuries to occupants of private vehicles; injuries from defects in, or negligent or wrongful use of, such vehicles, other than as public carriers or to employees; injuries from defects in, or obstruction of, highways or other public places, or from defects in private premises; liabilities for injuries; actions for injuries; statutory and punitive damages for injuries; violation of regulations, injuries to motor vehicles, and injuries from negligent or wrongful use of motor vehicles, as offenses, and prosecution and punishment thereof; regulation of chauffeurs; garages; and filling stations.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. CONTRIBUTORY NEGLIGENCE; ASSUMPTION OF RISK

1. IN GENERAL

§ 456. In General

As a general rule, a person who sustains injuries from the operation of a motor vehicle cannot recover therefor, notwithstanding negligence on the part of the defendant, if his own negligence was a direct and contributing cause of his injury.

It is a general rule, applicable in actions for injuries sustained from the operation of motor vehicles as in other cases, in the absence of a statute providing otherwise, that a person whose negligence proximately contributes to his own injuries cannot recover for such injuries, notwithstanding negligence on the part of defendant,⁹¹ and where, in an action for damages resulting from a collision between motor vehicles, defendant interposes a counterclaim or prosecutes a cross complaint, neither party can recover if his negligence contributed to the injury.⁹² However, the general rule that contributory negligence will bar recovery is subject to qualification where the doctrine of comparative neg-

ligence is recognized, as discussed in the C.J.S. title Negligence §§ 169-173, also 42 C.J. p 1185 notes 76-80; 45 C.J. p 1036 note 96-p 1043 note 62, or where the so-called "humanitarian" doctrine or that of last clear chance is applicable, *infra* § 493 (2), or where defendant's conduct was willful or wanton, *supra* § 258. Also, the mere fact of negligence on the part of the injured person will not preclude recovery by him unless such negligence was a direct and contributing cause of his injury,⁹³ although it need not have been the sole proximate cause thereof.⁹⁴ Plaintiff's negligence or freedom from negligence with respect to an automobile accident becomes immaterial where it appears that defendant was not negligent.⁹⁵ Where a person is injured by reason of the concurrent negligence of the operators of vehicles involved in a collision, his right of recovery does not depend on the applicability of the doctrines of contributory negligence or

91. U.S.—*Woods v. Gettelfinger*, 1 C.C. A Ga., 108 F.2d 549—*Grudice v. Delaware Sand & Gravel Co.*, D.C. Del., 38 F.Supp. 90
Ala.—*Heffelfinger v. Lane*, 196 So. 720, 239 Ala. 659.
Ark.—*Schaffner v. McCullough*, 42 S. W.2d 389, 184 Ark. 361.
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Ill.—*Schneiderman v. Interstate Transit Lines*, 60 N.E.2d 908, 326 Ill.App. 1, reversed on other grounds 69 N.E.2d 293, 394 Ill. 569—*McGoorty v. Benhart*, 27 N.E.2d 289, 305 Ill.App. 458.
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- Doherty v. Stewart*, 8 N.Y.S.2d 423, 255 App.Div. 1004.
N.C.—*Tyson v. Ford*, 47 S.E.2d 251, 228 N.C. 778—*Benton v. Johnson*, 46 S.E.2d 645, 228 N.C. 625—*Grimsley v. Scott*, 195 S.E. 83, 213 N.C. 110—*Malphurs v. Ellington*, 181 S. E. 266, 208 N.C. 834.
Pa.—*Sargeant v. Ayers*, 57 A.2d 881, 358 Pa. 393—*Riley v. McNaugher*, 178 A. 6, 318 Pa. 217—*Hess v. Stuner*, 19 A.2d 560, 144 Pa Super. 249—*Thompson v. Lamoreaux*, Com.Pl., 33 Del.Co. 247—*National Liberty Ins. Co. v. Mihalko*, Com.Pl., 7 Sch. Reg. 237.
Tex.—*Lewis v. Martin*, Civ.App., 120 S.W.2d 910, error refused—*Tinker v. Yellow Cab Co.*, Civ.App., 74 S. W.2d 521, error dismissed.
Wis.—*Stuart v. Collins*, 229 N.W. 533, 201 Wis. 170.
42 C.J. p 888 note 75, p 1132 note 38.
Affirmative defense
In an automobile accident case, contributory negligence is an "affirmative defense."—*Guthshall v. Wood*, 123 F.2d 174, 74 App.D.C. 379.
92. Ill.—*Chapin v. Foege*, 15 N.E.2d 943, 296 Ill.App. 96.
Ohio.—*Twin Dry Cell Battery Co. v. W. P. Southworth Co.*, 154 N.E. 58, 22 Ohio App. 450.
Tex.—*Schneider v. Delavan*, Civ.App., 118 S.W.2d 823, error dismissed.
41 C.J. p 1133 note 41.
93. U.S.—*Powell Bros. Truck Lines v. Platt*, C.C.A.Okla., 92 F.2d 879.
Cal.—*Ketchum v. Pattee*, 98 P.2d 1051, 37 Cal.App.2d 122—*Falasco v. Hulen*, 44 P.2d 469, 6 Cal.App.2d 224

- Gaster v. Hinkley*, 258 P. 988, 85 Cal App. 55.
Iowa.—*McIntyre v. O. B. West Co.*, 281 N.W. 353, 225 Iowa 739.
La.—*Herring v. Holicer Gas Co.*, App., 22 So.2d 868—*Bouillon v. Bonin*, App., 2 So.2d 535, followed in *Motty v. Bonin*, 2 So.2d 541—*Streetman v. Andress Motor Co.*, American Mut Liability Ins. Co., Intervenor, App., 189 So. 321.
Pa.—*Murray v. Finnigan*, Com.Pl., 31 Del.Co. 186.
Tex.—*Magnolia Petroleum Co. v. Owen*, Civ.App., 101 S.W.2d 354, error dismissed—*Morelos v. Milde*, Civ.App., 43 S.W.2d 133, error dismissed.
Vt.—*McKenna v. McDonald*, 10 A.2d 208, 111 Vt. 60.
42 C.J. p 1133 note 42.
Concurrent contributing factor
In order for negligence of motorist who was thrown onto highway when his automobile overturned and was struck by defendant's automobile to bar recovery for death of motorist, the motorist's negligence must have been a concurrent contributing factor existing and efficient at the very time of the accident, regardless of whether defendant's negligence was primary or subsequent negligence.—*Heffelfinger v. Lane*, 196 So. 720, 239 Ala. 659.
94. U.S.—*Sapp v. Gardner*, C.C.A.Or., 143 F.2d 423.
Iowa.—*Hogan v. Nesbit*, 246 N.W. 270, 216 Iowa 75.
95. Wis.—*Crombie v. Powers*, 227 N. W. 278, 200 Wis. 299.

last clear chance as applied to the conduct of the operators of the vehicles involved.⁹⁶

Assumption of risk. The doctrine of assumption of risk may apply so as to bar recovery by a person injured as the result of the operation of a motor vehicle.⁹⁷

§ 457. What Constitutes Contributory Negligence

With respect to the question what constitutes contributory negligence, every person using the highway is required to exercise ordinary care for his own safety and protection and that of his property, or that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid danger.

With respect to the question what constitutes contributory negligence sufficient to bar recovery for injuries suffered from the operation of motor vehicles, it is generally the rule that every person using the highway, whether a pedestrian, a rider of an animal, or a driver of, or passenger in, a vehicle, is required to exercise ordinary care for his own safety and protection and that of his property,⁹⁸ or that

degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid danger;⁹⁹ and the care required is proportionate to the danger involved,¹ under all the circumstances of the particular case.² Extraordinary care³ or the highest degree of caution⁴ is not required, unless specifically so provided by statute,⁵ and, hence, when ordinary and reasonable care is exercised, there is no contributory negligence.⁶

Danger incurred to save life or property. Generally, where the negligence of defendant in the operation of a motor vehicle has imperiled human life, a person who takes such steps as are reasonably necessary to rescue or protect those imperiled is not contributorily negligent in voluntarily leaving a place of safety and incurring danger if he does not act with recklessness which would not be warranted under the circumstances in the judgment of a prudent man.⁷ However, a person injured by a motor vehicle as a consequence of going to the rescue of another may avail himself of this rule only where engaged in a "rescue" within the purview of the rule,⁸ and the rule may not be applied as against a

96. La.—Lynch v. Fisher, App., 34 So.2d 513.

97. Cal.—La Porte v. Houston, App., 189 P.2d 544.

Defective equipment

The driver of a truck to which was attached an oil company's tank assumed the risk of use of defective equipment, where he continued to use the truck with knowledge thereof.—Gooze v. Speaks, 9 S.E.2d 439, 194 S.C. 206.

98. Ala.—Heffelfinger v. Lane, 196 So. 720, 239 Ala. 659.

Ark.—Arkansas Power & Light Co. v. Kennedy, 70 S.W.2d 506, 189 Ark. 95.

Cal.—Isham v. Trimble, 43 P.2d 581, 5 Cal.App.2d 648.

Fla.—Bassett v. Edwards, 30 So.2d 374.

Ill.—Anderson v. Krancic, 66 N.E.2d 316, 328 Ill.App. 364.

Ind.—Opple v. Ray, 195 N.E. 81, 208 Ind. 450.

Iowa.—Kaffenberger v. Holle, 22 N.W.2d 804, 237 Iowa 542—Hatfield v. White Line Motor Freight Co., 272 N.W. 99, 223 Iowa 7.

Ky.—Owen Motor Freight Lines v. Russell's Adm'r, 86 S.W.2d 708, 260 Ky. 795.

La.—Conrad v. Bertucci, App., 158 So. 596.

Me.—Tomlinson v. Clement Bros., 154 A. 355, 130 Me. 189.

Pa.—Dudenhofer v. Williams, 193 A. 77, 127 Pa.Super. 166—Thompson v. Lamoreaux, Com.Pl., 33 Del.Co. 247—Valente v. Linder, Com.Pl., 35

Luz.Leg.Reg.Rep. 9, affirmed 17 A.2d 371, 340 P.a. 508.

S.C.—Epps v. South Carolina State Highway Dept., 39 S.E.2d 198, 209 S.C. 125.

Tex.—Norris Bros v. Mattinson, Civ. App., 145 S.W.2d 204.

Wash.—Nicholson v. Nelson, 178 P.2d 739, 27 Wash.2d 472.

Wis.—Patterson v. Edgerton Sand & Gravel Co., 277 N.W. 636, 227 Wis. 11.

42 C.J. p 1133 note 44.
Care required of particular persons see infra §§ 462-485.

Whether defendant is lawfully or unlawfully using the highway, it is the duty of plaintiff to exercise due care for his own safety and to avoid injury from defendant's acts or negligence.—Tomlinson v. Clement Bros., 154 A. 355, 130 Me. 189—42 C.J. p 1133 note 44 [b].

Person sitting on sled

N.C.—Grimsley v. Scott, 195 S.E. 83, 213 N.C. 110.

99. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

Md.—Jones v. Dickerson, 41 A.2d 492, 184 Md. 499.

Or.—Flatman v. Lulay Bros. Lumber Co., 154 P.2d 535, 175 Or. 495.

S.C.—Oakman v. Ogilvie, 193 S.E. 920, 185 S.C. 118.

Tex.—Norris Bros v. Mattinson, Civ. App., 145 S.W.2d 204.

Wash.—Nicholson v. Nelson, 178 P.2d 739, 27 Wash.2d 472.

42 C.J. p 1134 note 45.

1. Iowa.—Dickeson v. Laicar, 225 N.W. 406, 208 Iowa 275.

S.C.—Oakman v. Ogilvie, 193 S.E.2d 920, 185 S.C. 118.

42 C.J. p 1134 note 46.

2. S.C.—Oakman v. Ogilvie, supra.

42 C.J. p 1134 note 47.

3. W.Va.—Ritter v. Hicks, 135 S.E. 601, 102 W.Va. 541.

42 C.J. p 1134 note 48.

4. W.Va.—Ritter v. Hicks, supra.

5. Mo.—Rader v. David, App., 207 S.W.2d 519—Nowlin v. Kansas City Public Service Co., App., 58 S.W.2d 324.

42 C.J. p 1134 note 50.

6. Cal.—Moreas v. Ferry, 26 P.2d 886, 135 Cal.App. 202.

Ind.—Opple v. Ray, 195 N.E. 81, 208 Ind. 450.

Ky.—Tate v. Hall, 57 S.W.2d 986, 247 Ky. 843.

La.—Landry v. McNeil Hunter Motor Co., 122 So. 293, 11 La.App. 380.

Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

42 C.J. p 1134 note 51.

7. Cal.—Petersen v. Lang Transp. Co., 90 P.2d 94, 32 Cal.App.2d 462.

Pedestrian attempting to board uncontrolled vehicle see infra § 468.

Danger from electric light wire falling into highway when truck broke pole was not so obvious as to require motorist, as matter of law, to refrain from getting out of his car and going to truck driver's assistance.—Butler v. Jersey Coast News Co., 160 A. 659, 109 N.J.Law 255.

8. Wash.—Hawkins v. Palmer, 188 P.2d 121, 29 Wash.2d 570.

defendant not responsible for placing the person being rescued in a position of peril.⁹

§ 458. — Duty to Discover Danger

In the exercise of due care, a person using the highway is required to make reasonable use of his senses and intelligence to observe and discover impending danger; but he is not strictly bound to see or to avoid collision with, or injury from, all vehicles upon the street, and is not required to exercise an infallible judgment with respect to approaching vehicles.

In the exercise of due care a person using the highway is required to make reasonable use of his senses and intelligence to observe and discover impending danger,¹⁰ and the duty to look implies a duty to see what is in plain sight,¹¹ so that, if the danger is visible and obvious, his failure to discover and avoid it amounts to contributory negligence,¹² unless some reasonable explanation is shown for not so doing;¹³ but he is not strictly bound to see or to avoid collision with, or injury from, all vehicles upon the street;¹⁴ nor is he required to exercise with respect to approaching vehicles an infallible judgment.¹⁵ A traveler on the highway is not required to anticipate extraordinary hazards or constantly to expect and search for unusual dangers.¹⁶

There is no imperative rule requiring him to be constantly looking and listening for the approach of an automobile under the penalty that on failure to do so his own negligence will be conclusively presumed if he is injured;¹⁷ and it is not necessarily negligence to fail to look for such danger when under the surrounding circumstances there is no reason to apprehend it.¹⁸

§ 459. — Reliance on Care of Person Causing Injury

A user of the highway is not guilty of contributory negligence in assuming, in the absence of knowledge or notice to the contrary, that others using it in common with him will comply with the law and use ordinary care to avoid injuring him; but he cannot for that reason omit any of the care which the law otherwise demands of him.

Under the rule that the rights of all persons using the public highways are reciprocal, as discussed supra § 246, any person upon the highway has the right to assume, in the absence of knowledge or notice to the contrary, that others using it in common with him will use ordinary care to avoid injuring him,¹⁹ and he may assume that they will conform to and not violate the statutes or ordinances²⁰ and

9. Wash.—Hawkins v. Palmer, supra.
10. Ind.—Opplie v. Ray, 195 N.E. 81, 208 Ind. 450—Drewrys Limited, U. S. A., v. Crippen, 44 N.E.2d 1006, 113 Ind.App. 120.
- Iowa.—Shenkle v. Mains, 247 N.W. 635, 216 Iowa 1324.
- Mich.—Francis v. Rumsey, 6 N.W. 2d 766, 303 Mich. 526.
- Pa.—Clee v. Brinks, Inc., 5 A.2d 387, 135 Pa.Super. 345—Dixon v. Pentony, 176 A. 782, 116 Pa.Super. 443, 42 C.J. p 1135 note 54.
- Duty to keep lookout in general see supra §§ 284-287.
11. U.S.—Campbell v. Kozera, D.C. Cal., 63 F.Supp. 251.
- La.—Brown v. Dalton, App., 148 So. 672.
- Mich.—Wallace v. Rosenfeld, 280 N.W. 733, 285 Mich. 204.
- Pa.—Gaskill v. Melella, 18 A.2d 455, 144 Pa.Super. 78—Clee v. Brinks, Inc., 5 A.2d 387, 135 Pa.Super. 345, 42 C.J. p 1135 note 55.
12. U.S.—Campbell v. Kozera, D.C. Cal., 63 F.Supp. 251.
- La.—Radovich v. Stipelcovich, App., 32 So.2d 394, 42 C.J. p 1135 note 56.
13. Iowa.—Kemmlish v. McCoid, 185 N.W. 628, 193 Iowa 958.
14. Ind.—Opplie v. Ray, 195 N.E. 81, 208 Ind. 450.
- La.—Murry v. Salley, App., 35 So.2d 820.
- Md.—Gutheridge, on Behalf and to

- Use of Ring Engineering Co. v. Gorsuch, 8 A.2d 885, 177 Md. 109.
- N.J.—Myles v. Sussman, 171 A. 547, 12 N.J.Misc. 341.
- 42 C.J. p 1135 note 58.
15. Iowa.—Kemmlish v. McCoid, 185 N.W. 628, 193 Iowa 958.
- Fact that by taking other precautions plaintiff might have avoided the accident is by no means conclusive that she was negligent.—Flynn v. Peracchio, 170 A. 926, 118 Conn. 124.
16. Ind.—Opplie v. Ray, 195 N.E. 81, 208 Ind. 450.
17. Cal.—Maggart v. Bell, 2 P.2d 516, 116 Cal.App. 306.
- Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.
- Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28—*Corpus Juris cited in* Hanson v. Manning, 239 N.W. 793, 797, 213 Iowa 625.
- 42 C.J. p 1135 note 60.
18. Cal.—Simonsen v. L. J. Christopher Co., 200 P. 615, 186 Cal. 786.
- 42 C.J. p 1136 note 61.
19. Ark.—Powell Bros. Truck Lines v. Barnett, 121 S.W.2d 116, 196 Ark. 1082.
- Cal.—Beck v. Sirota, 109 P.2d 419, 42 Cal.App.2d 551—Swartz v. Feddershon, 268 P. 430, 92 Cal.App. 285.
- Iowa.—Kaffenberger v. Holle, 22 N.W.2d 804, 237 Iowa 542—Orr v. Hart, 258 N.W. 84, 219 Iowa 408.
- La.—Roos v. Metropolitan Casualty Ins. Co. of Newark, N. J., App., 195 So. 657.
- Mont.—McCulloch v. Horton, 74 P.2d

- 1, 105 Mont. 531, 114 A.L.R. 823—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.
- N.J.—German v. Harris, 148 A. 619, 106 N.J.Law 521.
- S.C.—Oakman v. Ogilvie, 193 S.E. 920, 185 S.C. 118.
- Vt.—Porter v. Fleming, 156 A. 903, 104 Vt. 76.
- 42 C.J. p 1136 note 64.
- Control**
- Intending passenger asked by driver to crank automobile had right to rely on driver's having car in control, and was not required to anticipate that driver would have his car in gear while it was being cranked.—Hunter v. Baldwin, 255 N.W. 431, 268 Mich. 106.
20. Conn.—Hubbs v. Edmond, 186 A. 496, 121 Conn. 506.
- Ill.—Starr v. Rossin, 23 N.E.2d 740, 302 Ill.App. 325.
- Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.
- Kan.—Jones v. McCullough, 83 P.2d 669, 148 Kan. 561.
- La.—Jones v. Ouachita Baking Co., 128 So. 551, 14 La.App. 415.
- Mont.—Marsh v. Ayers, 260 P. 702, 80 Mont. 401.
- Ohio.—Scott v. Spaulding, App., 58 N.E.2d 815.
- Tenn.—Herstein v. Kemker, 94 S.W.2d 76, 19 Tenn.App. 681.
- 42 C.J. p 1136 note 65.
- Particular violations**
- Person is not required to anticipate those violations of automobile

the rules of the road,²¹ and he is not guilty of contributory negligence in acting on such assumption.²² However, he cannot for that reason omit any of the care which the law otherwise demands of him,²³ and, if he is himself guilty of negligence contributing to his injury, he has no right to act on the assumption that another traveler will exercise due care to protect him.²⁴

§ 460. — Acts in Emergencies

Where a traveler upon or across a highway is confronted by a sudden emergency created by the negligence of another and not by his own fault, he is not held to the same degree of care and prudence as is ordinarily demanded of a person who has time for deliberation and the full exercise of his judgment, and he is not guilty of contributory negligence if he acts as an ordinarily prudent person would act under like circumstances.

traffic laws which he does not know of, or which reasonably prudent person similarly situated would not reasonably anticipate.—Tarry Warehouse & Storage Co. v. Price, Tex. Civ.App., 76 S.W.2d 162, error dismissed.

21. Ind.—Rentschler v. Hall, App., 69 N.E.2d 619.

Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.

Md.—Garozynski v. Daniel, 57 A.2d 339.

Mich.—Sanderson v. Barkman, 249 N.W. 492, 264 Mich. 152.

Pa.—Lonasco v. Velli, 45 A.2d 417, 158 Pa. Super. 456.

Vt.—Porter v. Fleming, 156 A. 903, 104 Vt. 76.

42 C.J. p 1137 note 66.

22. Iowa.—Kaffenberger v. Holle, 22 N.W.2d 804, 237 Iowa 542—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.

Ohio.—Sidle v. Baker, 3 N.E.2d 537, 52 Ohio App. 89.

Wash.—Hadley v. Simpson, 115 P.2d 675, 9 Wash.2d 541.

W.Va.—Sewell v. Lawson, 177 S.E. 293, 115 W.Va. 527.

42 C.J. p 1137 note 67.

23. Ind.—Rentschler v. Hall, App., 69 N.E.2d 619.

Mass.—Sutherland v. Caruso, 155 N.E. 435, 258 Mass. 513.

42 C.J. p 1137 note 68.

Busy highway

One may not go upon a busy public highway and shut his eyes to danger relying on assumption that another motorist will comply with the law of the road, since that assumption ceases to protect one when it becomes apparent, or in the exercise of ordinary care and caution it should become apparent, that the law is not going to be obeyed.—Rogers v. Jefferson, 275 N.W. 874, 224 Iowa 324.

24. Okl.—Cushing Refining & Gas-

line Co. v. Deshan, 300 P. 312, 149 Okl. 225.

Vt.—Steele v. Fuller, 158 A. 666, 104 Vt. 303.

42 C.J. p 1137 note 69.

Anticipating contributory negligence

Operator of motor vehicle on highway may not be relieved of contributory negligence on ground that defendant ought to have anticipated that plaintiff would be guilty of contributory negligence.—Anderson v. Thompson, 22 P.2d 438, 137 Kan. 754.

25. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

26. U.S.—Car & General Ins. Corporation v. Keal Driveway Co., C.C.A. Fla., 132 F.2d 834, certiorari denied Keal Driveway Co. v. Car & General Ins. Corporation, 63 S.Ct. 1330, 319 U.S. 766, 87 L.Ed. 1716—Cram v. Eveloff, C.C.A. Minn., 127 F.2d 486—Oklahoma Natural Gas Co. v. McKee, C.C.A. Okl., 121 F.2d 583—Little v. Ireland, D.C. Idaho, 30 F. Supp. 653.

Cal.—Power v. Crown Stage Co., 256 P. 457, 82 Cal.App. 660

Iowa.—Handlon v. Henshaw, 221 N.W. 489, 206 Iowa 771.

Ky.—Hogge v. Anchor Motor Freight of Delaware, 126 S.W.2d 877, 277 Ky. 460.

La.—Teche Lines v. Gorum, 13 So.2d 291, 202 La. 993—Engeron v. Le Blanc, App., 29 So.2d 497, rehearing refused 30 So.2d 157—White v. Halliburton Oil Well Cementing Co., App., 183 So. 537, rehearing denied 185 So. 68—Aultman v. Union City Transfer, App., 172 So. 455—Goff v. Sinclair Refining Co., App., 162 So. 452—Nicholas Camarata, Inc., v. Cook, 134 So. 415, 17 La.App. 145—Gatlin v. Spangler, 6 La.App. 332.

Mich.—McConnell v. Elliott, 218 N.W. 653, 242 Mich. 145.

Mo.—Iman v. Walter Freund Bread Co., 58 S.W.2d 477, 332 Mo. 461.

The time available to a person to protect himself from injury resulting from the negligent operation of a motor vehicle by another must be given consideration in determining the issue of contributory negligence,²⁵ and a traveler upon or across a highway, who, without fault on his part, is suddenly confronted with a reasonable apprehension of imminent peril or danger by reason of the acts or negligence of the operator of a motor vehicle, is not required to exercise in the emergency as great an amount of care for his own safety or that of his property as is ordinarily demanded of one who has time for deliberation and the full exercise of his judgment and reasoning faculties.²⁶ Accordingly, conduct which under other circumstances would be negligent may not amount to contributory negligence.²⁷ In such case the person who was con-

N.J.—Jaffe v. Spata, 157 A. 135, 9 N.J.Misc. 1067.

Pa.—Zurcher v. Pittsburgh Rys. Co., 44 A.2d 581, 353 Pa. 212—Gaskill v. Melella, 18 A.2d 455, 144 Pa. Super. 78—Bernstein v. Smith, 86 Pa. Super. 366—Trupp v. Crow, Com.Pl., 39 Berks Co. 73—Eckenrode v. Produce Trucking Co., Com.Pl., 49 Dauph Co. 271—Logan v. Hughes, Com.Pl., 45 Lack.Jur. 94.

Tex.—Foster v. Woodward, Civ.App., 134 S.W.2d 417, error refused

Wash.—Kellerher v. Porter, 189 P.2d 223, 29 Wash.2d 650—Mahoney v. Canafax, 162 P.2d 903, 23 Wash.2d 869—Nystuen v. Spokane County, 77 P.2d 1002, 194 Wash. 312—Hook v. Kirby, 27 P.2d 567, 175 Wash. 352.

42 C.J. p 1137 note 71.

Jumping from vehicle at time of impending collision is not negligence per se—Franks v. Armstrong, 120 So. 829, 152 Miss. 719.

Time required for action

In action against owner and operator of automobile by motorcyclist for personal injuries sustained in collision when operator of automobile made a "U-turn" in middle of city block, some allowance was required to be made for the time required for the mental and physical operations by motorcyclist to meet the emergency.—Suarez v. Katon, 299 N.W. 798, 299 Mich. 38.

27. Cal.—Corpus Juris cited in Freitas v. Passerino, 21 P.2d 993, 994, 131 Cal.App. 585.

La.—Teche Lines v. Gorum, 13 So.2d 291, 202 La. 993—Willis v. Standard Oil Co. of Louisiana, 135 So. 777, 17 La.App. 217.

Mich.—Suarez v. Katon, 299 N.W. 798, 299 Mich. 38—Saunders v. Berger, 297 N.W. 240, 297 Mich. 199.

Wash.—Kellerher v. Porter, 189 P.2d 223, 29 Wash.2d 650—Mahoney v.

fronted with the emergency is not as a matter of law to be denied recovery of damages on the ground of his negligence because he failed to take every precaution which he might have taken,²⁸ or because in the light of subsequent events he is shown to have chosen the wrong method of avoiding injury,²⁹ and he is not guilty of contributory negligence if he acts as an ordinarily prudent person would act under like circumstances.³⁰ However, a person whose own negligence has contributed to his finding himself in a position of danger cannot be relieved of the imputation of contributory negligence in his

subsequent acts on the ground that they were done in a sudden emergency.³¹

What constitutes an emergency. In order to render applicable the rules relating to acts in emergencies, for the purpose of freeing plaintiff from guilt of contributory negligence under such circumstances, it must appear that the alarm was caused by defendant's negligence, that the apprehension of peril was reasonable, and that the appearance of danger was so imminent as to leave no time for deliberation;³² but it need not be shown that the danger or peril was actual, as long as there was a reasonable

Canafax, 162 P.2d 903, 23 Wash.2d 869.

42 C.J. p 1138 note 72, p 891 note 95
Effect of violation of statute or ordinance in emergency see *infra* § 461.

Errors or mistakes

Where emergency does not arise through motorist's fault, he is not responsible as a matter of law merely because of his possible errors or mistakes in trying to extricate himself from a position of danger.—Zurcher v. Pittsburgh Rys. Co., 44 A.2d 581, 353 Pa. 212.

28. La.—Webb v. Dunn, App., 15 So.2d 129—Geddes & Moss Undertaking & Embalming Co. v. Dunne, App., 161 So. 211, reinstated 165 So. 879—Chitwood v. King, App., 155 So. 466—General Exchange Ins. Corporation v. Caraccio, App., 144 So. 630—Newstadt v. Motor Freight Lines, 135 So. 628, 18 La. App. 15—Hanno v. Motor Freight Lines, 134 So. 317, 17 La. App. 62—Ernesto v. Gutierrez, 134 So. 114, 16 La. App. 550.

42 C.J. p 1138 note 73.

29. U.S.—Dubrock v. Interstate Motor Freight System, C.C.A.Pa., 143 F.2d 304, certiorari denied 65 S.Ct. 119, 323 U.S. 765, 89 L.Ed. 613.

Ark.—Coca Cola Bottling Co. of Blytheville v. Doud, 76 S.W.2d 87, 189 Ark. 986.

Cal.—Salgado v. Matsui, 119 P.2d 777, 48 Cal.App.2d 230—Enos v. Norton, 292 P. 276, 108 Cal.App. 19.

Conn.—Zint v. Wheeler, 169 A. 52, 117 Conn. 484.

Fla.—White v. Hughes, 190 So. 446, 139 Fla. 54.

Kan.—Deselms v. Combs, 174 P.2d 107, 162 Kan. 15—Barzen v. Kepler, 266 P. 69, 125 Kan. 648.

Ky.—Hogge v. Anchor Motor Freight of Delaware, 126 S.W.2d 877, 277 Ky. 460.

La.—Home Ins. Co. v. Warren, App., 29 So.2d 551—Allen v. Albritton, App., 172 So. 198—Andrews v. Foster, App., 169 So. 103, amended on other grounds 170 So. 563—Parker v. Employers' Casualty Co., App., 152 So. 373.

Mich.—Socony Vacuum Oil Co. v. Marvin, 21 N.W.2d 841, 313 Mich. 528.

Minn.—Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 215 Minn. 394, 147 A.L.R. 945.

N.J.—Clayton v. Vallaster, 194 A. 167, 118 N.J.Law 568.

Pa.—Sillies v. American Stores Co., 53 A.2d 610, 357 Pa. 176—West v. Morgan, Com.Pl., 52 Dauph.Co. 361, affirmed 27 A.2d 46, 345 Pa. 61.

Tex.—Foster v. Woodward, Civ.App., 134 S.W.2d 417, error refused.

Va.—Lavenstein v. Maile, 132 S.E. 844, 146 Va. 789.

42 C.J. p 1138 note 74, p 891 note 95 [a].

Mature or deliberate judgment

Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.—Roby v. Auken, 32 N.W.2d 491, 149 Neb. 734.

30. U.S.—Car & General Ins. Corp. v. Cheshire, C.C.A.La., 159 F.2d 985—Williams v. Powers, C.C.A.Ohio, 135 F.2d 153—Car & General Ins. Corporation v. Keal Driveway Co., C.C.A.Fla., 132 F.2d 834, certiorari denied Keal Driveway Co. v. Car & General Ins. Corporation, 63 S.Ct. 1330, 319 U.S. 766, 87 L.Ed. 1716—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718—Woody v. Utah Power & Light Co., C.C.A.Utah, 54 F.2d 220.

Ark.—East v. Woodruff, 193 S.W.2d 664, 209 Ark. 1046—Coca Cola Bottling Co. of Blytheville v. Doud, 76 S.W.2d 87, 189 Ark. 986.

Cal.—Enos v. Norton, 292 P. 276, 109 Cal.App. 19—Bennett v. Hardy, 291 P. 903, 108 Cal.App. 473.

Ga.—Cone v. Davis, 17 S.E.2d 849, 66 Ga.App.2d 229.

Idaho.—Colwell v. Bothwell, 89 P.2d 193, 60 Idaho 107.

Ill.—Skala v. Lehon, 258 Ill.App. 252, affirmed 175 N.E. 832, 343 Ill. 602.

Iowa.—Lein v. John Morrell & Co., 224 N.W. 576, 207 Iowa 1271.

La.—Teche Lines v. Gorum, 13 So.2d 291, 202 La. 993—Murray v. Kauf-

man, App., 22 So.2d 750—Geddes & Moss Undertaking & Embalming Co. v. Dunne, App., 161 So. 211, reinstated 165 So. 879—Chitwood v. King, App., 155 So. 466—Abel v. Gulf Refining Co., App., 143 So. 82, setting aside 138 So. 708—Lacy v. Lucky, 140 So. 85, 19 La.App. 743—Payne v. Prestridge, 133 So. 512, 16 La.App. 479—Thornhill v. Yellow Cab Co. of Monroe, 6 La.App. 787. Me.—Tomlinson v. Clement Bros., 154 A. 355, 130 Me. 189.

Minn.—Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 215 Minn. 394, 147 A.L.R. 945.

Mont.—Marsh v. Ayers, 260 P. 702, 80 Mont. 401.

N.J.—Clayton v. Vallaster, 194 A. 167, 118 N.J.Law 568.

Or.—Kiddle v. Schnitzer, 114 P.2d 109, 167 Or. 316, opinion adhered to 117 P.2d 983, 167 Or. 316.

Va.—Brown v. Wallace, 35 S.E.2d 793, 134 Va. 570.

Wash.—Kellerher v. Porter, 189 P.2d 223, 29 Wash.2d 650—Mahoney v. Canafax, 162 P.2d 903, 23 Wash.2d 869.

Wis.—Klas v. Fenske, 22 N.W.2d 596, 248 Wis. 534.

42 C.J. p 1139 note 75.

31. La.—McCook v. Rebecca-Fabacher, Inc., App., 10 So.2d 512.

Me.—Field v. Webber, 169 A. 732, 132 Me. 236—Esponette v. Wiseman, 155 A. 650, 130 Me. 297.

Mich.—Socony Vacuum Oil Co. v. Marvin, 21 N.W.2d 841, 313 Mich. 528.

Minn.—Erickson v. Northland Transp. Co., 232 N.W. 715, 181 Minn. 406.

N.Y.—Neumann v. Hudson County Consumers' Brewing Co., 139 N.Y. S. 1028, 155 App.Div. 271.

Or.—Kiddle v. Schnitzer, 114 P.2d 109, 167 Or. 316, opinion adhered to 117 P.2d 983, 167 Or. 316.

S.D.—Stacey v. Patzloff, 295 N.W. 287, 67 S.D. 503.

Wis.—Kane v. Loyd's Am. Line, 19 N.W.2d 296, 247 Wis. 145.

32. Mo.—Stanley v. Helm, 223 S.W. 125, 204 Mo.App. 159.

42 C.J. p 1139 note 76.

apprehension thereof from plaintiff's standpoint.³³ It has been held that a traveler on the highway cannot wholly ignore conditions which he knows to exist or be relieved of responsibility with which he is charged by claiming that the known condition is an emergency.³⁴

§ 461. — Violation of Statute or Ordinance

Regulations prescribing rules of traffic establish rules of conduct which constitute standards for testing contributory negligence. The violation of a regulation may constitute evidence of negligence or negligence per se which will bar the right of recovery if it contributes to the injury.

Statutes or municipal ordinances prescribing the rules of traffic have been held to establish rules of conduct which constitute the standards for testing contributory negligence,³⁵ as well as negligence, as discussed supra §§ 248, 268, 269.

In accordance with the variance of opinion among the authorities as to the effect to be given to the violation of a statute or ordinance as establishing negligence, it has been held that such violation by a person who sustains injuries as a result of the operation of a motor vehicle upon the highway is not in itself contributory negligence,³⁶ although it may be evidence thereof,³⁷ and, contrarily, that it is negligence per se.³⁸ The rule that such violation

constitutes negligence is, however, subject to the qualification that, if it is necessary in an emergency, under all the circumstances, in an attempt to avoid an accident, to act otherwise than as the law or ordinance prescribes, the violation is not contributory negligence or evidence thereof;³⁹ and, where the act constituting the violation is occasioned by the negligent act of defendant, he cannot rely on such violation as contributory negligence.⁴⁰ No question of imputed negligence arises between persons all of whom are mutually engaged in illegal conduct.⁴¹

Where the violation of a statute or ordinance constitutes negligence, either by itself or under the circumstances, it will bar the right of recovery if it contributes to the injury,⁴² but recovery will not be barred where the violation is not a direct and contributing cause of the injury.⁴³

§ 462. Owners or Operators of Motor Vehicles

- a. In general
- b. Negligence of operator as affecting rights of owner

a. In General

As a general rule, the owner or operator of an automobile cannot recover for injuries sustained in a colli-

Emergency shown

N.H.—Labreque v. Childs, 55 A.2d 473.

Emergency not shown

Ind.—Hedgecock v. Orlosky, 44 N.E. 2d 93, 220 Ind. 390.

La.—Gaubert v. Ed. E. Hebert Co., App., 174 So. 716.

33. Mo.—Norton v. Davis, App., 265 S.W. 107.

34. Wis.—Kane v. Loyd's Am. Line, 19 N.W.2d 296, 247 Wis. 145.

35. Wash.—Portland-Seattle Auto Freight v. Jones, 131 P.2d 736, 15 Wash.2d 603.

36. Ill.—Price v. Illinois Bell Telephone Co., 269 Ill.App. 581.

La.—McBride v. Gill, App., 15 So.2d 643.

N.J.—Henry v. Ehrlich Transfer & Trucking Co., 3 A.2d 453, 121 N.J. Law 541.

42 C.J. p 1139 note 79.

37. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

42 C.J. p 1139 note 80.

38. Ky.—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8.

Mich.—Haszcyn v. Detroit Creamery Co., 275 N.W. 211, 281 Mich. 467.

S.C.—Shields v. Chevrolet Truck, 12 S.E.2d 19, 195 S.C. 437.

Wis.—Langdon v. City of West Allis, 257 N.W. 8, 216 Wis. 325.

42 C.J. p 1139 note 81.

39. Colo.—Dillon v. Sterling Rendering Works, 106 P.2d 358, 106 Colo. 407.

N.M.—Mozley v. Rinehart, 291 P. 294, 35 N.M. 164.

42 C.J. p 1140 note 84.

40. Tex.—Grohn v. Lucey Mfg. Co., Civ.App., 246 S.W. 1059.

42 C.J. p 1140 note 85.

41. Mass.—Boyd v. Ellison, 143 N.E. 41, 248 Mass. 250.

42 C.J. p 1140 note 86.

42. Ala.—Greer v. Marriott, 167 So. 597, 27 Ala.App. 108, certiorari denied 167 So. 599, 232 Ala. 194.

Ky.—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8.

La.—McBride v. Gill, App., 15 So.2d 643.

Mass.—Cannon v. Bassett, 162 N.E. 772, 264 Mass. 383.

S.C.—Shields v. Chevrolet Truck, 12 S.E.2d 19, 195 S.C. 437.

Tenn.—Ijams v. Knoxville Power & Light Co., 1 Tenn.App. 627.

42 C.J. p 1139 note 82.

Regulation prohibiting coasting on public way

Mass.—Ahmedjian v. Erickson, 183 N.E. 65, 281 Mass. 6.

Vt.—Shea v. Pilette, 189 A. 154, 108 Vt. 446, 109 A.L.R. 933, followed in 189 A. 159, 108 Vt. 457.

43. Cal.—Ingram v. Wessendorf, 57 P.2d 989, 14 Cal.App.2d 16.

Ill.—Pfle v. Owens, 73 N.E.2d 445, 331 Ill.App. 390—Price v. Illinois Bell Telephone Co., 269 Ill.App. 581

—Miller v. Burch, 254 Ill.App. 387.

Kan.—Crawford v. Miller, 186 P.2d 116, 163 Kan. 718.

La.—Martinez v. Rein, App., 146 So. 787—Bordlee v. Di Carlo, 135 So. 725, 17 La.App. 200—Michel Bros. v. Mallynn, 3 La.App. 69.

Mass.—Renaud v. New England Transp. Co., 189 N.E. 789, 286 Mass. 39—Minnehan v. Hilland, 180 N.E. 295, 278 Mass. 518.

Mich.—Haszcyn v. Detroit Creamery Co., 275 N.W. 211, 281 Mich. 467.

N.H.—Judd v. Perkins, 138 A. 312, 83 N.H. 39.

Pa.—Vunak v. Walters, 43 A.2d 536, 157 Pa.Super. 660—Sensenig v. Kauffman, 13 Pa.Dist. & Co. 501—Hanawalt v. Ranshaw, Com.Pl., 34 Del.Co. 551.

R.I.—McWright v. Providence Telephone Co., 131 A. 841, 47 R.I. 196.

S.D.—Harvison v. Herrick, 248 N.W. 205, 61 S.D. 245.

Tenn.—Elmore v. Thompson, 14 Tenn. App. 78.

42 C.J. p 1140 note 83.

sion with another vehicle or other accident resulting from the negligent operation of another vehicle where negligence in the operation of his own car contributed to the accident, but what constitutes contributory negligence barring recovery depends on the circumstances of the particular case.

As a general rule, the owner or operator of an automobile cannot recover for injuries to himself or to his vehicle sustained in a collision with another vehicle or other accident resulting from the negligence of the operator of another vehicle, where negligence in the operation of his own car contributed to the accident,⁴⁴ except under the "last clear chance" or "humanitarian" doctrine, as discussed infra § 493 (2), or that of comparative negligence, as considered in the C.J.S. title Negligence §§ 169-173, also 42 C.J. p 1185 notes 76-80; 45 C.J. p 1036

note 96-p 1043 note 62, or where the conduct of defendant was wanton or willful, as discussed supra § 258. However, negligence of the operator of a vehicle will not preclude recovery unless such negligence was a direct and contributing cause of the injury.⁴⁵ What constitutes contributory negligence of a motor vehicle operator depends on the circumstances of the particular case,⁴⁶ and it has been held that no fixed rule can be laid down in automobile collision cases on the question of contributory negligence,⁴⁷ but that each case must be determined by general principles which have been definitely established.⁴⁸ Since the duty of care rests on all users of the highway alike, as discussed supra § 246, and since the same acts or omissions constitute negligence whether the person chargeable therewith is

44. Ala.—A. B. C. Truck Lines v Kenemer, 25 So.2d 511.
Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140—Kirby v. Swift & Co., 134 S.W.2d 865, 199 Ark. 442—Riceland Petroleum Co. v. Moore, 12 S.W.2d 415, 178 Ark. 599.
Cal.—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App.2d 1
Ind.—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65.
La.—Brown v. Dalton, App., 143 So 672—Holloway v. Pure Oil Co., 135 So. 381, 17 La.App. 584, rehearing denied 136 So. 748, 17 La.App. 584—Hoffman v. Peter Judlin, Inc., 134 So. 435, 17 La.App. 183—Nestor v. Item Co., 131 So. 482, 15 La.App. 339—Buckner v. Powers, 125 So. 744, 12 La.App. 630—De La Vergne v. Levy, 123 So. 182, 10 La.App. 768—Medley v. American Ry. Exp. Co., 120 So. 75, 9 La.App. 702—Worsham v. Gebelin, 119 So. 291, 9 La.App. 593—Roberts v. Eason, 6 La.App. 703—Couvillion v. Zoder, 2 La.App. 339—Bardwell v. Reid, 2 La.App. 309.
Mich.—Meisenheimer v. Pullen, 260 N.W. 756, 271 Mich. 509—Kerns v. Lewis, 224 N.W. 647, 246 Mich. 423.
Miss.—Mangum v. Reid, 173 So. 284, 178 Miss. 352.
Mo.—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243—Schroeder v. Rawlings, 155 S.W.2d 189, 348 Mo. 824.
N.Y.—Diem v. Adams, 42 N.Y.S.2d 55, 266 App.Div. 307, appeal granted 44 N.Y.S.2d 264, 266 App.Div. 948—Mergentime v. New England Telephone & Telegraph Co., 8 N.Y.S.2d 637, 255 App.Div. 628, reargument denied 10 N.Y.S.2d 674, 256 App.Div. 932, motion denied 20 N.E.2d 1022, 280 N.Y. 670, affirmed 23 N.E.2d 551, 281 N.Y. 739—Maxson v. Tomek, 280 N.Y.S. 319, 244 App.Div. 604—Plunkett v. Heath, 1 N.Y.S.2d 778.

N.C.—Tyson v. Ford, 47 S.E.2d 251, 228 N.C. 778—Mangum v. Winstead, 162 S.E. 557, 202 N.C. 252.
N.D.—Bagan v. Bitterman, 259 N.W. 266, 65 N.D. 423—Billingsley v. McCormick Transfer Co., 228 N.W. 424, 58 N.D. 913.
Pa.—Matys v. Consumers Ice & Coal Co., 36 A.2d 821, 154 Pa.Super. 568—Williams v. Philadelphia Toilet & Laundry Co., 29 A.2d 336, 150 Pa.Super. 643—Hess v. Stiner, 19 A.2d 560, 144 Pa.Super. 249—Hess v. Mumma, 19 A.2d 524, 144 Pa.Super. 313—Pittsburgh Corrugated Paper Box Co. v. Luterman, 156 A. 631, 102 Pa.Super. 297—Mohr v. Schubert, 22 Lehigh Co.L.J. 164—Warner v. Wilson, 90 Pittsb.Leg.J. 106.
Tenn.—Frye v. Elkins, 122 S.W.2d 827, 22 Tenn.App. 317.
Tex.—Blakesley v. Kircher, Com. App., 41 S.W.2d 53—Wright v. McCoy, Civ.App., 131 S.W.2d 52.
Wash.—Jamieson v. Taylor, 95 P.2d 791, 1 Wash.2d 217—Warner v. Keebler, 94 P.2d 175, 200 Wash. 608.
Wis.—Kane v. Loyd's Am. Line, 19 N.W.2d 296, 247 Wis. 145.
42 C.J. p 1140 note 90.

Sole or contributing cause

A motorist's negligence need not have been sole proximate cause of injuries sustained by him in collision with truck, standing on highway ahead of him, to bar recovery of damages therefor, as "contributory negligence" signifies contribution to, rather than independent or sole cause of, injury, and bars recovery if it contributes to injury as a proximate cause or one of proximate causes thereof.—Tyson v. Ford, 47 S.E.2d 251, 228 N.C. 778.

Conduct following collision

In order to prevent recovery for defendant's negligence, allegedly resulting in injuries following a collision, plaintiff's conduct following

collision must have been either negligent or independent of defendant's negligence.—Molloy v. Mitchell, 137 So. 896, 223 Ala. 666.

45. Cal.—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435.
La.—Gauvereau v. Checker Cab Co., 131 So. 590, 14 La.App. 448.
Md.—Friedman v. Hendler Creamery Co., 148 A. 426, 158 Md. 131.
Mich.—Michigan Fire & Marine Ins. Co. v. Pretty Lake Vacation Camp, 25 N.W.2d 166, 316 Mich. 197.
Minn.—Sanders v. Gilbertson, 29 N.W.2d 357, 224 Minn. 546.
N.M.—Williams v. Haas, 189 P.2d 632.
Or.—Kuehl v. Hamilton, 297 P. 1043, 136 Or. 240.
Tex.—Blakesley v. Kircher, Civ.App., 26 S.W.2d 1091, reversed on other grounds, Com.App., 41 S.W.2d 53.

46. U.S.—Burdick v. Powell Bros. Truck Lines, C.C.A.Ill., 124 F.2d 694.

Contributory negligence held shown
U.S.—McGregor v. U. S., 98 Ct.Cl. 638.

47. Wash.—Hefner v. Pattee, 96 P. 2d 583, 1 Wash.2d 607—Fosdick v. Middendorf, 115 P.2d 679, 9 Wash. 2d 616.

No prescribed act

Where two motor vehicles collide, there is no prescribed act which will constitute contributory negligence, and the only rule which can be followed in ascertaining plaintiff's responsibility for the accident under the circumstances is the rule of negligence as to what a reasonably prudent man would do under similar circumstances.—Washam v. Peerless Automatic Staple Mach. Co., 113 P. 2d 724, 45 Cal.App.2d 174.

48. Wash.—Fosdick v. Middendorf, 115 P.2d 679, 9 Wash.2d 616.

plaintiff or defendant in an action arising out of a collision between vehicles or other accident resulting from the negligent operation of one vehicle with respect to another, the duties of both drivers have hereinbefore been discussed together, *supra* §§ 246-377.

It has been held that a driver has the right, after first feeling contact between his vehicle and another, to take prudent measures to protect his property from further damage provided he exercises reasonable care for his own safety in doing so.⁴⁹

b. Negligence of Operator as Affecting Rights of Owner

The owner of a motor vehicle damaged in a collision with another vehicle may recover for such damage notwithstanding the negligence of the operator of his vehicle contributed to the accident where the relation of the parties is such as not to make the owner responsible for the negligence of the operator.

Where the owner of a motor vehicle damaged in a collision and the operator thereof stand in such a relation to each other that the negligence of the operator will be imputed to the owner, as where they are master and servant or principal and agent, as discussed in the C.J.S. title Negligence §§ 157-168, also 45 C.J. p 1019 note 19-p 1036 note 95, the owner will be precluded from recovering for such dam-

age against the owner or operator of the other vehicle involved in the collision, notwithstanding the negligence of the latter,⁵⁰ unless the negligence of the operator of plaintiff's vehicle was not a contributing cause of the accident.⁵¹ Similarly, the owner of goods in a vehicle damaged by a collision with defendant's vehicle may be barred from recovering for damage to such goods where the owner and operator of the vehicle in which the goods were carried were contributorily negligent.⁵²

The owner of a motor vehicle may recover for injuries thereto, however, notwithstanding the injuries resulted from the combined negligence of the operator of his vehicle and the operator of another vehicle with which it collided where the relation of the parties is such as not to make the owner responsible for the negligence of the operator of his vehicle, as where the vehicle was being operated by a person who had taken it without any authority or right,⁵³ or by a person to whom the owner had loaned it, and who was at the time using it for his own purposes,⁵⁴ unless he knew that the person to whom he had loaned the car was a careless, inefficient, and unskilled driver,⁵⁵ or was not licensed as required by statute.⁵⁶ Similarly, the owner of a trailer may recover for damages thereto notwithstanding the negligence of the operator of the trac-

49. N.Y.—Rague v. Staten Island Coach Co., 42 N.E.2d 488, 288 N.Y. 206.

Disengaging bumper

Where plaintiff, whose truck had been struck by defendant's automobile, was compelled to move bumper before he could drive truck, plaintiff's act in pulling bumper away from front wheel after having felt a pain on his left side at moment of collision did not constitute negligence contributing to hernias from which plaintiff was thereafter found to be suffering.—Abdow v. Silverbrand, 17 N.E.2d 163, 301 Mass. 337.

50. Ark.—Kirby v. Swift & Co., 134 S.W.2d 865, 199 Ark. 442.

La.—Weltkam v. Jonston, App., 5 So. 2d 582, rehearing denied 6 So.2d 54. Pa.—McCandless v. Krut, 14 A.2d 181, 140 Pa.Super. 183.

S.D.—L. A. McKean Auto Co. v. G. & G. Rug & Furniture Co., 269 N. W. 375, 64 S.D. 594.

Tenn.—Frye v. Elkins, 122 S.W.2d 627, 22 Tenn.App. 317.

The contributory negligence of wife, operating husband's automobile as his agent at time of accident, bars recovery by him against third person negligently damaging automobile.—Tibbetts v. Harbach, 198 A. 610, 135 Me. 397.

Where motorist was a minor residing with his father, father was re-

sponsible for any loss resulting from motorist's negligence, and hence could not recover for damage to automobile caused by collision wherein the minor motorist and another were guilty of joint negligence.—Di Leo v. Du Montier, La.App., 195 So. 74.

51. La.—Stanley v. Ritchie Grocer Co., App., 167 So. 124.

52. Cal.—Anheuser-Busch, Inc., v. Starley, 170 P.2d 448, 28 Cal.2d 347. Tex.—Rose v. Baker, 160 S.W.2d 515, 138 Tex. 554.

53. N.Y.—Niagara F. Ins. Co. v. Nathan, 178 N.Y.S. 450.

54. Me.—Tibbetts v. Harbach, 198 A. 610, 135 Me. 397.

Mass.—Leveillee v. Wright, 15 N.E. 2d 247, 300 Mass. 382—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448.

N.H.—Wells v. O'Keefe, 18 A.2d 836, 91 N.H. 299.

N.J.—Malswinkle v. Penn Jersey Auto Supply Co., 2 A.2d 593, 121 N.J.Law 349.

N.Y.—Lubell v. Annunziata, 9 N.Y.S. 2d 100.

Utah.—Conklin v. Walsh, 193 P.2d 437.

42 C.J. p 1140 note 94.

In New York

(1) It has been held that the text rule prevails under the common law where the owner is not present in

the car at the time of the accident.—Mergentime v. New England Telephone & Telegraph Co., 8 N.Y.S.2d 637, 255 App.Div. 628, reargument denied 10 N.Y.S.2d 674, 256 App.Div. 932, motion denied 20 N.E.2d 1022, 280 N.Y. 670, affirmed 23 N.E.2d 551, 281 N.Y. 739.

(2) Some decisions have held that the text rule is still in force notwithstanding a statute imposing liability on the owner for damages resulting from the operation of his vehicle by any person using the vehicle with his express or implied permission.—Mills v. Gabriel, 18 N.Y. S.2d 78, 259 App.Div. 60, affirmed 31 N.E.2d 512, 284 N.Y. 755—Webber v. Graves, 255 N.Y.S. 726, 234 App. Div. 579—Tuttle v. State, 78 N.Y.S. 2d 820, 191 Misc. 1014—Hirschberg v. Meadow Brook Farms, 34 N.Y.S.2d 378, 178 Misc. 531—Nannes v. Ideal Garage, 269 N.Y.S. 777, 150 Misc. 522—Plunkett v. Heath, 1 N.Y.S.2d 778.

(3) Other decisions have held to the contrary.—Renza v. Brennan, 300 N.Y.S. 221, 165 Misc. 96—Darrohn v. Russell, 277 N.Y.S. 783, 154 Misc. 783.

55. Mo.—Stoeckle v. St. Louis, etc., R. Co., 258 S.W. 58, 214 Mo.App. 124.

56. N.Y.—Plunkett v. Heath, 1 N.Y.S.2d 778.

tor hauling such trailer where such operator was not his agent.⁵⁷

§ 463. Motorcyclists

A motorcyclist must exercise ordinary care for his own safety and usually cannot recover for injuries to which his own negligence contributed, but, in order to bar recovery, such negligence must be a direct and contributing cause of the injury.

A motorcycle rider is required to exercise ordinary care for his own protection and safety,⁵⁸ and cannot recover for injuries to himself or to his vehicle to which his own negligence contributed,⁵⁹ except under the last clear chance or humanitarian doctrine, as discussed *infra* § 493, or that of comparative negligence, as considered in the C.J.S. title Negligence §§ 169-173, also 42 C.J. p 1185 notes 76-80; 45 C.J. p 1036 note 96-p 1043 note 62, or where the conduct of defendant was wanton or willful, as discussed *supra* § 258. However, contributory negligence on the part of a motorcyclist is a matter of defense,⁶⁰ and will not preclude recovery for injuries sustained by him unless such negligence was a direct and contributing cause of his injury.⁶¹

Since motorcycles are included within the term "motor vehicle," as discussed *supra* § 6, the rights and duties of a motorcyclist, and his particular acts as constituting negligence or contributory negligence, have been considered together with those of

the operators of other motor vehicles *supra* §§ 246-377.

§ 464. Bicyclists

- a. In general
- b. Entering upon or crossing highway or intersection

a. In General

Bicyclists generally have the same rights as automobile drivers to the use of the highway, and are subject to the same obligations. Failure to use due care or to comply with regulations may constitute contributory negligence which will bar recovery if it is a direct contributing cause of injury.

With respect to the contributory negligence of a bicycle rider injured by a motor vehicle, bicyclists generally have the same rights as automobile drivers to the use of the highway,⁶² and usually are subject to the same obligations,⁶³ and must conform to the same standards of care.⁶⁴ Accordingly, in determining the right of a bicyclist to recover for injuries inflicted by a motor vehicle, it has been held that the bicyclist must exercise such care, for his own protection and safety, as an ordinary, cautious, and prudent person would exercise under the same circumstances,⁶⁵ although, where he is a minor, he is chargeable only with such care as would be exercised by a prudent person of like age and experience.⁶⁶ Where a bicyclist has been placed in a dangerous situation by another's negligence, he

57. N.Y.—Cote v. Autocar Sales & Service Co., 79 N.Y.S.2d 130, 191 Misc. 988.

58. Ill.—Jirkovsky v. Elfman, 55 N.E.2d 288, 323 Ill.App. 282.
Or.—Frame v. Arrow Towing Service, 64 P.2d 1312, 155 Or. 522.
42 C.J. p 1141 note 97.

Acts or omissions

Contributory negligence of motorcyclist on through way, who collided with motorist at intersection, must be determined by what motorcyclist did or omitted to do, without regard to motorist's lack of care.—Parro v. Meagher, 184 A. 885, 108 Vt. 182.

Minor

An eighteen-year-old motorcyclist injured in collision with automobile would be guilty of contributory negligence if he did something which an ordinarily prudent person of the same age and experience would not have done.—Gunter v. Claggett, 151 P.2d 271, 65 Cal.App.2d 636.

59. U.S.—Stegner v. Florini, C.C.A. Pa., 103 F.2d 980.

Cal.—Holopoff v. Malletta, 44 P.2d 403, 6 Cal.App.2d 80—Robbins v. Rogues, 16 P.2d 695, 128 Cal.App. 1.

Conn.—Smith v. Usher, 33 A.2d 137, 130 Conn. 204.

Fla.—Menendez v. Saffold Bros. Produce Co., 163 So. 573, 121 Fla. 296.

Ill.—Jirkovsky v. Elfman, 55 N.E.2d 288, 323 Ill.App. 282.

La.—Wyble v. Lafleur, App., 164 So. 461—James v. Fidelity & Casualty Co. of New York, App., 163 So. 421.

Md.—Sudbrook v. State, 138 A. 12, 153 Md. 194.

Me.—Field v. Webber, 169 A. 732, 132 Me. 236.

Neb.—Most v. Cedar County, 252 N.W. 465, 126 Neb. 54.

N.C.—Davis v. Jeffreys, 150 S.E. 488, 197 N.C. 712.

Ohio.—Michael v. Saul, App., 42 N.E.2d 219.

Pa.—Susa v. Consolidated Ice Co., 166 A. 559, 811 Pa. 150.

S.D.—Jamieson v. Garth, 249 N.W. 921, 61 S.D. 514.

Tex.—Stinson v. Boulevard Undertaking Co., Civ.App., 91 S.W.2d 1172.

Vt.—Parro v. Meagher, 184 A. 885, 108 Vt. 182.

Wash.—Allen v. Porter, 143 P.2d 328, 19 Wash.2d 503.

42 C.J. p 1141 note 97.

60. Mo.—Bates v. Friedman, App., 7 S.W.2d 452.

61. La.—Murray v. Kaufman, App., 22 So.2d 750.

Mich.—Suarez v. Katon, 299 N.W. 798, 299 Mich. 38.

Or.—Wilson v. Bittner, 276 P. 268, 129 Or. 122, 64 A.L.R. 132.

Va.—Gaines v. Campbell, 166 S.E. 704, 159 Va. 504.

62. Cal.—Hunt v. Los Angeles Ry. Corporation, 294 P. 745, 110 Cal. App. 456.

Mo.—McCoy v. Home Oil & Gas Co., App., 48 S.W.2d 113.

Neb.—Bixby v. Ayers, 298 N.W. 533, 139 Neb. 652.

63. Mo.—McCoy v. Home Oil & Gas Co., App., 48 S.W.2d 113.

64. N.C.—Threatt v. Railway Express Agency, 19 S.E.2d 873, 221 N.C. 211.

Pa.—Davis v. Moylan, 47 A.2d 641—Gallen v. Griffiths, 38 A.2d 721, 155 Pa.Super. 306.

65. Cal.—La Fleur v. Hernandez, 191 P.2d 95, 84 Cal.App.2d 569.

Iowa.—Grisell v. Johnson, 294 N.W. 618, 229 Iowa 364.

66. Cal.—Hunt v. Los Angeles Ry. Corp., 294 P. 745, 110 Cal.App. 456.

need exercise only ordinary care in the emergency,⁶⁷ and the fact that his conduct, in other circumstances, would be negligent,⁶⁸ or that he failed to adopt a safe or the safest course,⁶⁹ will not constitute contributory negligence.

It has been held, with respect to contributory negligence, that a bicyclist must observe the rules of the road and traffic regulations governing motor vehicles,⁷⁰ unless such regulations are limited to vehicles propelled by other than human power,⁷¹ and that he must comply with regulations expressly applicable to bicycle riders.⁷² The youth of the rider does not ordinarily exempt him from the operation of laws designed to regulate the conduct of travelers on public ways,⁷³ but it has been held that a regulation making it a crime for a bicyclist to operate his bicycle in a certain way must be construed

together with a statute prohibiting the conviction of children, below a certain age, for crimes in considering the question of a child's contributory negligence in violating the regulation.⁷⁴ It has been held that the violation of regulations governing the conduct of bicyclists may constitute negligence per se,⁷⁵ but according to other decisions, such a violation does not make the bicyclist a trespasser or nuisance on the highway,⁷⁶ and constitutes merely evidence of negligence.⁷⁷

The contributory negligence of a bicyclist in violating some traffic regulation or breaching some other duty imposed by law will preclude his recovery for injuries inflicted by a motor vehicle where such violation or breach of duty is a direct and contributing cause of the injuries.⁷⁸ Such a violation or breach of duty, however, does not, in all

Ill.—Glassman v. Keller, 9 N.E.2d 589, 291 Ill.App. 262.

Neb.—Bixby v. Ayers, 298 N.W. 533, 139 Neb. 652.

Care required of children generally see *infra* § 485.

Boy riding bicycle handle bars was required to protect himself with means presently available.—Dugan v. Fry, C.C.A.N.J., 34 F.2d 723.

Passenger on bicycle

Conn.—Johnson v. Shattuck, 3 A.2d 229, 129 Conn. 60.

67. Ariz.—Southwestern Freight Lines v. Floyd, 119 P.2d 120, 58 Ariz. 249.

N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.
42 C.J. p 1024 note 25 [a], p 1137 note 71 [b] (3).

68. N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.

42 C.J. p 1138 note 72 [a] (1).

Violation of regulation

Ariz.—Southwestern Freight Lines v. Floyd, 119 P.2d 120, 58 Ariz. 249.

La.—Elliot v. Rhymes, App., 153 So. 600.

69. Ariz.—Southwestern Freight Lines v. Floyd, 119 P.2d 120, 58 Ariz. 249.

70. Cal.—Flury v. Beeskau, 33 P.2d 1033, 139 Cal.App. 398.

Iowa.—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.

Ky.—Thomas v. Dahl, 170 S.W.2d 337, 293 Ky. 808.

La.—Clark v. De Beer, App., 188 So. 517.

Mo.—McCoy v. Home Oil & Gas Co., App., 48 S.W.2d 113.

Neb.—Bixby v. Ayers, 298 N.W. 533, 139 Neb. 652.

N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.—Van Dyke v. Atlantic Grey-

hound Corporation, 10 S.E.2d 727, 218 N.C. 283.

Or.—Haynes v. Sprague, 295 P. 964, 137 Or. 23.

71. U.S.—Johnson v. Railway Express Agency, C.C.A.Ill., 131 F.2d 1009.

Cal.—Green v. Pedigo, 170 P.2d 999, 75 Cal.App.2d 300.

Mo.—McCoy v. Home Oil & Gas Co., App., 48 S.W.2d 113.

Or.—Haynes v. Sprague, 295 P. 964, 137 Or. 23.

Conduct of persons

The provision of statute that persons riding bicycles should be subject to provisions of act regulating traffic on highways applicable to drivers of vehicles except provisions which could have no application was directed at the conduct of persons and not the things therein enumerated and so did not require that a bicycle be equipped with lights.—Johnson v. Railway Express Agency, C.C.A.Ill., 131 F.2d 1009.

72. La.—Jordan v. Crowell, App., 171 So. 477.

N.J.—Kuczeko v. Prudential Oil Corporation, 164 A. 308, 110 N.J.Law 111.

Violation not shown

(1) In general.—Walsdorf v. Perrett, La.App., 23 So.2d 782.

(2) Where automobiles were parked along curb, bicyclist riding eighteen feet from curb did not violate an ordinance keeping bicycles within five feet of curb unless turning or passing vehicles.—Hart v. Farris, 21 P.2d 432, 218 Cal. 69.

(3) Plaintiff, while pushing a small bicycle to repair shop, was a "pedestrian" and was not "using" bicycle within statute requiring every bicycle to be equipped with lighted lamp when used at night.—Holmes v. Blue Bird Cab, 43 S.E.2d 71, 227 N.C. 581.

73. Mass.—Patrican v. Garvey, 190 N.E. 9, 287 Mass. 62.

Keeping to right

Violation of statute requiring operator of a vehicle to keep to right of center of intersection in making a left turn by boy while riding a bicycle was negligence, without regard to qualifying rule that negligence of a child should be measured by that which is reasonably to be expected of a child of similar age, judgment, and experience.—Sagor v. Joseph Burnett Co., 190 A. 258, 122 Conn. 447.

74. Ill.—Glassman v. Keller, 9 N.E.2d 589, 291 Ill.App. 262.

75. Conn.—Atkinson v. Molstein, 191 A. 344, 122 Conn. 611.

La.—Jordan v. Crowell, App., 171 So. 477.

Mo.—McCoy v. Home Oil & Gas Co., App., 48 S.W.2d 113.

Regulations as to lamps and reflectors

Minn.—Campbell v. Sargent, 243 N.W. 142, 186 Minn. 293.

Pa.—Cardarelli v. Simon, 27 A.2d 250, 149 Pa.Super. 364.

76. Or.—Landis v. Wick, 57 P.2d 759, 154 Or. 199, rehearing denied 59 P.2d 403, 154 Or. 199.

77. N.J.—Kuczeko v. Prudential Oil Corporation, 164 A. 308, 110 N.J.Law 111.

Circumstance to be considered

Mass.—Scranton v. Crosby, 9 N.E.2d 391, 298 Mass. 15.

78. Conn.—Atkinson v. Molstein, 191 A. 344, 122 Conn. 611.

La.—Jordan v. Crowell, App., 171 So. 477.

Mass.—Patrican v. Garvey, 190 N.E. 9, 287 Mass. 62.

Mich.—Ertzbischoff v. Smith, 282 N.W. 159, 286 Mich. 306.

Mo.—McCoy v. Home Oil & Gas Co., App., 48 S.W.2d 113.

cases, constitute negligence as a matter of law barring recovery,⁷⁹ and the bicyclist will not be precluded from recovering unless his negligence proximately contributed to the injury,⁸⁰ or had some causal connection with it.⁸¹ The violation of a regulation is not necessarily the contributing cause of a collision between a bicyclist and a motorist,⁸² and it is no defense, in the absence of a showing that the accident would not have happened if there had been a compliance with the law.⁸³ In any case, contributory negligence of a bicyclist will not bar recovery where the negligent conduct of the operator of the motor vehicle was willful or wanton.⁸⁴

Particular acts or omissions. The rule that a bicyclist has the duty to use reasonable care and to comply with regulations, and that a failure of duty may constitute negligence precluding recovery, has been applied to particular acts or omissions,⁸⁵ as with respect to equipment, such as lights⁸⁶ or brakes,⁸⁷ position on the highway,⁸⁸ keeping a lookout,⁸⁹ maintaining reasonable speed and control,⁹⁰ and keeping such distance from the vehicle ahead as to permit a safe stop in case of an emergency.⁹¹ Likewise, it may be negligent to fail in any duty imposed by law while turning around for the purpose of traveling in the opposite direction,⁹² following,⁹³ passing,⁹⁴ or, according to other decisions on

Pa.—Gallenz v. Griffiths, 38 A.2d 721, 155 Pa.Super. 306—Cortez v. Hanna, Com.Pl., 32 Del.Co. 13.

79. Idaho—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.

La.—Lambert v. Cire, App., 179 So. 112.

Wash.—Sigol v. Kaplan, 266 P. 154, 147 Wash. 269.

80. Ala.—Godfrey v. Vinson, 110 So. 13, 216 Ala. 166.

La.—Walsdorf v. Perrett, App., 23 So.2d 782—Elliot v. Rhymes, App., 153 So. 600.

Md.—Miles v. State, for Use of Wistling, 198 A. 724, 174 Md. 292.

Wash.—Sigol v. Kaplan, 266 P. 154, 147 Wash. 269.

Lamps and reflectors

(1) In general.

Cal.—Hart v. Farris, 21 P.2d 432, 218 Cal. 69.

Idaho—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.

Ind.—Bechstein v. Sayler, 179 N.E. 581, 93 Ind.App. 686.

Or.—Landis v. Wick, 57 P.2d 759, 154 Or. 199, rehearing denied 59 P.2d 403, 154 Or. 199.

(2) Fact, that rear reflector on bicycle was visible for only four hundred feet instead of five hundred feet as required by statute did not preclude recovery for injury sustained by bicyclist whose bicycle was struck at night by overtaking truck, where truck driver testified that truck's lights illuminated roadway only about one hundred feet ahead of truck and that he did not see bicyclist at all until after accident, since under those circumstances inadequacy of reflector had nothing to do with accident.—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 468.

81. La.—Walsdorf v. Perrett, App., 23 So.2d 782.

Tenn.—Holt v. Walsh, 174 S.W.2d 657, 180 Tenn. 307.

82. Md.—Miles v. State, for Use of Wistling, 198 A. 724, 174 Md. 292.

83. Ariz.—Southwestern Freight Lines v. Floyd, 119 P.2d 120, 58 Ariz. 249.

Tenn.—Holt v. Walsh, 174 S.W.2d 657, 180 Tenn. 307.

84. Ala.—Godfrey v. Vinson, 110 So. 13, 216 Ala. 166.

85. N.J.—Sharkey v. Herman Bros Inc., Sup., 127 A. 525, affirmed 130 A. 920.

42 C.J. p 1142 note 21.

86. Cal.—Neilson v. Walker, 286 P. 1091, 105 Cal App. 23.

Minn.—Campbell v. Sargent, 243 N. W. 142, 186 Minn. 293.

Pa.—Cardarelli v. Simon, 27 A.2d 250, 149 Pa Super. 364.

Wash.—Everest v. Riecken, 174 P.2d 762, 26 Wash.2d 542.

42 C.J. p 1142 note 18.

87. Wash.—Bacon v. Varney, 223 P. 322, 128 Wash. 472.

42 C.J. p 1142 note 19.

88. Conn.—Atkinson v. Molstein, 191 A. 344, 122 Conn. 611.

La.—Pigott v. Bates, App., 143 So. 535.

Riding on wrong side of street or highway

Conn.—Atkinson v. Molstein, 191 A. 344, 122 Conn. 611.

La.—Pigott v. Bates, App., 143 So. 535.

Mass.—Patrican v. Garvey, 190 N.E. 9, 287 Mass. 62.

Pa.—Davis v. Moylan, 47 A.2d 641, 42 C.J. p 1141 note 10.

89. Conn.—Radwick v. Goldstein, 98 A. 583, 90 Conn. 701.

N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.

Wash.—Larpenteur v. Eldridge Motors, 55 P.2d 1064, 185 Wash. 530.

42 C.J. p 1141 note 10 [c], p 1142 note 15 [a].

Failure to look in direction of movement

U.S.—General Purchase Corporation v. Armour, C.C.A.Miss., 125 F.2d 147.

La.—Jordan v. Campbell, App., 171 So. 477.

Wash.—Barton v. Van Gesen, 157 P. 215, 91 Wash. 94.

Looking back

Child, after mounting bicycle and proceeding on his course, was under no duty to look back to see whether bus was approaching—Hunt v. Los Angeles Ry. Corporation, 294 P. 745, 110 Cal.App. 456.

90. U.S.—General Contract Purchase Corp. v. Armour, C.C.A.Miss., 125 F.2d 147.

Cal.—Hunt v. Los Angeles Ry. Corp., 294 P. 745, 110 Cal.App. 456.

Conn.—Radwick v. Goldstein, 98 A. 583, 90 Conn. 701.

La.—Jordan v. Campbell, App., 171 So. 477.

N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.

Pa.—Gallenz v. Griffiths, 38 A.2d 721, 155 Pa.Super. 306—Cortez v. Hanna, Com.Pl., 32 Del.Co. 13—Lopo v. McFadden, Com.Pl., 39 Luz Leg.Reg. 279.

Va.—McGowan v. Tayman, 132 S.E. 316, 144 Va. 358.

Wash.—Larpenteur v. Eldridge Motors, 55 P.2d 1064, 185 Wash. 530.

42 C.J. p 1141 note 8.

91. Wash.—Larpenteur v. Eldridge Motors, 55 P.2d 1064, 185 Wash. 530.

92. N.C.—Toney v. Henderson, 45 S. E.2d 41, 228 N.C. 253.

42 C.J. p 1141 note 11.

93. Pa.—Gallenz v. Griffiths, 92 Pittsb Leg.J. 340, affirmed 38 A.2d 721, 155 Pa.Super. 306.

Wash.—Larpenteur v. Eldridge Motors, 55 P.2d 1064, 185 Wash. 530.

42 C.J. p 1141 note 12.

94. Mo.—McCoy v. Home Oil & Gas Co., App., 48 S.W.2d 113.

Passing parked vehicle

When bicyclist saw automobile parked seventy five feet away on curve in narrow street and knew that his view around such curve was obstructed, he was bound to realize that he would not be able to determine whether he could pass automobile in safety until he was

the question, being overtaken by⁹⁵ a motor vehicle, or riding by its side or close to it,⁹⁶ meeting a motor vehicle coming from the opposite direction,⁹⁷ colliding with an automobile which turns against the bicycle or into its path,⁹⁸ or "hitching" a ride by holding on to a moving motor vehicle.⁹⁹

Reliance on care of motorist causing injury. In respect of whether the acts or conduct of a bicyclist constitutes contributory negligence, he has the right, in the absence of notice to the contrary, to assume, and to act on such assumption, that other users of the highway will exercise reasonable and ordinary care for his safety,¹ and will observe the rules of the road and traffic regulations.² However, he may not rely on due care by others to relieve himself from the obligation to exercise reasonable care for his own safety.³

almost on it and to anticipate that other vehicles might be coming from opposite direction—*Gallenz v. Griffiths*, 38 A 2d 721, 155 Pa Super. 306.

95. N.C.—*Van Dyke v. Atlantic Greyhound Corporation*, 10 S.E.2d 727, 218 N.C. 283.

42 C.J. p 1141 note 13.

Keeping to right to permit passing
Ala.—*Crescent Motor Co. v. Stone*, 94 So. 78, 208 Ala. 137.

42 C.J. p 1141 note 13 [a].

Awareness of peril

In action for injuries sustained by bicyclist colliding with automobile overtaking bicyclist on the latter's left, bicyclist's action in turning to left to go around stationary automobile in bicyclist's path was not contributory negligence, where bicyclist was unaware of his peril.—*Lambert v. Cire*, La.App., 179 So. 112.

96. N.J.—*Jackson v. Geiger*, 126 A. 438, 100 N.J.Law 330.

42 C.J. p 1141 note 14.

97. Mich.—*Essenberg v. Achterhof*, 237 N.W. 43, 255 Mich. 55.

42 C.J. p 1142 note 15, p 1136 note 61 [a] 2.

Compliance with regulations

(1) As respects contributory negligence bicyclists, while traveling on highways, are controlled by statute requiring meeting vehicles to turn to right.—*Haynes v. Sprague*, 295 P. 964, 137 Or. 23.

(2) Minor, who was riding bicycle along right side of street and who crossed center line to sidewalk on left in front of approaching automobile, sustaining injuries in resultant collision, violated criminal statute providing that, when persons traveling with vehicles meet on a way, each should drive his vehicle to right of middle of way.—*Patrican v. Garvey*, 190 N.E. 9, 287 Mass. 62.

b. Entering upon or Crossing Highway or Intersection

A bicyclist who enters upon or starts to cross a highway or intersection must use due care to observe other vehicles and avoid collision therewith, and his failure to do so may constitute contributory negligence barring recovery.

A bicyclist who enters upon or starts to cross a street does not exercise common prudence if he fails to look for approaching vehicles,⁴ and he is guilty of negligence if he runs directly into the path of a motor vehicle,⁵ or if he tries to cross ahead of a motor vehicle which is only a short distance away and which he sees approaching⁶ or which he must have seen if he had looked,⁷ unless he could fairly assume that he might safely cross before the automobile reached him.⁸ A bicycle rider who enters upon a highway from a private driveway, where his vision is obscured, is not free from contributory

Running into illegally parked car
Pa.—*Gallenz v. Griffiths*, 38 A 2d 721, 155 Pa Super. 306.

98. Mo.—*Taylor v. Sesler*, App., 113 S.W.2d 812.

42 C.J. p 1142 note 16.

99. N.C.—*Hood v. Orange Crush Bottling Co.*, 135 S.E. 609, 192 N.C. 827.

42 C.J. p 1142 note 17.

Intervening negligence

Finding that alleged negligence of boy bicyclist in holding onto moving truck did not contribute to his death was proper, where proximate cause of his death was independent, efficient, intervening act of negligence of motorist following truck in striking boy after boy released hold on truck.—*Long v. Bevers*, 58 P.2d 1295, 15 Cal.App.2d 47.

1. N.C.—*Tarrant v. Pepsi Cola Bottling Co.*, 20 S.E.2d 565, 221 N.C. 390.

Tex.—*Jennison v. Darnielle*, Civ.App., 146 S.W.2d 788, error dismissed.

Wash.—*Briggs v. United Fruit & Produce*, 119 P.2d 687, 11 Wash.2d 466.

Riding ahead of automobile

An operator of a bicycle riding ahead of a motor vehicle has the right to assume that the driver thereof will maintain a reasonable lookout, drive at a reasonable speed, and keep a proper distance between such vehicle and the bicycle.—*Tarrant v. Pepsi Cola Bottling Co.*, 20 S.E.2d 565, 221 N.C. 390.

Riding in vicinity of school

Minor who was struck by automobile when minor rode bicycle through a short driveway into street was entitled to take into account the probability that motorist in approaching driveway would regard the presence of a school and the likelihood that

school children would be encountered, and minor was not contributorily negligent as a matter of law.—*Clouatre v. Lees*, Mass., 75 N.E.2d 242.

2. Tex.—*Jennison v. Darnielle*, Civ. App., 146 S.W.2d 788. Error dismissed.

Wash.—*Briggs v. United Fruit & Produce*, 119 P.2d 687, 11 Wash.2d 466.—*Saulness v. Reynolds*, 60 P. 2d 93, 187 Wash 357.

Automobile on wrong side of road

Even if bicyclist saw automobile approaching on wrong side of road, he could rely on assumption that automobilist also would be looking and would steer car to own side of road.—*Essenberg v. Achterhof*, 237 N.W. 43, 255 Mich. 55.

3. Mass.—*Wade v. Buchanan*, 28 N. E.2d 421, 306 Mass. 318.

Mich.—*Duffy v. Enright Topham Co.*, 276 N.W. 715, 282 Mich. 662.—*Townsend v. Reader*, 233 N.W. 381, 252 Mich. 465.

4. U.S.—*General Contract Purchase Corporation v. Armour*, C.C.A. Miss., 125 F.2d 147.

Ala.—*Francis v. Imperial Sanitary Laundry & Dry Cleaning Co.*, 2 So. 2d 388, 241 Ala. 327.

42 C.J. p 1142 note 22.

5. Ala.—*Francis v. Imperial Sanitary Laundry & Dry Cleaning Co.*, 2 So.2d 388, 241 Ala. 327.

Iowa.—*Mowrey v. Schulz*, 296 N.W. 822, 230 Iowa 102.

Me.—*Hunter v. Mountfort*, 102 A. 975, 117 Me. 555.

6. N.J.—*Nolan v. Davis*, 112 A. 188, 95 N.J.Law 227.

7. Mich.—*Gibbs v. Dayton*, 131 N.W. 544, 166 Mich. 263.

8. Pa.—*Walleigh v. Bean*, 93 A. 1069, 248 Pa. 339.

negligence when he is struck by an automobile which had given warning signals as it approached the driveway.⁹ Crossing a roadway diagonally at a place where there is no crosswalk, with the knowledge that automobiles are approaching, may be negligence as a matter of law.¹⁰ A bicyclist crossing an alley on the sidewalk line is not guilty of negligence because a moment before he had been riding on the sidewalk in violation of ordinance.¹¹

At intersections. On approaching a street intersection it is the duty of a bicycle rider so to operate his machine as to be able to control it and stop or turn to avoid a collision with another vehicle,¹² and to look in such intelligent and careful manner as to be able to see what a person in the exercise of reasonable care and caution would see under like circumstances;¹³ but there is no duty resting on him to keep a special lookout for an automobile on an intersecting street, beyond the general duty to exercise due care.¹⁴ A bicyclist entering an intersection before an automobile has the right of way,¹⁵ and under some regulations, a bicycle rider approaching an intersection from the right of an automobile has the right of way.¹⁶ A bicyclist having the right of way may, under normal conditions, proceed uninterruptedly in the direction in which he is moving,¹⁷ in preference to an automobile turning into his path from the left.¹⁸ However, although the bicyclist may have the right of way, he must proceed in a lawful manner¹⁹ and exercise care to avoid colliding with motor vehicles across whose

path he must travel.²⁰

A bicyclist making a turn at an intersection is under a duty to use due care to observe, and avoid collision with, approaching vehicles.²¹ Failure to go beyond the center of an intersection in turning is not negligence as a matter of law, under an ordinance requiring vehicles turning to pass beyond the center and to keep close to the right-hand curb, when the bicyclist follows the customary path into the intersecting street, and when neither street has any curbing or any indication of the curb line.²²

Ordinarily, negligence of a bicyclist contributing to an intersectional collision with a motor vehicle will bar recovery,²³ except where the doctrine of "last clear chance" is applicable, as discussed *infra* § 493; but it has been held that, in order to be barred from recovery, the bicyclist must have violated some governmental regulation,²⁴ or the facts must be such that no other conclusion than that bicyclist was negligent may be drawn.²⁵

§ 465. Drivers or Occupants of Horse-Drawn Vehicles

It is not in itself negligence to drive a horse or other draft animal upon a highway frequented by motor vehicles, but the driver must exercise reasonable care to avoid accident or injury or be barred from recovering therefor if his failure to use due care is a direct and contributing cause of the injury.

It is not in itself negligence to drive a horse or other draft animal upon a highway frequented by motor vehicles²⁶ even though there is a nearby par-

9. N.Y.—Simpson v. Whitman, 132 N.Y.S. 801, 147 App.Div. 642.

10. Wash.—Maddux v. Gray, 222 P. 470, 128 Wash. 149.

11. Minn.—Hackert v. Prescott, 205 N.W. 893, 165 Minn. 134.

12. Pa.—Mehler v. Doyle, 115 A. 797, 271 Pa. 492.

Assumption

A bicyclist had no right to assume that approaching automobile would not make left turn at intersection, in absence of ordinance or other regulation prohibiting such left turn.—Harris v. Brock, La.App., 191 So. 762.

Perilous situation

Where defendant's truck driver approaching intersection with intent to make a left turn placed minor bicyclist in a perilous situation, defendant could not contend that bicyclist should have done something different to avoid the collision.—Johnson v. Railway Express Agency, C.C.A.Ill., 181 F.2d 1009.

13. Cal.—Peel v. California Belting Co., 291 P. 219, 108 Cal.App. 93.

La.—Harris v. Brock, App., 191 So. 762.

42 C.J. p 1142 note 31.

Looking to right

Bicyclist, seeing automobile approaching street intersection from his right before starting across street, was guilty of negligence, barring recovery for injuries in collision therewith, in failing to look to right when crossing and to stop in time to avoid collision.—Lane v. Beede, 171 A. 371, 54 R.I. 168.

14. Tenn.—Mason v. Burgess, 8 Tenn.Civ.App. 138, 42 C.J. p 1143 note 32.

15. La.—Lepinay v. Vittrano, 125 So. 304, 12 La.App. 475.

16. Ohio.—Sherburn v. Armstrong, App., 42 N.E.2d 716.

17. N.J.—Zanzonico v. Yellow Cab Co., Sup., 133 A. 84.

Ohio.—Sherburn v. Armstrong, App., 42 N.E.2d 716.

18. Ohio.—Sherburn v. Armstrong, supra.

19. Ohio.—Sherburn v. Armstrong, supra.

20. Cal.—Peel v. California Belting Co., 291 P. 219, 108 Cal.App. 93.

21. Cal.—Peel v. California Belting Co., supra.

Mich.—Zabawa v. Eshenroeder, 21 N. W.2d 852, 313 Mich. 555.

22. S.D.—Kriens v. McMillan, 173 N.W. 731, 42 S.D. 285.

23. La.—Clark v. De Boer, App., 188 So. 517.

Va.—McGowan v. Tayman, 132 S.E. 316, 144 Va. 358.

24. Tex.—Carter v. Ferris, Civ App., 93 S.W.2d 504, error dismissed.

25. Tex.—Carter v. Ferris, supra.

26. Iowa.—Delfs v. Dunshee, 122 N. W. 236, 143 Iowa 381.

Equality of rights as between persons riding or driving animals and motor vehicles see *supra* § 381.

Closed highway

One driving wagon on highway closed to traffic may recover from road contractor for personal injuries arising from careless operation of motor truck.—Hine v. Elklar, 19 Ohio App. 510.

Negligence by occupant not shown

La.—Ravare v. McCormick & Co., App., 166 So. 183.

Wash.—Clausen v. Jones, 71 P.2d 362, 191 Wash. 334.

allel road less used by automobiles and upon which horse-drawn vehicles usually travel.²⁷ It has also been held that it is not negligence per se to drive on the highway a horse of ordinarily gentle and tractable habits merely because it occasionally becomes frightened at a motor vehicle,²⁸ but one who drives a horse known to be greatly afraid of automobiles does so at his own peril.²⁹ In any case, the driver must exercise such care and caution to avoid accident or injury as an ordinarily prudent person would use under like circumstances³⁰ and comply with all regulations,³¹ and the failure to use such care may bar recovery for injuries sustained from the operation of a motor vehicle if such negligence is a direct and contributing cause of the injuries.³² The driver of a horse-drawn vehicle has the right to rely on the use of due care by operators of motor vehicles using the highway³³ and he need not anticipate that a motorist will be negligent.³⁴

The rule requiring the exercise of due care and barring recovery for failure to use such care has

been applied in determining the effect of plaintiff's conduct with respect to particular acts or with respect to particular situations,³⁵ as, for example, in entering upon or crossing a highway,³⁶ approaching or crossing a street intersection,³⁷ traveling on the wrong side of the road,³⁸ leaving his horse and vehicle unattended,³⁹ driving carelessly and inattentively⁴⁰ or while intoxicated,⁴¹ or in driving without lights or reflectors.⁴²

When a horse becomes frightened by the approach of a motor vehicle, the failure of the driver to signal the operator of the automobile to stop is not necessarily negligence,⁴³ and whether it is such depends on the facts of the particular case.⁴⁴ An attempt to drive a frightened horse past an automobile may constitute negligence⁴⁵ unless there is no other reasonable course for the driver to pursue, and he exercises due care in so doing.⁴⁶ A person riding in a horse-drawn vehicle is not guilty of negligence per se in remaining in the vehicle when the horse becomes frightened at an ap-

27. U.S.—Myers v. Velasquez, C.C.A. Tex., 16 F.2d 111.

28. Ark.—Butler v. Cabe, 171 S.W. 1190, 116 Ark. 26, 28, L.R.A.1915C 702.

42 C.J. p 1143 note 39.

29. S.D.—Pease v. Cochran, 173 N.W. 158, 42 S.D. 130, 5 A.L.R. 936.

30. Wash.—Ross v. Rose, 186 P. 892, 109 Wash. 273.

42 C.J. p 1137 note 71 [c] (2), p 1143 note 40.

Acts in emergency

Cal.—Collins v. Marsh, 169 P. 389, 176 Cal. 639.

42 C.J. p 1008 note 42 [b].

31. Iowa.—Knepe v. Huismann, 272 N.W. 602, 22 Iowa 569.

32. Ala.—Hawkins v. Barber, 163 So. 608, 231 Ala. 53.

33. Mo.—Housley v. Berberich Delivery, App., 87 S.W.2d 209.

A driver standing on the step of a wagon, attending to his accustomed business, has the right to assume that while doing so he will not be struck by any automobile under proper control.—Hayes v. Axelrod, 3 A. 2d 346, 232 Pa. 518.

34. Pa.—Brown v. Chambers, 65 Pa. Super. 373.

42 C.J. p 1136 note 64 [a] (4).

35. Iowa.—Delfs v. Dunshee, 122 N.W. 236, 143 Iowa 381.

42 C.J. p 1144 note 65.

36. Ala.—Hawkins v. Barber, 163 So. 608, 231 Ala. 53.

La.—Neddum Lumber Co. v. Baker, 6 La.App. 229.

42 C.J. p 1144 note 60.

37. Iowa.—Buzick v. Todman, 162 N.W. 259, 179 Iowa 1019.

42 C.J. p 1144 note 61.

Crossing right of way street

Driver of horse-drawn vehicle, seeing an automobile a block away on right-of-way street, was not required to wait until no automobiles were in sight before crossing and, having almost crossed right-of-way street when struck by automobile, had right under ordinance to complete the crossing.—Synigol v. Oury, 134 So. 324, 17 La.App. 163.

Negligence not shown

La.—Synigol v. Oury, supra.

42 C.J. p 1144 note 61 [a] (1), (2), [b], [d].

38. N.C.—Bullard v. Ross, 171 S.E. 789, 205 N.C. 495.

42 C.J. p 1144 note 65.

39. Pa.—Weikel v. Pullman Taxicab Co., 59 Pa.Super. 595.

42 C.J. p 1142 note 62.

Violation of ordinance

Driver of milk wagon struck by automobile was guilty of violating municipal ordinance in leaving wagon unattended while delivering milk.—Cloverland Dairy Products Co. v. Leach, 134 So. 433, 16 La.App. 659.

40. Utah.—Rosenthal v. Harker, 189 P. 666, 56 Utah 113.

42 C.J. p 1144 note 63.

Swerving

Fact that tracks of horsedrawn vehicle swerved back and forth across road did not necessarily indicate that driver was asleep.—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.

41. Ala.—Stewart v. Smith, 78 So. 724, 16 Ala.App. 461.

42 C.J. p 1144 note 64.

42. Iowa.—Knepe v. Huismann, 272 N.W. 602, 22 Iowa 569.

La.—Meredith v. Kidd, App., 147 So. 539.

N.C.—Bullard v. Ross, 171 S.E. 789, 205 N.C. 495.

Tex.—McFall v. Fletcher, 157 S.W.2d 131, 138 Tex. 93—Headstream v. Mangum, Civ.App., 174 S.W.2d 496.

Statute sole measure of obligation
Tex.—Valley Film Service Co. v. Cruz, Civ.App., 173 S.W.2d 952, error refused.

Recovery held not barred

La.—Call v. Cloverland Dairy Products Co., App., 21 So.2d 166.

Ohio.—Miller v. Trummer, 198 N.E. 492, 50 Ohio App. 446.

42 C.J. p 1140 note 83 [a] (3).

Necessity of causal connection with injury

La.—Meredith v. Kidd, App., 147 So. 539.

S.D.—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.

42 C.J. p 1139 note 82 [a].

43. Iowa.—Strand v. Grinnell Auto. Garage Co., 113 N.W. 488, 136 Iowa 68.

42 C.J. p 1143 note 42.

Duty of motorist to stop on frightening animals see supra § 416.

44. Minn.—Nelson v. Halland, 149 N.W. 194, 127 Minn. 188.

45. Ky.—Cumberland Tel., etc., Co. v. Yeiser, 131 S.W. 1049, 141 Ky. 15, 31 L.R.A.N.S., 1137.

42 C.J. p 1143 note 44.

46. Ky.—Cumberland Tel., etc., Co. v. Yeiser, supra.

42 C.J. p 1143 note 45.

proaching automobile,⁴⁷ although he may be negligent in alighting from the vehicle;⁴⁸ and it is not necessarily negligence to jump from the vehicle in an attempt to avoid injury.⁴⁹

Meeting motor vehicle. The driver of a horse-drawn vehicle who keeps to the center of the highway when he sees an approaching automobile or its lights is guilty of negligence,⁵⁰ but he is not necessarily negligent in being in the center of the roadway while passing around another vehicle parked at the curb.⁵¹ It is not negligence to stop a well-broken horse close to the side of the road when a motor vehicle approaches.⁵²

Being overtaken by motor vehicle. A driver of a vehicle drawn by a horse or other draft animal is, in the absence of knowledge or warning, under no duty to look for motor vehicles approaching from the rear,⁵³ and he is not necessarily negligent in failing to control his team frightened by the approach of a motor vehicle from behind without any warning.⁵⁴ However, if the driver of the horse-drawn vehicle knows that a motor vehicle is approaching from the rear, he must act with reasonable prudence in the light of such knowledge,⁵⁵ and if he veers to the left without notice of warning,⁵⁶ or suddenly slackens his speed or stops,⁵⁷ when the automobile is so close that its operator has no reasonable opportunity to avoid the collision, he may be guilty of contributory negligence precluding a recovery. A driver who has warning of the intention of the operator of a motor vehicle to overtake him has the duty, sometimes by virtue of express regulation, to yield the center of the road and drive to the right, where such movement is necessary to per-

mit the motor vehicle to pass safely,⁵⁸ unless in the exercise of due care and prudence it is impossible for him to move to the right;⁵⁹ but either under such a regulation⁶⁰ or in its absence⁶¹ he may continue on his course, and is not bound to go to the extreme right side of the roadway, if there is sufficient room for the automobile to pass to his left without undue interference.

§ 466. Persons on Horseback

A person riding horseback on a public highway is bound to use ordinary care for his own safety and property, with respect to an injury incurred through the operation of a motor vehicle by another, and the failure to use such care may constitute contributory negligence barring recovery against the motorist.

A person riding horseback on a public highway is bound to use ordinary care for his own safety and property, with respect to an injury incurred through the operation of a motor vehicle by another,⁶² and whether such care is exercised depends on the particular circumstances of each case.⁶³ The failure to use such care may constitute contributory negligence barring recovery against the motorist,⁶⁴ as, for example, where a person rides a horse at a high rate of speed on a perilous road at nighttime and runs into a lighted automobile,⁶⁵ or where a person rides a horse which he knows is easily frightened and hard to handle, and remains upon it without indicating to the driver of an approaching motor vehicle that he has any fear of his ability to manage and control it.⁶⁶ It is not, however, negligence per se to ride a horse which may be frightened by automobiles along a road frequented by them⁶⁷ unless the horse is wild and dangerous.⁶⁸

47. Ind.—McIntyre v. Orner, 76 N. E. 750, 166 Ind. 57, 117 Am.S.R. 359, 4 L.R.A.,N.S., 1130.

48. Ky.—Ham v. Hord, 224 S.W. 868, 189 Ky. 317.

42 C.J. p 1137 note 71 [c] (1).

49. Me.—Pease v. Gardner, 113 Me. 264, 93 A. 550.

50. Minn.—Brutscher v. Jacobson, 185 N.W. 934, 150 Minn. 444.

51. Iowa.—Menefee v. Whisler, 150 N.W. 1034, 169 Iowa 19.

52. Wis.—Pfeiffer v. Radke, 125 N. W. 934, 142 Wis. 512.

53. Iowa.—Strever v. Woodward, 158 N.W. 504, 178 Iowa 30.

Tex.—Valley Film Service Co. v. Cruz, Civ.App., 173 S.W.2d 952, error refused.

42 C.J. p 1135 note 60 [a].

54. La.—English v. Barbee, 135 So. 271, 18 La.App. 27.

Fright of mule backing wagon into truck, if not fault of either party,

was unavoidable accident, and could not be charged as negligence against driver of mule.—New Winder Lumber Co. v. Payne, 149 S.E. 85, 40 Ga. App. 188.

55. Kan.—Arrington v. Horner, 129 P. 1159, 88 Kan. 817.

56. Ala.—Morrison v. Clark, 72 So. 305, 196 Ala. 670.

La.—Reems v. Chavigny, 71 So. 798, 139 La. 539.

57. Iowa.—Strever v. Woodward, 158 N.W. 504, 178 Iowa 30.

58. Ky.—Ware v. Saufley, 237 S.W. 1060, 194 Ky. 53.

Wis.—Hoppe v. Petersen, 161 N.W. 738, 165 Wis. 200.

59. Kan.—Pens v. Kreitzer, 160 P. 200, 98 Kan. 759.

60. N.Y.—Tooker v. Fowler, etc., Co., 132 N.Y.S. 213, 147 App Div. 164.

42 C.J. p 1144 note 56.

61. Me.—Savoy v. McLeod, 88 A. 721, 111 Me. 234, 48 L.R.A.,N.S., 971.

62. Ky.—Fullenwider v. Brawner, 6 S.W.2d 264, 224 Ky. 274.

Reliance on care of motorist

A horseback rider may rely to some extent on an approaching motorist to use proper care to avoid injuring him.—Butler v. Graves, 187 N.E. 115, 284 Mass. 84.

63. Ky.—Fullenwider v. Brawner, 6 S.W.2d 264, 224 Ky. 274.

Contributory negligence held not shown

La.—Joyner v. Williams, App., 35 So. 2d 812.

64. Minn.—Rosenthal v. McCulloch, 225 N.W. 651, 177 Minn. 523.

65. Minn.—Rosenthal v. McCulloch, supra.

66. Iowa.—Dreier v. McDermott, 141 N.W. 315, 157 Iowa 726, 50 L.R.A., N.S., 566.

67. Va.—Cohen v. Meador, 89 S.E. 876, 119 Va. 429.

68. Va.—Cohen v. Meador, supra.

A horseback rider approaching an intersecting street is not as a matter of law negligent in failing to look up and down such street for automobiles before attempting to ride across it,⁶⁹ nor is one riding a horse on a highway required constantly to look back for approaching motor vehicles.⁷⁰ In the absence of a regulation providing otherwise, a person riding a horse along the highway is not required at all times and under all conditions to remain on the right side of the road;⁷¹ and it is not negligence for a rider to be on the left side of the road, when his position there is caused by the actions of his frightened horse which he is unable to control.⁷² Ordinarily a rider on horseback at a place in the public road where he has the right to be is not guilty of negligence in refusing to leave the beaten path to permit a motor vehicle to pass him.⁷³

§ 467. Persons in Charge of Animals

A person in charge of an animal on a highway is bound to use reasonable care to avoid injury from a motor vehicle, and his failure to exercise such care may constitute contributory negligence precluding recovery.

As a general rule, a person in charge of animals has a right to lead or drive them along the highway,⁷⁴ but in so doing he must exercise reasonable care to avoid any injury from motor vehicles using the highway,⁷⁵ and the failure to exercise such care may constitute contributory negligence precluding recovery for injury sustained,⁷⁶ if it was a direct and contributing cause of the injury.⁷⁷ The negligence of a person in charge of an animal or animals on the highway is not to be determined by his want of qualification for the task, but by whether or not he was guilty of some act or omission constituting a want of due care.⁷⁸ A person leading an animal

along the highway is entitled to assume that a motorist will exercise common caution and will obey statutory regulations, and will not run upon him suddenly and without warning.⁷⁹

Duty to look or listen. A person driving animals along a highway is, in the absence of knowledge or warning, under no duty as a matter of law to look or listen for the approach of motor vehicles from behind him;⁸⁰ and he is not necessarily negligent in failing to see a motor vehicle, which he could have seen if he had looked, because his attention was directed to the animals in his charge.⁸¹

Harnessing or restraining animals. A person in charge of domestic animals upon the public highway is not guilty of negligence per se because they are driven without being haltered or restrained in any way,⁸² but leaving a horse unfastened and untended on the public highway has been held to constitute contributory negligence.⁸³

Lights. In the absence of a statute requiring lights, a failure on the part of one driving animals along a public highway at night to carry a light is not negligence as a matter of law,⁸⁴ and will not preclude recovery for injuries from a motor vehicle when the lights of the car render the animals visible in time to avoid a collision.⁸⁵

Rules of the road; position on highway. It has been held that the mere fact that a person is leading animals on a highway does not bring him within the rules of the road applicable to vehicles⁸⁶ so as to require him to proceed on the right side of the road;⁸⁷ nor is he considered to be a pedestrian so as to be governed by regulations requiring pedestrians to keep to the left of the highway facing oncoming traffic.⁸⁸ In oth-

69. Tenn.—Studer v. Plumlee, 172 S. W. 305, 130 Tenn. 517.

70. Cal.—Furtado v. Bird, 146 P. 58, 26 Cal.App. 152.

42 C.J. p 1144 note 75.

71. Ky.—Fullenwider v. Brawner, 6 S.W.2d 264, 224 Ky. 274.

72. Cal.—Eddy v. Stone, 185 P. 1024, 43 Cal.App. 789.

73. Ill.—Traeger v. Wasson, 163 Ill. App. 572.

74. Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28—Lawson v. Fordyce, 12 N.W.2d 301, 234 Iowa 632.

Or.—Sertic v. McCullough, 63 P.2d 884, 155 Or. 216.

Care required of motorists as to animals driven along highway see supra § 408.

75. Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28—Lawson

v. Fordyce, 12 N.W.2d 301, 234 Iowa 632.

Or.—Sertic v. McCullough, 63 P.2d 884, 155 Or. 216.

Pa.—Floyd v. Sheller, Com.Pl., 54 Montg.Co 143.

76. N.J.—Tabaka v. Gerard, 169 A. 722, 12 N.J.Misc. 110.

Or.—Sertic v. McCullough, 63 P.2d 884, 155 Or. 216.

77. Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.

78. Conn.—Andrews v. Dougherty, 112 A. 700, 96 Conn. 40.

42 C.J. p 1145 note 80.

79. Iowa.—Lawson v. Fordyce, 12 N.W.2d 301, 234 Iowa 632.

80. Ala.—Doxier v. Woods, 67 So. 283, 190 Ala. 279.

Iowa.—Lawson v. Fordyce, 12 N.W.2d 301, 234 Iowa 632.

81. Kan.—Kelly v. Vucklich, 206 P. 894, 111 Kan. 199.

82. Ill.—Fitzsimmons v. Snyder, 181 Ill.App. 70.

83. N.J.—Tabaka v. Gerard, 169 A. 722, 12 N.J.Misc. 110.

84. La.—Meredith v. Kidd, App., 147 So. 539.

42 C.J. p 1145 note 85.

85. Vt.—Bombard v. Newton, 111 A. 510, 94 Vt. 354, 11 A.L.R. 1402.

86. Or.—Sertic v. McCullough, 63 P.2d 884, 155 Or. 216.

87. Or.—Sertic v. McCullough, supra.

88. Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.

Sheep harder endeavoring to chase lamb from highway into field when struck by automobile was not pedestrian within statute requiring pedestrian to walk close to left-hand edge of highway.—Zumwalt v. E. H. Tryon, Inc., 14 P.2d 912, 126 Cal.App. 583.

er words, in the absence of a regulation providing otherwise, such a person has the right to lead or drive his animals on any part of the highway not then occupied or in use by another traveler,⁸⁹ subject to the rule that plaintiff, in respect of his position on the highway, must have exercised reasonable care under the circumstances.⁹⁰ It has been held, on the other hand, that the ordinary rules of the road, such as the duty to keep to the right, apply to the driving of animals in the highway,⁹¹ and the driver must use reasonable care to keep them on the proper side of the road,⁹² although it is not in itself negligence to permit them to be upon the wrong side of the road, because of the difficulty in so driving them.⁹³ The driver under such circumstances is bound to use more care and keep a better lookout for approaching vehicles than would be required of him if they were upon the right side.⁹⁴

Dogs. To release a dog from its leash on a street is not in itself negligence, as respects the owner's right to recover for injury to the dog by an automobile,⁹⁵ and the standard of prudence marking the conduct of the average careful creature cannot be exacted of a dog.⁹⁶ It has been held that a dog accompanying its owner along a highway is not within a statute prohibiting dogs at large⁹⁷ and that recovery for the negligent killing

of such a dog by a motorist is not barred by contributory negligence on the ground that the statute had been violated.⁹⁸ It has also been held that a motorist who is guilty of gross negligence in the killing of a dog may not rely on the fact that the owner was likewise guilty of contributory negligence in allowing his dog to go on the highway in violation of such a statute.⁹⁹

§ 468. Pedestrians

- a. In general
- b. Degree and amount of care required
- c. Persons on private property or private ways

a. In General

A pedestrian ordinarily has the right, subject to proper governmental regulation, to use and traverse any part of the public street or highway, but he must do so with due regard for the rights of motor vehicles and exercise due care for his own safety; and the failure to exercise such care may constitute negligence barring recovery for an injury inflicted by a motor vehicle if the negligence was a proximate or contributing cause of the injury.

Ordinarily a pedestrian, in the exercise of reasonable care for his own safety, has the right, subject to proper governmental regulation, to use and traverse any part of the public street or highway,¹

89. Iowa—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.

90. Or.—Sertic v. McCullough, 63 P. 2d 884, 155 Or. 216.

91. Conn.—Andrews v. Dougherty, 112 A. 700, 96 Conn. 40.

92. Conn.—Andrews v. Dougherty, supra.

93. Conn.—Andrews v. Dougherty, supra.
42 C.J. p 1140 note 85 [a] (2).

94. Conn.—Andrews v. Dougherty, supra.

95. N.Y.—Smith v. Palace Transp. Co., 253 N.Y.S. 87, 142 Misc. 93.

96. N.Y.—Smith v. Palace Transp. Co., supra.

97. Tenn.—Dalton v. Dean, 136 S.W. 2d 721, 175 Tenn. 620.

98. Tenn.—Dalton v. Dean, supra.

99. Tenn.—Craig v. Stagner, 19 S. W.2d 234, 159 Tenn. 511.

1. U.S.—White v. State of Maryland, to Use of Anderson, C.C.A.Md., 106 F.2d 392.

Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381, 60 Ariz. 354.

Ark.—Brotherton v. Walden, 161 S.W. 2d 391, 204 Ark. 92—Self v. Kirkpatrick, 110 S.W.2d 13, 194 Ark.

1014—Murphy v. Clayton, 15 S.W. 2d 391, 179 Ark. 225.

Cal.—Burk v. Extrafine Bread Bakery, 280 P. 522, 208 Cal. 105—McGough v. Hendrickson, 136 P.2d 110, 58 Cal.App.2d 60—Scaif v. Eicher, 53 P.2d 368, 11 Cal.App.2d 44—McVea v. Nickols, 286 P. 761, 105 Cal.App. 28—White v. Davis, 284 P. 1086, 103 Cal.App. 531.

Conn.—Caschetto v. Silliman & Godfrey Co., 9 A.2d 286, 126 Conn. 22.

Fla.—Greiper v. Coburn, 190 So 902, 139 Fla. 293—Clair v. Meriwether, 174 So. 591, 127 Fla. 841.

Ga.—Sprayberry v. Snow, 10 S.E.2d 179, 190 Ga. 723, mandate conformed to 11 S.E.2d 431, 63 Ga.App. 489—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

Ill.—Ledford v. Reardon, 25 N.E.2d 116, 303 Ill.App. 300.

Iowa.—McMurry v. Guth, 295 N.W. 133, 229 Iowa 776—Huffman v. King, 268 N.W. 144, 222 Iowa 150—Whitman v. Pilmer, 239 N.W. 686, 214 Iowa 461.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611—Stotts v. Taylor, 285 P. 571, 130 Kan. 158.

Ky.—Igo v. Smith, 138 S.W.2d 497, 282 Ky. 336—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602—Southeastern Telephone Co. v. Payne, 69 S.W.2d 358, 253 Ky. 245.

La.—Law v. Osterland, 3 So.2d 680, 198 La. 421, affirming 3 So.2d 674—

Neyrey v. Maillet, App., 21 So 2d 158.

Me.—Hill v. Finnemore, 172 A. 826, 132 Me. 459.

Md.—Universal Credit Co. v. Merryman, 195 A. 689, 173 Md 256.

Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 680—Carter v. C. F. Smith Co., 281 N.W. 380, 285 Mich. 621—Buechel v. Williams, 262 N.W. 759, 273 Mich. 132—Watrous v. Connor, 254 N.W. 143, 266 Mich. 397—Szekeres v. Detroit Motorbus Co., 232 N.W. 700, 252 Mich. 46.

Mont.—Johnson v. Herring, 295 P. 1100, 89 Mont. 156—McKeon v. Kilduff, 281 P. 345, 85 Mont. 562.

N.J.—Poole v. Twentieth Century Operating Co., 1 A.2d 389, 121 N.J. Law 244—Redfield v. Hurff, 152 A. 451, 9 N.J.Misc. 15.

Ohio.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335—Brinkley v. Rhea, 4 N.E.2d 270, 53 Ohio App. 128, petition dismissed Rhea v. Brinkley, 198 N.E. 40, 130 Ohio St. 172.

Pa.—McGurk v. Belmont, 146 A. 539, 297 Pa. 192—Henry v. Nace, Com. Pl., 56 York Leg.Rec. 157.

Tenn.—Harbor v. Wallace, App., 211 S.W.2d 172—Zamora v. Shappley, 173 S.W.2d 721, 27 Tenn.App. 768—Elmore v. Thompson, 14 Tenn.App.

and it is not as a matter of law negligence for him so to do,² in accordance with the rule, discussed supra § 383, that the rights of pedestrians and motor vehicles upon the highway are equal, and their duties reciprocal, except to the extent that the right of way is given to the one or the other under particular circumstances, discussed supra § 388 and infra § 470. However, the right of a pedestrian to use the highway is not superior to that of motor

vehicles,³ and he must exercise his right with due regard to the rights of such vehicles.⁴ The pedestrian must exercise ordinary or reasonable care for his own safety and protection to avoid injury by motor vehicles,⁵ and his failure to use such care may constitute negligence,⁶ or, in some circumstances, negligence as a matter of law;⁷ but the exercise of such care will render him free from any

78—Yellow Cab Co. v. Jelks, 9 Tenn.App. 288.

42 C.J. p 1031 note 4, p 1145 note 95. Right of persons under disability to use highway see infra §§ 484-485.

The law of the road does not restrict a pedestrian to any particular part of the highway or street for purpose of travel.—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga.App. 383.

Unoccupied part

Pedestrian may use any unoccupied part of road.—Lowie v. Dixie Stores, 174 S.E. 394, 172 S.C. 468.

2. Cal.—Burk v. Extrafine Bread Bakery, 280 P. 522, 208 Cal. 105—Chalmers v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Ill.—Blumb v. Getz, 8 N.E.2d 620, 366 Ill. 273, conformed to 13 N.E.2d 1019, 294 Ill.App. 432.

3. Cal.—MacCorkell v. Williams, 295 P. 879, 111 Cal.App. 572.

Idaho.—Jones v. Mikesch, 95 P.2d 575, 60 Idaho 680.

Ind.—Fishman v. Eads, 168 N.E. 495, 90 Ind.App. 137.

4. Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381, 60 Ariz. 354.

Cal.—Maggart v. Bell, 2 P.2d 516, 116 Cal.App. 306—MacCorkell v. Williams, 295 P. 879, 111 Cal.App. 572.

Conn.—Caschetto v. Silliman & Godfrey Co., 9 A.2d 286, 126 Conn. 22.

Fla.—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635—Greiper v. Coburn, 190 So. 902, 139 Fla. 293—Robb v. Pike, 161 So. 732, 119 Fla. 833.

Ga.—De Gollan v. Faulkner, 41 S.E. 2d 661, 74 Ga.App. 866—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga.App. 383.

Idaho.—Jones v. Mikesch, 95 P.2d 575, 60 Idaho 680.

Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649.

Ky.—Pryor's Adm'r v. Otter, 105 S.W. 2d 564, 268 Ky. 602.

Md.—Fotterall v. Hilleary, 13 A.2d 358, 178 Md. 335—Mahan v. State, to Use of Carr, 191 A. 675, 172 Md. 873.

Mass.—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216—Hutchinson v. H. E. Shaw Co., 172 N.E. 788, 273 Mass. 51.

Mich.—Carter v. C. F. Smith Co., 281 N.W. 380, 285 Mich. 621.

Va.—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193.

5. Ark.—Lion Oil Refining Co. v. Smith, 153 S.W.2d 895, 199 Ark. 397—Missouri Pacific Transp. Co. v. George, 133 S.W.2d 37, 198 Ark. 1110—Morel v. Lee, 33 S.W.2d 1110, 182 Ark. 985—Snow v. Riggs, 290 S.W. 591, 172 Ark. 835.

Cal.—Hurtel v. Albert Cohn, Inc., 52 P.2d 922, 5 Cal.2d 145—Conness v. McCarty, 14 P.2d 507, 216 Cal. 415—Bosserman v. Olmstead, 175 P.2d 49, 77 Cal.App.2d 236—Dawson v. Lalanne, 70 P.2d 1002, 22 Cal. App.2d 314—Scaif v. Elcher, 53 P. 2d 368, 11 Cal.App.2d 44—Kapper v. Harris, 52 P.2d 569, 10 Cal.App.2d 630—Crooks v. Doeg, 40 P.2d 590, 4 Cal.App.2d 21—Pinello v. Taylor, 17 P.2d 1039, 128 Cal.App. 508—De Greek v. Freeman, 291 P. 854, 108 Cal.App. 645—McVea v. Nickols, 286 P. 761, 105 Cal.App. 28—Wong Kit v. Crescent Creamery Co., 262 P. 481, 87 Cal.App. 563—Moeller v. Packard, 261 P. 315, 86 Cal.App. 459—Chalmers v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Conn.—Caschetto v. Silliman & Godfrey Co., 9 A.2d 286, 126 Conn. 22.

Fla.—Clair v. Meriwether, 174 So. 591, 127 Fla. 841.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

Idaho.—Jones v. Mikesch, 95 P.2d 575, 60 Idaho 680.

Ill.—Tuttle v. Checker Taxi Co., 274 Ill.App. 525.

Iowa.—McMurry v. Guth, 295 N.W. 133, 229 Iowa 776—Huffman v. King, 268 N.W. 144, 222 Iowa 150—Kessel v. Hunt, 244 N.W. 714, 215 Iowa 117—Whitman v. Pilmer, 239 N.W. 486, 214 Iowa 461.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 458, 163 Kan. 611—Stotts v. Taylor, 285 P. 571, 130 Kan. 158.

Ky.—Igo v. Smith, 138 S.W.2d 497, 282 Ky. 336—Dixon v. Stringer, 126 S.W.2d 448, 277 Ky. 347—Pryor's Adm'r v. Otter, 105 S.W. 2d 564, 268 Ky. 602—Wheeler's Adm'r v. Sullivan's Adm'r, 86 S.W.2d 1023, 260 Ky. 814—Southeastern Telephone Co. v. Payne, 69 S.W.2d 358, 253 Ky. 245—Porter v. Music, 67 S.W.2d 958, 252 Ky. 582—Tate v. Hall, 57 S.W.2d 986, 247 Ky. 843—Jackson's Adm'r v. Rose, 40 S.W.2d 343, 239 Ky. 754.

La.—Neyrey v. Maillet, App., 21 So.2d 158.

Me.—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76.

Md.—Fotterall v. Hilleary, 13 A.2d 358, 178 Md. 335—Universal Credit Co. v. Merryman, 195 A. 689, 173 Md. 256—Mahan v. State, to Use of Carr, 191 A. 675, 172 Md. 373—Sillik v. Hoeck, 178 A. 852, 168 Md. 639.

Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557—Szekeres v. Detroit Motorbus Co., 232 N.W. 700, 252 Mich. 46.

Mo.—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379.

Mont.—Johnson v. Herring, 295 P. 1100, 89 Mont. 156—McKeon v. Kilduff, 281 P. 345, 85 Mont. 562.

N.J.—Poole v. Twentieth Century Operating Co., 1 A.2d 389, 121 N.J. Law 244.

N.H.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

N.H.—Sylvia v. Eyth, 259 N.Y.S. 86, 144 Misc. 316, affirmed 257 N.Y.S. 1073, 236 App.Div. 739, motion denied 258 N.Y.S. 1040, 236 App.Div. 759.

Ohio.—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335—Brinkley v. Rhea, 4 N.E.2d 270, 53 Ohio App. 428.

Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186.

R.I.—Cunningham v. Walsh, 163 A. 223, 53 R.I. 23.

Tenn.—Harbor v. Wallace, App., 212 S.W.2d 172.

Tex.—White's Auto Stores v. Boaz, Civ.App., 166 S.W.2d 942, reversed on other grounds Boaz v. White's Auto Service, 172 S.W.2d 481, 141 Tex. 366—Kooch v. Goodnight, Civ. App., 71 S.W.2d 927, error refused.

Vt.—Parker v. Smith, 135 A. 495, 100 Vt. 130.

Va.—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193.

Wash.—Strom v. Dobrin, 186 P.2d 906, 29 Wash.2d 198.

42 C.J. p 1134 note 45.

Care required of persons under disability see infra §§ 484-485.

6. Minn.—Naylor v. McDonald, 241 N.W. 474, 186 Minn. 618.

7. Cal.—Gaston v. Hisashi Tsuruda, 43 P.2d 355, 5 Cal.App.2d 639.

Wash.—Turnquist v. Rosala Bros., 33 P.2d 353, 196 Wash. 434.

charge of contributory negligence.⁸ The contributory negligence of a pedestrian injured by a motor vehicle must be determined without regard to the negligence of the driver of the vehicle.⁹

A pedestrian who has failed to use due care for his own safety may be precluded by his negligence from recovering for injury resulting to him from the operation of a motor vehicle,¹⁰ whether such negligence was the sole proximate cause of the injury¹¹ or was merely a contributing cause of the accident which resulted in part from the negligence of the operator of the vehicle;¹² but contributory negligence will not bar recovery where the motorist was guilty of willful or wanton negligence,¹³ or where the so-called last clear chance rule is applicable, as discussed *infra* § 493, or where the doctrine of comparative negligence is applied, as is discussed in the C.J.S. title Negligence §§ 169-173, also 42 C.J. p 1185 notes 76-80, and 45 C.J. p 1036

note 96-p 1043 note 62. In any case, the pedestrian's negligence will not bar recovery if it did not proximately cause or contribute to the injury,¹⁴ and the fact that the pedestrian would not have been injured if he had not been where he was at the time of the accident is not of itself controlling in determining whether his contributory negligence was a direct contributing cause to the accident.¹⁵

Working about motor vehicles. Persons working about motor vehicles, as in loading or unloading them, or assisting therein, or guiding such vehicles into position, must use due care for their own safety¹⁶ and avoid injury by the vehicle¹⁷ or by the articles being loaded or unloaded.¹⁸

Danger incurred to save life or property. When an unattended or uncontrollable motor vehicle is moving over a public highway, endangering persons or other vehicles, a pedestrian who attempts to board the vehicle and control it or change its

8. Mich.—Collins v. Perry, 217 N.W. 32, 241 Mich. 361.

9. Cal.—Gernhardt v. Rancadore, 24 P.2d 946, 134 Cal.App. 65.

Me.—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76.

10. U.S.—Shipley v. Komer, D.C.Fla. 60 F.Supp. 551, affirmed, C.C.A., 154 F.2d 861.

Ill.—Bryan v. City of Chicago, 20 N.E.2d 37, 371 Ill. 64.

Ky.—Dixon v. Stringer, 126 S.W.2d 448, 277 Ky. 347—Southeastern Telephone Co. v. Payne, 69 S.W.2d 358, 253 Ky. 245.

La.—Jones v. American Mut. Liability Ins. Co., App., 189 So. 509—Bass v. Means, 124 So. 553, 12 La. App. 260.

Md.—Sillik v. Hoeck, 178 A. 862, 168 Md. 639.

Mich.—Pomeroy v. Dykema, 239 N.W. 342, 256 Mich. 100—Bosma v. Daniels, 230 N.W. 199, 250 Mich. 261.

Mont.—Johnson v. Herring, 300 P. 535, 89 Mont. 420.

Or.—Houston v. Maunula, 255 P. 477, 121 Or. 552.

Pa.—Schweitzer v. Scranton Bus Co., 25 A.2d 156, 344 Pa. 249—Andrukat v. Packard Lackawanna Auto Co., 27 A.2d 453, 149 Pa.Super. 550.

S.C.—Wright v. South Carolina Power Co., 31 S.E.2d 904, 205 S.C. 327.

Tex.—McKinney v. Watts, Civ.App., 99 S.W.2d 673.

Vt.—Parker v. Smith, 135 A. 496, 100 Vt. 130.

Wash.—De Vore v. Longview Public Service Co., 298 P. 717, 162 Wash. 338.

11. Conn.—Meacham v. Pagels, 159 A. 458, 114 Conn. 733.

La.—Butler v. Oswald, App., 4 So.2d 341—Matassa v. Economy Cab Co., App., 158 So. 239.

Me.—Ross v. Russell, 48 A.2d 403.

Nev.—Styris v. Folk, 146 P.2d 782, 62 Nev. 208, 139 P.2d 614.

N.J.—Rowe v. Coopey, 34 Luz.Leg. Reg. 57, affirmed 14 A.2d 76, 339 Pa. 105.

W.Va.—Vance v. Logan Williamson Bus Co., 46 S.E.2d 783.

Negligence held sole proximate cause of injury

Mo.—Goodson v. Schwandt, 300 S.W. 795, 318 Mo. 666.

12. U.S.—Fair v. Floyd, C.C.A.N.J., 75 F.2d 920.

Cal.—Raggio v. Mallory, 76 P.2d 660, 10 Cal.2d 723.

Ga.—Elrod v. Anchor Duck Mills, 179 S.E. 188, 50 Ga.App. 531.

Mich.—Leary v. Fisher, 227 N.W. 767, 248 Mich. 574.

Neb.—Cuevas v. Yellow Cab & Baggage Co., 4 N.W.2d 790, 141 Neb. 662.

Va.—Holland v. Edelblute, 20 S.E.2d 506, 179 Va. 685—Paytes v. Davis, 157 S.E. 567, 156 Va. 229.

Wash.—Turnquist v. Rosala Bros., 83 P.2d 353, 196 Wash. 434.

Proceeding forward

Until pedestrian reaches point where he is in position of peril from defendant's automobile and further progress on his part or other negligent conduct will not increase his danger, his negligence in proceeding forward is only contributing proximate cause of injury.—Correnti v. Catino, 160 A. 892, 115 Conn. 213.

13. Ga.—Elrod v. Anchor Duck Mills, 179 S.E. 188, 50 Ga.App. 531.

Ill.—Gannon v. Kiel, 252 Ill.App. 550.

14. Cal.—Blodget v. Preston, 5 P.2d 25, 118 Cal.App. 297.

La.—Gray v. De Bretton, App., 184 So. 390, affirmed 188 So. 722, 192

La. 628—Tooke v. Muslow Oil Co., App., 183 So. 97.

Mass.—Snow v. Nickerson, 22 N.E.2d 593, 304 Mass. 63.

N.D.—Clark v. Feldman, 224 N.W. 167, 57 N.D. 741.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618.

Wash.—Knutson v. McMahan, 58 P. 2d 1033, 186 Wash. 518.

42 C.J. p 1133 note 42 [b].

Conduct of pedestrian prior to time that he became fully cognizant of position of vehicle and surrounding circumstances and when he had it within his power to prevent accident was not proximate cause of, or direct contributing cause to, the injury.—Sherman v. Ross, 62 P.2d 1151, 99 Colo. 354.

15. Cal.—Sharick v. Galloway, 66 P. 2d 185, 19 Cal.App.2d 693.

16. U.S.—Giudice v. Delaware Sand & Gravel Co., D.C.Del., 38 F.Supp. 90.

Iowa.—Nelson v. Mitten, 255 N.W. 662, 218 Iowa 914.

Contributory negligence not shown

La.—Carroll v. Louisiana Iron & Supply Co., App., 17 So.2d 650.

17. U.S.—Giudice v. Delaware Sand & Gravel Co., D.C.Del., 38 F.Supp. 90.

Iowa.—Nelson v. Mitten, 255 N.W. 662, 218 Iowa 914.

La.—Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822.

18. La.—Franklin v. Gordon's Transports, App., 26 So.2d 387.

Contributory negligence not shown

La.—Richey v. Swink, App., 4 So.2d 749.

Or.—Motejl v. Greenwood, 138 P.2d 216, 171 Or. 469.

course is not guilty of negligence as a matter of law.¹⁹

b. Degree and Amount of Care Required

A pedestrian is generally held to that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to prevent injury from a motor vehicle, and the care required, as with respect to use of the senses to discover danger, is commensurate with the risk of danger involved.

In determining the right of a pedestrian to recover for injuries inflicted by a motor vehicle, he is generally held to that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to prevent injury.²⁰ No pedestrian has the right to pass over a public thoroughfare unmindful of his surroundings and without regard to approaching motor vehicles,²¹ whose presence on the highway he must anticipate,²² and he is required to use ordinary care not unnecessarily to place himself in a position of danger.²³ So it may be contributory negligence as a matter of law for a pedestrian to move from a place of safety into the path of an automobile.²⁴ How-

ever, a pedestrian is not bound as a matter of law to exercise such a degree of care as will be necessary to protect himself in all circumstances from the danger of a collision with an automobile,²⁵ and when he is in the exercise of due care he is not strictly required to use every conceivable precaution in an attempt to avoid injury.²⁶

While the duty to use due care is a continuing one,²⁷ the amount of care required varies with the circumstances²⁸ and is commensurate with the risk of danger involved.²⁹ A pedestrian occupying a portion of a public or private way customarily used by vehicles must use greater care than when on the sidewalk,³⁰ and at points in a busy street not frequently traversed by pedestrians a higher degree of care is imposed on him to avoid any injury.³¹ Also, a pedestrian may be required to exercise greater care when using the highway away from a crosswalk than when at a crosswalk.³²

A pedestrian has the duty to use his natural senses to discover the approach of an automobile and to avoid being injured thereby,³³ and such duty may

19. Me.—Hatch v. Globe Laundry Co., 171 A. 387, 132 Me. 379. 42 C.J. p 1146 note 3.

20. Cal.—De Victoria v. Erickson, 188 P.2d 276, 83 Cal.App.2d 206—McNear v. Pacific Greyhound Lines, 146 P.2d 34, 63 Cal.App.2d 11—Warnke v. Griffith Co., 24 P.2d 583, 133 Cal.App. 481.

Me.—Bechard v. Lake, 11 A.2d 287, 136 Me. 385.

Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1—Universal Credit Co. v. Merryman, 195 A. 689, 173 Md. 256.

Mich.—Buechel v. Williams, 262 N.W. 759, 273 Mich. 132.

N.J.—Kovacs v. Ford, 158 A. 473, 108 N.J.Law 379.

N.Y.—Tedla v. Ellman, 19 N.E.2d 987, 280 N.Y. 124.

Pa.—Miller v. Carey, 177 A. 511, 117 Pa.Super. 218.

21. Minn.—Quinn v. Heidman, 195 N.W. 774, 157 Minn. 129.

22. Md.—Fotterall v. Hilleary, 13 A.2d 358, 178 Md. 335—Mahan v. State, to Use of Carr, 191 A. 575, 172 Md. 373.

Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 618. 42 C.J. p 1145 note 98.

23. Md.—Sillik v. Hoeck, 178 A. 852, 168 Md. 639.

Mich.—Batchelor v. Famous Cleaners & Dyers, 17 N.W.2d 787, 310 Mich. 654—Lawrence v. Bartling & Dull Co., 238 N.W. 180, 255 Mich. 580.

Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.

Pa.—Heath v. Klosterman, 28 A.2d

209, 343 Pa. 501—Rowe v. Coopey, 34 Luz Leg.Reg. 57, affirmed 14 A.2d 76, 339 Pa. 105.

42 C.J. p 1145 note 99.

Assertion of right of way

A pedestrian is guilty of contributory negligence if, abandoning all care, he attempts to assert his right of way in face of approaching traffic dangerously near to him.—Arlington & Fairfax Motor Transp. Co. v. Simmonds, 30 S.E.2d 581, 182 Va. 796.

24. Conn.—Meacham v. Pagels, 159 A. 658, 114 Conn. 733.

Ill.—Bryan v. City of Chicago, 20 N.E.2d 37, 371 Ill. 64.

La.—Butler v. Oswald, App., 4 So.2d 241.

Me.—Milligan v. Weare, 28 A.2d 463, 139 Me. 199.

Mass.—Woodward v. City, 76 N.E.2d 656, 322 Mass. 197.

Neb.—Cuevas v. Yellow Cab & Baggage Co., 4 N.W.2d 790, 141 Neb. 662.

N.Y.—Maranta v. Wenzelberg, 272 N.Y.S. 710, 241 App.Div. 420, affirmed 196 N.E. 554, 267 N.Y. 510.

Wash.—De Vore v. Longview Public Service Co., 298 P. 717, 162 Wash. 338.

W.Va.—Slaters v. Shirkey, 8 S.E.2d 897, 122 W.Va. 271.

Obscure position

A pedestrian who without exigency suddenly emerges from a position of safety but of obscurity and presents himself directly in the path of an approaching automobile and so near to it that a collision cannot be avoided is not exercising due care.—Milligan v. Weare, 28 A.2d 463, 139 Me. 199.

25. Iowa.—Faatz v. Sullivan, 200 N.W. 321, 199 Iowa 875.

Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

Negligence not shown

La.—Stone v. Baton Rouge Yellow Cab Co., 124 So. 778, 12 La.App. 520.

26. Ga.—O'Dowd v. Newnham, 80 S.E. 36, 13 Ga.App. 220.

42 C.J. p 1145 note 2.

27. Cal.—Maggart v. Bell, 2 P.2d 516, 116 Cal.App.2d 306.

28. Cal.—Burton v. Los Angeles Ry Corp., 180 P.2d 367, 79 Cal.App.2d 605—Ducat v. Goldner, 175 P.2d 914, 77 Cal.App.2d 332—O'Brien v. Schellberg, 140 P.2d 159, 59 Cal.App.2d 764.

N.H.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

Tenn.—Zamora v. Shappley, 173 S.W.2d 721, 27 Tenn.App. 768.

Tex.—Kooek v. Goodnight, Civ.App., 71 S.W.2d 927, error refused.

29. Cal.—Thompson v. Held, 183 P.2d 711, 81 Cal.App.2d 275.

Conn.—Caschetto v. Silliman & Godfrey Co., 9 A.2d 286, 126 Conn. 22.

N.J.—Poole v. Twentieth Century Operating Co., 1 A.2d 389, 121 N.J.Law 244.

30. Conn.—Petrillo v. Kolbay, 165 A.346, 116 Conn. 389.

31. Fla.—Prior v. Pounds, 151 So. 890, 113 Fla. 308.

32. Ill.—Ledford v. Reardon, 25 N.E.2d 116, 303 Ill.App. 300.

33. Ky.—Jackson's Adm'r v. Rose, 40 S.W.2d 243, 239 Ky. 754.

require him to keep a vigilant lookout³⁴ and to see what is obviously to be seen.³⁵ The extent of the lookout required depends on the circumstances³⁶ and on what a person of ordinary prudence would do under such circumstances;³⁷ and, while the pedestrian must look at least in those directions from which danger may reasonably be apprehended,³⁸ he need not use his senses to look for and to apprehend danger from every possible direction and at all times.³⁹

Compliance with governmental regulations. It is incumbent on a pedestrian to comply with all regulations governing the conduct of persons on foot who use the highway,⁴⁰ but the statutory rules for the guidance of pedestrians have been held to pre-

scribe only the minimum measure of care to be exercised, and additional precautions may be required under the circumstances.⁴¹ Some regulations making it an offense for a pedestrian to use a highway negligently or recklessly have been held to establish no standard with respect to negligence other than that of the common law.⁴²

Reliance on care of motorist causing injury. In determining the extent of the care required of a pedestrian, it is generally held that he has the right, in the absence of knowledge or notice to the contrary, to assume, and to act on such assumption, that motorists on the highway will exercise reasonable care and prudence in the use thereof⁴³ to avoid injuring him;⁴⁴ and he need not anticipate that a

Duty to stop, look, and listen when crossing highway see *infra* § 471.

34. U.S.—Valanda v. Baum & Reissman, C.C.A.Pa., 113 F.2d 188.

Cal.—Cannon v. Kemper, 73 P.2d 268, 23 Cal.App.2d 239.

Mich.—Batchelor v. Famous Cleaners & Dyers, 17 N.W.2d 787, 310 Mich. 654—Dokey v. Carpenter, 2 N.W.2d 802, 300 Mich. 648.

Pa.—Espenshade v. McCorkle, 28 Pa. Dist. & Co. 1, affirmed 189 A. 311, 324 Pa. 528.

W.Va.—Vance v. Logan Williamson Bus Co., 46 S.E.2d 783.

Wis.—Ebel v. Rehorst, 248 N.W. 799, 212 Wis. 122.

35. Me.—Milligan v. Wear, 28 A.2d 463, 139 Me. 199.

Wis.—Ebel v. Rehorst, 248 N.W. 799, 212 Wis. 122.

36. Ill.—Brackett v. Builders' Lumber Co., 253 Ill.App. 107.

37. Cal.—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63.

Tex.—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct.

Knowledge of approach of vehicle

In order to establish contributory negligence, it must be shown that pedestrian knew of the approach of the vehicle or by the use of reasonable care would have known of it in time to avoid the accident.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

38. Cal.—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63.

Mo.—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379.

N.M.—Russell v. Davis, 37 P.2d 536, 38 N.M. 533.

39. Cal.—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63—Maggart v. Bell, 2 P.2d 516, 116 Cal.App. 308.

Ga.—De Golan v. Faulkner, 41 S.E. 2d 661, 74 Ga.App. 866—Jackson v.

Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

40. Cal.—Leek v. Western Union Telegraph Co., 66 P.2d 1232, 20 Cal.App.2d 374—Scalf v. Elcher, 53 P.2d 368, 11 Cal.App.2d 44.

Construction

In applying, regulations prohibiting pedestrians from stepping into portion of street open to moving traffic, its language must be given a construction conformable to reason and common sense.—Discargar v. City of Seattle, 171 P.2d 205, 25 Wash.2d 306.

41. Cal.—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183.

42. Conn.—Goodsell v. Brighenti, 24 A.2d 834, 128 Conn. 581—Atkins v. Varrone, 14 A.2d 731, 127 Conn. 156.

43. Cal.—Foerster v. Direlto, 170 P.2d 986, 75 Cal.App.2d 323.

Ky.—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602.

Md.—Edwards v. State, for Use of Guy, 170 A. 761, 166 Md. 217.

Mass.—Levin v. Twin Tanners, 60 N.E.2d 6, 318 Mass. 13—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216—Pease v. Lenssen, 190 N.E. 18, 286 Mass. 207—Hennessey v. Moynihan, 172 N.E. 93, 272 Mass. 165.

Mich.—Paquette v. Consumers Power Co., 25 N.W.2d 599, 316 Mich. 501—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

Minn.—Yorek v. Potter, 207 N.W. 188, 166 Minn. 131.

Pa.—Dempsey v. Cuneo Eastern Press Ink Co. of Pennsylvania, 179 A. 220, 318 Pa. 557.

Wash.—Cox v. Kirch, 123 P.2d 328, 12 Wash.2d 678.

Wis.—West v. Day, 212 N.W. 648, 193 Wis. 187.

42 C.J. p 1136 note 64 [a] (2), (3).

Speed

Cal.—Naudack v. Canini, 85 P.2d 510, 29 Cal.App.2d 687—Ching Wing v. Kishi, 268 P. 483, 92 Cal.App. 495.

Iowa.—Huffman v. King, 268 N.W. 144, 232 Iowa 150.

42 C.J. p 1136 note 64 [a] (1).

Lookout

La.—Locke v. Shreveport Laundries, 137 So. 645, 18 La.App. 169.

Conformance to regulations and rules of road

(1) In general.

Cal.—Pinello v. Taylor, 17 P.2d 1039, 128 Cal.App. 508—MacCorkell v. Williams, 295 P. 879, 111 Cal.App. 572.

La.—Langley v. Viguerie, App., 189 So. 606.

Mass.—Barrett v. Checker Taxi Co., 160 N.E. 792, 263 Mass. 252.

N.J.—Poole v. Twentieth Century Operating Co., 1 A.2d 389, 121 N.J. Law 244.

Ohio.—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335.

S.C.—Lowie v. Dixie Stores, 174 S.E. 394, 172 S.C. 468.

42 C.J. p 1136 note 65 [a].

(2) Pedestrian may assume that motorist will not approach on wrong side of street.

Tenn.—Walkup v. Covington, 73 S.W.2d 718, 18 Tenn.App. 117—Elmore v. Thompson, 14 Tenn.App. 78.

Tex.—Reilly v. Buster, Civ.App., 52 S.W.2d 521, reversed on other grounds 82 S.W.2d 931, 125 Tex. 323.

Va.—Adkins v. Young Men's Christian Ass'n of Lynchburg, 141 S.E. 117, 149 Va. 193.

44. U.S.—Boston Elevated Ry. v. Greaney, C.C.A.Mass., 68 F.2d 657.

La.—Guillot v. Baton Rouge Yellow Cab Co., 138 So. 219, 18 La.App. 202.

Mass.—Shea v. Butler, 53 N.E.2d 678, 315 Mass. 523—Nolan v. Shea, 45 N.E.2d 956, 312 Mass. 631—Martin v. Florin, 172 N.E. 895, 273 Mass. 13.

Mich.—Malone v. Vining, 21 N.W.2d 144, 313 Mich. 315—Moldenhauer v. Smith, 18 N.W.2d 818, 311 Mich. 265—Batchelor v. Famous Cleaners

motor vehicle will be driven negligently⁴⁵ in violation of regulations and rules of the road.⁴⁶ It has been held, however, that such right of assumption applies only in favor of a pedestrian whose conduct measures up to the standard of due care⁴⁷ and that a pedestrian may not rest content on such assumption and take no care for his own safety.⁴⁸ A pedestrian who has actual or constructive notice of the motorist's negligence and of the danger created thereby must use due care under the circumstances to avoid being injured,⁴⁹ and if he fails to exercise such care he will be guilty of contributory negligence barring recovery.⁵⁰

Acts in emergencies. Where a pedestrian is confronted by a sudden emergency and imminent peril due to the negligent acts of a motorist, his actions are not to be judged by what he should have done if he had an opportunity to deliberate,⁵¹ and he is not necessarily guilty of contributory negligence in failing to exercise the best judgment in the emergency;⁵² in such case, his conduct is to be judged by the standard of what a prudent person would be likely to do under the same circumstances.⁵³ However, the pedestrian is not entitled to the benefits of this rule where his own negligence placed him in

the perilous position⁵⁴ or where the circumstances did not constitute an emergency.⁵⁵

c. Persons on Private Property or Private Ways

Ordinarily a person standing on private property adjacent to a street or highway need not anticipate that a motor vehicle will enter the premises and inflict injury, and a lower degree of care is required of a person on foot in a private way, sometimes used by motor vehicles, than is required of pedestrians in a public street.

Ordinarily a person standing on private property adjacent to a street or highway need not observe traffic on the highway or anticipate that a motor vehicle will enter the premises and inflict injury;⁵⁶ but, if the use of a person's land extends an invitation to motorists to come onto the property for parking or for any other purpose, such person must anticipate that vehicles may enter on the premises and cause injury.⁵⁷

Private ways. A lower degree of care and diligence is required of a person on foot standing in or walking along a private way or areaway, sometimes used by motor vehicles, than is required of pedestrians in a public street,⁵⁸ since there is not only less travel, but less rapid travel, on a private

& Dyers, 17 N.W.2d 787, 310 Mich 654.

Pa.—Koppenhaver v. Swab, 174 A. 393, 316 Pa. 207.

45. Minn.—Yorek v. Potter, 207 N. W. 188, 166 Minn. 131.

Mo.—Collins v. Leahy, App., 102 S.W. 2d 801—Russell v. Bauer-Berger Grocery Co., App., 288 S.W. 985.

Pa.—Koppenhaver v. Swab, 174 A. 393, 316 Pa. 207.

R.I.—Cunningham v. Walsh, 163 A. 223, 53 R.I. 23.

It is not contributory negligence as matter of law to fail to anticipate motorist's negligence.—Sturtevant v. Ouellette, 140 A. 368, 126 Me. 558—Day v. Cunningham, 133 A. 855, 125 Me. 328, 47 A.L.R. 1229.

46. Mich.—Burnash v. Compton, 298 N.W. 408, 298 Mich. 70—Lawrence v. Bartling & Dull Co., 238 N.W. 180, 255 Mich. 580.

Mo.—Frees v. Hosack, App., 119 S.W. 2d 460—Collins v. Leahy, App., 102 S.W.2d 801.

47. Vt.—Eagan v. Douglas, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 18.

48. Mich.—Paquette v. Consumers Power Co., 25 N.W.2d 599, 316 Mich. 501—Batchelor v. Famous Cleaners & Dyers, 17 N.W.2d 787, 310 Mich. 654—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

49. Ky.—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602.

Mich.—Malone v. Vining, 21 N.W.2d

144, 313 Mich. 315—Moldenhauer v. Smith, 18 N.W.2d 818, 311 Mich 265.

Mo.—Russell v. Bauer-Berger Grocery Co., App., 288 S.W. 985.

50. Mo.—Frees v. Hosack, App., 119 S.W.2d 460.

51. Cal.—Cannon v. Kemper, 73 P.2d 268, 23 Cal App 2d 239.

Iowa.—Handlon v. Henshaw, 221 N. W. 489, 206 Iowa 771.

La.—Pettaway v. K. C. S. Drug Co., App., 166 So. 902—Simpson v. Hyde, App., 147 So. 759—Lombardino v. 707 Tire Co., 133 So. 495, 16 La.App. 460.

Mich.—Burton v. Yellow & Checker Cab & Transfer Co., 278 N.W. 106, 283 Mich. 384.

Pa.—Dougherty v. Davis, 51 Pa. Super. 229, affirming 15 Luz.L.Reg. Rep. 86.

52. La.—Baquie v. Meraux, 123 So. 338, 11 La.App. 368.

Va.—W. B. Bassett & Co. v. Wood, 132 S.E. 700, 146 Va. 654.

42 C.J. p 1138 note 74 [b] (1)-(3).

Safe course

Pedestrian suddenly confronted with rapidly approaching automobile is not chargeable with contributory negligence for failing to select course which would extricate him safely.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.

53. Ill.—Goldberg v. Capitol Freight Lines, 41 N.E.2d 802, 314 Ill.App.

347, affirmed 47 N.E.2d 67, 382 Ill. 283.

54. Iowa.—Zuck v. Larson, 270 N.W. 384, 222 Iowa 842.

Ky.—Womack v. Ison, 95 S.W.2d 277, 264 Ky 640.

Me.—Smith v. Joe's Sanitary Market, 169 A. 900, 132 Me. 234.

Mich.—Anderson v. Bliss, 274 N.W. 809, 281 Mich. 323.

Wash.—Turnquist v. Rosala Bros., 83 P.2d 353, 196 Wash. 434.

55. Me.—MacDonald v. Pratt, 152 A. 532, 129 Me. 434.

56. Pa.—Gerhart v. East Coast Coach Co., 166 A. 564, 310 Pa. 535.

Va.—West v. L. Bromm Baking Co., 186 S.E. 291, 166 Va. 530.

Safeguards against fire

Where fire damaging plaintiff's fence, crops, and meadow had been set when truck tire flew off wheel after becoming ignited from being driven flat over concrete pavement, plaintiff's failure to set up fire guards, plow furrows, or remove dry grass from highway was not contributory negligence.—Butts v. Anthis, 73 P.2d 843, 181 Okl. 276.

57. Pa.—Gerhart v. East Coast Coach Co., 166 A. 564, 310 Pa. 535.

58. Mich.—Thurkow v. City of Detroit, 291 N.W. 29, 292 Mich. 617.

Pedestrian on sidewalk crossing private driveway see infra § 474.

Person working near filling station pumps is obliged to use lower degree of care to avoid being injured by

way.⁵⁹ Nevertheless, the exercise of due care under the circumstances is required,⁶⁰ and a person on foot in such a way who fails to keep a lookout for the approach of a vehicle which he knows is being operated in dangerous proximity to him may be chargeable with contributory negligence as a matter of law if injured thereby.⁶¹

§ 469. — Walking along Street or Highway

- a. In general
- b. Care required generally
- c. Reliance on care of motorists
- d. Keeping lookout
- e. Walking on left
- f. Stepping aside to allow motor vehicle to pass
- g. Right to recover for injury

a. In General

In the absence of statutory restriction, a pedestrian traveling along a street or highway ordinarily may walk on the roadway, or on any part thereof, even if a side-

walk or footpath is available, and he is not negligent as a matter of law in so doing.

Under some statutory provisions, where a portion of a highway has been prepared for use by pedestrians, one walking along a highway may be restricted to the use of that portion of the road.⁶² In the absence of statutory restriction, however, a pedestrian traveling on a street or highway is not confined to the use of the sidewalk or footpath,⁶³ and ordinarily he has a right to walk in the roadway⁶⁴ or on any part thereof,⁶⁵ at any time of day or night,⁶⁶ and is not negligent as a matter of law,⁶⁷ or negligent per se,⁶⁸ in so doing. Where not in contravention of a statutory restriction, the right of a pedestrian to travel along a highway has been held equal to that of a motorist,⁶⁹ as where there are no sidewalks or footpaths available for his use⁷⁰ or where the sidewalks or footpaths are covered with ice or snow.⁷¹

A pedestrian may have the right to walk along any part of the highway, in the absence of statutory restriction, even if a sidewalk is available⁷² or if he could walk outside the traveled roadway.⁷³

motorist driving away from pumps than degree of care required on public highway.—Reedy v. Goodin, 281 N.W. 377, 285 Mich. 614.

59. Mich.—Reedy v. Goodin, *supra*.

60. Pa.—Murphy v. Watson, 197 A. 151, 329 Pa. 64.

61. Pa.—Murphy v. Watson, *supra*.

62. Cal.—Scalf v. Elcher, 53 P.2d 368, 11 Cal App 2d 44.

Who is pedestrian within statute

Where motorist left his automobile near curb and walked along highway for purpose of determining nature of impediment in thoroughfare which occasioned placing of flares and for purpose of learning whether it would be safe to move onto and through the danger signals, he was a pedestrian within statute defining where a pedestrian shall not walk.—Sprung v. E. I. Dupont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94.

63. Neb.—Corpus Juris quoted in Nichols v. Havlat, 1 N.W.2d 829, 835, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.—Corpus Juris quoted in Cotten v. Stolley, 248 N.W. 384, 386, 124 Neb. 855.

Tex.—Moss v. Koetter, Civ.App., 249 S.W. 259.

64. Me.—Barlow v. Lowery, 59 A. 2d 702.

Neb.—Corpus Juris quoted in Nichols v. Havlat, 1 N.W.2d 829, 835, 140 Neb. 723, set aside on other grounds, 7 N.W.2d 84, 142 Neb. 534.—Corpus Juris quoted in Cotten v.

Stolley, 248 N.W. 384, 386, 124 Neb. 855.

42 C.J. p 1146 note 6.

The statute relating to right of way as between motor vehicle and pedestrian crossing highway does not affect traveler's right to use public way and all parts thereof including right of longitudinal travel thereon.—Brenning v. Remington, 287 N.W. 776, 136 Neb. 883.

65. Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.—Korstange v. Kroeze, 246 N.W. 127, 261 Mich. 298.

Neb.—Nichols v. Havlat, 1 N.W.2d 829, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.

N.H.—Dane v. MacGregor, 52 A.2d 290, 94 N.H. 294.

42 C.J. p 1037 note 59.

Walking on edge of roadway

A pedestrian who was walking on edge of roadway very near ditch and off gravel surface has been held not a trespasser.—Harbin v. Moore, 175 So. 264, 234 Ala. 266.

66. Neb.—Nichols v. Havlat, 1 N.W.2d 829, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.

67. Conn.—Peterson v. Meehan, 163 A. 757, 116 Conn. 150.

Me.—Barlow v. Lowery, 59 A.2d 702. Mich.—Lapachin v. Standard Oil Co., 256 N.W. 490, 268 Mich. 477.

Neb.—Corpus Juris quoted in Nichols v. Havlat, 1 N.W.2d 829, 835, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.—Corpus Juris quoted in Cotten v.

v. Stolley, 248 N.W. 384, 386, 124 Neb. 855.

R.I.—Banewicz v. Sullivan, 20 A.2d 273, 66 R.I. 494.

42 C.J. p 1146 note 7.

68. La.—Neyrey v. Mallet, App., 21 So.2d 158.

69. Me.—Cole v. Wilson, 143 A. 178, 127 Me. 316.

Pa.—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586.

70. La.—Ward v. Donahue, 8 La. App 335.

Pa.—Gilbert v. Stipa, 41 A.2d 284, 157 Pa Super. 1.—Dennis v. Munyan, 11 A.2d 566, 139 Pa Super. 310.—Neidlinger v. Haines, Com.Pl., 5 Sch Reg. 51.

Pedestrian wheeling carriage

Where there were no footpaths along highway and center grass plot was soft, it was not unlawful for pedestrian, wheeling a baby carriage to use roadway.—Tedla v. Ellman, 19 N.E.2d 987, 280 N.Y. 124.

71. Mass.—Byrne v. Dunn, 5 N.E. 2d 10, 296 Mass. 184.

Mich.—Kemp v. Aldrich, 282 N.W. 833, 286 Mich. 591, reversed on other grounds 286 N.W. 81, 286 Mich. 715.

72. Mass.—Byrne v. Dunn, 5 N.E.2d 10, 296 Mass. 184.

Pa.—Bright v. Stettenbauer, 32 Berks Co.L.J. 154, reversed on other grounds 15 A.2d 676, 339 Pa. 545. 42 C.J. p 1146 note 8.

73. Cal.—Devecchio v. Ricketts, 226 P. 11, 66 Cal.App. 334.

Pa.—Petrie v. E. A. Myers Co., 112 A. 240, 269 Pa. 134.

While ordinarily a pedestrian need not walk on the berm or shoulder of the road, rather than on the paved portion,⁷⁴ he has, as a rule, a legal right to walk thereon,⁷⁵ and he may not be considered negligent in so doing.⁷⁶ However, walking in the middle of the road, under some circumstances, may constitute negligence.⁷⁷ A pedestrian traveling along the portion of a road prescribed for his use has no right of way thereon over a motorist except as provided by statute.⁷⁸

b. Care Required Generally

A pedestrian walking along a highway should use due or reasonable care commensurate with the circumstances for his own safety and protection, but he need not exercise extraordinary care.

A pedestrian walking along a roadway is, like every other user of the public highway, required to

use due or reasonable care commensurate with the circumstances for his own safety and protection,⁷⁹ and, while extraordinary care is not demanded of him,⁸⁰ he must, because of the greater danger of his position in the portion of the highway usually devoted to the use of vehicles, ordinarily exercise a greater amount of care in observing and avoiding danger than if he were at a place used exclusively by pedestrians.⁸¹

A pedestrian walking on the right side of a highway should use due care under the circumstances for his safety and protection,⁸² and he may be required to use more care than if he walked on either shoulder thereof.⁸³ A person failing to walk on the left edge of a road may be required to use more care for his protection than is required of one walking on the left edge thereof.⁸⁴

74. Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649. Pa.—Henry v. Nace, Com.Pl., 56 York Leg.Rec. 157.

Where rain affected surface of berm, making it a less convenient footway, there was no duty on pedestrian to make use of earth berm or shoulder of road as sidewalk.—Dennis v. Munyan, 11 A.2d 566, 139 Pa.Super. 310.

75. Ala.—W & W Pickle & Canning Co. v. Baskin, 181 So. 765, 236 Ala. 168.

La.—Cooper v. Kennard, App., 192 So. 534.

Wash.—De Vore v. Longview Public Service Co., 298 P. 717, 162 Wash. 338.

76. La.—Cooper v. Kennard, App., 192 So. 534.

Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19—Volay v. Williams, 241 N.W. 846, 258 Mich. 184. Wash.—Harry v. Pratt, 285 P. 440, 155 Wash. 552.

77. N.J.—Laffier v. Lafer, 142 A. 545, 6 N.J.Misc. 709.

78. Va.—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193.

Reason for rule

The mere right to travel on a specified portion of a highway should not be confused with a right of way thereon superior to the rights of others also entitled to use the highway.—South Hill Motor Co. v. Gordon, supra.

79. Conn.—Krupien v. Doolittle, 169 A. 268, 117 Conn. 534.

Ill.—Alden v. Coultrip, 275 Ill.App. 306.

Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649.

Iowa.—Armbruster v. Gray, 282 N.W. 342, 225 Iowa 1226.

Ky.—Igo v. Smith, 138 S.W.2d 497,

282 Ky. 336—Kelly v. Marcum, 114 S.W.2d 1102, 272 Ky. 609—South-eastern Telephone Co. v. Payne, 69 S.W.3d 358, 253 Ky. 245.

Me.—Barlow v. Lowery, 69 A.2d 702. Mich.—Tio v. Molter, 247 N.W. 772, 262 Mich. 655—Korstange v. Kroeze, 246 N.W. 127, 261 Mich. 298.

Neb.—Nichols v. Havlat, 1 N.W.2d 829, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.

Pa.—Koppenhaver v. Swab, 174 A. 393, 316 Pa. 207—O'Leary v. Willis, 200 A. 125, 131 Pa.Super 578.

R.I.—Banewicz v. Sullivan, 20 A.2d 273, 66 R.I. 494. 42 C.J. p 1146 note 11.

Great or high degree of care required

(1) The obligation of pedestrian, independent of statute defining where pedestrian shall not walk, when he was in highway and before he was struck by defendant's truck was covered by his duty to exercise ordinary care under the circumstances which was a high degree of care.—Sprung v. E. I. Dupont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94.

(2) Pedestrian at night, on narrow road, in outskirts of city, where numerous automobiles travel, is in danger calling for great care.—Worringen v. Zetmann, 2 La.App. 106.

(3) Where pedestrians left sidewalk, and walked on highway, they were bound to exercise great care.—McNeal v. Hettich, 172 A. 157, 113 Pa.Super. 131.

Stepping into place of danger

A pedestrian, who is walking in a place of safety on a highway, should not step directly into a place of danger in front of an oncoming automobile.—Bratvold v. Lalum, 282 N.W. 514, 68 N.D. 534.

Acts in emergency

Where an emergency situation is created through no fault on the part of a pedestrian, the fact that he may have escaped injury had he run in a different direction from the one chosen by him is of no moment.—Zuvich v. Ballay, La.App., 149 So. 281.

80. Utah.—Nikoleropoulos v. Ramsey, 214 P. 304, 61 Utah 465. 42 C.J. p 1146 note 12.

81. Conn.—Matulis v. Gans, 141 A. 870, 107 Conn 562. 42 C.J. p 1146 note 13.

82. Iowa.—Taylor v. Wistey, 254 N.W. 50, 218 Iowa 785.

Walking on dark road or at night

(1) Traveler must use ordinary care for his safety from vehicles when walking on right side of highway at night.—Taylor v. Wistey, supra.

(2) A pedestrian walking on right side of pavement on rainy night when traffic was heavy was bound to exercise high degree of care to avoid being struck by following automobile.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

(3) Person dressed in dark clothing, walking along dark road with back to approaching traffic must exercise care proportionate to inherent danger.—Schmeiske v. Laubin, 145 A. 890, 109 Conn. 206.

83. N.H.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

84. Iowa.—Lindloff v. Duecker, 251 N.W. 698, 217 Iowa 326.

Walking in center of road

A pedestrian, walking in the center of a road instead of on the left edge thereof, should use more care for his protection than in walking on the left edge.—Lindloff v. Duecker, supra.

c. Reliance on Care of Motorists

A pedestrian walking along a highway usually may assume that motorists driving thereon will use due or reasonable care to avoid injuring him, but his right to rely on such care is not unlimited.

As a rule, a pedestrian lawfully walking along a highway has the right to assume that motorists driving thereon will exercise due or reasonable care to avoid injuring him,⁸⁵ since his rights and duties while walking along a highway are reciprocal with those of a motorist.⁸⁶ Thus, he may generally assume that motorists traveling on the highway will obey the law⁸⁷ and that they will keep a proper lookout to avoid injuring him.⁸⁸ He may also usually assume that the operator of a motor vehicle will not carelessly run him down, but will avoid contact with him,⁸⁹ and that he will give a signal

or warning of his approach in order to avoid an accident.⁹⁰ However, a pedestrian's right, on walking along a highway, to rely on the care of a motorist is not unlimited,⁹¹ and he may not himself omit to take the requisite amount of care for his safety and depend on the care of a motorist to save him from disaster.⁹²

d. Keeping Lookout

With respect to contributory negligence, a person walking along a street or highway should use due or reasonable care under the circumstances to discover approaching motor vehicles, but he need not be continuously looking and listening for such purpose.

A person walking along a street or highway has a duty to use due or reasonable care under the circumstances to discover approaching motor vehicles,⁹³ and a failure so to do may constitute contrib-

85. Ala.—*W & W Pickle & Canning Co. v. Baskin*, 181 So. 765, 236 Ala. 168.

Ill.—*Alden v. Coultrip*, 275 Ill.App. 306.

Mass.—*Sadak v. Tucker*, 37 NE2d 495, 310 Mass. 153.

Mich.—*Pearce v. Rodell*, 276 N.W. 883, 253 Mich. 19.

Neb.—*Cotten v. Stolley*, 248 N.W. 384, 124 Neb. 855.

N.H.—*Dane v. MacGregor*, 52 A.2d 290, 94 N.H. 294—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

Pa.—*O'Leary v. Willis*, 200 A. 125, 131 Pa.Super. 578.

Position of pedestrian

The "presumption of safety" has been held to apply to one walking on either shoulder or even on right side of pavement when visibility is good and motorists may be fairly thought to be able to see pedestrian who keeps a straight course.—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

Whether or not he sees an automobile, a pedestrian walking along a road may rely to a reasonable extent on expectation that automobile approaching him will slow down, and that it was not be operated at a speed greater than is reasonable and proper, having regard to the traffic, the use of the way, and the safety of the public.—*Sadak v. Tucker*, 37 N.E.2d 495, 310 Mass. 153.

86. Ind.—*American Carloading Corporation v. Gary Trust & Savings Bank*, 25 N.E.2d 777, 216 Ind. 649.

N.D.—*Bratvold v. Lalum*, 282 N.W. 514, 68 N.D. 534.

87. Cal.—*Buchignoni v. De Haven*, 72 P.2d 159, 23 Cal.App.2d 76.

Iowa.—*Lindloff v. Duecker*, 251 N.W. 698, 217 Iowa 326.

Ky.—*Fork Ridge Bus Line v. Matthews*, 58 S.W.2d 615, 248 Ky. 419.

La.—*Savoie v. Walker, App.*, 183 So. 580.

N.H.—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

Wash.—*Darach v. Island Empire Telephone & Telegraph Co.*, 275 P. 713, 151 Wash. 279.

88. Ala.—*W & W Pickle & Canning Co. v. Baskin*, 181 So. 765, 236 Ala. 168.

Cal.—*Buchignoni v. De Haven*, 72 P. 2d 159, 23 Cal.App.2d 76.

Ill.—*Alden v. Coultrip*, 275 Ill.App. 306.

Iowa.—*Lindloff v. Duecker*, 251 N.W. 698, 217 Iowa 326.

Neb.—*Johnson v. Anoka-Butte Lumber Co.*, 5 N.W.2d 114, 141 Neb. 851.

89. Ky.—*Tri-State Refining Co. v. Skaggs*, 4 S.W.2d 739, 223 Ky. 731.

Mass.—*Sadak v. Tucker*, 37 NE2d 495, 310 Mass. 153—*Byrne v. Dunn*, 5 N.E.2d 10, 296 Mass. 184.

Mich.—*Burnash v. Compton*, 298 N. W. 408, 298 Mich. 70—*Marth v. Lambert*, 287 N.W. 916, 290 Mich. 557—*Lapachin v. Standard Oil Co.*, 256 N.W. 490, 268 Mich. 477—*Budnick v. Peterson*, 184 N.W. 493, 215 Mich. 678.

Pa.—*Stein v. Taylor, Com.Pl.*, 56 Montg.Co. 199.

90. Ky.—*Fork Ridge Bus Line v. Matthews*, 58 S.W.2d 615, 248 Ky. 419.

La.—*Savoie v. Walker, App.*, 183 So. 530.

Mich.—*Burnash v. Compton*, 298 N.W. 408, 298 Mich. 70—*Marth v. Lambert*, 287 N.W. 916, 290 Mich. 557—*Kemp v. Aldrich*, 282 N.W. 833, 286 Mich. 591, reversed on other grounds 286 N.W. 81, 286 Mich. 715—*Lapachin v. Standard Oil Co.*, 256 N.W. 490, 268 Mich. 477.

N.H.—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

Pa.—*O'Leary v. Willis*, 200 A. 125, 131 Pa.Super. 578.

91. Mass.—*Sadak v. Tucker*, 37 N.E.

2d 495, 310 Mass. 153—*Byrne v. Dunn*, 5 N.E.2d 10, 296 Mass. 184.

92. N.H.—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

93. Conn.—*Krupien v. Doolittle*, 169 A. 268, 117 Conn. 534.

Iowa.—*Lindloff v. Duecker*, 251 N.W. 698, 217 Iowa 326.

Ky.—*Straughan's Adm'r v. Fendley*, 191 S.W.2d 391, 301 Ky. 209—*Southeastern Telephone Co. v. Payne*, 69 S.W.2d 358, 253 Ky. 245—*Page's Adm'r v. Scott*, 54 S.W.2d 23, 215 Ky. 648.

La.—*Savoie v. Walker, App.*, 183 So. 530.

Neb.—*Corpus Juris* quoted in *Nichols v. Havlat*, 1 N.W.2d 829, 835, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534—*Corpus Juris* quoted in *Cotten v. Stolley*, 248 N.W. 384, 386, 124 Neb. 855.

Pa.—*Koppenhaver v. Swab*, 174 A. 393, 316 Pa. 207—*Vuchovich v. King, Com.Pl.*, 9 Fay.L.J. 170.

Wash.—*De Vore v. Longview Public Service Co.*, 298 P. 717, 162 Wash. 338.

42 C.J. p 1146 note 15.

Duty to look for impending danger generally see *supra* § 458.

Extreme caution required

Pedestrian traveling along a highway at night must exercise extreme caution to discover approaching vehicles.—*Laguens v. Masera*, 3 La.App. 762.

"Proper lookout"

Law imposes on every person proceeding along a public highway or street duty of maintaining a "proper lookout" for his own safety, the term importing such lookout as a person of ordinary prudence would keep under the same or similar circumstances.—*Blunt v. H. G. Berning, Inc.*, Tex.Civ.App., 211 S.W.2d 773, error refused.

tory negligence.⁹⁴ Similarly, where a pedestrian looks, but fails to see what he should see, he may be held to be negligent.⁹⁵ While due care on the part of a pedestrian walking along a highway may demand that he frequently look and listen for approaching motor vehicles,⁹⁶ he is not bound to be continuously looking and listening for such purpose.⁹⁷

Lookout to rear. As a general rule, a pedestrian traveling along a street or highway may be required, in the exercise of reasonable care, to be alert to,⁹⁸ and look out for,⁹⁹ motor vehicles approaching from the rear, and a failure to look back under some circumstances may constitute negligence.¹ It has been held, however, that a pedestrian walking on the highway is not necessarily required in all circumstances to look back for the ap-

proach of motor vehicles² at stated intervals of time and space,³ at least where he is walking on the left side of the road,⁴ and that he is not negligent as a matter of law, or negligent per se, if he does not turn and look back⁵ constantly and repeatedly,⁶ especially where there is ample room for an automobile to pass him.⁷

A pedestrian walking on the right side of the road has been held to be under a duty to maintain a lookout to the rear for approaching motor vehicles,⁸ and he may be guilty of negligence in failing to keep such a lookout.⁹ In at least one jurisdiction the duty to maintain a lookout to the rear when walking on the right of the road exists where there are sidewalks available for use by pedestrians,¹⁰ but not where there are no sidewalks.¹¹

Ordinarily a pedestrian walking off the traveled

Vigilance required

(1) A pedestrian traveling along a street is required to keep a vigilant lookout.—*Reld v. Owens*, 93 P.2d 680, 98 Utah 50, 126 A.L.R. 55.

(2) Due care requires that pedestrian walking on narrow concrete highway on dark night should be most vigilant for own safety.—*Cole v. Wilson*, 143 A. 178, 127 Me. 316.

94. Neb.—*Corpus Juris* quoted in *Nichols v. Havlat*, 1 N.W.2d 829, 835, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.—*Corpus Juris* quoted in *Cotten v. Stolley*, 248 N.W. 384, 386, 124 Neb. 855.

N.Y.—*Willis v. Harby*, 144 N.Y.S. 154, 159 App.Div. 94.

Pa.—*Murphy v. Watson*, 197 A. 151, 329 Pa. 64.

Wash.—*De Vore v. Longview Public Service Co.*, 298 P. 717, 162 Wash. 338.

95. Wash.—*De Vore v. Longview Public Service Co.*, *supra*.

96. Me.—*Barlow v. Lowery*, 59 A.2d 702.

97. W.Va.—*Fleming v. McMillan*, 26 S.E.2d 8, 125 W.Va. 356.

98. Pa.—*Koppenhaver v. Swab*, 174 A. 393, 316 Pa. 207.

99. Iowa.—*Lindloff v. Duecker*, 251 N.W. 698, 217 Iowa 326.

Reliance on companion

Mass.—*Byrne v. Dunn*, 5 N.E.2d 10, 296 Mass. 184.

1. Va.—*Saunders v. Temple*, 153 S.E. 691, 154 Va. 714.

At or near center of road

(1) Pedestrian clad in dark clothes without light or lantern, who walked at night in center of paved highway used by two-way traffic, without looking back for approach of traffic from rear, was held negligent.—*Lind-*

loff v. Duecker, 251 N.W. 698, 217 Iowa 326.

(2) Pedestrian walking near center of concrete roadway on dark, misty night, without heeding automobiles approaching from rear, was held negligent.—*Saunders v. Temple*, 153 S.E. 691, 154 Va. 714.

2. Cal.—*Burk v. Extrafine Bread Bakery*, 280 P. 522, 208 Cal. 105—*Olson v. Meacham*, 19 P.2d 527, 129 Cal.App. 670—*Stealey v. Chessum*, 11 P.2d 428, 123 Cal.App. 446.

La.—*Kelly v. Ludlum*, 118 So. 781, 9 La.App. 57.

Mich.—*Marth v. Lambert*, 287 N.W. 916, 290 Mich. 567.

Pedestrian plainly visible to driver

Where pedestrian walking along highway is plainly visible to driver, he need not look back.—*Wilson v. Kestenholz*, 297 P. 954, 113 Cal.App. 13.

3. Ill.—*Alden v. Coultrip*, 275 Ill. App. 306.

4. La.—*Savoie v. Walker*, App., 183 So. 530.

5. Pa.—*O'Leary v. Willis*, 200 A. 125, 131 Pa.Super. 578—*Matzasoski v. Jacobson*, 186 A. 227, 122 Pa.Super. 180—*Neidlinger v. Haines*, Com. Pl., 5 Sch.Reg. 51.

Pedestrians walking on left side of road have been held not negligent as a matter of law in not looking back for approach of traffic from rear.

Neb.—*Johnson v. Anoka-Butte Lumber Co.*, 5 N.W.2d 114, 141 Neb. 851. N.H.—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

6. Neb.—*Corpus Juris* quoted in *Nichols v. Havlat*, 1 N.W.2d 829, 835, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.—*Corpus Juris* quoted in *Cotten v. Stolley*, 248 N.W. 384, 386, 124 Neb. 855.

42 C.J. p 1146 note 17.

7. Neb.—*Corpus Juris* quoted in *Nichols v. Havlat*, 1 N.W.2d 829, 835, 140 Neb. 723, set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.—*Corpus Juris* quoted in *Cotten v. Stolley*, 248 N.W. 384, 386, 124 Neb. 855.

42 C.J. p 1147 note 18.

8. La.—*Harlow v. Owners' Automobile Ins. Co. of New Orleans*, App., 160 So. 169.

N.H.—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

N.Y.—*Sylvia v. Eyth*, 259 N.Y.S. 85, 144 Misc. 316, affirmed 257 N.Y.S. 1073, 236 App.Div. 739, motion denied 258 N.Y.S. 1040, 236 App.Div. 759.

Violation of statute

A pedestrian who was walking along right side of highway at night, contrary to statute, had the duty to use his faculties for hearing and seeing to avoid being struck by automobiles.—*Donaho v. Large*, 158 S.W.2d 447, 25 Tenn.App. 433.

9. La.—*Harlow v. Owners' Automobile Ins. Co. of New Orleans*, App., 160 So. 169.

Wis.—*Panzer v. Hesse*, 24 N.W.2d 613, 249 Wis. 340.

Edge of road

Pedestrian walking near edge of right side of street on dark foggy night was held negligent in failing to look back.—*Sylvia v. Eyth*, 259 N.Y.S. 85, 144 Misc. 316, affirmed 257 N.Y.S. 1073, 236 App.Div. 739, motion denied 258 N.Y.S. 1040, 236 App.Div. 759.

10. Pa.—*McNeal v. Hettich*, 173 A. 167, 113 Pa.Super. 431.

11. Pa.—*Neidlinger v. Haines*, 200 A. 581, 331 Pa. 629—*Gilbert v. Stipa*, 41 A.2d 284, 157 Pa. Super. 1—*Dennis v. Munyan*, 11 A.2d 566, 139 Pa.Super. 310.

or paved portion of the road is not required to look back to ascertain whether motor vehicles are approaching from behind,¹² and it does not constitute negligence per se to fail to look back under such circumstances.¹³ No such duty has been held to exist whether the pedestrian is walking on the left shoulder of the road¹⁴ or on the right of the paved portion of the highway.¹⁵ It has been held, however, that one traveling on the shoulder of the right side of the road is under a duty to keep a lookout to the rear¹⁶ unless there is little vehicular traffic on the roadway so that a driver need not approach near the shoulder thereof.¹⁷

e. Walking on Left

Usually a pedestrian may walk on the left side of the road, and it is safer for him to walk on such side; but he is not always obliged to walk on the left except where it is so required by regulation, in which case it may constitute negligence to fail to comply therewith.

In the absence of a statute otherwise providing,

a pedestrian may walk on the left side of the road facing traffic,¹⁸ and walking on such side,¹⁹ or turning to the left out of the roadway when danger impends,²⁰ ordinarily is not negligence per se. Unless made applicable by express terms or necessary implication, a statute establishing the rule of the road to keep to the right does not apply to pedestrians.²¹ While in the absence of a statute so providing a pedestrian need not walk on the left side of a highway facing traffic,²² generally the safest place on a highway for a pedestrian is on the left side thereof,²³ and due care may require that he walk on the left side in order better to see and avoid approaching traffic.²⁴ However, walking along the right-hand side of the road has been held not to constitute negligence per se.²⁵

Regulations requiring walking on left. Under regulations so providing, pedestrians when walking on or along a highway must walk on the left side of such highway,²⁶ and a failure to comply with

12. Ala.—*W & W Pickle & Canning Co. v. Baskin*, 181 So. 765, 236 Ala. 168.

Cal.—*Burk v. Extrafine Bread Bakery*, 280 P. 522, 208 Cal. 105.

13. Cal.—*Burk v. Extrafine Bread Bakery*, supra.

42 C.J. p 1146 note 17 [b].

14. Cal.—*Olson v. Meacham*, 19 P.2d 527, 129 Cal.App. 670.

15. Ala.—*W & W Pickle & Canning Co. v. Baskin*, 181 So. 765, 236 Ala. 168.

16. Wis.—*Panzer v. Hesse*, 24 N.W. 2d 613, 249 Wis. 340.

17. Wis.—*Kaminski v. Standard Oil Co.*, 286 N.W. 327, 281 Wis. 582.

18. U.S.—*Shipley v. Komer*, D.C.Fla., 60 F.Supp. 551, affirmed, C.C.A., 154 F.2d 861.

Veering to right to avoid obstacle

Pedestrian walking on left side of road has been held not negligent in veering to right to walk around obstacle where he remains in left half of highway.—*Shipley v. Komer*, supra.

Where there is no pathway, lane, or sidewalk prepared for use of pedestrian, he may walk on left-hand side of highway.—*Scaif v. Elcher*, 53 P.2d 368, 11 Cal.App.2d 44.

19. Wash.—*Marton v. Pickrell*, 191 P. 1101, 112 Wash. 117, 17 A.L.R. 68.

42 C.J. p 1147 note 20.

20. Cal.—*Fahey v. Madden*, 209 P. 41, 58 Cal.App. 637.

21. Wash.—*Marton v. Pickrell*, 191 P. 1101, 112 Wash. 117, 17 A.L.R. 68.

22. U.S.—*Shipley v. Komer*, D.C.Fla., 60 F.Supp. 551, affirmed, C.C.A., 154 F.2d 861.

Ind.—*American Carloading Corporation v. Gary Trust & Savings Bank*, 25 N.E.2d 777, 216 Ind. 649.

N.H.—*Dane v. MacGregor*, 52 A.2d 290, 94 N.H. 294.

Where there is no sidewalk, pedestrians may properly walk along road in village on right side next to grass.—*Healy v. Moore*, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Under "residence district" statute

Under a statute so providing, a pedestrian may have the right to travel anywhere on a public highway in a residence district, but the exercise of his right to walk on the right-hand side of the highway instead of on the left may, under some circumstances, constitute negligence; in order that the statute may be applicable, the highway in question must be in a residence district within the meaning of the statute.—*McGough v. Hendrickson*, 136 P.2d 110, 58 Cal. App.2d 60.

23. N.H.—*Murphy v. Granz*, 17 A.2d 449, 91 N.H. 244.

If road is level and straight, and pedestrian's vision ahead is clear for some distance, with respect to automobile traffic, safest place on highway for pedestrian is on left side of highway, but local conditions may vary the situation.—*Lawson v. Fordyce*, 21 N.W.2d 69, 237 Iowa 28.

Where pedestrian not struck from rear

The danger, referred to in statement that a pedestrian who walks in right lane with traffic is exposed to greater danger from the rear than a pedestrian who walks in left lane and faces traffic, is danger of collision, and rules with reference to con-

tributory negligence in such collision cases do not apply where injured pedestrian is not struck by an automobile approaching from rear.—*Lawson v. Fordyce*, supra.

24. Me.—*Barlow v. Lowery*, 59 A. 2d 702.

25. Pa.—*Gilbert v. Stipa*, 41 A.2d 284, 157 Pa Super. 1.

26. U.S.—*Smith v. Town of Orangetown*, D.C.N.Y., 57 F.Supp. 52, affirmed, C.C.A., 150 F.2d 782, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462.

Iowa.—*Lawson v. Fordyce*, 21 N.W.2d 69, 237 Iowa 28.

Ky.—*Straughan's Adm'r v. Fendley*, 191 S.W.2d 391, 301 Ky. 209.

La.—*Antoine v. Louisiana Highway Commission*, App., 188 So. 443.

Minn.—*Nicholas v. Minnesota Milk Co.*, 4 N.W.2d 54, 212 Minn. 333.

N.C.—*Hunnicut v. Kimbrell*, 177 S.E. 323, 207 N.C. 494—*Radford v. Young*, 140 S.E. 806, 194 N.C. 747.

Tenn.—*Donaho v. Large*, 158 S.W. 2d 447, 25 Tenn App. 433.

Va.—*South Hill Motor Co. v. Gordon*, 200 S.E. 637, 172 Va. 193—*Saunders v. Temple*, 153 S.E. 691, 154 Va. 714.

Wis.—*Panzer v. Hesse*, 24 N.W.2d 613, 249 Wis. 340.

Who is pedestrian

(1) One leaving vehicle stalled on highway and alighting to secure gasoline was held to become a pedestrian, and subject to statute requiring him to walk on left side of road.—*Keller v. Breneman*, 279 P. 588, 153 Wash. 208, 67 A.L.R. 92.

(2) A person walking along a public highway pulling a small cart has been held a pedestrian within the meaning of such statute.

such a regulation may constitute negligence,²⁷ or negligence as a matter of law,²⁸ or negligence per se.²⁹ Such regulations are designed for the safety of pedestrians³⁰ and to enable them to care for themselves better than if traffic approached them from the rear,³¹ and they should be given a reasonable construction and application.³² While a pedestrian may not be permitted to determine for himself when to observe such a regulation,³³ circumstances may excuse his noncompliance therewith,³⁴ and usually he will not be required to place himself in a position of danger in order to observe the regulation.³⁵ However, it has also been held, under such a statute, that a pedestrian must walk on the left side of a highway whether it increases or diminishes the danger to himself.³⁶ A pedestrian walking on the left side of the road is not guilty of negligence in that respect where the law requires him to walk on that part of the road.³⁷

A regulation requiring a pedestrian to walk on the left side of the road has been held to apply to a way or place of whatever nature open to use by the public for travel,³⁸ and it may include a through highway traversing a street within a city,³⁹ a narrow country road,⁴⁰ or a divided highway.⁴¹ Although a statute requiring pedestrians to travel on and along the left side of the highway has been held to apply to persons walking on the shoulders of the highway,⁴² it has also been held that such a statute relates only to the paved portion of the highway.⁴³

and that such a statute applies only to pedestrians engaged in walking along and upon that portion of a public highway on which motor vehicles are accustomed to travel.⁴⁴ Under some statutory provisions, it is unlawful for a pedestrian to walk along a highway in any manner except close to the left-hand edge thereof,⁴⁵ and a statute requiring pedestrians using highways without suitable sidewalks to keep as near the extreme left side or edge thereof as reasonably possible does not forbid a pedestrian from walking on the edge of the hard surface of the road and require him to walk on the edge of the natural boundary thereof or the usable portion of the highway as generally accepted by the public.⁴⁶ A statute requiring a pedestrian to walk on the left side of a highway does not require him to walk completely off the roadway.⁴⁷

f. Stepping Aside to Allow Motor Vehicle to Pass

On meeting or being overtaken by a motor vehicle, a pedestrian walking on a highway may be required to step aside or out of the traveled way to allow it to pass him, but usually he need not step off the highway to do so.

On meeting or being overtaken by a motor vehicle, a pedestrian walking in the roadway may be required, in the exercise of reasonable care, to step aside or out of the traveled way to allow it to pass him,⁴⁸ and, if necessary, promptly leave the way entirely free for motor traffic.⁴⁹ If the roadway is so narrow that one or the other must go outside the

N.C.—*Lewis v. Watson*, 47 S.E.2d 484, 229 N.C. 29.

Wash.—*Flaumer v. Samuels*, 104 P.2d 484, 4 Wash.2d 609.

Right to recover property accidentally on highway

Statute requiring pedestrian to walk on left side of highway was not intended to interfere with one's right to recover property accidentally on highway, and in such cases rules of ordinary care govern conduct of pedestrian.—*Bump v. Voights*, 249 N.W. 508, 212 Wis. 256.

27. Iowa.—*Anderson v. Holsteen*, 26 N.W.2d 855, 238 Iowa 630.
N.Y.—*Tedla v. Ellman*, 19 N.E.2d 987, 280 N.Y. 124.

N.C.—*Hunnicutt v. Kimbrell*, 177 S.E. 323, 207 N.C. 494—*Radford v. Young*, 140 S.E. 806, 194 N.C. 747.
Wash.—*Keller v. Breneman*, 279 P. 588, 153 Wash. 208, 67 A.L.R. 92.

28. Wash.—*Geri v. Bender*, 168 P.2d 144, 25 Wash.2d 50—*Flaumer v. Samuels*, 104 P.2d 484, 4 Wash.2d 609.

Wis.—*Panzer v. Hesse*, 24 N.W.2d 613, 249 Wis. 340.

29. Cal.—*Escobar v. McNiel*, 124 P.2d 70, 51 Cal.App.2d 122—*Sharick v. Galloway*, 66 P.2d 185, 19 Cal.

App.2d 693—*Scaif v. Elcher*, 53 P.2d 368, 11 Cal.App.2d 44.

Tenn.—*Donaho v. Large*, 158 S.W.2d 447, 25 Tenn.App. 433.

30. N.Y.—*Tedla v. Lillman*, 19 N.E.2d 987, 280 N.Y. 124.

Tenn.—*Hamilton v. Moyers*, 140 S.W.2d 799, 24 Tenn.App. 86.

Wis.—*Bump v. Voights*, 249 N.W. 508, 212 Wis. 256.

31. N.Y.—*Tedla v. Ellman*, 19 N.E.2d 987, 280 N.Y. 124.

32. Tenn.—*Hamilton v. Moyers*, 140 S.W.2d 799, 24 Tenn.App. 86.

33. Tenn.—*Hamilton v. Moyers*, supra.

34. N.Y.—*Tedla v. Ellman*, 19 N.E.2d 987, 280 N.Y. 124.

Wash.—*Geri v. Bender*, 168 P.2d 144, 25 Wash.2d 50.

35. N.Y.—*Tedla v. Ellman*, 19 N.E.2d 987, 280 N.Y. 124.

Tenn.—*Hamilton v. Moyers*, 140 S.W.2d 799, 24 Tenn.App. 86.

36. Wis.—*Panzer v. Hesse*, 24 N.W.2d 613, 249 Wis. 340.

37. La.—*Coleman v. Danos*, App. 186 So. 407—*Savole v. Walker*, App. 183 So. 530.

38. Cal.—*Scaif v. Elcher*, 53 P.2d 368, 11 Cal.App.2d 44.

39. Iowa.—*Reynolds v. Aller*, 284 N.W. 825, 226 Iowa 642.

40. Wis.—*Hanson v. Matas*, 249 N.W. 505, 212 Wis. 275, 93 A.L.R. 646.

41. Minn.—*Wojtowicz v. Belden*, 1 N.W.2d 409, 211 Minn. 461.

42. Wis.—*Panzer v. Hesse*, 24 N.W.2d 613, 249 Wis. 340, overruling *Kaminski v. Standard Oil Co.*, 286 N.W. 327, 231 Wis. 582.

43. Wash.—*Highland v. Chas. H. Lilly Co.*, 27 P.2d 693, 175 Wash. 507.

44. Cal.—*Armstrong v. Sengo*, 61 P.2d 1188, 17 Cal.App.2d 300.

45. Cal.—*Scaif v. Elcher*, 53 P.2d 368, 11 Cal.App.2d 44.

46. Va.—*Stuart v. Coates*, 42 S.E.2d 311, 186 Va. 229.

47. Cal.—*Buchignoni v. De Haven*, 72 P.2d 159, 23 Cal.App.2d 76.

48. Kan.—*Eames v. Clark*, 177 P. 540, 104 Kan. 63.

Pa.—*Juriac v. Miljerick*, 18 Pa.Dist. & Co. 715.

Wis.—*Hanson v. Mattas*, 249 N.W. 505, 212 Wis. 275, 93 A.L.R. 646.

49. Me.—*Barlow v. Lowery*, 59 A.2d 702.

road to pass, the duty so to do ordinarily is on the pedestrian, because of the greater convenience with which he can perform it.⁵⁰ As a rule, however, a pedestrian is not required to step off a highway in order to permit an automobile to pass,⁵¹ although he should use reasonable care to keep out of its way,⁵² and, where the beaten track is wide enough for a vehicle to pass without unreasonable interference, a pedestrian is not, in the absence of statutory provision, bound as a matter of law to go completely outside the roadway on observing a motor vehicle approaching thereon.⁵³ A pedestrian who knows of the approach of an automobile from his rear may be negligent in stepping in front of it,⁵⁴ or in not taking the shortest course to a place of safety.⁵⁵

g. Right to Recover for Injury

Notwithstanding the driver's negligence, the negligence of a pedestrian injured as a result of an accident involving a motor vehicle may bar recovery for such injury where it proximately contributed thereto, but not otherwise.

Where a pedestrian walking along a highway is injured by a motor vehicle, the pedestrian's negligence may bar recovery for such injury if it proximately contributed thereto, notwithstanding the negligence of the motor vehicle operator.⁵⁶ So a pedestrian's violation of a statute requiring him to

travel on the left-hand side of a highway may bar recovery for injuries received by him where,⁵⁷ and only where,⁵⁸ such violation proximately contributed to the injury. Under some regulations, a pedestrian walking along a highway closed for repair may be barred from recovering for injuries incurred thereon when struck by a motor vehicle used in repairing the road.⁵⁹

The violation by a pedestrian of a statute requiring one overtaken on a highway to turn to the right so as to leave free passage to his left does not in itself prevent recovery for injuries sustained by collision with a motor vehicle,⁶⁰ especially where there is room for the vehicle to pass him without interference,⁶¹ unless such violation directly contributes to his injuries.⁶² Where a pedestrian has a duty to look back for the approach of motor vehicles from the rear, his failure to do so may bar recovery for injuries received by him, provided such injuries proximately resulted therefrom.⁶³

§ 470. — Crossing Street or Highway in General

- a. General rules
- b. Place of crossing
- c. Crossing in front of approaching vehicle

50. Kan.—Eames v. Clark, 177 P. 540, 104 Kan. 65.

Narrow country roads have been held within purview of statute requiring pedestrian to step off traveled roadway, if practicable, on meeting vehicles—Hanson v. Matas, 249 N.W. 606, 212 Wis. 275, 93 A.L.R. 546.

51. Ky.—Tri-State Refining Co. v. Skaggs, 4 S.W.2d 739, 223 Ky. 731. Pa.—Neidlinger v. Haines, 200 A. 581, 331 Pa. 529—Dennis v. Munyan, 11 A.2d 566, 139 Pa.Super. 310.

52. Ky.—Straughan's Adm'r v. Fendley, 191 S.W.2d 391, 301 Ky. 209—Southeastern Telephone Co. v. Payne, 69 S.W.2d 358, 253 Ky. 245—Page's Adm'r v. Scott, 54 S.W.2d 23, 245 Ky. 648.

53. Ky.—Tri-State Refining Co. v. Skaggs, 4 S.W.2d 739, 223 Ky. 731. 42 C.J. p 1147 note 26.

54. Ala.—Vansandt v. Brewer, 95 So 463, 209 Ala. 131. 42 C.J. p 1147 note 19.

55. Iowa.—Armbruster v. Gray, 282 N.W. 342, 225 Iowa 1226.

56. Ill.—Bouslough v. Schumacher, 270 Ill.App. 79.

Mich.—Rohrkemper v. Bodenmiller, 283 N.W. 591, 287 Mich. 311.

N.H.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

N.D.—Bratvold v. Lalum, 282 N.W. 514, 68 N.D. 534.

Pa.—Juric v. Milljerick, 18 Pa Dist. & Co. 715.

57. N.Y.—Tedla v. Ellman, 19 N.E. 2d 987, 280 N.Y. 124

N.C.—Hunnicut v. Kimbrell, 177 S.E. 323, 207 N.C. 494—Radford v. Young, 140 S.E. 806, 194 N.C. 747.

Tenn.—Donaho v. Large, 158 S.W.2d 447, 25 Tenn.App. 433.

Wash.—Flaumer v. Samuels, 104 P 2d 484, 4 Wash.2d 609.

Wis.—Panzer v. Hesse, 24 N.W.2d 613, 249 Wis. 340. 42 C.J. p 1147 note 23.

58. Idaho.—Hooker v. Schuler, 260 P. 1027, 45 Idaho 83.

La.—Antoine v. Louisiana Highway Commission, App., 188 So. 443—Jones v. Thibodeaux, App., 163 So. 183.

Miss.—Wheat v. Wheat, 139 So. 849, 162 Miss. 595.

Va.—Bray v. Boston Lumber & Builders' Corporation, 172 S.E. 296, 161 Va. 686.

59. Conn.—McManus v. Jarvis, 22 A. 2d 857, 128 Conn. 707.

Extent of immunity

Under statute providing that the highway commissioner may, by posting notices, close or restrict traffic over any section of a trunk line or

state-aid highway for the purpose of reconstruction or repair, and that any person using highway when notices are posted shall do so at own risk, a pedestrian who ventured on road closed by notices of highway commissioner at each end of the road, and who was injured when struck by a truck of contractor engaged in performing contract for regrading and resurfacing road, was not entitled to recover for injuries from contractor, since immunity under the statute is not restricted to risk resulting from defects in surface of closed highway.—McManus v. Jarvis, supra.

60. Cal.—Mauchle v. Panama-Pacific International Exposition Co., 174 P. 400, 37 Cal.App. 715.

Conn.—Feehan v. Slater, 96 A. 159, 89 Conn. 697.

61. Cal.—Mauchle v. Panama-Pacific International Exposition Co., 174 P. 400, 37 Cal.App. 715.

62. Conn.—Feehan v. Slater, 96 A. 159, 89 Conn. 697.

63. N.H.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

Pa.—McNeal v. Hettich, 172 A. 157, 113 Pa.Super. 131.

Wis.—Panzer v. Hesse, 24 N.W.2d 613, 249 Wis. 340.

- d. Crossing diagonally
- e. Obstruction of view
- f. Compliance with, or violation of, traffic signal

a. General Rules

A pedestrian has a right to go upon a highway for the purpose of crossing it, subject to proper governmental regulation as to the places at and manner in which he may do so; but he must exercise ordinary or reasonable care to avoid injury and the failure to use such care may constitute contributory negligence barring recovery against the operator of the vehicle injuring him where such negligence is a proximate or contributing cause of the accident.

A pedestrian has a right to go upon a highway for the purpose of crossing it,⁶⁴ subject to compliance with proper governmental regulation as to the places at and manner in which he may do so.⁶⁵ However, the pedestrian must exercise ordinary or reasonable care in crossing to avoid injury,⁶⁶ and his failure to use such care or to comply with regulations may constitute contributory negligence,⁶⁷ or contributory negligence as a matter of law,⁶⁸ barring recovery against the operator of the vehicle injuring him,⁶⁹ where such negligence is a proximate cause or contributing cause of the

64. U.S.—Boston Elevated Ry. v. Greaney, C.C.A. Mass., 68 F.2d 657.
Ark.—Hutson Motor Co. v. Lake, 98 S.W.2d 947, 193 Ark. 200.

Tenn.—Elmore v. Thompson, 14 Tenn. App. 78—Yellow Cab Co. v. Jelks, 9 Tenn.App. 288.

Tex.—Vesper v. Lavender, Civ.App., 149 S.W. 377.

65. Tenn.—Yellow Cab Co. v. Jelks, 9 Tenn.App. 288.

Right of way

(1) The statute relating to right of way as between motor vehicle and pedestrian crossing highway at certain places does not affect traveler's right to use public way and all parts thereof, but only affects degree of care required of the pedestrian.—Brenning v. Remington, 287 N.W. 776, 136 Neb. 883.

(2) Statute requiring that pedestrian crossing highways outside corporate limits of cities and towns should yield right of way to approaching vehicles, places greater degree of care on pedestrian than on driver of motor vehicle.—Humphries v. Hopkins, La.App., 157 So. 625.

Regulation held inapplicable

Statute requiring pedestrians to walk near left edge of highway does not apply to pedestrians crossing highway.—Catton v. Kerns, 10 P.2d 1036, 123 Cal.App. 94.

68. Ala.—Davis v. Humphrey, 114 So. 412, 217 Ala. 30.

Ark.—Hutson Motor Co. v. Lake, 98 S.W.2d 947, 193 Ark. 200.

Cal.—Lang v. Barry, 161 P.2d 949, 71 Cal.App.2d 121—O'Brien v. Scheilberg, 140 P.2d 159, 59 Cal.App.2d 764—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183—Lincoln v. Williams, 6 P.2d 563, 119 Cal.App. 498—Rignell v. Font, 266 P. 588, 90 Cal.App. 730.

Conn.—Muse v. Page, 4 A.2d 329, 125 Conn. 219—Hizam v. Blackman, 131 A. 415, 103 Conn. 547.

Fla.—Russ v. State, 191 So. 296, 140 Fla. 217.

Ill.—Kawkes v. Richter Food Products, 49 N.E.2d 852, 320 Ill.App. 134.

Ind.—Fields v. Hahn, 57 N.E.2d 955,

115 Ind.App. 365, petition dismissed 59 N.E.2d 359, 223 Ind. 178.

Iowa.—Orth v. Gregg, 250 N.W. 113, 217 Iowa 516.

Ky.—Trainor's Adm'r v. Keller, 79 S.W.2d 232, 257 Ky. 840.

Me.—Dyer v. Ayoub, 187 A. 757, 134 Me. 502—Sturtevant v. Ouellette, 140 A. 368, 126 Me. 558.

Md.—Webb-Pepploe v. Cooper, 151 A. 235, 159 Md. 426.

Mass.—Bartley v. Phillips, 57 N.E.2d 26, 317 Mass. 35—Desjarlais v. Kelley, 12 N.E.2d 190, 299 Mass. 182—Joughin v. Federal Motor Transp. Co., 181 N.E. 754, 279 Mass. 408.

Mich.—Tio v. Molter, 247 N.W. 772, 262 Mich. 655—Billingsley v. Gulick, 233 N.W. 225, 252 Mich. 235—People v. Campbell, 212 N.W. 97, 237 Mich. 424.

Minn.—Reier v. Hart, 277 N.W. 405, 202 Minn. 154.

Miss.—Hall v. Caughran, 134 So. 576, 160 Miss. 571.

N.J.—Horowitz v. Schanerman, 187 A. 346, 117 N.J.Law 314—Newman v. Katz, 169 A. 643, 112 N.J.Law 49.

Ohio.—Valentine v. Pavilonis, 160 N.E. 737, 27 Ohio App. 26.

Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or 518.

Pa.—McGurk v. Belmont, 146 A. 539, 297 Pa. 192.

Tenn.—Elmore v. Thompson, 14 Tenn. App. 78.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

Wash.—Cox v. Kirch, 123 P.2d 328, 12 Wash.2d 678—Turnquist v. Rosala Bros., 83 P.2d 353, 196 Wash. 434—Tomchak v. Poland, 52 P.2d 1262, 185 Wash. 101.

Care required of persons under disability in crossing highway see *infra* §§ 484, 485.

Constructive knowledge

In order to determine whether pedestrian struck by automobile while crossing street was negligent, he must be held to have been required to act on what he should have known, as well as on what he knew.—Hizam v. Blackman, 131 A. 415, 103 Conn. 547.

Extraordinary care not required

A pedestrian, whether or not he has the right of way, is not required to use extraordinary care merely because the consequences incident to a collision between automobile and pedestrian are much more serious to pedestrian than to the automobile.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

Negligence not shown

Ill.—Synwolt v. Klank, 15 N.E.2d 895, 296 Ill.App. 79.

67. Conn.—Kadish v. Waterbury Yellow Cab Co., 172 A. 851, 118 Conn. 695.

Wash.—Turnquist v. Rosala Bros., 83 P.2d 353, 196 Wash. 434.

Facts and circumstances

Contributory negligence of pedestrian, struck by truck while crossing street, must be determined from all facts and circumstances in evidence.—Strange v. Los Angeles Examiner, 12 P.2d 678, 124 Cal.App. 419.

68. Pa.—Antish v. Kopp, 178 A. 163, 117 Pa.Super. 492—Kirk v. Gerbo, Com.Pl., 9 Sch.Reg. 34.

Wash.—Turnquist v. Rosala Bros., 83 P.2d 353, 196 Wash. 434.

69. U.S.—Standard Oil Co. of Kentucky v. Noakes, C.C.A. Ky., 59 F.2d 897.

Cal.—Gibb v. Cleave, 55 P.2d 938, 12 Cal.App.2d 468—Nelson v. Malcolm, 53 P.2d 1014, 11 Cal.App.2d 352.

Colo.—Fabling v. Jones, 114 P.2d 1100, 108 Colo. 144.

Iowa.—Ward v. Zerzanek, 289 N.W. 443, 227 Iowa 918.

La.—Thompson v. Dyer, App., 1 So. 2d 433—Gomez v. State Farm Mut. Auto Ins. Co., App., 191 So. 139—Joubert v. American Employers Ins. Co., App., 167 So. 221—James v. Rivet, 133 So. 448, 16 La.App. 345—Monroe v. Eager, 131 So. 719, 16 La.App. 540—Perret v. Geraci, 131 So. 72, 15 La.App. 329.

Mass.—Hughes v. Torregrossa, 180 N.E. 304, 278 Mass. 530.

Mich.—De Jager v. Vandenberg, 284 N.W. 673, 288 Mich. 136.

Or.—Bakkum v. Holder, 295 P. 1115, 135 Or. 387.

Pa.—Schweitzer v. Scranton Bus Co.,

accident;⁷⁰ but recovery will not be barred where plaintiff's conduct does not constitute negligence⁷¹ or where his failure to take necessary precautions or to observe, statutory regulations is not a proximate or contributing cause of the accident.⁷²

The amount of care necessary in crossing a street or highway depends on the attendant condi-

tions and circumstances and the danger involved,⁷³ and the pedestrian must use that degree and amount of care which the usual and actual traffic conditions of the thoroughfare require;⁷⁴ but there is no distinction in the degree of care required by reason of the direction in which the traffic is moving.⁷⁵ The fact that under the circumstances the

25 A.2d 156, 344 Pa. 249—Glancy v. Meadville Bread Co., 17 A.2d 395, 340 Pa. 452—Goldberg v. Kelly, 17 A.2d 390, 340 Pa. 430—Dando v. Brobst, 177 A. 831, 318 Pa. 325—Halpert v. Earnshaw, 155 A. 299, 304 Pa. 95—Dorris v. Bridgman & Co., 145 A. 827, 296 Pa. 198—Johnson v. Butler, 182 A. 650, 120 Pa. Super. 501.

Wash.—Turnquist v. Rosaia Bros., 83 P.2d 353, 196 Wash. 434.

W.Va.—Slater v. Shirkey, 8 S.E.2d 897, 122 W.Va. 271—McLeod v. Charleston Laundry Co., 145 S.E. 756, 106 W.Va. 361.

Wis.—Rang v. Klawun, 223 N.W. 121, 198 Wis. 1—Kroehler v. Arntz, 221 N.W. 727, 197 Wis. 195.

42 C.J. p 1147 note 35.

70. Cal.—Meincke v. Oakland Garage, 79 P.2d 91, 11 Cal.2d 265—Ramsperger v. Los Angeles Motor Coach Co., 41 P.2d 562, 4 Cal.App.2d 673—Ching Wing v. Kishi, 268 P. 483, 92 Cal.App. 495.

Colo.—Fabling v. Jones, 114 P.2d 1100, 108 Colo. 144.

D.C.—Boaze v. Windridge & Handy, 102 F.2d 628, 76 App.D.C. 24.

Ill.—Green v. Drew, 57 N.E.2d 227, 324 Ill.App. 84.

Iowa.—Ward v. Zerzanek, 289 N.W. 443, 227 Iowa 918.

La.—Roberts v. Duracher, App., 196 So. 576—Rutter v. Norman, App., 189 So. 609—Hayes v. Gunter Bros. Lumber Co., 129 So. 401, 14 La.App. 402.

Md.—Jackson v. Forwood, 47 A.2d 81, 186 Md. 379.

Mich.—Anderson v. Bliss, 274 N.W. 809, 281 Mich. 323.

Ohio.—Titus v. Stouffer, App., 40 N.E.2d 178.

Or.—Maneff v. Lamer, 54 P.2d 287, 152 Or. 619.

Pa.—Koch v. Shillady, Com.Pl., 29 Del.Co. 238.

Vt.—Merrihew v. Goodspeed, 147 A. 346, 102 Vt. 206, 66 A.L.R. 1109.

Va.—Jenkins v. Johnson, 42 S.E.2d 319, 186 Va. 191—Willard Stores v. Cornell, 23 S.E.2d 761, 181 Va. 143.

Particular acts or omissions held proximate or contributing cause of injury:

(1) Crossing street diagonally.—Fennel v. Yellow Cab Co., 244 P. 253, 138 Wash. 196.

(2) Disregard of traffic signal.—Hurtel v. Albert Cohn, Inc., 53 P.2d 922, 5 Cal.2d 145.

(3) Failure to follow crosswalk.—Milligan v. Weare, 28 A.2d 463, 139 Me. 199.

(4) Failure to keep proper lookout.—Harper v. Shreveport Ice Cream Factory, La.App., 162 So. 471.

(5) Failure to yield right of way. Cal.—Weissman v. Seehusen, 131 P.2d 10, 55 Cal.App.2d 391.

Wis.—Engstrum v. Sentinel Co., 267 N.W. 536, 221 Wis. 577.

(6) Other particular acts or omissions.

Ky.—Runge v. Haller, 33 S.W.2d 317, 236 Ky. 423.

La.—Rottman v. Beverly, App., 162 So. 73, reversed on other grounds 165 So. 153, 183 La. 947.

Ohio.—Glasco v. Mendelman, App., 58 N.E.2d 94, reversed on other grounds 56 N.E.2d 210, 143 Ohio St. 649.

Wash.—Steen v. Hedstrom, 63 P.2d 507, 189 Wash. 75.

Failure to look where motor vehicle not visible

A pedestrian's failure to look for approaching motor vehicles before crossing a street or highway will not preclude his recovery for injuries sustained if the automobile which injured him could not have been seen if he had looked, and, therefore, the failure to look was not a contributing cause of his injury.—Parker v. Smith, 135 A. 495, 100 Vt. 130—42 C.J. p 1153 note 46.

71. La.—Tooke v. Muslow Oil Co., App., 183 So. 97.

Wash.—Cox v. Kirch, 123 P.2d 328, 12 Wash.2d 678.

72. U.S.—U. S. v. Standard Oil Co. of Cal., D.C.Cal., 60 F.Supp. 807, affirmed, C.C.A., 153 F.2d 958, affirmed 67 S.Ct. 1604, 332 U.S. 301, 91 L.Ed. 2067.

Cal.—Broun v. Blair, 80 P.2d 95, 26 Cal.App.2d 613—Rock v. Orlando, 280 P. 377, 100 Cal.App. 498—Potter v. Driver, 275 P. 526, 97 Cal. App. 311.

Conn.—La Femina v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 45 A.2d 158, 132 Conn. 420.

Ill.—Hoobler v. Voelpel, 246 Ill.App. 69.

Mich.—Guina v. Harrod, 266 N.W. 393, 275 Mich. 893.

Ohio.—Standard Motor Sales Co. v. Miller, 164 N.E. 55, 30 Ohio App. 7.

Wash.—Knutson v. McMahan, 58 P.2d 1033, 186 Wash. 518.

42 C.J. p 1133 note 42 [b].

Particular acts or omissions

(1) Crossing at place other than intersection or crosswalk.

Cal.—Griffiths v. Crawford, 52 P.2d 548, 10 Cal.App.2d 543—Mahoney v. Murray, 35 P.2d 612, 140 Cal.App. 206.

Ky.—Murphy v. Homans, 150 S.W.2d 14, 286 Ky. 191.

Ohio.—Standard Motor Sales Co. v. Miller, 164 N.E. 55, 30 Ohio App. 7.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618—Elmore v. Thompson, 14 Tenn.App. 78.

W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545.

(2) Failure to yield right of way.

—Ramsey v. Sharpley, 171 S.W.2d 427, 294 Ky. 286.

73. Cal.—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183—Davis v. Renton, 278 P. 442, 99 Cal.App. 264—Kinnear v. Martinelli, 258 P. 686, 84 Cal.App. 721.

Ohio.—Valentine v. Pavilonis, 160 N.E. 737, 27 Ohio App. 26.

Tenn.—Elmore v. Thompson, 14 Tenn. App. 78.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

Wash.—Cox v. Kirch, 123 P.2d 328, 12 Wash.2d 678—Turnquist v. Rosaia Bros., 83 P.2d 353, 196 Wash. 434.

Conduct

The determination of the question whether a pedestrian in crossing a street used the requisite care involved a consideration of his conduct and of the circumstances which might properly influence that conduct.—Stinson v. Sobie, 17 N.E.2d 703, 301 Mass. 483.

Vigilance required of pedestrian in crossing street or highway must be proportionate to dangers involved.

Tex.—Kooch v. Goodnight, Civ.App., 71 S.W.2d 927, error refused.

Vt.—Howley v. Kantor, 163 A. 628, 105 Vt. 128.

74. U.S.—Boston Elevated Ry. v. Greaney, C.C.A.Mass., 68 F.2d 657.

Cal.—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183—Henry v. Lingsweller, 253 P. 357, 81 Cal.App. 142.

Mich.—Leary v. Fisher, 227 N.W. 767, 248 Mich. 574.

42 C.J. p 1147 notes 33 [a], 34.

75. Md.—Dallas v. Diegal, 41 A.2d

pedestrian has the right of way while crossing does not absolve him from the duty to observe the rule of due care and caution to avoid injury,⁷⁶ and, on the other hand, a pedestrian not having the right of way is not guilty of negligence merely because of that fact, if he exercises the care required of a person in that situation.⁷⁷ The rule as to the care required of a person crossing a railroad track has been held inapplicable to a pedestrian crossing a street.⁷⁸

A pedestrian crossing a street or highway has a right to rely on the exercise of due care by the operator of a motor vehicle and his compliance with rules of the road and traffic regulations,⁷⁹ and a pedestrian need not anticipate a motorist's negligence.⁸⁰ However, there is no such right of reliance after the pedestrian acquires actual or constructive notice of the negligent operation of the

vehicle,⁸¹ and in any case he is not absolved from the duty of using due care under the circumstances.⁸²

Extent of road traversed. As a general rule, the duty to use due care while crossing continues throughout the entire passage from one side of the street to the other,⁸³ and the fact that the pedestrian in crossing reaches a point on the further shoulder of the highway or beyond does not excuse him from any further duty to use reasonable care;⁸⁴ but a pedestrian on the shoulder of the road need observe less caution than one on the road itself.⁸⁵

Stopping in roadway to allow passage of vehicle. It is not as a matter of law negligence for a pedestrian who has started to cross a street to stop near the curb⁸⁶ or in the middle of the street⁸⁷ and out of the apparent path of an approaching vehicle to

161, 184 Md. 372—Universal Credit Co. v. Merryman, 195 A. 689, 173 Md. 256.

76. U.S.—Thomas v. Goldman, C.C.A. Va., 187 F.2d 315—Suburban Transit Corp. v. Malone, C.C.A.S.C., 156 F.2d 422.

Md.—Sheriff Motor Co. v. State, for use of Parker, 179 A. 508, 169 Md. 79.

Wash.—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1.

77. Or.—Lynch v. Clark, 194 P.2d 416.

78. Mich.—Arnell v. Gordon, 207 N. W. 825, 234 Mich. 140.

Ohio.—Valentine v. Pavilonis, 160 N. E. 737, 27 Ohio App. 26.

Less exacting duty

The duty of a pedestrian to avoid a collision is less exacting in the case of a motor vehicle than in that of a locomotive or trolley car confined to a track, since the former can change its path at the pleasure of the operator.—Lamont v. Adams Express Co., 107 A. 373, 264 Pa. 17.

79. Cal.—Brannock v. Bromley, 86 P. 2d 1062, 30 Cal.App.2d 516—Rignell v. Font, 286 P. 588, 90 Cal.App. 730—Henry v. Lingsweller, 253 P. 357, 81 Cal.App. 142.

Ind.—Vogel v. Rldens, 44 N.E.2d 238, 112 Ind.App. 493.

Iowa.—Lawlor v. Gaylord, 10 N.W.2d 531, 233 Iowa 834.

Ky.—Murphy v. Homans, 150 S.W.2d 14, 286 Ky. 191.

La.—Law v. Osterland, 3 So.2d 680, 198 La. 421—Morgan v. Domino, App., 166 So. 208—Delcourt v. Bernard, 136 So. 909, 18 La.App. 616.

Me.—Sturtevant v. Ouellette, 140 A. 368, 126 Me. 558.

Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

Mass.—Desjarlais v. Kelley, 13 N.E.

2d 190, 299 Mass. 182—Legg v. Bloom, 184 N.E. 832, 282 Mass. 303—Laroche v. Singen, 183 N.E. 767, 281 Mass. 369—Martin v. Florin, 172 N.E. 895, 273 Mass. 13—Hutchinson v. H. E. Shaw Co., 172 N.E. 788, 273 Mass. 51.

Mich.—Shank v. Luckner, 296 N.W. 852, 296 Mich. 705—Carter v. C. F. Smith Co., 281 N.W. 380, 285 Mich. 621.

Minn.—Reier v. Hart, 277 N.W. 405, 202 Minn. 154.

Mo.—Danzo v. Humfeld, 180 S.W.2d 722—Pitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—Lee v. City Ice Co., App., 64 S.W.2d 736—Phillips v. Yellow Cab Co., 36 S.W.2d 419, 225 Mo.App. 1172—Cox v. Reynolds, App., 18 S.W.2d 575.

N.H.—Chemikles v. J. M. Willson Co., 152 A. 275, 84 N.H. 437—McCarthy v. Souther, 137 A. 445, 83 N.H. 29.

Ohio.—Valentine v. Pavilonis, 160 N. E. 737, 27 Ohio App. 26.

Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226.

Pa.—Lane v. Samuels, 39 A.2d 626, 350 Pa. 446—McGurk v. Belmont, 146 A. 539, 297 Pa. 192—Morris v. White, Com.Pl., 33 Luz Leg.Reg. 437.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313—Farrell v. Greene, 2 A.2d 194, 110 Vt. 87.

Va.—Moore v. Scott, 169 S.E. 902, 160 Va. 610.

Vigilance

The rule requiring constant vigilance by pedestrians to protect their own safety must be relaxed if there is evidence to show that automobile was at least partially on wrong side of street.—Van Antwerp v. Smith, 103 P.2d 446, 39 Cal.App. 458.

80. Cal.—Foerster v. Diretto, 170 P. 2d 986, 75 Cal.App.2d 323.

Md.—Crunkilton v. Hook, 42 A.2d 517,

185 Md. 1—Edwards v. State, for Use of Guy, 170 A. 761, 166 Md. 217. Mass.—Desjarlais v. Kelley, 13 N.E. 2d 190, 299 Mass. 182.

Mich.—Guina v. Harrod, 266 N.W. 393, 275 Mich. 393—Leary v. Fisher, 227 N.W. 767, 248 Mich. 574.

Minn.—Reier v. Hart, 277 N.W. 405, 202 Minn. 154.

N.J.—Horn v. Szumski, 137 A. 792, 5 N.J.Misc. 672.

Ohio.—Martin v. Heintz, 184 N.E. 852, 126 Ohio St. 227.

81. Iowa.—Lawlor v. Gaylord, 10 N. W.2d 531, 233 Iowa 834.

Md.—Webb-Pepploe v. Cooper, 151 A. 235, 159 Md. 426.

Vt.—Farrell v. Greene, 2 A.2d 194, 110 Vt. 87.

Knowledge by plaintiff's witnesses of excessive speed of automobile striking plaintiff, not communicated to plaintiff, is not imputed to plaintiff.—Trentman v. Cox, 160 N.E. 715, 118 Ohio St. 247.

82. Mo.—Danzo v. Humfeld, 180 S. W.2d 722.

N.H.—L'Heureux v. Desmarais, 197 A. 327, 89 N.H. 237.

Ohio.—Weaver v. Liberty Cabs, App., 33 N.E.2d 853.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313—Farrell v. Greene, 2 A.2d 194, 110 Vt. 87.

83. Cal.—O'Brien v. Schellberg, 140 P.2d 159, 59 Cal.App.2d 764.

84. Conn.—Minacci v. Logudice, 11 A.2d 354, 126 Conn. 345.

85. Conn.—Minacci v. Logudice, supra.

86. La.—Martin v. Zatarain, 7 La. App. 629.

42 C.J. p 1148 note 40.

87. Pa.—Arnold v. McKelvey, 98 A. 559, 253 Pa. 324.

42 C.J. p 1148 note 41.

allow it to pass ahead of him; but the fact that an injured person could have avoided the accident by stopping and allowing a motor vehicle to pass does not defeat his recovery, where under the circumstances he exercised ordinary care in proceeding.⁸⁸

Attempt to avoid injury. A pedestrian who after advancing part way into the roadway sees an automobile approaching and steps back in an attempt to avoid it, is not negligent as a matter of law;⁸⁹ but one who stops in the middle of a roadway in a place of safety, and then steps into a place of danger when an automobile is nearly upon him, is negligent.⁹⁰

Excuse for negligence. While a distracting cause might excuse a temporary want of due care on the part of a pedestrian crossing a street,⁹¹ it must be something more than mere carelessness or forgetfulness,⁹² and one who by inadvertence, forgetfulness, inattention, absent-mindedness, or carelessness places himself in a position of danger in crossing a street is negligent.⁹³

Towing and towed vehicles. A pedestrian attempting to cross a street or highway between a towing and a towed motor vehicle is not negligent as a matter of law in failing to observe the rope between the two vehicles when there is nothing to

warn him of its presence or to see that the second car is not under its own power,⁹⁴ but he is required to use reasonable care to discover it,⁹⁵ and a failure to exercise such care constitutes negligence.⁹⁶

b. Place of Crossing

- (1) In general
- (2) At intersections and public crossings

(1) In General

- (a) General rules
- (b) Governmental regulations

(a) General Rules

In the absence of a restrictive or prohibitory regulation, a pedestrian has the right to cross a street or highway at any point therein, and it is not of itself negligence to cross between intersections or at a place where there is no regular crossing, although in such case a greater amount of care is required than when crossing at a place regularly provided or used therefor.

In the absence of a restrictive or prohibitory regulation, a pedestrian in the exercise of reasonable care has the right to cross a street or highway at any point therein,⁹⁷ and it is, therefore, not negligence as a matter of law to cross between intersections or at a place where there is no regular crossing.⁹⁸ The pedestrian must, however, take into ac-

88. Utah.—Sorenson v. Bell, 170 P. 72, 51 Utah 262.

89. Cal.—Potter v. Back Country Transp. Co., 164 P. 342, 33 Cal.App. 24.

Failure to look before stepping back see infra § 471.

90. Conn.—Russell v. Vergason, 111 A 625, 95 Conn. 431.

91. Ala.—Racine Tire Co. v. Grady, 88 So. 337, 205 Ala. 423.

Circumstances held not to excuse negligence

Iowa.—Zuck v. Larson, 270 N.W. 384, 222 Iowa 842.

92. Ala.—Racine Tire Co. v. Grady, 88 So. 337, 205 Ala. 423.
42 C.J. p 1148 note 46.

93. Ala.—Racine Tire Co. v. Grady, supra.

94. N.Y.—Wolcott v. Renault Selling Branch, 119 N.E. 556, 223 N.Y. 288.

95. Cal.—Steinberger v. California Electric Garage Co., 168 P. 570, 176 Cal. 386.

96. Cal.—Steinberger v. California Electric Garage Co., supra.

97. Cal.—Quinn v. Rosenfeld, 102 P. 2d 317, 15 Cal.2 486—Kapitan v. Smith, 161 P.2d 270, 70 Cal.App.2d 454—Nickell v. Rosenfeld, 255 P. 760, 82 Cal.App. 369.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18—Claxton v.

Hooks, 23 S.E.2d 101, 68 Ga.App. 383—**Corpus Juris cited in Eubanks v. Mullis**, 181 S.E. 604, 606, 51 Ga. App. 728.

Iowa.—Sheridan v. Limbrecht, 218 N. W. 278, 205 Iowa 573

La.—Pettaway v. K. C. S. Drug Co., App. 166 So. 902—**Corpus Juris quoted in Morgan v. Domino**, App., 166 So. 208, 211.

Mich.—Delfosse v. Bresnahan, 9 N. W.2d 866, 305 Mich. 621—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 680—Ruchel v. Williams, 262 N.W. 759, 273 Mich. 132.

Mo.—Danzo v. Humfeld, 180 S.W.2d 722—Pitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—Richards v. Gardner, App., 193 S.W.2d 354—Hicks v. De Luxe Cab Co., App., 189 S.W.2d 152—Smart v. Raymond, App., 142 S.W.2d 100.

Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

Neb.—Watters v. McPherson, 4 N.W. 2d 605, 141 Neb. 607—Kaufman v. Fundaburg, 242 N.W. 658, 123 Neb. 340.

N.Y.—Sosniak v. Lazar, 35 N.Y.S.2d 511.

Pa.—Morris v. Harmony Short Line Motor Transp. Co., 34 A.2d 534, 348 Pa. 117—Dempsey v. Cuneo Eastern Press Ink Co. of Pennsylvania, 179 A. 220, 318 Pa. 557—Kolb v. Isenberg, 28 A.2d 729, 150 Pa.Super. 482—Pinto v. Bell Fruit Co.,

24 A.2d 768, 148 Pa.Super. 132—Driesbach v. Infants Socks, Inc., Com Pl. 36 Berks Co L.J. 59.

Tenn.—Elmore v. Thompson, 14 Tenn. App. 78.

42 C.J. p 1037 note 64.

98. Cal.—Tomey v. Dyson, 172 P.2d 739, 76 Cal.App.2d 212—Casalegno v. Leonard, 105 P.2d 125, 40 Cal. App.2d 575—De Nardi v. Palanca, 8 P.2d 220, 120 Cal App 371—Patanila v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600

Conn.—Caputo v. Wells, 149 A. 855, 111 Conn. 363.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

Iowa.—Spaulding v. Miller, 249 N.W. 642, 216 Iowa 948.

La.—Pettaway v. K. C. S. Drug Co., App., 166 So. 903—**Corpus Juris quoted in Morgan v. Domino**, App., 166 So. 208, 211.

Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223—Elbert Ice Cream Co. v. Eaton, 187 A. 865, 171 Md. 30—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299.

Mass.—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216—Boni v. Goldstein, 177 N.E. 581, 276 Mass. 372.

Mo.—Richards v. Gardner, App., 193 S.W.2d 354—Hicks v. De Luxe Cab Co., App., 189 S.W.2d 152.

N.J.—Van Rensselaer v. Viorst, 57 A.2d 49, 136 N.J.Law 628.

Pa.—Elbell v. Smith, 55 A.2d 321,

count the rights of vehicles and their presence in the street,⁹⁹ and exercise reasonable care¹ consistent with the circumstances² and commensurate with the danger,³ even though he may rely to some extent on the exercise of due care by a motorist.⁴ Accordingly, a greater amount of care usually is demanded of a pedestrian crossing between intersections than of one crossing at a place regularly provided or used therefor,⁵ although this rule does not apply to one crossing a highway where no

street intersections or crossings exist.⁶

The obligation on the part of a pedestrian crossing a street to make reasonable use of his senses to discover and avoid danger from approaching motor vehicles, discussed generally *infra* § 471, requires that he maintain a proper lookout when crossing a street between intersections,⁷ especially where the street is a main traveled one in a village or city,⁸ and failure to keep such a lookout may constitute negligence.⁹ Although it has been held that

357 Pa. 490—*Morris v. Harmony Short Line Motor Transp. Co.*, 34 A.2d 534, 348 Pa. 117—*Hamilton v. Moore*, 6 A.2d 787, 335 Pa. 433—*Ross v. Pittsburgh Motor Coach Co.*, 39 A.2d 148, 156 Pa.Super. 45—*Kolb v. Isenberg*, 28 A.2d 729, 150 Pa.Super. 482—*Pinto v. Bell Fruit Co.*, 24 A.2d 768, 148 Pa.Super. 132—*Joannides v. Norris*, 23 A.2d 53, 146 Pa.Super. 488—*Jacobson v. Palma*, 175 A. 731, 115 Pa.Super. 401—*Hartley v. Navickis*, Com.Pl., 33 Del.Co. 161.

Tenn.—*Kelley-Powell Co. v. Landen*, 7 Tenn.App. 92.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

42 C.J. p 1149 note 81.

99. La.—*Matassa v. Economy Cab Co.*, App., 158 So. 239.

Mich.—*Szekeres v. Detroit Motorbus Co.*, 232 N.W. 700, 252 Mich. 46, 43 C.J. p 1149 note 82.

1. N.J.—*Van Rensselaer v. Vlorst*, 57 A.2d 49, 136 N.J.Law 628.

N.Y.—*Sosniak v. Lazar*, 35 N.Y.S.2d 511.

Or.—*De Witt v. Sandy Market*, 115 P. 2d 184, 167 Or. 236.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

Gross negligence precludes recovery
Ill.—*Kannapel v. Goodyear Tire & Rubber Co.*, 4 N.E.2d 262, 288 Ill. App. 621.

2. Cal.—*Tomey v. Dyson*, 172 P.2d 739, 76 Cal.App.2d 212—*Colburn v. Schilling*, 107 P.2d 279, 41 Cal.App. 2d 541.

Iowa.—*Orth v. Gregg*, 250 N.W. 113, 217 Iowa 516.

Pa.—*Di Bona v. Philadelphia Transp. Co.*, 51 A.2d 768, 356 Pa. 204.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

Apparent situation

Contributory negligence of a pedestrian crossing the street between intersections is to be judged by the situation as it appeared or ought to have appeared to him at the time.—*Izor v. Brigham*, 17 A.2d 236, 111 Vt. 438.

3. Conn.—*Miller v. Stamford Transit Co.*, 32 A.2d 53, 130 Conn. 63.

Iowa.—*Spaulding v. Miller*, 249 N.W. 844, 216 Iowa 948—*Sheridan v.*

Limbrecht, 218 N.W. 278, 205 Iowa 573.

Vt.—*Izor v. Brigham*, 17 A.2d 236, 111 Vt. 438—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

4. Mass.—*Sooserial v. Town Taxi*, 191 N.E. 763, 287 Mass. 65—*Boni v. Goldstein*, 177 N.E. 581, 276 Mass. 372.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

Maintenance of lookout

Iowa.—*Orth v. Gregg*, 250 N.W. 113, 217 Iowa 516.

Va.—*Dobson-Peacock v. Curtis*, 186 S.E. 13, 166 Va. 550.

5. Cal.—*Casalegno v. Leonard*, 105 P.2d 125, 40 Cal.App.2d 575—*Gaston v. Hisashi Tsuruda*, 43 P.2d 355, 5 Cal.App.2d 639—*De Nardi v. Palanca*, 8 P.2d 220, 120 Cal.App. 371—*Patania v. Yellow Checker-Cab Co.*, 283 P. 295, 102 Cal.App. 600.

La.—*Morgan v. Domino*, App., 166 So. 208.

Md.—*State, for Use of Parks, v. Inasley*, 29 A.2d 904, 181 Md. 347—*Thursby v. O'Rourke*, 23 A.2d 656, 180 Md. 223—*Legum v. State, for use of Moran*, 173 A. 565, 167 Md. 339.

Mont.—*Carey v. Guest*, 258 P. 236, 78 Mont. 415.

Neb.—*Watters v. McPherson*, 4 N.W. 2d 605, 141 Neb. 607.

Pa.—*Ruchski v. Wisswesser*, 50 A. 2d 291, 355 Pa. 400—*Morris v. Harmony Short Line Motor Transp. Co.*, 34 A.2d 534, 348 Pa. 117—*Schweltzer v. Scranton Bus Co.*, 25 A.2d 156, 344 Pa. 249—*Gajewski v. Lightner*, 19 A.2d 355, 341 Pa. 514—*Hamilton v. Moore*, 6 A.2d 787, 335 Pa. 433—*Fearn v. City of Philadelphia*, 182 A. 534, 320 Pa. 156—*Dempsey v. Cuneo Eastern Press Ink Co. of Pennsylvania*, 179 A. 220, 318 Pa. 557—*Ross v. Pittsburgh Motor Coach Co.*, 39 A.2d 148, 156 Pa.Super. 45—*Pinto v. Bell Fruit Co.*, 24 A.2d 768, 148 Pa. Super. 132—*Driesbach v. Infants Socks, Inc.*, Com.Pl., 36 Berks Co. L.J. 59—*Hartley v. Nauleckis*, Com.Pl., 33 Del.Co. 161.

42 C.J. p 1149 note 84.

Greater vigilance

Iowa.—*Lorimer v. Hutchinson Ice*

Cream Co., 249 N.W. 220, 216 Iowa 384.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17—*Eagan v. Douglas*, 175 A. 222, 107 Vt. 18, followed in 175 A. 225, 107 Vt. 10.

6. Pa.—*Lowers v. Zuker*, 157 A. 339, 102 Pa.Super. 581.

7. U.S.—*Standard Oil Co. of Kentucky v. Noakes*, C.C.A.Ky., 59 F. 2d 897.

Iowa.—*Zuck v. Larson*, 270 N.W. 384, 222 Iowa 842.

Mich.—*Reers v. Arnot*, 14 N.W.2d 511, 308 Mich. 604—*Haley v. Grosse Ile Rapid Transit Co.*, 287 N.W. 536, 290 Mich. 373.

N.C.—*Tysinger v. Coble Dairy Products*, 36 S.E.2d 246, 225 N.C. 717.

Or.—*Bakkum v. Holder*, 295 P. 1115, 135 Or. 387.

Pa.—*Morris v. Harmony Short Line Motor Transp. Co.*, 34 A.2d 534, 348 Pa. 117—*Schweltzer v. Scranton Bus Co.*, 25 A.2d 156, 344 Pa. 249—*Watson v. Lit Bros.*, 135 A. 631, 288 Pa. 175—*Ross v. Pittsburgh Motor Coach Co.*, 39 A.2d 148, 156 Pa.Super. 45—*Pinto v. Bell Fruit Co.*, 24 A.2d 768, 148 Pa.Super. 132.
R.I.—*Kalfiy v. Udin*, 159 A. 644, 52 R.I. 191.

Time and place

A pedestrian crossing the street between intersections must look at such time and place as will reasonably be of some benefit in protecting him and informing him of traffic conditions.—*Izor v. Brigham*, 17 A.2d 236, 111 Vt. 438—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17—*Duchaine v. Ray*, 6 A.2d 28, 110 Vt. 313—*Eagan v. Douglas*, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 18.

8. Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17—*Duchaine v. Ray*, 6 A. 2d 28, 110 Vt. 313—*Eagan v. Douglas*, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 18.

9. Cal.—*Chase v. Thomas*, 46 P.2d 200, 7 Cal.App.2d 440.

Iowa.—*Zuck v. Larson*, 270 N.W. 384, 222 Iowa 842.

La.—*Cooper v. Baton Rouge Bus Co.*, App., 4 So.2d 619.

Me.—*Milligan v. Wear*, 28 A.2d 463, 139 Me. 199.

Md.—*Crunkilton v. Hook*, 43 A.2d

the pedestrian need not maintain a constant vigilance while crossing,¹⁰ it has also been held that he must continue to be watchful during all the time he is crossing,¹¹ and that his duty to keep a lookout cannot be said, as a matter of law, to be fully performed by merely looking in both directions as he leaves the curb or enters the roadway,¹² especially where the observation was made so long prior to his entry of the zone of danger as to be ineffective.¹³ A pedestrian crossing between intersections is charged with seeing what he could and should have seen,¹⁴ and if he looks and fails to see an approaching vehicle which is in plain view he may be guilty of negligence.¹⁵

(b) Governmental Regulations

A violation of a regulation prohibiting a pedestrian from crossing a street at a place other than an intersection or a regular crossing may constitute negligence, but a regulation merely requiring the pedestrian to yield the right of way in crossing at such a place does not prohibit a crossing although the pedestrian may be obliged to exercise a greater amount of care than when crossing at a point where he has the right of way.

Under some governmental regulations, a pedestrian is prohibited from crossing a street between intersections or at a point where there is no regular crossing,¹⁶ and, where a pedestrian violates such a regulation and is injured by a motor vehicle, such violation may be invoked as a defense to a suit by the pedestrian.¹⁷ Some decisions have held that noncompliance with such a regulation is not of itself contributory negligence,¹⁸ although it may constitute prima facie negligence,¹⁹ or evidence of negligence,²⁰ but other decisions have considered such noncompliance to constitute negligence per se.²¹ It has been held that a pedestrian crossing a street in violation of such a regulation is under a duty to keep a constant lookout for his own safety in all directions of anticipated danger, and is guilty of negligence if he fails to do so.²²

Regulations as to right of way. Under regulations giving to vehicles the right of way over pedestrians between regular crossings or street intersections, or requiring a pedestrian to yield the right of way at such a place to a motor vehicle, a pedes-

517, 185 Md. 1—State, for Use of Parks, v. Insley, 29 A.2d 904, 181 Md. 347.—Webb-Pepploe v. Cooper, 151 A. 235, 159 Md. 426.

Mo.—Danzo v. Humfeld, 180 S.W.2d 722.

Mich.—Schwartz v. Dahlquist, 30 N.W.2d 809, 320 Mich. 135.—Haley v. Grosse Ile Rapid Transit Co., 287 N.W. 536, 290 Mich. 373.

N.C.—Tysinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717.

Pa.—Schweitzer v. Scranton Bus Co., 25 A.2d 156, 344 Pa. 249.—Carnevale v. McCrady-Rodgers Co., 178 A. 472, 318 Pa. 369.—Bateman v. Zorocoff, 2 A.2d 574, 133 Pa.Super. 245.—Driesbach v. Infants Socks, Inc., Com.Pl., 36 Berks Co. 59.—Blake v. Marinelli, 30 Erie Co. 116, affirmed 53 A.2d 550, 357 Pa. 314.

Wis.—Kroehler v. Arntz, 221 N.W. 727, 197 Wis. 195.

Subsequent lookout does not excuse negligent conduct.—Getzwiller v. Ferguson, Tex.Civ.App., 145 S.W.2d 913.

10. Vt.—Isor v. Brigham, 17 A.2d 236, 111 Vt. 438.—Eagan v. Douglas, 175 A. 222, 107 Vt. 10, followed in 175 A. 325, 107 Vt. 18.

11. Cal.—Sheldon v. James, 166 P. 8, 175 Cal. 474, 479, 2 A.L.R. 1493. Or.—Bakkum v. Holder, 295 P. 1115, 135 Or. 387.

Pa.—Morris v. Harmony Short Line Motor Co., 34 A.2d 534, 348 Pa. 117.—Clark v. Simmons, Com.Pl., 43 Lack.Jur. 58.

42 C.J. p 1150 note 87.

12. Cal.—Sheldon v. James, 166 P. 8, 175 Cal. 474, 2 A.L.R. 1493.

42 C.J. p 1150 note 86.

13. Vt.—Eagan v. Douglas, 175 A. 222, 107 Vt. 18, followed in 175 A. 225, 107 Vt. 10.

14. Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611. Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

Rule held inapplicable

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

15. Cal.—Ramsperger v. Los Angeles Motor Coach Co., 41 P.2d 562, 4 Cal.App.2d 673.—Horton v. Stoll, 40 P.2d 603, 3 Cal.App.2d 687.

Conn.—Hizam v. Blackman, 131 A. 415, 103 Conn. 547.

La.—Thompson v. Dyer, App., 1 So. 2d 433.

Mich.—Haley v. Grosse Ile Rapid Transit Co., 287 N.W. 536, 290 Mich. 373.

Pa.—Carnevale v. McCrady-Rodgers Co., 178 A. 472, 318 Pa. 369.

16. Cal.—Koeppel v. Daluiso, 5 P.2d 457, 118 Cal.App. 442.

Ohio.—Smith v. Zone Cabs, 21 N.E.2d 336, 135 Ohio St. 415.—Masters v. Von Lehmden, 173 N.E. 303, 36 Ohio App. 414.

42 C.J. p 1038 note 68, p 1150 note 88.

Between crossings controlled by signals

(1) Under regulations prohibiting a pedestrian from crossing a street between adjacent street crossings where traffic is controlled by signals, a pedestrian may cross at a marked crosswalk between the adjacent intersections.—Templeton v. Kelley, 6 S.E.2d 555, 216 N.C. 487, modified on other grounds 7 S.E.2d 380, 217 N.C. 164.

(2) An unchanging stop warning sign does not constitute a controlled signal so as to render the prohibitory regulation applicable.—Quinn v. Rosenfeld, 102 P.2d 317, 15 Cal.2d 486.

(3) The prohibition is not applicable where the signals are not in operation.—Brown v. Regan, 75 P.2d 1063, 10 Cal.2d 519.

17. Tenn.—Jordan v. Finger, 89 S.W. 2d 183, 19 Tenn.App. 365. 42 C.J. p 1150 note 89 [a].

18. W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545.

19. W.Va.—Meyn v. Dulaney-Miller Auto Co., supra.

20. Me.—Rice v. Keene, 151 A. 199, 129 Me. 489.

N.C.—Templeton v. Kelley, 2 S.E.2d 696, 215 N.C. 577.

21. Cal.—Koeppel v. Daluiso, 5 P.2d 457, 118 Cal.App. 442.

Ky.—Murphy v. Homans, 150 S.W.2d 14, 286 Ky. 191.

Ohio.—Smith v. Zone Cabs, 21 N.E.2d 336, 135 Ohio St. 415.—Moody v. Vickers, App., 72 N.E.2d 280.—Masters v. Von Lehmden, 173 N.E. 303, 36 Ohio App. 414.

Violation not excusable

Momentary obstruction of crosswalk does not excuse violation.—Morris v. Purity Sausage Co., 38 P.2d 193, 2 Cal.App.2d 536.

22. Neb.—Doan v. Hoppe, 277 N.W. 64, 133 Neb. 767.

Wash.—Cook v. Carleton, 4 P.2d 1093, 165 Wash. 232.

trian is not prohibited from crossing between such crossings or intersections,²³ and it is not as a matter of law negligence so to do.²⁴ Although under such regulations the motor vehicle does not have an absolute right of way regardless of the rights of the pedestrian, as discussed supra § 389, the pedestrian ordinarily is obliged to yield the right of way²⁵ and to maintain such a lookout as is reasonably necessary to enable him to yield the right of way,²⁶ even though the crossing constitutes a practical and usual method of reaching vehicles parked in the center of the street.²⁷ The duty to yield the right of way is not lessened by the fact that the pedestrian has reached the center of the street.²⁸ A violation of the regulation may constitute negligence.²⁹

Such regulations are to be construed reasonably,³⁰ and the pedestrian's right yields to that of the vehicle only when the necessity arises³¹ To yield the right of way means only that when the course of an automobile along a highway meets with that

of a pedestrian who seeks to cross at a point other than an intersection or designated crossing, under circumstances which render a collision likely, the pedestrian must stop and permit the motorist to pass ahead of him.³² It does not mean that the pedestrian must yield the entire street,³³ and he is only required to yield the right of way to the particular lane of travel in which the motorist is traveling,³⁴ as he may assume that the motorist will obey the law, as by driving on the proper side of the street.³⁵

A pedestrian who crosses at a place where he is obliged by regulation to yield the right of way must exercise reasonable care³⁶ commensurate with his position,³⁷ and the amount of care required is usually greater than at crossings or intersections where pedestrians have the right of way.³⁸ In determining whether the pedestrian was guilty of contributory negligence the amount of traffic and all other circumstances must be con-

23. Cal.—Fuentes v. Ling, 130 P.2d 121, 21 Cal.2d 59—Quinn v. Rosenfeld, 102 P.2d 317, 15 Cal.2d 486—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217—Bays v. Clugston, 161 P.2d 953, 71 Cal.App.2d 55—Lang v. Barry, 161 P.2d 949, 71 Cal.App.2d 121—Shipway v. Monise, 139 P.2d 60, 59 Cal.App. 565.

Ill.—Wollard v. Quinn, 17 N.E.2d 725, 297 Ill.App. 650.

Minn.—Naylor v. McDonald, 241 N.W. 674, 185 Minn. 518.

Mo.—Smart v. Raymond, App., 142 S.W.2d 100.

Neb.—Brenning v. Remington, 287 N.W. 776, 136 Neb. 883.

Or.—Martin v. Harrison, 186 P.2d 534.

42 C.J. p 1150 note 91.

24. Cal.—Fuentes v. Ling, 130 P.2d 121, 21 Cal.2d 59—Jacoby v. Johnson, 190 P.2d 243, 84 Cal.App.2d 271—Wilton v. Henkin, 126 P.2d 425, 52 Cal.App.2d 368—Mitrovitch v. Graves, 78 P.2d 227, 25 Cal.App. 2d 649.

Ill.—Hart v. City of Chicago, 42 N.E.2d 887, 315 Ill.App. 214.
42 C.J. p 1150 note 92.

25. Cal.—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217—Thompson v. Held, 183 P.2d 711, 81 Cal.App.2d 275—Reed v. Stroh, 128 P.2d 829, 51 Cal.App.2d 183—Horton v. Stoll, 40 P.2d 603, 3 Cal.App.2d 687.

Minn.—Naylor v. McDonald, 241 N.W. 674, 185 Minn. 518.

N.C.—Tysinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717.

Or.—Keys v. Griffith, 55 P.2d 15, 153 Or. 190.

Crossing from corner of intersecting private way

Ill.—Cihal v. Carver, 79 N.E.2d 82, 334 Ill.App. 234.

Colliding with side of vehicle is as much a violation as walking in front of it.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226.

Regulations held inapplicable to pedestrian standing behind vehicle at curb which backed into pedestrian. Cal.—Toomey v. Dyson, 172 P.2d 739, 76 Cal.App.2d 212.

N.J.—Trout v. Bright, 161 A. 354, 10 N.J.Misc. 914.

26. Wis.—Brewster v. Ludtke, 247 N.W. 449, 211 Wis. 344.

27. Wis.—Langworthy v. Reisinger, 23 N.W.2d 482, 249 Wis. 24, followed in 28 N.W.2d 485, 249 Wis. 29.

28. Wis.—Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519.

29. Cal.—Carney v. RKO Radio Pictures, 178 P.2d 482, 78 Cal.App.2d 659—Foti v. Morrissey, 134 P.2d 51, 57 Cal.App.2d 328—Weissman v. Seehusen, 131 P.2d 10, 55 Cal.App.2d 391—Vitali v. Straight, 68 P.2d 746, 21 Cal.App.2d 253.

N.C.—Tysinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717.

Wis.—Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519—De Goey v. Hermesen, 288 N.W. 770, 233 Wis. 69—Engstrum v. Sentinel Co., 267 N.W. 536, 221 Wis. 577—Brewster v. Ludtke, 247 N.W. 449, 211 Wis. 344.

30. Idaho.—Quillin v. Colquhoun, 247 P. 740, 42 Idaho 522.

42 C.J. p 1150 note 96.

31. Va.—Green v. Ruffin, 125 S.E. 742, 127 S.E. 486, 141 Va. 628.

32. Cal.—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217—Mitrovitch v. Graves, 78 P.2d 227, 25 Cal.App.2d 649.

Confused hesitancy of a pedestrian crossing a city street outside of a crosswalk is not the yielding of right of way.—Stroud v. Hansen, 120 P.2d 102, 48 Cal.App.2d 556.

Right of way yielded

Cal.—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217.

33. Iowa.—McMurry v. Guth, 295 N.W. 133, 229 Iowa 776.

34. Ill.—Jones v. Standerfer, 15 N.E.2d 924, 296 Ill.App. 145.

35. Ill.—Wollard v. Quinn, 17 N.E.2d 725, 297 Ill.App. 650.

Effect of excessive speed of vehicle Cal.—Jacoby v. Johnson, 190 P.2d 243, 84 Cal.App.2d 271.

36. W.Va.—Skaff v. Dodd, 44 S.E.2d 621.

37. Wash.—Rhimer v. Davis, 218 P. 193, 126 Wash. 470.

38. Cal.—Bays v. Clugston, 161 P.2d 953, 71 Cal.App.2d 55—Lang v. Barry, 161 P.2d 949, 71 Cal.App.2d 121—Casalegno v. Leonard, 105 P.2d 125, 40 Cal.App.2d 575—Brancock v. Bromley, 86 P.2d 1062, 30 Cal.App.2d 516.

Ill.—Cihal v. Carver, 79 N.E.2d 82, 334 Ill.App. 234—Wollard v. Quinn, 17 N.E.2d 725, 297 Ill.App. 650.

Md.—Universal Credit Co. v. Merryman, 195 A. 689, 173 Md. 256.

Minn.—Naylor v. McDonald, 241 N.W. 674, 185 Minn. 518.

Wash.—McLeod v. Kjos, 274 P. 180, 150 Wash. 637.

42 C.J. p 1150 note 95.

sidered,³⁹ including the fact that at the crossing the pedestrian's right to use the street is subordinate to that of the motorist.⁴⁰ Although the statutory duty of the pedestrian to yield the right of way may call for a higher degree of care, the question is still whether the required care has been exercised,⁴¹ and not merely whether the right of way has been yielded.⁴²

(2) At Intersections and Public Crossings

- (a) In general
- (b) Right of way
- (c) Lookout
- (d) Reliance on care of motorist

(a) In General

A pedestrian crossing a street at an intersection or public crossing has a right equal to that of drivers of motor vehicles to the use of the crossing, but he may not exercise that right recklessly and should exercise reasonable care for his own safety.

A pedestrian crossing a street at an intersection or public crossing is not required as a matter of law to give way to motor vehicles,⁴³ and his right to the use of the crossing is equal and not subordinate

to that of the drivers of motor vehicles.⁴⁴ However, the pedestrian may not exercise that right recklessly⁴⁵ and he is required to exercise reasonable care for his own safety.⁴⁶ He is bound to anticipate the presence of vehicles in the roadway⁴⁷ and to use reasonable prudence to avoid placing himself in such a position that one operating a motor vehicle with ordinary care may be unable to avoid injuring him.⁴⁸

Where the pedestrian's behavior and conduct under the circumstances are those of an ordinarily and reasonably prudent person, he is not negligent.⁴⁹ If he is confronted with an emergency which he did not create, he is not required to exercise the best judgment in his choice of a method to avoid injury,⁵⁰ and, therefore, conduct which under other circumstances would be negligent may not amount to contributory negligence.⁵¹ So a pedestrian is not required to remain in a safety lane if ordinary prudence dictates that removal therefrom will avoid danger.⁵² The "sudden emergency" rule is applicable only with respect to action taken in an emergency,⁵³ where the emergency

39. Cal.—Mitrovitch v. Graves, 78 P. 2d 227, 25 Cal.App.2d 649.

40. Md.—Geschwendt v. Yoe, 198 A. 720, 174 Md. 374.

41. Cal.—Shipway v. Monise, 139 P. 2d 60, 59 Cal.App.2d 565.

42. Cal.—Shipway v. Monise, supra.

43. Ky.—Weidner v. Otter, 188 S.W. 335, 171 Ky. 167, 173.

42 C.J. p 1148 note 49.

Negligence not imputed

Negligence is not as matter of law imputed to pedestrians at street crossings.—Shafer v. Myers, 112 So. 230, 215 Ala. 678.

44. Ill.—Risch v. Consumers Petroleum Co., 53 N.E.2d 286, 321 Ill. App. 438.

Ky.—Keys v. Nash's Adm'x, 94 S.W. 2d 1006, 264 Ky. 398.

La.—Webb v. Baton Rouge Bus Co., App., 15 So.2d 646—Morgan v. Domino, App., 166 So. 208—Harper v. Shreveport Ice Cream Factory, App., 162 So. 471—Bass v. Means, 124 So. 553, 12 La.App. 260.

42 C.J. p 1148 note 50.

45. Cal.—Straten v. Spencer, 197 P. 540, 52 Cal.App. 98.

46. Cal.—Vitali v. Straight, 68 P.2d 746, 21 Cal.App.2d 253—Katz v. T. I. Butler Co., 254 P. 679, 81 Cal. App. 747.

D.C.—Miller v. Clark, 109 F.2d 677, 71 App.D.C. 341.

Kan.—Nicholas v. Wiles, 271 P. 307, 126 Kan. 687.

Ky.—Keys v. Nash's Adm'x, 94 S.W. 2d 1006, 264 Ky. 398.

Md.—Legum v. State, for Use of Moran, 173 A. 565, 167 Md. 339.

Mich.—Kochler v. Thom, 281 N.W. 336, 285 Mich. 593—Block v. Peterson, 278 N.W. 774, 284 Mich. 88.

Mo.—Frees v. Hosack, App., 119 S. W.2d 460.

Mont.—Webster v. Mountain States Telephone & Telegraph Co., 89 P.2d 602, 108 Mont. 188.

Ohio.—Goldberg v. Jordan, 196 N.E. 775, 130 Ohio St. 1.

Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135—*Corpus Juris* cited in Weinstein v. Wheeler, 295 P. 196, 200, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.

Pa.—Lane v. Samuels, 39 A.2d 626, 350 Pa. 446—Manion v. Brooke, Com.Pl., 60 Montg.Co. 221, 58 York Leg.Rec. 118.

Vt.—McKirryher v. Yager, 24 A.2d 331, 112 Vt. 336.

42 C.J. p 1148 note 53.

Crossing at intersection:

Diagonally see *infra* subdivision d of this section.

In front of approaching automobile see *infra* subdivision c of this section.

Continuing duty

Cal.—Isaacs v. City and County of San Francisco, 167 P.2d 221, 73 Cal. App.2d 253—King v. Unger, 78 P.2d 255, 25 Cal.App.2d 632.

47. Cal.—Straten v. Spencer, 197 P. 540, 52 Cal.App. 98.

Md.—Panitz v. Webb, 130 A. 913, 149 Md. 75.

48. Md.—Panitz v. Webb, supra. * Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.

Choice of ways

A pedestrian who chooses to cross an intersection by a path which incurs the risk of an obvious danger is guilty of contributory negligence.—Cowen v. Katz, 197 A. 516, 130 Pa. Super. 337.

49. Cal.—Wiswell v. Shinnars, 117 P.2d 677, 47 Cal.App.2d 156—Donovan v. P. Lorillard Co. of Delaware, 51 P.2d 142, 10 Cal.App.2d 253.

Contact with side of automobile turning at intersection does not of itself show that pedestrian walked into side of vehicle or was otherwise negligent.—Jacobson v. Palma, 175 A. 731, 115 Pa.Super. 401.

Negligence not shown

Mo.—Robinson v. Mayer, App., 94 S. W.2d 1067.

Tenn.—Jacobs v. Melton, 9 Tenn. App. 195.

Tex.—Boaz v. White's Auto Service, 172 S.W.2d 48, 141 Tex. 366.

Va.—McQuown v. Phaup, 2 S.E.2d 330, 172 Va. 419.

50. Pa.—Maselli v. Stephens, 200 A. 590, 331 Pa. 491.

51. N.J.—Thomas v. Metzendorf, 128 A. 162, 163, 101 N.J.Law 346.

Pa.—Peters v. Public Service Taxi Co., Com.Pl., 47 Lack.Jur. 133.

52. Cal.—Gallardo v. Luke, 91 P.2d 211, 33 Cal.App.2d 230.

53. Pa.—Cowen v. Katz, 197 A. 516, 130 Pa.Super. 337.

was not brought about by the pedestrian's own negligence.⁵⁴

Crossing behind standing vehicle. A pedestrian is not negligent as a matter of law in attempting to cross a street or highway at a regular crossing place behind a standing motor vehicle, where there is nothing to warn him of any danger in so doing;⁵⁵ but, in view of his duty to exercise reasonable care for his own safety and protection, he may be negligent under the circumstances,⁵⁶ as where he sees a traffic officer signal the driver of the automobile to move backward as he is about to cross.⁵⁷

(b) Right of Way

Whether a pedestrian has the right of way in crossing at an intersection or public crossing is material in determining the question of his contributory negligence, and, while some regulations grant him the right of way, such right is not an absolute one and does not impair the duty of the pedestrian to exercise ordinary care.

In determining the question of contributory negligence of a pedestrian injured by a motor vehicle

while crossing at an intersection or public crossing, whether the pedestrian or the automobile had the right of way must be considered.⁵⁸ In the absence of a governmental regulation conferring a right of way, a pedestrian has no right of way over vehicles at crossings,⁵⁹ although he is entitled to cross first if he reaches a crossing in advance of an approaching automobile,⁶⁰ and, where one has without negligence committed himself to a public crossing, he has a right to proceed superior to that of a vehicle thereafter approaching.⁶¹

Under some regulations pedestrians are accorded the right of way over vehicles at street intersections and public crossings.⁶² These regulations apply only when a pedestrian and a vehicle approach a crossing at the same time or in such manner that if both continue on their respective courses there is danger of collision,⁶³ and they entitle the pedestrian in such case to the first use of the crossing.⁶⁴ Such a regulation confers only a relative⁶⁵ or preferential⁶⁶ right of way, and not an absolute one,⁶⁷

Va.—Holland v. Edelblute, 20 S.E. 2d 506, 179 Va. 685.

54. Tenn.—Zamora v. Shappley, 173 S.W.2d 721, 27 Tenn.App. 768.

55. N.J.—Melia v. Mallick Bus Co., 147 A. 467, 7 N.J.Misc. 859. 42 C.J. p 1149 note 75.

56. Ky.—Grimes v. Thompson, 289 S.W. 290, 217 Ky. 389.

57. Ky.—Grimes v. Thompson, supra.

58. Cal.—Schulman v. Los Angeles Ry. Corporation, 111 P.2d 924, 44 Cal.App.2d 122.

Md.—Geschwendt v. Yoe, 198 A. 720, 174 Md. 374.

N.J.—Volpe v. Perruzzi, 3 A.2d 892, 122 N.J.Law 57, affirmed 3 A.2d 580, 123 N.J.Law 323.

Wis.—Callahan v. Rando, 3 N.W.2d 688, 240 Wis. 417—McDonald v. Wickstrand, 238 N.W. 820, 206 Wis. 58.

42 C.J. p 1148 note 59 [a].

Right of way as affecting rights and duties of operator of motor vehicle see supra § 388.

Regulation held inapplicable

Regulation as to right of way at point other than crosswalk is inapplicable in considering duty of pedestrian crossing at intersection.—Gaskins v. Kelly, 47 S.E.2d 34, 228 N.C. 697.

59. La.—Bass v. Means, 124 So. 553, 12 La.App. 260.

Wis.—Grimes v. Snell, 183 N.W. 895, 175 Wis. 557.

60. Or.—Yarbrough v. Carlson, 202 P. 739, 102 Or. 422.

61. Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186.

Pa.—Gilles v. Leas, 127 A. 774, 282

Pa. 318—Clarke v. Hughes, 165 A. 532, 108 Pa.Super. 586.

42 C.J. p 1149 note 67.

62. Cal.—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70.

La.—Poindexter v. Service Cab Co., App., 161 So. 40—Creevy v. D. H. Holmes Co., 134 So. 413, 16 La.App. 562.

Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223.

N.J.—Haines v. Baker, 153 A. 614, 108 N.J.Law 190.

Pa.—Maselli v. Stephens, 200 A. 590, 331 Pa. 491.

Va.—Stark v. Hubbard, 48 S.E.2d 216, 187 Va. 820—Holland v. Edelblute, 20 S.E.2d 506, 179 Va. 685—Lucas

v. Craft, 170 S.E. 836, 161 Va. 228.

Wis.—McDonald v. Wickstrand, 238 N.W. 820, 206 Wis. 58.

Private way intersection

A pedestrian, struck by automobile while crossing street from corner of intersection of private way with such street, was not in crosswalk within regulation.—Cihal v. Carver, 79 N.E. 2d 82, 334 Ill.App. 234.

Absence of crosswalk at highway intersection

Under statute requiring operator of vehicle to yield right of way to pedestrian crossing highway within marked or unmarked crosswalk and defining "unmarked crosswalk" as portion of highway within prolongation of curb and property line, there was no "unmarked crosswalk" and pedestrian was required to yield right of way at intersection of state trunk and county trunk highways, where there was no curb and no sidewalk or path of which there could be a continuation.—Burke v. Tesmer, 272 N.W. 857, 224 Wis. 667.

63. Ky.—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

64. Cal.—Thompson v. Baldwin, 80 P.2d 198, 26 Cal.App.2d 703.

Ky.—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

Va.—Heindl v. Perritt, 163 S.E. 93, 158 Va. 104.

42 C.J. p 1148 note 58.

Negligence not shown

Pedestrian having right of way was not negligent in starting to cross intersection before automobile, which struck her, reached it, or in hesitating in center of street to determine whether other automobiles would turn into street which she was crossing.—McQuown v. Phaup, 2 S.E. 2d 330, 172 Va. 419.

65. Ill.—Moran v. Gatz, 57 N.E.2d 281, 324 Ill.App. 45, reversed on other grounds 62 N.E.2d 443, 390 Ill. 478.

Ky.—Whittaker v. Thornberry, 209 S.W.2d 498, 306 Ky. 830—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

66. Ohio.—Horowitz v. Eurove, 193 N.E. 644, 129 Ohio St. 8, 96 A.L.R. 782—Titus v. Stouffer, App., 40 N.E.2d 178.

67. Ill.—Moran v. Gatz, 57 N.E.2d 443, 390 Ill. 478—Ripke v. Bernstein, 76 N.E.2d 852, 332 Ill.App. 658.

and in no way impairs the duty of the pedestrian to exercise ordinary care for his own safety.⁶⁸ Such a right of way must be exercised in a lawful manner and as a reasonably prudent person would exercise it,⁶⁹ and the pedestrian may not obstruct the crossing to the exclusion of others or to the interruption of street traffic.⁷⁰

In order to entitle one to the protection of a regulation giving pedestrians the right of way at public crossings, it is not necessary that he be exactly on the crossing,⁷¹ although he must use the defined or accustomed way to cross the street.⁷² When it is not shown that the pedestrian was using a regular crossing at the time of his injury, the regulation granting him the right of way does not apply,⁷³ and, where the pedestrian deviates from a crosswalk while crossing the street to a point where a motorist would not reasonably anticipate his presence, he must use the highest degree of care.⁷⁴

Under regulations granting a right of way to pedestrians crossing streets at an intersection or regular crossing, the right of way extends over the entire width of the street,⁷⁵ but the pedestrian does not have exclusive control of the entire area of the intersection,⁷⁶ and he is not entitled to a right of way everywhere within the four boundaries of the intersection.⁷⁷ Under some provisions the right of way is not limited to the exact line at which one street crosses another,⁷⁸ but includes any point close to such line where a person acting reasonably and prudently may properly step for the purpose of crossing the street.⁷⁹ Under other provisions, however, the right of way is limited to the confines of the highway embraced within the boundaries of the sidewalk lines if extended⁸⁰ or to the space between the curb and the building line as projected across the intersecting street.⁸¹

Ky.—Whittaker v. Thornberry, 209 S.W.2d 498, 306 Ky. 830—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602.

Ohio.—Horowitz v. Eurove, 193 N.E. 644, 129 Ohio St. 8, 96 A.L.R. 782—Titus v. Stouffer, App., 40 N.E.2d 178.

Or.—Hecker v. Union Cab Co., 293 P. 726, 134 Or. 385.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731

68. Cal.—Taha v. Finegold, 184 P.2d 533, 81 Cal.App.2d 536—Edwards v. McCormick, 181 P.2d 58, 79 Cal. App.2d 800—Carney v. RKO Radio Pictures, 178 P.2d 482, 78 Cal.App.2d 659—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63—Bedell v. Duniven, 174 P.2d 666, 77 Cal. App.2d 145—O'Brien v. Schellberg, 140 P.2d 159, 59 Cal.App.2d 764—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183.

Ill.—Moran v. Gatz, 62 N.E.2d 443, 390 Ill. 478—Ripke v. Bernstein, 76 N.E.2d 352, 332 Ill.App. 658.

Iowa.—Cumming v. Dosland, 288 N. W. 647, 227 Iowa 470.

Ky.—Whittaker v. Thornberry, 209 S. W.2d 498, 306 Ky. 830—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Bass v. Means, 124 So. 553, 12 La.App. 260.

Md.—Sugar v. Hafele, 17 A.2d 118, 179 Md. 75—Sheriff Motor Co. v. State, for use of Parker, 179 A. 508, 169 Md. 79—Chasanow v. Smouse, 178 A. 846, 168 Md. 629.

Minn.—Murray v. Jacobson, 262 N.W. 152, 195 Minn. 153—Bolster v. Cooper, 247 N.W. 260, 188 Minn. 364.

N.J.—Bora v. Yellow Cab Co., 135 A. 889, 103 N.J.Law 377.

N.D.—Clark v. Feldman, 224 N.W. 167, 57 N.D. 741.

Ohio.—Will v. McCoy, 20 NE 2d 371, 135 Ohio St. 241—Horwitz v. Eurove, 193 N.E. 644, 129 Ohio St. 8, 96 A.L.R. 782—Titus v. Stouffer, App., 40 N.E.2d 178.

Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226—Cline v. Bush, 52 P.2d 652, 152 Or. 63

Pa.—Todd v. Sippers, Com.Pl., 29 Del Co. 503.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

Va.—Stark v. Hubbard, 48 S.E.2d 216, 187 Va. 820—Arlington & Fairfax Motor Transp. Co. v. Simmonds, 30 S.E.2d 581, 182 Va. 796—McQuown v. Phaup, 2 S.E.2d 330, 172 Va. 419—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193—Sawyer v. Blankenship, 169 S.E. 551, 160 Va. 651.

Wash.—Williams v. Brockman, 193 P.2d 863—Miller v. Edwards, 171 P.2d 821, 25 Wash 2d 635—Turnquist v. Rosala Bros., 83 P.2d 353, 196 Wash. 434—Estill v. Berry, 74 P.2d 482, 193 Wash. 10—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1.

Wis.—Callahan v. Rando, 3 N.W.2d 688, 240 Wis. 417—McDonald v. Wickstrand, 238 N.W. 820, 206 Wis. 68.

42 C.J. p 1148 note 69.

Common-law duty

Regulation does not change the pedestrian's common-law duty to use reasonable care.—Eveleth v. Goodchap, 43 P.2d 876, 5 Cal.App.2d 735.

At center of street

A pedestrian stepping from sidewalk into street at intersection must ascertain whether traffic is approaching from left, and if way is clear pedestrian can proceed to comparative

zone of safety, which is center of street, at which place pedestrian must look to right for approaching traffic, and pedestrian's attempt to assert his statutory right of way in face of traffic approaching dangerously close from the right would be contributory negligence.—Thornton v. Downes, 14 S.E.2d 345, 177 Va. 451.

69. Or.—Maneff v. Lamer, 54 P.2d 287, 152 Or 619.

70. Iowa.—Switzer v. Baker, 160 N. W. 372, 178 Iowa 1063.

71. Wash.—Yanase v. Seattle Taxicab, etc., Co., 157 P. 1076, 91 Wash. 415.

72. Md.—Chasanow v. Smouse, 178 A. 846, 168 Md. 629.

73. Md.—Dashiell v. Jacoby, 120 A. 751, 142 Md. 330.

74. Wash.—Smith v. Bissig, 258 P. 34, 144 Wash. 491.

75. Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

76. Ky.—Whittaker v. Thornberry, 209 S.W.2d 498, 306 Ky. 830.

77. Md.—Chasanow v. Smouse, 178 A. 846, 168 Md. 629.

Within inner lines

Pedestrians at street crossing do not have right of way over space within inner lines of defined or customary street crossings of intersecting streets.—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299.

78. Wash.—Goninon v. Lee, 206 P. 2, 119 Wash. 471.

79. Wash.—Goninon v. Lee, supra.

80. N.J.—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380.

81. Md.—Chasanow v. Smouse, 178 A. 846, 168 Md. 629.

(c) Lookout

Although a pedestrian crossing a street at an intersection or designated crossing is not under an imperative duty to keep a lookout for approaching vehicles, the duty to exercise reasonable care may require him under the circumstances to look and listen, and a failure so to do may constitute negligence.

A pedestrian crossing a street at an intersection or public crossing is not under an imperative duty in all circumstances to keep a lookout for the approach of motor vehicles,⁸² and, therefore, it is not of itself contributory negligence in every case to fail to look and listen for such vehicles.⁸³ However, under the general rule requiring a pedestrian crossing a street or highway to exercise reasonable care for his own safety, discussed supra subdivision a of this section, and to stop, look and listen when necessary, discussed infra § 471, the circumstances may be such as to impose the duty to maintain a reasonable lookout,⁸⁴ in which case a failure so to do may, under the circumstances, constitute negligence,⁸⁵ notwithstanding the pedestrian may have the right of way.⁸⁶ Thus, a pedestrian

crossing a street at an intersection or designated crossing who, without looking, steps suddenly into the path of an oncoming motor vehicle⁸⁷ or into the side of a passing automobile⁸⁸ has been held guilty of negligence.

Since a duty to look ordinarily implies a duty to see that which is in plain sight, discussed generally supra § 458, a pedestrian crossing a street at an intersection or designated crossing who looks and fails to see a motor vehicle which is in plain sight may be guilty of negligence.⁸⁹ However, a pedestrian who looks is not guilty of negligence in failing to see a motor vehicle, if reasonable use of the powers of observation do not disclose its presence,⁹⁰ as where a vehicle is traveling without lights at a time when lights are required by law or are reasonably necessary⁹¹ or is being operated at an excessive speed.⁹²

Direction of observation. Although a pedestrian is not required to look in every direction during every instant of his progress while crossing an in-

82. Tenn.—Zamora v. Shappley, 173 S.W.2d 721, 27 Tenn.App. 768—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

42 C.J. p 1151 note 99.

83. Cal.—Pinello v. Taylor, 17 P.2d 1039, 128 Cal.App. 508.

Vt.—McKirryher v. Yager, 24 A.2d 331, 112 Vt. 336.

84. Ill.—Moran v. Gatz, 57 N.E.2d 281, 324 Ill.App. 45, reversed on other grounds 62 N.E.2d 443, 390 Ill. 478.

La.—Tassin v. Downs, App., 190 So. 232.

Mich.—Malone v. Vining, 21 N.W.2d 144, 313 Mich. 315—Halzle v. Hargreaves, 206 N.W. 356, 233 Mich. 234.

N.Y.—Wood v. Woodlawn Improvement Ass'n Transp. Corporation, 214 N.Y.S. 398, 215 App.Div. 628, affirmed 161 N.E. 197, 247 N.Y. 598.

Ohio.—Chevalley v. Degar, App., 52 N.E.2d 544.

Pa.—Jacobson v. Palma, 175 A. 731, 115 Pa.Super. 401—David v. Suburban Cab Co., Com.Pl., 55 Montg. Co. 104.

Tenn.—Tri-State Transit Co. of Louisiana, 173 S.W.2d 706, 27 Tenn.App. 731.

Tex.—Norris Bros. v. Mattinson, Civ. App., 118 S.W.2d 460, error dismissed.

Wash.—Estill v. Berry, 74 P.2d 482, 193 Wash. 10.

85. D.C.—Faucett v. Bergmann, 22 F.2d 718, 57 App.D.C. 290.

Iowa.—Stawsky v. Wheaton, 263 N.W. 313, 220 Iowa 981.

Mich.—Halzle v. Hargreaves, 206 N.W. 356, 233 Mich. 234.

N.H.—Green v. Bond, 36 A.2d 633, 93 N.H. 144.

N.Y.—Wood v. Woodlawn Improvement Ass'n Transp. Corporation, 214 N.Y.S. 398, 215 App.Div. 628, affirmed 161 N.E. 197, 247 N.Y. 598.

Vt.—McKirryher v. Yager, 24 A.2d 331, 112 Vt. 336.

Standard of care

In determining whether pedestrian's failure to look for approaching automobiles while he was crossing street at intersection was contributory negligence, fact that pedestrian's companions had stopped in street to let vehicle pass was not the standard by which the rights and duties of the parties were to be measured, but they were to be determined by care required of an ordinarily prudent man.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

Violation of statutory duty negligence per se

Ohio.—Souder v. Hassenfeldt, 494 N.E. 47, 48 Ohio App. 377.

86. Md.—Sugar v. Hafele, 17 A.2d 118, 179 Md. 75—Chasanow v. Smouse, 178 A. 846, 168 Md. 629.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

87. La.—Roberts v. Duracher, App., 196 So. 576—Rutter v. Norman, App., 189 So. 609.

Wash.—Farrow v. Ostrom, 117 P.2d 963, 10 Wash.2d 666.

88. La.—Rutter v. Norman, App., 189 So. 609.

Tenn.—Zamora v. Shappley, 173 S.W.2d 721, 27 Tenn.App. 768.

Wash.—Estill v. Berry, 74 P.2d 482, 193 Wash. 10.

89. Mich.—Russo v. City of Grand Rapids, 238 N.W. 273, 255 Mich. 474—Molda v. Clark, 210 N.W. 203, 236 Mich. 277.

Pa.—Taylor v. Philadelphia Rural Transit Co., 170 A. 327, 111 Pa. Super. 575.

Wash.—Steinheim v. Nicholas, 18 P.2d 836, 171 Wash. 614.

90. N.J.—Puorro v. Salerno, 162 A. 527, 109 N.J.Law 381.

Pa.—Mooney v. Connell, Com.Pl., 33 Luz.Leg.Reg. 337.

Assumption of ability to complete crossing

Pedestrian might assume he could reach other side of street before automobile, traveling at legal rate of speed, could reach him, where it was not within his vision.—Arnell v. Gordon, 207 N.W. 825, 234 Mich. 140.

Dependent on circumstances

Whether pedestrian who looked in both directions before leaving sidewalk to cross intersecting street and looked again when entering upon traveled way was guilty of contributory negligence in failing to observe approaching automobile was dependent on whether he exercised reasonable care under all the circumstances.—Skovronski v. Genovese, 200 A. 575, 124 Conn. 482.

91. Cal.—Katz v. T. I. Butler Co., 254 P. 679, 81 Cal.App. 747.

92. Wis.—McDonald v. Wickstrand, 238 N.W. 820, 206 Wis. 53.

tersection, he must look at least in those directions from which danger may reasonably be apprehended,⁹³ and, on reaching the center of the street or a point reasonably outside the zone of danger from vehicles coming from one direction, it ordinarily becomes his duty to look for vehicles coming in the opposite direction.⁹⁴ The pedestrian crossing the intersection is not necessarily negligent because he does not look behind him for approaching motor vehicles, in the absence of warning or notice of the impending danger,⁹⁵ as where he is struck by an automobile which approaches from the rear and turns into the intersecting street over the crossing on which he is proceeding.⁹⁶ However, a pedestrian crossing an intersection must make some effort to see whether vehicles traveling in the same direction are about to turn across his path,⁹⁷ and whether the precautions taken constitute ordinary care must be determined from the particular circumstances.⁹⁸

Duty to look again or continue to look. A pedes-

trian crossing a street at an intersection or designated crossing who has looked for approaching vehicles is not negligent as a matter of law in failing to look again⁹⁹ or to continue to look therefor.¹ However, in view of the duty to exercise reasonable care, circumstances may make the failure so to do negligence.²

(d) Reliance on Care of Motorist

A pedestrian crossing a street at an intersection or designated crossing has the right to assume, and to act on such assumption, in the absence of knowledge or notice to the contrary, that a motorist will use reasonable care to avoid injuring him and will comply with traffic regulations.

A pedestrian crossing a street at an intersection or designated crossing has the right to assume, in the absence of knowledge or notice to the contrary, that motorists will use reasonable care to avoid injuring him,³ and ordinarily he is not guilty of contributory negligence in acting on such an assumption⁴ and in failing to anticipate a motorist's

93. Cal.—Salsberry v. Smith, App., 192 P.2d 73.

NH.—Feuerstein v. Grady, 169 A 622, 86 N.H. 406.

Va.—Lucas v. Craft, 170 S.E. 836, 161 Va. 228.

Vehicle on left-hand side

A pedestrian may be negligent in failing to see a vehicle on wrong side of the street where he knows that most of the traffic turns at an intersection over which he is crossing and, as it approaches, is facing the automobile which strikes him, although it is on the left-hand side of the street.—Brown v. Redmond, 203 N.W. 739, 187 Wis. 67.

94. Va.—Stark v. Hubbard, 48 S.E. 2d 216, 187 Va. 820—Thornton v. Downes, 14 S.E.2d 345, 177 Va. 451.

95. Cal.—Bogan v. White, 30 P.2d 429, 137 Cal.App. 150.

Kan.—Cusick v. Miller, 171 P. 599, 102 Kan. 663, L.R.A.1918D 1086.

Minn.—Bruce v. Cohn, 215 N.W. 520, 172 Minn. 386.

Ohio.—Liberty Highway Co. v. Mastlin, 170 N.E. 604, 34 Ohio App. 183.

Wash.—Gable v. Field, 66 P.2d 356, 189 Wash. 526.

96. Cal.—Clark v. Bowers, 2 P.2d 456, 116 Cal.App. 88.

42 C.J. p 1153 note 33.

97. Cal.—Glover v. Los Angeles Ry. Corp., 164 P.2d 264, 72 Cal.App.2d 187.

98. Cal.—Glover v. Los Angeles Ry. Corp., *supra*.

99. Ill.—Moran v. Gatz, 62 N.E.2d 443, 390 Ill. 478.

Ohio.—Titus v. Stouffer, App., 40 N.E.2d 178.

Tenn.—Hunter v. Stacey, 141 S.W.2d 921, 24 Tenn App. 158.

1. Cal.—Young v. Tassop, 118 P.2d 371, 47 Cal.App. 557—King v. Unger, 78 P.2d 255, 25 Cal.App.2d 632—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70—Crooks v. Doeg, 40 P.2d 590, 4 Cal.App.2d 21—Pinnello v. Taylor, 17 P.2d 1039, 128 Cal App. 508—Nickell v. Rosenfield, 255 P. 760, 82 Cal.App. 369.

Kan.—Dicks v. Wilson, 56 P.2d 1036, 143 Kan. 716.

Va.—Sawyer v. Blankenship, 169 S.E. 551, 160 Va. 651.

42 C.J. p 1152 note 13 [a] (1).

Looking behind

Cal.—Bogan v. White, 30 P.2d 429, 137 Cal.App. 150.

42 C.J. p 1135 note 60 [c].

2. Ill.—Moran v. Gatz, 62 N.E.2d 443, 390 Ill. 478.

Pa.—Manion v. Brooke, Com Pl., 60 Montg.Co. 221, 58 York Leg.Rec. 118.

3. U.S.—Long Transp. Co. v. Domurat, C.C.A.III., 93 F.2d 23.

Cal.—McQuigg v. Childs, 3 P.2d 309, 213 Cal. 661—Torrey v. Nelson, 121 P.2d 336, 51 Cal.App.2d 191.

Conn.—Skovronski v. Genovese, 200 A. 575, 124 Conn. 482.

D.C.—American Ice Co. v. Moorehead, 66 F.2d 792, 62 App.D.C. 266.

Ky.—Whittaker v. Thornberry, 209 S.W.2d 498, 306 Ky. 830—Keys v. Nash's Adm'x, 94 S.W.2d 1006, 264 Ky. 398.

Mass.—Tookmanian v. Fanning, 31 N.E.2d 536, 308 Mass. 162.

Mo.—O'Shea v. Pattison-McGrath Dental Supplies, 180 S.W.2d 19, 362 Mo. 865.

Pa.—Pensak v. Peerless Oil Co., 166

A. 792, 311 Pa. 207—Giles v. Bennett, 148 A. 90, 298 Pa. 158—Kunish v. Porter, 99 Pa.Super. 235—Marko v. Henry, Com.Pl., 35 Berks Co.L.J. 75.

Tenn.—Cheek v. Fox, 7 Tenn.Civ.App. 160.

Va.—Sawyer v. Blankenship, 169 S.E. 551, 160 Va. 651.

Wash.—Gable v. Field, 66 P.2d 356, 189 Wash. 526.

Turning at intersection

(1) Pedestrian crossing street could assume that motorist turning at intersection would drive so as to avoid striking pedestrian beyond center of roadway.—Creedy v. D. H. Holmes Co., 134 So. 413, 16 La.App. 562.

(2) Pedestrian could assume that automobile would not change course into another street without warning.—Byrne v. Butterworth, 136 A. 708, 5 N.J.Misc. 425, affirmed 138 A. 918, 104 N.J.Law 164.

(3) Pedestrian, crossing at intersection, once past the center, is not under obligation to anticipate the approach of an automobile coming from the left.—Salsberry v. Smith, Cal.App., 192 P.2d 73—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63.

4. U.S.—U. S. v. Standard Oil Co. of Cal., D.C.Cal., 60 F.Supp 807, affirmed, C.C.A., 153 F.2d 958, affirmed 67 S.Ct. 1604, 332 U.S. 301, 91 L. Ed. 2067.

Ill.—Regan v. Keating, 42 N.E.2d 122, 315 Ill.App. 130.

Ohio.—Goldberg v. Jordan, 196 N.E. 775, 130 Ohio St. 1.

Or.—Siskel v. Calhoun, 84 P.2d 659, 147 Or. 606.

negligence.⁵ However, a pedestrian with knowledge or notice to the contrary has no right to engage in such an assumption,⁶ but it is his duty to look out for his own safety.⁷

Ordinarily a pedestrian crossing at an intersection may assume, and act on such assumption, that a motorist will exercise proper caution in approaching the crossing,⁸ and that he will obey traffic regulations,⁹ as with respect to speed,¹⁰ or slowing down on approaching pedestrians,¹¹ or yielding the right of way.¹² A pedestrian stepping into the street is not to be charged as a matter of law with the responsibility of anticipating that a vehicle would be run against the curb near to, and almost among, standing pedestrians;¹³ and, when one is already crossing a street¹⁴ or is far enough out from the curb so that an approaching car has room to pass behind him,¹⁵ he is not negligent in failing to anticipate a collision, as he is entitled to assume that the motorist will use such area and avoid strik-

ing him.¹⁶

c. Crossing in Front of Approaching Vehicle

Whether a pedestrian is guilty of contributory negligence in attempting to cross a street or highway in front of an approaching automobile depends on all the circumstances under which he acts, and on whether he exercises care commensurate with the danger reasonably to be anticipated.

Whether a pedestrian is guilty of contributory negligence in attempting to cross a street or highway in front of an approaching automobile depends on all the circumstances under which he acts,¹⁷ including the time, place, and conditions of traffic,¹⁸ and on whether he exercises care commensurate with the danger reasonably to be anticipated.¹⁹ A pedestrian about to cross a street or highway who sees a motor vehicle approaching him is not as a matter of law guilty of negligence in attempting to cross in front of it when he reasonably believes that he has time to do so with safety,²⁰ or in omitting

Pa.—Michener v. Lewis, 170 A. 272, 314 Pa. 156.

Va.—Sawyer v. Blankenship, 169 S.E. 551, 160 Va. 651.

Ill.—Szalacha v. Landsman, 60 N.E.2d 643, 325 Ill.App. 691.

Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.

Or.—Sherrard v. Werline, supra.

Mass.—Wilson v. Freeman, 171 N.E. 469, 271 Mass. 438.

N.J.—Stern v. Stulz-Sickles Co., 162 A. 571, 109 N.J. Law 415—Newham v. Nazzara, 152 A. 467, 107 N.J. Law 208—Clarkson v. Ley, 148 A. 745, 106 N.J. Law 380.

Pa.—Michener v. Lewis, 170 A. 272, 314 Pa. 156.

Cal.—Le Blanc v. Browne, 177 P. 2d 347, 78 Cal.App.2d 63—Wright v. Foreman, 261 P. 481, 86 Cal.App. 595.

Conn.—Murphy v. Way, 141 A. 858, 107 Conn. 633.

Mo.—Robinson v. Mayer, App., 94 S.W.2d 1067.

Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.

Cal.—Connolly v. Zaft, 130 P.2d 752, 55 Cal.App.2d 383.

La.—Tassin v. Downs, App., 190 So. 282—Poindexter v. Service Cab Co., App., 161 So. 40.

Mich.—Covert v. Randall, 298 N.W. 396, 298 Mich. 38.

Mont.—Webster v. Mountain States Telephone & Telegraph Co., 89 P.2d 602, 108 Mont. 188.

N.C.—Jones v. Bagwell, 177 S.E. 170, 207 N.C. 378.

Wash.—Wappler v. Pacific Door & Manufacturing Co., 63 P.2d 738, 185 Wash. 241.

Mass.—Tookmanian v. Fanning,

31 N.E.2d 536, 308 Mass. 162—Stinson v. Soble, 17 N.E.2d 703, 301 Mass. 483.

12. U.S.—Long Transp. Co. v. Domurat, C.C.A. Ill., 93 F.2d 23.

Cal.—Salomon v. Meyer, 32 P.2d 631, 1 Cal.2d 11—Goodwin v. Foley, 170 P.2d 503, 75 Cal.App.2d 195—Connolly v. Zaft, 130 P.2d 752, 55 Cal.App.2d 383—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70—Nicholas v. Leslie, 46 P.2d 761, 7 Cal.App.2d 590.

Ill.—Ripke v. Bernstein, 76 N.E.2d 352, 332 Ill.App. 658.

Mich.—Moore v. Noorthoek, 273 N.W. 758, 280 Mich. 431.

Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135—Siskel v. Calhoun, 34 P.2d 659, 147 Or. 606.

Wash.—Miller v. Edwards, 171 P.2d 821, 25 Wash.2d 635—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1.

Wis.—Hagen v. Thompson, 29 N.W.2d 615, 251 Wis. 484—McDonald v. Wickstrand, 238 N.W. 820, 206 Wis. 68.

13. Minn.—Pach v. Chippewa Springs Corp., 201 N.W. 293, 161 Minn. 125.

14. Md.—Panitz v. Webb, 130 A. 913, 149 Md. 75.

15. Colo.—Woodward v. McGraw, 206 P. 386, 71 Colo. 287.

16. Mass.—Stinson v. Soble, 17 N.E.2d 703, 301 Mass. 483.

17. Cal.—Brannock v. Bromley, 86 P.2d 1062, 30 Cal.App.2d 516—Naudack v. Canini, 85 P.2d 510, 29 Cal.App.2d 687—Galwey v. Pacific Auto Stages, 273 P. 366, 98 Cal.App. 169.

42 C.J. p 2158 note 48 [el.]

18. Cal.—Salomon v. Meyer, 32 P.2d 631, 1 Cal.2d 11.

19. Cal.—Lang v. Barry, 161 P.2d 949, 71 Cal.App.2d 121.

Conn.—Rosen v. Goldstein, 24 A.2d 840, 128 Conn. 605.

Proper observation

If one is to make a proper observation of oncoming automobile, observation must include not only distance of approaching automobile from point of possible collision but also some observation and judgment of its approximate speed—Malone v. Vining, 21 N.W.2d 144, 313 Mich. 315.

20. U.S.—Long Transp. Co. v. Domurat, C.C.A. Ill., 93 F.2d 23.

Cal.—Flach v. Fikes, 267 P. 1079, 204 Cal. 329—Glover v. Los Angeles Ry. Corp., 164 P.2d 264, 72 Cal. App.2d 187—Brannock v. Bromley, 86 P.2d 1062, 30 Cal.App.2d 516—Naudack v. Canini, 85 P.2d 510, 29 Cal.App.2d 687—Nicholas v. Leslie, 46 P.2d 761, 7 Cal.App.2d 590—Coursault v. Schwebel, 5 P.2d 77, 118 Cal.App. 259—Ching Wing v. Kishi, 268 P. 483, 92 Cal.App. 495.

Conn.—Mooney v. Wabrek, 27 A.2d 631, 129 Conn. 302—Caticola v. Hayes, 157 A. 271, 114 Conn. 716.

Iowa.—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89—Lorimer v. Hutchinson Ice Cream Co., 249 N.W. 220, 216 Iowa 384.

Ky.—Pryor's Adm'r v. Otter, 106 S.W.2d 564, 268 Ky. 603.

La.—Tassin v. Downs, App., 190 So. 282—Simpson v. Hyde, App., 147 So. 759.

N.Y.—Goodman v. Brown, 298 N.Y.S. 574, 164 Misc. 145.

Or.—Lynch v. Clark, 194 P.2d 416—

to look again or to keep his eyes on it,²¹ particularly at a crossing where the law gives him the right of way,²² and he is entitled to rely in part on his visibility to the driver of the motor vehicle²³ and to assume that the vehicle will be operated with ordinary care to avoid striking him.²⁴ So the pedestrian, in determining whether it is safe to attempt to cross ahead of the approaching vehicle, has the right to assume that such vehicle is proceeding and will continue to proceed at a lawful speed,²⁵ and

may take into consideration the fact that the driver of an automobile has the full width of the roadway, except to the extent that it is occupied by other vehicles, in which to maneuver his car in order to avoid a collision,²⁶ this being a matter of common knowledge.²⁷

A pedestrian must exercise reasonable care for his own safety, however, in crossing a street or highway in front of an approaching vehicle,²⁸ and he

Keys v. Griffith, 55 P.2d 15, 153 Or. 190.

Pa.—*Di Bona v. Philadelphia Transp. Co.*, 51 A.2d 768, 356 Pa. 204—*Michener v. Lewis*, 170 A. 272, 314 Pa. 158—*Goldschmidt v. Schumann*, 155 A. 297, 304 Pa. 172—*Pinto v. Bell Fruit Co.*, 24 A.2d 768, 148 Pa.Super. 132.

Tenn.—*National Cash Register Co. v. Leach*, 3 Tenn.App. 411.

Tex.—*Boaz v. White's Auto Stores*, 172 S.W.2d 481, 141 Tex. 366, 42 C.J. p 1153 note 48.

Busy thoroughfare

Pedestrian, before lawfully attempting to cross busy thoroughfare, need not, in absence of regulation to contrary, wait on curbing until he can cross ahead of all vehicles in sight.—*MacCorkell v. Williams*, 295 P. 879, 111 Cal.App. 572.

Failure to run

Pedestrian is not contributorily negligent in failing to run, on observing automobile which strikes him.—*Minor v. Foote*, 280 P. 197, 100 Cal.App. 441.

21. U.S.—*U. S. v. Standard Oil Co.*, D.C.Cal., of Cal., 60 F.Supp. 807, affirmed 153 F.2d 958, affirmed 67 S.Ct. 1604, 332 U.S. 301, 91 L.Ed. 2067.

La.—*Langley v. Viguerie*, App., 189 So. 606—*Simpson v. Hyde*, App., 147 So. 759.

Mich.—*Walker v. McGraw*, 271 N.W. 570, 279 Mich. 97.

N.J.—*Soklera v. H. A. Jaeger, Inc.*, 169 A. 347, 12 N.J.Misc. 17, affirmed 171 A. 786, 112 N.J.Law 500.

Pa.—*Eichelberger v. Leindecker, Com. Pl.*, 18 Lehigh Co.L.J. 215.

Va.—*Bethea v. Virginia Elec. & Power Co.*, 33 S.E.2d 651, 183 Va. 873.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

Wash.—*Brown v. Nelson*, 271 P. 894, 149 Wash. 587—*Jurisch v. Puget Transp. Co.*, 258 P. 39, 144 Wash. 409.

42 C.J. p 1154 note 49.

Justifiable conclusion

Pedestrian crossing highway and seeing automobile approaching from south was not required to keep continual gaze to south after justifiable conclusion he could cross in safety.

—*Filson v. Balkins*, 273 P. 578, 206 Cal. 209.

22. U.S.—*Long Transp. Co. v. Domurat*, C.C.A.Ill., 93 F.2d 23.

Cal.—*Douglas v. Hoff*, 185 P.2d 607, 82 Cal.App.2d 82—*Lowell v. Harris*, 74 P.2d 551, 24 Cal.App.2d 70.

Md.—*Sheriff Motor Co. v. State*, for use of *Parker*, 179 A. 508, 169 Md. 79.

Va.—*Bethea v. Virginia Elec. & Power Co.*, 33 S.E.2d 651, 183 Va. 973.

Wash.—*Wappler v. Pacific Door & Manufacturing Co.*, 53 P.2d 738, 185 Wash. 241.

42 C.J. p 1154 note 50.

23. Mass.—*Stinson v. Soble*, 17 N.E. 2d 703, 301 Mass. 483

N.H.—*Carr v. Orrill*, 166 A. 270, 86 N.H. 226.

42 C.J. p 1154 note 51.

24. Cal.—*Flach v. Fikes*, 267 P. 1079, 204 Cal. 329.

La.—*McNeill v. Boagni*, App., 153 So. 352—*Langenstein v. Reynaud*, 127 So. 764, 13 La.App. 272.

Mass.—*Stinson v. Soble*, 17 N.E.2d 703, 301 Mass. 483.

Nev.—*Styris v. Folk*, 146 P.2d 782, 62 Nev. 208.

Pa.—*Pinto v. Bell Fruit Co.*, 24 A. 2d 768, 148 Pa.Super. 132.

R.I.—*Bail v. Webster*, 13 A.2d 278, 65 R.I. 34—*Pucciarelli v. United Electric Rys. Co.*, 11 A.2d 924, 64 R.I. 269.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

Va.—*Bethea v. Virginia Elec. & Power Co.*, 33 S.E.2d 651, 183 Va. 973.

Wash.—*Williams v. Johnson*, 256 P. 1029, 144 Wash. 85.

42 C.J. p 1154 note 52.

Pedestrian is not bound to anticipate that automobile driver will change course so as to strike pedestrian.—*Brown v. Nelson*, 271 P. 894, 149 Wash. 587.

25. Cal.—*Brannock v. Bromley*, 86 P.2d 1062, 30 Cal.App.2d 516.

Colo.—*Schneider v. Ingalsbe*, 280 P. 880, 86 Colo. 265.

Mich.—*Covert v. Randall*, 298 N.W. 396, 298 Mich. 38—*Burton v. Yellow & Checker Cab & Transfer Co.*, 278 N.W. 106, 283 Mich. 384.

42 C.J. p 1153 note 48 [c], [d].

26. N.J.—*Thornton v. Cater*, 111 A. 158, 94 N.J.Law 435.

27. N.J.—*Thornton v. Cater*, supra.

28. U.S.—*Mortenson v. Hogg*, C.C.A. N.Y., 99 F.2d 803—*Petry v. H. M. Wagner Co.*, C.C.A.Pa., 93 F.2d 423.

Ill.—*Soic v. Richardson*, 42 N.E.2d 884, 315 Ill.App. 213.

Md.—*Barker v. Whitter*, 170 A. 678, 166 Md. 33.

Mich.—*Haley v. Grosse Ile Rapid Transit Co.*, 287 N.W. 536, 290 Mich. 373.

N.J.—*Laskowski v. Mankovich*, 159 A. 398, 10 N.J.Misc. 441.

N.C.—*Tysinger v. Coble Dairy Products*, 36 S.E.2d 246, 225 N.C. 717.

Ohio.—*Martin Baking Co. v. Tompkinson*, 161 N.E. 288, 27 Ohio App. 356.

Pa.—*Miller v. Gault*, 29 A.2d 71, 345 Pa. 474—*Gajewski v. Lightner*, 19 A.2d 355, 341 Pa. 514—*Rhoads v. Herbert*, 148 A. 693, 298 Pa. 522—*Pinto v. Bell Fruit Co.*, 24 A.2d 768, 148 Pa.Super. 132.

Va.—*Stark v. Hubbard*, 48 S.E.2d 216, 187 Va. 820—*Meade v. Saunders*, 144 S.E. 711, 151 Va. 636.

Assumption of risk

One who voluntarily attempts to pass in front of an approaching vehicle, when it is dangerously near, assumes the risk.—*Borits v. Tarapchak*, 12 A.2d 910, 338 Pa. 289.

Imminent danger

A pedestrian who is aware of approach of a vehicle about to cross an intersection in a manner or under such circumstances as to cause a reasonable person to perceive that danger is imminent, and who persists in an onward course, is guilty of negligence as matter of law.—*Isaacs v. City and County of San Francisco*, 167 P.2d 221, 73 Cal.App.2d 621.

Place of safety

A pedestrian in the street at a place of safety who sees and knows of the approach of an automobile has the duty of exercising ordinary care to avoid collision by remaining outside the path of the automobile if it be in close proximity or so regulate his speed in crossing as to avoid contact with automobile.—*Hagstrom v. Limbeck*, 130 P.2d 895, 15 Wash.2d 399.

may be negligent if he deliberately steps, walks, or runs into the path of an approaching automobile in close proximity to him,²⁹ or starts across the street when he knows that a motor vehicle is approaching without looking to see where it then is.³⁰ He may not close his eyes to the threatened danger³¹ or rely solely on the presumption that the driver will exercise due care and prudence.³² In determining whether or not it is safe to proceed, it is not the duty of a pedestrian to make mathematical calculations based on distances and relative speeds, but only to exercise ordinary care;³³ and in this connection it has been said to be common knowledge that it is difficult to judge at night the speed or distance away of an approaching automobile by observing its lights.³⁴

d. Crossing Diagonally

In the absence of a governmental regulation prohibit-

ing it, a pedestrian is not necessarily negligent in crossing a street or intersection diagonally, but he must exercise caution and make reasonable use of his senses to discover impending danger, and failure to use such care may render him negligent in fact, under the circumstances of the particular case.

In the absence of a statute or ordinance prohibiting it, a pedestrian who undertakes to cross a street³⁵ or intersection³⁶ diagonally is not negligent as a matter of law, especially where there is room for motor vehicles to pass on either side of him.³⁷ In this respect he may rely to some extent on the assumption that persons driving upon the street will obey the law³⁸ and will exercise ordinary care to avoid injuring him.³⁹ However, in view of the duty resting on a pedestrian crossing the highway to exercise care for his own safety and protection commensurate with the danger involved, discussed supra subdivision a of this section, a greater amount of care is required of a pedestrian crossing diag-

Excessive speed

Pedestrian who, while crossing street, was struck by automobile which he had observed approaching at excessive rate of speed was guilty of contributory negligence.—*Krazier v. Stout*, 181 S.E. 377, 165 Va. 68.

29. Cal.—*Kostouros v. O'Connell*, 103 P.2d 1028, 39 Cal.App.2d 618—*Foy v. Carlton*, 85 P.2d 220, 29 Cal.App. 2d 575—*Chase v. Thomas*, 46 P.2d 200, 7 Cal.App.2d 440.

Colo.—*Fabing v. Jones*, 114 P.2d 1100, 108 Colo. 144.

Fla.—*Robb v. Pike*, 161 So. 732, 119 Fla. 833.

Ill.—*Sole v. Richardson*, 42 N.E.2d 884, 315 Ill.App. 213.

Iowa.—*Pettijohn v. Weide*, 227 N.W. 824, 209 Iowa 902.

Ky.—*Cumberland Grocery Co. v. Hewlett*, 22 S.W.2d 97, 231 Ky. 702.

La.—*Rutter v. Norman*, App., 189 So. 609—*Bridges v. Werner*, App., 152 So. 401—*Eads v. Holliday*, App., 144 So. 646.

Md.—*McGarrey v. Duffy*, 3 A.2d 458, 175 Md. 634—*Webb-Pipploe v. Cooper*, 151 A. 235, 159 Md. 426.

Mich.—*Moldenhauer v. Smith*, 18 N.W.2d 818, 311 Mich. 265—*Beers v. Arnot*, 14 N.W.2d 511, 308 Mich. 604.

N.M.—*Gray v. Esslinger*, 130 P.2d 24, 46 N.M. 421, rehearing denied 131 P.2d 981, 46 N.M. 492.

Ohio.—*Martin Baking Co. v. Tompkinson*, 161 N.E. 288, 27 Ohio App. 355.

Pa.—*Harrington v. Pugarelli*, 25 A.2d 149, 344 Pa. 204—*Watson v. Lit Bros.*, 135 A. 631, 288 Pa. 175—*Forgioni v. Balaban*, 5 A.2d 398, 135 Pa. Super. 179—*Jackson v. Chapman*, Com.Pl., 48 Dauph.Co. 145—*Manion v. Broke*, 61 Montg. Co. 221, 68 York Leg Rec. 118,

Wash.—*Turnquist v. Rosa's Bros.*, 83 P.2d 353, 196 Wash. 434, 42 C.J. p 1154 note 54.

Assumption of risk

One attempting to pass in front of approaching vehicle dangerously near assumes risk.—*Watson v. Lit Bros.*, 135 A. 631, 288 Pa. 175—*Tayor v. Philadelphia Rural Transit Co.*, 170 A. 327, 111 Pa.Super. 575.

30. La.—*Gullory v. Shaddock*, App., 158 So. 681—*Neville v. Postal Telegraph Cable Co.*, 126 So. 720, 13 La. App. 76.

Mich.—*Malone v. Vinng.*, 21 N.W.2d 144, 313 Mich. 315—*Young v. Martinich*, 271 N.W. 753, 279 Mich. 267.

N.J.—*Petrus v. Public Service Transp. Co.*, 136 A. 169, 5 N.J. Misc. 237.

Pa.—*Goldberg v. Kelly*, 17 A.2d 390, 340 Pa. 430—*Fearn v. City of Philadelphia*, 182 A. 534, 320 Pa. 156—*Snyder v. Sekuta*, Com.Pl., 29 West. Co.L.J. 77.

R.I.—*McKean v. Barker*, 148 A. 599

Tex.—*Robertson v. Buck X-Ograph Co.*, Civ.App., 114 S.W.2d 308.

Wash.—*Moseley v. Mills*, 259 P. 715, 145 Wash. 253.

42 C.J. p 1154 note 55.

One-way street

A pedestrian crossing one-way street in middle of block had duty, when he left curb, to keep diligent lookout for approaching automobile which he had seen, and was negligent as a matter of law if he did not do so.—*Gajewski v. Lightner*, 19 A.2d 355, 341 Pa. 514.

31. Mich.—*Malone v. Vining*, 21 N.W.2d 144, 313 Mich. 315.

Pa.—*Goldberg v. Kelly*, 17 A.2d 390, 340 Pa. 430—*Snyder v. Sekuta*, Com.Pl., 29 West.Co.L.J. 77.

Wash.—*Turnquist v. Rosa's Bros.*, 83 P.2d 353, 196 Wash. 434.

42 C.J. p 1155 note 56.

32. Cal.—*Averdieck v. Barris*, 218 P. 786, 63 Cal.App. 495.

Vt.—*Colburn v. Frost*, 9 A.2d 104, 111 Vt. 17.

Passing to right

Pedestrian who, when automobile measured in time was less than four seconds from him, left safety zone in middle of street on assumption that motorist having right of way would go to right instead of to left of safety zone was guilty of contributory negligence as a matter of law.—*Jendrzewski v. Baker*, 31 A.2d 611, 182 Md. 41.

33. Va.—*Green v. Ruffin*, 125 S.E. 742, 127 S.E. 486, 141 Va. 628.

34. Wash.—*Jensen v. Culbert*, 236 P. 101, 134 Wash. 599.

35. U.S.—*Dryfoos v. Scavenger Service Corporation*, C.C.A.Ill., 115 F.2d 637.

Cal.—*Brannock v. Bromley*, 86 P.2d 1062, 30 Cal.App.2d 516—*Patanla v. Yellow-Checker Cab Co.*, 283 P. 295, 102 Cal.App. 600.

42 C.J. p 1155 note 62.

Person crossing diagonally after alighting from street car see *infra* § 478.

36. Tenn.—*Tiffany v. Shipley*, 161 S.W.2d 373, 25 Tenn.App. 539.

Wash.—*Durham v. Crist*, 38 P.2d 1054, 180 Wash. 213.

42 C.J. p 1155 note 63.

37. Wash.—*Lewis v. Seattle Taxicab Co.*, 130 P. 341, 72 Wash. 320.

38. Cal.—*Brannock v. Bromley*, 86 P.2d 1062, 30 Cal.App.2d 516.

39. Ga.—*Wright v. Bales*, 7 S.E.2d 765, 62 Ga.App. 328.

Mass.—*Conrad v. Maxman*, 191 N.E. 765, 287 Mass. 229.

onally than of one crossing directly at a regular crosswalk or intersection,⁴⁰ and he may be negligent in fact, under the circumstances of the particular case.⁴¹

A pedestrian crossing diagonally must make reasonable use of his senses to discover impending danger,⁴² and usually he must look in the direction from which motor vehicles may be expected to come before entering a lane of travel.⁴³ Thus one who, without looking for approaching vehicles, hurries diagonally across a street between intersections,⁴⁴ or who attempts to cross an intersection diagonally at a time when mist or rain obscures his vision,⁴⁵ may be guilty of negligence.

Duty to look back. A pedestrian crossing a street diagonally is not necessarily guilty of negligence because of his failure to turn and look back for approaching automobiles,⁴⁶ especially after he has traversed that portion of the street on which vehicles might be expected to come from behind him.⁴⁷ While he must be alert,⁴⁸ whether or not he is negligent in not turning and looking back depends on the circumstances of the particular case.⁴⁹

Prohibitory regulations. It has been held that crossing a street diagonally in violation of a municipal ordinance is negligence on the part of a

pedestrian, which precludes recovery for an injury to which it contributes,⁵⁰ but it has also been held that such violation is not negligence per se, but only prima facie evidence thereof,⁵¹ which may be rebutted by a showing that the failure to cross in a direct line was due to an obstruction in the street.⁵² An ordinance requiring pedestrians crossing a street at an intersection to cross at right angles does not apply to one crossing between intersections.⁵³

e. Obstruction of View

A pedestrian crossing or about to cross a street or highway when his view of an approaching motor vehicle is obstructed is usually required to exercise a greater degree of care than would otherwise be necessary, and he is negligent if he fails to take proper precautions to discover and observe the approach of such vehicle before placing himself in a position of danger.

Under the rule requiring a pedestrian crossing the highway to use reasonable care for his own safety and protection, discussed supra subdivision a of this section, a pedestrian crossing or about to cross a street or highway when his view of an approaching motor vehicle is obstructed is usually required to exercise a greater amount of care than would otherwise be necessary,⁵⁴ and is negligent if he fails to take proper precautions to discover and observe the approach of such vehicle before placing himself in a position of danger.⁵⁵ Thus, a pedes-

40. Cal.—Francis v. Riddle, 59 P.2d 532, 15 Cal.App.2d 282—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

42 C.J. p 1155 note 68.

41. Cal.—Mundy v. Marshall, 65 P. 2d 65, 8 Cal.2d 294—Francis v. Riddle, 59 P.2d 532, 15 Cal.App.2d 282.

Conn.—Krupien v. Doolittle, 169 A. 268, 117 Conn. 534.

Pa.—Schweitzer v. Scranton Bus Co., 25 A.2d 156, 344 Pa. 249.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

Wash.—Turner v. Good, 8 P.2d 414, 167 Wash. 27.

42 C.J. p 1155 note 67.

42. S.D.—Bock v. Sellers, 285 N.W. 437, 64 S.D. 450.

Duty to look in every direction

Pedestrian before crossing intersection diagonally must look in every direction.—Peterson v. Millnitz, 229 N.W. 12, 119 Neb. 365.

43. Wis.—Rang v. Klawun, 223 N. W. 121, 198 Wis. 1.

At center of street

(1) A pedestrian crossing diagonally on a street on which there is considerable automobile traffic is under a duty to look for automobiles not only when he leaves the curb,

but also when he arrives at the center of the street, before proceeding across the path of any traffic approaching from his right.—Rang v. Klawun, supra.

(2) So a pedestrian, crossing street diagonally northward from west side toward intersecting street on east side, must look toward south at center of street before entering lane of automobile travel from such direction.—Harper v. Shreveport Ice Cream Factory, La.App., 162 So. 471.

44. Conn.—Hizam v. Blackman, 131 A 415, 103 Conn. 547.

42 C.J. p 1155 note 68.

45. Cal.—Thompson v. White, 204 P. 561, 56 Cal.App. 173.

46. Ga.—Wright v. Bales, 7 S.E.2d 765, 62 Ga.App. 328.

42 C.J. p 1155 note 70.

47. N.J.—Fox v. Great Atlantic, etc., Tea Co., 87 A. 339, 84 N.J.Law 726.

48. Ga.—Wright v. Bales, 7 S.E.2d 765, 62 Ga.App. 328.

42 C.J. p 1155 note 72.

49. Ga.—Wright v. Bales, supra. Pa.—Lamont v. Adams Express Co., 107 A. 373, 264 Pa. 17.

50. U.S.—Sprinkle v. Davis, C.C.A. Va., 104 F.2d 487.

Mich.—Peck v. Hampel, 291 N.W. 648, 293 Mich. 252.

42 C.J. p 1155 note 75.

51. Iowa.—McElhinney v. Knittle, 201 N.W. 586, 199 Iowa 278.

42 C.J. p 1139 note 79 [a] (3).

52. Iowa.—McElhinney v. Knittle, supra.

53. Ill.—Stansfield v. Wood, 231 Ill. App. 586.

54. Cal.—Moss v. H. R. Boynton Co., 186 P. 631, 44 Cal.App. 474.

Me.—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76.

Mo.—Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo.App. 380, remanded 69 S.W.2d 947, 334 Mo. 712, transferred, see, App., 59 S.W.2d 744.

55. Cal.—Hansen v. Steele, 104 P.2d 93, 40 Cal.App.2d 1.

La.—Bailey v. Reggie, App., 22 So.2d 698.

Me.—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76.

Pa.—Letts v. Cole, 165 A. 847, 310 Pa. 509.

Wash.—Hamblet v. Soderburg, 65 P. 2d 1267, 189 Wash. 449.

Wis.—Mertens v. Lake Shore Yellow Cab & Transfer Co., 218 N.W. 85, 195 Wis. 646.

Insufficient observation

Pedestrian crossing concrete state highway carrying heavy fast-moving traffic, knowing of its danger, was negligent, as a matter of law, in making no observation in one direc-

trian may be guilty of contributory negligence where he steps into the path of an approaching automobile from between vehicles parked at the curb⁶⁶ or from behind a streetcar⁶⁷ or other vehicle.⁶⁸ Likewise, one who crosses in front of a standing⁶⁹ or moving⁶⁰ streetcar or other vehicle⁶¹ which prevents him from seeing an automobile passing it from the rear may be guilty of contributory negligence.

Where, on the other hand, a pedestrian crosses a street at a public crossing in front of a car stopped to permit him to proceed, it has been held that he is not as a matter of law guilty of negligence in failing to see or to avoid a motor vehicle which approaches from the rear of the standing automobile and passes around it.⁶² It has also been held that it is not negligence as a matter of law for a pedestrian to attempt to cross a street where his view is obstructed by reason of a car having been left in the center of the street in violation of a governmental regulation.⁶³ The obligation to use reasonable care does not impose on the pedestrian the duty to anticipate that a motor vehicle will emerge from a concealed position at unlawful speed⁶⁴ or at a place prohibited by law.⁶⁵ So, where his view is obstructed, he is not negligent as a matter of law in failing to see an automobile passing too close to a streetcar,⁶⁶ passing a vehicle on the wrong side,⁶⁷ or traveling on the wrong side of the street,⁶⁸ or in a safety zone, where vehicular traffic is prohib-

ited.⁶⁹ Similarly, one who steps behind a parked automobile to look for approaching traffic before crossing a street is not negligent as a matter of law when struck by a motor vehicle driven very close to the parked car.⁷⁰

Smoke, fog, rain, or snow. A pedestrian crossing the highway who travels through or near to a dense cloud of smoke which prevents him from seeing approaching traffic may be guilty of contributory negligence.⁷¹ However, a pedestrian is not always negligent in crossing a street when his vision is obscured by atmospheric conditions, if he exercises due care for his own safety and for the rights of other users of the highway,⁷² as where he crosses at night in a fog⁷³ or during a rain.⁷⁴

f. Compliance with, or Violation of, Traffic Signal

- (1) In general
- (2) Duty to look
- (3) Reliance on care of motorist

(1) In General

A pedestrian crossing a street or highway at a point controlled by traffic officers or signals is bound to exercise ordinary care for his own safety with respect to approaching vehicles and to obey the signals, and, while a favorable signal may entitle him to the right of way in crossing, he must still use reasonable care.

A pedestrian crossing a street or highway at a point controlled by traffic officers or traffic direc-

tion except before starting to cross, although he could then see only a short distance.—Burke v. Tesmer, 272 N.W. 857, 224 Wis. 667.

56. Fla.—Prior v. Pounds, 151 So. 890, 113 Fla. 308.

Ky.—Goodwin v. Miller, 276 S.W. 117, 210 Ky. 407.

La.—Dobrowolski v. Henderson, 130 So. 237, 15 La.App. 79.

57. Mo.—Winter v. Van Blarcom, 167 S.W. 498, 258 Mo. 418.

58. U.S.—Standard Oil Co. of Kentucky v. Noakes, C.C.A.Ky., 59 F.2d 897.

La.—Tooke v. Muslow Oil Co., App., 183 So. 97.

Me.—Beaucage v. Roak, 153 A. 894, 130 Me. 114.

Mich.—Jones v. Florios, 226 N.W. 852, 248 Mich. 153.

S.C.—Wright v. South Carolina Power Co., 31 S.E.2d 904, 205 S.C. 327.

Wash.—Harder v. Matthews, 121 P. 983, 67 Wash. 487.

59. N.J.—Conrad v. Green, Sup., 94 A. 390.

60. Cal.—Casey v. Delelio, 102 P.2d 557, 39 Cal.App.2d 91.

61. Me.—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76.

Wash.—Hamblet v. Soderburg, 65 P. 2d 1267, 189 Wash. 449.

62. Ky.—American Dye Works v. Baker, 276 S.W. 133, 210 Ky. 508.

Pa.—Eckert v. Merchants' Shipbuilding Corp., 124 A. 477, 280 Pa. 340.

63. Mo.—Jackson v. City of Malden, App., 72 S.W.2d 850.

64. La.—Tooke v. Muslow Oil Co., App., 183 So. 97.

42 C.J. p 1155 note 87.

A pedestrian who emerged from in front of a bus at an ordinary pace and who had a preference right to complete his trip was not guilty of such negligence as to bar a recovery by him for injuries sustained when he was run down because of the primary negligence of a motorist driving at an excessive speed.—Tooke v. Muslow Oil Co., *supra*.

65. Mich.—Metcalf v. Peerless Laundry, etc., Co., 184 N.W. 482, 215 Mich. 601.

42 C.J. p 1156 note 88.

66. Cal.—Reaugh v. Cudahy Packing Co., 208 P. 125, 189 Cal. 335.

67. N.J.—Bora v. Yellow Cab Co., 135 A. 889, 103 N.J.Law 377.

42 C.J. p 1156 note 90.

68. Ky.—Otte v. Guilford, 272 S. W. 41, 209 Ky. 33.

69. Mich.—Metcalf v. Peerless Laundry, etc., Co., 184 N.W. 482, 215 Mich. 601.

70. Cal.—Webster v. Motor Parcel Delivery Co., 183 P. 220, 41 Cal. App. 657.

71. Mo.—State v. Allen, 253 S.W. 768, 28 A.L.R. 1270.

42 C.J. p 1155 note 86.

72. Md.—Edwards v. State, for Use of Guy, 170 A. 761, 166 Md. 217.

Crossing in daytime while it was snowing

In determining contributory negligence of pedestrian struck by automobile while crossing street intersection in the daytime when it was snowing, pedestrian had right to give some attention to where she was walking.—O'Shea v. Pattison-McGrath Dental Supplies, 180 S.W.2d 19, 352 Mo. 855.

73. Md.—Edwards v. State, for Use of Guy, 170 A. 761, 166 Md. 217.

74. Cal.—Ducat v. Goldner, 175 P.2d 914, 77 Cal.App.2d 322.

tion devices is bound to exercise ordinary care for his own safety to avoid being charged with contributory negligence with respect to an injury inflicted by a motor vehicle,⁷⁵ and the existence of a traffic signal and its character are proper elements to be considered in determining whether the pedestrian's conduct constitutes negligence.⁷⁶ It is ordinarily the duty of a pedestrian to obey traffic signals in crossing,⁷⁷ and if he attempts to cross a street or highway at an intersection where the movement of traffic is controlled by signal or by a traffic officer he may be negligent in so doing when traffic is being permitted to move along the street over which he crosses.⁷⁸ It has been held, however, that crossing in disregard of the right of way afforded by a traffic signal does not constitute negligence under any and all circumstances,⁷⁹ and that crossing against a signal in violation of regulations does not amount to negligence as a matter of law,⁸⁰ although it is a circumstance which commands vigilance on

the part of the pedestrian.⁸¹ Thus a pedestrian who attempts to filter through traffic moving on the right of way must accommodate his movements to those of the vehicles, must yield the right of way to them, and cross only as the traffic affords an opportunity to do so in subordination to the right given the vehicles.⁸²

Generally, a pedestrian in crossing may rely to a considerable extent, although not exclusively, on a favorable traffic signal⁸³ or signal of a traffic officer.⁸⁴ The pedestrian also has the right to enter an intersection and to proceed across it when a traffic signal turns in his favor,⁸⁵ and one who starts across a street in accordance with traffic signals and commits himself to the crossing usually has a superior right of way against a vehicle thereafter approaching⁸⁶ until he has reached the opposite curb.⁸⁷ Where a pedestrian crossing a street in accordance with a traffic signal was struck by a vehicle turning into the intersection also in accordance

75. Ky.—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

N.D.—Blackstead v. Kent, 247 N.W. 607, 63 N.D. 246.

Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881.

Right of way as between pedestrian and motor vehicle at intersections controlled by traffic signals see supra § 388.

Due care shown

Pa.—Prisco v. Di Fabio, 2 A.2d 576, 133 Pa. Super. 299.

76. Ohio.—Wolfe v. Baskin, 28 N.E. 2d 629, 137 Ohio St. 284.

77. Ky.—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

What constitutes "signal"

A steadily burning red light, with or without the word "stop" thereon, placed in the center of a street intersection by the police authorities, was a "signal or sign of police officers" within meaning of statute providing that pedestrians should obey and abide by a "signal or sign of police officers."—Wolfe v. Baskin, 28 N.E. 2d 629, 137 Ohio St. 284.

Regulation held applicable

Regulation providing that ringing of first bell in connection with mechanical traffic signal should merely indicate preparation for change in traffic movement, and that no traffic should enter intersection until green or go signal was shown, was applicable to pedestrians, where ordinance made it unlawful for pedestrians to cross other than with released traffic.—Hurtel v. Albert Cohn, Inc., 52 P. 2d 922, 5 Cal.2d 145.

78. Ky.—Kinsella v. Meyer's Adm'r, 102 S.W.2d 974, 267 Ky. 508.

La.—Buckley v. Featherstone Garage, 133 So. 446, 11 La.App. 564.

N.J.—Henry v. Ehrlich Transfer & Trucking Co., 196 A. 444, 119 N.J. Law 493.

42 C.J. p 1156 note 96.

79. Md.—Weissman v. Hokamp, 188 A. 923, 171 Md. 197, dissenting opinion 189 A. 813, 171 Md. 197.

Other like situation

Crossing against the right of way at regular crossing gives rise to the same legal situation as crossing between regular crossings, where by statute vehicles have right of way.—Weissman v. Hokamp, supra.

80. Mich.—Russo v. City of Grand Rapids, 238 N.W. 273, 255 Mich. 474.

81. Mich.—Russo v. City of Grand Rapids, supra.

82. Md.—Weissman v. Hokamp, 188 A. 923, 171 Md. 197, dissenting opinion 189 A. 813, 171 Md. 197.

83. La.—Charlie Yee v. Charley Cabs, App., 158 So. 261.

84. Mass.—Wilson v. Freeman, 171 N.E. 469, 217 Mass. 438.

85. Pa.—Harrington v. Pugarelli, 25 A.2d 149, 344 Pa. 204.

Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881—Gable v. Field, 66 P.2d 356, 189 Wash. 526.

A "crosswalk", within ordinance giving pedestrians right to proceed across street within any crosswalk, marked or unmarked, on a go signal from traffic light, is the extension of the sidewalk lines over streets at street intersections.—Skaff v. Dodd, W.Va., 44 S.E.2d 621.

Amber signal

A pedestrian has the right to step off the curb onto a crosswalk when a traffic light flashes amber after a

red light.—Focht v. Justis, 77 N.E.2d 506, 81 Ohio App. 297.

86. Ill.—Petersen v. General Rug & Carpet Cleaners, 77 N.E.2d 58, 333 Ill.App. 47.

La.—Tooke v. Muslow Oil Co., App., 183 So. 97.

Ohio.—Chevalley v. Degar, App., 52 N.E.2d 544.

Pa.—Goodall v. Hess, 172 A. 693, 315 Pa. 289—Prisco v. Di Fabio, 2 A.2d 576, 133 Pa. Super. 299.

Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881.

42 C.J. p 1156 note 97.

Regulation held not to affect right of way

A statute providing the right of way for pedestrians at regular crossings of street intersections, except where the movement of traffic is regulated by traffic officers or directive devices, has been construed as not depriving pedestrians of the right of way at intersections where traffic is regulated, but rather to subject them to the regulation of traffic devices at street intersections.—Lott v. De Luxe Cab Co., 299 P. 303, 136 Or. 349.

87. Ohio.—Juergens v. Bell Distributing, 21 N.E.2d 90, 135 Ohio St. 335.

Effect of regulation

Under regulation giving pedestrian entering crosswalk with green or go electric signal right of way over vehicles until he has reached opposite curb, question of pedestrian's contributory negligence includes not only conduct of pedestrian in crossing crosswalk, but also extent of right of way granted by regulation.—Juergens v. Bell Distributing, supra.

with the signal, the pedestrian's right to cross has been held at least equal to the right of the motorist to turn at the intersection when the signal changed.⁸⁸

The fact that the traffic signal is set against traffic on the street over which the pedestrian is crossing does not, however, relieve him from the duty to exercise ordinary care,⁸⁹ or, unless so provided by statute or ordinance,⁹⁰ give him an absolute right to proceed or an absolute right of way over an approaching motor vehicle⁹¹ for the full distance of the crossing.⁹² Whatever right of way he has he acquires not alone from the traffic signal or the direction of the traffic officer, but from that in connection with other circumstances,⁹³ such as that the danger of crossing is lessened at such time and that he has actually accepted the invitation to cross and is, when approached by an automobile, in such position that the driver thereof should by the exercise of reasonable care have known of his peril in time to avoid striking him.⁹⁴ Notwithstanding the pedestrian's right of way afforded by the signal, if he sees or should have seen a vehicle approaching in disregard of his rights, he may be guilty of negligence in stepping into the path of the vehicle.⁹⁵ So a pedestrian who steps directly in front of a moving automobile without in any way indicating his intention to the operator thereof in time to permit him to avoid a collision is negligent, even

though he is crossing in the direction in which the traffic signal permits traffic to proceed, and the automobile is turning from the street in which traffic is moving into the street in which traffic is stopped.⁹⁶

When the traffic signal changes while a pedestrian is rightfully in the act of crossing the street or highway, ordinarily he has the right of way until the opposite curb is reached;⁹⁷ and similarly, under a regulation providing that at an intersection where a traffic officer is on duty pedestrians shall cross with released traffic and not otherwise, a pedestrian who starts across at such place with traffic is entitled to the right of way over vehicles crossing his course, although the signal is changed to release such vehicles before he has completed his crossing.⁹⁸ However, such a pedestrian has no absolute protection to complete the crossing,⁹⁹ and due care under the circumstances must be exercised,¹ although he is bound to act only as a reasonably prudent man in endeavoring to extricate himself from the danger of his position.²

(2) Duty to Look

A pedestrian crossing a street or highway at or near a point controlled by a traffic signal is generally bound to keep a lookout for approaching vehicles, and ordinarily he is not relieved of such duty by the fact that the signal is in his favor.

A pedestrian crossing a street or highway at or

88. Ohio.—Liberty Highway Co. v. Mastin, 170 N.E. 604, 34 Ohio App. 183.

89. Ill.—Petersen v. General Rug & Carpet Cleaners, 77 N.E.2d 58, 333 Ill.App. 47.

Ky.—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Charlie Yee v. Charley Cabs, App., 158 So. 261.

N.D.—Blackstead v. Kent, 247 N.W. 607, 63 N.D. 246.

Ohio.—Chevally v. Degar, App., 52 N.E.2d 544.

Pa.—Altman v. Kelly, 9 A.2d 423, 336 Pa. 481.

42 C.J. p 1156 note 1.

90. Ohio.—Juergens v. Bell Distributing, 21 N.E.2d 90, 135 Ohio St. 335.

Absolute and preferential right of way

Under an ordinance giving a pedestrian crossing a crosswalk at an intersection on a favorable signal the right of way over vehicles until he has reached the opposite curb, a pedestrian has the absolute right of way as long as the traffic signal remains favorable to him; and after the signal changes he still has the preferential right of way until he reaches the opposite curb or other

point on the crosswalk beyond the zone of existing danger.—Juergens v. Bell Distributing, supra.

91. Md.—Panitz v. Webb, 130 A. 913, 149 Md. 75.

N.D.—Blackstead v. Kent, 247 N.W. 607, 63 N.D. 246.

92. Pa.—Altman v. Kelly, 9 A.2d 423, 336 Pa. 481.

Wash.—Strom v. Dobrin, 186 P.2d 906, 29 Wash.2d 198.

93. Md.—Panitz v. Webb, 130 A. 913, 149 Md. 75.

94. Md.—Panitz v. Webb, supra.

95. Iowa.—Dougherty v. McFee, 265 N.W. 176, 221 Iowa 391.

Pa.—David v. Suburban Cab Co., Com.Pl., 55 Montg.Co. 104.

Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881.

96. Md.—Panitz v. Webb, 130 A. 913, 149 Md. 75.

97. U.S.—Railway Express Agency v. Little, C.C.A.Pa., 50 F.2d 59.

Mich.—Smarinsky v. Markowitz, 251 N.W. 539, 265 Mich. 412.

98. Wash.—Riddel v. Lyon, 213 P. 487, 124 Wash. 146, 37 A.L.R. 486.

99. Mich.—Sloan v. Ambrose, 1 N.W. 2d 505, 300 Mich. 188.

1. Mich.—Sloan v. Ambrose, supra—De Jager v. Vandenberg, 284 N.W. 673, 288 Mich. 136.

Wash.—Burson v. Blackwell, 52 P. 2d 351, 184 Wash. 669.

Crossing on amber signal

A pedestrian who proceeded to cross an intersection knowing that traffic light showed amber, where he saw automobiles waiting, on the street which he crossed, for the signal to proceed, knew that the intersection was subject to heavy traffic, and was hit by motorist who crossed intersection when lights signaled motorist to proceed, was negligent, and did not exercise due care in relying exclusively on motorist's watchfulness.—Jackson v. Smart, 195 A. 683, 89 N.H. 174.

2. Cal.—Lang v. McKinney Blueprint Paper Co., 266 P. 616, 91 Cal. App. 84.

42 C.J. p 1156 note 98.

Not required to run

Change of traffic light at intersection while pedestrian is crossing does not require pedestrian to run.—Smarinsky v. Markowitz, 251 N.W. 539, 265 Mich. 412.

Contributory negligence not shown La.—Tooke v. Muslow Oil Co., App., 183 So. 97.

near a point controlled by a traffic signal is generally bound to keep a lookout for approaching vehicles,³ at least where the traffic signal is not in his favor and gives him no right to cross.⁴ Ordinarily he is not relieved of the duty to look by the facts that the signal is set against traffic on the street over which he is crossing or is about to cross⁵ and that a regulation gives the right of way to a pedestrian who has started to cross an intersection on a favorable signal.⁶

A person who starts across a street in accordance with traffic signals has a duty to look to the right and to the left for approaching traffic⁷ and to watch out for vehicles already within the intersection;⁸ but he is under no extreme duty, as a matter of law, to keep a lookout to the rear⁹ or to look up the street beyond the intersection to discover approaching automobiles,¹⁰ nor is it ordinarily necessary for him to continue to look in a particular direction.¹¹ However, a pedestrian who steps into the highway after having observed a traffic signal set against him is required to look and to continue to look while crossing.¹² A pedestrian starting to cross under a

favorable signal must observe a change, if any, in the signal,¹³ and, when a signal changes while he is rightfully in the act of crossing, a failure to exercise due care to observe released traffic may constitute negligence.¹⁴

(3) Reliance on Care of Motorist

In the absence of notice or knowledge to the contrary, a pedestrian crossing a street or highway on a favorable traffic signal has a right to assume that operators of approaching vehicles will obey the law and will not disregard the signal.

In the absence of notice or knowledge to the contrary,¹⁵ a pedestrian crossing a street or highway on a favorable signal has a right to assume that operators of approaching vehicles will obey the law¹⁶ and will observe and not disregard the signal,¹⁷ and he is not required to anticipate that a motorist will not comply with the traffic signal.¹⁸ Such a person may properly assume that due precautions for his safety will be taken,¹⁹ such as that approaching vehicles will be operated at a reasonable rate of speed,²⁰ that a reasonably careful lookout for him will be kept,²¹ and that the vehicle will be under

3. La.—Schatz v. Kehoe, 131 So. 66, 15 La.App. 9—Harrison v. Carlisle, 121 So. 216, 9 La.App. 517.

Crossing between intersections

- Wis.—Mauch v. Chicago, M., St. P. & Pac. Ry. Co., 280 N.W. 307, 228 Wis. 322.

Failure to observe vehicle held not negligence

- La.—Charlie Yee v. Charley Cabs, App., 158 So. 261.

4. La.—Schatz v. Kehoe, 131 So. 66, 15 La.App. 9.

5. Pa.—Schweitzer v. Scranton Bus Co., 25 A.2d 156, 344 Pa. 249—Halpert v. Earnshaw, 155 A. 299, 304 Pa. 95.

6. Mich.—Long v. Garneau, 29 N.W. 2d 696, 319 Mich. 291.

Negligence of motorist in failing to yield right of way to pedestrian who had started to cross on favorable signal does not absolve pedestrian from looking while crossing street.—Long v. Garneau, supra.

7. Mich.—Long v. Garneau, supra. Neb.—Halliday v. Raymond, 22 N.W. 2d 614, 147 Neb. 179.

8. Pa.—Dando v. Brobst, 177 A. 831, 318 Pa. 325.

- Tex.—Townsend v. Young, Civ.App., 114 S.W.2d 296.

9. Ala.—Montgomery City Lines v. Scott, 26 So.2d 200, 248 Ala. 47. Neb.—Halliday v. Raymond, 22 N.W.2d 614, 147 Neb. 179.

- Wash.—Gable v. Field, 66 P.2d 356, 189 Wash. 526.

10. Tex.—Seinsheimer v. Burkhardt, 122 S.W.2d 1063, 132 Tex. 336.

11. Pa.—Newman v. Protective Motor Service Company, 148 A. 711, 298 Pa. 509—Mantia v. Pearlman, 91 Pa.Super. 478.

- Tex.—J. C. Penney Co. v. Oberpriller, Civ.App., 163 S.W.2d 1067, reversed on other grounds 170 S.W.2d 607, 141 Tex. 128.

12. Pa.—Taylor v. Philadelphia Rural Transit Co., 170 A. 327, 111 Pa.Super. 575.

Due care held shown

- Mass.—Nolan v. Shea, 45 N.E.2d 956, 312 Mass. 631.

13. Mich.—Long v. Garneau, 29 N.W.2d 696, 319 Mich. 291—Sloan v. Ambrose, 1 N.W.2d 505, 300 Mich. 188.

14. Mich.—Sloan v. Ambrose, supra—De Jager v. Vandenberg, 284 N.W. 673, 288 Mich. 136.

- R.I.—Gardiner v. Romano, 173 A. 84, 54 R.I. 348.

15. Ohio.—Juergens v. Bell Distributing, 21 N.E.2d 90, 135 Ohio St. 335.

- Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022.

16. Cal.—Walker v. Mason, 293 P. 125, 109 Cal.App. 361.

- Ohio.—Juergens v. Bell Distributing, 21 N.E.2d 90, 135 Ohio St. 335—Focht v. Justis, 77 N.E.2d 506, 81 Ohio App. 297.

- Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881—Gable v. Field, 66 P.2d 356, 189 Wash. 526—

- Woods v. Greenblatt, 1 P.2d 880, 163 Wash. 433—Church v. Shaffer, 297 P. 1097, 162 Wash. 126.

17. U.S.—Railway Express Agency v. Little, C.C.A.Pa., 50 F.2d 59, 75 A.L.R. 963.

- Cal.—King v. Unger, 78 P.2d 255, 25 Cal.App.2d 632.

- Iowa.—Dougherty v. McFee, 265 N.W. 176, 221 Iowa 391.

- Pa.—Harrington v. Pugarelli, 25 A. 2d 149, 344 Pa. 204—Villiger v. Yellow Cab Co. of Pittsburgh, 163 A. 537, 309 Pa. 213—Newman v. Protective Motor Service Co., 148 A. 711, 298 Pa. 509—Vivino v. Nevius, 98 Pa.Super. 574.

- Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022—Gable v. Field, 66 P.2d 356, 189 Wash. 526—Woods v. Greenblatt, 1 P.2d 880, 163 Wash. 433—Church v. Shaffer, 297 P. 1097, 162 Wash. 126.

18. Pa.—Newman v. Protective Motor Service Co., 148 A. 711, 298 Pa. 509.

- Tex.—Seinsheimer v. Burkhardt, 122 S.W.2d 1063, 132 Tex. 336—Brooks v. Enriquez, Civ.App., 172 S.W.2d 794, error refused.

19. Ohio.—Focht v. Justis, 77 N.E. 2d 506, 81 Ohio App. 297.

- Pa.—Newman v. Protective Motor Service Co., 148 A. 711, 298 Pa. 509.

20. Ill.—Petersen v. General Rug & Carpet Cleaners, 77 N.E.2d 58, 333 Ill.App. 47.

21. Ill.—Petersen v. General Rug & Carpet Cleaners, supra.

such control as will enable its operator to avoid colliding with him.²² He has a right to assume that his lawful progress will not be interfered with²³ and that the right of way will be yielded to him²⁴ until he has reached the opposite curb.²⁵

§ 471. — Duty to Stop, Look, and Listen

- a. In general
- b. Extent of duty
- c. Failure to see or hear approaching vehicle

a. In General

Although a pedestrian about to cross a public street or highway is not under an absolute duty to stop, look, and listen for approaching motor vehicles, in certain circumstances such precautions must be taken and the fail-

ure to do so may constitute negligence or negligence per se.

There is no imperative rule requiring a pedestrian about to cross a public street or highway to stop, or to look and listen for approaching motor vehicles under penalty of being deemed negligent as a matter of law on omission thereof,²⁶ and whether or not a failure so to do is negligence is ordinarily a question of fact under the circumstances, as discussed *infra* § 527. However, under the rule discussed *supra* § 468 b requiring pedestrians to exercise reasonable care for their own safety and in so doing to make reasonable use of their faculties and intelligence to discover impending danger, a pedestrian crossing a street or highway ordinarily is obliged to make reasonable use of his senses to avoid injury,²⁷ and, under certain circumstances, the duty may exist to stop²⁸ and look²⁹ for ap-

22. Ill.—Petersen v. General Rug & Carpet Cleaners, *supra*.

The law does not require a pedestrian to anticipate that a vehicle will change its course and strike him.—Brooks v. Enriquez, Tex.Civ.App., 172 S.W.2d 794, error refused.

23. Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022—Woods v. Greenblatt, 1 P.2d 880, 163 Wash. 433—Church v. Shaffer, 297 P. 1097, 162 Wash. 126.

24. Ill.—Petersen v. General Rug & Carpet Cleaners, 77 N.E.2d 58, 333 Ill.App. 47.

Iowa.—Dougherty v. McFee, 265 N.W. 176, 221 Iowa 391.

La.—Tooke v. Muslow Oil Co., App., 183 So. 97.

25. Wash.—Gable v. Field, 66 P.2d 356, 189 Wash. 526.

26. Ala.—Montgomery City Lines v. Scott, 26 So.2d 200, 248 Ala. 47—Tillery v. Walker, 114 So. 137, 216 Ala. 676—Shafer v. Myers, 112 So. 230, 215 Ala. 678.

Cal.—Connolly v. Zaft, 130 P.2d 752, 55 Cal.App.2d 383—Bosse v. Marye, 250 P. 693, 80 Cal.App. 109.

Iowa.—Huffman v. King, 268 N.W. 144, 222 Iowa 150.

Me.—Sturtevant v. Ouellette, 140 A. 368, 126 Me. 558.

Mass.—Tookmanian v. Fanning, 31 N.E.2d 538, 308 Mass. 162.

Pa.—Lowery v. Zuker, 157 A. 339, 102 Pa.Super. 581.

Vt.—Eagan v. Douglas, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 13.

Va.—Doss v. Rader, 46 S.E.2d 434, 187 Va. 231.

42 C.J. p 1150 note 98.

Reliance on husband

Wife was not chargeable with contributory negligence in accompany-

ing husband across street, being warranted under circumstances in relying on his having looked in both directions.—Goldschmidt v. Schumann, 155 A. 297, 304 Pa. 172.

27. Conn.—Alston v. Consolidated Motor Lines, 173 A. 899, 118 Conn. 707.

Me.—Bechard v. Lake, 11 A.2d 267, 136 Me. 385.

Mich.—Carter v. C. F. Smith Co., 281 N.W. 380, 285 Mich. 621.

Omission held immaterial

Whether pedestrian looked before starting across street was immaterial, if pedestrian, as reasonably prudent person, would have been justified in trying to cross had he looked before starting.—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1.

28. Cal.—Bosse v. Marye, 250 P. 693, 80 Cal.App. 109.

29. Ala.—Montgomery City Lines v. Scott, 26 So.2d 200, 248 Ala. 47—Shafer v. Myers, 112 So. 230, 215 Ala. 678.

Cal.—Connolly v. Zaft, 130 P.2d 752, 55 Cal.App.2d 383—Reed v. Stroh, 128 P.2d 839, 54 Cal.App.2d 183—Fischer v. Keen, 110 P.2d 693, 43 Cal.App.2d 244—Gibb v. Cleave, 55 P.2d 938, 12 Cal.App.2d 468—Horton v. Stoll, 40 P.2d 603, 3 Cal.App.2d 687—Patanila v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600—Ching Wing v. Kishi, 268 P. 483, 92 Cal.App. 495—Bosse v. Marye, 250 P. 693, 80 Cal.App. 109.

Conn.—La Femina v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 45 A.2d 158, 122 Conn. 420—Keeling v. Neuss Floor Covering Co., 14 A.2d 33, 126 Conn. 716.

D.C.—Boase v. Windridge & Handy, 102 F.2d 628, 70 App.D.C. 24.

Ky.—Trainor's Adm'r v. Keller, 79 S.W.2d 232, 257 Ky. 840.

La.—Charles v. Sullivan, App., 159 So. 756—Herrin v. Cicardo, 1 La. App. 587.

Mich.—Malone v. Vining, 21 N.W.2d 144, 313 Mich. 315—Anderson v. Bliss, 274 N.W. 809, 281 Mich. 323—Brodie v. City of Detroit, 267 N.W. 576, 275 Mich. 626—Richardson v. Williams, 228 N.W. 766, 249 Mich. 350—Stiegel v. Detroit Cab Co., 225 N.W. 601, 246 Mich. 620.

Miss.—Meridian Coca-Cola Co. v. Watson, 134 So. 824, 161 Miss. 108—Hall v. Caughran, 134 So. 576, 160 Miss. 571.

N.M.—Russell v. Davis, 37 P.2d 536, 38 N.M. 533.

N.Y.—Cherubino v. Meenan, 171 N.E. 708, 253 N.Y. 462.

Ohio.—Martin Baking Co. v. Tompkinson, 161 N.E. 288, 27 Ohio App. 355.

Pa.—Ruchesi v. Wisswesser, 50 A.2d 291, 355 Pa. 400—Miller v. Gault, 29 A.2d 71, 345 Pa. 474—Guy v. Lane, 26 A.2d 327, 345 Pa. 40—Schweitzer v. Scranton Bus Co., 25 A.2d 156, 344 Pa. 249—Dando v. Brobst, 177 A. 831, 318 Pa. 325—Dorris v. Bridgman & Co., 145 A. 827, 296 Pa. 198—Curran v. Battaglini, 39 A.2d 630, 156 Pa.Super. 173—Pinto v. Bell Fruit Co., 24 A.2d 768, 148 Pa.Super. 132—Peiffer v. Kreider, 169 A. 899, 111 Pa. Super. 30—Johnston v. McDade, 88 Pa.Super. 377—Kirk v. Gerbo, Com. Pl., 9 Sch.Reg. 34.

Tex.—Blunt v. H. G. Berning, Inc., Civ.App., 211 S.W.2d 778, error refused.

Vt.—McKirryher v. Yager, 24 A.2d 331, 112 Vt. 336—Eagan v. Douglas, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 13.

Wash.—Farrow v. Ostrom, 117 P.2d 963, 10 Wash.2d 666—Kuhnhausen v. Woodbeck, 97 P.2d 1099, 2 Wash. 2d 338—Estill v. Berry, 74 P.2d

proaching vehicles, and, likewise the duty may exist to listen³⁰ for approaching motor vehicles.

The failure of a pedestrian crossing a street or highway to stop, look, and listen when necessary has been variously held to constitute negligence,³¹ negligence per se,³² or merely evidence of negligence.³³ The violation of a regulation requiring a pedestrian to look in both directions before stepping into or on a public road or highway may constitute negligence per se,³⁴ and the effect of a failure to comply with the regulation does not depend on whether the regulation is usually obeyed or violated,³⁵ or on whether the pedestrian did or did not intend to violate the regulation.³⁶ In accordance with the foregoing rules, it has been held that a pedestrian may be guilty of contributory negligence where, without looking, he steps suddenly into a roadway,³⁷ or crosses with his head down,³⁸ or reading a newspaper,³⁹ or with an umbrella so held as to cut off his vision,⁴⁰ or where, having advanced into the traveled portion of a street, he steps back into the path of a motor vehicle without observing whether the way is clear.⁴¹

Reliance on due care of motorist. In accordance with the rule as to the right of a pedestrian crossing a street or highway to rely on the exercise of due care by motor vehicles using the highway, discussed generally supra § 459, the right to presume that the operators of such vehicles will comply with the law

may be considered in determining whether the failure of a pedestrian to look and listen was negligence under the circumstances.⁴² A pedestrian who crosses a busy street without looking cannot assume that a motorist will not be negligent, where the pedestrian by looking would have discovered the negligence in time to avoid injury.⁴³

b. Extent of Duty

(1) In general

(2) Duty to look again or continue to look

(1) In General

A pedestrian's duty to look on crossing a street or highway arises at the curb or at such time and place as will inform him of traffic conditions, and he must look in an effective manner in the directions from which danger may be anticipated.

The duty of a pedestrian, in the exercise of reasonable care, to stop, look, and listen on crossing a street or highway, ordinarily arises at the curb when he is about to step into the traveled portion of the street,⁴⁴ or at such time and place as will reasonably be of some benefit in protecting him and informing him of traffic conditions;⁴⁵ but it has been held that he is not required to look at some precisely fixed moment for a particular danger before entering on the highway.⁴⁶ The pedestrian crossing a street or highway is required to

482, 193 Wash. 10—Moseley v. Mills, 259 P. 715, 145 Wash. 253.

Wis.—Mertens v. Lake Shore Yellow Cab & Transfer Co., 218 N.W. 85, 195 Wis. 646.

42 C.J. p 1151 note 4.

Standard of care

Generally, whether pedestrian crossing street maintained a proper lookout is to be determined by what an ordinarily prudent person would do under similar circumstances—Norris Bros. v. Mattinson, Tex.Civ. App., 145 S.W.2d 204.

30. Cal.—Bosse v. Marye, 250 P. 693, 80 Cal.App. 109.

Pa.—Johnston v. McDade, 88 Pa. Super. 377.

42 C.J. p 1151 note 4.

31. Cal.—Weissman v. Seehusen, 131 P.2d 10, 55 Cal.App.2d 391—Ching Wing v. Kishi, 268 P. 483, 92 Cal. App. 495.

Fla.—Prior v. Pounds, 151 So. 890, 113 Fla. 308.

La.—Paquet v. Renken, App., 30 So. 2d 218—Gomez v. State Farm Mut. Auto Ins. Co., App., 191 So. 139—Paul v. Brady, 139 So. 492, 19 La. App. 37—Robichaux v. Dorion, 134 So. 784, 17 La.App. 159—Busch v. Scimeca, 8 La.App. 454.

Mich.—Tio v. Molter, 247 N.W. 772, 262 Mich. 655.

Pa.—Jackson v. Chapman, Com Pl., 48 Dauph Co. 145—Teel v. Erie Coach Co., Com Pl., 21 Erie Co. 82.

Wis.—Salsich v. Hunn, 238 N.W. 394, 205 Wis. 524, 79 A.L.R. 1069.

42 C.J. p 1151 note 4.

32. U.S.—McElwee v. Curtiss-Wright Corp., D.C.Mo., 70 F.Supp. 97.

Cal.—Connolly v. Zaft, 130 P.2d 752, 55 Cal.App.2d 383.

N.Y.—Pecora v. Marique, 79 N.Y.S.2d 350, 273 App Div. 705.

Or.—Martin v. Harrison, 186 P.2d 534.

Pa.—Rucheski v. Wisswasser, 50 A. 2d 291, 355 Pa. 400—Morris v. White, Com.Pl., 33 Luz.Leg.Reg. 437.

R.I.—Kalfy v. Udin, 159 A. 644, 52 R.I. 191.

Wash.—Kuhnhausen v. Woodbeck, 97 P.2d 1099, 2 Wash.2d 338.

33. Me.—Sturtevant v. Ouellette, 140 A. 368, 126 Me. 558.

34. Ohio.—Wolfe v. Baskin, 28 N.E. 2d 629, 137 Ohio St. 284.

35. Ohio.—Michalsky v. Gaertner, 5 N.E.2d 181, 53 Ohio App. 341.

36. Ohio.—Michalsky v. Gaertner, supra.

37. N.J.—Joyce v. Englehart, 153 A. 96, 9 N.J. Misc. 168.

42 C.J. p 1151 note 5.

38. Conn.—Wolfe v. Ives, 76 A. 526, 83 Conn. 174, 19 Ann.Cas. 752.

Mich.—Fulton v. Mohr, 166 N.W. 851, 200 Mich. 538.

39. N.J.—Petras v. Public Service Transp. Co., 136 A. 189, 5 N.J. Misc. 237.

40. Cal.—Atkins v. Bouchet, 223 P. 87, 65 Cal.App. 94.

La.—Lester v. Roach, 99 So. 707, 155 La. 947.

41. Wash.—Shanley v. Hadfield, 213 P. 932, 124 Wash. 192.

42. Tenn.—Union Transfer Co. v. Finch, 64 S.W.2d 222, 16 Tenn.App. 293.

43. Mo.—Danzo v. Humfeld, 180 S. W.2d 722.

44. Pa.—Espenshade v. McCorkle, 189 A. 311, 324 Pa. 528.

45. Pa.—Espenshade v. McCorkle, supra.

Wash.—Moseley v. Mills, 259 P. 715, 145 Wash. 253.

46. Tex.—Merritt v. Phoenix Refining Co., Civ.App., 103 S.W.2d 415.

make a proper and efficient observation⁴⁷ and look in such a manner that looking will be effective,⁴⁸ but his observation need not extend beyond the distance within which vehicles moving at a lawful speed will endanger him.⁴⁹

Direction of observation. Under the duty to exercise reasonable care in observing approaching vehicles, the pedestrian is required to look in the directions of anticipated danger,⁵⁰ but he is not guilty of contributory negligence as a matter of law in not keeping a lookout in a direction where automobiles are not to be anticipated.⁵¹ The pedestrian may be under a duty to look both to the left and the right before walking into the street,⁵² and, on reaching the center of the street or a point reasonably outside the zone of danger from vehicles coming from one direction, it ordinarily becomes his duty, in the exercise of due care, to look for automobiles coming in the opposite stream of traffic.⁵³

While a pedestrian is especially required to exercise care with reference to vehicles traveling forward on the right side of the street, he is not relieved from the duty of using ordinary care to protect himself against automobiles which may be backing into a parking place,⁵⁴ and he is guilty of negligence in going into the street to the rear of a vehicle which is backing up, when he should have discovered its movement and direction.⁵⁵ However, a pedestrian who has observed a motor vehicle passing is not guilty of negligence per se in not continuing to watch it to see that it does not re-

verse its motion and back against him⁵⁶ or suddenly turn about and return in the opposite direction.⁵⁷

A pedestrian crossing a street or highway is not guilty of negligence as a matter of law in failing to observe a motor vehicle traveling upon the wrong side of the roadway,⁵⁸ or swerving to the wrong side thereof,⁵⁹ when he has received no warning of the approaching vehicle⁶⁰ and has no reason to anticipate injury therefrom.⁶¹ Under the circumstances, however, the pedestrian may be negligent in failing to see the vehicle traveling on the wrong side of the street,⁶² and he is not relieved of the duty to anticipate the approach of a motor vehicle which is rightfully using the left-hand side of the street while overtaking and passing another vehicle headed in the same direction.⁶³

(2) Duty to Look Again or Continue to Look

A pedestrian crossing a street or highway ordinarily is not required to exercise constant vigilance and he is not necessarily negligent in failing to look a second time after having looked and seen no vehicles approaching or in failing to look continuously, but under some circumstances the failure to look again or to continue to look may constitute negligence.

A pedestrian crossing or about to cross a street or highway is not required to exercise constant vigilance,⁶⁴ nor does he have the burden of looking any certain number of times before crossing.⁶⁵ Accordingly, a pedestrian who has looked for approaching motor vehicles and seen none is not necessarily and as a matter of law negligent in failing to look a second time⁶⁶ or to continue to look there-

47. Mich.—Malone v. Vining, 21 N. W.2d 144, 313 Mich. 315.

Wash.—Hamblet v. Soderburg, 65 P. 2d 1267, 189 Wash. 449.

48. Ohio.—Chevalley v. Degar, App., 52 N.E.2d 544.

49. N.J.—Goldenberg v. Reggio, 171 A. 677, 112 N.J.Law 440—Rochford v. Stankewicz, 158 A. 386, 108 N. J.Law 265.

50. Cal.—Reed v. Stroh, 128 P.2d 829, 54 Cal.App. 183—Fischer v. Keen, 110 P.2d 693, 43 Cal.App.2d 244—Gibb v. Cleave, 55 P.2d 938, 12 Cal.App.2d 468—Horton v. Stoll, 40 P.2d 603, 3 Cal.App.2d 687—Ching Wing v. Kishl, 268 P. 483, 92 Cal.App. 495.

D.C.—Boase v. Windridge & Handy, 102 F.2d 628, 70 App.D.C. 24.

La.—Jones v. American Mut. Liability Ins. Co., App., 185 So. 509, annulled on other grounds 189 So. 169.

Wash.—Estill v. Berry, 74 P.2d 482, 193 Wash. 10.

51. Cal.—Hyams v. Simoncelli, 106 P.3d 68, 41 Cal.App.2d 126.

Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

52. R.I.—Cunningham v. Walsh, 163 A. 223, 53 R.I. 23.

42 C.J. p 1151 note 4 [a].

53. Cal.—Strange v. Los Angeles Examiner, 12 P.2d 678, 124 Cal. App. 419.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

42 C.J. p 1151 note 10.

54. Cal.—Sheldon v. James, 166 P. 8, 175 Cal. 474, 2 A.L.R. 1493.

55. Cal.—Sheldon v. James, supra. 42 C.J. p 1152 note 24.

56. Wash.—Westervelt v. Schwabacher, 176 P. 545, 104 Wash. 418.

57. Pa.—Moses v. Quaker City Cab Co., 84 Pa.Super. 157.

58. Cal.—Hendricks v. Pappas, 187 P.2d 436, 82 Cal.App.2d 774—Strange v. Los Angeles Examiner, 12 P.2d 678, 124 Cal.App. 419.

42 C.J. p 1152 note 25.

59. Pa.—Kennelly v. Waropoyak, 109 A. 608, 266 Pa. 94.

60. N.J.—Fox v. Great Atlantic, etc., Tea Co., 87 A. 339, 84 N.J.Law 726.

61. Cal.—Hyams v. Simoncelli, 106 P.2d 68, 41 Cal.App.2d 126—Park v. Orblison, 184 P. 428, 43 Cal.App. 74.

62. Wis.—Brown v. Redmond, 203 N. W. 739, 187 Wis. 67.

63. Pa.—Weaver v. Pickering, 123 A. 777, 279 Pa. 214.

64. Cal.—Whicker v. Crescent Auto Co., 66 P.2d 749, 20 Cal.App.2d 240. Iowa.—Lawlor v. Gaylord, 10 N.W.2d 531, 233 Iowa 834.

Ky.—Layne v. Cottle, 150 S.W.2d 684, 286 Ky. 221.

Vt.—Isor v. Brigham, 17 A.2d 236, 111 Vt. 438—Duchaine v. Ray, 6 A. 2d 28, 110 Vt. 313—Eagan v. Douglas, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 18—Aiken v. Metcalf, 97 A. 669, 90 Vt. 196.

65. W.Va.—Skaff v. Dodd, 44 S.E.2d 621—Ritter v. Hicks, 135 S.E. 601, 102 W.Va. 541.

66. Iowa.—Corpus Juris cited in Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 583, 225 Iowa 89, rehear-

for.⁶⁷ He need not look in all directions at all times,⁶⁸ and is not necessarily negligent because he does not look in a particular direction at a given moment.⁶⁹

The duty to exercise reasonable care under the circumstances may, however, in some situations, require a pedestrian, crossing or about to cross a street or highway, who has looked for vehicles and seen none to look again⁷⁰ or to continue looking,⁷¹ and the omission so to do may constitute negligence.⁷² Thus, a pedestrian who looked and saw no automobiles approaching at the time he started into a roadway has been held guilty of negligence in failing to look during his crossing for a car which he could not have seen from the curb,⁷³ in proceeding without observing further when he saw a light through an umbrella which he held in such manner as partially to obscure his vision,⁷⁴ or in walking a considerable distance over a much-traveled street without again looking;⁷⁵ and one who has looked once in the direction from which an automobile

would naturally be expected to come and then looked in the opposite direction and stepped into the street without further observation may be negligent in so doing.⁷⁶

c. Failure to See or Hear Approaching Vehicle

Generally, a pedestrian crossing a street or highway will be charged with having seen and heard that which could and should have been seen and heard, but the failure to see or hear an approaching vehicle does not always constitute negligence.

A pedestrian crossing a street or highway will be charged with having seen and heard that which he could and should have seen and heard, and this is true whether he did look and listen⁷⁷ or whether he failed to look and listen,⁷⁸ and one cannot be credited who says he looked and did not see an automobile, which, if he had looked, he in the nature of things must have seen.⁷⁹ Accordingly, the pedestrian's failure to see a vehicle in plain view and to avoid injury therefrom may constitute negligence.⁸⁰ However, a pedestrian about to cross a

ing denied 281 N.W. 504, 225 Iowa 89.

Minn.—Reier v. Hart, 277 N.W. 405, 202 Minn. 154.

Ohio.—Titus v. Stouffer, App., 40 N. E.2d 178.

42 C.J. p 1152 note 12.

67. Cal.—Grant v. Ryon, 53 P.2d 170, 11 Cal.App.2d 101—Wright v. Foreman, 261 P. 481, 86 Cal.App. 595.

Iowa.—Lawlor v. Gaylord, 10 N.W.2d 531, 233 Iowa 834—Swan v. Dalley-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89—Huffman v. King, 268 N.W. 144, 222 Iowa 150.

Pa.—Altman v. Kelly, 9 A.2d 423, 336 Pa. 481.

Va.—Sawyer v. Blankenship, 169 S.E. 551, 140 Va. 651.

W.Va.—Yuncke v. Welker, 36 S.E.2d 410, 128 W.Va. 299.

42 C.J. p 1152 note 13.

Duty to watch approaching car see supra § 470.

68. Cal.—Lincoln v. Williams, 6 P. 2d 563, 119 Cal.App. 498—Rinker v. Carl, 283 P. 317, 102 Cal.App. 436.

69. Iowa.—Corpus Juris cited in

Swan v. Dalley-Luce Auto Co., 277 N.W. 580, 225 Iowa 89.

42 C.J. p 1152 note 14.

70. Cal.—Taha v. Finegold, 184 P.2d 533, 81 Cal.App.2d 536.

Wash.—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1—Olsen v. Peerless Laundry, 191 P. 766, 111 Wash. 860.

Time of observation

Pedestrian crossing highway should not be permitted to rely on observation made so long prior to entry of

zone of danger as to be wholly ineffective, especially where his vision is obstructed.—Eagan v. Douglas, 175 A. 222, 107 Vt. 18, followed in 175 A. 225, 107 Vt. 10.

71. Mich.—Malone v. Vining, 21 N. W.2d 144, 313 Mich. 315—Richardson v. Williams, 228 N.W. 766, 249 Mich. 350.

Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.

Pa.—Ruchesi v. Wisswesser, 50 A.2d 291, 355 Pa. 400—Guy v. Lane, 26 A.2d 327, 345 Pa. 40—Curran v. Battagline, 39 A.2d 630, 156 Pa.Super. 173—Skrutski v. Rosar, Com. Pl., 45 Lack Jur 130.

Wash.—Farrow v. Ostrom, 117 P.2d 963, 10 Wash.2d 666—Olsen v. Peerless Laundry, 191 P. 766, 111 Wash. 860.

Rule held inapplicable

Where pedestrian, before he attempted to cross street, looked a second time for approaching vehicles and again in middle of street, but on no occasion observed danger approaching, and had reached a point almost at opposite curb line before being struck by oncoming automobile, rule that pedestrian must look before undertaking a street crossing and continue to look had no application.—Smith v. Wistar, 194 A. 486, 327 Pa. 419.

72. Iowa.—Hicks v. Burch, 2 N.W.2d 277, 231 Iowa 853—Ward v. Zeranek, 289 N.W. 443, 227 Iowa 918.

Pa.—Skrutski v. Rosar, Com.Pl., 45 Lack.Jur. 130.

42 C.J. p 1152 note 16.

73. Mich.—Halzle v. Hargreaves, 206 N.W. 356, 233 Mich. 234.

74. Cal.—Ogden v. Lee, 215 P. 122, 61 Cal.App. 493.

75. Conn.—Russell v. Vergason, 111 A. 625, 95 Conn. 431.

42 C.J. p 1152 note 19.

76. Cal.—Moss v. H. R. Boynton Co., 186 P. 631, 44 Cal.App. 474.

42 C.J. p 1152 note 20.

77. Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

La.—Owens v. Tisdale, App., 153 So. 564.

N.H.—L'Heureux v. Desmarais, 197 A. 327, 89 N.H. 237.

Pa.—Dando v. Brobst, 177 A. 831, 318 Pa. 325.

W.Va.—Yoder v. Charleston Transit Co., 192 S.E. 349, 119 W.Va. 61.

78. Conn.—Paskewicz v. Hickey, 149 A. 671, 111 Conn. 219.

Wash.—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1.

79. Mich.—Arnell v. Gordon, 207 N. W. 825, 234 Mich. 140.

Pa.—Guy v. Lane, 26 A.2d 327, 345 Pa. 40—Dando v. Brobst, 177 A. 831, 318 Pa. 325.

R.I.—Zielinski v. Riley, 199 A. 693, 61 R.I. 14.

Wis.—Mertens v. Lake Shore Yellow Cab & Transfer Co., 218 N.W. 85, 195 Wis. 646.

80. Colo.—Fabling v. Jones, 114 P. 2d 1100, 108 Colo. 144.

Conn.—Keeling v. Neuss Floor Covering Co., 14 A.2d 33, 126 Conn 716.

La.—Owens v. Tisdale, App., 153 So. 564.

Mich.—Brown v. Lilli, 274 N.W. 751, 281 Mich. 170.

Ohio.—Martin Baking Co. v. Tomp-

street or highway who has looked and listened with reasonable care for approaching motor vehicles is not as a matter of law negligent in all cases in failing to see or hear an approaching automobile,⁸¹ and under such circumstances he is not necessarily negligent in proceeding to cross,⁸² in view of his right to assume that an operator of a motor vehicle will drive at a reasonable speed and with due care,⁸³ especially after he has reached a point at which there is adequate room for passage of an automobile on either side of him.⁸⁴

A pedestrian who sees that no vehicle is approaching within the distance which would be covered by a vehicle operated at a lawful rate of speed during the time the pedestrian is crossing is not negligent as a matter of law in failing to see an automobile which approaches at excessive speed;⁸⁵ nor is he negligent per se in failing to observe a motor vehicle without lights,⁸⁶ or with its lights dimmed⁸⁷ or obscured,⁸⁸ as by a brightly lighted streetcar around which it is passing,⁸⁹ even though

there is nothing to distract his attention from it.⁹⁰

§ 472. —Standing or Sitting in Highway

- a. In general
- b. Duty to look or listen
- c. Reliance on care of operator

a. In General

Ordinarily, a pedestrian is not negligent as a matter of law in sitting or standing in the street or highway, but such a person is required to use ordinary or reasonable care for his own safety and protection.

Unless prohibited from so doing by a statute or municipal ordinance, a person is not negligent as a matter of law in sitting or standing in the street or highway,⁹¹ as when he is inspecting a vehicle to discover the cause of trouble⁹² or to remedy it,⁹³ or while conversing with another person.⁹⁴ Also, it does not constitute negligence as a matter of law for a person to stand on the highway for the purpose of warning travelers of the presence of a disabled vehicle⁹⁵ or for the purpose of aiding in

kinson, 161 N.E. 288, 27 Ohio App. 355.

Pa.—Guy v. Lane, 26 A.2d 327, 345 Pa. 40—Glancy v. Meadville Bread Co., 17 A.2d 395, 340 Pa. 452—Dando v. Brobst, 177 A. 831, 318 Pa. 325—Schulte v. Yellow Cab Co. of Philadelphia, 158 A. 184, 104 Pa.Super. 130.

W.Va.—Yoder v. Charleston Transit Co., 192 S.E. 349, 119 W.Va. 61.

81. Mass.—Barrett v. Checker Taxi Co., 160 N.E. 792, 263 Mass. 252. N.J.—Puorro v. Salerno, 162 A. 527, 109 N.J.Law 381.

42 C.J. p 1153 note 36. Failure to see where view is obstructed see supra § 470 E.

Standard of care

The question is whether a reasonably prudent man in such situation would reasonably believe that he could cross in safety.—Rosen v. Goldstein, 24 A.2d 840, 128 Conn. 605.

82. Wis.—White v. Kane, 192 N.W. 57, 179 Wis. 478.

42 C.J. p 1153 note 37.

83. Pa.—Smith v. Wistar, 194 A. 486, 327 Pa. 419—Lonick v. Davis, Com.Pl., 37 Luz.Leg.Reg. 192.

84. Mass.—Buoniconti v. Lee, 124 N.E. 791, 234 Mass. 73.

85. N.J.—Goldenberg v. Reggio, 171 A.2d 677, 112 N.J.Law 440.

42 C.J. p 1153 note 40.

86. Me.—Shaw v. Bolton, 419 A. 801, 122 Me. 282.

Pa.—Healy v. Shedaker, 107 A. 842, 264 Pa. 512.

87. Minn.—Johnson v. Brastad, 173 N.W. 668, 143 Minn. 332.

88. Ill.—Bruhl v. Anderson, 189 Ill. App. 461.

N.Y.—Fittin v. Sumner, 163 N.Y.S. 443, 176 App.Div. 617.

89. N.Y.—Fittin v. Sumner, supra.

90. Minn.—Johnson v. Brastad, 173 N.W. 668, 143 Minn. 332.

91. Cal.—Anthony v. Hobbie, 155 P. 2d 826, 25 Cal.2d 814—Armstrong v. Sengo, 61 P.2d 1188, 17 Cal.App. 2d 300.

La.—Neyrey v. Maillet, App., 21 So.2d 158.

N.H.—Adams v. Severance, 41 A.2d 233, 93 N.H. 289.

N.Y.—Estes v. Slater, 3 N.Y.S.2d 287, 254 App.Div. 634, followed in 3 N.Y.S.2d 288, 254 App.Div. 634, affirmed 18 N.E.2d 690, 279 N.Y. 744—Theil v. Radetzky, 2 N.Y.S.2d 867, 254 App.Div. 604.

Pa.—Andrukut v. Packard Lackawanna Auto Co., 27 A.2d 453, 149 Pa. Super. 550.

42 C.J. p 1156 note 10.

Pedestrian stopping to allow passage of vehicle before crossing street see supra § 470.

Person boarding or alighting from street car or other vehicle see infra §§ 477–482.

Not a trespasser

A pedestrian standing in or on the public highway is not a trespasser. Ala.—Cooper v. Agee, 132 So. 173, 222 Ala. 334.

Iowa.—Vass v. Martin, 226 N.W. 920, 209 Iowa 870.

Duty to leave highway

Pedestrian standing near extreme edge of paved road facing traffic was not required by any rule of law to leave paved road and enter deep snow on the side to avoid a possible accident which approaching motorist could have avoided by turning to

the left.—Fotterall v. Hilleary, 13 A. 2d 358, 178 Md. 335.

Person seated in or near roadside stand

Mich.—Heller v. Holtrop, 281 N.W. 434, 285 Mich. 570.

Person taking pictures

Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal.App. 2d 566.

Sitting on running board of a parked automobile belonging to another, even though constituting a trespass, does not in itself constitute contributory negligence so as to preclude recovery for injuries sustained.—Morrison v. Roush, 158 S.E. 514, 110 W.Va. 398.

92. Mass.—Bellenger v. Nally, 185 N.E. 346, 282 Mass. 533.

Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

Mo.—Walden v. Stone, App., 223 S.W. 136.

93. Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

42 C.J. p 1157 note 14.

94. Mass.—Millay v. Town Taxi, Inc., 136 N.E. 127, 242 Mass. 314. 42 C.J. p 1157 note 15.

95. La.—Bates v. Hayden National Casualty Co., Intervenor, App., 188 So. 751.

Mich.—Hanser v. Youngs, 180 N.W. 409, 213 Mich. 508.

Failure to leave sufficient clearance

Where lights on plaintiff's truck suddenly went out at night, parking of truck on paved portion of highway without leaving sufficient clearance for approaching traffic did not render plaintiff, who was struck by truck approaching from rear while

the removal of an injured animal.⁹⁶ Nevertheless, a pedestrian may not, with impunity, stand on a highway in the face of a known approaching vehicle,⁹⁷ but, like every other user of the highway, he is required to use ordinary or reasonable care for his own safety and protection,⁹⁸ or that degree of care which a reasonably prudent person would exercise under the same or similar circumstances to avoid danger.⁹⁹ If he fails to use such care he cannot recover for injuries to which such failure contributes,¹ but a neglect of duty not proximately contributing to the accident will not bar recovery.²

The amount of care required of a person standing or sitting in the highway is commensurate with the danger involved,³ and whether reasonable care has been exercised depends on all the circumstances.⁴ Among the elements to be considered are the type of highway, its locality, the mode of travel, the amount of traffic, the time of the occurrence, the

weather conditions then existing, the purpose for which plaintiff was on the highway, and his opportunity to avoid injury.⁵ Ordinarily a person standing in a place of safety who steps in front of an automobile is guilty of negligence,⁶ and it is also negligence to make no effort to avoid being hit by an approaching vehicle.⁷

b. Duty to Look or Listen

A person standing or sitting in the highway must exercise ordinary or reasonable care to observe approaching motor vehicles; but such care does not require that a constant lookout be kept.

A person standing or sitting in the highway is required to use ordinary or reasonable care to observe the approach of motor vehicles,⁸ and a failure to do so may render him guilty of contributory negligence.⁹ So it may constitute negligence for a person to stand in a position of imminent or obvious danger and remain inattentive to approaching ve-

he was putting out a lighted flare, guilty of contributory negligence, notwithstanding conflicting evidence as to position of stalled truck.—*Bates v. Hayden, National Casualty Co., Intervenor, 1st App., 188 So. 751.*

Regulation held inapplicable

Statute requiring a pedestrian to walk on left side of highway did not apply to plaintiff who, while placing a lighted flare back of his stalled truck, was struck by another truck approaching from rear, since plaintiff was acting within statute relating to placing of flares.—*Bates v. Hayden, National Casualty Co., Intervenor, supra.*

96. Ohio.—*Van Sickle v. Walper, 22 N.E.2d 585, 61 Ohio App. 366.*

97. Pa.—*Koppenhaver v. Swab, 174 A. 393, 316 Pa. 207.*

98. Cal.—*Catton v. Kerns, 32 P.2d 153, 138 Cal.App. 374.*

Conn.—*Larsen v. Thomas, 176 A. 400, 119 Conn. 335.*

Iowa.—*Jones v. Roach, 290 N.W. 87, 228 Iowa 129; Vass v. Martin, 226 N.W. 920, 209 Iowa 870.*

Mich.—*Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.*

Ohio.—*Van Sickle v. Walper, 22 N.E.2d 585, 61 Ohio App. 366.*

Wash.—*Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117.*

42 C.J. p 1157 note 18.

Foresight required

Where defendant's vehicle, while making a delivery and while standing unlighted and at angle to curb, sustained collision damage, and plaintiff walked into street at driver's request to inspect the damage, foresight required of plaintiff as to danger was the same as that required of truck driver, so that, where automobile thereafter struck truck and caromed

off against plaintiff, anything proving defendant's liability proved contributory negligence, and verdict for plaintiff could not stand.—*Levine v. Shell Eastern Petroleum Products, C.C.A.N.Y., 78 F.2d 292, certiorari denied 55 S.Ct. 545, 294 U.S. 719, 79 L.Ed. 1251.*

Parked vehicle about to be moved

Where plaintiff was standing in crowd near parked automobile with knowledge that it was about to be moved, plaintiff had duty to be vigilant for her own safety.—*Andrukut v. Packard Lackawanna Auto Co., 27 A.2d 453, 149 Pa.Super. 550.*

Beach as public highway

Fla.—*White v. Hughes, 190 So. 446, 139 Fla. 54.*

99. Pa.—*Koppenhaver v. Swab, 174 A. 393, 316 Pa. 207.*

Wash.—*Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117.*

The "sudden peril" doctrine, with respect to the contributory negligence of one injured while standing in the street, has been held not to extend to a person whose conduct is not the result of a sudden and spontaneous reaction to a situation of peril, without opportunity for deliberation.—*Hedgecock v. Orlowsky, 44 N.E.2d 93, 220 Ind. 390.*

1. Pa.—*Hall v. Freaney, 26 A.2d 454, 345 Pa. 45.*

Wash.—*Hawkins v. Palmer, 188 P.2d 121, 29 Wash.2d 570; Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117.*

W.Va.—*Ray v. Clawson, 14 S.E.2d 259, 123 W.Va. 99.*

42 C.J. p 1157 note 19.

2. Cal.—*Killough v. Lee, 40 P.2d 897, 4 Cal.App.2d 309.*

La.—*Perrodin v. Thibodeaux, App., 191 So. 148.*

N.H.—*Adams v. Severance, 41 A.2d 233, 93 N.H. 289.*

Tenn.—*Walkup v. Covington, 73 S.W.2d 718, 18 Tenn.App. 117.*

Violation of statute

Where pedestrians who were standing on right side of road, at night, were struck by a truck approaching from rear, the driver of which could have seen pedestrians three hundred fifty feet ahead and avoided striking them by a slight turn to left, pedestrians' violation of statute requiring them to keep on left side of highway was not a proximate cause of accident, and hence pedestrians were not guilty of contributory negligence which would bar recovery for death of pedestrian.—*Gregory v. Daniel, 4 S.E.2d 786, 173 Va. 442.*

3. Ohio.—*Van Sickle v. Walper, 22 N.E.2d 585, 61 Ohio App. 366.*

Pa.—*Greenberg v. McCusker, 35 A.2d 81, 154 Pa.Super. 36.*

4. Wash.—*Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117.*

5. Wash.—*Chadwick v. Ek, supra.*

6. Wash.—*Stephenson v. Parton, 155 P. 147, 89 Wash. 653.*

7. Iowa.—*Norris v. Lough, 251 N.W. 646, 217 Iowa 362.*

La.—*Dran v. Allied Underwriters, App., 11 So.2d 93.*

Pa.—*Andrukut v. Packard Lackawanna Auto Co., 27 A.2d 453, 149 Pa.Super. 550.*

8. Cal.—*Regan v. Los Angeles Ice, etc., Co., 189 P. 474, 46 Cal.App. 513.*

Pa.—*Koppenhaver v. Swab, 174 A. 393, 316 Pa. 207; Vuchovich v. King, Com.Pl., 9 Fay.L.J. 170.*

9. Pa.—*Greenberg v. McCusker, 35 A.2d 81, 154 Pa.Super. 36.*

hicles,¹⁰ or to fail to look for an automobile coming from the direction from which traffic would be expected to come over that part of the street in which he is stationed;¹¹ but it is not negligence as a matter of law to fail to look or listen for a vehicle traveling on the wrong side of the road.¹² Ordinary care does not, however, strictly require a person standing on the highway constantly to be on the lookout for approaching motor vehicles,¹³ especially when he is in a place of apparent safety,¹⁴ or to look for approaching vehicles where there is room for an automobile to pass him without interference;¹⁵ and one taking a position on, or immediately in front of, a plainly visible obstruction in the street is not necessarily negligent in failing to observe traffic.¹⁶ Thus, a person standing close to and just behind a parked automobile¹⁷ or in immediate proximity to a machine engaged in construction work in the highway¹⁸ is not negligent as a matter of law in failing to look for an automobile which approaches and strikes him.

c. Reliance on Care of Operator

Ordinarily a person standing in the highway may rely on the observance of regulations and of the rules of the road by the operator of an approaching motor vehicle, and may properly assume that the operator will exercise ordinary care to protect him.

Under the rule that a pedestrian on the highway is entitled to assume that others using it in common with him will exercise reasonable care to

avoid injuring him, as discussed supra § 468, a person who is standing in the highway in a place of apparent or reasonable safety, or in a place where he has a right to be, has the right to rely on the observance of regulations and of the rules of the road by the operator of an approaching automobile.¹⁹ The pedestrian on the highway is not required to anticipate the motorist's negligence,²⁰ so that he is not chargeable with contributory negligence, when standing on the side of the highway, in failing to anticipate that the approaching vehicle will leave the traveled portion of the highway and injure him.²¹ A person standing on the highway may properly assume that the operator of an approaching vehicle will exercise ordinary care to protect him,²² that he will give a warning signal,²³ and that he will not run the pedestrian down, but will avoid contact with him,²⁴ especially when there is room for the vehicle to pass without interference.²⁵ A person standing near the edge of the road is not required to assume either that the approaching motorist does not see him²⁶ or that, having seen him, the motorist means to drive him off the highway.²⁷

In view of the right to rely on a motorist's use of due care, a person standing in the narrow space between the curb and a vehicle with whose driver he is conversing is not negligent as a matter of law when the vehicle is struck by an automobile being driven on the wrong side of the street;²⁸ and

10. U.S.—Lynch v. Scalia, D.C.Pa., 45 F.Supp. 68.

Wash.—Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117.

W.Va.—Ray v. Clawson, 14 S.E.2d 259, 123 W.Va. 99.

11. Mo.—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379.

Wash.—Locke v. Greene, 171 P. 245, 100 Wash. 397.

12. N.Y.—Strauss v. Fred Schneider, Inc., 171 N.Y.S. 424, 184 App.Div. 265.

Tex.—Posener v. Long, Civ.App., 156 S.W. 591.

13. Iowa.—Smith v. Spirek, 195 N.W. 786, 196 Iowa 1328.

Wis.—Clifton v. Smith, 206 N.W. 923, 188 Wis. 560.

14. Iowa.—James v. Roach, 290 N.W. 87, 228 Iowa 129.

42 C.J. p 1157 note 25.

15. Mass.—Sarmiento v. Vance, 120 N.E. 848, 231 Mass. 310.

Wash.—Stephenson v. Parton, 155 P. 147, 89 Wash. 653.

16. Cal.—Regan v. Los Angeles Ice, etc., Co., 189 P. 474, 46 Cal.App. 513.

17. Cal.—Regan v. Los Angeles Ice, etc., Co., supra.

18. Mass.—Sarmiento v. Vance, 120 N.E. 848, 231 Mass. 310.

42 C.J. p 1157 note 29.

19. Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

Pa.—McNeal v. Spencer, 25 A.2d 147, 344 Pa. 417.

42 C.J. p 1157 note 31.

20. Iowa.—James v. Roach, 290 N.W. 87, 228 Iowa 129—Townsend v. Armstrong, 260 N.W. 17, 220 Iowa 396.

Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md 172.

Mich.—Camp v. Wilson, 241 N.W. 844, 258 Mich. 38.

Pa.—McNeal v. Spencer, 25 A.2d 147, 344 Pa. 417.

21. Mich.—Camp v. Wilson, 241 N.W. 844, 258 Mich. 38.

Pa.—McNeal v. Spencer, 25 A.2d 147, 344 Pa. 417.

22. Pa.—McNeal v. Spencer, supra—Haring v. Connell, 90 A. 910, 244 Pa. 439.

Where operator may use any part of highway when vehicles are not approaching from the opposite direction, it has been held that a person may not safely stand on the highway, even on the left-hand side,

on the assumption that a motor vehicle will not pass on that side of the highway.—Vance v. Logan Williamson Bus Co., W.Va., 46 S.E.2d 783.

23. Mich.—Burnash v. Compton, 298 N.W. 408, 298 Mich. 70—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557—Lapachin v. Standard Oil Co., 256 N.W. 490, 268 Mich. 477—Reynolds v. Knowles, 193 N.W. 900, 223 Mich. 70.

24. Mich.—Burnash v. Compton, 298 N.W. 408, 298 Mich. 70—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557—Lapachin v. Standard Oil Co., 256 N.W. 490, 268 Mich. 477—Lawrence v. Bartling & Dull Co., 238 N.W. 180, 255 Mich. 580—Reynolds v. Knowles, 193 N.W. 900, 223 Mich. 70.

25. Md.—Fotterall v. Hilleary, 13 A.2d 358, 178 Md. 335.

42 C.J. p 1157 note 32.

26. Md.—Fotterall v. Hilleary, supra.

27. Md.—Fotterall v. Hilleary, supra.

28. Ark.—Wells v. Shepard, 205 S.W. 806, 135 Ark. 466.

one in a place of apparent safety is not required as a matter of law to leave it on the assumption that an approaching automobile will leave the traveled roadway and strike him.²⁹ Also, it is not necessarily negligence to stand at the left side of a stopped automobile on the approach of another motor vehicle from the opposite direction to that in which the car is headed, where there is room for the approaching vehicle to pass without interference;³⁰ and a pedestrian who turns out into the roadway to avoid an obstruction on the sidewalk and, on the approach of a vehicle as he is passing around the obstruction, stands still where it apparently has room to pass, is not negligent as a matter of law in so doing.³¹

Streetcar loading space. One standing close to a streetcar track in a place ordinarily used by persons about to board a car is not negligent as a matter of law in assuming that an automobile will not be driven into such space,³² even though he is not in fact waiting for a streetcar.³³

Articles projecting from vehicle. A person standing in a roadway with his back to a passing motor truck is not bound to anticipate that its driver would so negligently turn it that a part of its load projecting from the rear of it would strike him,³⁴ and, therefore, is not negligent as a matter of law in failing to avoid injury.³⁵

§ 473. — On Sidewalk

A pedestrian's right on the sidewalk is superior to

that of motor vehicles, and he is not negligent in assuming that it is safe from the danger of vehicles passing on or across it, but nevertheless he must exercise due care to avoid injury.

A pedestrian has a right on the sidewalk or other space set aside for the use of pedestrians superior to that of motor vehicles.³⁶ Nevertheless, with respect to passing vehicles, he is required to exercise ordinary or due care to avoid injury,³⁷ although he need not take the same precautions as one who is walking on³⁸ or crossing³⁹ the highway. A pedestrian on the sidewalk and entirely within the outside curb line is not required to keep a lookout for approaching vehicles⁴⁰ unless he intends to enter the highway⁴¹ or to extend a part of his body beyond the outside curb line;⁴² but, when it is reasonably apparent that an approaching vehicle will come in contact with him, the situation must be avoided if there is a reasonable opportunity to do so.⁴³

Reliance on care of motorist. A pedestrian on the sidewalk may rely on the expectation that vehicles will conform to the customary rules of traffic⁴⁴ and travel only on the proper side of the street,⁴⁵ and he is not negligent in assuming that the sidewalk is safe from the danger of automobiles passing on or across it.⁴⁶ The pedestrian on the sidewalk is not negligent in failing to anticipate that the driver of a vehicle in the street will so operate it as to endanger his safety,⁴⁷ such as by moving into his zone of safety⁴⁸ or by causing articles projecting from the vehicle to strike him.⁴⁹

29. Ia.—Haring v. Connell, 90 A. 910, 244 Pa. 439.

42 C.J. p 1157 note 34.

30. U.S.—Bohrink v. Malone, C.C.A. Ill., 14 F.2d 601.

31. Mass.—Gray v. Batchelder, 94 N. E. 702, 208 Mass. 441.

32. Mich.—Jarosz v. Geisler, 189 N. W. 12, 219 Mich. 283.

33. Mich.—Jarosz v. Geisler, supra.

34. U.S.—Pacific Hardware, etc., Co. v. Monical, Wash., 205 F. 116, 123 C.C.A. 348.

35. U.S.—Pacific Hardware, etc., Co. v. Monical, supra.

36. Cal.—Brandes v. Freitas, 2 P.2d 830, 116 Cal App. 459.

Del.—Biddle v. Haldas Bros., 190 A. 588, 8 W.W.Harr. 210.

Ill.—Crawley v. Jermain, 218 Ill.App. 51.

La.—Levy v. White, App., 5 So.2d 28.

Me.—Corpus Juris quoted in Young v. Potter, 174 A. 387, 391, 133 Me. 104—Cole v. Willson, 143 A. 178, 127 Me. 316.

Md.—Hendler Creamery Co. v. Miller, 133 A. 1, 153 Md. 264.

Mich.—Grant v. Richardson, 267 N. W. 605, 276 Mich. 151.

Pedestrian on sidewalk crossing private driveway see infra § 474.

Inference of negligence

Fact that a pedestrian, who was struck by bus when it was driven so close to curbstone that its body projected over sidewalk, might have intended to do that which was improper by crossing street at a place other than crosswalk or intersection did not require inference that pedestrian was negligent, as long as he stood on sidewalk, nor did the fact that he was in a place usually reserved for loading and unloading bus passengers take from him the right to stand there, although he did not intend to become a passenger on bus.—Riegel v. Oakwood St. Ry. Co., Ohio App., 42 N.E.2d 676.

37. La.—Levy v. White, App., 5 So. 2d 28.

Me.—Young v. Potter, 174 A. 387, 133 Me. 104.

Ohio.—Riegel v. Oakwood St. Ry. Co., App., 42 N.E.2d 676.

38. Me.—Young v. Potter, 174 A. 387, 133 Me. 104.

39. La.—Levy v. White, App., 5 So. 2d 28.

40. W.Va.—Myers v. Charleston Transit Co., 37 S.E.2d 281, 128 W. Va. 564.

41. W.Va.—Myers v. Charleston Transit Co., supra.

42. W.Va.—Myers v. Charleston Transit Co., supra.

43. R.I.—Willmarth v. Cray, 149 A. 612, 50 R.I. 496.

W.Va.—Myers v. Charleston Transit Co., 37 S.E.2d 281, 128 W.Va. 564.

44. Cal.—Azzaro v. O'Connell, 9 P.2d 345, 121 Cal.App. 617.

45. Cal.—Azzaro v. O'Connell, supra.

46. Del.—Biddle v. Haldas Bros., 190 A. 588, 8 W.W.Harr. 210.

42 C.J. p 1158 note 43.

47. Del.—Biddle v. Haldas Bros., supra.

Mass.—Murray v. Liebmann, 120 N.E. 79, 231 Mass. 7.

48. Ohio.—Riegel v. Oakwood St. Ry. Co., App., 42 N.E.2d 676.

49. W.Va.—McCallam v. Hope Natural Gas Co., 117 S.E. 148, 93 W.Va. 426.

§ 474. — Crossing Private Driveway

A pedestrian on the sidewalk crossing a private driveway has the right of way over a motor vehicle emerging from private property, and is bound to exercise only reasonable and ordinary care to avoid injury.

A pedestrian on the sidewalk crossing a private driveway is not a trespasser,⁵⁰ but has the right of way over a motor vehicle emerging from private property,⁵¹ and is bound to exercise only reasonable and ordinary care to avoid injury.⁵² He may reasonably anticipate less frequent and serious dangers than if he were walking in that portion of the highway where vehicles regularly travel,⁵³ and may assume that the operator of a vehicle will take the necessary precautions required by law⁵⁴ and will not negligently run him down.⁵⁵ When a pedestrian and a vehicle approach a crossing over a sidewalk at the same time, and both stop, the pedestrian is not negligent in assuming that the driver of the automobile will not resume his progress over the sidewalk without first making sure that he will not injure the pedestrian.⁵⁶

The pedestrian is not required, as a matter of law, to be on the lookout for automobiles crossing the sidewalk,⁵⁷ and the fact that he fails to see such a vehicle approaching does not as a matter of law render him guilty of negligence.⁵⁸ It has been

held, however, that where a pedestrian, while walking along the sidewalk, came in contact with a vehicle which was coming out of an alley at a moderate rate of speed and had advanced so that the rear wheel was in the center of the sidewalk when it struck him, he was chargeable with contributory negligence as a matter of law in failing to observe it.⁵⁹

§ 475. Police or Traffic Officers

A police or traffic officer, while performing his duties in the street, must exercise ordinary or reasonable care to avoid injury from motor vehicles.

A police or traffic officer, while acting in the line of his duties in the street, must exercise ordinary or reasonable care to avoid injury from motor vehicles,⁶⁰ and ordinarily cannot recover for injuries which are caused by his own negligence.⁶¹ He need not, however, exercise as high a degree of care as is required of an ordinary pedestrian,⁶² and may act on the assumption that automobile drivers will obey the laws of the road⁶³ and exercise due care to avoid injuring him.⁶⁴

Special or private policemen; volunteers. In considering the degree of care required to be exercised by a special traffic policeman, an important factor is the nature and requirements of his work.⁶⁵

50. Ill.—Crawley v. Jermain, 218 Ill. App. 51.

Neb.—Corpus Juris quoted in Chew v. Coffin, 12 N.W.2d 839, 841, 144 Neb. 170.

Standing on private property or private way generally see supra § 468 c.

51. Neb.—Corpus Juris quoted in Chew v. Coffin, 12 N.W.2d 839, 841, 144 Neb. 170.

42 C.J. p 1158 note 46.

52. Conn.—McInerney v. New England Transp. Co., 41 A.2d 764, 131 Conn. 633.

La.—Levy v. White, App., 5 So.2d 28.

Neb.—Corpus Juris quoted in Chew v. Coffin, 12 N.W.2d 839, 841, 144 Neb. 170.

42 C.J. p 1158 note 47.

Kind of crossing

Care required by pedestrian on sidewalk while crossing entrance to garage or private crossing differs from that required in crossing street and in each case is commensurate with respective dangers involved in different kinds of crossings.—Guyan Chevrolet Co. v. Dillow, 95 S.W.2d 796, 264 Ky. 812.

53. Mass.—White v. Checker Taxi Co., 187 N.E. 49, 284 Mass. 73.

54. La.—Levy v. White, App., 5 So. 2d 28.

55. Mass.—White v. Checker Taxi Co., 187 N.E. 49, 284 Mass. 73.

56. La.—Moore v. Vance, 4 La.App. 353.

57. Neb.—Corpus Juris quoted in Chew v. Coffin, 12 N.W.2d 839, 841, 144 Neb. 170.

42 C.J. p 1158 note 48.

Adjacent garage

Facts that pedestrian knew that garage was adjacent to sidewalk on which she was walking and that she was looking away from it when struck by automobile being backed out of garage did not constitute contributory negligence.—Guyan Chevrolet Co. v. Dillow, 95 S.W.2d 796, 264 Ky. 812.

58. Mich.—Ottaway v. Gutman, 174 N.W. 127, 207 Mich. 393.

Neb.—Corpus Juris quoted in Chew v. Coffin, 12 N.W.2d 839, 841, 144 Neb. 170.

59. Ill.—Johnson v. Borden Co., 61 N.E.2d 1009, 320 Ill.App. 690.

60. Fla.—Prior v. Pounds, 151 So. 890, 113 Fla. 308.

42 C.J. p 1158 note 52.

Care required of:

Motorists as to traffic officers see supra § 391.

Operators of police vehicles see supra §§ 374, 375.

Police officer may enter street at any point in discharging duty, being charged with exercise of reasonable

care to preserve his safety.—Prior v. Pounds, supra.

61. La.—Terrebonne v. Huger, 130 So. 835, 14 La.App. 679.

42 C.J. p 1158 note 53.

62. Or.—White v. East Side Mill Co., 161 P. 969, 164 P. 736, 84 Or. 224.

42 C.J. p 1158 note 57.

63. Or.—White v. East Side Mill Co., supra.

42 C.J. p 1158 note 58.

Crossing street

A policeman who observed approaching automobile seventy-five feet distant when he was in the middle of a street which he was crossing could reasonably assume that there was ample time to cross street without further observation, since he was entitled to assume that motorist would proceed with reasonable care as to speed, control, lookout, and warning appropriate to situation and with due regard to rights of pedestrians.—Gardiner v. Hayes, 23 A.2d 627, 123 Conn. 332.

64. Fla.—Prior v. Pounds, 151 So. 890, 113 Fla. 308.

Ky.—Louisville Ry. Co. v. Offutt's Adm'x, 55 S.W.2d 391, 246 Ky. 508.

42 C.J. p 1158 note 59.

65. Pa.—Shaffer v. Torrens, 58 A.2d 439, 359 Pa. 187.

In order to perform his assigned duties with reasonable adequacy, he is not required to watch constantly and continuously for the approach of vehicles from any and all directions;⁶⁶ but his legal duty is to keep a reasonable lookout and to exercise care in the circumstances commensurate with the dangers and consistent with his faithful performance of the duties of his employment.⁶⁷ He is entitled to assume that the operators of approaching vehicles will observe his presence and avoid him.⁶⁸ A volunteer traffic director standing in his chosen place on the highway and attempting to give warning of danger to approaching motorists is not exempt from the law of contributory negligence and his failure to use due care may preclude his recovery for injuries inflicted by a motor vehicle.⁶⁹

§ 476. Persons Working on or in Highway

- a. In general
- b. Repairing, adjusting, or assisting vehicles on highway

a. In General

A person who is required to work on or in the traveled part of a highway must exercise ordinary, reasonable, or due care to avoid injury by passing vehicles, but he is not required to exercise as high a degree of precaution as is required of a pedestrian.

A person whose duties require him to work on or

in the traveled part of a highway must exercise ordinary, reasonable, or due care to avoid being injured by passing motor vehicles,⁷⁰ including such use of his senses of sight and hearing to discover their approach and such precautions against injury therefrom as an ordinarily prudent man similarly situated would exercise,⁷¹ and failure to exercise the required care may constitute contributory negligence barring recovery for injuries received.⁷² Recovery may not be denied, however, solely on the ground that the person working on the highway voluntarily assumed the risk of any injury.⁷³ Non-compliance with regulations relating to the use of the highway may sometimes constitute negligence per se,⁷⁴ but a person working in a highway who fails to display red lights required by an ordinance is not barred from recovering for injuries caused by a motor vehicle unless such failure contributed proximately to cause the injury.⁷⁵

The extent of care which a person working on the highway is required to exercise to avoid injury from passing motor vehicles depends on all the dangers which he should reasonably anticipate in the circumstances.⁷⁶ Inasmuch as such a person is required to devote the most of his attention to his work, ordinary care in his case usually does not require as high a degree of precaution as is required

66. Pa.—Shaffer v. Torrens, supra—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515.

67. Pa.—Shaffer v. Torrens, 58 A.2d 439, 359 Pa. 187.

68. Pa.—Shaffer v. Torrens, supra—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515.

69. W.Va.—Cooper v. Teter, 15 S.E. 2d 152, 123 W.Va. 372.

70. Ark.—Byrd v. Galbraith, 288 S.W. 717, 172 Ark. 219.

Ill.—Johnson v. Englehardt, 256 Ill. App. 557.

Mich.—Van Wormer v. Kramer Bros. Freight Lines, 278 N.W. 770, 284 Mich. 76.

Utah.—Reid v. Owens, 93 P.2d 680, 98 Utah 50, 126 A.L.R. 55.

Vt.—Rush v. Cody, 178 A. 891, 107 Vt. 326.

42 C.J. p 1159 note 60.

Flagman

Fact that flagman flagged from center of road did not constitute contributory negligence, in absence of showing that it was uniform practice and rule for flagman always to flag from side of road.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

71. Ark.—Byrd v. Galbraith, 288 S.W. 717, 172 Ark. 219.

N.J.—Lozie v. Ferrone, 168 A. 764, 111 N.J.Law 549.

Vt.—Rush v. Cody, 178 A. 891, 107 Vt. 326.

42 C.J. p 1159 notes 61, 63.

Lookout, barriers, signals

City employee, killed by automobile while making sewer repairs beside manhole in street, was negligent as matter of law in putting himself in dangerous place without keeping lookout, erecting barriers, or putting up danger signals.—Staib v. Tarbell, 273 N.W. 652, 65 S.D. 304.

Removal from place of known danger

The rule that a pedestrian and a motorist have equal rights upon highway did not permit a highway employee to recover for injuries received when struck by motorist, where employee, who was standing on motorist's right side of highway, with knowledge of icy condition of roads and after observing motorist's approaching automobile when it was approximately two hundred feet from employee, failed to move back from edge of pavement.—Cumming v. Dosland, 288 N.W. 647, 227 Iowa 470.

72. Iowa.—Cumming v. Dosland, supra.

La.—Andrus v. S. J. Boudreaux & Son, App., 158 So. 679.

Minn.—Hoelmer v. Sutton, 290 N.W. 225, 207 Minn. 140.

Vt.—Rush v. Cody, 178 A. 891, 107 Vt. 326.

Wash.—Hawkins v. Palmer, 188 P.2d 121, 29 Wash.2d 570.

73. Assumed risk

One who is necessarily working on a highway or other place where there is vehicular traffic, and is injured through the negligent operation of a vehicle, cannot be deprived of his cause of action for damages on the theory that he voluntarily assumed the risk of injury.—Hedding v. Pearson, 173 P.2d 382, 76 Cal.App.2d 481—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742.

74. Wash.—Price v. Gabel, 298 P. 444, 162 Wash. 275.

75. Conn.—Case v. Clark, 76 A. 518, 83 Conn. 183.

42 C.J. p 1159 note 67.

76. Mass.—Ferrairs v. Hewes, 16 N.E.2d 674, 301 Mass. 116.

Excessive noise

Linemen's helper, struck by street paving contractor's truck while standing near pole in street, was bound to use greater care and look more vigilantly for trucks, if noise of concrete mixer affected his ability to hear them, than otherwise.—Warnke v. Griffith Co., 24 P.2d 583, 133 Cal.App. 481.

of a pedestrian,⁷⁷ but this rule is inapplicable to a person who is not compelled by the nature of his work to be in the street,⁷⁸ or who is not engaged in labor on the highway requiring attention to his work⁷⁹ and is otherwise free to take precautions for his own safety.⁸⁰ A person working on or in the highway may assume that the other users of the highway will conform to, and not violate, governmental regulations⁸¹ and the rules of the road,⁸² and that approaching motorists will observe warnings and bring their vehicles under control.⁸³ He is entitled to rely to some extent on the assumption that automobile drivers will exercise due care to avoid injuring him,⁸⁴ and, therefore, is not required

to keep a constant lookout for such vehicles,⁸⁵ and is not necessarily guilty of contributory negligence if, by reason of his attention to his work, he fails to look out for and discover approaching motor vehicles.⁸⁶ However, the person working on the highway may not for such reason omit any care which the law otherwise demands of him.⁸⁷

The rule that persons who are working in or on streets and highways need not exercise the highest degree of diligence and look out constantly for approaching vehicles has been applied to persons injured while engaged in their work as street cleaners,⁸⁸ street repairmen,⁸⁹ streetcar conductors,⁹⁰

77. Cal.—Jones v. Hedges, 12 P.2d 111, 123 Cal.App.2d 742.

Mo.—Gaylor v. Wienshenk, 283 S.W. 464, 221 Mo.App. 555.

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

N.J.—Lozio v. Perrone, 168 A. 764, 111 N.J.Law 549.

Pa.—Copertino v. Chrobak, 29 A.2d 504, 346 Pa. 49—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515—Peters v. Schroeder, 138 A. 755, 290 Pa. 217.

R.I.—Riley v. Tsagarakis, 145 A. 12, 50 R.I. 62.

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d 981.

42 C.J. p 1159 note 62.

78. Cal.—Carlsen v. Diehl, 208 P. 150, 57 Cal.App. 731.

Pa.—Copertino v. Chrobak, 29 A.2d 504, 346 Pa. 49.

79. Minn.—Hoelmer v. Sutton, 290 N.W. 225, 207 Minn. 140.

Workman carrying materials

Where plaintiff, although a member of crew working in street and carrying two angle irons as he attempted to cross street, was not required to give angle irons any of his attention, so that plaintiff while crossing street had no duty to perform different from that which other pedestrians had to perform, he was required to exercise ordinary care for his own safety, and the giving of instruction which erroneously afforded to plaintiff benefit of protection given workmen on a street so engaged that their attention must be given to their work and not to their surroundings was error.—Gunning v. King, 23 N.W.2d 602, 249 Wis. 176.

83. Pa.—Copertino v. Chrobak, 29 A.2d 504, 346 Pa. 49—Greenberg v. McCusker, 35 A.2d 81, 154 Pa.Super. 86.

81. Del.—Ierardi v. Farmers' Trust Co. of Newark, 151 A. 822, 4 W.W. Harr. 246.

N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392.

82. Conn.—Larsen v. Thomas, 176 A. 400, 119 Conn. 335.

N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392.

83. La.—Ellis v. Whitmeyer, App., 183 So. 77.

84. Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App.2d 566—Mecham v. Crump, 30 P.2d 568, 137 Cal.App. 200—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742—State Compensation Insurance Fund v. Scamell, 238 P. 780, 73 Cal. App. 285.

Conn.—Viretto v. Tricarico, 165 A. 345, 116 Conn. 718.

Ill.—Leoni v. McMillan, 5 N.E.2d 742, 287 Ill.App. 579.

Mass.—Ferrairs v. Hewes, 16 N.E.2d 674, 301 Mass. 116.

Mich.—Botbyl v. Mackus, 246 N.W. 158, 261 Mich. 150.

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

N.J.—Lozio v. Perrone, 168 A. 764, 111 N.J.Law 549.

N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392.

Pa.—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515.

R.I.—Riley v. Tsagarakis, 145 A. 12, 50 R.I. 62.

W.Va.—Chaney v. Moore, 134 S.E. 204, 101 W.Va. 621, 47 A.L.R. 800.

42 C.J. p 1159 note 64.

Care required of motorists as to such persons see *supra* § 391.

Keeping lookout

Streetcar conductor flagging motorman to cross railway tracks could assume that motorist would observe proper lookout.—Walker v. Pomush, 238 N.W. 859, 206 Wis. 45.

85. Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App.2d 566—Mecham v. Crump, 30 P.2d 568, 137 Cal.App. 200—Woods v. Wisdom, 24 P.2d 863, 133 Cal. App. 694.

Pa.—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515.

W.Va.—Chaney v. Moore, 134 S.E. 204, 101 W.Va. 621, 47 A.L.R. 800.

42 C.J. p 1159 note 65.

Rule as to railroad employees

The rule requiring railroad employees working about a track to be constantly on the lookout is not applicable to laborers working on a street or highway with respect to approaching traffic.—Ledford v. Southeastern Motor Truck Lines, Tenn.App., 200 S.W.2d 981.

86. Ark.—Byrd v. Galbraith, 288 S. W. 717, 172 Ark. 219.

Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App.2d 178—Mecham v. Crump, 30 P.2d 568, 137 Cal.App. 200—Woods v. Wisdom, 24 P.2d 863, 133 Cal. App. 694.

W.Va.—Chaney v. Moore, 134 S.E. 204, 101 W.Va. 621, 47 A.L.R. 800.

42 C.J. p 1159 note 66.

87. Utah.—Reid v. Owens, 93 P.2d 680, 98 Utah 50, 126 A.L.R. 55.

Vt.—Rush v. Cody, 178 A. 891, 107 Vt. 326.

Knowledge of danger

Where a workman has reason to believe that there is danger of injury from passing vehicles he may not assume that he will not be injured by such vehicles, but is required to keep such lookout therefor as ordinarily prudent person would keep under similar circumstances.—Warneke v. Griffith Co., 24 P.2d 583, 133 Cal. App. 481.

88. Mo.—Ostermeier v. Kingman-St. Louis Impl. Co., 164 S.W. 218, 255 Mo. 128.

42 C.J. p 1160 note 68.

83. Mo.—Papic v. Freund, App., 181 S.W. 1161.

Va.—Chaney v. Moore, 134 S.E. 204, 101 W.Va. 621, 47 A.L.R. 800.

90. N.Y.—Caesar v. Fifth Ave. Coach Co., 90 N.Y.S. 359, 45 Misc. 331.

42 C.J. p 1160 note 70.

street railway switchmen,⁹¹ street railway repairmen,⁹² snow cleaners,⁹³ and linemen stringing electric wires.⁹⁴ However, persons who only occasionally use the streets to pursue their occupations and do so from choice rather than from necessity are not relieved from the duty of keeping a sharp lookout.⁹⁵

b. Repairing, Adjusting, or Assisting Vehicles on Highway

A person who stands on the highway to repair, adjust, or assist the movement of a vehicle must exercise ordinary care to avoid injury by passing motor vehicles.

A person who stands temporarily on the highway to repair or adjust a vehicle, or to assist in the movement of a disabled vehicle, is bound to exer-

cise ordinary care to avoid injury by passing motor vehicles,⁹⁶ as by complying with governmental regulations relating to the place of parking or stopping⁹⁷ or to the preservation of life and limb.⁹⁸ If his failure to use due care contributes proximately to cause his injuries, he is guilty of contributory negligence, and is barred from recovery therefor,⁹⁹ but failure to comply with an ordinance does not bar recovery if it is not the proximate cause of the accident.¹

A person engaged in repairing or assisting the movement of a vehicle on the highway is required to exercise only that degree of care which ordinarily prudent persons would use under the same or similar circumstances to avoid injury.² He is not

91. Mo.—Gaylor v. Wienshtienk, 283 S.W. 464, 221 Mo App. 585.

42 C.J. p 1160 note 71.

92. Pa.—Cecola v. 44 Cigar Co., 98 A. 775, 253 Pa. 623.

93. Wash.—Morrison v. Conley Taxicab Co., 162 P. 365, 94 Wash 436

42 C.J. p 1160 note 73.

94. Wash.—Burns v. Johns, 216 P. 2, 125 Wash 387.

42 C.J. p 1160 note 74.

95. Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App 2d 566.

Photographer

Cal.—Milton v. Los Angeles Motor Coach Co., supra.

96. Iowa.—Youngman v. Sloan, 281 N.W. 130, 225 Iowa 558—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771—Fortman v. McBride, 263 N.W. 345, 220 Iowa 1003—Hanson v. Manning, 239 N.W. 793, 213 Iowa 625—Voss v. Martin, 226 N.W. 920, 209 Iowa 870.

Me.—Tibbetts v. Dunton, 174 A. 453, 133 Me. 128.

Minn.—Shearer v. Puert, 208 N.W. 182, 166 Minn. 425.

Or.—Hayes v. Uglow, 3 P.2d 126, 137 Or. 373—Holman v. Uglow, 3 P.2d 120, 137 Or. 358.

Pa.—Susser v. Wiley, 39 A.2d 616, 350 Pa. 427.

42 C.J. p 1160 note 76.

Disabled vehicle generally see supra § 332.

Stop for repairs generally see supra § 331.

Leaving ample room to pass

Attempt to repair disabled truck extending five feet over pavement was not contributory negligence, where bus approaching from front and striking decedent repairing truck had ample room to pass.—Davis v. North Coast Transp. Co., 295 P. 921, 160 Wash. 576.

Assumed risk

An automobile passenger, placing

himself in front of automobile to aid driver in repairing tire at night while automobile was standing partly on paved portion of highway assumed risk of being struck by automobile as result of its being run into from rear by another automobile.—Basinger v. Yarian, Ohio App. 49 NE 2d 104.

97. Ky.—Tate v. Hall, 57 S.W.2d 986, 247 Ky 843

Statute held not violated

(1) One struck by automobile while repairing truck disabled on highway, from which it was temporarily impracticable to remove it, was not violating statute so as to preclude recovery for injuries sustained.—Tate v. Hall, supra.

(2) Motorist struck by automobile while changing tire on road, if such action was reasonably necessary, was not "parked" on highway within statute forbidding parking vehicles thereon when it is practicable to leave them elsewhere.—Tibbetts v. Dunton, 174 A. 453, 133 Me. 128.

(3) One undertaking to fasten more securely red lantern to truck on traveled portion of highway was not violating ordinance of highway commission making it unlawful to repair truck on used or traveled portion of highway.—Babbs v. Eury, 175 S.E. 100, 206 N.C. 679.

One assuming semireclining position to recover nut or screw which had rolled under automobile was repairing automobile on street under regulation forbidding repair of cars in street.—Goff v. Ell Witt Cigar Co., 121 So. 570, 97 Fla. 544.

98. N.C.—Babbs v. Eury, 175 S.E. 100, 206 N.C. 679.

99. Iowa.—Fortman v. McBride, 263 N.W. 345, 220 Iowa 1003.

Pa.—Susser v. Wiley, 39 A.2d 616, 350 Pa. 427.

42 C.J. p 1160 note 77.

Stopping on highway

(1) Negligence of operator of

highway grader which was struck by truck, in leaving grader standing on roadway while making repair when it was practical to move it off roadway, was contributing cause of operator's injury.—Kassela v. Hoseth, 258 N.W. 340, 217 Wis. 115.

(2) Person changing tire on automobile parked near center of highway, notwithstanding existence of adequate shoulders, on dark, rainy night, was guilty, as matter of law, of contributory negligence proximately contributing to injury sustained when struck by parked automobile propelled forward by overtaking automobile.—Dragotis v. Kennedy, 250 N.W. 804, 190 Minn. 128.

Knowledge of danger

(1) Where motorist was injured by collision of automobile with stationary service truck while he was at night assisting service truck operator in attaching cable from truck to motorist's disabled automobile, and motorist's knowledge of dangerous condition on highway created by operator's alleged negligence equaled that of operator and his employers, they were not liable for motorist's injuries.—Brucker v. Matsen, 139 P. 2d 276, 18 Wash 2d 375.

(2) Helper placing chain on wheel of truck standing diagonally on icy and hilly street was negligent in not watching defendant's ascending truck after it passed him, where he knew, or should have known, of the danger of the truck slipping down the hill, as his own truck had done.—Dahlman v. Petrovich, 156 A. 897, 102 Pa.Super. 454, affirmed 161 A. 550, 307 Pa. 298.

1. Ohio.—McIntire v. Wallace, App., 64 N.E.2d 66.

2. Conn.—Nichols v. Williams, 16 A. 2d 605, 127 Conn. 337.

Iowa.—Youngman v. Sloan, 281 N.W. 130, 225 Iowa 558.

42 C.J. p 1160 note 78.

bound to anticipate negligence on the part of the operators of approaching vehicles,³ and, in the absence of circumstances which would afford notice to the contrary,⁴ he may rely to some extent on the belief that the operators of motor vehicles will exercise ordinary care⁵ and will observe the rules of the road⁶ so as to avoid injuring him. Accordingly, he need not continuously watch for approaching vehicles where the nature of the work in which he is engaged requires his attention.⁷

A person doing repair work on his motor vehicle in the street is not necessarily guilty of negligence in being outside the line of his vehicle;⁸ and, where in making repairs he is protected by red lights and street lamps, he is not bound as a matter of law to anticipate that another vehicle will pass so near as to strike him,⁹ even though some part of his body is outside the line of the vehicle.¹⁰ However, if he unnecessarily places his body in a position of danger and thereby contributes to the accident which causes the injury, he is guilty of negligence.¹¹ A person adjusting a tow rope on a stalled car¹² or pushing his car along the right side of the road¹³ has been held not a "pedestrian" within a regulation requiring pedestrians to walk on the left of the road.

§ 477. Persons Boarding or Alighting from Streetcar or Other Vehicle

A person boarding or alighting from a street car or other vehicle has an equal right in the street with a motorist but must use ordinary care under the circum-

stances not to collide with, or be struck by, motor vehicles.

A person crossing a traveled roadway of a street or highway to or from a street car or other vehicle therein, or standing in the roadway waiting for such car or after alighting therefrom, has an equal right in the street with the driver of an automobile,¹⁴ but, like every other user of the highway, he must use ordinary care under the particular circumstances not to collide with, or be struck by, motor vehicles.¹⁵ A person standing upon the highway for the purpose of entering an automobile is a "pedestrian" within a statutory definition of the word,¹⁶ and he is not negligent as a matter of law in being upon the highway under such circumstances.¹⁷ A person entering a parked vehicle on the left side nearest to traffic is not negligent in so entering the vehicle.¹⁸

§ 478. — Crossing Street

- a. In general
- b. Place and manner of crossing

a. In General

The rules relating to the care required of a pedestrian crossing a street or highway ordinarily govern the conduct of a person crossing a roadway to or from a street car or other vehicle, and such person must exercise reasonable care for his own safety and protection.

The rules relating to the care required of a pedestrian crossing a street or highway, as discussed generally supra § 470, govern also the conduct of a person crossing a traveled roadway to or from a streetcar or other vehicle, as far as applicable.¹⁹ Such

2. Iowa.—Hanson v. Aldrich, 201 N. W. 778, 199 Iowa 168.

Or.—Hayes v. Uglow, 3 P.2d 126, 137 Or. 373.—Holman v. Uglow, 3 P.2d 120, 137 Or. 358.

Pa.—Handfinger v. Barnwell Bros., 189 A. 312, 325 Pa. 319.—Roberts v. Freihofer Baking Co., 129 A. 574, 283 Pa. 573.—O'Malley v. Quaker City Cabs, 163 A. 339, 107 Pa.Super. 380.

4. Mich.—Paquette v. Consumers Power Co., 25 N.W.2d 599, 316 Mich. 501.

Person assisting in pushing automobile out of gas cannot close eyes to attendant conditions and disregard evidences of approaching danger.—Hayes v. Uglow, 3 P.2d 126, 137 Or. 373.—Hayes v. Uglow, 3 P.2d 120, 137 Or. 358.

5. Iowa.—Hanson v. Aldrich, 201 N. W. 778, 199 Iowa 168.

Or.—Hayes v. Uglow, 3 P.2d 126, 137 Or. 373.—Holman v. Uglow, 3 P.2d 120, 137 Or. 358.

42 C.J. p 1160 note 79.

6. Or.—Hayes v. Uglow, 3 P.2d 126,

137 Or. 373.—Holman v. Uglow, 3 P.2d 120, 137 Or. 358.

7. Wash.—Deitchler v. Ball, 170 P. 123, 99 Wash. 483.
42 C.J. p 1160 note 80.

8. Pa.—Susser v. Wiley, 39 A.2d 616, 350 Pa. 427.—O'Malley v. Quaker City Cabs, 163 A. 339, 107 Pa.Super. 380.

42 C.J. p 1160 note 81.

9. Pa.—Roberts v. Freihofer Baking Co., 129 A. 574, 283 Pa. 573.

10. Pa.—Roberts v. Freihofer Baking Co., supra.

11. Pa.—Tait v. Philadelphia Transp. Co., 34 A.2d 269, 153 Pa. Super. 449.—O'Malley v. Quaker City Cabs, 163 A. 339, 107 Pa. Super. 380.

12. Wash.—Gooschin v. Ladd, 33 P. 2d 653, 177 Wash. 625.

13. Ill.—Stout v. Skinner, 283 Ill. App. 330.

14. Cal.—Morgan v. Los Angeles Rock & Gravel Corporation, 287 P. 152, 105 Cal.App. 224.

Mich.—Beers v. Arnot, 14 N.W.2d 511, 308 Mich. 604.

Ohio.—Denardo v. Pravc, 168 N.E. 225, 32 Ohio App. 445.

42 C.J. p 1160 note 85.

15. Iowa.—Hanson v. Manning, 239 N.W. 793, 213 Iowa 625.

42 C.J. p 1160 note 87.

Boarding moving school bus

Injury by bus carrying pupils to school, when boy attempted to board it before it stopped, was due to contributory negligence.—Hammond v. Wacker, 145 A. 871, 7 N.J.Misc. 453.

Negligence held not shown

U.S.—Powell Bros. Truck Lines v. Platt, C.C.A.Okla., 92 F.2d 879.

16. Wash.—Discargar v. City of Seattle, 171 P.2d 205, 25 Wash.2d 306.

17. Ky.—Williams v. Schmidt, 280 S.W. 494, 213 Ky. 122.

18. Md.—Garozynski v. Daniel, 57 A.2d 339.

19. Cal.—Patanian v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Ky.—Trout's Adm'r v. Ohio Valley Electric Ry. Co., 43 S.W.2d 507, 241 Ky. 144.

person is bound to exercise what is, under the circumstances, reasonable care for his own safety and protection,²⁰ commensurate with the danger involved;²¹ and, if he is confronted with a sudden emergency, the standard of care required of him is what a reasonably careful man would do in a like emergency or under similar circumstances.²² Although various regulations grant such person the right of way, in certain circumstances,²³ they do not relieve him of the duty to exercise reasonable care for his own safety.²⁴

Crossing in front of automobile. One alighting from a streetcar or other vehicle in the street is not negligent as a matter of law in crossing to the side of the street ahead of an approaching motor vehicle when he reasonably believes that he has time to do so in safety;²⁵ but he is negligent in attempting to cross ahead of an automobile which he sees or in the exercise of reasonable care should have seen approaching him and in close proximity to him.²⁶ The fact that he heard the approach of an automobile before stepping into the roadway will not, however, prevent a recovery for injuries sustained by a collision with it when the accident was caused by the deviation of the automobile from its course.²⁷ When an automobile stops on approaching a standing streetcar discharging passengers, as required by law, one who alights from the car is not to be held guilty of negligence in proceeding to

cross in front of the automobile, which starts immediately on the starting of the streetcar and before the pedestrian has reached the curb.²⁸

b. Place and Manner of Crossing

A person alighting from a streetcar or other vehicle may cross the street at right angles from where he alighted from the vehicle, and, ordinarily, in the absence of a restrictive regulation, he is not negligent as a matter of law in crossing diagonally, or at a place between intersections, or to or from the opposite side of the street.

A person alighting from a streetcar or other vehicle has the right to cross the street at right angles from where he alighted from the vehicle,²⁹ and, if there are no street cross-walk lines at the place of alighting, he has the right to find a reasonably safe lane of travel.³⁰ In the absence of governmental regulation providing otherwise, one alighting from a streetcar or other vehicle has the right to walk diagonally toward the side of the roadway, and, therefore, is not negligent as a matter of law in so doing,³¹ but ordinary care under the circumstances may call for additional vigilance on his part.³²

Crossing at other than regular place. A passenger alighting from a streetcar or other vehicle in the street between intersections has a right in the roadway equal to that of motor vehicles,³³ and he is not negligent merely because he crosses the

Wash.—Nylund v. Johnston, 141 P. 2d 863, 19 Wash.2d 163.

20. Ky.—Trout's Adm'r v. Ohio Valley Electric Ry. Co., 43 S.W.2d 507, 241 Ky. 144.

N.C.—Gaskins v. Kelly, 47 S.E.2d 34, 228 N.C. 697.

R.I.—Cunningham v. Walsh, 163 A. 223, 53 R.I. 23.

42 C.J. p 1161 note 91.

21. N.Y.—Crombie v. O'Brien, 165 N. Y.S. 858, 178 App.Div. 807.

Tenn.—Leach v. Asman, 172 S.W. 303, 130 Tenn. 510.

22. La.—Buisson v. Potts, App., 151 So. 97, affirmed 156 So. 408, 180 La. 330.

42 C.J. p 1161 note 93.

Negligence held not shown

Ill.—Mulligan v. Andel, 245 Ill.App. 132.

23. Mo.—Silliman v. Munger Laundry Co., 44 S.W.2d 159, 329 Mo. 235.

Walking to safety zone

If truck was several hundred feet away when pedestrian started to walk from curb to safety zone to board streetcar, pedestrian had right of way.—Silliman v. Munger Laundry Co., supra.

24. U.S.—Thomas v. Goldman, C.C. A.Va., 167 F.2d 315.

N.J.—Trimboli v. Public Service Co-ordinated Transport, 168 A. 572, 111 N.J.Law 481.

Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204.

Change in traffic signal

Where, before plaintiff left bus at intersection, traffic signal had turned red against bus, plaintiff who started across street with green light at intersection, in the exercise of ordinary care, was bound to anticipate that light might change against plaintiff before plaintiff could complete the crossing.—Boyd v. Maruski, 32 N.W.2d 53, 321 Mich. 71.

25. Or.—Marsters v. Isensee, 192 P. 907, 97 Or. 567.

42 C.J. p 1161 note 99.

School bus

Boy alighting from school bus if he observed approach of overtaking automobile could take into account motorist's duty to exercise proper degree of care, in forming belief as to whether he had time to pass in front of bus and to cross road.—Pond v. Somes, 20 N.E.2d 449, 302 Mass. 587.

26. Fla.—Sharpe v. Aqua Systems, 13 So.2d 903, 153 Fla. 154.

Pa.—Kauffman v. Nelson, 73 A. 1105, 225 Pa. 174—Skrutski v. Rosar Com.Pl., 45 Lack.Jur. 130.

27. Ga.—Hirsch v. Plowden, 134 S. E. 833, 35 Ga.App. 763.

28. Mich.—Steele v. Stahelin, 207 N. W. 822, 234 Mich. 307.

29. La.—Mathes v. Schwing, 125 So. 121, 169 La. 272.

30. Wash.—Reitan v. Crooks, 279 P. 97, 153 Wash. 75.

Implied authorization

A city, placing loading berths for busses in center of street, without providing crosswalks, impliedly authorized bus passengers or prospective passengers to use reasonable means to go to and from busses, notwithstanding any contrary municipal regulation.—Bonbright v. Biller, 36 N.E.2d 173, 67 Ohio App. 421.

31. Cal.—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Tenn.—Leach v. Asman, 172 S.W. 303, 130 Tenn. 510.

32. Cal.—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Tenn.—Leach v. Asman, 172 S.W. 303, 130 Tenn. 510.

33. N.Y.—Schafer v. Rose-Gorman-Rose, Inc., 183 N.Y.S. 161, 192 App. Div. 860.

street at such point,³⁴ although he must observe a greater degree of care than where a crosswalk is used.³⁵ Where a streetcar stops some distance from the crossing or its regular stopping place and the conductor invites passengers to alight, it is the right as well as the duty of the passengers to reach the sidewalk as expeditiously as possible,³⁶ having due regard to the traffic conditions upon the street;³⁷ and one who does so alight and crosses to the side of the street after using reasonable care to look for and discover the approach of automobiles is not guilty of negligence as a matter of law.³⁸

Crossing to or from opposite side of street. A person alighting from a streetcar or other vehicle is not negligent as a matter of law in crossing behind or in front of it toward the opposite side of the street or roadway,³⁹ and, being entitled to assume that no automobile will pass it on the wrong side, as discussed infra § 482, he is required to exercise only reasonable care in so crossing.⁴⁰ Similarly, one who crosses in front of a streetcar with intent to board it is not negligent as a matter of law in so doing.⁴¹ However, a person crossing from the opposite side of the street at the rear of the streetcar and between intersections for the purpose of boarding it is not entitled to the benefit of a regulation granting a right of way to persons boarding and alighting from streetcars,⁴² since such a regulation grants a right of way only to passengers on the right-hand side of the street over the portion of the street between the curb and the streetcar.⁴³

Restrictive regulations. A person crossing the traveled roadway after alighting from a streetcar or other vehicle is a pedestrian, within the meaning of an ordinance prohibiting pedestrians from crossing streets diagonally,⁴⁴ and his violation of such ordinance has been held to constitute negligence.⁴⁵ However, a regulation prohibiting pedestrians from

crossing a roadway other than at a crosswalk has been held to have no application to a person crossing from a safety zone to the nearest curb after alighting from a streetcar or other vehicle.⁴⁶ Under a similar regulation a person crossing to a safety island which is midway between intersections has been held to be crossing the street at a regular crossing,⁴⁷ and a person alighting at such an island from which there are no pedestrian lanes is entitled to proceed in any direction,⁴⁸ especially where the regulation provides that pedestrians may make necessary use of the roadway.⁴⁹

A regulation prohibiting pedestrians from using the roadway of a street between intersections, except to board a streetcar or to enter a safety zone at right angles, has no application to a person alighting from a streetcar and crossing toward the opposite side of the street,⁵⁰ and, therefore, one so crossing cannot be held negligent as a matter of law as for a violation of such regulation.⁵¹ An ordinance requiring pedestrians, where traffic is regulated, to cross streets with released traffic does not apply to a person alighting from a streetcar and crossing from the vehicle to the nearest curb,⁵² and a violation of such an ordinance does not alone preclude recovery;⁵³ but a person alighting from a streetcar or other vehicle, who crosses behind the vehicle to the opposite curb against the traffic signal in violation of the ordinance, is negligent per se.⁵⁴

§ 479. — Waiting in Street

It is not negligence as a matter of law to await the arrival of an approaching streetcar or other vehicle in the street at a regular stopping place thereof, but the person so waiting is required to use ordinary care for his own safety and protection.

It is not negligence as a matter of law to stand in the traveled portion of a street or highway to await the arrival of an approaching streetcar or other vehicle, at a regular stopping place thereof,⁵⁵ or to

34. Cal.—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

35. Cal.—Patania v. Yellow-Checker Cab Co., supra.

36. Pa.—Fish v. Stulb, 117 A. 789, 274 Pa. 87.

37. Pa.—Fish v. Stulb, supra.

38. Me.—Leitmeyer v. Feldman, 129 A. 573, 283 Pa. 512.

39. La.—Mathes v. Schwing, 125 So. 121, 169 La. 272.

40 C.J. p 1161 note 4.

41. Me.—Day v. Cunningham, 133 A. 855, 125 Me. 328, 47 A.L.R. 1229.

42 C.J. p 1161 note 6.

43. Wis.—Luethe v. Schmidt-Gaertner Co., 176 N.W. 63, 170 Wis. 590.

44. Wash.—McLeod v. Kjos, 274 P. 180, 150 Wash. 637.

45. Wash.—McLeod v. Kjos, supra.

46. Wash.—Fennel v. Yellow Cab Co., 244 P. 253, 138 Wash. 198.

47. Wash.—Fennel v. Yellow Cab Co., supra.

48. Cal.—Croxall v. Broadway Department Store, 15 P.2d 546, 127 Cal.App. 153.

49. Or.—Nisley v. Sawyer Service, Inc., 261 P. 890, 123 Or. 293.

50. Cal.—Kingston v. Hardt, 62 P.2d 1376, 18 Cal.App.2d 61.

51. Cal.—Kingston v. Hardt, supra.

52. Wash.—Eddy v. Spelger, 201 P. 898, 117 Wash. 632.

Right of way

Passenger leaving streetcar at regular landing had right of way over vehicles under such an ordinance—Tobin v. Goodwin, 290 P. 215, 157 Wash. 658.

53. Wash.—Eddy v. Spelger, 201 P. 898, 117 Wash. 632.

54. Wash.—Wright v. Zido, 276 P. 542, 151 Wash. 486.

55. Cal.—Morgan v. Los Angeles Rock & Gravel Corporation, 287 P. 152, 105 Cal.App. 224.

56. Wash.—Gottstein v. Daly, 7 P. 2d 610, 166 Wash. 582.

57. Cal.—Strafnotis v. Daniels, 265 P. 558, 90 Cal.App. 144.

stand at the outer edge of the roadway to give a signal preparatory to boarding such approaching vehicle,⁵⁶ and one so doing is not strictly bound to get out of the way of an approaching automobile.⁵⁷ However, a person so waiting in the street is, like every other user of the highway, required to exercise ordinary care for his own safety and protection,⁵⁸ and it has been held that a statute imposing a penalty on a pedestrian who negligently uses the street or recklessly disregards his own safety is proper to be considered in determining whether or not he has done so.⁵⁹ He is not necessarily negligent in stepping back one step to permit a passenger to alight from the street car he is about to board,⁶⁰ or in stepping in front of a motor vehicle when threatened with danger by the near approach of another automobile.⁶¹

§ 480. — Alighting from Streetcar or Vehicle

A person is not negligent as a matter of law in standing in a street or highway on alighting from a streetcar or other vehicle, but he is required to use the care and prudence of an ordinary person under similar circumstances.

It is not of itself negligence for a person to descend from a streetcar or other vehicle and consequently to be standing upon the highway,⁶² even though the descent is made on the side toward the open road,⁶³ nor does it constitute negligence as a

matter of law for a person, after alighting, to stand by the side of the car until it passes and permits crossing toward the opposite side of the street.⁶⁴ However, such a person, like every other user of the highway, is required to use the care and prudence of an ordinary person for his own safety and protection,⁶⁵ and to see that he does not place himself in such situation that injury will probably result to him;⁶⁶ and a failure to use such care may, under the circumstances, constitute negligence.⁶⁷ It has been held that a person intending to alight should remain on the streetcar until he has reasonably ascertained that it is safe for him to step into the street without being struck by an approaching motor vehicle;⁶⁸ but, when a car stops and it is announced that passengers are to alight, the passenger ordinarily has the right to assume that it is safe for him so to alight in the ordinary manner.⁶⁹

Alighting at unusual place. A person who alights from a streetcar or other vehicle in the middle of a block or at other than a regular stopping place thereof is not negligent as a matter of law,⁷⁰ but, in view of the duty resting on him to exercise reasonable care under all the circumstances, in so doing he is ordinarily required to be more cautious and vigilant for his own protection than when he alights at a regular stopping place,⁷¹ and a failure thereof may constitute negligence.⁷²

Alighting from moving car. One who alights

Ohio.—Denardo v. Prave, 168 N.E. 225, 32 Ohio App. 445.

42 C.J. p 1162 note 15.

Safety zone

(1) Person standing in streetcar safety zone does not have same duties to avoid being struck by automobile as pedestrian crossing street.—Straffiotis v. Daniels, 265 P. 558, 90 Cal.App. 144.

(2) Pedestrian waiting for streetcar who was struck by motorist was not contributorily negligent, notwithstanding he was not standing at exact point fixed by ordinance for persons waiting for streetcar, where motorist's visibility was such that he could have seen pedestrian standing in the street.—Pearson v. Picht, 52 P.2d 314, 184 Wash. 607.

56. Minn.—Lustik v. Walters, 211 N.W. 311, 169 Minn. 313.

57. Minn.—Lustik v. Walters, *supra*.

58. Mo.—Russell v. Bauer-Berger Grocery Co., App., 288 S.W. 985.

59. Conn.—Mezzi v. Taylor, 120 A. 871, 99 Conn. 1.

60. Cal.—Sommer v. Martin, 204 P. 33, 55 Cal.App. 603.

61. Cal.—Schilling v. Hayes, 202 P. 680, 55 Cal.App. 1.

Tex.—Ward v. Cathey, Civ.App., 210 S.W. 289.

62. Iowa.—Smith v. Spirek, 195 N.W. 736, 196 Iowa 1328.

Regulation held inapplicable

The statute providing that pedestrian crossing highway at point other than at pedestrian crossing shall yield right of way to vehicles on highway did not affect right of motorist to recover for injuries when struck by approaching automobile while standing on highway between intersections with hand on door of automobile after having parked automobile and got out of car with intention of crossing highway.—Brenning v. Remington, 287 N.W. 776, 136 Neb. 883.

63. Pa.—Hall v. Freaney, 26 A.2d 454, 345 Pa. 45.

64. Mass.—Hartnett v. Tripp, 121 N.E. 17, 231 Mass. 382.

65. N.Y.—Brewster v. Barker, 113 N.Y.S. 1026, 129 App.Div. 724.

Ohio.—Cleveland Ry. Co. v. Sebesta, 166 N.E. 898, 121 Ohio St. 26.

Alighting at safety island

Streetcar passenger, alighting at safety island on far side of street, did not violate ordinance requiring cars to discharge passengers on near

side of street.—Nisley v. Sawyer Service, Inc., 261 P. 890, 123 Or. 293.

66. N.Y.—Brewster v. Barker, 113 N.Y.S. 1026, 129 App.Div. 724.

67. Mich.—Mitchell v. Stroh Brewery Co., 15 N.W.2d 144, 309 Mich. 231.

Pa.—Heath v. Klosterman, 23 A.2d 209, 343 Pa. 501.

A series of negligent acts by one alighting from a streetcar or other vehicle, which contribute to the injury, will preclude a recovery.

Cal.—Corbin v. Bedel, 158 P.2d 221, 69 Cal.App.2d 60.

Wash.—Keller v. Breneman, 279 P. 588, 153 Wash. 208, 67 A.L.R. 92.

68. Minn.—Ruddy v. Ingebret, 204 N.W. 630, 164 Minn. 40, 44 A.L.R. 159.

69. N.Y.—Brewster v. Barker, 113 N.Y.S. 1026, 129 App.Div. 724.

70. N.Y.—Schafer v. Rose-Gorman-Rose, Inc., 183 N.Y.S. 161, 192 App.Div. 860.

42 C.J. p 1162 note 29.

71. Pa.—Leitmeyer v. Feldman, 129 A. 573, 283 Pa. 512.

42 C.J. p 1162 note 31.

72. Pa.—Leitmeyer v. Feldman, *supra*.

42 C.J. p 1162 note 32.

from a streetcar or other vehicle on which he was a passenger while it is moving or before it has come to a complete stop is not to be held guilty of negligence as a matter of law;⁷³ but it may be negligence to jump from a moving streetcar in front of a passing automobile.⁷⁴

Alighting backward from a streetcar or other vehicle is not necessarily negligence on the part of one in other respects exercising due care to discover the approach of automobiles.⁷⁵

Private driveway. A passenger alighting from a vehicle on the driveway of a private terminal is bound to exercise reasonable care for his safety,⁷⁶ but he is not required to assume the presence of any danger,⁷⁷ or to anticipate any subordinate use of the driveway which would create a danger against which he should guard.⁷⁸

§ 481. — Duty to Look and Listen

- a. Crossing highway to or from vehicle
- b. Standing in highway on boarding or alighting

a. Crossing Highway to or from Vehicle

- (1) In general
- (2) Extent of duty

73. Md.—Maryland Ice Cream Co. v. Woodburn, 105 A. 269, 133 Md. 295.

42 C.J. p 1162 note 33.

74. Cal.—Brown v. Brashear, 133 P. 805, 22 Cal.App. 135.

N.J.—Horowitz v. Gottwalt, Sup., 102 A. 330.

75. Mass.—Hartnett v. Tripp, 121 N. E. 17, 231 Mass. 382.

Wis.—Cunnien v. Superior Iron Works Co., 184 N.W. 767, 175 Wis. 172, 13 A.L.R. 667.

76. Md.—Feldser v. Beeman, 4 A. 2d 750, 176 Md. 377, 123 A.L.R. 786.

77. Md.—Feldser v. Beeman, supra.

78. Md.—Feldser v. Beeman, supra.

79. Conn.—Spagnola v. New Method Laundry Co., 152 A. 403, 112 Conn. 399.

42 C.J. p 1157 note 25 [a], p 1162 note 38.

80. Cal.—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Mich.—Beers v. Arnot, 14 N.W.2d 511, 308 Mich. 604—Brodie v. City of Detroit, 267 N.W. 576, 275 Mich. 626.

N.J.—Trimboli v. Public Service Co-ordinated Transport, 168 A. 572, 111 N.J.Law 481.

Pa.—Johnston v. McDade, 88 Pa. Super. 377—Driesbach v. Infants Socks, Inc., Com.Pl., 36 Berks Co. L.J. 59.

42 C.J. p 1163 note 40.

Effect of law of road

Obligation to give attention to approaching vehicles is not dispensed with by law of road that approaching vehicles must pass to right, in absence of legal requirement that vehicles move in undeviating lines.—Johnston v. McDade, 88 Pa.Super. 377.

Statutory duty

The statute providing that pedestrians shall not step into or upon a public road without looking in both directions was not applicable in action by passenger who was struck by negligently operated truck after passing in front of bus from which he had alighted, even if evidence affirmatively showed that passenger had failed to comply with statute, where passenger was struck before any possible precautions could have been of service to him.—Meier v. Joseph R. Peebles Sons Co., 11 N.E.2d 707, 57 Ohio App. 80.

81. Tex.—Norris Bros. v. Mattinson, Civ.App., 145 S.W.2d 204.

82. U.S.—Thomas v. Goldman, C.C. A.Va., 187 F.2d 315.

Cal.—Hence v. Teddy's Taxi, 282 P. 392, 101 Cal.App. 748, rehearing denied 283 P. 86, 101 Cal.App. 748.

Iowa.—Spaulding v. Miller, 249 N.W. 642, 216 Iowa 948.

Minn.—Murray v. Jacobson, 262 N.W. 152, 195 Minn. 153.

N.J.—Trimboli v. Public Service Co-

(1) In General

A person crossing a street or highway for the purpose of boarding, or after alighting from, a vehicle is not as a matter of law negligent in failing to look or listen for the approach of motor vehicles, but due care under the circumstances may require him to look or listen in which case his failure so to do may be negligence.

A person crossing a traveled portion of a street or highway, for the purpose of boarding, or after alighting from, a streetcar or other vehicle, has an equal right in the highway with motor vehicles, as discussed supra § 477, and, therefore, is not as a matter of law negligent in failing to look or listen for their approach.⁷⁹ However, the duty of such person as a user of the highway to exercise reasonable care for his own safety may, under the circumstances, require him to look or listen for approaching vehicles,⁸⁰ even though he may have the right of way,⁸¹ in which case his failure so to do may be negligence,⁸² which will preclude a recovery where it is a proximate or contributing cause of the injury.⁸³ Thus, one who crosses a street to or from a streetcar or other vehicle with an umbrella so held as to obscure his vision,⁸⁴ or runs into the side of,⁸⁵ or is struck by,⁸⁶ an automobile approach-

ordinated Transport, 168 A. 572, 111 N.J.Law 481.

Ohio.—Farrar v. Koontz, 16 N.E.2d 829, 58 Ohio App. 479.

Pa.—Heath v. Klosterman, 23 A.2d 209, 343 Pa. 501—Johnston v. McDade, 88 Pa.Super. 377—Driesbach v. Infants Socks, Inc., Com.Pl., 36 Berks Co.L.J. 59.

Tex.—Kooek v. Goodnight, Civ.App., 71 S.W.2d 927, error refused.

W.Va.—Slater v. Shirkey, 8 S.E.2d 897, 122 W.Va. 271.

42 C.J. p 1163 note 41.

Distraction or diversion does not excuse failure to perform duty.—Kooek v. Goodnight, Tex.Civ.App., 71 S.W.2d 927, error refused.

83. Tenn.—Harbor v. Wallace, App., 211 S.W.2d 172.

84. La.—Roder v. Legendre, 84 So. 787, 147 La. 295.

85. La.—Itzkovitch v. Schorling, 99 So. 553, 155 La. 423.

Ohio.—Farrar v. Koontz, 16 N.E.2d 829, 58 Ohio App. 479.

Tenn.—Harbor v. Wallace, App., 211 S.W.2d 172.

Wash.—McLeod v. Kjos, 274 P. 180, 150 Wash. 637.

86. Ill.—Bryan v. City of Chicago, 20 N.E.2d 37, 371 Ill. 64.

N.Y.—Wood v. Pace, 223 N.Y.S. 157, 220 App.Div. 386, affirmed 146 N.E. 322, 250 N.Y. 556.

42 C.J. p 1163 note 44.

ing in plain sight, may be guilty of negligence. On the other hand, where a traffic regulation requires motorists to stop, a prospective passenger of a streetcar is not negligent in stepping into the street without looking,⁸⁷ but such a regulation does not absolve him from all care where he enters a possibly dangerous position.⁸⁸

(2) Extent of Duty

A person crossing to or from a street car or other vehicle must keep such a lookout as would be maintained by an ordinarily prudent person under the circumstances, and it may be necessary to look more than once in all directions from which danger may be apprehended, and it may be negligence to fail to see what is in plain view.

The extent of the duty of lookout imposed on a person crossing a street or highway to board, or after alighting from, a vehicle is to be determined by what an ordinarily prudent person would be expected to do under similar circumstances.⁸⁹ A person crossing to or from a vehicle ordinarily should look in all the directions from which danger may reasonably be apprehended,⁹⁰ but he is not required, in the exercise of ordinary care, to look the whole distance that a motor vehicle might be visible.⁹¹ He need look only far enough to warrant an ordinarily careful and prudent person in concluding that no such automobile is in such proximity as, if properly managed and controlled, to endanger his safety in crossing,⁹² in view of his right to rely on the exercise of reasonable care and compliance with the law on the part of drivers thereof, as discussed *infra* § 482.

Looking again. There is no imperative rule of law requiring a person crossing a roadway to or

from a streetcar or other vehicle to be repeatedly and continuously looking for approaching vehicles, under the penalty that his failure to do so will constitute negligence,⁹³ and, hence, when on alighting from the vehicle or on leaving the curb, he has looked and has seen nothing, he is not as a matter of law negligent in proceeding to cross without looking again,⁹⁴ especially where the street is not much used or frequented by vehicles and, therefore, is not an exceptionally dangerous place.⁹⁵ However, he must make reasonable observations along the course of the street for approaching vehicles as long as he is within the area of danger,⁹⁶ regardless of the fact that the crossing is started with a traffic light in his favor,⁹⁷ and he may be negligent in fact, under the circumstances, in failing to continue or repeat his observation,⁹⁸ as where a considerable time elapses between his looking and alighting from the vehicle.⁹⁹

Failure to see. Since, as discussed *supra* § 458, the duty to look ordinarily implies the duty to see what is in plain sight, a person crossing to or from a streetcar or other vehicle, who has looked, may be negligent in failing to see a vehicle which is in plain view.¹ However, if he looks and listens with reasonable care for approaching automobiles, and sees none, he may not be negligent as a matter of law in failing to see a motor vehicle which strikes him,² especially where the vehicle is traveling at an excessive speed,³ or without lights,⁴ or where the view is obstructed.⁵

b. Standing in Highway on Boarding or Alighting

A person standing in a street or highway on board-

87. D.C.—J. Maury Dove Co. v. Cook, 32 F.2d 957, 59 App.D.C. 61.

88. U.S.—Pierce v. Sanden, C.C.A. Minn., 29 F.2d 87.

89. Tex.—Norris Bros. v. Mattinson, Civ.App., 145 S.W.2d 204.

Duty increased where view obstructed

Tex.—Kooch v. Goodnight, Civ.App., 71 S.W.2d 927, error refused.

90. R.I.—Cunningham v. Walsh, 163 A. 223, 53 R.I. 23.

Crossing in front of bus

(1) Passenger alighting from bus, who crosses in front of bus, has the duty to look for vehicles passing the bus on the left where such passing is legal.—Brodie v. City of Detroit, 287 N.W. 576, 275 Mich. 626.

(2) Passenger alighting from bus at intersection, who crosses in front of bus, has duty to look ahead for vehicles making right turn at intersection, as well as to left.—Lucas v. Craft, 170 S.E. 836, 161 Va. 223.

91. Me.—Wetzler v. Gould, 110 A. 686, 119 Me. 276.

92. N.J.—Goldenberg v. Reggio, 171 A. 677, 112 N.J.Law 440.

Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204.

42 C.J. p 1163 note 49.

93. Mass.—Hennessey v. Taylor, 76 N.E. 224, 189 Mass. 583, 3 L.R.A., N.S., 345, 4 Ann.Cas. 396.

Or.—Marsters v. Isensee, 192 P. 907, 97 Or. 567.

94. Cal.—McQuigg v. Childs, 3 P. 2d 309, 213 Cal. 661.

Ohio.—Titus v. Stouffer, App., 40 N. E.2d 178.

42 C.J. p 1163 note 57.

95. Mo.—Bongner v. Ze genheim, 147 S.W. 182, 165 Mo.App. 328.

96. Mich.—Boyd v. Maruski, 32 N. W.2d 53, 321 Mich. 71.

Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.

97. Mich.—Boyd v. Maruski, 32 N. W.2d 53, 321 Mich. 71.

98. Mich.—Boyd v. Maruski, *supra* Pa.—Driesbach v. Infants Socks, Inc., Conn.Pl., 36 Berks Co L.J. 59. 42 C.J. p 1163 note 59.

99. U.S.—Valanda v. Baum & Reissman, C.C.A.Pa., 113 F.2d 188. 42 C.J. p 1163 note 60.

1. Ark.—Ponder v. Carroll, 105 S.W. 2d 72, 193 Ark. 1120. Colo.—Fabling v. Jones, 114 P.2d 1100, 108 Colo. 144.

2. N.J.—Goldenberg v. Reggio, 171 A. 677, 112 N.J.Law 440. 42 C.J. p 1163 note 55.

3. N.J.—Goldenberg v. Reggio, *supra*. N.Y.—O'Neil v. Kopke, 156 N.Y.S. 664, 170 App.Div. 601.

4. Mo.—Ramsay v. Volkening, App., 245 S.W. 212.

5. La.—Cuccia v. White Top Cabs, App., 6 So.2d 358. 42 C.J. p 1163 note 45.

ing, or alighting from, a streetcar or other vehicle is not always guilty of negligence in failing to look for approaching motor vehicles, but due care under the circumstances may require that a lookout be maintained, so that a failure of duty in this respect will constitute negligence.

A person alighting from a streetcar or other vehicle onto a street or highway is not guilty of negligence as a matter of law in failing to look in the direction from which motor vehicles would approach,⁶ but the duty to exercise reasonable care under the circumstances may require him to look or listen,⁷ in which case the omission so to do may be negligence,⁸ barring a recovery where it is a direct and contributing cause of the injury.⁹ The failure to look or listen may constitute negligence especially where a person alights at a point other than a regular stopping place,¹⁰ or alights from a vehicle parked at the curb into the roadway of a busy street,¹¹ or alights from a vehicle on the narrow open portion of a road.¹²

The duty to look has been said to be of lesser degree in the case of one stepping from a streetcar into the traveled roadway than of a pedestrian leaving the curb to cross the street,¹³ because the latter is leaving a place of safety for one of danger, whereas careful observation on the part of the former, already in a dangerous situation, may not increase the safety of his position, and he may be more careful in attempting to reach the side of the street than to stop where he alights.¹⁴ In determining whether a failure to look is negligent, it is proper to consider the fact that a passenger, in alighting from a vehicle, ordinarily faces at right angles to the direction from which automobiles approach,¹⁵ and that he is entitled to assume that the driver of a motor vehicle will not attempt to pass so close to a streetcar or other vehicle discharging passengers as not to allow a reasonable space for them to step from the car to the street.¹⁶

A person standing in the street waiting to board a streetcar or other vehicle is not as a matter of

law negligent in failing to look for or see an approaching motor vehicle,¹⁷ especially when the automobile is on the wrong side of the street;¹⁸ and, similarly, one about to board a streetcar which is stopping is not necessarily negligent in walking by its side a few steps in the direction in which it is moving.¹⁹ However, in view of the duty resting on every user of the highway to exercise reasonable care for his own safety and protection, as discussed generally supra § 457, a person is not entitled to take a position in the street, even very close to the car tracks, as a streetcar approaches, and remain oblivious to his surroundings,²⁰ and a want of ordinary care in keeping a lookout constitutes negligence.²¹

In safety zone. A person alighting from a streetcar or other vehicle, or waiting therefor, at a place over which a statute or ordinance positively forbids the movement of motor vehicles, is not required to look for approaching automobiles, under the penalty that on failing to do so he will be deemed negligent as a matter of law.²²

§ 482. — Reliance on Care of Automobile Driver

A person boarding or alighting from a streetcar or other vehicle is not negligent as a matter of law in assuming that motorists will use reasonable care with respect to his position and will obey the law, but this does not absolve him from the duty to use ordinary care for his own safety.

In view of the right of a pedestrian using the highway to rely on the exercise of ordinary care and compliance with the law on the part of others using it in common with him, as discussed generally supra § 468, a person about to board a streetcar or other vehicle in the street or highway, or who is alighting or has alighted therefrom, is not negligent as a matter of law in assuming that the drivers of motor vehicles which may approach him will

6. Md.—Maryland Ice Cream Co. v. Woodburn, 105 A. 269, 133 Md. 295. 42 C.J. p 1164 note 61.

7. Pa.—Heath v. Klosterman, 23 A. 2d 209, 343 Pa. 501—Goff v. Borough of College Hill, 149 A. 477, 299 Pa. 343—Seller v. Philadelphia Rapid Transit Co., 169 A. 422, 111 Pa.Super. 69.

8. Ohio.—Cleveland Ry. Co. v. Sebesta, 166 N.E. 898, 121 Ohio St. 26.

9. Pa.—Heath v. Klosterman, 23 A.2d 209, 343 Pa. 501. 42 C.J. p 1164 note 62.

10. Pa.—Heath v. Klosterman, supra.

11. Mo.—Hetz v. Skinner, 249 S.W. 651, 212 Mo.App. 444.

12. U.S.—Valanda v. Baum & Reisman, C.C.A.Pa., 113 F.2d 188.

Pa.—Heath v. Klosterman, 23 A.2d 209, 343 Pa. 501—Goff v. Borough of College Hill, 149 A. 477, 299 Pa. 343.

13. Minn.—Cheadle v. James, 231 N.W. 242, 181 Minn. 41.

14. U.S.—Memphis Taxicab Co. v. Parks, Tenn., 202 F. 909, 121 C.C.A. 267.

15. U.S.—Memphis Taxicab Co. v. Parks, supra.

16. Wis.—Soustad v. Zils, 193 N.W. 656, 180 Wis. 464.

17. Wis.—Soustad v. Zils, supra.

18. Conn.—Mezzi v. Taylor, 120 A. 871, 99 Conn. 1. 42 C.J. p 1164 note 64.

19. Tex.—Posener v. Long, Civ.App., 156 S.W. 591.

20. Cal.—Warner v. Bertholf, 181 P. 808, 40 Cal.App. 776.

21. Minn.—Arseneau v. Sweet, 119 N.W. 46, 106 Minn. 257.

22. Minn.—Loverage v. Carmichael, 204 N.W. 921, 164 Minn. 76. 42 C.J. p 1164 note 70.

23. Mich.—Rohrer v. Schreiber, 193 N.W. 905, 223 Mich. 355. 42 C.J. p 1164 note 71.

use reasonable care with respect to his position,²³ and will obey the law;²⁴ and he is not required to anticipate the negligence of the approaching motorist,²⁵ or his violation of the rules of the road.²⁶

It may be assumed that the driver of the approaching vehicle will have his automobile under proper control,²⁷ and that it will not depart from its legal and ordinary course of travel,²⁸ or pass on the wrong side of the streetcar²⁹ or on the left-hand side of the street.³⁰ It may also be assumed that a driver will not operate his automobile at a dangerous or illegal speed,³¹ and will comply with a regulation requiring him to stop, or to slow down and stop if necessary, when approaching a streetcar or other vehicle taking on or discharging passengers³² or prohibiting him from approaching closer to it than a specified distance.³³ The right to assume that a motorist will exercise due care does not, however, absolve a person boarding or alighting from the car from using ordinary care for his own safety,³⁴ and, if he becomes or would become, in the

exercise of ordinary care, aware of danger in time to avoid being injured, and fails to do so, he is negligent.³⁵

A person in a safety zone has a right to deem himself secure from the dangers incident to motor vehicle traffic,³⁶ but is nevertheless bound to exercise reasonable care to avoid danger which is apparent.³⁷ A person alighting from a streetcar or other vehicle at a safety zone has no right to assume that motorists moving pursuant to traffic lights will stop to let him cross the street to the sidewalk,³⁸ and a person who acts under such an assumption may be guilty of negligence.³⁹

§ 483. Occupants or Operators of Railroad Cars or Streetcars

The occupants or operators of a railroad or streetcar must exercise reasonable care to avoid injury by, or collision with, motor vehicles, and the failure to exercise such care or to comply with statutory requirements may constitute negligence precluding recovery for an injury of which it is a contributing cause.

23. U.S.—*Abood v. Turner*, C.C.A. Pa., 72 F.2d 880.

Cal.—*Ladas v. Johnson's Black & White Taxicab Co.*, 110 P.2d 449, 43 Cal.App.2d 223—*Harvey v. Aceves*, 1 P.2d 1043, 115 Cal.App. 333.

Conn.—*Spagnola v. New Method Laundry Co.*, 152 A. 403, 112 Conn. 399.

La.—*Broussard v. Hotard*, App., 4 So.2d 563.

Pa.—*Morris v. Harmony Short Line Motor Transp. Co.*, 34 A.2d 534, 348 Pa. 117—*Smith v. Shatz*, 200 A. 620, 331 Pa. 453—*Handfinger v. Barnwell Bros.*, 189 A. 312, 325 Pa. 319.

Tenn.—*Tiffany v. Shipley*, 161 S.W. 2d 373, 25 Tenn.App. 539.

Tex.—*Norris Bros. v. Mattinson*, Civ. App., 145 S.W.2d 204, 42 C.J. p. 1164 note 73.

Stopping of bus on signal

Pedestrian crossing highway had right to assume that driver of bus would see pedestrian's signal and stop in locality where it was customary for busses to stop on signal.—*Morris v. Harmony Short Line Motor Transp. Co.*, 34 A.2d 534, 348 Pa. 117.

School bus

Mass.—*Fond v. Somes*, 20 N.E.2d 449, 302 Mass. 587.

Warning signs

Where warning sign which carried red flag was placed some distance in front of truck which was stopped on left-hand side of highway, workman on truck was entitled to assume in alighting from right-hand door that driver of approaching bus would pay attention to warning sign and not go so close to side of truck that he

would hit a person stepping down therefrom.—*Yasevac v. New Haven & S. L. Ry. Co.*, 9 A.2d 278, 126 Conn. 27.

24. Cal.—*Murphy v. St. Claire Brewing Co.*, 107 P.2d 273, 41 Cal.App. 2d 535.

La.—*Buisson v. Potts*, App., 151 So. 97, affirmed 156 So. 408, 180 La. 330.

Mass.—*Campbell v. Cairns*, 20 N.E.2d 427, 302 Mass. 584—*Wilcox v. Sides*, 165 N.E. 871, 267 Mass. 70.

Wash.—*Anselmo v. Morsing*, 6 P.2d 377, 166 Wash. 111, rehearing denied 9 P.2d 100, 166 Wash. 111—*Wright v. Zido*, 276 P. 542, 151 Wash. 486.

42 C.J. p. 1165 note 74.

Extent of assumption

Where a regulation provides for a definite speed and due care and caution in passing a street car which is discharging or receiving passengers, pedestrian leaving street car had no right to assume that passing automobile would stop until he reached curbing.—*Bence v. Teddy's Taxi*, 282 P. 392, 101 Cal.App. 748, rehearing denied 283 P. 86, 101 Cal.App. 748.

25. Iowa.—*Hanson v. Manning*, 239 N.W. 793, 213 Iowa 625.

N.C.—*Gaskins v. Kelly*, 47 S.E.2d 34, 228 N.C. 697.

Pa.—*Giles v. Bennett*, 148 A. 90, 298 Pa. 158—*Bert v. Walker*, 21 A.2d 483, 146 Pa.Super. 50.

26. Md.—*Garzynski v. Daniel*, 57 A. 2d 339.

27. Wis.—*Syslack v. Nevin Grocery Co.*, 193 N.W. 61, 180 Wis. 267.

28. U.S.—*Powell Bros. Truck Lines v. Platt*, C.C.A.Okl., 92 F.2d 879. Cal.—*Market St. Ry. Co. v. George*,

3 P.2d 41, 116 Cal.App. 572—*Averdieck v. Harris*, 218 P. 786, 63 Cal. App. 495.

Ill.—*McNally v. Chauncy Body Corporation*, 42 N.E.2d 853, 315 Ill.App. 190.

29. Wash.—*Mickelson v. Fischer*, 142 P. 1160, 81 Wash. 423.

42 C.J. p. 1165 note 77.

30. N.Y.—*Hall v. Dilworth*, 157 N.Y. S. 1091, 94 Misc. 240.

42 C.J. p. 1165 note 78.

31. Ohio.—*Trentman v. Cox*, 160 N. E. 715, 118 Ohio St. 247.

42 C.J. p. 1165 note 79.

32. Cal.—*Stewart v. Connolly*, 128 P.2d 894, 54 Cal.App.2d 352.

Ill.—*Guvo v. Banis*, 70 N.E.2d 736, 330 Ill.App. 243.

N.H.—*Manor v. Gagnon*, 32 A.2d 688, 92 N.H. 435.

42 C.J. p. 1165 note 80.

33. Mich.—*Metcalf v. Peerless Laundry, etc., Co.*, 184 N.W. 482, 215 Mich. 601.

42 C.J. p. 1165 note 81.

34. Cal.—*Averdieck v. Harris*, 218 P. 786, 63 Cal.App. 495.

Wis.—*Zimmermann v. Mednikoff*, 162 N.W. 349, 185 Wis. 333.

35. Mo.—*Russell v. Bauer-Berger Grocery Co., App.*, 288 S.W. 985.

36. Kan.—*Scott v. Vaughn*, 37 P.2d 1012, 140 Kan. 529.

42 C.J. p. 1165 note 84.

37. Mich.—*Rohrer v. Schreiber*, 193 N.W. 905, 223 Mich. 355.

38. Pa.—*Picharella v. Owens Transfer Co.*, 5 A.2d 408, 135 Pa.Super. 112.

39. Pa.—*Picharella v. Owens Transfer Co., supra*.

A person riding on a streetcar must exercise a degree of care commensurate with the obvious dangers to avoid injury by motor vehicles.⁴⁰ Ordinary care, however, is all that is required.⁴¹ He is not bound to anticipate negligence on the part of operators of motor vehicles.⁴² It is not negligence per se for a passenger to ride with his arm extended out of the car window where it is struck by a passing motor truck.⁴³ A passenger on a crowded streetcar standing on a bumper outside the rear platform is not guilty of contributory negligence precluding a recovery by him for injuries sustained when a motor vehicle following the streetcar failed to stop and ran into him when the streetcar slowed down and stopped.⁴⁴

Motormen and conductors of streetcars. A motorman of a streetcar is required to exercise ordinary care to see and to take precautions to avoid injury from collisions between his streetcar and motor vehicles⁴⁵ and to comply with regulations as to speed and right of way.⁴⁶ However, ordinary care is all that is required.⁴⁷ He has the right to assume that a motorist will exercise care and vigilance,⁴⁸ and need not anticipate and avoid any exigency that might possibly arise.⁴⁹ A conductor of a streetcar engaged in collecting fares on the running board of his car, and exercising ordinary care to see and avoid injury from other vehicles, is not guilty of contributory negligence barring recovery

for injuries sustained as a result of a collision between the streetcar and a motor vehicle.⁵⁰

Railroads. Employees of a railroad are required to exercise ordinary care to discover vehicles on tracks at highway crossings,⁵¹ and to apprehend and act on danger signals,⁵² in order to avoid being charged with contributory negligence as to injury or damage inflicted by a motor vehicle. Due care must also be exercised to avoid a collision with an approaching vehicle,⁵³ even though the vehicle is being negligently operated,⁵⁴ but the operation of a train at high speed through open country does not, it has been held, constitute negligence.⁵⁵ The operator of a railroad car has the right to assume that a motor vehicle approaching a crossing will stop before reaching the track where the train has the right of way,⁵⁶ and that the motorist will observe the law of "look and listen" before proceeding to drive on the crossing.⁵⁷

The operators of railroad vehicles usually must give warning signals of their approach to a crossing,⁵⁸ and the failure to give the signals required by regulation before reaching a crossing has been held to constitute negligence.⁵⁹ Where, however, a sufficient warning is given, the operator of the railroad vehicle is not negligent.⁶⁰ The operation of a motor car on a railroad track without signaling apparatus,⁶¹ or without giving a warning of its approach to a crossing,⁶² has been held to constitute

40. Mich.—Kutchai v. Moreton, 187 N.W. 339, 218 Mich. 242.

42 C.J. p 1165 note 87.

41. Mich.—Kutchai v. Moreton, supra.

42. Mich.—Kutchai v. Moreton, supra.

43. Mich.—Kutchai v. Moreton, supra.

44. Mo.—Smith v. Heibel, 137 S.W. 70, 157 Mo.App. 177.

45. Mass.—Lounshury v. McCormick, 129 N.E. 598, 237 Mass. 328.

42 C.J. p 1165 note 92.

46. Mo.—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475

47. Mass.—Lounshury v. McCormick, 129 N.E. 598, 237 Mass. 328.

42 C.J. p 1165 note 93.

Negligence not shown

Pa.—Philadelphia Rapid Transit Co. v. Mann, 169 A. 418, 110 Pa.Super. 602.

48. Pa.—Philadelphia Rapid Transit Co. v. Mann, supra.

49. Pa.—Philadelphia Rapid Transit Co. v. Mann, supra.

50. Ill.—Pierson v. Lyon, 90 N.E. 693, 243 Ill. 870.

Mass.—Dudley v. Kingsbury, 85 N.E. 76, 199 Mass. 258.

51. Ind.—Chicago, I & L Ry. Co. v. Downey, 5 N.E.2d 656, 103 Ind.App. 672.

Duty of fireman

Fla.—Penn v. Pearce, 163 So. 228, 121 Fla. 3.

Duty to look again

The operator and occupant of a railroad speeder, who looked along highway for vehicles when some distance from crossing and failed to look again when near crossing, were not guilty of negligence per se.—Peterson v. Ingersoll-Rand Co., 78 P. 2d 1083, 194 Wash. 584.

52. Ind.—Chicago I. & L. Ry. Co. v. Downey, 5 N.E.2d 656, 103 Ind.App. 672.

53. Tex.—Gillette Motor Transport Co. v. Whitfield, Civ.App., 186 S.W. 2d 90, refused for want of merit.

Slippery crossing

A railway company's agents, operating engine at crossing over street which they knew or should have known was slippery because of ice, were bound to take notice of special danger of collision with truck at such crossing because of such condition and act accordingly.—Hogue v. Colorado & S. Ry. Co., 136 P.2d 276, 110 Colo. 552.

54. Tex.—Gillette Motor Transport Co. v. Whitfield, Civ.App., 186 S.W. 2d 90, refused for want of merit.

55. Ill.—Bushu v. Cordera, 257 Ill. App. 234.

56. U.S.—Ralston Purina Co. v. Banksau, C.C.A.Ill., 73 F.2d 430.

57. Cal.—Davis v. Lane, 75 P.2d 565, 24 Cal.App.2d 400.

58. La.—Thompson v. Morgan, 119 So. 496, 9 La.App. 186, affirmed 119 So. 69, 167 La. 335.

59. U.S.—Norfolk, etc., R. Co. v. Norton Iron Works, C.C.A.Ky., 279 F. 32.

Ark.—Missouri Pac. R. Co. v. Dawson, 168 S.W.2d 1105, 205 Ark. 404.

60. Cal.—Davis v. Lane, 75 P.2d 565, 24 Cal.App.2d 400.

Warning is sufficient if given at a distance from the crossing, which the motorist, if listening, could have heard before entering the crossing, and if such warning is continued until the crossing is reached.—Davis v. Lane, supra.

61. La.—Thompson v. Morgan, 119 So. 69, 167 La. 335.

62. La.—Thompson v. Morgan, supra.

negligence; but it has also been held that the operator of a railroad speeder, not equipped with any signal device, which carried only two passengers and was used for inspection, was not negligent *per se* in failing to give any warning of approach to a crossing,⁶³ since the statutory warning requirements applicable to the engineer of a locomotive do not apply to the operator of such a speeder.⁶⁴

With respect to injury to a railroad car by a motor vehicle for which recovery is sought, the standard by which the duty of the railroad in maintaining a crossing is measured is based on the use being made of the highway at the time of the accident.⁶⁵ Thus, a crossing at a highway designated as a state detour is required to be in such condition and repair as not to impair its usefulness or interfere with its free use, and so as to afford security for life and property.⁶⁶ A failure so to maintain such a crossing is negligence.⁶⁷

Recovery precluded by negligence. The negligence of an occupant or operator of a railroad or streetcar will preclude a recovery for the injury received, where it is a contributing cause of the injury,⁶⁸ but not otherwise.⁶⁹

§ 484. Persons under Disability

- a. In general
- b. Intoxicated persons

a. In General

A person under any physical disability may have the right to use or traverse the highway but he is required to exercise ordinary care to avoid injury by a motor vehicle and the failure to do so may constitute contributory negligence barring recovery for an injury.

Persons under a physical disability, such as the

aged or infirm, are equally entitled with other pedestrians to the use of the streets and highways,⁷⁰ and are entitled to expect that other users of the highway will exercise ordinary care to avoid injury to them.⁷¹ However, such persons are required to exercise ordinary care to avoid injury by a motor vehicle,⁷² and the failure to exercise such care may constitute contributory negligence barring recovery against the operator of the vehicle causing the injury,⁷³ unless such negligence was not a direct and contributing cause of the injury.⁷⁴ With respect to the degree and amount of care required, a person under a disability must exercise such care in using the streets and highways as a person of ordinary prudence with a similar disability would use under the circumstances,⁷⁵ and he is not required to exercise a greater degree of care for his own safety than would be required of a person under no disability,⁷⁶ or to exercise care sufficient to make good his physical defects.⁷⁷ However, it may be incumbent on him to put forth a greater degree of effort than would otherwise be necessary in order to attain that standard of care which is required of everyone.⁷⁸ A person who is lying upon the street unconscious is not contributorily negligent in failing to yield the right of way to a motor vehicle as required by regulation,⁷⁹ and a person who is in a dazed condition following a collision may not be charged with contributory negligence in failing to exercise due care for his own safety with respect to a subsequent collision.⁸⁰

Blind persons. The mere fact that a person injured by a motor vehicle upon a street or highway was blind and unattended does not in itself show contributory negligence.⁸¹ However, such a per-

63. Wash.—Petersen v. Ingersoll-Rand Co., 78 P.2d 1083, 194 Wash. 584.

64. Wash.—Petersen v. Ingersoll-Rand Co., *supra*.

65. Ind.—Chicago, I. & L. Ry. Co. v. Downey, 6 N.E.2d 656, 103 Ind. App. 672.

66. Ind.—Chicago, I. & L. Ry. Co. v. Downey, *supra*.

67. Ind.—Chicago, I. & L. Ry. Co. v. Downey, *supra*.

68. Ark.—Missouri Pac. R. Co. v. Dawson, 168 S.W.2d 1105, 205 Ark. 404.

69. Colo.—Hogue v. Colorado & S. Ry. Co., 136 P.2d 276, 110 Colo. 552.

La.—Thompson v. Morgan, 119 So. 69, 167 La. 335.

Mo.—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475.

69. Cal.—Davis v. Lane, 75 P.2d 565, 24 Cal.App.2d 400.

70. Md.—Crunkilton v. Hook, 42 A. 2d 517, 185 Md. 1—Mahan v. State, to Use of Carr, 191 A. 575, 172 Md. 373.

Mass.—Wilson v. Freeman, 171 NE 469, 271 Mass. 438.

Or.—Weinstein v. Wheeler, 271 P. 733, 127 Or. 406, 62 A.L.R. 574.

71. Md.—Crunkilton v. Hook, 42 A. 2d 517, 185 Md. 1.

Mass.—Reed v. Union Street Ry. Co., 71 N.E.2d 114, 320 Mass. 706.

72. Conn.—Le Count v. Farrand, 171 A. 623, 118 Conn. 210.

Or.—Weinstein v. Wheeler, 271 P. 733, 127 Or. 406, 62 A.L.R. 574.

42 C.J. p 1166 note 97.

Care required of operator as to persons with physical disability see *supra* § 394.

73. Pa.—Rucheski v. Wisswesser, 50 A.2d 291, 355 Pa. 400.

74. La.—Hollins v. Crawford, App., 11 So.2d 641.

75. Cal.—Jones v. Bayley, 122 P.2d 293, 49 Cal.App.2d 647.

Negligence by mental incompetent not shown

La.—Hollins v. Crawford, App., 11 So.2d 611.

76. Wash.—Horney v. Giering, 231 P. 958, 132 Wash. 555.

77. Cal.—Jones v. Bayley, 122 P.2d 293, 49 Cal.App.2d 647.

78. Cal.—Jones v. Bayley, *supra*.

Mass.—Wilson v. Freeman, 171 NE 469, 271 Mass. 438.

42 C.J. p 1166 note 99.

79. Wis.—Kleiner v. Johnson, 23 N. W.2d 467, 249 Wis. 148.

80. N.Y.—Sherman v. Millard, 259 N.Y.S. 415, 144 Misc. 748, reversed on other grounds Sherman v. Leicht, 264 N.Y.S. 493, 238 App. Div. 271.

81. Ind.—Apperson v. Lazro, 87 N.E. 97, 88 N.E. 99, 44 Ind.App. 186.

son must use ordinary care to avoid being injured by motor vehicles,⁸² and, in determining what constitutes ordinary care on his part, his blindness, and all circumstances affecting the question what care was reasonably necessary to avoid injury, should be considered.⁸³ The fact that a person using the highway is blind may make it incumbent on him to make greater use of his other senses to prevent injury.⁸⁴

Deaf persons. A deaf person has the same rights upon a public street or highway as any other person,⁸⁵ and the mere fact that one injured by a motor vehicle thereon is deaf does not of itself show that he was guilty of contributory negligence.⁸⁶ However, he is guilty of contributory negligence if he fails to exercise ordinary care to avoid injury,⁸⁷ and the fact that he is deaf imposes on him a duty to make greater use of his other senses to that end than would otherwise be required.⁸⁸

b. Intoxicated Persons

The intoxication of a person using the highway does not excuse him from exercising the due care required of a sober person, and, where such intoxication prevents him from using the necessary care and his negligent conduct contributes directly to an injury by a motor vehicle, he cannot recover.

In respect of contributory negligence, the care

required of a pedestrian, who is traveling along a street or highway in a state of intoxication, to avoid injury by a motor vehicle is measured by the care which an ordinarily prudent person, not intoxicated, would exercise under similar conditions.⁸⁹ The intoxication of a pedestrian upon a street or highway will not excuse due care on his part⁹⁰ or exculpate him from the consequences of his contributory negligence,⁹¹ but no greater care is required of such a person than is required of one in his sober senses.⁹² The fact of intoxication alone does not bar a recovery,⁹³ and, in itself, is not necessarily evidence of contributory negligence,⁹⁴ although it is a circumstance to be considered on the question of contributory negligence.⁹⁵ The fact of intoxication must contribute to the injury in order to bar a recovery.⁹⁶ However, if the person injured was so intoxicated at the time of his injury as to prevent him from using ordinary care for his own protection, and he did not use such ordinary care and his failure to do so contributed directly to the injury, he cannot recover.⁹⁷

§ 485. — Children

- a. In general
- b. Recovery by parent

Mass.—Reed v. Union Street Ry. Co., 71 N.E.2d 114, 320 Mass. 706.
Or.—Weinstein v. Wheeler, 271 P. 733, 127 Or. 406, 62 A.L.R. 574.

82. Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.
42 C.J. p 1166 note 2.

83. Ind.—Apperson v. Lazro, 87 N.E. 97, 88 N.E. 99, 44 Ind.App. 186.

84. Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.
42 C.J. p 1166 note 4.

Person blind in one eye

Person without use of one eye must exercise unusual precautions on street.—Handy v. New Orleans Public Service, 120 So. 271, 10 La.App. 72.

85. Cal.—Tomey v. Dyson, 172 P.2d 739, 76 Cal.App.2d 312.
Pa.—Freas v. Campbell, Com.Pl., 48 Lanc.L.Rev. 464.
42 C.J. p 1166 note 5.

86. Cal.—Tomey v. Dyson, 172 P.2d 739, 76 Cal.App.2d 312.
Pa.—Adams v. Armour & Co., 16 A.2d 142, 142 Pa.Super. 280.
42 C.J. p 1166 note 6.

87. Pa.—Robb v. Quaker City Cab Co., 129 A. 331, 283 Pa. 454.

Failure to maintain lookout

Va.—Paytes v. Davis, 157 S.E. 557, 156 Va. 229.

Wis.—Hanson v. Matas, 249 N.W. 505, 212 Wis. 275, 93 A.L.R. 546.

88. Cal.—Jones v. Bayley, 122 P.2d 293, 49 Cal.App.2d 647.

Mass.—Wilson v. Freeman, 171 N.E. 469, 271 Mass. 438.
Pa.—Robb v. Quaker City Cab Co., 129 A. 331, 283 Pa. 454.

89. Ky.—Straughan's Adm'r v. Fendley, 191 S.W.2d 391, 301 Ky. 209.
Minn.—Olstad v. Fahse, 282 N.W. 694, 204 Minn. 118.
Or.—Brady v. Schnitzer, 295 P. 961, 135 Or. 250.

Walking upon highway

Where a statute requires pedestrians to walk on the left-hand side of a highway, an intoxicated person injured as a result of his violation of such statute may be contributorily negligent.—Jackson v. Cook, App. 176 So. 622, reversed on other grounds 181 So. 195, 189 La. 860.

Crossing highway

La.—Jones v. American Mut. Liability Ins. Co., App., 189 So. 169.

90. Ky.—Straughan's Adm'r v. Fendley, 191 S.W.2d 391, 301 Ky. 209.
Mo.—Dickens v. Heitzman, App., 141 S.W.2d 183.

91. Md.—Sugar v. Hafele, 17 A.2d 118, 174 Md. 75.

92. Mich.—De Saddler v. Yellow

Taxicab Co., 184 N.W. 419, 216 Mich. 45.

93. Mich.—De Saddler v. Yellow Taxicab Co., *supra*.

Or.—Brady v. Schnitzer, 295 P. 961, 135 Or. 250.

Pa.—Bright v. Stettenbauer, 15 A.2d 676, 339 Pa. 545.
42 C.J. p 1166 note 11.

94. Cal.—Coakley v. Ajuria, 290 P. 33, 209 Cal. 745.

Md.—Sugar v. Hafele, 17 A.2d 118, 174 Md. 75.

Or.—Brady v. Schnitzer, 295 P. 961, 135 Or. 250.

95. Cal.—Coakley v. Ajuria, 290 P. 33, 209 Cal. 745.

Pa.—Bright v. Stettenbauer, 15 A.2d 676, 339 Pa. 545.
42 C.J. p 1166 note 10.

96. Cal.—Coakley v. Ajuria, 290 P. 33, 209 Cal. 745.

Mass.—Murphy v. Moore, 51 N.E.2d 305, 314 Mass. 731.
42 C.J. p 1166 note 12.

97. Ky.—Straughan's Adm'r v. Fendley, 191 S.W.2d 391, 301 Ky. 209.

Mass.—Baczek v. Damian, 29 N.E.2d 632, 307 Mass. 167—Martin v. Florin, 172 N.E. 895, 273 Mass. 13.
N.H.—Carr v. Orrill, 166 A. 270, 86 N.H. 226.

42 C.J. p 1166 note 13.

a. In General

- (1) General rules
- (2) Walking, playing, or coasting upon highway

(1) General Rules

A child may be precluded from recovery for an injury inflicted by a motor vehicle where he fails to exercise care and prudence in accordance with his age and capacity, and such lack of care is a direct contributing cause of the accident, but the rule as to the effect of contributory negligence is inapplicable where the child is of such tender years as to be presumed to be incapable of exercising any care or discretion.

As a general rule, infants as well as adults are bound by the law of contributory negligence with respect to their right to recover for injuries received from the operation of a motor vehicle.⁹⁸ However, the standard of care applicable in the case of adults is not ordinarily applied in determining whether a child is guilty of contributory negligence,⁹⁹ and all that is required of an infant is the exercise of care and prudence equal to his ca-

capacity.¹ In other words, the care required of a child to avoid injury by a motor vehicle is that care which would ordinarily be exercised under the same or similar circumstances by a child of ordinary prudence of his age and understanding,² or that care which may reasonably be expected under the same or similar circumstances of children of the same age, capacity, intelligence, and experience.³ So, in determining whether a child used the requisite care, consideration may be given not only to his age, but also to his capacity to appreciate danger,⁴ alertness,⁵ intelligence,⁶ and discretion.⁷ A child may be contributorily negligent as a matter of law where he exposes himself to a danger or risk he has been warned to avoid,⁸ and he may be grossly negligent in remaining in a dangerous position after he becomes aware of an approaching automobile.⁹

The failure of a child injured by a motor vehicle to exercise the degree of care required of him ordinarily will bar recovery for his injuries where such failure contributed proximately to cause his inju-

98. Ark.—Brotherton v. Walden, 161 S.W.2d 391, 204 Ark. 92.

Ga.—Jordan v. Wiggins, 18 S.E.2d 512, 66 Ga. App. 534—Gresson v. Davis, 9 S.E.2d 690, 62 Ga. App. 667.

La.—Moreau v. Southern Bell Telephone & Telegraph Co., App. 158 So. 412—O'Try v. Berdon, App. 149 So. 287.

Mich.—Ackerman v. Advance Petroleum Transport, 7 N.W.2d 235, 304 Mich. 96.

Violation of statute

Rule that operator of vehicle who violates statute governing the operation of vehicles does so at his own risk is applicable to all operators of vehicles, even though the incapacities of youth are to be accorded due weight in matters of intent.—Sagor v. Joseph Burnett Co., 190 A. 258, 122 Conn. 447.

99. Cal.—Shannon v. Central-Gaither Union School Dist., 23 P.2d 769, 133 Cal. App. 124.

Kan.—Walls v. Consolidated Gas Utilities Corporation, 96 P.2d 656, 150 Kan. 919.

Mo.—Ridabaugh v. Williford, 116 S.W.2d 118, 342 Mo. 528, 42 C.J. p. 1166 note 15.

1. N.C.—Leach v. Varley, 189 S.E. 636, 211 N.C. 207.

2. Cal.—Graham v. Consolidated Motor Transport Co., 297 P. 617, 112 Cal. App. 648.

Ill.—Oliver v. Kelley, 21 N.E.2d 649, 300 Ill. App. 487—Nelson v. Seymour, 248 Ill. App. 392.

Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521.

Kan.—Walls v. Consolidated Gas

Utilities Corporation, 96 P.2d 656, 150 Kan. 919.

Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.

Mass.—Bartley v. Almeida, 76 N.E.2d 22—Falzone v. Burgoyne, 58 N.E.2d 751, 317 Mass. 493—Holden v. Bloom, 50 N.E.2d 193, 314 Mass. 309, 147 A.L.R. 722—Pond v. Somes, 20 N.E.2d 449, 302 Mass. 587.

Mich.—Clemens v. City of Sault Ste. Marie, 286 N.W. 232, 289 Mich. 254.

Minn.—McCarthy v. City of St. Paul, 276 N.W. 1, 201 Minn. 276.

Mont.—Pierce v. Safeway Stores, 20 P.2d 253, 93 Mont. 560.

Neb.—Kaufman v. Fundaburg, 242 N.W. 658, 123 Neb. 310.

N.Y.—Touris v. Fairmont Creamery Co., 240 N.Y.S. 225, 228 App. Div. 569.

Wis.—Mueller v. O'Leary, 257 N.W. 161, 216 Wis. 257.

42 C.J. p. 1166 note 16.

3. Cal.—Taylor v. Oakland Scavenger Co., 110 P.2d 1044, 17 Cal.2d 594.

Conn.—Sherman v. William M. Ryan & Sons, 21 A.2d 378, 128 Conn. 182.

Ill.—Schwanz v. Sangamo Electric Co., 13 N.E.2d 1007, 294 Ill. App. 395.

Ind.—Rentschler v. Hall, 69 N.E.2d 619, 117 Ind. App. 255.

Me.—Blanchette v. Miles, 27 A.2d 396, 139 Me. 70.

Mass.—Sadak v. Tucker, 37 N.E.2d 495, 310 Mass. 153—Schneider v. De Christopher, 16 N.E.2d 857, 301 Mass. 241.

Mich.—Chadwick v. Kempf, 2 N.W.2d 440, 300 Mich. 402.

Similar statement of rule

It has been held that the care required of a child to avoid injury by a motor vehicle is that care ordinarily expected of one of his age or years.

Ark.—Gates v. Plummer, 291 S.W. 816, 173 Ark. 27.

Kan.—Walls v. Consolidated Gas Utilities Corporation, 96 P.2d 656, 150 Kan. 919.

Ky.—McCray v. Earls, 101 S.W.2d 192, 267 Ky. 89.

Mass.—Jean v. Nester, 158 N.E. 893, 261 Mass. 442.

N.J.—Barwick v. Blauvelt, 146 A. 430, 2 N.J. Misc. 270.

Ohio.—Fichtmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.

4. N.C.—Manheim v. Blue Bird Taxi Corporation, 200 S.E. 382, 214 N.C. 689.

Tex.—Yellow Cab & Baggage Co. v. Smith, Civ. App., 30 S.W.2d 697, error dismissed—Hilliard v. Murdock, Civ. App., 20 S.W.2d 1070, error refused.

5. Cal.—Taylor v. Oakland Scavenger Co., 110 P.2d 1044, 17 Cal.2d 594.

6. N.C.—Manheim v. Blue Bird Taxi Corporation, 200 S.E. 382, 214 N.C. 689.

Tex.—Yellow Cab & Baggage Co. v. Smith, Civ. App., 30 S.W.2d 697, error dismissed—Hilliard v. Murdock, Civ. App., 20 S.W.2d 1070, error refused.

7. Tex.—Hilliard v. Murdock, *supra*.

8. Mich.—Bird v. Meade, 274 N.W. 730, 281 Mich. 114.

9. Wash.—Colwell v. Nygaard, 111 P.2d 838, 8 Wash.2d 462.

ries,¹⁰ notwithstanding the motorist may have been negligent,¹¹ except where the child is so young as to be conclusively presumed to be incapable of exercising any care or discretion.¹² Also, no liability may be imposed on the motorist where the accident was due solely to the acts of the child,¹³ and the negligence, if any, of the motorist was not a proximate

cause of the injury.¹⁴ On the other hand, a child is not guilty of contributory negligence barring recovery if his conduct does not amount to a failure to use due care,¹⁵ or if his negligence did not contribute proximately to the cause of the injury.¹⁶

10. Ill.—Thomas v. Siegman, 22 N.E. 2d 476, 301 Ill.App. 627.

La.—Helo v. Lyons, App., 142 So. 805—Powers v. Simmons, 7 La.App. 523—Valcour v. Simon Hubig Co., 4 La.App. 521.

Mass.—Jackman v. O'Hara, 182 N.E. 860, 280 Mass. 496.

N.M.—Haire v. Brooks, 83 P.2d 980, 42 N.M. 634.

Tenn.—Stafford v. Consolidated Bus Lines, 164 S.W.2d 15, 179 Tenn. 185.

Wash.—Colwell v. Nygaard, 112 P.2d 838, 8 Wash.2d 462.

42 C.J. p 1167 note 18.

Children held guilty of contributory negligence

(1) Eight-year-old.

La.—Barrere v. Schubert, 5 La.App. 67.

Mich.—Ackerman v. Advance Petroleum Transport, 7 N.W.2d 235, 304 Mich. 96.

42 C.J. p 1167 note 18 [a] (2), (3).

(2) Nine-year-old.—Akoboff v. Dusenbury, 106 P.2d 33, 41 Cal.App.2d 173—42 C.J. p 1167 note 18 [a] (4), (5).

(3) Twelve-year-old.—Fontenot v. Freudenstein, La App., 199 So. 677.

(4) Fifteen-year-old.—Mallek v. Stults, 6 N.E.2d 312, 288 Ill.App. 619—42 C.J. p 1167 note 18 [a] (9).

(5) Sixteen-year-old.—McKirryher v. Yager, 24 A.2d 331, 112 Vt. 336

11. Ky.—Dixon v. Stringer, 126 S. W.2d 448, 277 Ky. 347.

12. Iowa.—Paschka v. Carsten, 3 N. W.2d 542, 231 Iowa 1185.

Mont.—Johnson v. Herring, 300 P. 635, 89 Mont. 420.

Ohio.—Benning v. Schlemmer, 14 N. E.2d 941, 67 Oh.o App. 457.

42 C.J. p 1167 note 17.

Age at which contributory negligence is chargeable generally see the C.J.S. title Negligence § 145, also 45 C.J. p 1000 note 94—p 1003 note 19.

Children held incapable of contributory negligence

(1) Under three years old.—Davies v. Consolidated Underwriters, La App., 14 So.2d 494—42 C.J. p 1167 note 17 [a] (1).

(2) Between three and four years old.

Cal.—Scandalis v. Jenny, 22 P.2d 545, 132 Cal.App. 307.

La.—Doyle v. Nelson, App., 11 So.2d 645.

Me.—Farrell v. Hidiash, 165 A. 903, 132 Me. 57.

Mass.—Eaton v. S. S. Pierce Co., 192 N.E. 831, 288 Mass. 323—Rondesu v. Kay, 184 N.E. 926, 282 Mass. 452.

N.Y.—Meyer v. Inguaggiato, 16 N.Y. S.2d 672, 258 App.Div. 331, appeal denied 17 N.Y.S.2d 1021, 258 App. Div. 1055, appeal denied 26 N.E.2d 881, 282 N.Y. 811—Colon v. Salute, 12 N.Y.S.2d 444, 171 Misc. 842, affirmed 39 N.Y.S.2d 610.

Or.—Simpson v. Hillman, 97 P.2d 527, 163 Or. 357.

Wash.—Cleveland v. Grays Harbor Dairy Products, 74 P.2d 909, 193 Wash. 122.

42 C.J. p 1167 note 17 [a] (2).

(3) Between four and five years old.

Ariz.—Womack v. Freach, 165 P.2d 657, 64 Ariz. 61.

Mich.—Morris v. Radley, 11 N.W.2d 291, 306 Mich. 689.

N.Y.—Ramos v. Dixie Cab Corporation, 39 N.Y.S.2d 591, 179 Misc. 287.

N.C.—Reid v. City Coach Co., 2 S.E. 2d 578, 215 N.C. 469, 123 A.L.R. 140—Kelly v. Hunsacker, 189 S.E. 664, 211 N.C. 153—Bevan v. Carter, 186 S.E. 321, 210 N.C. 291

Va.—Shackler v. Anderson, 29 S.E.2d 867, 182 Va. 701

42 C.J. p 1167 note 17 [a] (3).

(4) Between five and six years old.

Ga.—Riggs v. Watson, App., 47 S.E. 2d 900

Iowa.—Darr v. Porte, 263 N.W. 240, 220 Iowa 751.

Mich.—Guscinski v. Kenzie, 275 N.W. 820, 282 Mich. 204—Benedict v. Rinna, 241 N.W. 200, 257 Mich. 349—Micks v. Norton, 239 N.W. 512, 256 Mich. 308—Easton v. Medema, 224 N.W. 636, 246 Mich. 130.

Mo.—Hults v. Miller, App., 299 S.W. 85.

Ohio.—Rothe v. Dworkin, App., 70 N.E.2d 146.

Pa.—Goodstein v. King, 148 A. 300, 298 Pa. 313—Johnson v. Abbott's Alderney Dairies, 145 A. 605, 295 Pa. 548.

Wis.—Ruka v. Zierer, 218 N.W. 358, 195 Wis. 285.

42 C.J. p 1167 note 17 [a] (4), (5). Contra Smith v. Harger, 191 P.2d 25.

(5) Between six and seven years old.

Ill.—Brown v. Murray, 39 N.E.2d 83, 313 Ill.App. 444—Lagerstrom v.

Jago, 44 N.E.2d 330, 316 Ill.App. 156

Iowa.—Paschka v. Carsten, 3 N.W.2d 542, 231 Iowa 1185.

Ky.—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246 Ky. 758.

La.—Millannos v. Fatter, 138 So. 378, 18 La.App. 708.

Mont.—Johnson v. Herring, 300 P. 535, 89 Mont. 420.

Neb.—McKinney v. Wintersteen, 241 N.W. 112, 122 Neb. 679.

42 C.J. p 1167 note 17 [a] (6), (7).

Contra

Mich.—Tyler v. Weed, 280 N.W. 827, 285 Mich. 460.

Wis.—Van Lydegraf v. Scholz, 4 N. W.2d 121, 240 Wis. 599.

(6) Seven years old.—Biddle v. Haldas Bros., 190 A. 588, 8 W.W. Harr.Del., 210.

(7) Eight years old.—Brzyski v. Schreiber, 171 A. 614, 314 Pa. 353.

13. Cal.—Norland v. Gould, 264 P. 560, 200 Cal. 706.

14. N.M.—Haire v. Brooks, 83 P.2d 980, 42 N.M. 634.

Tenn.—Stafford v. Consolidated Bus Lines, 164 S.W.2d 15, 179 Tenn. 185

15. Ala.—Watson v. Ingalls, 119 So. 667, 218 Ala. 537.

Mass.—Bartley v. Almeida, 76 N.E.2d 22.

Mich.—Jenkins v. Bentley, 268 N.W. 819, 277 Mich. 81.

La.—O'Pry v. Berdon, App., 149 So. 287.

Tenn.—Walkup v. Covington, 73 S.W. 2d 718, 18 Tenn.App. 117.

Question of due care not raised

Wash.—Davis v. Pinkerton, 92 P.2d 706, 199 Wash. 579.

Mistaken belief

If boy alighting from school bus looked and saw approach of overtaking automobile but formed belief that he had time to pass in front of bus and to cross road and if belief, although mistaken, was reasonable, boy was not imprudent in acting on it.—Pond v. Somes, 20 N.E.2d 449, 302 Mass. 587.

Right of way statute held inapplicable

Ind.—Rentschler v. Hall, App., 69 N. E.2d 619.

16. Cal.—Waterbury v. Elysian Spring Water Co., 33 P.2d 1048, 139 Cal.App. 365.

Tenn.—Garis v. Eberling, 71 S.W.2d 215, 18 Tenn.App. 1.

Reliance on due care of motorist. In the absence of knowledge to the contrary, a child lawfully upon a street or highway need not anticipate negligence on the part of motorists,¹⁷ and he may assume, and rely to some extent on the assumption, that a motorist will exercise ordinary care for his safety,¹⁸ and take proper precautions to save him from injury.¹⁹ A child has a right to assume that the driver of a motor vehicle will comply with the requirements of law as to the operation of his vehicle,²⁰ and give him some warning before running him down.²¹

(2) Walking, Playing, or Coasting upon Highway

As a general rule, children have the same right as adult pedestrians to use and traverse the public streets and highways, with respect to whether they are precluded by contributory negligence from recovering for an injury inflicted by a motor vehicle, and it is only re-

quired that they conform to the standard of care exacted of infants.

As a general rule, children have the same right as adult pedestrians to use and traverse the public streets and highways, with respect to whether they are contributorily negligent in so doing so as to bar recovery against the operator of a motor vehicle inflicting injury.²² So, a child has the right to walk along the highway on the side proper for pedestrians,²³ provided he exercises ordinary care to avoid injury by a motor vehicle,²⁴ but, if he violates regulations as to the side on which to walk, he may be guilty of contributory negligence as a matter of law.²⁵ It is not of itself negligence for a child to enter upon a street or highway for the purpose of crossing it,²⁶ but, if he is old enough to be charged with contributory negligence, he is obliged to use due care in crossing, and may be guilty of negligence in failing to use such care,²⁷

Violation of ordinance

Kan.—McCausland v. Fille, 40 P.2d 323, 141 Kan. 120.

17. Pa.—Neidlinger v. Haines, 200 A. 581, 331 Pa. 529.

18. Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521—Rentschler v. Hall, App., 69 N.E.2d 619.

Mass.—Mazzafarro v. Dupuis, 75 N.E.2d 503, 321 Mass. 718—Mroczek v. Craig, 44 N.E.2d 644, 312 Mass. 236—De Francisco v. Heath, 28 N.E.2d 995, 306 Mass. 527—Birch v. Strout, 20 N.E.2d 429, 303 Mass. 28—Schneider v. De Christopher, 16 N.E.2d 857, 301 Mass. 241.

19. Mass.—Falzone v. Burgoyne, 58 N.E.2d 751, 317 Mass. 493—Holden v. Bloom, 50 N.E.2d 193, 314 Mass. 309, 147 A.L.R. 722.

20. Mass.—Gaulin v. Yagobian, 158 N.E. 352, 261 Mass. 145—Smith v. Whittall, 153 N.E. 536, 257 Mass. 306.

Mich.—Zylstra v. Graham, 221 N.W. 318, 244 Mich. 319, affirmed 224 N.W. 343, 246 Mich. 91.

N.J.—Eastmond v. Wachstein, 135 A. 67, 4 N.J.Misc. 966.

42 C.J. p 1168 note 20.

21. Mass.—Falzone v. Burgoyne, 58 N.E.2d 751, 317 Mass. 493—Sadak v. Tucker, 37 N.E.2d 495, 310 Mass. 153—Hirrell v. Lacey, 174 N.E. 679, 274 Mass. 431—Calrney v. Cook, 165 N.E. 406, 266 Mass. 279—Smith v. Whittall, 153 N.E. 536, 257 Mass. 306.

42 C.J. p 1168 note 21.

22. Cal.—Hunt v. Los Angeles Ry. Corporation, 294 P. 745, 110 Cal. App. 456.

Mass.—Holden v. Bloom, 50 N.E.2d 193, 314 Mass. 309, 147 A.L.R. 722—Schneider v. De Christopher, 16 N.E.2d 857, 301 Mass. 241.

Care required of operator see supra § 396.

23. Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521—Rentschler v. Hall, App., 69 N.E.2d 619.

24. Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521—Rentschler v. Hall, App., 69 N.E.2d 619.

Iowa.—Reynolds v. Aller, 284 N.W. 825, 236 Iowa 642.

25. Iowa.—Reynolds v. Aller, supra Va.—Hutcheson v. Misenheimer, 194 S.E. 665, 169 Va. 511.

Regulations to be reasonably construed

Cal.—Scaif v. Eicher, 53 P.2d 368, 11 Cal App.2d 44.

Walking on dirt shoulder

As respects contributory negligence of boy who was struck from rear by automobile on highway which had no sidewalk, boy in walking on dirt shoulder was using highway within statute prohibiting pedestrian from walking along highway outside of business or residence district otherwise than close to his left-hand edge of highway.—Scaif v. Eicher, supra.

26. Neb.—Kauffman v. Fundaburg, 242 N.W. 658, 123 Neb. 340.

Roller skates

Fact that child was on roller skates when injured crossing an intersection may be considered with other facts on the question of due care under statute not classifying roller skates as vehicles.—Elchinger v. Krouse, 144 A. 638, 105 N.J.Law 402.

27. Mich.—Moore v. Cook, 267 N.W. 567, 275 Mich. 578.

N.J.—Rizio v. Public Service Electric & Gas Co., 23 A.2d 585, 128 N.J.Law 60.

Vt.—McKirryher v. Yager, 24 A.2d

331, 112 Vt. 336—Farrell v. Greene, 2 A.2d 194, 110 Vt. 87.

Manner of crossing

(1) Proceeding diagonally.

Cal.—Richardson v. Ribasso, 8 P.2d 226, 120 Cal App. 641

La.—Fontenot v. Freudenstein, App., 199 So. 677.

(2) Running.

Mass.—Zarrillo v. Murphy, 42 N.E.2d 1, 311 Mass. 493.

Mich.—Ackerman v. Advance Petroleum Transport, 7 N.W.2d 235, 304 Mich. 96.

(3) Crossing on scooter.—Peluso v. De Pasquale, 182 A. 405, 120 Conn. 701.

Place of crossing

(1) Bridge roadway.—Eagan v. Douglas, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 18.

(2) Between intersections.

Ill.—Thomas v. Siegman, 22 N.E.2d 476, 301 Ill.App. 627.

N.Y.—Sosniak v. Lazar, 35 N.Y.S.2d 511.

Vt.—Duval v. Palmer, 34 A.2d 317, 113 Vt. 389.

Va.—Hutcheson v. Misenheimer, 194 S.E. 665, 169 Va. 511.

Wis.—Volkman v. Fidelity & Cas Co of New York, 32 N.W.2d 348, 252 Wis. 464.

(3) At intersections.

Ky.—Dixon v. Stringer, 126 S.W.2d 448, 277 Ky. 347.

La.—O'Pry v. Berdon, App., 149 So 287—Helo v. Lyons, App., 142 So. 805.

Failure to accelerate pace or to retreat

Vt.—Farrell v. Greene, 2 A.2d 194, 110 Vt. 87.

Precise timing

In action for injuries received by fourteen-year-old pedestrian when

as with respect to keeping a proper lookout,²⁸ or yielding the right of way when necessary.²⁹ However, the mere fact that a child could have seen the approaching automobile had he looked while crossing has been held not to be conclusive on the question of contributory negligence,³⁰ although it is a fact to be considered with the other circumstances of the case.³¹ The rule that a pedestrian who, without looking, steps suddenly into a street or highway from behind an obstruction is guilty of contributory negligence, as considered supra § 468, does not apply with the same strictness to a child.³² However, if a child suddenly darts in front of a motor vehicle, without such regard for the danger of his actions as may be reasonably expected of one of his age, he may be guilty of contributory negligence.³³

Playing in highway. It is not of itself improper for a child to play in the highway, so as to render him contributorily negligent with respect to an injury inflicted by a motor vehicle,³⁴ unless such use

of the highway is prohibited by governmental regulation,³⁵ and it is only required that he conform to the standard of care generally imposed on infants to avoid injury by motor vehicles.³⁶ The failure of a child playing in the street to exercise due care to avoid injury by a motor vehicle may constitute contributory negligence,³⁷ but his failure to escape injury is not always conclusive evidence of negligence.³⁸

Coasting. Coasting by a child on a sled or wagon upon a public street or highway which is not put to an extended public use, where not expressly prohibited by governmental regulation, is not necessarily an unlawful act or a nuisance,³⁹ or negligence per se;⁴⁰ and a child who is free from contributory negligence while coasting is not precluded from recovery for injuries sustained through the negligent operation of a motor vehicle.⁴¹ However, where a child coasts upon a street or highway in violation of a regulation expressly prohibiting such conduct and is injured by a motor vehicle while so doing, he is

struck by truck while crossing intersection on pedestrian crosswalk, court could not measure responsibility of pedestrian by precise timing of relative movements of truck and streetcars which were moving on street or by close calculation of time and space where the underlying facts were based on estimate and not measurements.—*Flowers v. Pistella*, 200 A. 904, 132 Pa.Super. 338.

28. Mich.—*Moore v. Cook*, 267 N.W. 567, 275 Mich. 578.

Wash.—*Davis v. Pinkerton*, 92 P.2d 706, 199 Wash. 579.

Wis.—*Volkman v. Fidelity & Cas. Co. of N. Y.*, 32 N.W.2d 348, 252 Wis. 464.

Negligence held immaterial

Infant's contributory negligence in failing to look was irrelevant where jury found injury by automobile occurred at point of safety in crossing.—*Parillo v. Friss*, 231 N.Y.S. 418, 129 Misc. 340.

Vehicle approaching from rear

Iowa.—*Riddle v. Frankl*, 247 N.W. 493, 215 Iowa 1083.

29. Cal.—*Satariano v. Sleight*, 129 P.2d 35, 54 Cal.App.2d 278.—*Akoff v. Dusenbury*, 106 P.2d 38, 41 Cal. App.2d 173.

N.J.—*Rizio v. Public Service Electr. & Gas Co.*, 23 A.2d 585, 128 N.J. Law 60.

Wis.—*Volkman v. Fidelity & Cas. Co. of N. Y.*, 32 N.W.2d 348, 252 Wis. 464.—*Volkman v. Fidelity & Cas. Co. of N. Y.*, 22 N.W.2d 660, 248 Wis. 615.

30. Mass.—*Jean v. Nester*, 158 N.E. 893, 261 Mass. 442.

31. Mass.—*Jean v. Nester*, supra.

N.J.—*Eastmond v. Wachstein*, 135 A. 67, 4 N.J.Misc. 966.

32. Mass.—*Jean v. Nester*, 158 N.E. 893, 261 Mass. 442.

Proximate cause

Fact that boy ran in front of automobile did not eliminate lack of headlights, or failure to give warning or keep lookout, as proximate causes of boy's death.—*Wilcox v. Wunderlich*, 272 P. 207, 73 Utah 1.

33. Ill.—*Thomas v. Siegmans*, 22 N.E. 2d 476, 301 Ill.App. 627.

Ia.—*Gauthier v. Foote, App.*, 12 So. 2d 9.—*Rodriguez v. Abadie, App.*, 168 So. 515.—*Lowers v. Simmons*, 7 La.App. 523.—*Laurere v. Schuber*, 5 La.App. 67.—*Valcour v. Simon Hug-bug Co.*, 4 La.App. 521.

Mich.—*Zehell v. Buck*, 248 N.W. 559, 263 Mich. 93.

N.Y.—*Surace v. Ide*, 225 N.Y.S. 744, 131 Misc. 69.

Pa.—*Rittle v. Zeller*, 100 Pa.Super. 516.

Vt.—*Duval v. Palmer*, 34 A.2d 317, 113 Vt. 389.

34. Mass.—*Falzone v. Burgoyne*, 58 N.E.2d 751, 317 Mass. 493.—*Holden v. Bloom*, 50 N.E.2d 193, 314 Mass. 309, 147 A.L.R. 722.—*Schneider v. De Christopher*, 16 N.E.2d 857, 301 Mass. 241.

N.C.—*Hollingsworth v. Burns*, 185 S. E. 476, 210 N.C. 40.

35. Utah.—*Graham v. Johnson*, 166 P.2d 230, 109 Utah 346, rehearing denied and modified on other grounds 172 P.2d 665, 109 Utah 365.

36. Mass.—*Holden v. Bloom*, 50 N.E. 2d 193, 314 Mass. 309, 147 A.L.R. 309.

N.Y.—*Tamburrino v. Sterrick Deliv-*

ery Corporation, 271 N.Y.S. 765, 241 App.Div. 221.

Or.—*Forrest v. Turley*, 266 P. 229, 125 Or. 251.

Riding scooter on designated play street

Where six-year-old infant plaintiff, riding on "scooter" or "pushmobile" pushed by another, was struck by defendants' truck while on street designated as school and play street, plaintiff was held not contributorily negligent.—*Tamburrino v. Sterrick Delivery Corporation*, 271 N.Y.S. 765, 241 App.Div. 221.

37. Md.—*Slaysman v. Gerst*, 150 A. 728, 159 Md. 292.

N.J.—*Clerici v. Gennari*, 132 A. 667, 102 N.J.Law 377, 44 A.L.R. 1302.

38. Or.—*Forrest v. Turley*, 266 P. 229, 125 Or. 251.

39. Pa.—*Morris v. Kauffman*, 182 A. 758, 120 Pa.Super. 515.

40. Pa.—*Kovacs v. Ajhar*, 196 A. 876, 130 Pa.Super. 149.—*Morris v. Kauffman*, 182 A. 758, 120 Pa.Super. 515.

41. Pa.—*Fisher v. Duquesne Brewing Co. of Pittsburgh*, 187 A. 90, 123 Pa.Super. 208.

Wash.—*Fabbio v. Diesel Oil Sales Co.*, 95 P.2d 788, 1 Wash.2d 234.—*Pritchard v. Hockett*, 249 P. 989, 140 Wash. 499.

Restricted use of street

The adoption and publication of village ordinance restricting use of streets to coasting constituted an invitation to the public to coast upon such streets with the result that child coasting thereon was justified in believing that he had the right to coast there.—*Lockwood v. Hugo*, 61 N.Y.S.2d 793, 187 Misc. 159.

generally precluded from a recovery because of his contributory negligence.⁴²

b. Recovery by Parent

The parents of a child injured by a motor vehicle may be precluded from recovery for their own benefit by reason of their contributory negligence in permitting the child to be upon the highway unattended; but this rule has no application where the child used due care for his own safety.

The parents of a child injured by a motor vehicle cannot recover in an action for their own benefit where they are guilty of contributory negligence in permitting the child to be upon the highway unattended.⁴³ It has been held, however, that a parent is not negligent as a matter of law in permit-

ting his child to cross a street unattended,⁴⁴ and that ordinary care to protect the child from exposure to danger from motor vehicles is all that is required.⁴⁵ The rule that the parents may be barred from recovery because of their negligence in permitting the child to be upon the highway has no application where the child has not failed to use ordinary care to avoid injury,⁴⁶ or where the driver of the motor vehicle failed to exercise ordinary care to avoid injury to the child after becoming aware of his peril.⁴⁷ Ordinarily a parent may not claim that, because the child was obedient and knew what due care required, the child used due care for his safety.⁴⁸

2. CONTRIBUTORY NEGLIGENCE OF OCCUPANT; ASSUMPTION OF RISK

§ 486. In General

- a. General rules
- b. Care of occupant and of driver compared
- c. What constitutes contributory negligence in general
- d. Knowledge of danger and opportunity to act
- e. Control of vehicle; interfering with driver
- f. Gross negligence; willful or wanton conduct
- g. Assumption of risk

a. General Rules

A person riding as an occupant or guest in or on a motor vehicle driven by another must exercise reasonable or ordinary care for his own safety, and generally is chargeable with contributory negligence, barring a recovery, if his failure to exercise such care contributes proximately to his injuries.

A person riding as an occupant or nonpaying guest in or on a motor vehicle driven by another is not absolved from all personal care to avoid injury to himself,⁴⁹ but must exercise ordinary or reasonable care for his own safety, that is, such

42. Mass.—Reynolds v. Jacobucci, 58 N.E.2d 838, 317 Mass. 500—Roteho v. Margarida, 45 N.E.2d 266, 312 Mass. 429—Towle v. Morin, 4 N.E.2d 348, 295 Mass. 583—Richards v. Pass, 178 N.E. 643, 277 Mass. 372—Brown v. Daley, 173 N.E. 545, 273 Mass. 432—Query v. Howe, 172 N.E. 887, 273 Mass. 92.

N.Y.—Pardy v. Kendall, 28 N.Y.S.2d 185, 262 App.Div. 858—Frazier v. Reinman, 245 N.Y.S. 32, 230 App.Div. 394, affirmed 177 N.E. 168, 256 N.Y. 626.

Coaster unable to stop

Fact that coaster was unable to halt descent after beginning slide on city street where coasting was prohibited did not alter effect of coaster's negligence in coasting on such street as bar to recovery for injuries sustained in collision with automobile which was parked at time coaster started slide.—Shea v. Pillette, 189 A. 154, 108 Vt. 446, 109 A.L.R. 933 followed in 189 A. 159, 108 Vt. 457.

Proximate cause

Where boy who was skiing on street in violation of city ordinance when walking back across the street with his skis on was struck by automobile, his illegal act in skiing

was so intimately connected with his injury as a proximate cause that as a matter of law he was barred from recovering for injuries based on motorist's negligence.—Reynolds v. Jacobucci, 58 N.E.2d 838, 317 Mass. 500.

Violation of coasting ordinance not shown

Iowa.—Samuelson v. Sherrill, 280 N.W. 596, 225 Iowa 421.

43. Pa.—Nelson v. Johnstown Tract. Co., 119 A. 918, 276 Pa. 178.

Wash.—Bruner v. Little, 166 P. 1166, 97 Wash. 319.

44. Cal.—Wong Kit v. Crescent Creamery Co., 262 P. 481, 87 Cal. App. 563.

Mass.—Ferris v. Turner, 70 N.E.2d 715, 320 Mass. 555.

45. Wash.—Bruner v. Little, 166 P. 1166, 97 Wash. 319.

42 C.J. p 1169 note 31.

46. Wash.—Bruner v. Little, supra.

42 C.J. p 1169 note 32.

47. Mo.—Reynolds v. Kinyon, 222 S.W. 476.

Injury avoidable notwithstanding contributory negligence generally see infra § 493.

48. Mass.—Ferris v. Turner, 70 N.E.2d 715, 320 Mass. 555.

49. Ala.—Utility Trailer Works v. Phillips, 29 So.2d 289, 249 Ala. 61. Ariz.—Noel v. Ostlie, 22 P.2d 831, 42 Ariz. 113.

Ark.—Arkansas Valley Co-op Rural Electric Co. v. Elkins, 141 S.W.2d 538, 200 Ark. 883.

Colo.—United Brotherhood of Carpenters & Joiners of America, Local Union No. 55 v. Salter, 167 P.2d 954, 114 Colo. 513.

Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.

Ill.—Lasko v. Meler, 67 N.E.2d 162, 394 Ill. 71.

Ohio.—Langdon v. Cincinnati St. Ry. Co., 62 N.E.2d 380, 75 Ohio App. 380.

Pa.—Alperdt v. Paige, 140 A. 555, 292 Pa. 1.

S.D.—Russell v. Crow, 245 N.W. 249, 60 S.D. 230.

Va.—Yellow Cab Co. of Virginia v. Gulley, 194 S.E. 683, 169 Va. 611.

A guest cannot treat himself as "dead freight," but when danger or negligence on the part of the driver arises guest must act as an ordinarily prudent person would act under the same or similar circumstances to discover it and avoid its consequences.

care as an ordinarily prudent person would exercise | similar circumstances;⁵⁰ and, if his failure to exercise such care contributes proximately with the

Ga.—Crandall v. Sammons, 7 S.E.2d 575, 62 Ga.App. 1.

Ill.—Ames v. Terminal R. Ass'n of St. Louis, 75 N.E.2d 42, 332 Ill.App. 187.

A guest is not excused from exercising due care by reason of the non-existence of automobile driver's agency for guest or negligence attributable to latter.—Hoidhusen v. Schallie, 244 N.W. 392, 60 S.D. 275.

50. U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 311—Pagenkamp v. Devillez, C.C.A. Ill., 80 F.2d 485—Higgins v. Lodo, C.C.A.N.H., 66 F.2d 265—Daugherty v. Pompeo Transporting Corporation, C.C.A. Mass., 62 F.2d 319—Wicker v. Scott, C.C.A. Ohio, 29 F.2d 807.

Ala.—Utility Trailer Works v. Phillips, 29 So.2d 289, 249 Ala. 61—McDermott v. Sibert, 119 So. 681, 218 Ala. 670.

Ariz.—Noel v. Ostlie, 22 P.2d 831, 42 Ariz. 113.

Ark.—Arkansas Valley Co-op Rural Electric Co. v. Elkins, 141 S.W.2d 538, 200 Ark. 883—Sparks v. Chittwood Motor Co., 94 S.W.2d 359, 192 Ark. 743—Bagland v. Snotzmeier, 55 S.W.2d 923, 186 Ark. 778—Graves v. Jewel Tea Co., 23 S.W.2d 972, 180 Ark. 980.

Cal.—Stewart v. Wagenbach, 47 P.2d 267, 3 Cal.2d 755—Shields v. King, 277 P. 1043, 207 Cal. 275—Benjamin v. Noonan, 277 P. 1045, 207 Cal. 279—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App.2d 1—Silva v. Market St. Ry. Co., 123 P.2d 904, 50 Cal.App.2d 796—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298—Queirolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal. App. 610.

Colo.—United Brotherhood of Carpenters and Joiners of America, Local Union No. 55, v. Salter, 167 P.2d 954, 114 Colo. 513.

Conn.—Speerle v. Dabney, 155 A. 56, 113 Conn. 302—Tracy v. Welch, 115 A. 662, 109 Conn. 141—Fitzpatrick v. Cinitus, 139 A. 639, 107 Conn. 91.

D.C.—Weber v. Eaton, 160 F.2d 577, 82 U.S.App. D.C. 66.

Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27—Florida Motor Lines v. Hill, 137 So. 169, 106 Fla. 33, reheard 143 So. 261, 106 Fla. 33.

Ga.—Lazar v. Black & White Cab Co., 179 S.E. 250, 50 Ga.App. 567.

Idaho—Dillon v. Brooks, 6 P.2d 851, 51 Idaho 510.

Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71—Thomas v. Buchanan, 192 N.E. 215, 357 Ill. 270—Hohmer v. Fricke, 46 N.E.2d 169, 317 Ill. App. 372—Walker v. Illinois Commercial Tel. Co., 43 N.E.2d 412, 315 Ill.App. 553—Thompson v. Riemer,

283 Ill.App. 371—Smith v. Courtney, 281 Ill.App. 530—McDermott v. McKeown Transp. Co., 263 Ill.App. 325—St. Clair Nat. Bank v. Monaghan, 256 Ill.App. 471—Waitrovich v. Black, 254 Ill.App. 49.

Ind.—Keeshin Motor Express Co. v. Glassman, 38 N.E.2d 847, 219 Ind. 538—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1—Davis v. Dondanville, 26 N.E.2d 568, 107 Ind.App. 665.

Iowa—Teufel v. Kaufmann, 6 N.W.2d 850, 233 Iowa 443—Williams v. Kearney, 278 N.W. 180, 221 Iowa 1006—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 417—In re Hill's Estate, 208 N.W. 331, 202 Iowa 1038, modified on other grounds 210 N.W. 241, 202 Iowa 1038.

Kan.—Henderson v. National Mut. Casualty Co., 187 P.2d 508, 161 Kan. 109—Leabo v. Willett, 175 P.2d 109, 169 Kan. 236—Ferguson v. Lang, 268 P. 117, 126 Kan. 273, 63 A.L.R. 1423.

Ky.—Mattingly v. Meuter, 121 S.W.2d 676, 275 Ky. 291—Hintermisch v. Brewsbaugh, 87 S.W.2d 934, 261 Ky. 432—Haller's Pet Shop v. Pearlman, 69 S.W.2d 9, 253 Ky. 130—Stephenson's Adm'x v. Sharp's Ex'rs, 1 S.W.2d 957, 222 Ky. 496.

La.—DeLaune v. Breaux, 139 So. 753, 174 La. 43—Lorance v. Smith, 138 So. 871, 173 La. 883—Barr v. Fidelity & Casualty Co. of New York, App. 188 So. 521—Prudhomme v. Continental Casualty Co., App., 169 So. 147—Lockhart v. Missouri Pac. R. Co., App. 153 So. 577—Chanson v. Morgan's Louisiana & T. R. & S. Co., 136 So. 647, 18 La.App. 602.

Me.—Trumpfeller v. Crandall, 155 A. 616, 130 Me. 279—Humphrey v. Hoppe, 145 A. 748, 128 Me. 42.

Mass.—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64.

Mich.—Bucker v. Green, 21 N.W.2d 105, 313 Mich. 218, 163 A.L.R. 697—Fabiano v. Carey, 271 N.W. 754, 279 Mich. 269—Laughlin v. Michigan Motor Freight Lines, 268 N.W. 887, 276 Mich. 545.

Minn.—Hubanette v. Ostby, 6 N.W.2d 637, 213 Minn. 349.

Mo.—Davis v. F. M. Stamper Co., 148 S.W.2d 765, 347 Mo. 761—State ex rel. Alton R. Co. v. Shaun, 143 S.W.2d 233, 346 Mo. 681—Halsey v. Metz, App., 93 S.W.2d 41—Scism v. Alexander, 93 S.W.2d 36, 230 Mo. App. 1175—Rosenstein v. Lewis Automobile Co., App. 34 S.W.2d 1023—Lewis v. Kansas City Public Service Co., App., 17 S.W.2d 359.

Mont.—Marinkovich v. Tierney, 17 P.2d 93, 93 Mont. 72—Black v. Martin, 292 P. 577, 88 Mont. 256.

Neb.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636.

Nev.—Nicora v. Cerveri, 244 P. 897, 49 Nev. 261.

N.J.—Tobish v. Cohen, 164 A. 415, 110 N.J.Law 296—Audino v. Hantman, 166 A. 698, 11 N.J.Misc. 478.

N.Y.—Nelson v. Nygren, 181 N.E. 52, 259 N.Y. 71—Wormuth v. Wormuth, 299 N.Y.S. 380, 252 App.Div. 828, appeal denied 13 N.E.2d 481, 276 N.Y. 691.

N.D.—Eddy v. Wells, 231 N.W. 785, 59 N.D. 663.

Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657—Hocking Valley Ry. Co. v. Wykle, 171 N.E. 860, 123 Ohio St. 391—Langdon v. Cincinnati St. Ry. Co., 62 N.E.2d 380, 75 Ohio App. 482—Johnson v. Eastern Ohio Transport Corporation, 50 N.E.2d 1003, 72 Ohio App. 172—Hughes v. Hanselman, 185 N.E. 852, 44 Ohio App. 516.

Or.—Waller v. Hill, 190 P.2d 147—Hamilton v. Haworth, 177 P.2d 409, 180 Or. 477—Holzhauer v. Portland Traction Co., 169 P.2d 127, 178 Or. 607—Willoughby v. Dusecoll, 121 P.2d 917, 168 Or. 187—Koski v. Anderson, 71 P.2d 1009, 157 Or. 349—Layman v. Heard, 66 P.2d 492, 156 Or. 94.

Pa.—Ashworth v. Hannum, 32 A.2d 407, 317 Pa. 393—Gaber v. Weinberg, 188 A. 187, 324 Pa. 385—Frank v. Markley, 173 A. 186, 315 Pa. 257—Simrell v. Eschenbach, 154 A. 369, 303 Pa. 156—Lloyd v. Noakes, 96 Pa. Super. 164.

S.C.—Hunsucker v. State Highway Department, 189 S.E. 652, 182 S.C. 441—**Corpus Juris** quoted in Fundenburk v. Powell, 187 S.E. 742, 748, 181 S.C. 412.

S.D.—Schumacher v. Stoberg, 7 N.W.2d 141, 69 S.D. 103—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484—Lapp v. J. Laucsen & Co., 293 N.W. 536, 67 S.D. 411—Russell v. Crow, 245 N.W. 249, 60 S.D. 230.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn. App. 596—Claxton v. Claxton, 64 S.W.2d 854, 16 Tenn.App. 399—Coppedge v. Blackburn, 15 Tenn.App. 587—Williamson v. Howell, 13 Tenn.App. 506—Woodfin v. Insel, 13 Tenn.App. 493—Talley v. Dalton, 10 Tenn.App. 597—Tennessee Cent. Ry. Co. v. Melvin, 5 Tenn.App. 85.

Tex.—Garcia v. Moncada, 94 S.W.2d 123, 124 Tex. 453—**Corpus Juris** cited in Ford Motor Co. v. Maddin, 76 S.W.2d 474, 478, 124 Tex. 131—**Corpus Juris** cited in Langham v. Talbott, Civ. App., 211 S.W.2d 987, 990, error refused, no reversible error—Harper v. Texas & P. Ry. Co., Civ. App., 146 S.W.2d 426, error refused—Magnolia Petroleum Co. v. Owen, Civ.App., 101 S.W.2d 354, error dis-

negligence of others to cause his injury or death, he is guilty of contributory negligence which will defeat a recovery,⁵¹ even though, in case of injury by another vehicle, the latter vehicle was violating a statutory regulation.⁵² In such cases recovery is denied to the occupant or guest because of his own negligence and not on the ground of the negligence

of the driver being imputed to him.⁵³ The failure of the occupant to use ordinary care must contribute proximately to cause his injuries, otherwise he will not be barred from recovery therefor.⁵⁴ In any event, the occupant may recover from one whose negligence proximately caused the injury, if he himself was free from contributory negligence⁵⁵

missed—Toney v. Herman Hale Lumber Co., Civ.App., 36 S.W.2d 234, error dismissed.

Utah.—Earle v. Salt Lake & Utah R. Corp., 165 P.2d 877, 109 Utah 111—Baile v. Smith, 17 P.2d 224, 81 Utah 179.

Vt.—Huestis v. Lapham's Estate, 32 A.2d 115, 113 Vt. 191—Senecal v. Bleau, 189 A. 139, 108 Vt 486—Round v. Pike, 148 A. 283, 102 Vt. 324—Leclair v. Boudreau, 143 A. 401, 101 Vt. 270, 63 A.L.R. 1427.

Va.—Yellow Cab Co. of Virginia v. Gulley, 194 S.E. 683, 169 Va. 611.

Wash.—Meath v. Northern Pac. Ry. Co., 36 P.2d 533, 179 Wash. 177—Graves v. Mickel, 29 P.2d 405, 178 Wash. 329—Quayle v. Knox, 27 P.2d 115, 175 Wash. 182—White v. Stanley, 13 P.2d 457, 169 Wash. 342.

W.Va.—Dangerfield v. Akers, 33 S.E. 2d 140, 127 W.Va. 409—Broyles v. Hagerman, 180 S.E. 99, 116 W.Va. 267—Oney v. Binford, 180 S.E. 11, 116 W.Va. 242—Herold v. Clendenen, 161 S.E. 21, 111 W.Va. 121—Lewellyn v. Shott, 155 S.E. 115, 109 W.Va. 379—Clise v. Prunty, 152 S.E. 201, 108 W.Va. 635.

Wis.—Brothers v. Berg, 254 N.W. 384, 214 Wis. 661—Goehmann v. National Biscuit Co., 235 N.W. 792, 204 Wis. 427.

42 C.J. p 1169 note 35.

Passenger in taxicab was bound to exercise reasonable care for own safety, as affecting right to recover from driver of truck with which cab collided.—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584.

51. U.S.—Marcus v. Forcier, C.C.A. Miss., 38 F.2d 8—Roberts v. White Star Bus Line, C.C.A. Puerto Rico, 38 F.2d 1, certiorari denied White Star Bus Line v. Roberts, 50 S.Ct. 463, 281 U.S. 764, 74 L.Ed. 1172—Price v. U. S., D.C.Ky., 50 F.Supp. 676.

Ark.—Dermott Grocery & Commission Co. v. Kennedy, 85 S.W.2d 705, 191 Ark. 211.

Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Ind.—Bain v. Mattmiller, 13 N.E.2d 712, 213 Ind. 549—Munson v. Rucker, 151 N.E. 101, 96 Ind.App. 15.

Kan.—Darrington v. Campbell, 94 P.2d 305, 150 Kan. 407—Shrewsbury v. Goodacre, 10 P.2d 1, 135 Kan. 230—Ferguson v. Lang, 268 P. 117, 126 Kan. 273, 63 A.L.R. 1423.

Ky.—Mattingly v. Meuter, 121 S.W. 2d 676, 275 Ky. 294—Haller's Pet

Shop v. Pearlman, 69 S.W.2d 9, 253 Ky. 130.

La.—Lorance v. Smith, 138 So. 871, 173 La. 883—Elbert v. Creswell Street Pharmacy, App., 161 So. 42—Roberts v. Eason, 6 La.App. 703.

Mass.—Walker v. Lloyd, 4 N.E.2d 306, 295 Mass. 507.

Mich.—Luck v. Gregory, 241 N.W. 862, 257 Mich. 562, modified on other grounds and rehearing denied 244 N.W. 155, 257 Mich. 562.

Mo.—Pence v. Kansas City Laundry Service Co., 59 S.W.2d 633, 332 Mo. 930—Seism v. Alexander, 93 S.W.2d 36, 230 Mo.App. 1175—Carlton v. Stanek, 38 S.W.2d 505, 225 Mo.App. 646.

N.Y.—Barnes v. Royer, 292 N.Y.S. 469, 249 App.Div. 877—Sherman v. Leicht, 264 N.Y.S. 492, 238 App. Div. 271.

N.D.—Wilson v. Oscar H. Kjolric Co., 12 N.W.2d 526, 73 N.D. 134—Bagan v. Bitterman, 259 N.W. 268, 65 N.D. 429.

Ohio—Strouse v. Baltimore & O. R. Co., 64 N.E.2d 257, 76 Ohio App. 327—Rogers v. French Bros-Bauer Co., 166 N.E. 427, 31 Ohio App. 77. Or.—Holzhauser v. Portland Traction Co., 169 P.2d 127, 178 Or. 607—Layman v. Heard, 66 P.2d 492, 156 Or. 94.

Pa.—Fingeret v. Mann, 178 A. 674, 319 Pa. 262—Morningstar v. Northeast Pennsylvania R. Co., 137 A. 800, 290 Pa. 14—Samuel v. City of Wilkes-Barre, Com Pl., 33 Luz Leg. Reg. 405.

S.C.—Corpus Juris quoted in Funderburk v. Powell, 187 S.E. 742, 748, 181 S.C. 412.

Tex.—Magnolia Petroleum Co. v. Owen, Civ.App., 101 S.W.2d 354, error dismissed—West Texas Transp. Co. v. Hash, Civ.App., 43 S.W.2d 152, error dismissed.

Utah.—Baile v. Smith, 17 P.2d 224, 81 Utah 179.

Wash.—Boyle v. Lewis, 193 P.2d 332. W.Va.—Clise v. Prunty, 152 S.E. 201, 108 W.Va. 635.

42 C.J. p 1170 note 36.

Relaxation of rule

It has been held that the rule for contributory negligence as between the guest and the owner or operator of the motor vehicle in which he is riding is somewhat relaxed where he is injured through the negligent operation of another motor vehicle.—Lettieri v. Blaladen, 101 Pa.Super. 423.

Automobile guest must be wholly free from contributory negligence in order to recover for injuries sustained through negligence of third person.—Sloan v. Gulf Refining Co. of Louisiana, La.App., 139 So. 26.

Independent act

Act of adult guest in going to rear of automobile, that had been stopped on dangerous curve in violation of statute, to remove tire constituted independent negligent act for which host was not liable, even though guest acted at host's request, and precluded recovery from host for injuries sustained when struck by overtaking automobile—Steiner v. Muldrew, 173 S.E. 891, 114 W.Va. 801.

52. Mich.—Deal v. Snyder, 168 N.W. 973, 203 Mich. 273.

Horse-drawn vehicle failing to display lights

Mich.—Holsapple v. Superintendents of Poor of Menominee County, 206 N.W. 529, 232 Mich. 503.

53. Ky.—Winston v. Henderson, 200 S.W. 330, 179 Ky. 220, L.R.A.1918C 616.

N.J.—Schroeder v. Public Service Ry. Co. Sup., 118 A. 337.

S.C.—Corpus Juris quoted in Funderburk v. Powell, 187 S.E. 742, 748, 181 S.C. 412.

Utah.—Baile v. Smith, 17 P.2d 224, 81 Utah 179.

Contributory negligence of driver as not imputed to occupant see the C. J.S. title Negligence § 168, also 45 C.J. p 1029 note 15—p 1036 note 95.

54. U.S.—Pagenkamp v. Devillez, C. C.A.111, 80 F.2d 485.

La.—Edenfield v. Wheless, App., 151 So. 659—Chanson v. Morgan Louisiana & T. R. & S. S. Co., 136 So. 647, 18 La.App. 602.

Mass.—Bartoszewicz v. Farashian, 187 N.E. 544, 284 Mass. 200.

S.C.—Crappe v. Southern Ry. Co., 21 S.E.2d 737, 201 S.C. 176—Corpus Juris quoted in Funderburk v. Powell, 187 S.E. 742, 748, 181 S.C. 412.

42 C.J. p 1170 note 39.

Accident due solely to driver

Automobile accident could not be due partly to passenger's negligence, if it was due solely to driver's negligence.—Higgins v. Metzger, 143 A. 394, 101 Vt. 285.

55. U.S.—Price v. U. S., D.C.Ky., 50 F.Supp. 676.

La.—Barber v. El Dorado Lumber

or, in the exercise of reasonable care, could have done nothing to avert the accident.⁵⁶

Joint adventure. With respect to the contributory negligence of the occupant, in case of an injury through the negligence of the driver, the fact that they were engaged in a joint adventure is immaterial;⁵⁷ and even though they are engaged in such an adventure they owe each other the duty to exercise ordinary care.⁵⁸

b. Care of Occupant and of Driver Compared

An occupant is generally not held to the same degree of care and vigilance as is the driver of the motor vehicle.

The standard of duty of an occupant or nonpaying guest to exercise reasonable or ordinary care for his own safety is the same as that of the driver of the motor vehicle,⁵⁹ but the conduct required to

fulfill that duty is ordinarily different because the circumstances are different;⁶⁰ and, accordingly, the precautions to be taken by the occupant or the degree of care and vigilance to be exercised by him is not as high as that required of the driver,⁶¹ taking into consideration the respective duties of the occupant or guest and of the driver.⁶² A statute requiring persons owning, operating, or controlling motor vehicles to exercise the highest degree of care has no application to a mere occupant of the vehicle.⁶³ The occupant is not held to the same degree of care with respect to the speed of the vehicle,⁶⁴ and, where the driver is in sole control of the vehicle, the negligence of the occupant must be determined by his conduct or omissions without regard to the driver's negligence⁶⁵ or the performance of the driver's duties.⁶⁶

Co., App., 139 So. 29, reheard 142 So. 718.

56. La.—Dupuy v. Godchaux Sugars, App., 184 So. 730.

Me.—Nadeau v. Perkins, 193 A. 877, 135 Me. 215—Peasley v. White, 152 A. 530, 129 Me. 450, 73 A.L.R. 1017. N.J.—Hoffman v. Smith, 143 A. 923, 6 N.J.Misc. 1090.

Futile act

Automobile passenger will not be charged with negligence for failure to do futile thing.—Kimball v. Bauckman, 158 A. 694, 131 Me. 14.

57. Ala.—Proctor v. Coffey, 149 So. 838, 227 Ala. 318.

58. Ill.—Barnett v. Levy, 213 Ill. App. 129.

Wash.—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 369—White v. Stanley, 13 P.2d 457, 169 Wash. 342.

Joint enterprise as affecting negligence of driver being imputed to occupant, with respect to third person, see the C.J.S. title Negligence § 168, also 45 C.J. p 1031 note 32—p 1032 note 37.

59. Ark.—Willbank v. Laster, 199 S. W.2d 602, 211 Ark. 88—Arkansas Valley Co-op. Rural Electric Co. v. Elkins, 141 S.W.2d 538, 200 Ark. 882.

Ky.—Toppass v. Perkins' Adm'x, 104 S.W.2d 423, 268 Ky. 186.

Neb.—Glick v. Poska, 239 N.W. 626, 122 Neb. 102.

N.H.—Hoen v. Haines, 154 A. 129, 85 N.H. 36.

S.D.—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484.

Tex.—Edmiston v. Texas & N. O. Ry. Co., 138 S.W.2d 526, 135 Tex. 67—Harper v. Texas & P. Ry. Co., Civ. App., 146 S.W.2d 426.

Vt.—Huestis v. Lapham's Estate, 32 A.2d 115, 113 Vt. 191.

60. Ark.—Willbank v. Laster, 199 S. W.2d 602, 211 Ark. 88.

Cal.—Chinnis v. Pomona Pump Co., 98 P.2d 560, 36 Cal.App.2d 633.

Ky.—Toppass v. Perkins' Adm'x, 104 S.W.2d 423, 268 Ky. 186.

Neb.—Glick v. Poska, 239 N.W. 626, 122 Neb. 102.

N.H.—Hoen v. Haines, 154 A. 129, 85 N.H. 36.

Tex.—Edmiston v. Texas & N. O. Ry. Co., 138 S.W.2d 526, 135 Tex. 67.

61. Ky.—Epperson v. Wright, 126 S. W.2d 123, 277 Ky. 205—Toppass v. Perkins' Adm'x, 104 S.W.2d 423, 268 Ky. 186.

La.—Barr v. Fidelity & Casualty Co. of New York, App., 188 So. 521.

Md.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.

Mich.—Moore v. Rety, 22 N.W.2d 68, 314 Mich. 52.

Minn.—Lang v. Chicago & N. W. Ry. Co., 295 N.W. 57, 208 Minn. 487.

Mo.—Setzer v. Ulrich, App., 90 S.W.2d 154.

Neb.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.

N.H.—MacDonald v. Appleyard, 53 A. 2d 434, 94 N.H. 362—Everett v. Littleton Const. Co., 46 A.2d 317, 94 N.H. 43—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69.

Pa.—Harris v. E. Oostdyk Motor Transp. Corporation, 17 A.2d 347, 340 Pa. 478—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Janeway v. Lafferty Bros., 185 A. 827, 323 Pa. 324—Fingeret v. Mann, 178 A. 674, 319 Pa. 262—Alio v. Pennsylvania R. Co., 167 A. 326, 312 Pa. 453, 90 A.L.R. 980—Alperdt v. Paige, 140 A. 555, 292 Pa. 1—Volz v. Dresser, 28 A.2d 493, 150 Pa.Super. 371—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa.Super. 547—Iorio v. Kidd, Com.Pl., 32 Del.Co. 400.

Tenn.—Talley v. Dalton, 10 Tenn. App.597.

Vt.—Huestis v. Lapham's Estate, 32 A.2d 115, 113 Vt. 191—Round v. Pike, 148 A. 283, 102 Vt. 324.

Wash.—Graves v. Mickel, 29 P.2d 405, 176 Wash. 329.

W.Va.—Clise v. Prunty, 152 S.E. 201, 108 W.Va. 635.

Wis.—Brothers v. Berg, 254 N.W. 384, 214 Wis. 661.

"The guest, whether seated in the front or back seat . . . cannot be placed on the same footing with the driver in reference to the care, caution, and vigilance which should be required of one driving such a high-powered machine."—Delaune v. Breaux, 135 So. 253, 254, 18 La App. 609, affirmed 139 So. 753, 174 La. 43.

62. Minn.—Kapla v. Lehti, 30 N.W. 2d 685, 689, 225 Minn. 325.

Pa.—Ashworth v. Hannum, 32 A.2d 407, 347 Pa. 393.

"The duty of driving the automobile and the correlative duty of exercising due care for the safety of a passenger rests primarily upon the driver. A guest should not undertake to drive, for that is the function of the driver. Nor should he direct the driver, except where such action is reasonably necessary for the guest's own safety."—Kapla v. Lehti, supra.

63. Mo.—Allen v. Chicago, etc., R. Co., 281 S.W. 737, 313 Mo. 42—Corn v. Kansas City, C. & St. J. Ry. Co., 228 S.W. 78—Halsey v. Metz, App., 93 S.W.2d 41.

64. Vt.—Higgins v. Metzger, 143 A. 394, 101 Vt. 285—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

65. Vt.—Higgins v. Metzger, 143 A. 394, 101 Vt. 285—Ronan v. J. G. Turnbull Co., 131 A. 788, 99 Vt. 280.

66. Wis.—Scory v. La Fave, 254 N. W. 643, 215 Wis. 21.

c. What Constitutes Contributory Negligence in General

Whether or not the conduct of an occupant or guest in a motor vehicle constituted contributory negligence must be determined from the facts and circumstances of the particular case.

Whether or not the conduct of an occupant or guest in a motor vehicle constituted contributory negligence must be determined from the facts and circumstances of the particular case.⁶⁷

Among the circumstances to be considered in determining whether an occupant or guest has exercised due care, or, on the other hand, has been guilty of contributory negligence, are the experience and skill of the driver,⁶⁸ his physical condition,⁶⁹ the occupant's situation and duty under the circumstances existing at the time of the accident,⁷⁰ the apparent care which the driver was using,⁷¹ the

condition of the motor vehicle,⁷² the time of the day or night,⁷³ the hazards of the road and travel,⁷⁴ the condition of the highway,⁷⁵ the weather conditions,⁷⁶ the amount of traffic,⁷⁷ the speed of the motor vehicle,⁷⁸ and the fact that the occupant was unaccustomed to motor vehicle travel and not apprehensive of danger.⁷⁹ Contributory negligence on the part of the occupant is not shown by the mere fact of injury or death caused by a collision,⁸⁰ or by the fact that the driver has been convicted of negligence,⁸¹ unless it is further shown that the occupant had the right to control the driver.⁸²

Intoxication of occupant. The fact that the occupant was intoxicated, or had been drinking intoxicating liquor, at the time of the injury does not of itself constitute contributory negligence which will preclude a recovery,⁸³ unless his intoxication

Guest injured by another motorist was not chargeable with contributory negligence in failing to perform host's duty to park on right side of highway, where neither host nor host's automobile was under guest's control.—*Scory v. La Fave*, supra.

67. U.S.—*Kuper v. Betzer*, C.C.A.S. D., 115 F.2d 842.

Ark.—*Arkansas Valley Co-op. Rural Electric Co. v. Elkins*, 141 S.W.2d 538, 200 Ark. 883.

Cal.—*Jacob v. Watson*, 298 P. 64, 113 Cal.App. 299.

Conn.—*Mignone v. Murphy*, 33 A.2d 130, 130 Conn. 196.

Ill.—*Jepsen v. Sprout & Davis*, 71 N.E.2d 542, 330 Ill.App. 448.

Kan.—*Link v. Miller*, 300 P. 1105, 133 Kan. 469.

Ky.—*Thompson v. Kost*, 181 S.W.2d 445, 298 Ky. 32—*Ralston v. Dossey*, 157 S.W.2d 739, 289 Ky. 40—*Chambers v. Hawkins*, 25 S.W.2d 363, 233 Ky. 211—*Stephenson's Adm'r v. Sharp's Ex'rs*, 1 S.W.2d 957, 222 Ky. 496.

La.—*Edenfield v. Wheelless*, App., 151 So. 659—*Sandoz v. Beridon*, App., 150 So. 25, costs taxed 154 So. 677. Me.—*Keller v. Banks*, 156 A. 817, 130 Me. 397.

Md.—*State, to Use of Creasey v. Pennsylvania R. Co.*, 59 A.2d 190—*Dashiell v. Moore*, 11 A.2d 640, 177 Md. 657—*Baltimore, C. & A. Ry. Co. v. Turner*, 136 A. 609, 152 Md. 216.

Nev.—*Nicora v. Cerveri*, 244 P. 897, 49 Nev. 261.

Pa.—*Koshgerian v. Yellow Cab Co.*, 100 Pa.Super. 376.

S.C.—*Crapse v. Southern Ry. Co.*, 21 S.E.2d 737, 201 S.C. 176.

Vt.—*Senecal v. Bleau*, 189 A. 139, 108 Vt. 486.

Va.—*Brown v. Parker*, 189 S.E. 339, 167 Va. 286.

Conduct held negligent

(1) Affirmative act encouraging

excessive speed or reckless driving.—*Mattingly v. Meuter*, 121 S.W.2d 676, 275 Ky. 291.

(2) Attempting to board moving truck.—*Carter v. Bailey*, 20 S.E.2d 58, 221 N.C. 278.

(3) Inattention of rider on rear seat of tandem motorcycle driven by another.—*Bonefant v. Chapdelaine*, 158 A. 857, 131 Me. 45.

(4) Opening unlatched door of sedan while going around curve.—*Kent v. Miller*, 189 S.E. 332, 167 Va. 422.

(5) Riding as guest on motorcycle, aware of excessive speed and defective headlight.—*Allen v. Porter*, 143 P.2d 328, 19 Wash.2d 503.

Conduct held not negligent

(1) Fact that guest did nothing to prevent accident, where automobile, after rounding curve, struck overturned truck.—*Gaber v. Weinberg*, 188 A. 187, 324 Pa. 385.

(2) Where accident resulted from a defective accelerator.—*Hennig v. Rooth*, 132 A. 294, 4 N.J.Misc. 150.

68. Minn.—*Hubenette v. Ostby*, 6 N.W.2d 637, 213 Minn. 349.

69. Minn.—*Hubenette v. Ostby*, supra.

70. Mo.—*Kaley v. Huntley*, 63 S.W.2d 21, 333 Mo. 771.

Mont.—*Simpson v. Miller*, 34 P.2d 528, 97 Mont. 328.

71. Iowa.—*Shepherd v. Bremner*, 260 N.W. 48, 220 Iowa 1.

72. Minn.—*Hubenette v. Ostby*, 6 N.W.2d 637, 213 Minn. 349.

W.Va.—*Clise v. Prunty*, 152 S.E. 201, 108 W.Va. 635.

73. Minn.—*Hubenette v. Ostby*, 6 N.W.2d 637, 213 Minn. 349.

74. Or.—*Whiting v. Andrus*, 144 P.2d 501, 173 Or. 133.

75. Minn.—*Hubenette v. Ostby*, 6 N.W.2d 637, 213 Minn. 349.

76. Minn.—*Hubenette v. Ostby*, supra.

77. Minn.—*Hubenette v. Ostby*, supra.

78. Conn.—*Fitzpatrick v. Cinitis*, 139 A. 639, 107 Conn. 91.

Negligence of occupant was not necessarily shown by proof of excessive speed of the driver of the automobile with the occupant's knowledge and consent unless circumstances proved negligence as matter of law.—*Woodman v. Peck*, 7 A.2d 251, 90 N.H. 292, 122 A.L.R. 1402.

79. Me.—*Banks v. Adams*, 195 A. 206, 135 Me. 270.

Back seat passenger who was unaccustomed to the risks of automobile travel and apprehensive of no danger was not negligent with respect to injuries sustained when motorist turned automobile to the right into driveway and automobile was struck by streetcar which was proceeding in the same direction in which the automobile had been traveling, on tracks parallel to the highway.—*Banks v. Adams*, supra.

80. Tex.—*Schumacher Co. v. Shooter*, 124 S.W.2d 857, 132 Tex. 560.

81. Tex.—*Safeway Stores of Texas v. Webb*, Civ.App., 164 S.W.2d 868, error refused.

82. Tex.—*Safeway Stores of Texas v. Webb*, supra.

83. Cal.—*McMahon v. Schindler*, 102 P.2d 378, 38 Cal.App.2d 642—*Schneider v. Brecht*, 44 P.2d 662, 6 Cal.App.2d 379.

Ky.—*Watson v. Bailey*, 132 S.W.2d 53, 279 Ky. 671—*Winston's Adm'r v. City of Henderson*, 200 S.W. 330, 179 Ky. 220, L.R.A.1918C 646.

Lack of knowledge

Where owner of automobile was too intoxicated to drive automobile and his friend helped him into the automobile which the friend proceed-

so incapacitated him that he was reckless or careless, and such want of care on his part contributed to bring about his injury.⁸⁴

Application to particular occupants. The duty of an occupant to exercise ordinary or reasonable care for his own safety, and of being chargeable with contributory negligence if he fails to do so, has been applied where injury or death has occurred to a bailor of a motor vehicle riding with bailor's agent, as driver,⁸⁵ a city employee riding in a city truck,⁸⁶ an employee assisting on a motor vehicle,⁸⁷ a minor riding with a parent,⁸⁸ a parent riding as occupant or guest with a child,⁸⁹ a passenger in a motor vehicle in a funeral procession,⁹⁰ a person climbing in and out of a motor vehicle,⁹¹ a wife riding with her husband,⁹² and a young or imma-

ture child riding as guest.⁹³ One voluntarily riding as a passenger on a fire engine during a test run must take greater precautions for his own safety than a passenger in an ordinary motor vehicle.⁹⁴

d. Knowledge of Danger and Opportunity to Act

An occupant or guest may be chargeable with contributory negligence where he knows, or by the exercise of ordinary care should know, of the danger which his acts or omissions involve, and has a reasonable opportunity to take steps to protect himself.

An occupant's acts or failure to act may constitute contributory negligence where, and only where, he knows and appreciates, or by the exercise of ordinary care should know and appreciate, the danger which his acts or omissions involve,⁹⁵ and has a

ed to drive, without knowledge or request of owner, the owner could not be held guilty of negligence in permitting himself to be driven by the friend, so as to preclude recovery for the death of the owner as result of collision which occurred while friend was driving—*Sanders v. H. P. Welch Co.*, 26 A.2d 34, 92 N.H. 74.

84. Kv.—*Winston's Adm'r v. City of Henderson*, 200 S.W. 330, 179 Ky. 220, 1 L.R.A. 1918C 646

85. Pa.—*Brown v. Crescent Nut & Chocolate Co.*, 165 A. 743, 310 Pa. 489.

86. Or.—*Rice v. City of Portland*, 17 P.2d 562, 141 Or. 205.

Due care of city employee riding in city truck must be measured by standard of care which ordinarily prudent person would have exercised under circumstances as they appeared.—*Rice v. City of Portland*, *supra*.

87. Fla.—*Ryder v. Plumley*, 189 So. 422, 138 Fla. 378.

La.—*Richey v. Swink*, App., 4 So.2d 749.

Assisting contractor

Where contractors hired trucking company to transport machinery and directed their employee to assist in loading, transporting, and unloading machinery, and employee was injured when thrown from truck as it rounded curve, employee's recovery was not barred by contributory negligence.—*Ryder v. Plumley*, 189 So. 422, 138 Fla. 378.

88. Kan.—*Earhart v. Tretbar*, 80 P. 2d 4, 148 Kan. 42—*Ferguson v. Lang*, 268 P. 117, 126 Kan. 273, 63 A.L.R. 423.

Parent nearsighted

Eighteen-year-old daughter riding in automobile as guest of mother who she knows is nearsighted has duty to exercise ordinary care for her own safety.—*Maybee v. Maybee*, 11 P.2d 973, 79 Utah 585.

89. Iowa.—*Rogers v. Jefferson*, 275 N.W. 874, 224 Iowa 324.

La.—*Bailey v. Demourelle*, 135 So. 623, 17 La.App. 116, followed in *Eastman v. Demourelle*, 135 So. 625, 17 La.App. 119.

Pa.—*Volz v. Dresser*, 28 A.2d 493, 150 Pa.Super. 371

Father suggesting hazardous course to son who is driving

La.—*Solomon v. Davis Bus Line*, App., 1 So.2d 816.

90. N.Y.—*Merkling v. Ford Motor Co.*, 296 N.Y.S. 393, 251 App.Div. 89.

91. Tex.—*Hausman Packing Co. v. Badway*, Civ.App., 147 S.W.2d 856, error refused.

92. Me.—*Kimball v. Bauckman*, 158 A. 694, 131 Me. 14.

Mass.—*Smith v. Brown*, 19 N.E.2d 732, 302 Mass. 432.

Mo.—*Pence v. Kansas City Laundry Service Co.*, 59 S.W.2d 633, 332 Mo. 930—*Setzer v. Ulrich*, App., 90 S.W.2d 154.

N.H.—*Putnam v. Bowman*, 195 A. 865, 89 N.H. 200.

N.C.—*Hogen v. Bogen*, 18 S.E.2d 162, 220 N.C. 648.

Ohio.—*Henderson v. Cleveland Ry. Co.*, 175 N.E. 863, 123 Ohio St. 468—*Telling Belle Vernon Co. v. Krenz*, 171 N.E. 357, 34 Ohio App. 499.

Okl.—*Stillwater Milling Co. v. Tempelin*, 77 P.2d 732, 182 Okl. 309.

Pa.—*Meads v. Rutter*, 184 A. 560, 122 Pa.Super. 64—*Benkert v. Buehler*, Com.Pl., 58 Montg.Co. 416.

S.D.—*Lapp v. J. Lauesen & Co.*, 293 N.W. 536, 67 S.D. 411.

Duty to exercise ordinary care

A wife riding with her husband "is under an obligation not substantially different from that of anyone else, not so circumstanced, to exercise ordinary care for her own safety."—*Bogen v. Bogen*, 18 S.E.2d 162, 164, 220 N.C. 648.

Wife need not be as vigilant as her husband who is driving.—*Setzer v. Ulrich*, Mo.App., 90 S.W.2d 154.

93. La.—*Elbert v. Creswell Street Pharmacy*, App., 161 So. 42.

Mass.—*Marshall v. Carter*, 17 N.E.2d 205, 301 Mass. 372.

Utah.—*Nelson v. Arrowhead Freight Lines*, 104 P.2d 225, 99 Utah 129.

Thirteen-year-old child, riding as guest in automobile must exercise due care of child of tender years, not being so young as to be incapable of negligence.—*Eddleman v. Askew*, 179 S.E. 247, 50 Ga.App. 540.

Children of insufficient maturity to be negligent are not chargeable with contributory negligence.

La.—*Ford v. Chicago, R. I. & P. Ry. Co.*, 8 La.App. 584.

Mass.—*Marshall v. Carter*, 17 N.E.2d 205, 301 Mass. 372.

A six-year-old boy who fell out of defendant's moving automobile was not required to exercise a higher degree of care than that which children of his age are accustomed to exercise under similar circumstances.—*May v. Szwed*, 39 N.E.2d 630, 68 Ohio App. 459.

94. Cal.—*Grassie v. American La France Fire Engine Co.*, 272 P. 1073, 95 Cal.App. 384.

95. Ga.—*Randall Bros. v. Duckett*, 185 S.E. 394, 53 Ga.App. 250—*Lazar v. Black & White Cab Co.*, 179 S.E. 250, 50 Ga.App. 567—*Eddleman v. Askew*, 179 S.E. 247, 50 Ga.App. 540—*Russell v. Bayne*, 163 S.E. 290, 45 Ga.App. 55.

Ky.—*Chambers v. Hawkins*, 25 S.W. 2d 363, 233 Ky. 211.

La.—*Lawason v. Richard*, 135 So. 29, 172 La. 696—*Dupuy v. Godchaux Sugars*, App., 184 So. 730.

Me.—*Kimball v. Bauckman*, 158 A. 694, 131 Me. 14—*Trumpfeller v. Crandall*, 155 A. 648, 130 Me. 279.

N.H.—*Boston v. B. & M. Super Service*, 20 A.2d 633, 91 N.H. 392—*Sal-*

reasonable opportunity to take steps necessary to protect himself and avert the accident,⁹⁶ as where he knows, or by ordinary care should know, that the driver is negligent in his operation of the motor vehicle,⁹⁷ or where he rides in a motor vehicle which he knows is defective in some part vital to its safe operation.⁹⁸ Contributory negligence, however, cannot be based on the guest's mere knowledge that the driver on former occasions has so driven his motor vehicle as to indicate that he is likely to drive recklessly.⁹⁹ With respect to the negligence of a third person, an occupant has been held to be responsible for his actual negligence in joining with his driver in testing a danger he knows to exist,¹ but a guest can be held guilty of contributory negligence only if his host is negligent.²

Acts in emergency. The rules relating to contributory negligence in the case of an emergency,

discussed supra § 460, apply in determining an occupant's contributory negligence in an emergency,³ as, for instance, whether he is to be held guilty of contributory negligence in having interfered with the driver's control of the motor vehicle in the face of a sudden emergency.⁴

e. Control of Vehicle; Interfering with Driver

Whether or not the occupant has control over the driver's operation of the motor vehicle, or interferes with the driver in such operation, is an important fact to be considered in determining whether the occupant was guilty of contributory negligence.

Probably the most important circumstance to be considered in determining the care to be exercised by the occupant, or his contributory negligence, is the fact that ordinarily he has no control, supervision, or management over the driver's operation of the motor vehicle,⁵ and, except where the occupant

vas v. Cantin, 160 A. 727, 85 N.H. 489.

Or.—Holzhauser v. Portland Traction Co., 169 P.2d 127, 178 Or. 607—Koski v. Anderson, 71 P.2d 1009, 157 Or. 349.

Pa.—Harris v. E. Oostdyk Motor Transp. Corporation, 17 A.2d 347, 340 Pa. 478—Iorio v. Kldd, Com.Pl., 32 Del.Co. 400—Wherry v. Cox, Com.Pl., 28 Del.Co. 299

Tenn.—Renfro v. Keen, 89 S.W.2d 170, 19 Tenn App 345.

Utah—Maybee v. Maybee, 11 P.2d 973, 79 Utah 585.

Guest, ignorant of speed of automobile and perils thereof, cannot be held to same responsibility as one having full knowledge thereof.—Higgins v. Metzger, 143 A. 394, 101 Vt. 285

Belief of occupants of automobile that they could drive onto highway ahead of approaching bus without danger did not relieve them from duty of exercising ordinary care.—Safety First Bus Co. v. Skibinski, Tex. Civ.App., 36 S.W.2d 288.

Hiding on fender

Where decedent for benefit of defendant who was having difficulty keeping truck running rode on fender of truck and poured gasoline into carburetor each time truck stopped, some of which would run over the hot motor, decedent was chargeable with knowledge of general consequences which might result from pouring gasoline on hot metal and decedent by assisting defendant to start motor by pouring gasoline into carburetor was guilty of negligence precluding recovery for his death resulting when motor burst into flames.—Granfield v. Herlihy, 77 N.E.2d 225, 322 Mass. 313.

98. Cal.—Queirolo v. Pacific Gas &

Electric Co., 300 P. 487, 114 Cal. App. 610.

Ky.—Mattingly v. Meuter, 121 S.W.2d 676, 275 Ky. 294

La.—Dupuy v. Godchaux Sugars, App., 181 So. 730.

Me.—Kimball v. Bauckman, 158 A. 694, 131 Me. 14.

N.J.—Hoffman v. Smith, 143 A. 923, 6 N.J. Misc. 1090.

N.Y.—Amann v. Thurston, 231 N.Y.S. 657, 133 Misc. 293, affirmed 230 N.Y. S. 794, 224 App. Div. 782—Mariorenzi v. New York Cent. R. Co., 11 N.Y.S.2d 637.

Or.—Gilman v. Olson, 265 P. 439, 125 Or. 1.

Pa.—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa. Super. 547.

W. Va.—Dangerfield v. Akers, 33 S.E. 2d 140, 127 W. Va. 409.

97. Conn.—Tracy v. Welch, 145 A. 662, 109 Conn. 144—Marks v. Dorkin, 136 A. 83, 105 Conn. 521, 61 A. L.R. 1224.

La.—Driefus v. Levy, App., 140 So. 259.

98. Pa.—Zimmer v. Little, 10 A.2d 911, 138 Pa. Super. 374.

99. Conn.—Marks v. Dorkin, 136 A. 83, 105 Conn. 521, 61 A.L.R. 1224.

1. Pa.—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245—Minnich v. Easton Transit Co., 110 A. 273, 267 Pa. 200, 18 A.L.R. 296—Azinger v. Pennsylvania, 105 A. 87, 89, 262 Pa. 242—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa. Super. 547.

2. Pa.—Rocks v. Bender, 157 A. 705, 103 Pa. Super. 546.

3. U.S.—Kuper v. Betser, C.C.A.S.D., 115 F.2d 842.

Ill.—Lasko v. Meier, 63 N.E.2d 531, 327 Ill. App. 5, affirmed 67 N.E.2d 162, 394 Ill. 71.

Iowa.—Withey v. Fowler Co., 145 N.W. 923, 164 Iowa 377.

Held not contributory negligence

Attempting to jump out of automobile when it was skidding on icy road and was rapidly going toward bridge and mill pond.—Keatley v. Hanna Chevrolet Co., 6 S.E.2d 1, 121 W. Va. 669.

4. N.J.—Wright v. Belth, 157 A. 840, 9 N.J. Misc. 1183.

Grabbing driver around neck

The fact that occupant of truck grabbed driver thereof around the neck after truck had been struck, due to the negligent operation of another truck, and was turning over, did not constitute contributory negligence, barring recovery for the death of occupant.—Cooper v. Garrett, La App., 6 So.2d 209, followed in Veronie v. Garrett, 6 So.2d 215.

5. Ark.—Willbanks v. Laster, 199 S.W.2d 602, 211 Ark. 88—Arkansas Valley Co-op. Rural Electric Co. v. Elkins, 141 S.W.2d 538, 200 Ark. 833.

Cal.—Chinnis v. Pomona Pump Co., 98 P.2d 560, 36 Cal App.2d 633.

Ind.—Keeshin Motor Express Co. v. Glassman, 38 N.E.2d 847, 219 Ind. 538.

Neb.—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.

Okl.—Aydelotte & Young v. Saunders, 77 P.2d 50, 182 Okl. 226.

S.D.—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484.

Control of vehicle as affecting negligence of driver being imputed to occupant see the C.J.S. title Negligence § 168, also 45 C.J. p 1029 note 15—p 1036 note 95.

Operator possessing permit

The facts that the guest is a licensed driver and the actual operator of the motor vehicle is driving only by permit do not give the guest control over the car's actual opera-

is the owner of the vehicle,⁶ he generally is under no duty to assume active physical control or supervision over such operation⁷ or to make suggestions as to the management of the vehicle.⁸ The occupant, however, should make an effort to control the operation of the vehicle in the face of known or obvious dangers,⁹ and where it is obvious that the driver is not taking precautions for their safety,¹⁰ and in such a case the occupant may not be negligent in taking the wheel and swerving the car to avoid a collision with another car approaching on the wrong side of the road.¹¹

Interference. An occupant usually is chargeable with contributory negligence, if he interferes with a competent driver's control of the operation of the motor vehicle,¹² such as by grabbing the steering wheel¹³ or by diverting the driver's attention from his duties as driver.¹⁴ A warning should not be given in such a manner as to divert the driver's attention from the road.¹⁵

tion.—*Van Sciver v. Abbott's Alderney Dairies*, 143 A. 153, 6 N.J.Misc. 949.

The fact that the occupant protested speed, fifteen or twenty minutes before the accident, does not show assumption of control over automobile or chauffeur.—*Tobish v. Cohen*, 164 A. 415, 110 N.J.Law 296.

6. Cal.—*Williamson v. Fitzgerald*, 2 P.2d 201, 116 Cal.App. 19.
Ill.—*Rigdon v. Crosby*, 66 N.E.2d 190, 328 Ill.App. 399.

Owner lending automobile to another and becoming passenger therein has right, and, in absence of contrary agreement, duty to prevent driver's carelessness.—*Williamson v. Fitzgerald*, 2 P.2d 201, 116 Cal.App. 19.

7. Cal.—*Ireland v. Marsden*, 291 P. 912, 108 Cal.App. 632.
Me.—*Kimball v. Bauckman*, 158 A. 694, 131 Me. 14—*Keller v. Banks*, 156 A. 817, 130 Me. 397.
Minn.—*Burgess v. Crafts*, 238 N.W. 798, 184 Minn. 384.

Tex.—*Garcia v. Moncada*, 94 S.W.2d 123, 127 Tex. 453.
Va.—*Mize v. Gardner Motor Co.*, 186 S.E. 108, 166 Va. 415.

Wis.—*Gochmann v. National Biscuit Co.*, 235 N.W. 792, 204 Wis. 427.

Guest's duty to keep lookout and warn driver of apparent danger does not require or empower guest to assume control of automobile.—*Nadeau v. Perkins*, 193 A. 877, 135 Me. 215.

8. Wis.—*Haines v. Duffy*, 240 N.W. 152, 206 Wis. 193.

No duty to command driver to stop or to hurry

N.J.—*Falicki v. Camden County Beverage Co.*, 37 A.2d 858, 131 N.J.Law 590.

9. Ohio—*Wills v. Anchor Cartage & Storage Co.*, 159 N.E. 124, 26 Ohio App. 66.

Pa.—*Anstine v. Pennsylvania R. Co.*, 20 A.2d 774, 342 Pa. 423.

10. Kan.—*Darrington v. Campbell*, 94 P.2d 305, 150 Kan. 407.

Va.—*Mize v. Gardner Motor Co.*, 186 S.E. 108, 166 Va. 415.

Duty to protest negligence or unlawful act of driver see infra § 489

11. La.—*Pruett v. Brantley*, 127 So. 2, 13 La.App. 208.

12. Va.—*Jones v. Hanbury*, 164 S.E. 545, 158 Va. 842.

13. Pa.—*Reese v. Herr*, 4 A.2d 195, 134 Pa.Super. 34.

Va.—*Jones v. Hanbury*, 164 S.E. 545, 158 Va. 842.

Causing vehicle to swerve

Where automobile being driven at high rate of speed suddenly swerved into concrete abutment, if guest grabbed steering wheel causing automobile to swerve, guest's act would be negligence which would bar recovery for injuries, notwithstanding driver's negligence in diverting attention from steering wheel to close automobile door which had blown open.—*Reese v. Herr*, 4 A.2d 195, 134 Pa.Super. 34.

14. Md.—*State, to Use of Brandau v. Brandau*, 6 A.2d 233, 176 Md. 584.
Pa.—*Campbell v. Campbell*, 175 A. 407, 316 Pa. 331.

Asking the time

Fact that guest in automobile at night asked driver what time it was, whereupon driver attempted to look, resulting in accident, did not constitute contributory negligence.—*Kirby v. Keating*, 171 N.E. 671, 271 Mass. 390.

f. Gross Negligence; Willful or Wanton Conduct

Under the so-called guest statutes, contributory negligence on the part of the occupant will not be considered unless it consists of gross negligence or willful or wanton conduct.

Under a so-called guest statute, providing that the owner or operator of a motor vehicle shall not be liable for injuries to a nonpaying guest, except in the case of gross negligence or willful or wanton misconduct, discussed generally supra § 399, contributory negligence of such a guest is not an element to be considered or dealt with as a defense to an action for injuries caused by defendant's gross negligence or willful or wanton conduct¹⁶ except where the guest's contributory negligence itself consists of gross negligence or willful or wanton conduct.¹⁷ In an action by an occupant against a driver for willful or wanton misconduct, the fact that the occupant was also guilty of such misconduct constitutes a defense.¹⁸ It has been held that the

Merely carrying on a conversation with the driver was not contributory negligence.—*Sweeney v. New Orleans Public Service*, La.App., 184 So. 740.

Occupant of automobile with driver's arm around her, who, near crossing where collision occurred, told driver he had five minutes to get her home, was held negligent.—*Raines v. Mercer*, 55 S.W.2d 263, 165 Tenn. 415.

15. La.—*Redden v. Blythe*, App., 12 So.2d 728.

Md.—*Dashiell v. Moore*, 11 A.2d 640, 177 Md. 657.

16. U.S.—*Russell v. Turner*, D.C. Iowa, 56 F.Supp. 455, affirmed, C. CA., 148 F.2d 562.

Conn.—*Smith v. Furness*, 166 A. 759, 117 Conn. 97—*Lionetti v. Coppola*, 161 A. 797, 115 Conn. 499—*Bordonaro v. Senk*, 147 A. 136, 109 Conn. 428.

Ind.—*Hoeppner v. Saltzgaber*, 200 N.E. 458, 102 Ind.App. 458—*Coconow-er v. Stoddard*, 182 N.E. 466, 96 Ind.App. 287.

Iowa.—*Edwards v. Kirk*, 288 N.W. 875, 227 Iowa 684—*Shenkle v. Mains*, 247 N.W. 635, 216 Iowa 1324—*Kaplan v. Kaplan*, 239 N.W. 682, 213 Iowa 646—*Neessen v. Armstrong*, 239 N.W. 56, 213 Iowa 378—*Siesseger v. Puth*, 239 N.W. 46, 213 Iowa 164.

Wis.—*Schubring v. Weggen*, 291 N.W. 788, 234 Wis. 517.

17. Ind.—*Pierce v. Clemens*, 46 N.E. 2d 836, 113 Ind.App. 65.

Kan.—*Koster v. Matson*, 30 P.2d 107, 139 Kan. 124.

18. Ill.—*Willgeroth v. Maddox*, 281 Ill.App. 480.

occupant cannot recover, if he might, by the exercise of ordinary care, have avoided the accident, notwithstanding the gross negligence of the driver.¹⁹

G. Assumption of Risk

- (1) General rules
- (2) Condition of vehicle

(1) General Rules

An occupant of a motor vehicle, as an invited or permissive guest, assumes the risk, as between himself and his host, of injury from known or obvious dangers or hazards incident to the ordinary operation of the vehicle.

Although the relation of guest and driver is not contractual, it is consensual, and because of its consensual character, it is generally subject to the rules relating to assumption of risk,²⁰ although there is also authority to the contrary.²¹ There are three

elements of the doctrine of assumption of risk: (1) A hazard or danger inconsistent with the safety of the occupant. (2) Knowledge or appreciation of the hazard by the occupant. (3) Acquiescence or a willingness to proceed in the face of the danger.²²

Under this doctrine an occupant or guest in a motor vehicle, whether invited or permissive, voluntarily assumes the risk of injuries from known or obvious dangers or hazards incident to the ordinary operation of the vehicle,²³ and, therefore, cannot recover for injuries resulting therefrom.²⁴ He assumes all the ordinary risks of injury incident to travel in a motor vehicle²⁵ controlled by a reasonably prudent driver.²⁶ The risk which the occupant may be held to have assumed may arise from the condition of the weather,²⁷ driving on a much-traveled highway at night without lights,²⁸ the icy condition of the streets or highways,²⁹ the purpose and character of the trip in the motor vehicle,³⁰ rid-

19. Ga.—Oast v. Mopper, 199 S.E. 249, 58 Ga App. 506.

Wash.—Kloppfenstein v. Eads, 254 P. 854, 143 Wash. 104, opinion adhered to 256 P. 333, 143 Wash. 104.

20. Conn.—Freedman v. Hurwitz, 164 A. 647, 116 Conn. 283.

N.Y.—Schwartz v. Forty-Second St. M & St. N. A. Ry. Co., 22 N.Y.S.2d 752, 175 Misc. 49.

Wis.—Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599.

Nature and basis of assumption of risk:

As between master and servant see Master and Servant § 357.

In negligence cases in general see the C.J.S. title Negligence § 171, also 45 C.J. p 1043 note 63—p 1044 note 77.

21. Ill.—Reed v. Zellers, 273 Ill.App. 18.

22. Wis.—Kimball v. Mathey, 31 N.W.2d 184, 252 Wis. 102—Olson v. State Farm Mut. Automobile Ins. Co. of Bloomington, Ill., 30 N.W.2d 196, 252 Wis. 37—Knipfer v. Shaw, 246 N.W. 328, 210 Wis. 617, amended 247 N.W. 320, 210 Wis. 617.

The doctrine can apply only where the particular situation or condition producing the risk has continued for such a length of time that the occupant or guest can be found to have known it or been charged with knowledge of it, to have appreciated the risk, and to have had an opportunity to avoid it.—Freedman v. Hurwitz, 164 A. 647, 116 Conn. 283.

23. La.—Duncan v. Pedare, App., 161 So. 221.

Minn.—Landru v. Stensrud, 17 N.W.2d 322, 219 Minn. 227.

Wis.—State Farm Mut. Auto. Ins. Co. of Bloomington, Ill., 30 N.W.2d 196, 252 Wis. 37—Bourestom v.

Bourestom, 285 N.W. 426, 231 Wis. 666.

Glaring headlight

Guest assumed risk of injury when riding in host's automobile if glaring headlights thereon, which caused collision with oncoming automobile at night, were apparent from observation to guest.—Petiteys v. Leith, 252 N.W. 18, 62 S.D. 149

24. Ind.—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65

Miss.—Monsour v. Farris, 181 So. 326, 181 Miss. 803

"The guest who voluntarily takes a chance on known dangers in preference to renouncing the benefits of the relationship which he creates by entering the car, must himself bear the consequences when he is injured by a known danger."—Bourestom v. Bourestom, 285 N.W. 426, 231 Wis. 666.

25. Miss.—Monsour v. Farris, 181 So. 326, 181 Miss. 803—Green v. Maddox, 151 So. 160, 168 Miss. 171

N.D.—Eddy v. Wells, 231 N.W. 785, 59 N.D. 663.

Va.—Boggs v. Plybon, 160 S.E. 77, 157 Va. 30.

Wis.—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501—Elkey v. Elkey, 290 N.W. 627, 234 Wis. 149, motion denied 292 N.W. 300, 234 Wis. 149. 42 C.J. p 1055 note 38, p 1057 note 68.

26. Ala.—Perkins v. Galloway, 69 So. 875, 194 Ala. 265, L.R.A.1916E 1190.

42 C.J. p 1055 note 39.

Duty not to increase hazard

The term "assumption of risk" refers to duty of an automobile host not to increase hazard assumed by guest when entering automobile, and responsibility of guest to refuse hos-

pitality if he knows of careless habits or fixed defects which make host an unsafe driver.—Bourestom v. Bourestom, 285 N.W. 426, 231 Wis. 666.

27. Wis.—Monsos v. Euler, 256 N.W. 630, 216 Wis. 133.

Fog

Wis.—Knipfer v. Shaw, 246 N.W. 328, 210 Wis. 617, amended 247 N.W. 320, 210 Wis. 617.

Frosty condition of windshield and windows

Wis.—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501.

Weather conditions immaterial

Guest's assumption of risk of weather conditions was immaterial with respect to driver's liability for guest's injuries where cause of accident was driver's sudden application of brakes when he had ample time and opportunity to bring automobile to stop and avoid accident.—Monsos v. Euler, 256 N.W. 630, 216 Wis. 133.

28. La.—Sloan v. Gulf Refining Co. of Louisiana, App., 139 So. 26.

29. Wis.—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501—Elkey v. Elkey, 290 N.W. 627, 234 Wis. 149, motion denied 292 N.W. 300, 234 Wis. 149.

30. Minn.—Landru v. Stensrud, 17 N.W.2d 322, 219 Minn. 227.

Wis.—Brockhaus v. Neuman, 228 N.W. 477, 201 Wis. 57—Sommerfeld v. Flury, 223 N.W. 408, 198 Wis. 163.

Going to football game

Where plaintiff, with others, rode as a guest to a football game in defendant's motor vehicle, and the time within which the trip was to be made was known to all parties, and no suggestion was made at any time

ing in the back seat,³¹ or the necessity of making a detour.³² An occupant does not assume the risk of a hazard or danger of which he has no knowledge or appreciation.³³ A guest of a police officer driving a motor vehicle does not assume the risk of a collision with another vehicle while assisting the officer to overtake a speeding traffic violator.³⁴

Under a so-called guest statute, assumption of risk has been held to be available as an affirmative defense to an action by a guest to recover for injuries sustained as a result of the willful or wanton conduct of the driver,³⁵ particularly if the guest has been guilty of the same kind of misconduct that constitutes the gross negligence of his host.³⁶

Doctrine available only as to host. A guest's assumption of risk, in case of a motor vehicle collision, applies only as between the guest and his host,³⁷ and does not bar recovery from a third person for injuries to which the third person's negligence proximately contributed,³⁸ unless the acts of the host, in which the guest acquiesces, operate as

the cause of the collision.³⁹

Contributory negligence distinguished. An occupant's assumption of risk is distinct from any question of his contributory negligence,⁴⁰ and in determining the fact of the host's nonliability for the occupant's injuries on the theory of assumption of risk the fact that the occupant was not guilty of contributory negligence is immaterial.⁴¹

(2) Condition of Vehicle

A person who accepts a gratuitous ride in a motor vehicle assumes the risk of injury from any defect inherent in the vehicle except as to a defect known to the driver and not known or patent to the occupant.

The characteristics of a motor vehicle may be supposed to be within the contemplation of a guest when he accepts an invitation to ride therein,⁴² and, accordingly, one who accepts a gratuitous ride in a motor vehicle accepts the vehicle as he finds it, and assumes the risk of injury from any defect inherent in the vehicle,⁴³ except with respect to any-

that defendant was driving improperly, and the car was in good condition, plaintiff assumed the risk of injury, where the car toppled over as a result of an attempt to make an unexpected turn at too high a rate of speed.—*Brockhaus v. Neuman*, 238 N.W. 477, 201 Wis. 57.

Riding to fire

If guests in automobile, riding to fire, should have anticipated some accident would be sustained because of character of trip, it was unnecessary that they should anticipate happening of particular accident.—*Sommerfeld v. Flury*, 223 N.W. 408, 198 Wis. 163.

31. La.—*Duncan v. Pedarre*, App., 164 So. 498.

32. La.—*Duncan v. Pedarre*, supra.

33. Ind.—*National Motor Vehicle Co. v. Kellum*, 109 N.E. 196, 184 Ind. 457.

Mo.—*Hall v. Wilkerson*, App., 84 S.W. 2d 1063.

N.Y.—*Russo v. State*, 2 N.Y.S.2d 350, 166 Misc. 316.

Tex.—*McMillian v. Sims*, Civ.App., 112 S.W.2d 793.

Wis.—*Uren v. Purity Dairy Co.*, 32 N.W.2d 616, 252 Wis. 446, rehearing denied 33 N.W.2d 213, 252 Wis. 446—*Olson v. State Farm Mut. Automobile Ins. Co. of Bloomington, Ill.*, 30 N.W.2d 196, 252 Wis. 37—*Kuhle v. Ludwig*, 295 N.W. 41, 237 Wis. 147.

34. Wash.—*Carpenter v. Thomas*, 3 P.2d 1001, 164 Wash. 583.

35. U.S.—*Russell v. Turner*, D.C. Iowa, 56 F.Supp. 455, affirmed, C.C.A., 148 F.2d 562.

Iowa.—*Miller v. Mathis*, 8 N.W.2d 744, 233 Iowa 221.

Ohio.—*Gill v. Arthur*, 43 N.E.2d 894, 69 Ohio App. 386.

33. Wis.—*Schubring v. Weggen*, 291 N.W. 788, 234 Wis. 517.

37. Wis.—*Schubring v. Weggen*, supra—*Canzoneri v. Heckert*, 269 N.W. 716, 223 Wis. 25—*Cameron v. Union Automobile Ins. Co.*, 246 N.W. 420, 210 Wis. 659, rehearing denied 247 N.W. 453, 210 Wis. 659.

38. Wis.—*Kauth v. Landsverk*, 271 N.W. 841, 224 Wis. 554—*Canzoneri v. Heckert*, 269 N.W. 716, 223 Wis. 25—*Scory v. La Fave*, 254 N.W. 643, 215 Wis. 21—*Cameron v. Union Automobile Ins. Co.*, 246 N.W. 420, 210 Wis. 659, rehearing denied 247 N.W. 453, 210 Wis. 659.

Guest's assumption of risk incident to host's parking on left shoulder of highway did not bar recovery for injuries inflicted by another motorist unless guest was negligent or was chargeable with host's negligence through cooperation with host, or failure to use power to control host.—*Scory v. La Fave*, 254 N.W. 643, 215 Wis. 21.

39. Wis.—*Wiese v. Polzer*, 248 N.W. 113, 212 Wis. 337.

40. Ind.—*Pierce v. Clemens*, 46 N.E. 2d 836, 113 Ind.App. 65.

Wis.—*Nordahl v. Farmers Mut. Auto. Ins. Co.*, 27 N.W.2d 707, 250 Wis. 609.

Acquiescence of guest to manner in which host drives automobile relates itself to assumption of risk rather than to contributory negligence.—

Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599.

41. Wis.—*Nordahl v. Farmers Mut. Auto. Ins. Co.*, 27 N.W.2d 707, 250 Wis. 609.

42. Me.—*Avery v. Thompson*, 103 A. 4, 117 Me. 120, L.R.A.1918D 205, Ann Cas 1918E 1122.

43. U.S.—*Liggett & Myle's Tobacco Co. v. De Paerq*, C.C.A. Minn., 66 F. 2d 678.

Ark.—*Peay v. Panich*, 87 S.W.2d 23, 191 Ark. 538—*Howe v. Little*, 34 S.W.2d 218, 182 Ark. 1083.

Ill.—*Bartolucci v. Falletti*, 41 N.E.2d 777, 314 Ill.App. 551, affirmed 46 N.E.2d 930, 382 Ill. 168.

Mich.—*Gifford v. Dice*, 257 N.W. 830, 269 Mich. 293, 96 A.L.R. 1477.

Minn.—*Olson v. Buckley*, 19 N.W.2d 57, 220 Minn. 155.

N.Y.—*Lahr v. Tirrill*, 8 N.E.2d 298, 274 N.Y. 112, reargument denied 10 N.E.2d 575, 274 N.Y. 611—*Calbraith v. Busch*, 196 N.E. 36, 267 N.Y. 230—*Higgins v. Mason*, 174 N.E. 77, 255 N.Y. 104—*Parker v. Helfert*, 253 N.Y.S. 35, 140 Misc. 905. S.D.—*Petteys v. Leith*, 252 N.W. 18, 62 S.D. 149.

Va.—*Boggs v. Plybon*, 160 S.E. 77, 157 Va. 30.

W.Va.—*Lewellyn v. Shott*, 155 S.E. 115, 109 W.Va. 379—*Marple v. Haddad*, 138 S.E. 113, 103 W.Va. 508, 61 A.L.R. 1248.

Wis.—*Haugen v. Wittkopf*, 7 N.W.2d 886, 242 Wis. 276—*Hensel v. Hensel Yellow Cab Co.*, 245 N.W. 159, 209 Wis. 489—*Sweet v. Underwriters' Casualty Co.*, 240 N.W. 199, 208 Wis. 447—*Waters v. Markham*, 235 N.W. 797, 204 Wis. 832—*Ponci-*

thing in the nature of a trap or concealed defect known to the driver and not known or patent to the guest or other occupant,⁴⁴ and subject to the operator's duty to warn him of a known dangerous defect, as discussed supra § 403.

§ 487. Reliance on Care of Others

- a. In general
- b. Assumption of risk

a. In General

An occupant of a motor vehicle ordinarily may rely,

within reasonable limits, on the assumption that his driver, and others on the highway, will exercise reasonable care to avoid danger; but this does not justify the occupant in intrusting his safety absolutely to the driver.

In the absence of any fact or circumstance indicating that the driver is incompetent or careless, an occupant or guest in a motor vehicle ordinarily has the right to rely on the assumption, within reasonable limits, that the driver possesses skill and judgment and, in the operation of the motor vehicle, will exercise reasonable care and vigilance to avoid danger,⁴⁵ especially where the guest is seated on the

towcki v. Harres, 228 N.W. 126, 200 Wis. 504—Sommerfield v. Flury, 223 N.W. 408, 198 Wis. 163—Krueger v. Krueger, 222 N.W. 784, 197 Wis. 588—Cleary v. Eckart, 210 N.W. 267, 191 Wis. 114, 51 A.L.R. 576. 42 C.J. p 1059 note 85.

Mistake of judgment

Guest assumes risks arising out of automobile owner's mistake of judgment in believing automobile is safe for travel—Kemp v. Stephenson, 247 N.Y.S. 650, 139 Misc. 38.

Tires

(1) Tires are part of automobile within rule that guest assumes risk of accident occurring through defective condition of automobile, with certain exceptions.—Pawlowski v. Eskofski, 244 N.W. 611, 209 Wis. 189.

(2) The risk of riding on tires which had been used for approximately seventeen thousand miles and which had no apparent defects discoverable by owner of automobile in exercise of ordinary care was ordinary risk of automobile travel which was assumed by guest, precluding recovery for injuries received by guest when tire blew out—Monsour v. Farris, 181 So. 326, 181 Miss. 803.

44. U.S.—Liggett & Myers Tobacco Co. v. De l'arq, C.C.A.Minn., 66 F. 2d 678.

Ark.—Peay v. Panich, 87 S.W.2d 23, 191 Ark. 538—Shrigley v. Pierson, 72 S.W.2d 541, 189 Ark. 386.

Ill.—Bartolucci v. Falletti, 41 N.E.2d 777, 314 Ill.App. 551, affirmed 46 N.E.2d 980, 332 Ill. 168.

Iowa.—Stanbery v. Johnson, 254 N.W. 303, 218 Iowa 160.

Minn.—Olson v. Buckey, 19 N.W.2d 67, 220 Minn. 155.

Neb.—In re Byrne's Estate, 277 N.W. 74, 133 Neb. 750.

N.Y.—Lahr v. Tirrill, 8 N.E.2d 298, 274 N.Y. 112, reargument denied 10 N.E.2d 575, 274 N.Y. 611—Galbraith v. Busch, 196 N.E. 36, 267 N.Y. 230.

S.D.—Petteys v. Leith, 252 N.W. 18, 62 S.D. 149.

Va.—Boggs v. Plybon, 160 S.E. 77, 157 Va. 30.

Wis.—Hensel v. Hensel Yellow Cab Co., 245 N.W. 159, 209 Wis. 439—Sweet v. Underwriters' Casualty

Co., 240 N.W. 199, 206 Wis. 447—Ponietowski v. Harres, 228 N.W. 126, 200 Wis. 504.

42 C.J. p 1059 note 86.

Absence of nut from steering wheel was held not a "trap."—Albers v. Shell Co. of California, 286 P. 752, 760, 104 Cal.App. 733.

Defective accelerator

A guest driving an automobile at the request of the owner is not guilty of assumption of risk, where the accident happens because of the sticking of a defective accelerator, since the guest is placed in a position of peril by the owner—Hennig v. Booth, 132 A. 294, 4 N.J.Misc. 150.

45. U.S.—McCrate v. Morgan Packing Co., C.C.A.Ohio, 117 F.2d 702—Kuper v. Betzer, C.C.A.S.D., 115 F.2d 842—Daugherty v. Pompeo Transporting Corporation, C. C.A.Mass., 62 F.2d 349.

Conn.—Guarnaccia v. Wlencinski, 81 A.2d 464, 130 Conn. 20—Speerle v. Dabney, 155 A. 56, 113 Conn. 302.

Ga.—Lazar v. Black & White Cab Co., 179 S.E. 250, 50 Ga.App. 567—Eddleman v. Askew, 179 S.E. 247, 50 Ga.App. 540.

Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.

Iowa.—Jensvold v. Chicago Great Western R. Co., 12 N.W.2d 293, 234 Iowa 627—Teufel v. Kaufmann, 6 N.W.2d 850, 233 Iowa 443—Denny v. Augustine, 275 N.W. 117, 223 Iowa 1202—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 417.

Ky.—Rennolds' Adm'x v. Waggener, 111 S.W.2d 647, 271 Ky. 300.

La.—Delaune v. Breaux, 139 So. 753, 174 La. 43—Cassar v. Mansfield Lumber Co., App., 35 So.2d 797—Coffey v. Lalanne, App., 20 So.2d 614, opinion adhered to 24 So.2d 658—Chaney v. Hutches, App., 192 So. 556—Barr v. Fidelity & Casualty Co. of New York, App., 188 So. 521—Johnson v. National Casualty Co., App., 176 So. 235—Clifton v. Dean, App., 169 So. 788, followed in 169 So. 790—Frudhomme v. Continental Casualty Co., App., 169 So. 147—Ponder v. Ponder, App., 157 So. 627—Gomer v. Anding, App., 146 So. 704, rehearing denied 147

So. 545—Brown v. Dalton, App., 143 So. 672—Chanson v. Morgan's Louisiana & T. R. & S. S. Co., 136 So. 647, 18 La.App. 602—Bailey v. Demourelle, 135 So. 623, 17 La.App. 116, followed in Eastman v. Demourelle, 135 So. 625, 17 La.App. 119—Delaune v. Breaux, 135 So. 253, 18 La.App. 609, affirmed 139 So. 753, 174 La. 43—Grouchy v. Globe Furniture Co., 134 So. 347, 16 La. App. 311—Grantham v. Smith, App., 134 So. 263, reversed on other grounds Lorange v. Smith, 138 So. 871, 173 La. 883.

Md.—State, to Use of Creasey v. Pennsylvania, 59 A.2d 190.

Mass.—Brightman v. Blanchette, 80 N.E.2d 864, 307 Mass. 584—Gallup v. Lazott, 171 N.E. 658, 271 Mass. 406.

Mo.—Flint v. Chicago, B. & Q. R. Co., 207 S.W.2d 474—State ex rel. Alton R. Co. v. Shain, 143 S.W.2d 233, 346 Mo. 681—Buchler v. Festus Mercantile Co., 119 S.W.2d 961, 343 Mo. 139—Annis v. Jackson, 100 S.W.2d 872, 340 Mo. 331—Setzer v. Ulrich, App., 90 S.W.2d 154.

Neb.—Rogers v. Brown, 260 N.W. 794, 129 Neb. 9—Lewis v. Rapid Transit Lines, 252 N.W. 804, 126 Neb. 158.

N.H.—Macgowan v. Mills, 35 A.2d 797, 93 N.H. 84—Sanders v. H. P. Welch Co., 28 A.2d 34, 92 N.H. 74—Mason v. Andrews, 167 A. 156, 86 N.H. 277.

N.Y.—Reilly v. Rawleigh, 281 N.Y.S. 366, 245 App.Div. 190.

Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657—Smith v. Cushman Motor Delivery Co., 6 N.E.2d 594, 54 Ohio App. 99—Simensky v. Zwayer, 178 N.E. 422, 40 Ohio App. 275.

Pa.—Simrell v. Eschenbach, 154 A. 369, 303 Pa. 156—Alperdt v. Paige, 140 A. 555, 292 Pa. 1—Zimmer v. Little, 10 A.2d 911, 138 Pa.Super. 374.

S.D.—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484.

Tenn.—Tennessee Cent. R. Co. v. Vanhoey, 226 S.W. 225, 143 Tenn. 312—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn. App. 596—Harrison v. Graham, 107

back seat.⁴⁶ In accordance with this rule, unless the danger is known or obvious, an occupant is not required to anticipate negligence on the part of the driver,⁴⁷ and is not guilty of contributory negligence if, in reliance on the skill and due care of the driver, he does not take active steps to see that the vehicle is properly operated.⁴⁸

In the absence of any fact or circumstance indicating the contrary, an occupant need not anticipate that the driver, who has exclusive control and management of the vehicle, will enter a sphere of danger,⁴⁹ will omit to exercise proper care to observe the approach of other vehicles,⁵⁰ or fail to

keep the speed of the vehicle within proper limits,⁵¹ or violate the law of the road,⁵² or otherwise improperly increase the ordinary risks or dangers of travel on the public highway.⁵³ An occupant may also rely on the assumption that the driver can control his car within a reasonable distance of an obstruction to which his attention is called.⁵⁴

An occupant of a motor vehicle, however, may not abandon the exercise of his own faculties and intrust his safety absolutely to the driver, regardless of the imminence of danger, or the visible lack of ordinary care on the part of the driver to avoid harm,⁵⁵ and if the occupant knows, or by the exer-

S.W.2d 517, 21 Tenn.App. 189—Woodfin v. Insel, 13 Tenn.App. 493—Tennessee Cent. Ry. Co. v. Melvin, 5 Tenn.App. 85.

Tex.—Harper v. Texas & P. Ry. Co., Civ.App., 146 S.W.2d 426.

In other words, a guest is not required to foresee, nor is he responsible for, a danger suddenly created by a combination of circumstances.—Zimmer v. Little, 10 A.2d 911, 138 Pa.Super. 374.

Minor guest has been held not contributorily negligent, when approaching intersection, in relying on experienced driver's proper operation of automobile.—Bailey v. Demourelle, 135 So. 623, 17 La.App. 116, followed in Eastman v. Demourelle, 135 So. 625, 17 La.App. 119.

Guest need not investigate safety appliances on host's automobile or ascertain that driver is complying with law.—Yates v. Brazelton, 291 P. 695, 108 Cal.App. 533.

46. La.—Chaney v. Hutches, App., 192 So. 566.

A passenger sitting in rear seat of automobile, who was not controlling driver and had no right of control, and was not aware of danger of collision until collision was unavoidable, was not under any duty to act and was not guilty of contributory negligence.—Goldberg v. Cook, 289 N.W. 512, 206 Minn. 450.

47. Cal.—Hagen v. Metzger, 20 P.2d 117, 130 Cal.App. 497.

Ga.—Corpus Juris cited in Russell v. Bayne, 163 S.E. 290, 291, 45 Ga. App. 55.

Iowa.—Williams v. Kearney, 278 N.W. 180, 224 Iowa 1006.

N.H.—Laflamme v. Lewis, 192 A. 851, 89 N.H. 69.

Pa.—Kirr v. Suwak, 9 A.2d 735, 336 Pa. 561—Zimmer v. Little, 10 A.2d 911, 138 Pa.Super. 374.

S.C.—Cummings v. Tweed, 10 S.E.2d 322, 195 S.C. 173.

Vt.—Huestis v. Lapham's Estate, 32 A.2d 115, 113 Vt. 191—Steele v. Lackey, 177 A. 309, 107 Vt. 192—Round v. Pike, 148 A. 283, 102 Vt.

324—Higgins v. Metzger, 143 A. 394, 101 Vt. 285.

42 C.J. p 1170 note 42.

City employee riding in city truck was not bound to anticipate negligence.—Rice v. City of Portland, 17 P.2d 562, 141 Or. 205.

48. Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657.

49. N.H.—Corpus Juris cited in Hoen v. Haines, 154 A. 129, 130, 85 N.H. 36.

N.J.—Falicki v. Camden County Beverage Co., 37 A.2d 858, 131 N.J.Law 590—Tobish v. Cohen, 164 A. 415, 417, 110 N.J.Law 296.

S.C.—Corpus Juris quoted in Funderburk v. Powell, 187 S.E. 742, 749, 181 S.C. 412.

42 C.J. p 1171 note 43.

50. N.H.—Corpus Juris cited in Hoen v. Haines, 154 A. 129, 130, 85 N.H. 36.

N.J.—Falicki v. Camden County Beverage Co., 37 A.2d 858, 131 N.J.Law 590—Tobish v. Cohen, 164 A. 415, 417, 110 N.J.Law 296.

S.C.—Funderburk v. Powell, 187 S.E. 742, 181 S.C. 412.

42 C.J. p 1171 note 44.

51. La.—Corpus Juris cited in Pipes v. Gallman, 140 So. 40, 43, 174 La. 257.

N.J.—Falicki v. Camden County Beverage Co., 37 A.2d 858, 131 N.J.Law 590—Tobish v. Cohen, 164 A. 415, 417, 110 N.J.Law 296.

S.C.—Funderburk v. Powell, 187 S.E. 742, 181 S.C. 412.

Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

Wis.—Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599.

Guest in rear seat was not bound to anticipate or suspect negligence of driver in driving at excessive speed in violation of statute.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

52. Or.—Rice v. City of Portland, 17 P.2d 562, 141 Or. 205.

Wis.—Olson v. State Farm Mut. Auto.

Ins. Co. of Bloomington, Ill., 30 N.W.2d 196, 252 Wis. 204.

53. N.J.—Falicki v. Camden County Beverage Co., 37 A.2d 858, 131 N.J.Law 590—Tobish v. Cohen, 164 A. 415, 417, 110 N.J.Law 296.

R.I.—Leonard v. Bartle, 135 A. 853, 48 R.I. 101.

S.C.—Funderburk v. Powell, 187 S.E. 742, 181 S.C. 412.

Tenn.—Wilkins v. Malone, 13 Tenn. App. 648.

42 C.J. p 1171 note 47.

Guest riding on bed of truck had right to assume that truck driver would exercise care to avoid ordinary dangers of road including negligence of drivers of other vehicles.—Roddy Mfg. Co. v. Dixon, 105 S.W.2d 513, 21 Tenn.App. 81.

Starting without signal

La.—Richey v. Swink, App., 4 So.2d 749.

54. Tenn.—Wilkins v. Malone, 13 Tenn.App. 648.

55. Ala.—Bradford v. Carson, 137 So. 426, 223 Ala. 594—McDermott v. Sibert, 119 So. 681, 218 Ala. 670.

Ill.—Pope v. Illinois Terminal R. Co., 67 N.E.2d 284, 329 Ill.App. 62—Price v. Chicago & E. I. Ry. Co., 270 Ill.App. 111.

Iowa.—Jensvold v. Chicago Great Western R. Co., 12 N.W.2d 293, 234 Iowa 427.

La.—Aaron v. Martin, 177 So. 242, 188

La. 371—Corpus Juris quoted in Lorraine v. Smith, 138 So. 871, 876, 173 La. 883—Lockhart v. Missouri Pac. R. Co., App., 153 So. 577—Brown v. Dalton, App., 143 So. 672.

Mo.—Buehler v. Festus Mercantile Co., 119 S.W.2d 961, 343 Mo. 139—Annin v. Jackson, 100 S.W.2d 872, 340 Mo. 331—Scism v. Alexander, 93 S.W.2d 36, 230 Mo.App. 1175—Hayde v. Patten, App., 39 S.W.2d 813.

Neb.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636.

N.C.—Bogen v. Bogen, 18 S.E.2d 162, 220 N.C. 648—Cummings v. Tweed, 10 S.E.2d 322, 195 S.C. 173.

cise of reasonable care should know, that he can no longer rely on the driver to exercise reasonable care and caution he himself should take affirmative action and exercise care proportionate to the known or obvious danger.⁵⁶ If he fails to use such care, including the exercise of his own senses of sight, hearing, and perception to protect himself under such circumstances, he is guilty of contributory negligence.⁵⁷

Persons other than occupant's driver. A motor vehicle occupant may also rely on the assumption, until the contrary appears, that other motorists will operate their motor vehicles with reasonable or ordinary care,⁵⁸ and comply with highway regulations,⁵⁹ such as that they will obey the law of the road,⁶⁰ will signal the approach of the vehicles which they are driving,⁶¹ or will observe intersec-

tion signals against them,⁶² or at least will have their vehicles under control, at an intersection, so as to yield the right of way, if necessary, to the vehicle in which the occupant is riding, and which has the right of way.⁶³

b. Assumption of Risk

An occupant or guest in a motor vehicle assumes the risk of injury incident to the driver's skill, competency, or judgment in operating the vehicle.

A guest, in entering the motor vehicle of his host, accepts the driver with his known habits of driving⁶⁴ with such skill, competency, and judgment in operating motor vehicles as he actually possesses, and assumes the risk of injury incident to the driver's unskillfulness or error in judgment in the management and control of the vehicle,⁶⁵ and the

Tenn.—Dedman v. Dedman, 291 S.W. 449, 155 Tenn. 241—Webster v. Trice, 133 S.W.2d 621, 23 Tenn App 365—Tennessee Cent. R. Co. v. Melvin, 5 Tenn App 85.
42 C.J. p 1171 note 48.

Guest riding in front seat of automobile having equal opportunity with driver to see, in absence of diverting circumstances, cannot completely surrender to driver's care.—Hutchinson v. Sioux City Service Co., 230 N.W. 387, 210 Iowa 9.

Wife riding with her husband cannot by reason of her husband's presence abandon precautions and blindly entrust all care for her safety to her husband—Bogen v. Bogen, 18 S.E. 2d 162, 220 N.C. 648—42 C.J. p 1171 note 48 [a].

56. Conn.—Guarnaccia v. Wiczenski, 31 A.2d 464, 130 Conn. 20.
Ga.—Eddleman v. Askew, 179 S.E. 247, 50 Ga.App. 540.

Ill.—Pope v. Illinois Terminal R. Co., 67 N.E.2d 284, 329 Ill.App. 62.

La.—Barr v. Fidelity & Casualty Co. of New York, App., 188 So 521—Clifton v. Dean, App., 169 So. 788, followed in 169 So. 790—Brown v. Dalton, App., 143 So. 672.

Minn.—Kapla v. Lehti, 30 N.W.2d 685, 225 Minn. 325.

N.H.—Mason v. Andrews, 167 A. 156, 86 N.H. 277.

Tenn.—Woodfin v. Insel, 13 Tenn. App. 493.

Tex.—Harper v. Texas & P. Ry. Co., Civ.App., 146 S.W.2d 426, error refused.

Duty to take affirmative action

Guest passenger is under duty to take affirmative action for his own protection only when it becomes apparent to him that he can no longer rely on driver to protect him, as where driver by conduct shows that he is incompetent, or is unmindful of, or oblivious to, dangers of which

guest is aware—Kapla v. Lehti, 30 N.W.2d 685, 225 Minn. 325.

57. U.S.—Marcus v. Forcier, C.C.A. Mass., 38 F.2d 8.

Ill.—Pope v. Illinois Terminal R. Co., 67 N.E.2d 284, 329 Ill.App. 62.

La.—Aaron v. Martin, 177 So 242, 246, 188 La 371—**Corpus Juris** quoted in Loran v. Smith, 138 So. 871, 876, 173 La. 883—Grouchy v. Globe Furniture Co., 134 So 347, 16 La App 311.

Mass.—Oppenheim v. Barkin, 159 N.E. 628, 262 Mass. 281, 61 A.L.R. 1228.

Mont.—Marinkovich v. Tierney, 17 P. 2d 93, 93 Mont. 72.

N.H.—Richards v. Richards, 166 A. 823, 86 N.H. 273.

S.C.—**Corpus Juris** quoted in Funderburk v. Powell, 187 S.E. 742, 749, 181 S.C. 412.

S.D.—Lapp v. J. Lauesen & Co., 293 N.W. 536, 67 S.D. 411.

42 C.J. p 1171 note 49.

Wife riding with husband could not recover against third person for injuries if, in exercise of ordinary care, she could have known that danger threatened and that driver was remiss in guarding against it.—Setzer v. Ulrich, Mo.App., 90 S.W.2d 154.

58. Ga.—Lazar v. Black & White Cab Co., 179 S.E. 250, 50 Ga.App. 667.

Ill.—Thomas v. Buchanan, 192 N.E. 215, 357 Ill. 270.

Minn.—Jacobsen v. Ahasay, 246 N.W. 670, 188 Minn. 179.

Vt.—Leclair v. Boudreau, 143 A. 401, 101 Vt. 270, 63 A.L.R. 1427.

59. Iowa.—Rogers v. Jefferson, 275 N.W. 874, 224 Iowa 324.

Minn.—Jacobsen v. Ahasay, 246 N.W. 670, 188 Minn. 179.

60. Iowa.—Willis v. Schertz, 178 N.W. 321, 188 Iowa 712.

Or.—Rice v. City of Portland, 17 P.2d 562, 141 Or. 205.

42 C.J. p 1173 note 61.

Tailights

An occupant was not required to search the highway for unlighted vehicles but could assume that automobiles would be provided with tailights required by statute.—Smith v. Producers Cold Storage Co., Mo.App., 128 S.W.2d 299.

Wrong side of road

Automobile passenger could assume that motorist approaching on wrong side of highway would return to right side in time to avoid collision.—McComas v. Clements, 21 P.2d 895, 137 Kan. 681.

61. Iowa.—Willis v. Schertz, 175 N.W. 321, 188 Iowa 712.

62. Ohio.—Henderson v. Cleveland Ry. Co., 175 N.E. 863, 123 Ohio St. 468.

"Slow" sign

An occupant had right to assume that other motorist seen approaching from the left, would take cognizance of presence of "slow" sign facing traffic from that direction.—Rogers v. Jefferson, 275 N.W. 874, 224 Iowa 324.
63. Ill.—Thomas v. Buchanan, 192 N.E. 215, 357 Ill. 270.

64. U.S.—Liggett & Myers Tobacco Co. v. De Paerq, C.C.A.Minn., 66 F. 2d 678.

Wis.—Harter v. Dickman, 245 N.W. 157, 209 Wis. 283—Ponietowski v. Harres, 228 N.W. 126, 200 Wis. 504—Olson v. Hermansen, 220 N.W. 203, 196 Wis. 614, 61 A.L.R. 1243.

65. U.S.—Liggett & Myers Tobacco Co. v. De Paerq, C.C.A.Minn., 66 F. 2d 678.

Ark.—Peay v. Panich, 87 S.W.2d 23, 191 Ark. 538.

Neb.—Kelly v. Gagnon, 236 N.W. 160, 121 Neb. 113.

S.D.—Hall v. Hall, 268 N.W. 491.

guest may demand no more than that the driver conscientiously exercise the skill possessed by him in handling the automobile in emergencies.⁶⁶ He does not, however, assume the risk of a danger or hazard caused by the driver's unexpected negligence,⁶⁷ such as his failure properly to manage and control the vehicle,⁶⁸ or a danger caused by his faulty or hasty judgment based on faulty premises proceeding from careless observation,⁶⁹ or by a condition of the driver's faculties of which the guest is unaware;⁷⁰ nor does he assume the risk of a danger created by the negligent operation of motor vehicles over which he has no control.⁷¹ An occupant has been held to assume the risk of injury by reason of the driver falling asleep at the wheel, where the occupant knows that the driver had been without sleep the night before;⁷² but it has also been

held that he does not assume the risk of a physician's drowsiness while driving, where he knows that the physician had only a few hours sleep on the preceding night.⁷³

§ 488. Duty to Observe and Warn of Danger

- a. In general
- b. Occupant sleeping
- c. Compared with vigilance of driver
- d. Assumption of risk

a. In General

An occupant or guest in a motor vehicle is not under an absolute duty to discover and warn the driver of approaching vehicles or other dangers, and ordinarily is not required to keep a constant lookout for this purpose. The extent of his duty is to exercise reasonable care, depending on the circumstances, to discover and warn the driver of known or obvious dangers.

Wis.—Haugen v. Wittkopf, 7 N.W.2d 886, 242 Wis. 276—Hutzler v. McDonnell, 7 N.W.2d 835, 242 Wis. 256—Schneider v. American Indemnity Co., 6 N.W.2d 644, 241 Wis. 668—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400—School v. Milwaukee Automobile Ins. Co., 291 N.W. 311, 234 Wis. 332—Rudolph v. Ketter, 289 N.W. 674, 233 Wis. 329—Schwab v. Martin, 279 N.W. 699, 228 Wis. 45—Young v. Nunn, Bush & Weldon Shoe Co., 249 N.W. 278, 212 Wis. 403—Eisenhut v. Eisenhut, 248 N.W. 440, 212 Wis. 467, 91 A.L.R. 549, rehearing denied 250 N.W. 441, 212 Wis. 467, 91 A.L.R. 552—Harter v. Dickman, 245 N.W. 157, 209 Wis. 283—Ganser v. Weed, 244 N.W. 588, 209 Wis. 135—Ponietowski v. Harres, 228 N.W. 126, 200 Wis. 504—Krueger v. Krueger, 222 N.W. 784, 197 Wis. 588—Olson v. Hermansen, 220 N.W. 203, 196 Wis. 614, 61 A.L.R. 1243—Cleary v. Eckart, 210 N.W. 267, 191 Wis. 114.

"This rule is separate and distinct from the doctrines applicable to emergencies and from the rules relating to the acquiescence of a guest in the conduct of a host which he impliedly accepts by not protesting."—Rudolph v. Ketter, 289 N.W. 674, 233 Wis. 329.

Guest, knowing driver had only one arm, assumed risk of any contingency.—Doggett v. Lacey, 9 P.2d 257, 121 Cal.App. 395.

66. Wis.—Hutzler v. McDonnell, 7 N.W.2d 835, 242 Wis. 256—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400—Eisenhut v. Eisenhut, 248 N.W. 440, 212 Wis. 467, 91 A.L.R. 549, rehearing denied 250 N.W. 441, 212 Wis. 467, 91 A.L.R. 552.

67. Or.—Smith v. Pacific Truck Express, 100 P.2d 474, 164 Or. 318.

S.D.—Zeigler v. Ryan, 271 N.W. 767, 65 S.D. 110.

Automobile owner voluntarily joining pleasure expedition did not thereby assume risks from driver's unexpected negligence.—Williamson v. Fitzgerald, 2 P.2d 201, 116 Cal.App. 19.

Lights

A guest does not assume the automobile driver's sudden and temporary failure to return his lights from dim to full after an oncoming automobile has gone by unless it is a known practice and constant enough to attract the attention of a reasonable person exercising ordinary care.—Tietz v. Blaier, 26 N.W.2d 551, 250 Wis. 214.

Assumption of risk as to driver's negligence is immaterial, where such negligence could not have been contributing cause of accident.—Patterson v. Phillips, 256 N.W. 624, 216 Wis. 165.

68. Wis.—Hutzler v. McDonnell, 2 N.W.2d 207, 239 Wis. 568—Milwaukee Automobile Ins. Co., Limited, Mutual v. Felten, 281 N.W. 637, 229 Wis. 29.

Failure to stop

A guest does not assume the risk of danger arising from the host's failure to come to a complete stop before entering an arterial highway.—Milwaukee Automobile Ins. Co., Limited, Mutual, v. Felten, *supra*.

69. Wis.—Rudolph v. Ketter, 289 N.W. 674, 233 Wis. 329—Harter v. Dickman, 245 N.W. 157, 209 Wis. 283.

Misjudging distance

Wis.—Rudolph v. Ketter, 289 N.W. 674, 233 Wis. 329.

Driver's failure properly to calculate course of automobile making wide right turn into highway from his left was so directly connected with his driving ability as to be in-

cluded in risk assumed by his guest.—Grover v. Sherman, 252 N.W. 680, 214 Wis. 152.

70. Miss.—Gower v. Strain, 145 So. 244, 169 Miss. 344.

71. Colo.—Leonard v. Bauer, 149 P.2d 376, 112 Colo. 247.

Where two drivers create a dangerous condition by each following a course along a highway which, under rules of road, he has no right to follow, a passenger who has no control of either motor vehicle does not assume the hazard of the peril negligently so created.—Campbell v. Trate, 149 P.2d 380, 112 Colo. 265—Leonard v. Bauer, 149 P.2d 376, 112 Colo. 247.

72. Wis.—Markovich v. Schlafke, 284 N.W. 516, 230 Wis. 639—Krueger v. Krueger, 222 N.W. 784, 197 Wis. 588.

Matter for consideration

Fact that plaintiff guest started automobile trip with full knowledge that defendant had not obtained sufficient sleep the night previously, although a matter for consideration in determining whether plaintiff exercised proper diligence, did not constitute a rash, imprudent, and dangerous undertaking so as to charge plaintiff with having assumed the risk.—Horne v. Neill, 29 S.E.2d 275, 70 Ga.App. 602, followed in 29 S.E.2d 280, 70 Ga.App. 610.

73. Miss.—Gower v. Strain, 145 So. 244, 169 Miss. 344.

"In the fact that a physician, who was accustomed to being disturbed and making visits at all hours of the night, had secured only three and one half hours of sleep the preceding night, there was nothing to charge . . . [the occupant] with knowledge or notice of probable dangers resulting from the negligent driving of the automobile by him while in a state of drowsiness or sleep."—Gower v. Strain, *supra*.

Since an occupant of a motor vehicle may rely, to a limited extent, on the assumption that the driver will exercise proper care and caution, as discussed supra § 487, the occupant's or guest's duty to warn him usually does not arise until some fact or circumstance out of the usual and ordinary is presented.⁷⁴ An occupant cannot be held to an absolute duty, in every case and under all circumstances, to use his senses in order to discover approaching vehicles or other dangers⁷⁵ or to warn the driver or give him directions concerning such dangers,⁷⁶ and his failure to discover a danger or to warn the driver thereof in time to avert an accident does not necessarily constitute contributory negligence.⁷⁷ Ordinarily an occupant or guest is

not required to be constantly on the lookout for any unexpected danger or sudden emergency that may arise,⁷⁸ where there is nothing to indicate that the driver is incompetent or that he is not driving in a careful manner,⁷⁹ and a guest or occupant has been held not to be responsible for mere inaction in failing to discover dangers of which he is ignorant, but which might have been discovered had he been giving his attention to the roadway ahead of him.⁸⁰

The extent of the occupant's duty is to exercise reasonable or ordinary care and caution, depending on the circumstances existing at the time of the accident, to look out for approaching vehicles or other dangers,⁸¹ and to warn the driver of dangers or threatened dangers, apparently not observed or

74. Neb.—Rogers v. Brown, 260 N. W. 794, 129 Neb. 9—Lewis v. Rapid Transit Lines, 252 N.W. 804, 126 Neb. 158.

75. U.S.—Kuper v. Betzer, C.C.A.S. D., 115 F.2d 842.

Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.

Iowa—Jensvold v. Chicago Great Western R. Co., 12 N.W.2d 293, 234 Iowa 627.

Ohio—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657.

Or.—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133.

S.D.—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484.

42 C.J. p 1172 note 50.

76. Cal.—Crawford v. Rose, 39 P.2d 217, 2 Cal.App.2d 734, rehearing denied 40 P.2d 277, 2 Cal.App. 734.

Iowa—Teufel v. Kaufmann, 6 N.W. 2d 850, 233 Iowa 443.

77. La.—Delaune v. Breaux, 139 So. 753, 174 La. 43—Maheu v. Employers Liability Assur. Corp., App., 25 So.2d 363—Hataway v. F. Strauss & Son, App., 158 So. 408—Bailey v. Demourelle, 135 So. 623, 17 La.App. 116, followed in Eastman v. Demourelle, 135 So. 625, 17 La.App. 119.

Md.—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.

Mass.—Gibbons v. Denoncourt, 9 N. E.2d 633, 297 Mass. 448.

Mont.—Marinkovich v. Tierney, 17 P. 2d 93, 93 Mont. 72.

Pa.—Richards v. Warner Co., 166 A. 496, 311 Pa. 50, 87 A.L.R. 1559.

Tenn.—American Tobacco Co. v. Zoller, 6 Tenn.App. 390.

Wis.—Royer v. Saacker, 234 N.W. 742, 204 Wis. 265.

42 C.J. p 1172 note 51.

Driver's negligence sole cause of accident

Guest who warned driver before he got into automobile to drive carefully, and who shortly before and at time automobile struck a parked automobile did not watch driver, could

not be held negligent so as to bar his recovery of damages from driver, where collision resulted solely from driver's negligence.—Maheu v. Employers Liability Assur. Corp., La. App., 25 So.2d 363.

Guest of police officer driving automobile while assisting him in stopping speeding traffic violator was held not negligent for failure to warn officer of approach of streetcar.—Carpenter v. Thomas, 3 P.2d 1001, 164 Wash. 583.

78. Colo.—Campion v. Eakle, 246 P. 280, 79 Colo. 320, 47 A.L.R. 289.

Iowa.—In re Hill's Estate, 208 N.W. 334, 202 Iowa 1038, modified on other grounds 210 N.W. 241, 202 Iowa 1038.

La.—Delaune v. Breaux, 139 So. 753, 174 La. 43—Johnson v. National Casualty Co., App., 176 So. 235—Clifton v. Dean, App., 169 So. 788, followed in 169 So. 790—Prudhomme v. Continental Casualty Co., App., 169 So. 147—Lapeze v. O'Keefe, App., 158 So. 36, modified on other grounds 159 So. 403—Brown v. Dalton, App., 143 So. 672—Chanson v. Morgan's Louisiana & T. R. & S. S. Co., 136 So. 647, 18 La.App. 602—Grouchy v. Globe Furniture Co., 134 So. 347, 16 La. App. 311.

Md.—State, to Use of Creasey v. Pennsylvania R. Co., 59 A.2d 190—Gordon v. Opalecky, 137 A. 299, 152 Md. 536—Baltimore, C. & A. Ry. Co. v. Turner, 136 A. 699, 152 Md. 216.

Neb.—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.

N.H.—Sanders v. H. P. Welch Co., 26 A.2d 34, 92 N.H. 74—Laffame v. Lewis, 192 A. 851, 89 N.H. 69.

Or.—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133.

Pa.—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245.

Tex.—Harrison v. Southwest Coaches, Civ.App., 207 S.W.2d 159—Alpine Tel. Corp. v. McCall, Civ.App., 195 S.W.2d 585—Tippitt v. Gohman, Civ.App., 145 S.W.2d 908, error dismissed, judgment correct.

W.Va.—Darling v. Browning, 200 S. E. 737, 120 W.Va. 666.

Traffic conditions

Guest is not charged with responsibility for observing traffic conditions.—Murphy v. National Ice Cream Co., 300 P. 91, 114 Cal.App. 482.

79. Md.—Dashiell v. Moore, 11 A.2d 640, 177 Md. 657.

N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200—Mason v. Andrews, 167 A. 156, 86 N.H. 277.

Ohio—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657.

Or.—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133.

Tex.—Harper v. Texas & P. Ry. Co., Civ.App., 146 S.W.2d 426, error refused.

Guest on back seat, who was thrown off seat when automobile hit hole in road, was under no duty to keep lookout for obstructions in road where motorist was driving only twenty miles per hour and guest knew him to be careful driver.—Papin v. Japhet, Tex.Civ.App., 74 S.W. 2d 737, error dismissed.

Guest need not watch the speedometer or take heed of every movement of the automobile, if the driver is apparently a careful driver.

N.Y.—Reilly v. Rawleigh, 281 N.Y.S. 366, 245 App.Div. 190.

Wis.—Landskron v. Hartford Accident & Indemnity Co., 6 N.W.2d 178, 241 Wis. 445.

80. Pa.—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245—Minnich v. Easton Transit Co., 110 A. 273, 267 Pa. 200, 18 A.L.R. 296—Azinger v. Pennsylvania R. Co., 105 A. 87, 262 Pa. 242.

81. Del.—Burton v. Delaware Poultry Co., 15 A.2d 440, 2 Terry 68.

guarded against by him, of which the occupant is | in the exercise of ordinary care should have, be-
aware,⁸² or of which he has an opportunity to, and | come aware,⁸³ especially where the guest has an

Ill.—Hohimer v. Fricke, 46 N.E.2d 169, 317 Ill.App. 372.
Ind.—Davis v. Dendanville, 26 N.E.2d 568, 107 Ind.App. 665.
Iowa.—Teufel v. Kaufmann, 6 N.W. 2d 850, 233 Iowa 443—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 417—Shenkle v. Mains, 247 N.W. 635, 216 Iowa 1324—Muirhead v. Chellis, 240 N.W. 912, 213 Iowa 1108.
Kan.—Darrington v. Campbell, 94 P. 2d 305, 150 Kan. 407.
La.—Clifton v. Dean, App., 169 So. 788, followed in 169 So. 790—Chanson v. Morgan's Louisiana & T. R. & S. S. Co., 136 So. 647, 18 La.App. 602.
Me.—Nadeau v. Perkins, 193 A. 877, 135 Me. 215.
Mass.—Gibbons v. Denoncourt, 9 N. E.2d 633, 297 Mass. 448.
Mich.—Moore v. Retz, 22 N.W.2d 68, 314 Mich. 52.
Mo.—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299—Scism v. Alexander, 93 S.W.2d 36, 230 Mo.App. 1175.
Neb.—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.
Ohio.—Simensky v. Zwyer, 178 N.E. 422, 40 Ohio App. 275.
Pa.—Matthews v. Baltimore & O. R. Co., 162 A. 221, 308 Pa. 238—Rodgers v. Saxton, 158 A. 166, 305 Pa. 479, 80 A.L.R. 280—Apfelbaum v. Markley, 3 A.2d 975, 134 Pa.Super. 392—Stermer v. C. R. R. of N. J., Com.Pl., 37 Luz.Leg.Reg. 141.
S.C.—Hunsucker v. State Highway Department, 189 S.E. 652, 182 S.C. 441.
Tex.—Alpine Tel. Corp. v. McCall, Civ.App., 195 S.W.2d 585.
Wis.—Hahn v. Smith, 254 N.W. 750, 215 Wis. 277—Teas v. Eisenlord, 253 N.W. 795, 215 Wis. 455—Haines v. Duffy, 240 N.W. 152, 206 Wis. 193—Goehmann v. National Biscuit Co., 235 N.W. 792, 204 Wis. 427—Sommerfield v. Flury, 223 N.W. 408, 198 Wis. 163—Krause v. Hall, 217 N.W. 290, 195 Wis. 565.
42 C.J. p 1172 note 52.

Circumstances may clearly justify a failure on the part of an occupant of an automobile to keep a lookout.
Del.—Burton v. Delaware Poultry Co., 15 A.2d 440, 2 Terry 68.
Wis.—Krause v. Hall, 217 N.W. 290, 195 Wis. 565.

Crossing frozen lake

Guest passenger who accepted ride in automobile across frozen lake was only required to keep such watch of course taken as a prudent person would keep.—Huestis v. Lapham's Estate, 32 A.2d 115, 118 Vt. 191.

Wife riding with her husband may be charged with contributory negligence, where the facts establish an

obligation on her part to exercise an oversight as to way in which automobile was being operated or to keep a lookout for impending danger.—Smith v. Brown, 19 N.E.2d 732, 302 Mass. 432.

82. U.S.—Stafford v. Roadway Transit Co., D.C.Pa., 70 F.Supp. 555, motion refused 73 F.Supp. 458, affirmed in part and reversed in part on other grounds, C.C.A., 165 F.2d 920.
Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.
Ill.—Stitzel v. Johnson, 73 N.E.2d 653, 331 Ill.App. 609—Baumgardner v. Boyer, 51 N.E.2d 784, 320 Ill. App. 438—Hohimer v. Fricke, 46 N. E.2d 169, 317 Ill.App. 372—Moore v. Jansen & Schaefer, 265 Ill.App. 459.
Iowa.—Teufel v. Kaufmann, 6 N.W. 2d 850, 233 Iowa 443.
Ky.—Mazyck v. Pennsylvania R. R., 172 S.W.2d 614, 295 Ky. 1.
La.—Delaune v. Breaux, 139 So. 753, 174 La. 43—Lorance v. Smith, 138 So. 871, 173 La. 883—Gardiner v. Travelers Indemnity Co., App., 11 So.2d 61—Lapeze v. O'Keefe, App., 158 So. 36, modified on other grounds 159 So. 403—Williams v. Lenfant, 131 So. 857, 15 La.App. 515.
Me.—Wells v. Sears, 4 A.2d 680, 136 Me. 160—Banks v. Adams, 195 A. 206, 135 Me. 240—Nadeau v. Perkins, 193 A. 877, 135 Me. 215—Keller v. Banks, 156 A. 817, 130 Me. 397.
Mich.—Mitchell v. De Vitt, 21 N.W. 2d 111, 313 Mich. 428—Bricker v. Green, 21 N.W.2d 105, 313 Mich. 218, 163 A.L.R. 697.
Mo.—Kaley v. Huntley, 63 S.W.2d 21, 333 Mo. 771.
Neb.—Whitney v. Penrod, 32 N.W. 2d 131, 149 Neb. 636—Hamblen v. Steckley, 27 N.W.2d 178, 148 Neb. 283—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.
N.H.—Hoen v. Haines, 154 A. 129, 85 N.H. 36.
N.D.—Wilson v. Oscar H. Kjolrie Co., 12 N.W.2d 526, 73 N.D. 134.
Ohio.—Smith v. Cushman Motor Delivery Co., 6 N.E.2d 594, 54 Ohio App. 99.
Pa.—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Hyron v. Porter, 9 A.2d 357, 336 Pa. 441—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245—Winters v. York Motor Express Co., 176 A. 812, 116 Pa.Super. 421.
Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.
Va.—Remline v. Whited, 21 S.E.2d 743, 180 Va. 1.
Wash.—Graves v. Mickel, 29 P.2d 405, 176 Wash. 329.

Wis.—Goehmann v. National Biscuit Co., 235 N.W. 792, 204 Wis. 427.
42 C.J. p 1172 note 53.

Similar statement of rule

Automobile occupant was only required to see approaching automobile, realize the danger and warn driver of automobile in which occupant was riding of the danger if a reasonably careful and prudent person under the same or similar circumstances would have seen the automobile, realized the danger, and given warning thereof.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.

It is only where driver is acting in careless manner, or is approaching danger which is known to guest and unknown to driver, that duty devolves on guest to warn driver.—State, for Use of Shipley, v. Lupton, 161 A. 393, 163 Md. 180.

A guest's primary duty, in the avoidance of accidents, is to warn the driver of the existence or sudden appearance of unexpected obstacles and hazards.—Cassar v. Mansfield Lumber Co., La.App., 35 So.2d 797.

Danger to own safety

Guest, having absolutely no control over operation of automobile, merely had duty to notify driver if observing anything which endangered guest's safety.—Cate v. Fresno Traction Co., 2 P.2d 364, 213 Cal. 190.

A wife riding with her husband may be responsible for the consequences of her own negligence in failing to warn the husband of a known approaching danger.

Neb.—Crandall v. Ladd, 7 N.W.2d 642, 142 Neb. 736—Murphy v. Shibiya, 250 N.W. 746, 125 Neb. 487.
N.C.—Bogen v. Bogen, 18 S.E.2d 162, 220 N.C. 648.
Pa.—Samuel v. City of Wilkes-Barre, Com.Pl., 33 Luz.Leg.Reg. 405.

83. U.S.—Stafford v. Roadway Transit Co., D.C.Pa., 70 F.Supp. 555, motion refused 73 F.Supp. 458, affirmed in part and reversed in part on other grounds, C.C.A., 165 F.2d 920.

Ga.—Crandall v. Sammons, 7 S.E.2d 575, 62 Ga.App. 1.
Ill.—Ames v. Terminal R. Ass'n of St. Louis, 75 N.E.2d 42, 332 Ill.App. 187—Baumgardner v. Boyer, 51 N. E.2d 784, 320 Ill.App. 438—Walker v. Illinois Commercial Tel. Co., 43 N.E.2d 412, 315 Ill.App. 553—Price v. Chicago & E. I. Ry. Co., 270 Ill. App. 111—Moore v. Jansen & Schaefer, 265 Ill.App. 459.
Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.
Kan.—Henderson v. National Mut. Casualty Co., 187 P.2d 508, 164 Kan. 109—Curtiss v. Fahle, 139 P.2d 837, 157 Kan. 226.

equal opportunity with the driver to observe the dangerous conditions and circumstances;⁸⁴ and if he fails in any of these respects he may be chargeable with contributory negligence, precluding a recovery,⁸⁵ provided, of course, such failure contributes proximately to cause his injury.⁸⁶

A guest, however, is not required to warn the driver where the situation is such that a reason-

ably prudent person under the same or similar circumstances would not have observed the danger or given the warning,⁸⁷ as where he is unaware of the danger, and has not had an opportunity to learn of it and give a warning in time to avert the accident;⁸⁸ and it has been held that mere opportunity by the guest to know of danger is insufficient, in the absence of facts suggesting to him, as a person of

La.—Lorance v. Smith, 138 So. 871, 173 La. 883—Gardiner v. Travelers Indemnity Co., App., 11 So.2d 61.
Me.—Banks v. Adams, 195 A. 206, 135 Me. 240—Keller v. Banks, 156 A. 817, 130 Me. 397—Peasley v. White, 152 A. 530, 129 Me. 450, 73 A.L.R. 1017.
Mo.—Kaley v. Huntley, 63 S.W.2d 21, 333 Mo. 771—Clifton v. Caraker, App., 50 S.W.2d 758, certiorari quashed State ex rel. Caraker v. Decker, 62 S.W.2d 899, 333 Mo. 400.
Neb.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.
N.Y.—Marlorenzi v. New York Cent. R. Co., 11 N.Y.S.2d 637.
Pa.—Rynon v. Porter, 9 A.2d 357, 336 Pa. 441—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Rodgers v. Saxton, 158 A. 166, 305 Pa. 479, 80 A.L.R. 280—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa. Super. 547—Wherry v. Cox, Com. Pl., 28 Del.Co. 299.
Utah—Balle v. Smith, 17 P.2d 224, 81 Utah 179.
Wash.—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 369.
W.Va.—Elswick v. Charleston Transit Co., 36 S.E.2d 419, 128 W.Va. 241—Jones v. Virginian Ry. Co., 177 S.E. 621, 115 W.Va. 665.
42 C.J. p 1172 note 54.

84. U.S.—McCrate v. Morgan Packing Co., C.C.A. Ohio, 117 F.2d 702.
Kan.—Curtiss v. Fahle, 139 P.2d 827, 157 Kan. 226.
La.—Horn v. Barras, App., 172 So. 451.

85. Ill.—Baumgardner v. Boyer, 51 N.E.2d 784, 320 Ill.App. 438—Johnson v. Kushler, 269 Ill.App. 553.
Iowa.—Denny v. Augustine, 275 N.W. 117, 223 Iowa 1202.
Kan.—Darrington v. Campbell, 94 P.2d 305, 150 Kan. 407—Earhart v. Trethar, 80 P.2d 4, 148 Kan. 42.
Ky.—Mazyck v. Pennsylvania R. R. Co., 172 S.W.2d 614, 295 Ky. 1—Hinternisch v. Brewsaugh, 87 S.W.2d 934, 261 Ky. 432—Lexington Ice Co. v. Williams' Adm'r, 33 S.W.2d 14, 236 Ky. 318—Stephenson's Adm'r v. Sharp's Ex'rs, 1 S.W.2d 957, 222 Ky. 496.

La.—Lorance v. Smith, 138 So. 871, 173 La. 883—Horn v. Barras, App., 172 So. 451—Gray v. Southern Auto Wreckers, App., 166 So. 154—

Davis v. Langlois, App., 158 So. 672—Waddell v. Langlois, App., 158 So. 665—Williams v. Lenfant, 131 So. 857, 15 La.App. 515.

Md.—State, to Use of Creasey v. Pennsylvania R. Co., 59 A.2d 190—Baltimore, C. & A. Ry. Co. v. Turner, 136 A. 609, 152 Md. 216.

Mass.—Monaghan v. Keith Oil Corporation, 183 N.E. 252, 281 Mass. 129.
Mo.—Kaley v. Huntley, 63 S.W.2d 21, 333 Mo. 771—Corpus Juris cited in Scism v. Alexander, 93 S.W.2d 36, 39, 230 Mo. App. 1175.

Mont.—Marinkovich v. Tierney, 17 P.2d 93, 93 Mont. 72.
Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

N.D.—Wilson v. Oscar H. Kjollic Co., 12 N.W.2d 526, 73 N.D. 134.

Pa.—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Frank v. Markley, 173 A. 186, 315 Pa. 257—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Morningstar v. Northeast Pennsylvania R. Co., 137 A. 800, 290 Pa. 14—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa. Super. 547.

Tenn.—Hatch v. Brinkley, 80 S.W.2d 838, 169 Tenn. 17—Dedman v. Dedman, 291 S.W. 449, 155 Tenn. 241.

Tex.—Thweatt v. Ocean Accident & Guarantee Corporation, Civ.App., 62 S.W.2d 250.

Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.

Va.—Remine v. Whited, 21 S.E.2d 743, 180 Va. 1.

Wash.—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 369.

W.Va.—Jones v. Virginian Ry. Co., 177 S.E. 621, 115 W.Va. 665.

Wis.—Glick v. Baer, 201 N.W. 752, 186 Wis. 268.

42 C.J. p 1173 note 57.

A boy sixteen years of age who, while guest in automobile, failed to warn host of approaching train while car was still thirty feet from track, where the car could have been stopped within two feet, was guilty of contributory negligence.—Crane v. Weber, 247 N.W. 882, 211 Wis. 294.

86. Ill.—Baumgardner v. Boyer, 51 N.E.2d 784, 320 Ill.App. 438.

Kan.—Darrington v. Campbell, 94 P.2d 305, 150 Kan. 407.

La.—Brown v. Dalton, App., 143 So. 672—Delaune v. Breaux, 135 So. 253, 18 La.App. 609, affirmed 139 So. 753, 174 La. 43.

Vt.—Le Febvre v. Central Vermont R. Co., 123 A. 211, 97 Vt. 342.

Assisting driver

Passenger who undertook at driver's request to aid driver in operating automobile by keeping lookout and keeping driver posted as to their whereabouts could not recover against driver for injuries, where his negligent failure to fulfill undertaking proximately contributed to his injury.—Dunklin v. Hanna, 156 So. 768, 229 Ala. 242.

87. Cal.—Binford v. Purcell, 37 P.2d 732, 2 Cal.App.2d 87.

La.—Gardiner v. Travelers Indemnity Co., App., 11 So.2d 61.
42 C.J. p 1173 note 55.

88. U.S.—McCrate v. Morgan Packing Co., C.C.A. Ohio, 117 F.2d 702.
Cal.—Mesnickow v. Fawcett, 278 P. 500, 99 Cal. App. 357.

Ill.—Baumgardner v. Boyer, 51 N.E.2d 784, 320 Ill.App. 438.

Ind.—Oppl v. Ray, 195 N.E. 81, 208 Ind. 450—Davis v. Dondanville, 26 N.E.2d 568, 107 Ind. App. 665.

Ky.—Bowman v. Ernst, 71 S.W.2d 1013, 254 Ky. 376.

La.—Cooper v. Garrett, App., 6 So.2d 209, followed in Veronie v. Garrett, 6 So.2d 215—Provosty v. Christy, App., 152 So. 784—Gilly v. Harris, App., 152 So. 378—Rumpf v. Callo, 132 So. 763, 16 La. App. 12.

Me.—Hanks v. Adams, 195 A. 206, 135 Me. 270—Kimball v. Bauckman, 158 A. 694, 131 Me. 14.

Minn.—Hubenette v. Ostby, 6 N.W.2d 637, 213 Minn. 349.

Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418—O'Brien v. J. I. Case Co., 2 N.W.2d 107, 140 Neb. 847.

N.Y.—Klauber v. Jackson, 209 N.Y.S. 209, 124 Misc. 738.

Pa.—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Winters v. York Motor Express Co., 176 A. 812, 116 Pa. Super. 421.

Tex.—Horton & Horton v. House, Com. App., 29 S.W.2d 984.

42 C.J. p 1173 note 56.

Necessity of opportunity

An opportunity to be apprised of threatened danger and a further opportunity to warn driver thereof are necessary to charge automobile passenger with contributory negligence in failing to warn driver.—Hamilton v. Haworth, 177 P.2d 409, 180 Or. 477.

ordinary care, the necessity of keeping watch, to charge him with contributory negligence in not warning the driver.⁸⁹ An occupant of a motor vehicle is not required to warn the driver of what the latter already knows and appreciates,⁹⁰ and ordinarily he is under no obligation to point out obvious obstacles or dangers which would be apparent to any reasonably careful driver.⁹¹

Particular circumstances affecting duty. Among the circumstances to be considered, as affecting a guest's duty to observe and warn the driver of unexpected perils or dangers, or his contributory negligence in failing to do so, are the place or position the guest occupied in or about the motor vehicle,⁹² such as riding in the front⁹³ or rear⁹⁴ seat, the con-

89. Ala.—Proctor v. Coffey, 149 So. 338, 227 Ala. 318.

90. Ill.—Mathels v. Aharonian, 57 N.E.2d 140, 324 Ill.App. 82—Smith v. Carter, 23 N.E.2d 738, 302 Ill.App. 235—Hagen v. Ballus, 283 Ill.App. 249.

Ind.—Davis v. Dondanville, 26 N.E.2d 588, 107 Ind.App. 665.

Miss.—Sternberg Dredging Co. v. Screws, 166 So. 754, 175 Miss. 383.

Mo.—Buehler v. Festus Mercantile Co., 119 S.W.2d 961, 343 Mo. 139—Rosenstein v. Lewis Automobile Co., App., 34 S.W.2d 1023.

Neb.—James v. Krebeck, 2 N.W.2d 629, 141 Neb. 73, vacated on other grounds 7 N.W.2d 637, 142 Neb. 757.

N.J.—Wiese v. Baldanza Bros., 179 A. 377, 13 N.J.Misc. 472.

N.D.—Wilson v. Oscar H. Kjolrie Co., 12 N.W.2d 526, 73 N.D. 134.

Or.—Hamilton v. Haworth, 177 P.2d 409, 180 Or. 477—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133—Lasene v. Syvanen, 263 P. 59, 123 Or. 615.

Pa.—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245—Jerko v. Buffalo, etc., R. Co., 119 A. 543, 275 Pa. 459.

Va.—Morris v. Dame's Ex'r, 171 S.E. 662, 161 Va. 545.

Wis.—Kull v. Advance-Rumely Thresher Co., 245 N.W. 589, 209 Wis. 565—Goehmann v. National Biscuit Co., 235 N.W. 792, 204 Wis. 427.

Guest has no duty to warn driver of danger ahead unless he has cause to believe that driver does not see it or, seeing it, does not intend to take adequate measures to avoid it.—Arble v. Murray, 58 A.2d 143, 359 Pa. 12.

91. U.S.—McCrate v. Morgan Packing Co., C.C.A.Ohio, 117 F.2d 702.

Cal.—Marchetti v. Southern Pac. Co., 269 P. 529, 204 Cal. 679—Hagen v. Metzger, 20 P.2d 117, 130 Cal.App. 497—Malone v. Clemow, 295 P. 70, 111 Cal.App. 13.

La.—Hataway v. F. Strauss & Son, App., 158 So. 408—Delaune v. Breaux, 135 So. 253, 18 La.App. 609, affirmed 189 So. 753, 174 La. 43.

Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

N.J.—Tobish v. Cohen, 164 A. 415, 110 N.J.Law 296.

Tex.—Papin v. Japhet, Civ.App., 74 S.W.2d 737, error dismissed. 42 C.J. p 1173 note 60.

Assumption of care

Guest could not be charged with contributory negligence, with respect to motorist who collided with automobile in which guest was riding, for failing to warn driver of automobile in driver's path before it became apparent that driver did not see automobile and would not take steps to avoid accident, since guest had right to assume such facts until the contrary became apparent.—Senecal v. Bleau, 189 A. 139, 108 Vt. 486.

Vehicle ahead

Guest was not bound to call host's attention to vehicle preceding automobile unless guest had cause to believe that host did not see it or, seeing it, did not intend to take adequate measures to go around, or avoid hitting such vehicle.

Pa.—Little v. Straw, 192 A. 894, 326 Pa. 577.

Va.—Yonker v. Williams, 192 S.E. 753, 169 Va. 294.

92. Md.—State, to Use of Creasey v. Pennsylvania R. Co., 59 A.2d 190.

Neb.—Mackechnie v. Lyders, 279 N.W. 328, 134 Neb. 682.

Or.—Rice v. City of Portland, 7 P.2d 989, 141 Or. 205, reheard 17 P.2d 562, 141 Or. 205.

Tex.—Harper v. Texas & P. Ry. Co., Civ.App., 146 S.W.2d 426, error refused.

"The place which a passenger occupies in an automobile is . . . important in determining whether he exercised reasonable care and prudence to detect and avoid danger, for one on the front seat with the driver may have a far better opportunity of discovering any danger ahead in the course of the car than one in the back seat."

Md.—Baltimore, C. & A. Ry. Co. v. Turner, 136 A. 809, 614, 152 Md. 216.

Neb.—Mackechnie v. Lyders, 279 N.W. 328, 333, 134 Neb. 682.

Duty to ride in favorable position

Guest is not under duty to ride in every circumstance in such position in vehicle that he can observe road ahead and to warn driver of danger.—Hamilton v. Boyd, 256 N.W. 290, 218 Iowa 885.

Occupant assisting in putting chains on tires may be guilty of contributory negligence in failing to

keep a lookout for approaching vehicles.—Denny v. Augustine, 275 N.W. 117, 223 Iowa 1202.

Turning in seat

Automobile passenger who turns around in automobile to speak to friend in back seat is not guilty of contributory negligence if the motorist commits some negligent act which the passenger, had he been on the alert, might have had the opportunity to prevent.—Bynon v. Porter, 9 A.2d 357, 336 Pa. 441.

Riding on running board

(1) One riding on running board of automobile as driver's guest was not required to keep constant lookout for his own safety.—Alpine Tel. Corp. v. McCall, Tex.Civ.App., 195 S.W.2d 585, refused no reversible error.

(2) However, a person so riding was held to have the duty to look and warn driver of attempts by a truck to back out from curb, and was held negligent in not observing such an attempt.—Fidelity Union Casualty Co. v. Carpenter, 125 So. 504, 12 La.App. 321.

93. Iowa.—Shenkle v. Mains, 247 N.W. 635, 216 Iowa 1324.

La.—Gray v. Southern Auto Wreckers, App., 166 So. 154—Grouchy v. Globe Furniture Co., 134 So. 347, 16 La.App. 311.

Me.—Banks v. Adams, 195 A. 206, 135 Me. 270.

Ohio.—Community Traction Co. v. Konte, 172 N.E. 533, 35 Ohio App. 361, affirmed 172 N.E. 442, 122 Ohio St. 514.

Guest in front seat is not excused from all responsibility, but may rely on driver's watchfulness without forfeiting right to recovery against person causing injury.—Leclair v. Boudreau, 143 A. 401, 101 Vt. 270, 43 A.L.R. 1427.

94. La.—David v. Joseph, App., 164 So. 467—Kimbrow v. Holladay, App., 154 So. 369.

Me.—Banks v. Adams, 195 A. 206, 135 Me. 270.

Mich.—Fabiano v. Carey, 271 N.W. 754, 279 Mich. 269.

Tex.—Papin v. Japhet, Civ.App., 74 S.W.2d 737.

Wis.—Whyte v. Lindblom, 255 N.W. 267 (second case), 216 Wis. 28.

Duty

(1) Guest on back seat has duty to warn driver of known hazard, of

dition of the weather,⁹⁵ the fact that the guest's attention was diverted to other matters,⁹⁶ that the guest was a comparative stranger in the city or vicinity,⁹⁷ or that he was inexperienced with respect to motor vehicles.⁹⁸ Other circumstances to be considered are the facts that at the time of the accident the driver was crossing a railroad track at grade without stopping,⁹⁹ or was entering the street from a parking lot,¹ or was driving recklessly or

at an excessive rate of speed.²

The fact that the motor vehicle was approaching an intersection is also a circumstance to be considered in determining the guest's duty, and contributory negligence, with respect to observing and warning the driver of unexpected dangers,³ such as with respect to a vehicle approaching on an intersecting street or highway,⁴ except where the intersection was protected by traffic lights.⁵

which he believes driver has not become aware.—*Burgess v. Crafts*, 238 N.W. 798, 184 Minn. 384.

(2) He need not be on alert to discover danger which apparently competent driver may not discover.—*Burgess v. Crafts*, *supra*.

(3) Where he is not consulted about the driving and knows even less about road than host, he owes no duty to warn host of curves.—*Theriot v. Tassin*, La.App. 146 So. 729.

(4) Where he knows driver to be careful, he is not required to keep lookout and warn of danger.—*Lawrence v. Troy*, 289 P. 491, 133 Or. 196.

Persons held not negligent

(1) Elderly person riding in back seat of closed car at night.—*Chambers v. Hawkins*, 25 S.W.2d 363, 233 Ky. 211.

(2) Guest in rumble seat on cold foggy night with head covered with blanket.—*Crawford v. Rose*, 39 P.2d 217, 2 Cal.App.2d 734, rehearing denied 40 P.2d 277, 2 Cal.App.2d 734.

(3) Guest in seat immediately back of driver.—*Mansur v. Abraham*, La. App. 164 So. 418.

(4) Passenger in rear of automobile with child on lap.—*Lexington Ice Co. v. Williams' Adm'r*, 33 S.W.2d 14, 236 Ky. 318.

(5) Passenger on back seat with view of road obstructed.—*Peasley v. White*, 152 A. 530, 129 Me. 450, 73 A. L.R. 1017.

95. Cal.—*Crawford v. Rose*, 39 P.2d 217, 2 Cal.App.2d 734, rehearing denied 40 P.2d 277, 2 Cal.App.2d 734. La.—*Gilly v. Harris*, App., 152 So. 378.

Pa.—*Perry v. Ryback*, 153 A. 770, 302 Pa. 559.

96. Cal.—*Binford v. Purcell*, 37 P.2d 732, 2 Cal.App.2d 87.

A trained nurse, riding in the vehicle to attend a minor who had been injured, was under no duty to warn the driver of danger.—*Palmer v. Miller*, 35 N.E.2d 104, 310 Ill.App. 582, reversed on other grounds 43 N.E.2d 973, 380 Ill. 256.

Persons held not negligent

(1) Guest reading book.—*Fugelsang v. Steiner*, 1 P.2d 553, 115 Cal. App. 167.

(2) Guest who was looking at sew-

ing and books in her lap and did not see other car in road.—*Binford v. Purcell*, 37 P.2d 732, 2 Cal.App.2d 87.

(3) Passenger pulling down rear curtain when automobile passed over frost heaves in road.—*Mason v. Andrews*, 167 A. 156, 86 N.H. 277.

(4) Passenger, talking to copassenger.—*Hyman v. Salzer Plumbing Co.*, 135 So. 703, 18 La.App. 188, amended 138 So. 132, 18 La.App. 188.

97. Va.—*Yorke v. Cottle*, 4 S.E.2d 372, 173 Va. 372.

98. Ala.—*Kelly v. Hanwick*, 153 So. 269, 228 Ala. 336.

99. Ky.—*Stephenson's Adm'r v. Sharp's Ex'rs*, 1 S.W.2d 957, 222 Ky. 496.

Pa.—*Schlossstein v. Bernstein*, 142 A. 324, 293 Pa. 245—*Morningstar v. Northeast Pennsylvania R. Co.*, 137 A. 800, 290 Pa. 14.

1. Pa.—*Volz v. Dresser*, 28 A.2d 493, 150 Pa.Super. 371.

Direction to driver

Direction of occupant to driver who was about to enter street from parking lot, that driver had better drive a little closer to street in order to see better before entering street, was not contributory negligence as direction to driver to violate section of vehicle code providing that automobile entering highway from private driveway shall yield right of way to vehicles approaching on highway.—*Volz v. Dresser*, *supra*.

2. Me.—*Shea v. Hern*, 171 A. 248, 132 Me. 361.

Pa.—*Schlossstein v. Bernstein*, 142 A. 324, 293 Pa. 245.

Passenger is not required to watch speedometer constantly in order to see whether driver is exceeding legal speed limit and must call driver's attention to his speed only when it is so great that reasonable man would realize its excessiveness.—*Landskron v. Hartford Accident & Indemnity Co.*, 6 N.W.2d 178, 241 Wis. 445.

If warning would have been futile, the failure of gratuitous passengers to warn automobile driver of danger of excessive speed was not negligence.—*Shea v. Hern*, 171 A. 248, 132 Me. 361.

3. U.S.—*Kuper v. Betser, C.C.A.S.D.*, 115 F.2d 842.

Iowa.—*Carpenter v. Wolfe*, 273 N.W. 169, 223 Iowa 417.

La.—*Bailey v. Demourelle*, 135 So. 623, 17 La.App. 116, followed in *Eastman v. Demourelle*, 135 So. 625, 17 La.App. 119.

Mass.—*Gibbons v. Denoncourt*, 9 N. E.2d 633, 297 Mass. 448.

Constant lookout not required

Guest passenger is not obliged to be continually on watch at street and road intersections for indications of peril.—*Landy v. Rosenstein*, 188 A. 855, 325 Pa. 209.

Duty to look left and right

Passenger in motor truck coming from private alley into street had duty to look to left and to right.—*Mattes v. Brugner*, 159 N.E. 156, 88 Ind.App. 36.

Failure to warn of train approaching crossing

La.—*Chanson v. Morgan's Louisiana & T. R. & S. S. Co.*, 136 So. 647, 18 La.App. 602.

4. Ill.—*Walker v. Illinois Commercial Tel. Co.*, 43 N.E.2d 412, 315 Ill. App. 553—*Wever v. Staggs*, 264 Ill. App. 556.

Kan.—*Earhart v. Treibbar*, 80 P.2d 4, 148 Kan. 42.

La.—*Gardiner v. Travelers Indemnity Co.*, App., 11 So.2d 61—*Mathews v. Hayne*, App., 188 So. 462—*Prudhomme v. Continental Casualty Co.*, App., 169 So. 147—*Gray v. Southern Auto Wreckers*, App., 166 So. 154, followed in *Bates v. Southern Auto Wreckers*, 166 So. 156—*Brown v. Dalton*, App., 143 So. 672—*Welch v. Louisiana Oil Refining Corporation*, 135 So. 617, 17 La.App. 100—*Grouchy v. Globe Furniture Co.*, 134 So. 347, 16 La.App. 311.

Mass.—*Gibbons v. Denoncourt*, 9 N. E.2d 633, 297 Mass. 448.

Minn.—*Hubenette v. Ostby*, 6 N.W.2d 637, 213 Minn. 349.

N.D.—*Wilson v. Oscar H. Kjolrie Co.*, 12 N.W.2d 526, 73 N.D. 134.

Pa.—*Carden v. Philadelphia Transp. Co.*, 41 A.2d 667, 351 Pa. 407.

Va.—*Remine v. Whited*, 21 S.E.2d 743, 180 Va. 1.

Limit of occupant's duty was to warn driver if he saw an automobile approaching.—*Kuper v. Betser, C.C.A.S.D.*, 115 F.2d 842.

5. La.—*Lowery v. Zorn*, App., 157 So. 326.

b. Occupant Sleeping

The fact that a guest in a motor vehicle closes his eyes or falls asleep does not necessarily constitute contributory negligence.

The fact that a guest in a motor vehicle closes his eyes, at a time when there is no indication of danger,⁶ or the fact that the guest dozes or is asleep at the time of the accident⁷ does not necessarily constitute contributory negligence unless there is a causal connection between the fact that the guest is asleep and the accident.⁸ The fact of the guest being asleep at the time of the accident is merely one of the circumstances to be considered in connection with other surrounding circumstances,⁹ and, when so considered, may constitute contributory negligence,¹⁰ as where he goes to sleep knowing of an impending peril or hazard in the driver's operation of the vehicle,¹¹ or may not constitute contributory negligence,¹² as where there is no indication of danger¹³ or nothing to indicate that, if awake, he

could have helped to prevent the accident.¹⁴

A guest ordinarily is under no duty to stay awake to guard his safety against intentional injuries inflicted on him by anyone,¹⁵ or to guard against gross negligence of the driver.¹⁶ However, it has also been held that a guest who is injured while asleep is guilty of such negligence as will preclude a recovery, notwithstanding gross negligence on the part of the driver.¹⁷

c. Compared with Vigilance of Driver

A guest in a motor vehicle ordinarily is not held to as high a degree of care and vigilance in keeping a lookout as is the driver of the vehicle.

Since a guest ordinarily has no control over the driver's operation of the motor vehicle, ordinarily he is not held to as high a degree of care and vigilance in keeping a lookout and listening for unexpected dangers or sudden emergencies as is the driver of the vehicle¹⁸ unless they are engaged in a mu-

Passenger has no duty to keep lookout for automobiles at intersection protected by traffic lights.—Lowery v. Zorn, *supra*.

6. Miss.—Sternberg Dredging Co. v. Screws, 166 So. 754, 175 Miss. 383.

Closing eyes momentarily to rest them did not relieve motorist from liability for injuries sustained by guest when motorist did not follow a curve in the highway and struck a tree.—Macgowan v. Mills, 35 A.2d 797, 98 N.H. 84.

7. Ark.—George v. George, 88 S.W. 2d 71, 191 Ark. 799.

Iowa.—Fry v. Smith, 253 N.W. 147, 217 Iowa 1295.

Kan.—Howse v. Weinrich, 298 P. 766, 133 Kan. 132.

Ky.—Jesse v. Dunn, 51 S.W.2d 918, 244 Ky. 613.

La.—Weddle v. Phelan, App., 177 So. 407.

Me.—Wells v. Sears, 4 A.2d 680, 136 Me. 160.

Mo.—Scism v. Alexander, 93 S.W.2d 36, 230 Mo.App. 1175.

N.J.—Niles v. Phillips Express Co., 193 A. 183, 118 N.J.Law 455.

N.Y.—Diem v. Adams, 42 N.Y.S.2d 55, 266 App.Div. 307, appeal granted 44 N.Y.S. 264, 266 App.Div. 948—Walter v. State, 65 N.Y.S.2d 378, 187 Misc. 1034.

Pa.—Frank v. Markley, 173 A. 186, 315 Pa. 257—Oestreich v. Zibman, 169 A. 14, 110 Pa.Super. 457.

Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

Wash.—Cody v. Bennett, 31 P.2d 83, 177 Wash. 199.

Wis.—Forbes v. Forbes, 377 N.W. 113, 226 Wis. 477—Suschnick v. Underwriters Casualty Co., 248 N.W. 477, 211 Wis. 474.

A guest passenger in baseball bus

at night on paved highway with no outward appearance of danger was not required to keep awake and observe road ahead or to watch bus driver to ascertain that he was not on wrong side of road or driving too fast, but guest had right to assume, in absence of special circumstances and danger, that driver was properly operating bus—Weddle v. Phelan, La.App., 177 So. 407.

8. Iowa.—Fry v. Smith, 253 N.W. 147, 217 Iowa 1295.

Me.—Wells v. Sears, 4 A.2d 680, 136 Me. 160.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596.

Wis.—Schmidt v. Leuthener, 227 N.W. 17, 199 Wis. 567.

9. La.—Weddle v. Phelan, App., 177 So. 407.

Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

10. Ala.—McDermott v. Sibert, 119 So. 681, 218 Ala. 670.

La.—Weddle v. Phelan, App., 177 So. 407.

11. La.—Clinton v. City of West Monroe, App., 187 So. 561, followed in Willis v. City of West Monroe, 187 So. 829, Madden v. City of West Monroe, 187 So. 829 and Perritt v. City of West Monroe, 187 So. 830.

N.Y.—Parker v. Helfert, 252 N.Y.S. 35, 140 Misc. 905.

12. Conn.—Dobberentz v. Gregory, 26 A.2d 475, 129 Conn. 57.

Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.

13. La.—Weddle v. Phelan, App., 177 So. 407.

Pa.—Simrell v. Eschenbach, 154 A. 369, 303 Pa. 156.

14. Tex.—Browning v. Beck, Civ.

App., 73 S.W.2d 626, affirmed 101 S.W.2d 545, 129 Tex. 7.

Wash.—Cody v. Bennett, 31 P.2d 83, 177 Wash. 199.

Wis.—Schmidt v. Leuthener, 227 N.W. 17, 199 Wis. 567.

15. Tex.—McMillian v. Sims, Civ. App., 112 S.W.2d 793, error granted.

16. Tex.—McMillian v. Sims, *supra*.

Guest in gasoline truck
Tex.—McMillian v. Sims, *supra*.

17. Mass.—Oppenheim v. Barkin, 159 N.E. 628, 262 Mass. 281, 61 A.L.R. 1228.

Rule criticized

Mo.—Scism v. Alexander, 93 S.W.2d 36, 38, 230 Mo.App. 1175.

18. Iowa.—Jensvold v. Chicago Great Western R. Co., 12 N.W.2d 293, 234 Iowa 627—Shepherd v. Bremner, 260 N.W. 48, 220 Iowa 1.

Ky.—Epperson v. Wright, 126 S.W.2d 123, 277 Ky. 205.

La.—Gardiner v. Travelers Indemnity Co., App., 11 So.2d 61.

Md.—Dashiell v. Moore, 11 A.2d 640, 177 Md. 657.

Mich.—Fabiano v. Carey, 271 N.W. 754, 279 Mich. 269.

N.H.—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69—Hoen v. Haines, 154 A. 129, 85 N.H. 36.

Pa.—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Bynon v. Porter, 9 A.2d 357, 336 Pa. 441—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Volz v. Dresser, 28 A.2d 493, 150 Pa.Super. 371.

S.D.—Simmons v. Leighton, 244 N.W. 883, 60 S.D. 524.

Vt.—Huestis v. Lapham's Estate, 32 A.2d 115, 113 Vt. 191—Leclair v. Boudreau, 143 A. 401, 101 Vt. 270, 63 A.L.R. 1427.

Wis.—Canoneri v. Heckert, 269 N.W. 716, 223 Wis. 25—Cherney v. Sim-

tual adventure, in which case the guest has the same duty as the driver to observe dangers.¹⁹

Owner as occupant. An owner riding in his own automobile driven by another is bound to the same degree of care as to looking out as is the driver, if the driver is acting for and on behalf of the owner in the operation of the automobile,²⁰ or if the owner has not yielded to the driver a right of possession or control of the manner in which the automobile is being driven.²¹

d. Assumption of Risk

As a general rule a guest does not assume the risk of injury incident to the driver's failure to keep a proper lookout.

As a general rule a guest does not assume the risk of injury incident to the driver's failure to maintain a proper lookout,²² particularly where the want of lookout by the driver is merely momentary.²³ A guest, however, having knowledge of the driver's negligence with respect to keeping a lookout, and an opportunity to protest or object thereto, will be deemed to have assumed the risk of such negligence

so as to bar a recovery for injuries thereby sustained.²⁴

§ 489. Duty to Protest Negligence or Unlawful Act of Driver

- a. In general
- b. Continuation of protests
- c. Assumption of risk

a. In General

An occupant in a motor vehicle is not under an absolute duty to protest against the negligent or unlawful acts of the driver in operating the vehicle; but the extent of such duty depends on what a person of ordinary prudence would do under the same or similar circumstances.

The duty of a guest in a motor vehicle, to protest or remonstrate against the negligent or unlawful acts of the driver,²⁵ such as against his driving at an excessive or unlawful rate of speed,²⁶ is not an absolute or positive duty; and, since the guest ordinarily has the right to assume that the driver knows how to operate the motor vehicle and is driving it properly, as discussed supra § 487, a failure

onis, 265 N.W. 203, 220 Wis. 339, followed in 265 N.W. 206, 220 Wis. 346—Krause v. Hall, 217 N.W. 290, 195 Wis. 565.

Duties compared

A driver must use care constantly in keeping a lookout while driving on public highway, whereas ordinarily guests may reasonably and lawfully rely on driver to keep watch.

Pa.—Ellsworth v. Lauth, 166 A. 855, 311 Pa. 286.

Tex.—Harper v. Texas & P. Ry. Co. Civ.App., 146 S.W.2d 426, error refused.

19. Md.—Mitchell v. Dowdy, 42 A.2d 717, 184 Md. 634.

20. Ill.—Johnson v. Kushler, 269 Ill. App. 553.

Tex.—Langham v. Talbott, Civ.App., 211 S.W.2d 987.

21. Tex.—Langham v. Talbott, supra.

22. S.D.—Hall v. Hall, 258 N.W. 491, 63 S.D. 343.

Wis.—Tietz v. Blaier, 26 N.W.2d 551, 250 Wis. 214—Haugen v. Wittkopf, 7 N.W.2d 886, 242 Wis. 276—Hutzler v. McDonnell, 2 N.W.2d 207, 239 Wis. 568—Elkey v. Elkey, 290 N.W. 627, 234 Wis. 149, motion denied 292 N.W. 300, 234 Wis. 149—Rudolph v. Ketter, 289 N.W. 674, 233 Wis. 329—Milwaukee Automobile Ins. Co., Limited, Mutual v. Felten, 281 N.W. 637, 229 Wis. 29—Maltby v. Thiel, 272 N.W. 848, 224 Wis. 648—Eisenhut v. Eisenhut, 248 N.W. 440, 212 Wis. 467, 91 A.L.R. 549, rehearing denied 250 N.W. 441, 212 Wis. 467, 91 A.L.R. 552—Harter v.

Dickman, 245 N.W. 157, 209 Wis. 283.

Prospective purchaser of automobile did not, by consenting to salesman's driving automobile at excessive speed during demonstration, assume all risk of injury so as to be barred from recovering for injuries resulting in part from salesman's negligence in failing to watch road.—Weis v. Davis, 82 P.2d 487, 28 Cal. App.2d 240.

23. Wis.—Haugen v. Wittkopf, 7 N.W.2d 886, 242 Wis. 276—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501.

"The negligence of the host as to lookout which the guest does not assume is the momentary act or nonaction of the host of which he has had no knowledge and to which he has had no opportunity to protest or object."—Haugen v. Wittkopf, supra.

At crossing

A guest does not assume the risk of the motorist's want of lookout resulting in a railway crossing collision, where the want of lookout does not persist long enough to give the guest time to protest, and he has no reason to think that the motorist is not maintaining a proper lookout until another guest calls out.—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501.

24. Wis.—Storlie v. Hartford Accident & Indemnity Co., 28 N.W.2d 920, 251 Wis. 340—Haugen v. Wittkopf, 7 N.W.2d 886, 242 Wis. 276—State ex rel. Litzen v. Dillett, 7 N.W.2d 599, 242 Wis. 107, rehear-

ing denied 9 N.W.2d 80, 242 Wis. 107—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.

Collision

Where guest assumed risk of his host's negligent lookout resulting in collision with approaching automobile, guest was not entitled on ground of host's negligent lookout to recover from host for his ensuing injuries.—State ex rel. Litzen v. Dillett, 7 N.W.2d 599, 242 Wis. 107, rehearing denied 9 N.W.2d 80, 242 Wis. 107.

25. Ga.—McCord v. Benford, 173 S.E. 208, 48 Ga. App. 738

Iowa.—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 414

N.H.—Ramsdell v. John B. Varick Co., 170 A. 12, 86 N.H. 457.

Ohio.—Wills v. Anchor Cartage & Storage Co., 159 N.E. 124, 26 Ohio App. 66.

26. Ariz.—Friedman v. Friedman, 9 P.2d 1015, 40 Ariz. 96.

Cal.—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal.2d 480—Curran v. Earle C. Anthony, Inc., 247 P. 236, 77 Cal. App. 462.

Md.—Powers v. State, for the Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.

N.H.—Lafamme v. Lewis, 192 A. 861, 89 N.H. 69.

The law imposes no duty on guest in automobile to remonstrate against speed at which it is driven, in absence of facts suggesting necessity to watch speed.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.

to protest or remonstrate with the driver as to his manner of driving, at the time or immediately before an accident, ordinarily does not of itself constitute contributory negligence.²⁷ The extent of an occupant's or guest's duty to protest depends on the facts and circumstances of the particular case, that is, on what a person of ordinary prudence would do, under the same or similar circumstances, with respect to protesting against the excessive or unlawful rate of speed,²⁸ or other negligent or unlawful acts or conduct on the part of the driver.²⁹

Accordingly, if an occupant or guest in a motor vehicle knows, or in the exercise of ordinary care should know, that the driver is conducting himself in the operation of the vehicle in a negligent or unlawful manner, and, if under the same or similar circumstances a reasonably prudent person would have attempted to persuade the driver from such conduct, by protest, or other warning, he is guilty of contributory negligence if, a reasonable opportunity therefor being afforded, he fails to do so and such failure contributed proximately to cause his injury;³⁰ but in order for failure to protest, or

27. U.S.—*McCrater v. Morgan Packing Co.*, C.C.A.Ohio, 117 F.3d 702.
Ill.—*Lasko v. Meier*, 63 N.E.2d 531, 327 Ill.App. 5, affirmed 67 N.E.2d 162, 394 Ill. 71.

Iowa.—*Carpenter v. Wolfe*, 273 N.W. 169, 223 Iowa 417.

Ohio.—*Cleveland Ry. Co. v. Heller*, 15 Ohio App. 346.

"Fault in a passenger's acceptance of improper driving is not conclusively established unless the driver's fault or incompetence is so gross or extreme that effort to abate the danger, by inducing proper driving or by leaving the car if it may be done in safety, is unquestionably demanded."—*Woodman v. Peck*, 7 A.2d 251, 255, 90 N.H. 292, 122 A.L.R. 1402.

28. Ariz.—*Friedman v. Friedman*, 9 P.2d 1015, 40 Ariz. 96.

Cal.—*Lindemann v. San Joaquin Cotton Oil Co.*, 65 P.2d 870, 5 Cal.2d 480—*Shields v. King*, 277 P. 1043, 207 Cal. 275—*Swink v. Gardena Club*, 151 P.2d 313, 65 Cal.App.2d 674—*Williamson v. Fitzgerald*, 2 P.2d 201, 116 Cal.App. 19—*Queirolo v. Pacific Gas & Electric Co.*, 300 P. 487, 114 Cal.App. 610—*Brown v. Davis*, 257 P. 877, 84 Cal.App. 180—*Curran v. Earle C. Anthony, Inc.*, 247 P. 236, 77 Cal.App. 462.

Ill.—*McDermott v. McKeown Transp. Co.*, 263 Ill.App. 325.

Md.—*Powers v. State, for Use and Benefit of Reynolds*, 11 A.2d 909, 178 Md. 23.

Mass.—*Murphy v. Smith*, 29 N.E.2d 726, 307 Mass. 64.

N.H.—*Lafamme v. Lewis*, 192 A. 851, 89 N.H. 49.

Wis.—*Goechmann v. National Biscuit Co.*, 235 N.W. 792, 204 Wis. 427.

29. Ark.—*Sparks v. Chitwood Motor Co.*, 94 S.W.2d 359, 192 Ark. 743.

Ill.—*Lasko v. Meier*, 63 N.E.2d 531, 327 Ill.App. 5, affirmed 67 N.E.2d 162, 394 Ill. 71.

Kan.—*Curtiss v. Fahle*, 139 P.2d 827, 157 Kan. 226.

La.—*Chanson v. Morgan's Louisiana & T. R. & S. S. Co.*, 136 So. 647, 18 La.App. 602.

N.H.—*Ramsdell v. John B. Varick Co.*, 170 A. 12, 86 N.H. 457.

Pa.—*Stermer v. C. R. R. of N. J.*, Com.Pl., 37 Luz Leg.Reg. 141.

W.Va.—*Boyce v. Black*, 15 S.E.2d 588, 123 W.Va. 234.

Wis.—*Goechmann v. National Biscuit Co.*, 235 N.W. 792, 204 Wis. 427.

Circumstances to be considered

In determining duty of automobile guest to protest, the circumstances of time, duration of negligence, conduct, reaction of driver to complaint, character of negligence, and the like must be considered—*Apfelbaum v. Markley*, 3 A.2d 975, 134 Pa.Super. 392.

When unusual circumstances present themselves and danger of driving increases, guest must exercise greater prudence for his own safety and must at least protest against negligence of driver.—*Clifton v. Dean*, La.App., 169 So. 788, followed in 169 So. 790.

If guest saw, or ought to have seen, traffic signal on right of highway, and noticed that driver was continuing as though he had not seen it, guest had plain duty to protest.—*Teas v. Eisenlord*, 253 N.W. 795, 215 Wis. 455.

30. Ark.—*Lewis v. Chitwood Motor Co.*, 115 S.W.2d 1072, 196 Ark. 86.

Cal.—*King v. City of Long Beach*, 153 P.2d 445, 67 Cal.App.2d 1.

Idaho.—*French v. Tebben*, 27 P.2d 474, 53 Idaho 701—*Dale v. Jaeger*, 258 P. 1081, 44 Idaho 576.

Ill.—*Ames v. Terminal R. Ass'n of St. Louis*, 75 N.E.2d 42, 332 Ill. App. 187—*Pope v. Illinois Terminal R. Co.*, 67 N.E.2d 284, 329 Ill. App. 62.

Kan.—*Curtiss v. Fahle*, 139 P.2d 827, 157 Kan. 226—*Darrington v. Campbell*, 94 P.2d 305, 150 Kan. 407—*Donehan v. Wright*, 81 P.2d 50, 148 Kan. 287.

Ky.—*Louisville Taxicab & Transfer Co. v. Barr*, 209 S.W.2d 719, 307 Ky. 28—*Mattingly v. Meuter*, 121 S.W.2d 676, 275 Ky. 294—*Louisville & N. R. Co. v. Hadler's Adm'r*, 106 S.W.2d 106, 269 Ky. 115—*Chambers v. Hawkins*, 25 S.W.2d 363, 233 Ky. 211.

La.—*Aaron v. Martin*, 177 So. 242,

246, 188 La. 371—*Lorance v. Smith*, 138 So. 871, 173 La. 883—*Mansur v. Abraham*, App., 164 So. 418—*Waddell v. Langlois*, App., 158 So. 665, followed in *Davis v. Langlois*, 158 So. 672, *Waddell v. Istrouma Water Co.*, 158 So. 672 and *Davis v. Istrouma Water Co.*, 158 So. 672—*Lapeze v. O'Keefe*, App., 158 So. 36, modified on other grounds 159 So. 403—*Provosty v. Christy*, App., 152 So. 784—*Reggie v. Karre*, 139 So. 532, 19 La.App. 477—*Livaudais v. Black*, 127 So. 129, 13 La.App. 345.

Me—*Kimball v. Bauckman*, 158 A. 694, 131 Me. 14.

Md.—*Mitchell v. Dowdy*, 42 A.2d 717, 184 Md. 634—*Montgomery Bus Lines v. Diehl*, 148 A. 453, 158 Md. 233.

Mo.—*Cheatham v. Chartrau*, 176 S.W.2d 865, 237 Mo.App. 793—*Heyde v. Patten*, App., 39 S.W.2d 813.

Neb.—*Iamblen v. Stickley*, 27 N.W.2d 178, 148 Neb. 283—*Fulcher v. Ike*, 6 N.W.2d 610, 142 Neb. 418.

N.H.—*Ramsdell v. John B. Varick Co.*, 170 A. 12, 86 N.H. 457.

N.Y.—*Reilly v. Rawleigh*, 281 N.Y.S. 366, 245 App.Div. 190.

N.C.—*Bogen v. Bogen*, 18 S.E.2d 162, 230 N.C. 648.

Ohio.—*Wills v. Anchor Cartage & Storage Co.*, 159 N.E. 124, 26 Ohio App. 66.

Pa.—*Ellenberger v. Kramer*, 186 A. 809, 322 Pa. 589—*Janeway v. Laferty Bros.*, 185 A. 827, 323 Pa. 324—*Perry v. Ryback*, 153 A. 770, 302 Pa. 559—*Curry v. Riggles*, 153 A. 325, 302 Pa. 156—*Alperdt v. Paige*, 140 A. 555, 292 Pa. 1—*Apfelbaum v. Markley*, 3 A.2d 975, 134 Pa.Super. 392—*Oesterreich v. Zibman*, 169 A. 14, 110 Pa.Super. 457—*Christian v. Gwynne*, 158 A. 290, 103 Pa.Super. 539—*Iorio v. Kidd*, Com.Pl., 32 Del.Co. 400—*Pritchard v. Philadelphia Suburban Transp. Co.*, Com.Pl., 32 Del.Co. 383.

Tex.—*Thweatt v. Ocean Accident & Guarantee Corporation*, Civ.App., 62 S.W.2d 250, error refused.

Va.—*Sutton v. Bland*, 184 S.E. 231, 166 Va. 122.

W.Va.—*Darling v. Browning*, 200 S.

acquiescence, to constitute contributory negligence, it must be with respect to the driver's negligence which caused the injury,⁸¹ and the fact that the occupant protests as to particular acts of negligence does preclude him from recovering for injuries proximately caused by other negligent or unlawful acts of the driver.⁸² An occupant or guest who knows, or should know, and appreciate the danger involved may, under the particular circumstances, be

guilty of contributory negligence in failing to protest or remonstrate against the vehicle being driven at a dangerous, excessive, or unlawful rate of speed,⁸³ such as in driving at an unlawful speed in a school zone,⁸⁴ or in being driven into a situation of danger without proper precaution,⁸⁵ or in violation of the rules of the road,⁸⁶ or in driving without lights, in violation of statute.⁸⁷

On the other hand, a guest or occupant is not

E. 737, 120 W.Va. 666—Oney v. Binford, 180 S.E. 11, 116 W.Va. 242 —Adams v. Hutchinson, 167 S.E. 135, 113 W.Va. 217—Herold v. Clendennen, 161 S.E. 21, 111 W.Va. 121—Clise v. Prunty, 152 S.E. 201, 108 W.Va. 635.

Wis.—Royer v. Saecker, 234 N.W. 742, 204 Wis. 265.

42 C.J. p 1173 note 62.

Owner occupant

An owner occupant who had equal opportunity with driver of observing conditions and yet permitted automobile to be operated so as to collide with truck which had stalled on highway was contributorily negligent, precluding his recovery for injuries sustained when automobile collided with truck which had been left with lights burning.—Horn v. Barras, La. App., 172 So. 451.

A wife riding with her husband may be responsible for the consequences of her own negligence in failing to protest against the husband's negligent or reckless driving. Neb.—Crandall v. Ladd, 7 N.W.2d 642, 142 Neb. 736—Murphy v. Shibiya, 250 N.W. 746, 125 Neb. 487.

Pa.—Alperdt v. Paige, 140 A. 555, 292 Pa. 1.

31. Iowa—Miller v. Mathis, 8 N.W. 2d 744, 223 Iowa 221.

32. Cal.—Weis v. Davis, 82 P.2d 487, 28 Cal.App.2d 240.

Iowa.—Miller v. Mathis, 8 N.W.2d 744, 223 Iowa 221.

Excessive speed

An automobile passenger, knowingly acquiescing in operation of automobile at excessive speed under adverse driving conditions for sufficient time to assume risk of injury therefrom, is guilty of contributory negligence, barring his recovery for injuries proximately caused by such speed, but not for injuries proximately caused solely by driver's failure to keep proper lookout when he undertook to make turn on which accident happened.—Miller v. Mathis, *supra*.

33. Cal.—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App. 2d 1—Valencia v. San Jose Scavenger Co., 69 P.2d 480, 21 Cal.App. 2d 469.

Conn.—Tracy v. Welch, 145 A. 662, 109 Conn. 144.

Idaho.—Dale v. Jaeger, 258 P. 1081, 44 Idaho 576.

Ill.—McDermott v. McKeown Transp. Co., 263 Ill.App. 325.

Ky.—Mattingly v. Meuter, 121 S.W. 2d 676, 275 Ky. 294.

La.—Lorance v. Smith, 138 So. 871, 173 La. 883—Pipes v. Gallman, 136 So. 302, 173 La. 158, annulled on other grounds 140 So. 40, 174 La. 257. Followed in 135 So. 692, 18 La.App. 437, annulled on other grounds 140 So. 43, 174 La. 265. Followed in Sumlin v. Gallman, 135 So. 692, 18 La.App. 436 annulled on other grounds 140 So. 44, 174 La. 269. Followed in Byrd v. Gallman, 135 So. 692, 18 La.App. 436, annulled on other grounds 140 So. 44, 174 La. 268—Waddell v. Langlois, App. 158 So. 665, followed in Davis v. Langlois, 158 So. 672, Waddell v. Istrouma Water Co., 158 So. 672 and Davis v. Istrouma Water Co., 158 So. 672—Reggie v. Karre, 139 So. 532, 19 La.App. 477, followed in 139 So. 536, 19 La.App. 476, Karre v. Karre, 139 So. 536, 19 La.App. 476 and Zwan v. Karre, 139 So. 536, 19 La.App. 475—Hutchens v. Morgan, 125 So. 309, 12 La. App. 545.

N.Y.—Reilly v. Rawleigh, 281 N.Y.S. 366, 245 App.Div. 190.

N.D.—Eddy v. Wells, 231 N.W. 785, 69 N.D. 663.

Pa.—Wagenbauer v. Schwinn, 131 A. 699, 285 Pa. 128.

Tenn.—Coppedge v. Blackburn, 65 Tenn.App. 587.

Utah.—Maybee v. Maybee, 11 P.2d 973, 79 Utah 585.

Wash.—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 869.

Wis.—Hahn v. Smith, 254 N.W. 750, 215 Wis. 277—Goehmann v. National Biscuit Co., 235 N.W. 792, 204 Wis. 427—Krause v. Hall, 217 N.W. 290, 195 Wis. 565.

42 C.J. p 1174 note 63.

Failure to protest speed held contributory negligence

(1) Where guest had knowledge of driver's shortsightedness.—Maybee v. Maybee, 11 P.2d 973, 79 Utah 585.

(2) Where night was foggy and winding road along hillside was nar-

row.—Adams v. Hutchinson, 167 S.E. 135, 113 W.Va. 217.

34. Tenn.—Webster v. Trice, 133 S. W.2d 621, 23 Tenn.App. 365.

35. Ark.—Rayland v. Snotzmeier, 55 S.W.2d 923, 186 Ark. 778.

La.—Clifton v. Deen, App., 169 So. 788, followed in 169 So. 790.

Pa.—Otis v. Kolsky, 94 Pa.Super. 548. Tenn.—Dedman v. Dedman, 291 S.W. 449, 155 Tenn. 241.

W.Va.—Darling v. Browning, 200 S.E. 737, 120 W.Va. 666—Oney v. Binford, 180 S.E. 11, 116 W.Va. 242.

42 C.J. p 1174 note 64.

Defective steering apparatus

Where fact that steering apparatus was faulty was known to both host and guest, and automobile was being driven at excessive speed, guest who suggested that they stop and inspect the steering apparatus but did not protest against proceeding further was guilty of contributory negligence barring recovery for injuries sustained in accident which occurred when host lost control of automobile.—Ellenberger v. Kramer, 186 A. 809, 322 Pa. 589.

Where driver put her foot on gas instead of brake when car started zigzagging, guests were contributorily negligent, as regards suddenly resulting accident, in failing to protest.—Reggie v. Karre, 139 So. 532, 19 La.App. 477, followed in 139 So. 536, 19 La.App. 476, Karre v. Karre, 139 So. 536, 19 La.App. 476 and Zwan v. Karre, 139 So. 536, 19 La.App. 475.

Where automobile driver could have crossed intersection ahead of truck at speed of fifteen miles an hour, passengers were not negligent in failing to protest against effort to cross.—Goehmann v. National Biscuit Co., 235 N.W. 792, 204 Wis. 427.

36. Pa.—Alperdt v. Paige, 140 A. 555, 292 Pa. 1.

42 C.J. p 1174 note 65.

37. Cal.—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App. 2d 1.

Guest on motorcycle with weak headlights was presumed to know that headlight law was violated and could not claim immunity from contributory negligence.—Le Doux v. Alert Storage & Transfer Co., 259 P. 24, 146 Wash. 115.

guilty of contributory negligence in failing to protest or remonstrate against the vehicle's being driven at an excessive, dangerous, or unlawful rate of speed,³⁸ or into a situation of danger,³⁹ or in any other negligent or unlawful manner,⁴⁰ where he did not know, or in the exercise of ordinary care should not have known and appreciated, that the vehicle was being so driven,⁴¹ or where a reasonably prudent person in the same or similar circumstances would not have protested,⁴² or where his failure to do so did not contribute proximately to cause his injury.⁴³ Moreover, the duty of an occupant or guest to protest as to the driver's neg-

ligence or unlawful acts exists only where it will serve some useful purpose.⁴⁴ There is no contributory negligence on the part of one riding in a motor vehicle as a guest who observes approaching danger and at once gives warning, because the driver does not heed the warning but goes ahead into obvious peril, which the guest is powerless to prevent or avoid,⁴⁵ or where it reasonably appears that a protest would go unheeded,⁴⁶ or where, by reason of the danger not becoming apparent and appreciated in time to affect the driver's conduct and avert the accident, the occupant had no reasonable opportunity to protest or remonstrate,⁴⁷ or where

38. Ala.—Moore v. Cruitt, 191 So. 252, 238 Ala. 414—Baker v. Baker, 124 So. 740, 220 Ala. 201.

Cal.—Quierolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal.App. 610.

La.—Pipes v. Gallman, 140 So. 40, 174 La. 257.

N.C.—Norfleet v. Hall, 169 S.E. 143, 204 N.C. 573.

42 C.J. p 1174 note 66.

Speed not negligence in itself

It has been held that a passenger is not negligent in failing to protest against speed exceeding statutory limit, but not of itself negligence—Higgins v. Metzger, 143 A. 394, 101 Vt. 285.

39. Iowa.—Wagner v. Kloster, 175 N.W. 840, 188 Iowa 174.

42 C.J. p 1174 note 67.

40. La.—Alost v. J. Moock Wood & Drayage Co., 120 So. 791, 10 La. App. 57.

Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

42 C.J. p 1174 note 68.

41. U.S.—Gray v. Dieckmann, C.C.A. N.H., 109 F.2d 382.

Ala.—Moore v. Cruitt, 191 So. 252, 238 Ala. 414.

La.—Alost v. J. Moock Wood & Drayage Co., 120 So. 791, 10 La.App. 57.

Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

N.D.—Bolton v. Wells, 225 N.W. 791, 58 N.D. 286.

Pa.—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245.

Wis.—Olson v. State Farm Mut. Auto. Ins. Co. of Bloomington, Ill., 30 N.W.2d 196, 252 Wis. 37.

42 C.J. p 1174 note 69.

Guest in rumble seat

La.—Lawrason v. Richard, 129 So. 250, 16 La.App. 434, affirmed 135 So. 29, 173 La. 696.

Tenn.—City of Chattanooga v. Evatt, 14 Tenn.App. 474.

42. Wash.—Bauer v. Tougaw, 224 P. 20, 128 Wash. 654, 656.

42 C.J. p 1175 note 70.

Stop sign

Where the motor vehicle has come

to a virtual stop at a stop sign, before entering an intersection, an occupant has no duty to protest and demand that the vehicle come to a complete stop.—Gardiner v. Travelers Indemnity Co., La.App., 11 So.2d 61.

Where driver manifested realization of danger, the occupant of truck owed driver no duty to protest against driver's speed.—Morris v. Dame's Ex'r, 171 S.E. 662, 161 Va. 545.

43. Cal.—Queirolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal. App. 610.

La.—Hamilton v. F. Strauss & Son, App., 154 So. 489.

42 C.J. p 1174 note 71.

44. Pa.—Bynon v. Porter, 9 A.2d 357, 336 Pa. 441.

45. Me.—Avery v. Thompson, 130 A. 4, 117 Me. 120, L.R.A.1918D 206, Ann Cas.1918E 1122.

Mo.—Rowe v. St. Louis United R. Co., 247 S.W. 443, 211 Mo.App. 526.

N.Y.—Clark v. Traver, 200 N.Y.S. 52, 205 App.Div. 206, affirmed 143 N.E. 736, 237 N.Y. 544.

Wis.—Glick v. Baer, 201 N.W. 752, 186 Wis. 288.

42 C.J. p 1175 note 72.

46. Neb.—Hamblen v. Steckley, 27 N.W.2d 178, 148 Neb. 283—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

47. Cal.—Queirolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal. App. 610.

La.—Pipes v. Gallman, 140 So. 40, 174 La. 257—Provosty v. Christy, App., 152 So. 784—McDonald v. Stellwagon, App., 140 So. 133, followed in McConnell v. Stellwagon, 140 So. 138—Neuman v. Eddy, 130 So. 247, 15 La.App. 45.

Me.—Kimball v. Bauckman, 158 A. 694, 131 Me. 14.

Md.—Gordon v. Opalecky, 137 A. 299, 152 Md. 538.

Mo.—Kaley v. Huntley, 63 S.W.2d 21, 333 Mo. 771—Rappaport v. Roberts, App., 203 S.W. 676.

Neb.—Hamblen v. Steckley, 27 N.W.

2d 178, 148 Neb. 283—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

N.C.—Norfleet v. Hall, 169 S.E. 143, 204 N.C. 573.

N.D.—Wilson v. Oscar H. Kjolrie Co., 12 N.W.2d 526, 73 N.D. 134.

Ohio—Metzger v. Yellow Taxicab Co., 193 N.E. 75, 48 Ohio App. 75.

Pa.—Bynon v. Porter, 9 A.2d 357, 336 Pa. 441—Becker v. Saylor, 177 A. 804, 317 Pa. 573—Kulp v. Lehigh Valley Transit Co., 81 Pa. Super. 296.

W.Va.—Young v. Wheby, 30 S.E.2d 6, 126 W.Va. 741, 154 A.L.R. 919.

Wis.—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501—Rudolph v. Ketter, 289 N.W. 674, 233 Wis. 329.

42 C.J. p 1174 note 73.

42 C.J. p 1174 note 74.

Demand to stop

Where guest and host both saw truck approaching intersection seventy-five feet away and both thought it safe for automobile to proceed and danger did not become apparent until automobile had entered intersection, there was no contributory negligence by guest in not directing host to stop so as to bar recovery against owner of truck.—Wilson v. Oscar H. Kjolrie Co., 12 N.W.2d 526, 73 N.D. 134.

Inability to stop on icy pavement

Where road appeared dry, and driver was not exceeding speed which would be legal if road were dry, there was no occasion for guest to protest the manner of driving, and hence guest was not barred by contributory negligence for recovering for injuries suffered when driver was unable to stop on icy pavement in time to avoid parked truck.—Engel v. Interstate Transit Co., 115 P.2d 681, 9 Wash.2d 590.

A wife riding in an automobile driven by her husband is not contributorily negligent in not remonstrating with him with respect to his driving, where she had no reasonable time or opportunity for an effective protest.

Cal.—McSweeney v. East Bay Transit Co., 141 P.2d 787, 60 Cal.App.2d 807.

La.—Giorlando v. Maitrejean, App.,

from the conduct of the occupant it may be reasonably inferred that he had not acquiesced in the negligent conduct of the driver.⁴⁸

b. Continuation of Protests

If a guest protests to the driver as to particular negligent acts or conduct, he is generally not required to protest further, unless the first protest is not heeded. If there are several guests in the vehicle, an audible protest by one of them is generally sufficient.

If a guest protests and cautions the driver with respect to particular negligent acts, he generally performs his full duty as to such acts.⁴⁹ If in response to such protest the driver replies that he will watch out and be careful, the guest may assume that he will act in accordance with his reply,⁵⁰ and, if thereafter the driver drives in a more prudent manner, it is generally not incumbent on the guest to complain or protest further.⁵¹ If, however, the first protest is not heeded, other protests should be made as the occasion requires.⁵² A guest is not required to suggest slowing down of the motor vehicle each time it overtakes another vehicle;⁵³ nor need he protest against every incautious or imprudent act of the driver,⁵⁴ or keep remonstrating, interfering, or instructing the driver as to the operation of the vehicle.⁵⁵ Where the

driver was warned as to the speed of the car as it approached the place of the accident, its excessive speed elsewhere on the journey is immaterial with respect to the guest's contributory negligence in not protesting throughout the journey.⁵⁶

If there are several guests in the motor vehicle, it is unnecessary for all of them to protest or caution the driver, if any one of them protested, and the others heard it.⁵⁷

c. Assumption of Risk

If a guest, with knowledge of the facts, acquiesces, without protest or remonstrance, in the negligent or unlawful manner in which the driver operates the motor vehicle, the guest generally will be deemed to assume the risk of injury incident to such operation, and cannot recover therefor as against the host.

If a guest in a motor vehicle, with knowledge of the facts, acquiesces, without protest or remonstrance, in the negligent or unlawful manner in which the driver operates the vehicle, the guest will be deemed to assume the risk of injury incident to such operation, and cannot recover therefor, as against the host,⁵⁸ as where he knowingly acquiesces, until it is too late to protest, in the operation of the motor vehicle at an excessive or un-

22 So.2d 564—Kientz v. Charles Denberry, Inc., App., 17 So.2d 506, annulled 24 So.2d 292, 209 La. 144 Mo.—Cheatham v. Chartrau, 176 S.W.2d 865, 237 Mo.App. 793.

46. Tex.—Routledge v. Rambler Auto Co., Civ App., 95 S.W. 749. 42 C.J. p 1175 note 73.

Fact that guest considered host a bad driver did not show that he acquiesced in his fast driving when he made many protests against it.—Burnett v. Cockrill, La.App., 145 So. 398.

Guest's comment that it was "pretty fast for a new car" was held to relieve him of charge of contributory negligence.—McAdd v. Shea, 122 So. 879, 10 La.App. 733.

49. La.—Lapeze v. O'Keefe, App., 158 So. 38, modified on other grounds 159 So. 403.

Minn.—Thorstad v. Doyle, 273 N.W. 255, 199 Minn. 543.

Pa.—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Ebey v. Schwartz, 158 A. 291, 104 Pa.Super. 181.

50. Ark.—Ragland v. Snotzmeier, 55 S.W.2d 923, 186 Ark. 778.

51. Ky.—Edmiston v. Robinson, 168 S.W.2d 740, 293 Ky. 273.

N.J.—Tobish v. Cohen, 164 A. 415, 110 N.J.Law 296.

52. La.—David v. Joseph, App., 164 So. 467.

53. La.—Cassar v. Mansfield Lumber Co., App., 35 So.2d 797.

54. Wash.—Alexiou v. Nockas, 17 P. 2d 911, 171 Wash. 369.

55. La.—Cassar v. Mansfield Lumber Co., App., 35 So.2d 797. Ohio—Telling Belle Vernon Co. v. Krenz, 171 N.E. 357, 34 Ohio App. 499—Cleveland Ry. Co. v. Heller, 15 Ohio App. 346.

"It is not expected that the guest will continually endeavor to substitute his own judgment for that of the driver in matters of routine operation of the car."—Cassar v. Mansfield Lumber Co., La.App., 35 So.2d 797, 800.

Passenger who warned driver of defendant's approaching automobile is not required to make further suggestions to avert accident or to participate in driving.—Davis v. Tobin, 163 A. 780, 131 Me. 426.

56. Pa.—Moquin v. Mervine, 146 A. 443, 297 Pa. 79.

57. Ark.—Ragland v. Snotzmeier, 55 S.W.2d 923, 186 Ark. 778.

La.—Metropolitan Casualty Ins. Co. of New York v. Bowdon, App., 164 So. 464.

W.Va.—Boyce v. Black, 15 S.E.2d 588, 123 W.Va. 234.

Wis.—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501.

Warning to slow down

Where one passenger in automobile

warned driver to slow down because of dust obstructing vision and driver reduced speed, plaintiff, who was also a passenger, was under no obligation also to warn driver and was not chargeable with negligence for failure to do so.—Huston v. Robinson, 13 N.W.2d 885, 144 Neb. 553.

58. Ohio.—Fay v. Thrasher, 66 N.E. 2d 236, 77 Ohio App. 179.

Wis.—Haugen v. Wittkopf, 7 N.W.2d 886, 242 Wis. 276—Schneider v. American Indemnity Co., 6 N.W.2d 644, 241 Wis. 568—Young v. Nunn, Bush & Weldon Shoe Co., 249 N.W. 278, 212 Wis. 403—Sommerfield v. Flury, 223 N.W. 408, 198 Wis. 163.

Legal effect

The risk assumed by automobile passenger from negligence of the driver of automobile has the same legal effect as that incurred from other conditions of danger.—Woodman v. Peck, 7 A.2d 261, 90 N.H. 292, 122 A.L.R. 1402.

Sluggishness

If automobile accident was caused by driver's weariness and resulting sluggishness in management and control of automobile, guests would be barred from recovery for injuries sustained on ground of driver's negligence, where guests assumed risk of any injury resulting from weariness.—Storlie v. Hartford Acc. & Indem. Co., 28 N.W.2d 920, 251 Wis. 340.

lawful rate of speed,⁵⁹ or in violation of the law of the road,⁶⁰ or where he acquiesces in the parking of the vehicle on the left shoulder of the highway,⁶¹ and in the turning on of the bright lights of a vehicle so parked.⁶² A guest, however, will be deemed to have assumed the risk incident to a negligent or unlawful course of driving, only where it has persisted long enough to give him an opportunity to protest and indicate his dissent or disapproval of the negligent or reckless manner of driving.⁶³ If the driver heeds such a protest and discontinues the protested course of driving, the guest

will not, by reason of such previous improper driving, be considered as acquiescing in subsequent improper driving, so as to render assumption of risk applicable.⁶⁴

Extent of risks assumed. If the guest assumes the risk incident to the driver's negligence, he also assumes the risk involved in an emergency caused by such negligence,⁶⁵ such as ensuing collision with another vehicle, of which collision the driver's negligence is the primary cause.⁶⁶

Withdrawal of protest. The withdrawal of a

59. S.D.—Miller v. Stevens, 256 N. W. 152, 63 S.D. 10.

Wis.—Nordahl v. Farmers Mut. Auto. Ins. Co., 27 N.W.2d 707, 250 Wis. 609—Raddant v. Labutzke, 289 N. W. 659, 233 Wis. 381—Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599—Kauth v. Landsverk, 271 N. W. 841, 224 Wis. 554—Hotz v. Ingels, 258 N.W. 177, 214 Wis. 856—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680—Young v. Nunn, Bush & Weldon Shoe Co., 249 N. W. 278, 212 Wis. 403—Haines v. Duffy, 240 N.W. 152, 206 Wis. 193—Biersach v. Wechselberg, 238 N. W. 905, 206 Wis. 113—Sommerfield v. Flury, 223 N.W. 408, 198 Wis. 163—Harding v. Jesse, 207 N.W. 706, 189 Wis. 652, followed in 207 N.W. 708, 189 Wis. 659.

Reason for rule

"There is an increasing tendency to designate this failure to protest as contributory negligence. It is not strictly contributory negligence. The duty to protest grows out of the relation of host and guest, and it constitutes an essential element in the question of whether the guest may recover damages resulting from the negligence of the host. . . . Where this results with the acquiescence of the guest, the guest is not permitted to recover from the host. This is not because the guest is, strictly speaking, guilty of contributory negligence, or any negligence, but rather because the guest has acquiesced in the conduct of the host, and it would be against reason and justice to permit a recovery against the host under such circumstances."—Haines v. Duffy, 240 N.W. 152, 153, 206 Wis. 193.

Remark held not acquiescence

Where guest asked host to decrease speed, and host replied that they should hurry, that his wife could drive on return trip and they could sleep on rear seat, statement of guest that, "That part is sure fine, I wouldn't mind a little sleep now," was not a consent to manner in which automobile was driven so as to relieve host from liability for willful

misconduct.—Wright v. Sellers, 78 P. 2d 209, 25 Cal.App.2d 603.

A wife who knew that her husband was a fast driver and had cautioned him many times about driving too fast but who voluntarily entered automobile as guest and accepted benefits to be derived therefrom knowing of the danger, assumed the risk of her husband's known habit and could not base right to recover from husband for injuries sustained in collision on alleged negligence of husband in driving too fast, notwithstanding her previous protests as to speed on evening of accident.—Bourestom v. Bourestom, 285 N.W. 426, 231 Wis. 666.

60. Wis.—Scory v. La Fave, 254 N. W. 643, 215 Wis. 21.

61. Wis.—Scory v. La Fave, supra. "Assumption of risk" or "contributory negligence"

Guest's conduct in undertaking to move or to enter automobile parked on left shoulder of highway was "assumption of risk," if hazards were no greater than ordinarily prudent person usually assumes in similar circumstances, but was "contributory negligence" if hazards were greater.—Scory v. La Fave, supra.

62. Wis.—Scory v. La Fave, supra. **As increased danger**

Where guest assumed risk of host's parking on left shoulder of highway, and host's negligence in so parking could not be separated from host's subsequent turning on of lights at such place, guest also assumed risk of any increase in danger resulting from such turning on of lights as far as action against host was concerned.—Scory v. La Fave, supra.

63. Ill.—O'Neal v. Caffarello, 25 N.E. 2d 534, 303 Ill.App. 574.

Neb.—Kovar v. Beckius, 275 N.W. 670, 133 Neb. 487.

Wis.—Olson v. State Farm Mut. Auto. Ins. Co. of Bloomington, Ill., 30 N.W.2d 196, 252 Wis. 37—Haugen v. Wittkopf, 7 N.W.2d 886, 242 Wis. 276—Forecki v. Kohlberg, 295 N.W. 7, 237 Wis. 67, rehearing denied 296 N.W. 419, 237 Wis. 67—Pacor v. Home Indemnity Co. of New York,

291 N.W. 313, 234 Wis. 407—Raddant v. Labutzke, 289 N.W. 659, 233 Wis. 381—Webster v. Krembs, 282 N.W. 664, 230 Wis. 252—Schwab v. Martin, 279 N.W. 699, 228 Wis. 45—Groh v. W. O. Krahn, Inc., 271 N.W. 374, 223 Wis. 662—Young v. Nunn, Bush & Weldon Shoe Co., 249 N.W. 278, 212 Wis. 403.

Assumption has been held not to apply, where guest had previously ridden with host who was considered a safe driver and had never had an accident, and host testified that there was no occasion for guest to protest his manner of driving prior to accident in which guest was killed.—Komma v. Kreifels, 14 N.W.2d 591, 144 Neb. 745.

64. Ind.—Ridgway v. Yenny, 57 N.E. 2d 581, 223 Ind. 16.

Ohio.—Fay v. Thrasher, 66 N.E.2d 236, 77 Ohio App. 179.

Anticipation of resumption of dangerous driving

When protest against driving at an excessive rate of speed under dangerous conditions results in stopping the automobile and indication of a willingness to drive more carefully, it cannot be said that the guest must anticipate a resumption of the dangerous driving.—Ridgway v. Yenny, 57 N.E.2d 581, 223 Ind. 16.

65. Wis.—Schwab v. Martin, 279 N. W. 699, 228 Wis. 45—Young v. Nunn, Bush & Weldon Shoe Co., 249 N.W. 278, 212 Wis. 403.

Reason for rule

"If a host is proceeding at a negligent rate of speed, which the guest assumes, and by reason of this speed finds himself in a situation requiring instant decision and giving him opportunity for further negligence with respect to control, it is impossible to isolate the subsequent negligence from the prior negligence and to hold in spite of the fact that the guest has acquiesced in the former, that the momentary character of the latter makes acquiescence impossible."—Young v. Nunn, Bush & Weldon Shoe Co., supra.

66. Wis.—Harding v. Jesse, 207 N.W. 706, 189 Wis. 652.

protest, previously made at a point some distance from the place of the accident, does not constitute acquiescence and assumption of risk at the latter place.⁶⁷

§ 490. Riding in Dangerous or Improper Place or Position

- a. In general
- b. Riding on running board or platform
- c. Overcrowding or overloading
- d. Assumption of risk

a. In General

An occupant may be charged with contributory negligence in knowingly riding in a dangerous or improper place or position in or on a motor vehicle, without a reasonable necessity or excuse therefor, although the circumstances may be such that his conduct in riding in such a place or position will not preclude a recovery for injuries sustained.

An occupant of a motor vehicle who, without some reasonable necessity or excuse, rides in a place or position which he knows, or in the exercise of ordinary care should know, exposes him to

danger, is ordinarily guilty of contributory negligence if such conduct contributes proximately to cause his injuries,⁶⁸ and the fact that the driver knowingly permits the occupant to ride in a dangerous place or position does not waive the occupant's contributory negligence in so riding.⁶⁹ The mere fact, however, that an occupant rides in an unusual or improper place or position, even though he is not required to do so, does not necessarily constitute contributory negligence,⁷⁰ but depends on the facts and circumstances of the particular case, and on what a person of ordinary prudence would do under the same or similar circumstances.⁷¹ A guest riding in an unusual or improper place or position is not guilty of contributory negligence, where he has no reasonable cause to believe that the place or position in which he is riding is any more dangerous than another place or position on the vehicle,⁷² or where the nature of the danger or accident is such as he is not bound to anticipate,⁷³ or where his conduct in so riding does not proximately contribute to cause his injury,⁷⁴ as where his position on the vehicle is simply a condi-

67. Cal.—Wright v. Sellers, 78 P.2d 209, 25 Cal.App.2d 603.

Remarks held not withdrawal of protest

Where guest had protested to excessive speed, and host stated that host was a good driver and knew the road, guest's reply of, "Maybe so," was not a withdrawal of guest's protest so that guest thereby assumed risks incident to the speed, especially in view of fact that guest's remark was made at a point several miles from scene of accident.—Wright v. Sellers, *supra*.

68. Kan.—Farmer v. Central Mut. Ins. Co. of Chicago, Ill., 67 P.2d 511, 145 Kan. 951.

La.—Segrist v. Interurban Transp. Co., 5 La.App. 404.

N.C.—Roberson v. Carolina Taxi Service, 200 S.E. 363, 214 N.C. 624.

Pa.—Earl v. Wichser, 30 A.2d 803, 346 Pa. 357—McFadden v. Penzoll Co., 19 A.2d 370, 341 Pa. 433.

Wis.—Wiese v. Polzer, 248 N.W. 113, 212 Wis. 337.

42 C.J. p 1175 note 75.

Conduct held contributory negligence

(1) Riding, facing backward, with legs dangling, on a truck tailboard held in a horizontal position by chains.—Earl v. Wichser, 30 A.2d 803, 346 Pa. 357.

(2) Riding on fender.—Wheeler v. Buerkle, 58 P.2d 230, 14 Cal.App.2d 368.

One riding on step of agricultural tractor having only single seat for driver must exercise ordinary care for his own safety, even though he

is considered a guest or passenger.—Tidd v. New York Cent. R. Co., 9 N.E.2d 509, 132 Ohio St. 531.

Riding in ambulance

Where plaintiff with the consent of ambulance driver entered ambulance to administer to sick man during course of trip, and was injured when side door of ambulance sprang open either because of pressure of plaintiff's body resting against it as he placed his arm outside of the window or because of the pressure of plaintiff's knee resting against the inside door lever or handle, plaintiff could not recover for injuries, since in either instance he was contributorily negligent.—Rushing v. Mulhearn Funeral Home, La.App., 200 So. 52.

69. Cal.—Wheeler v. Buerkle, 58 P.2d 230, 14 Cal.App.2d 368

70. Conn.—Kudla v. Pignone, 175 A. 469, 119 Conn. 204.

71. R.I.—Rose v. Cartier, 120 A. 581, 45 R.I. 150.

42 C.J. p 1175 note 76.

Conduct held not contributory negligence

(1) In general.—Agnew v. Wenstrand, 90 P.2d 813, 33 Cal.App.2d 21.

(2) Permitting a portion of an arm or hand to extend only a few inches beyond the side of the vehicle.—Hadrick v. Burbank Cooperage Co., La.App., 177 So. 831.

72. Kan.—Farmer v. Central Mut. Ins. Co. of Chicago, Ill., 67 P.2d 511, 145 Kan. 951.

Pa.—Yatsun v. Chaprun, 19 Pa. Dist. & Co. 52, 34 Lack.Jur. 41.

73. Cal.—Chapman v. Pickwick Stag-

es System, 4 P.2d 283, 117 Cal.App. 560.

La.—Wirth v. Pokert, 140 So. 234, 19 La.App. 690.

Mich.—Breger v. Feigenson Bros. Co., 249 N.W. 493, 264 Mich. 37.

N.H.—Platek v. Swindell, 151 A. 262, 84 N.H. 402.

Pa.—Kirr v. Suwak, 9 A.2d 735, 336 Pa. 561.

R.I.—Rose v. Cartier, 120 A. 581, 45 R.I. 150.

Collision

Passenger in motorbus whose arm or elbow was on sill of bus window was under no obligation to anticipate that bus and truck would collide and cause injury to arm, in determining issue of passenger's contributory negligence.—Selfe v. Fuller, 18 S.E. 2d 254, 179 Va. 30.

Dislodged cargo

Boys sleeping with heads in open window of school bus in which they were riding as paying passengers were not guilty of contributory negligence proximately causing their death when their heads were struck by cases dislodged from loaded truck when bus was sideswiped by truck, since boys had right to assume that driver of bus and drivers of approaching vehicles would stay on right side of road.—Smith v. Monroe Grocer Co., La.App., 179 So. 495.

74. Iowa.—Hamilton v. Boyd, 256 N.W. 290, 218 Iowa 885.

La.—Chaudoir v. Cotey, App., 182 So. 526.

Pa.—Robinson v. American Ice Co., 141 A. 244, 292 Pa. 366—Yatsun v.

tion of the occurrence of the accident, and not the real cause thereof.⁷⁵ A guest's conduct in riding in a dangerous place or position, despite the host's warnings and requests that he ride elsewhere, does not relieve the host of liability for any reckless disregard of the guest's rights in the operation of the vehicle.⁷⁶

Under statute. Under some statutes and ordinances, a guest on a motor vehicle is guilty of negligence per se if he rides in a place or position prohibited by the statute or ordinance,⁷⁷ such as on a fender of the vehicle.⁷⁸ A guest is chargeable with contributory negligence, precluding a recovery, in riding on the rear bumper, in violation of a statute prohibiting any person from riding on the rear of a vehicle without the driver's consent;⁷⁹ but such a statute is not violated, so as to preclude a recovery, by an occupant riding on the running board.⁸⁰ Under a statute prohibiting any person from hanging onto, or riding on, the outside or rear of any vehicle, a person so riding, without the invitation or consent of the driver, is regarded as a trespasser and is precluded from recovering for injuries thereby sustained;⁸¹ but such a statute does not prevent a recovery by one riding, in violation of the statute, with the consent of the driver, and, therefore, as a licensee rather than a trespasser.⁸²

Riding on motorcycle. A boy injured in a colli-

sion with a motor vehicle while riding with another on a one-seated motorcycle, and with nothing on which to hold, has been held to be guilty of contributory negligence.⁸³ An ordinance prohibiting a person from riding on the handle bar, frame, or tank of a motorcycle or bicycle, is not applicable to show contributory negligence of a person riding on the single seat of a motor scooter immediately behind the driver, since the method of riding so employed is not prohibited by the ordinance.⁸⁴

b. Riding on Running Board or Platform

In the absence of a statute to the contrary, a person riding on the running board of a motor vehicle is not necessarily negligent, but such conduct may constitute contributory negligence under the facts and circumstances of the particular case.

In the absence of statute, a guest is not necessarily guilty of contributory negligence, precluding a recovery, in riding on the running board or platform of a motor vehicle;⁸⁵ but whether such conduct constitutes contributory negligence depends on the particular facts, and on what a person of ordinary prudence would do under the same or similar circumstances,⁸⁶ and on whether such conduct was a contributing cause of the injury.⁸⁷ Accordingly it may, under particular circumstances, constitute contributory negligence, precluding a recovery, for a guest to ride on the running board, with-

Chuprun, 19 Pa. Dist. & Co. 52, 34 Lack. Jur. 41.

Tenn.—Roddy Mfg. Co. v. Dixon, 105 S.W.2d 513, 21 Tenn. App. 81.

Va.—Morris v. Dame's Ex'r, 171 S.E. 662, 161 Va. 545.

42 C.J. p 1175 note 77.

Conduct held not proximate cause

(1) Child occupant standing on floor with face pressed against glass of window on side from which colliding automobile approached.—Balsamo v. Hall, La. App., 170 So. 402.

(2) Climbing on hood of moving truck.—Guile v. Greenberg, 257 N.W. 649, 192 Minn. 548.

(3) Rider in trailer extending arm at full length outside trailer which struck side of bridge which it was crossing.—Hadrick v. Burbank Co-op. Co., La. App., 177 So. 831.

(4) Person allowing legs to hang from the bed of the truck.—Williams v. Brown, La. App., 181 So. 679.

Obstructing view of driver

In suit against truck owner for injuries sustained by passenger of truck in collision at street intersection with automobile approaching from right, defense of contributory negligence of passenger in obstructing driver's view to right could not be sustained where driver made no attempt to look to right before colli-

sion.—Lowery v. Zorn, La. App., 157 So. 826.

75. S.C.—Oakman v. Ogilvie, 193 S.E. 920, 185 S.C. 118.

76. Ind.—Johnson v. Pedicord, 10 N.E.2d 295, 105 Ind. App. 71.

77. Cal.—Wheeler v. Buerkle, 58 P.2d 230, 14 Cal. App. 2d 368.

Statute held not violated

Cal.—Albania v. Kovacevich, 113 P.2d 251, 44 Cal. App. 2d 925.

78. Cal.—Wheeler v. Buerkle, 58 P.2d 230, 14 Cal. App. 2d 368.

Wis.—Wiese v. Polzer, 248 N.W. 113, 212 Wis. 337.

79. N.Y.—Jennings v. Delaney, 242 N.Y.S. 361, 229 App. Div. 439, affirmed 175 N.E. 342, 255 N.Y. 626, reargument denied 177 N.E. 136, 256 N.Y. 551.

80. N.Y.—Hagadorn v. Socony-Vacuum Oil Co., Inc., 78 N.Y.S.2d 28, 273 App. Div. 922—Webb v. Miles, 291 N.Y.S. 200, 249 App. Div. 688—Morris v. Town of Stafford, 274 N.Y.S. 595, 242 App. Div. 809, affirmed 195 N.E. 217, 266 N.Y. 597.

81. Pa.—Srednick v. Sylak, 23 A.2d 333, 343 Pa. 486—Harris v. Seisavitch, 9 A.2d 375, 336 Pa. 224.

Plaintiff who sat on tailboard of truck parked in front of his home without invitation from defendant's

truck owner was a trespasser.—Stefan v. New Process Laundry Co., 185 A. 734, 323 Pa. 373.

82. Pa.—Di Giuseppe v. Hrivnak, 59 A.2d 164, 359 Pa. 408—Harris v. Seisavitch, 9 A.2d 375, 336 Pa. 294.

83. Cal.—McMahon v. Hamilton, 287 P. 546, 204 Cal. 228.

84. Okl.—Greenlease - Ledterman, Inc., v. Hawkins, 186 P.2d 318.

85. Ga.—Taylor v. Morgan, 188 S.E. 44, 54 Ga. App. 426.

La.—Quatray v. Wickeř, 134 So. 313, 16 La. App. 515.

Tenn.—Cecil v. Jernigan, 4 Tenn. App. 80.

86. Ala.—First Nat. Bank v. Sanders, 143 So. 578, 225 Ala. 417.

Conn.—Kalmich v. White, 111 A. 845, 95 Conn. 568.

La.—Fidelity Union Casualty Co. v. Carpenter, 125 So. 504, 12 La. App. 321—Stout v. Lewis, 123 So. 346, 11 La. App. 503.

Md.—Bauer v. Calic, 171 A. 713, 166 Md. 387.

Pa.—Lettieri v. Blaisden, 101 Pa. Super. 423.

87. Pa.—Lettieri v. Blaisden, supra. S.C.—Oakman v. Ogilvie, 193 S.E. 920, 185 S.C. 118.

Tenn.—Goodman v. Hicks, 15 Tenn. App. 231.

42 C.J. p 1175 note 77 [a].

out any reason or necessity therefor,⁸⁸ or he may be guilty of such negligence in riding on the left running board,⁸⁹ or in standing on the running board⁹⁰ or an open platform,⁹¹ or it may constitute negligence for a policeman to ride on the running board while directing the operation of the motor vehicle,⁹² where he is not confronted with an emergency which requires him to do more than give directions.⁹³ A guest, however, riding on the running board or platform has the right to assume that the driver will operate the motor vehicle with due care for his safety, and is not required to anticipate negligence on the part of the driver.⁹⁴

Under some statutes it is negligence per se for an occupant of a motor vehicle to ride on the running board,⁹⁵ but that circumstance alone is not sufficient to establish contributory negligence, so as to preclude a recovery for injuries sustained.⁹⁶

c. Overcrowding or Overloading

A guest in a motor vehicle is not necessarily guilty of contributory negligence in sitting in the front seat with two or more other persons, but such conduct may constitute contributory negligence if the overcrowding re-

stricts the driver's freedom of action in operating the vehicle and in exercising necessary control in an emergency.

A guest in a motor vehicle is not necessarily guilty of contributory negligence, precluding a recovery, in sitting in the front seat with two or more other persons,⁹⁷ even though such conduct is unlawful;⁹⁸ but whether it does constitute contributory negligence depends on the particular facts and circumstances,⁹⁹ and whether it is a contributing cause of the accident.¹ If such overcrowding restricts the driver's freedom of action in operating the vehicle and in exercising necessary control in an emergency, a guest taking part in the overcrowding is generally guilty of contributory negligence, precluding a recovery,² even though, because of his age, knowledge, and experience he could not have known of the hazard created by his presence on the overcrowded seat.³

d. Assumption of Risk

A guest riding in a dangerous or improper place or position assumes the risk of injury incident to the ordinary operation of the motor vehicle.

88. Ala.—*Evans v. Buck Creek Cotton Mills*, 163 So 591, 231 Ala. 75.

Ga.—*Taylor v. Morgan*, 188 S.E. 44, 54 Ga.App. 426.

Pa.—*De Gregorio v. Malloy*, 52 A 2d 195, 356 Pa. 511—*Fritz v. Smith*, 46 Pa.Dist. & Co. 269.

89. Ga.—*Taylor v. Morgan*, 188 S.E. 44, 54 Ga.App. 426.

Injury by approaching vehicle

Deceased who would not have been struck by defendant's approaching automobile while voluntarily riding on left running board of another automobile on dusty road if his body had not protruded beyond automobile on which he was riding was negligent precluding recovery for his death, notwithstanding defendant might have been driving to left of center of road.—*Taylor v. Morgan*, supra.

90. Ala.—*Starkey v. Starkey*, 107 So. 807, 214 Ala. 287.

La.—*Barnes v. Maryland Casualty Co.*, App., 197 So. 639.

Mo.—*Smith v. Ozark Water Mills Co.*, App., 238 S.W. 573.

N.J.—*Murray v. Cohen*, 132 A. 221, 4 N.J.Misc. 139.

Pa.—*Srednick v. Sylak*, 23 A.2d 333, 343 Pa. 486.

S.C.—*Oakman v. Ogilvie*, 193 S.E. 920, 185 S.C. 118.

Part of body inside window

Pa.—*Schomaker v. Havey*, 139 A. 495, 291 Pa. 30, 61 A.L.R. 1241.

Remote cause

Contributory negligence, if any, of plaintiff standing on left running board of stationary truck which was upon extreme right of center of high-

way, who was injured when defendant's automobile collided with truck, was too remote in chain of causation to constitute a defense, and, if negligence at all, was a mere condition on which defendant's negligence operated as an efficient cause, without which the injury would not have happened.—*Oakman v. Ogilvie*, 193 S.E. 920, 185 S.C. 118.

91. Pa.—*Zavodnick v. A. Rose & Son*, 146 A. 455, 297 Pa. 86.

92. Pa.—*Valente v. Linder*, 35 Luz. Leg.Reg. 9, affirmed 17 A.2d 371, 340 Pa. 508.

93. Pa.—*Valente v. Linder*, supra.

94. La.—*Stout v. Lewis*, 123 So. 346, 11 La App. 503.

Tenn.—*Harrison v. Graham*, 107 S.W. 2d 517, 21 Tenn.App. 189.

95. U.S.—*New Amsterdam Cas. Co. v. Ledoux*, C.C.A.La., 159 F.2d 905.

La.—*Robinson v. Miller*, App., 177 So. 440.

Ohio.—*Slicker v. Seccombe*, 182 N.E. 131, 42 Ohio App. 357.

Pa.—*Valente v. Linder*, 35 Luz.Leg. Reg. 9, affirmed 17 A.2d 371, 340 Pa. 508.

96. U.S.—*New Amsterdam Cas. Co. v. Ledoux*, C.C.A.La., 159 F.2d 905.

La.—*Robinson v. Miller*, App., 177 So. 440.

97. U.S.—*McCrate v. Morgan Packing Co.*, C.C.A.Ohio, 117 F.2d 702.

Pa.—*Ywardowski v. Olock*, 56 Montg. Co. 222.

98. Or.—*McDowell v. Hurner*, 20 P. 2d 395, 142 Or. 611, 88 A.L.R. 578.

99. U.S.—*McCrate v. Morgan Packing Co.*, C.C.A.Ohio, 117 F.2d 702—

Price v. U. S., D.C.Ky., 50 F.Supp. 676.

Ohio.—*Sheen v. Kubiak*, 1 N.E.2d 943, 131 Ohio St. 52.

Pa.—*McIntyre v. Pope*, 191 A. 607, 326 Pa. 172—*Mahoney v. City of Pittsburgh*, 181 A. 590, 320 Pa. 44.

Tex.—*Phoenix Refining Co. v. Walker*, Civ.App., 108 S.W.2d 323, error dismissed.

Crowding of four persons into coupe built for two may constitute contributory negligence, depending on the circumstances.

La.—*Lorance v. Smith*, 138 So. 871, 173 La. 883—*Herr v. Thames*, App., 165 So. 530.

Tex.—*City of Pampa v. Todd*, Civ. App., 39 S.W.2d 636, reversed on other grounds, Com.App., 59 S.W. 2d 114.

1. Pa.—*McIntyre v. Pope*, 191 A. 607, 326 Pa. 172—*Twardowski v. Olock*, Com Pl., 56 Montg.Co. 223.

Held not contributing cause

La.—*Baker v. Travelers Ins. Co.*, App., 13 So.2d 65, rehearing denied and amended 13 So.2d 758—*Stevens v. Streun*, App., 200 So. 182.

2. Pa.—*McIntyre v. Pope*, 191 A. 607, 326 Pa. 172.

Overcrowding held not contributory negligence restricting driver

U.S.—*McCrate v. Morgan Packing Co.*, C.C.A.Ohio, 117 F.2d 702.

Ill.—*Moore v. Jansen & Schaefer*, 265 Ill.App. 459.

La.—*Alost v. J. Mook Wood & Drayage Co.*, 120 So. 791, 10 La.App. 57.

3. Pa.—*McIntyre v. Pope*, 191 A. 607, 326 Pa. 172.

A guest riding in a dangerous or improper place or position ordinarily assumes the risk of injury incident to the insecurity of his position from the ordinary operation of the motor vehicle,⁴ and such assumption includes such negligence as can be reasonably considered as being included in the risk to which the guest's position exposes him,⁵ and also negligence of which he is aware, and against which he does not protest.⁶ The guest, however, does not assume a risk which is occasioned by unanticipated negligence or recklessness in the operation of the vehicle,⁷ or by the driver's willful misconduct after the guest's presence is discovered,⁸ nor does he assume the risk of danger involved in the reckless, careless, and negligent driving of another vehicle which comes in collision with the vehicle in which he is riding.⁹ A boy riding with another on a one-seated motorcycle with nothing on which to hold assumes the responsibility for any injury to which his dangerous position presumably contributes.¹⁰

§ 491. Duty to Leave Vehicle

- a. In general
- b. Assumption of risk

a. In General

A guest may be guilty of contributory negligence in failing to leave the motor vehicle, at a favorable opportunity, when he knows, or should know, that it is dangerous to remain therein any longer.

If an occupant of a motor vehicle knows, or in the exercise of ordinary care should know, that to remain longer in the vehicle is dangerous, and if under the same or similar circumstances a reasonably prudent person would leave or withdraw from the vehicle, he is guilty of contributory negligence if, a reasonable opportunity therefor being afforded, he fails to do so, and such failure contributes proximately to cause his injury.¹¹ An occupant may be guilty of contributory negligence, precluding a recovery, in failing to withdraw from a motor vehicle where the driver persists, despite protests and warnings, in operating the vehicle at a dangerous or unlawful rate of speed,¹² or in a reck-

4. La.—Brown v. Waller, App., 8 So. 2d 304—Keown v. Amite Sand & Gravel Co., App., 4 So.2d 79—Elliott v. Corell, App., 158 So. 698—Wirth v. Pokert, 140 So. 234, 19 La.App. 690—McDonald v. Stellwagon, App., 140 So. 133.

Minn.—Guile v. Greenberg, 257 N.W. 649, 192 Minn. 548.

Extent of assumption

One who accepts an invitation to ride on the running board of a car to a certain point assumes the risk of his position, not only as far as the specified point but to any farther point.—Fritz v. Smith, 46 Pa.Dist. & Co. 269.

On fire engine

One voluntarily assuming dangerous position of passenger on fire engine during test run assumed risk ordinarily incident to that dangerous position.—Grassie v. American La France Fire Engine Co., 272 P. 1073, 95 Cal.App. 384.

One riding on flange of stone spreader towed by truck assumed risks of injuries from jars or jerks when spreader struck objects protruding only one or two inches above ground, so as to bar recovery of damages from truck owner for such rider's death from injuries sustained when dislodged by jar as result of spreader striking manhole cover.—Wunsch v. Colonial Sand & Stone Co., 12 N.Y.S.2d 488, 257 App.Div. 857.

5. Pa.—McFadden v. Pennzoll Co., 19 A.2d 370, 341 Pa. 433.

6. Wis.—Nordahl v. Farmers Mut. Auto. Ins. Co., 27 N.W.2d 707, 250 Wis. 609—Schneider v. American

Indemnity Co., 6 N.W.2d 644, 241 Wis. 568.

Failure to protest negligence as assumption of risk generally see supra § 489.

Standing up in car

Such an assumption of negligence is not avoided by the fact that the guest voluntarily stood up and faced the rear to fix the back seat at which time he was thrown to the floor when the driver of the automobile was forced to make an abrupt stop in order to avoid collision with the automobile ahead.—Schneider v. American Indemnity Co., supra.

Where guest riding on platform of truck died as result of fall from truck and only negligence that could be charged against driver was that his judgment had been impaired by drinking and that he maintained a too high rate of speed in view of bad condition of road, but guest assumed risk in that he placed himself on platform of truck as a matter of choice and made no protest against the speed maintained, and had participated in the drinking, no recovery could be had against insurer of owner of truck because of negligent operation.—Nordahl v. Farmers Mut. Auto. Ins. Co., 27 N.W.2d 707, 250 Wis. 609.

7. La.—Wirth v. Pokert, 140 So. 234, 19 La.App. 690—McDonald v. Stellwagon, App., 140 So. 133, followed in McConnell v. Stellwagon, 140 So. 138—Quatray v. Wicker, 134 So. 313, 16 La.App. 515.

N.H.—Vandell v. Sanders, 155 A. 193, 85 N.H. 143, 80 A.L.R. 550.

Pa.—McFadden v. Pennzoll Co., 19 A. 2d 370, 341 Pa. 433.

8. Mich.—Schneider v. Draper, 267 N.W. 831, 276 Mich. 259.

Riding on running board

Mich.—Schneider v. Draper, supra.

9. Cal.—Hawthorne v. Gunn, 11 P.2d 411, 123 Cal.App. 452.

La.—Keown v. Amite Sand & Gravel Co., App., 4 So.2d 79—Elliott v. Corell, App., 158 So. 698.

Minn.—Guile v. Greenberg, 257 N.W. 649, 192 Minn. 548.

10. Cal.—McMahon v. Hamilton, 267 P. 546, 204 Cal. 228.

11. Cal.—Shields v. King, 277 P. 1043, 207 Cal. 275—King v. City of Long Beach, 153 P.2d 445, 67 Cal. App.2d 1—Van Fleet v. Heyler, 125 P.2d 586, 51 Cal.App.2d 719—Valencia v. San Jose Scavenger Co., 69 P.2d 480, 21 Cal.App.2d 469.

Colo.—Wilson v. Hill, 86 P.2d 1084, 103 Colo. 409.

Ga.—Oast v. Mopper, 199 S.E. 249, 58 Ga.App. 506.

Ky.—Archer v. Bourne, 300 S.W. 604, 222 Ky. 268.

La.—Livaudais v. Black, 127 So. 129, 13 La.App. 345.

Mass.—McGaffigan v. Kennedy, 18 N.E.2d 344, 302 Mass. 12.

N.C.—Bogen v. Bogen, 18 S.E.2d 162, 220 N.C. 648.

42 C.J. p 1176 note 78.

Incapacity of driver

A guest's duty to leave automobile because of incapacity of driver must be judged in light of all surrounding circumstances.—Wilson v. Hill, 86 P. 2d 1084, 103 Colo. 409.

12. Kan.—Donelan v. Wright, 81 P. 2d 50, 148 Kan. 287.

less or negligent manner,¹³ such as in driving without sufficient lights at night,¹⁴ in driving into a situation of danger without taking proper care,¹⁵ or in remaining in the vehicle with knowledge that it is illegally parked,¹⁶ or that there is a dangerous defect in the car.¹⁷ A guest may be negligent in jumping off the vehicle, on the negligent command of the driver, if no character of coercion or fright was produced by the command.¹⁸

On the other hand, it is not the duty of a guest, under all circumstances of reckless or negligent driving, to ask to be let out;¹⁹ and he is not guilty of contributory negligence in failing to quit the vehicle where he has no knowledge, and is not chargeable with knowledge, that to remain longer is dangerous,²⁰ or where a reasonably prudent person in the same or similar circumstances would not have withdrawn from the vehicle,²¹ as where leaving the vehicle would involve exposure to other and per-

haps greater risks;²² nor is he contributorily negligent in failing to leave the vehicle where he has no reasonable opportunity to do so.²³ It has been held that, if the guest was guilty of contributory negligence in failing to leave the vehicle before the accident happened, the proximate cause of the accident is immaterial.²⁴

b. Assumption of Risk

A guest assumes the risk of further negligent or reckless driving, if, after protesting against the negligent or reckless manner in which the motor vehicle is being operated, he fails to leave the vehicle when a favorable opportunity to do so is presented.

If a guest, after protesting against the negligent or reckless manner in which the motor vehicle is being operated, fails to leave the vehicle when a favorable opportunity to do so is presented, he assumes the risk of injury from further negligent or reckless driving;²⁵ but the assumption does not ap-

La.—Lorance v. Smith, 138 So. 871, 173 La. 883.

Mass.—Curley v. Mahan, 193 N.E. 34, 288 Mass. 369.

N.Y.—Reilly v. Rawleigh, 281 N.Y.S. 366, 245 App.Div. 190.

N.C.—Bogen v. Bogen, 18 S.E.2d 162, 220 N.C. 648.

42 C.J. p 1176 note 79.

As against third person

Failure of passenger to withdraw from vehicle operated at excessive speed may bar his action against third person whose negligence contributed to his injury, even though negligence of driver is not imputable to passenger.—Curley v. Mahan, 193 N.E. 34, 288 Mass. 369.

Gross negligence

(1) The occupant has been held to be precluded from recovering, in such a case, even though the driver was grossly negligent.—Oast v. Mopper, 199 S.E. 249, 58 Ga.App. 506.

(2) However, there is also authority to the contrary.—Wachtel v. Bloch, 160 S.E. 97, 43 Ga.App. 756.

13. Cal.—Hirsch v. D'Autremont, 23 P.2d 1066, 133 Cal App. 106.

Ky.—Louisville Taxicab & Transfer Co. v. Barr, 209 S.W.2d 719, 307 Ky. 28—Chambers v. Hawkins, 25 S.W. 2d 363, 233 Ky. 211.

Mass.—McGaffigan v. Kennedy, 18 N.E.2d 344, 302 Mass. 12.

Wash.—Blazer v. Freedman, 5 P.2d 1031, 165 Wash. 476.

W.Va.—Young v. Wheby, 30 S.E.2d 6, 126 W.Va. 741, 154 A.L.R. 919.

6. 126 W.Va. 741, 154 A.L.R. 919.

14. Kan.—Donelan v. Wright, 81 P. 2d 50, 148 Kan. 287.

Tenn.—Talbot v. Taylor, 201 S.W.2d 1, 184 Tenn. 428.

15. Mass.—Maldman v. Rose, 149 N.E. 630, 253 Mass. 594.

42 C.J. p 1176 note 80.

16. Miss.—Terry v. Smylie, 133 So. 662, 161 Miss. 31.

Not contributory negligence

Remaining in automobile parked on shoulder between flares which had been set out to warn approaching motorists that another truck was in ditch across highway from parked automobile did not constitute contributory negligence, where automobile was parked entirely off highway before flares were set out.—Edwards v. Frost, La.App., 191 So. 591.

17. Iowa.—Helming v. People's Nat. Bank of Waukon, 220 N.W. 45, 206 Iowa 1213.

18. Tex.—Magnolia Petroleum Co. v. Winkler, Civ.App., 40 S.W.2d 831.

19. Wis.—Krause v. Hall, 217 N.W. 290, 195 Wis. 565.

Consideration may be given on the question of automobile guest's contributory negligence, whether the guest failed to request driver to stop so that she might leave automobile.—Lazar v. Black & White Cab Co., 179 S.E. 250, 50 Ga.App. 567.

20. U.S.—Roberts v. White Star Bus Line, C.C.A.Puerto Rico, 38 F.2d 1, certiorari denied White Star Bus Line v. Roberts, 50 S.Ct. 463, 281 U.S. 764, 74 L.Ed. 1172.

Cal.—Meighan v. Baker, 6 P.2d 1015, 119 Cal.App. 582—Yates v. Brazelton, 291 P. 695, 108 Cal.App. 533.

La.—Hyman v. Salzer Plumbing Co., 135 So. 703, 18 La.App. 188, amended on other grounds 138 So. 132, 18 La.App. 188.

42 C.J. p 1176 note 81.

Probability of danger from stalling of automobile in which guest was riding or its failure to pull hill was

held not so great as to impose on guest duty of leaving car at night and walking home.—Hinternisch v. Brewsough, 87 S.W.2d 934, 261 Ky. 432.

21. Cal.—Shields v. King, 277 P. 1043, 207 Cal. 275.

42 C.J. p 1176 note 82.

An elderly woman was not contributorily negligent in not insisting that the driver stop speeding automobile and alighting therefrom at an isolated point on rainy day.—Shields v. King, supra.

22. Ind.—Ridgway v. Yenny, 57 N.E. 2d 581, 223 Ind. 16.

In slum district

Where female plaintiffs had choice of remaining as guests in automobile and facing danger incident to riding with a drunken driver, or of leaving the automobile in a slum district of the city late at night, trial court properly concluded that plaintiffs were not contributorily negligent in failing to leave automobile.—McCance v. Montroy, 170 P.2d 109, 75 Cal.App.2d 186.

23. Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Pa.—Young v. Freeman, 164 A. 114, 108 Pa.Super. 399.

Wash.—Trotter v. Bullock, 269 P. 825, 148 Wash. 516.

42 C.J. p 1176 note 83.

24. Ariz.—Friedman v. Friedman, 9 P.2d 1015, 40 Ariz. 96.

25. W.Va.—Young v. Wheby, 30 S.E.2d 6, 126 W.Va. 741, 154 A.L.R. 919.

Passenger on motorcycle colliding with automobile who knew that driver was driving at excessive speed but who did not discontinue journey when driver stopped for five minutes, where driver did not agree to diminish

ply where the acts of negligence or recklessness occurred such a short time before the accident that the guest had no opportunity to leave the vehicle in time to avoid injury, particularly where such acts were not a continuance or repetition of similar acts.²⁶

§ 492. Riding with Reckless, Inexperienced, or Intoxicated Driver

- a. In general
- b. Assumption of risk

a. In General

An occupant who knows, or by the exercise of ordinary care should know, that he is being driven by a reckless, inexperienced, incompetent, or intoxicated driver may be guilty of contributory negligence if he fails to use ordinary care to protect himself from harm.

An occupant of a motor vehicle who knows, or in the exercise of ordinary care should know, that he is being driven by a reckless, inexperienced, incompetent, or intoxicated person may be guilty of contributory negligence if he fails to take such steps to protect himself from harm as a reasonably prudent person would take under the same or sim-

ilar circumstances.²⁷ An occupant may be guilty of contributory negligence in riding or continuing to ride with a driver of known imprudence, carelessness, or recklessness,²⁸ or with a driver who is unable to operate the vehicle with proper caution or skill because of incompetency or inexperience,²⁹ or because of his drowsy mental condition;³⁰ and a guest or occupant may be guilty of contributory negligence in failing to require the driver to turn the management of the vehicle over to another capable of operating it properly.³¹

The mere fact that the occupant has knowledge of the driver's carelessness or recklessness does not of itself preclude him from recovering for injuries sustained, if he uses proper care, under the circumstances;³² but such knowledge may impose on the occupant a duty of greater watchfulness.³³ Moreover, an occupant is not guilty of contributory negligence in failing to take steps to protect himself where he has no knowledge, and is not chargeable with knowledge, of the driver's recklessness or incompetency,³⁴ or where a reasonably prudent person would not have done so in the same or similar circumstances,³⁵ or where his failure to do

speed if they should go on, could not recover from driver for injuries, since he assumed risk of excessive speed.—Curley v. Mahan, 193 N.E. 34, 288 Mass. 369.

Willful or wanton conduct

Guest held not estopped to claim that driver's conduct was negligent, willful, or wanton, even though he did not insist that automobile be stopped to let him out.—O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 574.

26. Wis.—Webster v. Krembs, 282 N.W. 564, 230 Wis. 252.

27. Colo.—Wilson v. Hill, 86 P.2d 1084, 103 Colo. 409.

Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Ky.—Mattingly v. Meuter, 121 S.W.2d 676, 275 Ky. 294.

N.Y.—Reilly v. Rawleigh, 281 N.Y.S. 366, 245 App Div. 190.

42 C.J. p 1176 note 84.

28. Colo.—Wilson v. Hill, 86 P.2d 1084, 103 Colo. 409.

Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Miss.—Haynes-Walker Lumber Co. v. Hankins, 105 So. 858, 141 Miss. 55.

Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.

Wife riding with reckless husband

N.C.—Bogen v. Bogen, 18 S.E.2d 162, 220 N.C. 648.

29. Colo.—Wilson v. Hill, 86 P.2d 1084, 103 Colo. 409.

Mo.—McCloskey v. Renne, 37 S.W.2d 950, 225 Mo.App. 810.

Pa.—Lloyd v. Noakes, 96 Pa.Super. 164.

42 C.J. p 1176 note 86.

Defective eyesight

Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.

Gross negligence

Where plaintiff knew of employee's inability safely to operate an automobile and nevertheless engaged in a joint venture with employee, permitting employee to operate automobile, plaintiff was guilty of gross negligence in riding with employee, which negligence barred recovery from employer for injuries sustained when employee lost control of automobile.—Scott v. McCrocklin, La. App., 29 So.2d 619.

A guest is contributorily negligent in riding with a boy under the statutory age for driving, if the statutory violation had a causal connection with the accident.—Canzoneri v. Heckert, 269 N.W. 716, 223 Wis. 25.

30. Cal.—Price v. Schroeder, 96 P.2d 949, 35 Cal.App.2d 700.

31. Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Ky.—Winston v. Henderson, 200 S.W. 330, 179 Ky. 220, L.R.A.1918C 646.

Tenn.—Hicks v. Herbert, 113 S.W.2d 1197, 173 Tenn. 1.

32. Ohio.—Ward v. Barringer, 176 N.E. 217, 123 Ohio St. 565.

Wis.—Hutzler v. McDonnell, 7 N.W.2d 835, 242 Wis. 256.

Excessive speed on former occasions

Fact that motorist on one or two occasions on trip drove at excessive speed would not necessarily warn guests that motorist, notwithstanding guests' warning, would so drive through deep drain.—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298.

Passenger may or may not be negligent in continuing to ride with motorist who is manifestly incompetent or inattentive to duty.—Wold v. Gardner, 8 P.2d 975, 167 Wash. 191.

33. Conn.—Amato v. Desenti, 169 A. 611, 117 Conn. 612.

Duty to observe and warn of danger generally see supra § 488.

34. Conn.—Marks v. Dorkin, 136 A. 83, 105 Conn. 521.

La.—Williams v. Brown, App., 181 So. 679.

Miss.—Haynes-Walker Lumber Co. v. Hankins, 105 So. 858, 141 Miss. 55.

N.H.—Noel v. Lapointe, 164 A. 769, 86 N.H. 162—Roberts v. Lisbon, 149 A. 508, 84 N.H. 266.

Riding with elderly man

Negligence could not be imputed to guest in automobile involved in collision because she intrusted her safety to driver, who was an elderly man over sixty years of age, in absence of other evidence of driver's incompetency.—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133.

35. Cal.—Wiley v. Young, 174 P. 316, 178 Cal. 681.

so did not contribute proximately to cause his injuries.³⁶ Where the injuries result from the negligence of another motorist, the occupant may recover notwithstanding his driver was too young to obtain a license.³⁷

Intoxication. An occupant may be guilty of contributory negligence, precluding a recovery, in riding or continuing to ride with a driver who he knows, or in the exercise of reasonable care should know, is unable to operate the motor vehicle with proper precaution or skill, because of his incompetency, carelessness, or recklessness due to intoxication, and the injuries sustained are proximately

caused or contributed to by the driver's intoxicated condition,³⁸ unless there is willful negligence on the part of the driver.³⁹ This rule is particularly applicable where the occupant has participated in drinking,⁴⁰ or was instrumental in furnishing,⁴¹ the liquor with which the driver became intoxicated. A guest's contributory negligence, however, in case of the driver's intoxication, must be determined by the facts, and by what an ordinarily prudent person would do under the same or similar circumstances.⁴² A guest is not contributorily negligent if he does not know, and is not charged with knowledge, that the driver is intoxicated,⁴³ or if the driv-

Conn.—Kalamian v. Kalamian, 139 A. 635, 107 Conn. 86.
42 C.J. p 1176 note 90.

36. NH.—Hoen v. Haines, 154 A. 129, 85 N.H. 36.
42 C.J. p 1176 note 91.

37. Me.—Davis v. Simpson, 23 A.2d 320, 138 Me. 134.

Mother of unlicensed driver too young to obtain a license may recover for injuries sustained while accompanying such driver, if the injuries resulted from negligence of another motorist and the violation of law by her child was not the proximate cause thereof.—Davis v. Simpson, supra.

Misrepresentation as to age

Occupants of car driven by one who had secured a license through misrepresentation of age could recover for injuries received in collision caused by negligence of driver of another motor vehicle.—Reeve Bros. v. Guest, C.C.A.Ga., 132 F.2d 778.

38. Ariz.—Franco v. Vakares, 277 P. 812, 35 Ariz. 309.

Ark.—Lewis v. Chitwood Motor Co., 115 S.W.2d 1072, 196 Ark. 86—Sparks v. Chitwood Motor Co., 94 S.W.2d 359, 192 Ark. 743.

Cal.—Provin v. Continental Oil Co., 121 P.2d 740, 49 Cal.App.2d 417—McMahon v. Schindler, 102 P.2d 378, 38 Cal.App.2d 642.

Colo.—United Broth. of Carpenters and Joiners of America, Local Union No. 55 v. Salter, 167 P.2d 954, 114 Colo. 613.

Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.

Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Idaho.—French v. Tebben, 27 P.2d 474, 53 Idaho 701.

Ky.—Louisville Taxicab & Transfer Co. v. Barr, 209 S.W.2d 719, 307 Ky. 28—Spencer v. Boes, 205 S.W.2d 150, 305 Ky. 573—Spivey's Adm'r v. Hackworth, 200 S.W.2d 131, 304 Ky. 141—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474—Rennold's Adm'r v. Waggener, 111 S.W.2d 647, 271 Ky. 800—Toppass v. Perk-

ins' Adm'r, 104 S.W.2d 423, 268 Ky. 186—Winston v. City of Henderson, 200 S.W. 330, 179 Ky. 220, L.R.A. 1918C 646.

La.—Clinton v. City of West Monroe, App., 187 So. 561, followed in Willis v. City of West Monroe, 187 So. 829, Madden v. City of West Monroe, 187 So. 829 and Perritt v. City of West Monroe, 187 So. 830—Richard v. Canning, App., 158 So. 598.

Me.—Bubar v. Fisher, 180 A. 923, 134 Me. 10.

N.H.—Boston v. B. & M. Super Service, 20 A.2d 633, 91 N.H. 392.

Tenn.—Hicks v. Herbert, 113 S.W.2d 1197, 173 Tenn. 1.

Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

Wash.—Taylor v. Taug, 136 P.2d 176, 17 Wash.2d 533.

42 C.J. p 1176 note 87.

A guest who goes to sleep while riding with an intoxicated, and therefore incompetent, automobile driver, is contributorily negligent.

Cal.—Whitsett v. Morton, 33 P.2d 54, 138 Cal.App. 628.

La.—Clinton v. City of West Monroe, App., 187 So. 561, followed in Willis v. City of West Monroe, 187 So. 829, Madden v. City of West Monroe, 187 So. 829 and Perritt v. City of West Monroe, 187 So. 830.

Cannot weigh risks

Guest, being aware of driver's intoxication and of possibility of injury, cannot weigh the risks involved in the enterprise and then conclude to accept the dangers involved on supposition that he might, in case of an emergency, be able to take effective steps for his own safety.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

A trespasser who knew that truck driver was becoming progressively drunk and who appreciated danger of riding in truck and who did not leave truck was guilty of contributory willfulness which barred his recovery for injuries sustained in acci-

dent.—Nettles v. Your Ice Co., 4 S.E. 2d 797, 191 S.C. 429.

39. Tenn.—Schwartz v. Johnson, 280 S.W. 32, 152 Tenn. 586, 47 A.L.R. 323.

40. Ark.—Sparks v. Chitwood Motor Co., 94 S.W.2d 359, 192 Ark. 743.

Cal.—Reposa v. Pearce, 54 P.2d 475, 11 Cal.App.2d 517—Schneider v. Brecht, 44 P.2d 662, 6 Cal.App.2d 379—House v. Schmelzer, 40 P.2d 577, 3 Cal App 2d 601.

La.—Mercier v. Fidelity & Casualty Co. of New York, App., 10 So.2d 262.

N.D.—McKeen v. Iverson, 180 N.W. 805, 47 N.D. 132.

Tenn.—Schwartz v. Johnson, 280 S.W. 32, 152 Tenn. 586, 47 A.L.R. 323.

Willful misconduct

Automobile guest, who knowingly and intentionally participated in drunken orgy leading up to motorist's intoxicated condition, was guilty of willful misconduct which precluded guest's recovery for injuries received in collision proximately caused by motorist's reckless driving induced by intoxication.—Schneider v. Brecht, 44 P.2d 662, 6 Cal.App.2d 379.

41. Ariz.—Franco v. Vakares, 277 P. 812, 35 Ariz. 309.

Idaho.—French v. Tebben, 27 P.2d 474, 53 Idaho 701.

Furnishing beer to driver held remote cause

Cal.—Mann v. Chase, 107 P.2d 498, 41 Cal.App.2d 701.

42. Cal.—McCance v. Montroy, 170 P.2d 109, 75 Cal.App.2d 186.

Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.

Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Or.—Willoughby v. Driscoll, 121 P.2d 917, 168 Or. 187.

Tenn.—Hicks v. Herbert, 113 S.W.2d 1197, 173 Tenn. 1.

43. Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.

Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

Me.—Bubar v. Fisher, 180 A. 923, 134 Me. 10.

er, although intoxicated, is free from negligence contributing to the injury;⁴⁴ nor does the occupant's negligence in participating in the drinking constitute a proximate cause, if the driver is not so intoxicated as to affect his driving.⁴⁵

b. Assumption of Risk

An occupant riding with a driver, with knowledge of the latter's driving habits or inexperience, ordinarily assumes the risk of injury incident thereto.

An occupant riding with a driver, with knowledge of the latter's driving habits or inexperience, and acquiescing therein, assumes the risk of, and cannot recover for, an injury incident to the driver's incompetency or inexperience⁴⁶ or recklessness.⁴⁷ An occupant also assumes the risk of injury inci-

dent to riding with a driver who he knows, or should know, is intoxicated to such an extent that he is unable properly to operate the motor vehicle,⁴⁸ unless the driver's intoxication constitutes gross negligence,⁴⁹ except that, even though the driver is guilty of gross negligence while intoxicated, the occupant assumes the risk of injury therefrom if he too has become so intoxicated from drinking with the driver that he is unable to appreciate the hazard incident to the driver's intoxication.⁵⁰ An occupant, however, does not assume the risk of the driver's inexperience or recklessness, of which he has no knowledge or appreciation, and which he has no reason to anticipate, in time to avert the accident.⁵¹

3. DOCTRINE OF LAST CLEAR CHANCE; HUMANITARIAN DOCTRINE; DOCTRINE OF DISCOVERED PERIL, ETC.

§ 493(1). In General

Under the last clear chance doctrine as applied to the

operation of motor vehicles, the fact that the person killed or injured was negligent in placing himself in a position of peril does not preclude recovery from the de-

Md.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.

N.H.—Boston v. B. & M. Super Service, 20 A.2d 633, 91 N.H. 392.

44. Cal.—Yates v. Brazelton, 291 P. 695, 108 Cal.App. 533.

45. La.—Baker v. Travelers Ins. Co., App., 13 So.2d 65, rehearing denied and amended 13 So.2d 758.

N.D.—McKeen v. Iverson, 180 N.W. 805, 47 N.D. 132.

46. Ark.—Peay v. Panich, 87 S.W.2d 23, 191 Ark. 538.

N.C.—Bogen v. Bogen, 18 S.E.2d 162, 220 N.C. 648.

Ohio.—Fay v. Thrasher, 66 N.E.2d 236, 77 Ohio App. 179.

Utah.—Maybee v. Maybee, 11 P.2d 973, 79 Utah 585.

Wis.—Kauth v. Landsverk, 271 N.W. 841, 224 Wis. 554—Eisenhut v. Eisenhut, 248 N.W. 440, 212 Wis. 467, 91 A.L.R. 549, rehearing denied 250 N.W. 441, 212 Wis. 467, 91 A.L.R. 552—Harter v. Dickman, 245 N.W. 157, 209 Wis. 283—Ganzer v. Weed, 244 N.W. 588, 209 Wis. 135—Thomas v. Steppert, 228 N.W. 513, 200 Wis. 388—Sommerfeld v. Flurry, 223 N.W. 408, 198 Wis. 163.

47. Conn.—Freedman v. Hurwitz, 164 A. 647, 116 Conn. 283.

Iowa.—White v. McVicker, 246 N.W. 385, 216 Iowa 90.

N.C.—Bogen v. Bogen, 18 S.E.2d 162, 220 N.C. 648.

Ohio.—Fay v. Thrasher, 66 N.E.2d 236, 77 Ohio App. 179.

Wis.—Schubring v. Weggen, 291 N.W. 788, 234 Wis. 517—Biersach v. Wechselberg, 238 N.W. 905, 206 Wis. 113.

Riding on fire truck

If occupant of fire truck chose to join fire chief and others in festive

expedition, under conditions which must have been manifest to occupant, and to ride in truck which was driven in completely reckless and dangerous manner, occupant assumed risk necessarily involved, and plaintiff could not recover for occupant's death which resulted from accident occurring when truck collided with an automobile and overturned.—Nardone v. Milton Fire Dist., 27 N.Y.S.2d 489, 261 App.Div. 717, affirmed 42 N.E.2d 746, 288 N.Y. 654.

Speeding around curve

A mother riding in automobile driven by her daughter, with knowledge of daughter's propensity for turning corners at dangerous speed, assumed risk of injury from daughter's negligence in speeding around curve.—Page v. Page, 227 N.W. 233, 199 Wis. 641.

48. Colo.—United Broth. of Carpenters and Joiners of America, Local Union No. 55, v. Salter, 167 P.2d 954, 114 Colo. 513.

D.C.—Weber v. Eaton, 160 F.2d 577.

Iowa.—Garrity v. Mangan, 6 N.W.2d 292, 232 Iowa 1188.

Ky.—Spencer v. Boes, 205 S.W.2d 150, 305 Ky. 573—Mahin's Adm'r v. McClellan, 131 S.W.2d 478, 279 Ky. 595—Rennolds' Adm'r v. Waggener, 111 S.W.2d 647, 271 Ky. 300—Toppass v. Perkins' Adm'r, 104 S.W.2d 423, 268 Ky. 186.

Miss.—Saxton v. Rose, 29 So.2d 646, 201 Miss. 814.

Or.—Willoughby v. Driscoll, 121 P.2d 917, 168 Or. 187.

Tenn.—Hicks v. Herbert, 113 S.W.2d 1197, 173 Tenn. 1.

Wash.—Taylor v. Taug, 136 P.2d 176, 17 Wash.2d 533.

Wis.—Gilbertson v. Grmeinder, 31 N.W.2d 160, 252 Wis. 210—Koepke v.

Miller, 6 N.W.2d 670, 241 Wis. 501—Schubring v. Weggen, 291 N.W. 788, 234 Wis. 517—Biersach v. Wechselberg, 238 N.W. 905, 206 Wis. 113.

Passenger by voluntarily riding in truck beside driver so obviously intoxicated that passenger, unless himself intoxicated, must have been aware of his condition, thereby assumed the risk and was not merely contributorily negligent, and neither driver nor owner of truck could be held liable in damages for passenger's death as a result of driver's intoxicated condition, regardless of whether or not truck owner was negligent in employing driver.—Saxton v. Rose, 29 So.2d 646, 201 Miss. 814.

Taking a chance

Where driver was intoxicated and guest, in order to avoid disagreeable possibilities, took a chance on driver's ability to drive, when there was no emergency confronting guest, and abundant means of conveyance over highway, guest accepted the consequence of his venture which would preclude his recovery.—Hicks v. Herbert, 113 S.W.2d 1197, 173 Tenn. 1.

49. Wis.—Schubring v. Weggen, 291 N.W. 788, 234 Wis. 517.

50. Wis.—Schubring v. Weggen, supra.

51. Conn.—Doberrants v. Gregory, 26 A.2d 475, 129 Conn. 57—Kalamian v. Kalamian, 139 A. 635, 107 Conn. 86.

Iowa.—Edwards v. Kirk, 288 N.W. 875, 227 Iowa 684—Stingley v. Crawford, 268 N.W. 316, 219 Iowa 509.

S.D.—Knutsen v. Dilger, 258 N.W. 459, 62 S.D. 474.

endant if the latter failed to exercise ordinary care to avoid the injury after becoming aware of the peril, where the exercise of such care would have avoided the injury.

In the application of the last clear chance doctrine, also referred to as the "humanitarian doctrine," "the doctrine of discovered peril," and "the doctrine of antecedent or subsequent negligence," discussed generally in the C.J.S. title Negligence, §§ 136-139, also 45 C.J. p 984 note 82-995 note 41, it is generally held that, notwithstanding a person injured by a motor vehicle may have been guilty of negligence in placing himself in a position of peril, he may, nevertheless, recover for his injuries, if the driver of the vehicle failed to exercise ordinary

care to avoid injuring him after he became aware, or in many jurisdictions, should have become aware, of his peril, where the exercise of such care would have avoided the injury.⁵² It has been said that the courts are wide of agreement as to the extent of the last clear chance doctrine as applied to the operation of automobiles,⁵³ and in some jurisdictions the doctrine does not prevail.⁵⁴

All the necessary elements of the doctrine must be present in order to bring it into play in motor vehicle cases.⁵⁵ Recovery has been permitted under the last clear chance doctrine in cases in which pedestrians were killed or injured by a motor ve-

52. U.S.—Schoen v. Western Union Telegraph Co., C.C.A.Fla., 135 F.2d 967.

Ariz.—Casey v. Marshall, 163 P.2d 240, 64 Ariz. 232, rehearing denied 169 P.2d 84, 64 Ariz. 280.

Cal.—Underhill v. Peterson, 293 P. 861, 110 Cal.App. 231—Giovannoni v. Union Ice Co., 291 P. 461, 108 Cal.App. 190.

Colo.—Woods v. Siegrist, 149 P.2d 241, 112 Colo. 257.

Del.—Baker v. Reid, 57 A.2d 103.

Fla.—Davis v. Cuesta, 1 So.2d 475, 146 Fla 471.

Ky.—Lieberman v. McLaughlin, 26 S. W.2d 753, 233 Ky. 763.

La.—Carroll v. Louisiana Iron & Supply Co., App., 17 So.2d 650—Iklesias v. Campbell, App., 175 So. 145—Wyble v. Pufork, App., 141 So. 776—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564. Mass.—Rocha v. Alber, 18 N.E.2d 1018, 302 Mass. 155.

Minn.—Turenne v. Smith, 9 N.W.2d 409, 215 Minn. 64.

Mo.—Pennington v. Weis, 184 S.W.2d 416, 353 Mo. 750—Housley v. Berberich Delivery, App., 87 S.W.2d 209.

Neb.—Diehm v. Dargaczewski, 280 N. W. 898, 135 Neb. 251.

N.J.—Lechner v. Lavine, 147 A. 587, 7 N.J.Misc. 929.

N.Y.—Doherty v. Stewart, 8 N.Y.S. 2d 423, 255 App.Div. 1004—Sherman v. Leicht, 264 N.Y.S. 492, 238 App. Div. 271.

Va.—Herbert v. Stephenson, 35 S.E. 2d 753, 184 Va. 457—Willard Stores v. Cornnell, 23 S.E.2d 761, 181 Va. 143—Yellow Cab Corporation of Abingdon v. Henderson, 16 S.E.2d 389, 178 Va. 207—Kinsey v. Brugh, 161 S.E. 41, 157 Va. 407.

Wash.—Smith v. Gamp, 35 P.2d 40, 178 Wash. 451—McAbee v. French, 274 P. 713, 150 Wash. 646.

43 C.J. p 1182 note 59.

Reason for rule

Negligence of motorist who had last clear chance to avoid injury was proximate cause of injury.—Smith v. Gamp, 35 P.2d 40, 178 Wash. 451.

Doctrine presupposes that both parties were negligent, that there was an opportunity, a clear chance, established by substantial evidence, that defendant saw or knew of plaintiff's perilous position, and could have avoided collision, but did not do so.—Berton v. Cochran, 185 P.2d 349, 81 Cal.App.2d 776—Dalley v. Williams, 166 P.2d 595, 73 Cal.App.2d 427.

Essence of humanitarian doctrine is that a defendant in charge of dangerous instrumentality, such as automobile, will be held liable to plaintiff for injuries caused thereby, notwithstanding plaintiff's contributory negligence, if plaintiff was in position of imminent peril and defendant, by exercising reasonable care, could have discovered such peril and averted accident by use of means and instrumentalities at hand without danger to defendant or others after peril became discoverable, but failed to use such means and instrumentalities to avoid accident.—State ex rel. Thompson v. Shain, 159 S.W.2d 582, 349 Mo. 27.

Bicycle rider

La.—Clark v. De Beer, App., 188 So. 517.

Va.—McGowan v. Tayman, 132 S.E. 316, 144 Va. 358.

53. Fla.—Merchants' Transp. Co. v. Daniel, 149 So. 401, 109 Fla. 496.

Wash.—Thompson v. Porter, 151 P. 2d 433, 21 Wash.2d 449—Mosso v. E. H. Stanton Co., 134 P. 941, 75 Wash. 220.

54. S.C.—Spillers v. Griffin, 95 S.E. 133, 109 S.C. 78, L.R.A.1918D 1193.

55. Cal.—Center v. Yellow Cab Co., 13 P.2d 918, 216 Cal. 205—Girdler v. Union Oil Co., 13 P.2d 915, 216 Cal. 197—Brown v. McCuan, 132 P.2d 838, 56 Cal.App.2d 35—Johnson v. Southwestern Engineering Co., 107 P.2d 417, 41 Cal.App.2d 623—Akoboff v. Dusenbury, 106 P.2d 33, 41 Cal.App.2d 173—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554—Clerley v. Uhalt, 10 P.2d 769, 122 Cal.App. 701—Solko v. Jones, 3 P.2d 1028, 117 Cal.App. 372—Bence

v. Teddy's Taxi, 297 P. 128, 112 Cal. App. 636.

Conn.—Rix v. Stone, 163 A. 258, 115 Conn. 658.

D.C.—Hochelsen v. Smith, 158 F.2d 100, 81 U.S.App.D.C. 323.

Ky.—Howell v. Standard Oil Co., 28 S.W.2d 3, 234 Ky. 347.

La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406.

Mich.—Morrison v. Hall, 22 N.W.2d 838, 314 Mich. 522.

Ohio.—Pitt v. Nichols, 37 N.E.2d 379, 138 Ohio St. 555.

Okl.—Yellow Taxicab & Baggage Co. v. New, 40 P.2d 651, 170 Okl. 334.

Tex.—Parks v. Airline Motor Coach- es, 193 S.W.2d 967, 145 Tex. 44—

Miller v. Rhodius, Civ.App., 153 S. W.2d 491, error dismissed—Burton

v. Billingsly, Civ.App., 129 S.W.2d 439, error refused—Schumacher v.

Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed.

Wash.—Delsman v. Bertotti, 93 P.2d 371, 200 Wash. 380—Skates v. Con- niff, 280 P. 15, 153 Wash. 538.

Reason for rule

Automobile drivers in crowded traffic cannot recklessly disregard the essentials of careful driving and throw on others, under the doctrine of last clear chance, the whole burden of protecting all persons potentially involved, and under penalty of liability for the ensuing damages.—Hochelsen v. Smith, 158 F.2d 100, 81 U.S.App.D.C. 323.

Guest in automobile struck by truck

A finding that guest occupant of automobile involved in intersectional collision with truck was in a position of imminent peril because of actual obliviousness of automobile driver, that reasonable appearances of situation were such that truck driver knew or should have known thereof in time to act to prevent collision by warning signal, slackening speed, or stopping, and that he had means and time to do so effectively thereafter, was necessary to establish humanitarian negligence of truck driver.—Teague v. Plaza Exp. Co., 205 S.W.2d 563, 356 Mo. 1186.

hicle,⁵⁶ and in cases in which persons were killed or injured in collisions between motor vehicles,⁵⁷ but the doctrine has been said to be of limited application in the case of two moving vehicles.⁵⁸

Doctrine as defense. While it has been held that a defendant driver may be given the benefit of the

last clear chance doctrine if the facts justify its application,⁵⁹ the doctrine has been held inapplicable when urged as a defense to defeat recovery by the injured person,⁶⁰ where the injured person was in no way negligent,⁶¹ where defendant's negligence is found to be the sole or proximate cause of the

56. U.S.—Arnold v. Owens, C.C.A.N. C., 78 F.2d 495.

Cal.—Brown v. McCuan, 132 P.2d 838, 56 Cal.App.2d 35—Box v. Van Slooten, 101 P.2d 780, 38 Cal.App. 554—Bence v. Teddy's Taxi, 297 P. 128, 112 Cal.App. 636—Atkins v. Bouchet, 260 P. 828, 86 Cal.App. 294.

D.C.—Boase v. Windridge & Handy, 102 F.2d 628, 70 App.D.C. 24.

Ky.—Heskamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky. 618—Dixon v. Stringer, 126 S.W.2d 448, 277 Ky. 847.

La.—Rottman v. Beverly, 165 So. 153, 183 La. 947—Paquet v. Renken, App., 30 So.2d 218—Muller v. Phillips, App., 20 So.2d 443—Gauthier v. Foote, App., 12 So.2d 9—Brousard v. Hotard, App., 4 So.2d 563—Stansbury v. Drillon, App., 2 So.2d 662—Jones v. American Mut. Liability Ins. Co., App., 185 So. 509, annulled on other grounds 189 So. 169—Hantel v. Service Drayage Co., App., 177 So. 425—Iglesias v. Campbell, App., 170 So. 265, reinstated 175 So. 145—Haywood v. Noel, App., 154 So. 484—Eads v. Holliday, App., 144 So. 646—Robichaux v. Dorion, 184 So. 784, 17 La.App. 159—Santos v. Duvic, 133 So. 399, 16 La.App. 105—Lanphier v. D'Antoni, 131 So. 628, 14 La.App. 441—Langenstein v. Reynaud, 127 So. 764, 13 La.App. 272—Norwood v. Bahm, 127 So. 475, rehearing denied 129 So. 183, 14 La. App. 261—Baader v. Driverless Cars, 120 So. 515, 10 La.App. 310—Hodges v. Davis, 7 La.App. 327—Roy v. Israel, 3 La.App. 311.

Mo.—Wright v. Osborn, 201 S.W.2d 935, 356 Mo. 382—Iman v. Walter Freund Bread Co., 58 S.W.2d 477, 332 Mo. 461—Burke v. Pappas, 293 S.W. 142, 316 Mo. 1235—Hudlow v. Langerhans, 91 S.W.2d 629, 230 Mo. App. 1160.

Ohio.—Brock v. Marlatt, 191 N.E. 703, 128 Ohio St. 435.

Tenn.—Hodge v. Hamilton, 293 S.W. 752, 155 Tenn. 403.

Va.—Crawford v. Hite, 10 S.E.2d 561, 176 Va. 69—Paytes v. Davis, 157 S. E. 557, 156 Va. 229.

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Va.—Virginia Electric & Power Co. v. Evich, 146 S.E. 265, 152 Va. 236.

W.Va.—Smith v. Gould, 159 S.E. 53, 110 W.Va. 579, 91 A.L.R. 28.

42 C.J. p 1182 note 59 [a] (3), (4).

Jaywalkers

Cal.—Meincke v. Oakland Garage, 79

P.2d 91, 11 Cal.2d 255—Bays v. Clugston, 161 P.2d 953, 71 Cal.App. 2d 55.

Tenn.—Elmore v. Thompson, 14 Tenn. App. 78.

Trespasser

Driver's duty to use reasonable care not to injure pedestrian-trespasser was held to include obligation not to do trespasser injury under circumstances involved in application of last clear chance doctrine.—Waselik v. Ferrie Const. Co., 157 A. 642, 114 Conn. 85.

57. Ala.—Brown Hauling Co. v. Newsome, 2 So.2d 782, 241 Ala. 300. Cal.—Brown v. McCuan, 132 P.2d 838, 56 Cal.App.2d 35—Yates v. Morotti, 8 P.2d 519, 120 Cal.App. 710—Boyn-ton v. Richfield Oil Co., 4 P.2d 614, 117 Cal.App. 699—Brown v. Yocum, 298 P. 845, 113 Cal.App. 621.

Fla.—Panama City Transit Co. v. Du Vernoy, 33 So.2d 48—Petroleum Carrier Corp. v. Hall, 29 So.2d 624, 158 Fla. 549.

La.—Hanson v. Great American Indemnity Co., App., 33 So.2d 549—Thiaville v. Toups, App., 25 So.2d 361—Bouillon v. Bonin, App., 2 So. 2d 535, followed in Motty v. Bonin, 2 So.2d 541—Prevost v. Smith, App., 197 So. 905—Greer v. Ware, App., 187 So. 842—O'Rourke v. McConaughy, App., 157 So. 598—Burthe v. Lee, App., 152 So. 100, rehearing refused 152 So. 559—Guinn v. Kemp, 136 So. 764, 18 La.App. 3—Raziano v. Trauth, 131 So. 212, 15 La.App. 650—Spahn v. Shrewsbury Ice & Feed Co., 130 So. 837, 14 La. App. 682—Parlongue v. Leon, 6 La. App. 18.

Mo.—Teague v. Plaza Express Co., 190 S.W.2d 254, 354 Mo. 582—Clarke v. Jackson, 116 S.W.2d 122, 342 Mo. 537—State ex rel. Sirkin & Needles Moving Co. v. Hostetter, 101 S.W. 2d 50, 340 Mo. 211—Capps v. Beene, App., 162 S.W.2d 80—Jacobson v. Graham Ship-By-Truck Co., App., 61 S.W.2d 401.

R.I.—Dembicer v. Pawtucket Cabinet & Builders Finish Co., 193 A. 622, 58 R.I. 451.

Tex.—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed—Younger Bros. v. Ross, Civ.App., 151 S.W.2d 621, error dismissed.

Va.—State of Maryland, for Use of Joynes v. Coard, 9 S.E.2d 454, 175 Va. 571.

Guest in vehicle struck by another vehicle

La.—Smith's Tutorship v. Perrin, App., 145 So. 685.

Mo.—Teague v. Plaza Express Co., 205 S.W.2d 563, 356 Mo. 1186.

Stalled automobile

Where bus driver saw stalled automobile in time to avoid colliding therewith, and motorist was unable to move automobile, last clear chance doctrine was properly invoked against driver.—Devlin v. Spokane United Rys., 48 P.2d 252, 183 Wash. 342, opinion adhered to 53 P.2d 1198, 183 Wash. 342.

58. Utah.—Hickok v. Skinner, 190 P. 2d 514.

In exceptional circumstances only is the last clear chance doctrine applicable to action arising from collision of two moving vehicles, especially where injured person drove rapidly, since the act which under such conditions created peril must of necessity have occurred practically simultaneously with the collision.—Folger v. Richfield Oil Corp., 182 P. 2d 337, 80 Cal.App.2d 655.

59. Va.—McNamara v. Rainey Luggage Corp., 123 S.E. 515, 139 Va. 197.

60. Cal.—Shippy v. Peninsula Rapid Transit Co., 275 P. 515, 97 Cal. App. 367—Dover v. Archambeault, 208 P. 178, 57 Cal.App. 659.

N.H.—Cleveland v. Reasby, 33 A.2d 554, 92 N.H. 518.

In negligence actions generally see the C.J.S. title Negligence § 136, also 45 C.J. p 988 notes 2, 3.

61. La.—Houston Oil Field Material Co. v. Marlow, App., 6 So.2d 149—Gassiot v. Southland Produce Co., 138 So. 214, 18 La.App. 437.

R.I.—Urquhart v. Marty, 200 A. 456, 61 R.I. 102.

Contributory negligence of injured person as element of doctrine see infra § 493 (2).

Action against joint tort-feasors

Where bicyclist who was struck by automobile which turned to its left to avoid striking a truck making a U-turn was not negligent, last clear chance doctrine was no defense against claim for bicyclist's death, regardless of what application doctrine might have in suit between the joint tort-feasors.—Killian v. Modern Iron Works, La.App., 15 So.2d 532.

injury,⁶² as where the defendant driver could have observed the danger and avoided the accident by keeping a proper lookout,⁶³ or where defendant turned into an intersection with an arterial highway without first stopping as required by statute.⁶⁴ Recovery cannot be denied one injured by a motor vehicle on the ground that he had the last clear chance to avoid injury where plaintiff, unexpectedly imperiled, could not have avoided the accident by exercising care,⁶⁵ or where defendant actually had the last clear chance to avoid the accident but negligently failed to act thereon.⁶⁶

§ 493(2). Cause of Injury

a. In general

b. Concurrent or continuing negligence of plaintiff

a. In General

The doctrine of last clear chance has no application where the negligence of the injured person was the sole proximate cause of the accident or where the injured person was not placed in a position of danger by his own negligence.

In order to invoke the doctrine of last clear chance, the negligence of defendant in failing to avoid injuring plaintiff must have been a proximate cause of the injury,⁶⁷ and the doctrine has no ap-

plication where the injured person's negligence was the sole proximate cause of the accident, as where defendant exercised due care⁶⁸ or where defendant's negligence was not a proximate cause of the accident.⁶⁹

Position of peril not due to negligence. The last clear chance doctrine has been held to have no application where the injured person has not been placed in the position of danger by his own negligence.⁷⁰

b. Concurrent or Continuing Negligence of Plaintiff

As a general rule the last clear chance doctrine is inapplicable if the negligence of the injured person continued to the time of the accident and concurred with the negligence of the motorist as a proximate cause of the injury. This rule is limited in some jurisdictions, so as to permit recovery under the doctrine, if the driver actually discovered or should have discovered the danger in time to avoid the accident by the exercise of due care.

It has been held as a general rule that recovery for death or injuries suffered in a motor vehicle accident cannot be based on the last clear chance doctrine where the negligence of the deceased or injured person actively continued up to the time of the accident, and concurred with the negligence of the driver in proximately causing the injury.⁷¹ In

62. La.—Cox v. Shreveport Packing Co., Fidelity & Casualty Co., of N. Y., Intervener, App., 28 So.2d 617, motion denied 31 So.2d 815, 213 La. 325 and affirmed 34 So.2d 373, 213 La. 53—Muse v. Chambley, App., 16 So.2d 276—Muse v. Gulf Refining Co., App., 8 So.2d 330—Calvert Fire Ins. Co. v. Tri-State Transit Co., App., 5 So.2d 156—Meredith v. Arkansas Louisiana Gas Co., App., 185 So. 498—Allen v. Allbritton, App., 172 So. 198—Chitwood v. King, App., 155 So. 466—Van Baast v. Thibaut Feed Mills, App., 151 So. 226—Roy v. Israel, 3 La.App. 311.

63. La.—Crow v. State Farm Mut. Automobile Ins. Co., App., 10 So.2d 105.

64. Wash.—Angelo v. Lawson, 173 P. 2d 124, 26 Wash.2d 198.

65. La.—Hardee v. Nevers, 120 So. 227, 10 La.App. 537.

66. Wash.—McAbee v. French, 274 P. 713, 150 Wash. 646.

67. Tex.—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S. W.2d 1136, error dismissed.

Turning into wrong side of road

The doctrine has been held inapplicable to impose liability on defendant where the negligence of plaintiff in turning into the wrong side of the road was the sole cause of a collision

with defendant's vehicle proceeding along the proper side of the road—Bell v. Kenney, C.C.A. Ohio, 67 F.2d 896.

68. La.—Carkuff v. Geophysical Service, App., 179 So. 490.

69. La.—Jones v. Indemnity Ins. Co. of North America, App., 178 So. 702.

70. Ala.—Williams v. Wicker, 179 So. 250, 235 Ala. 348.

N.C.—Taylor v. Rlerson, 185 S.E. 627, 210 N.C. 185.

Utah.—Thomas v. Sadleir, 162 P.2d 112, 108 Utah 552.

Va.—Yellow Cab Corporation of Abingdon v. Henderson, 16 S.E.2d 389, 178 Va. 207.

42 C.J. p 1185 note 74.

71. Cal.—Folger v. Richfield Oil Corp., 182 P.2d 337, 80 Cal.App.2d 655—Keller v. Arden Farms, 139 P. 2d 47, 59 Cal.App.2d 506—Holopoff v. Malletta, 44 P.2d 403, 6 Cal.App. 2d 80—Magarian v. Moser, 42 P.2d 385, 5 Cal.App.2d 208—Ramsperger v. Los Angeles Motor Coach Co., 41 P.2d 562, 4 Cal.App.2d 673—Solko v. Jones, 3 P.2d 1028, 117 Cal.App. 372.

Conn.—Correnti v. Catino, 160 A. 892, 115 Conn. 213.

Fla.—Davis v. Cuesta, 1 So.2d 475, 146 Fla. 471.

La.—General Exchange Ins. Corpora-

tion v. Carp, App., 176 So. 145—Harper v. Shreveport Ice Cream Factory, App., 162 So. 471—Guillory v. Shaddock, App., 158 So. 681—Harris v. Landry, App., 150 So. 671—Baptiste v. Mateu, App., 147 So. 731—Pigott v. Bates, App., 143 So. 535—Bayer v. Whitley, 138 So. 702, 18 La.App. 443—Synigol v. Oury, 134 So. 324, 17 La.App. 163—Jordan v. Katz & Besthoff, 132 So. 380, 15 La.App. 500—Neville v. Postal Telegraph Cable Co., 126 So. 720, 13 La.App. 76—Bass v. Means, 124 So. 553, 12 La.App. 260.

Me.—Goudreau v. Ouelette, 178 A. 355, 133 Me. 365.

Md.—Caple v. Amoss, 28 A.2d 566, 181 Md. 56—Askin v. Long, 6 A.2d 246, 176 Md. 545—Legum v. State, for Use of Moran, 173 A. 565, 167 Md. 339.

Mich.—Duffy v. Enright Topham Co., 276 N.W. 715, 282 Mich. 662—Boerma v. Cook, 239 N.W. 314, 256 Mich. 266—Howell v. Hakes, 232 N.W. 216, 251 Mich. 372.

Minn.—Wilmes v. Mihelich, 25 N.W. 2d 833, 223 Minn. 139—Turenne v. Smith, 9 N.W.2d 409, 215 Minn. 64.

Neb.—Donald v. Heller, 10 N.W.2d 447, 143 Neb. 600—Long v. Guilliatt, 288 N.W. 689, 137 Neb. 199.

Ohio.—Brock v. Marlatt, 191 N.E. 703, 128 Ohio St. 435—Secombe v. Slicker, 174 N.E. 788, 37 Ohio App. 389.

order for the doctrine to be applicable, the negligence of the deceased or injured person must have ceased as the proximate cause of the accident,⁷² and defendant motorist must have been guilty of some new breach of duty subsequent to plaintiff's negligence.⁷³ The position of peril must be one from which the injured person could not escape by the exercise of ordinary care.⁷⁴ This rule, however, does not require that the inability of the injured person to escape the danger shall be due to a situ-

ation which makes it physically impossible for him to do so; it applies equally when he is oblivious of the danger and for that reason unable to cope with it,⁷⁵ but this inability to cope with the situation must be apparent.⁷⁶ Under some of the authorities the rule of continuing or concurrent negligence does not necessarily bar recovery if the driver of the vehicle actually discovered, or should have discovered the peril in time to avoid the accident,⁷⁷ and actually had the last clear chance to avoid it,⁷⁸ at least

R.I.—Pettella v. Carrelrero, 53 A.2d 531, 72 R.I. 439—Zielinski v. Riley, 199 A. 693, 61 R.I. 14.

Tenn.—Zamora v. Shapley, 173 S.W. 2d 721, 27 Tenn.App. 768.

Va.—Harris Motor Lines v. Green, 37 S.E.2d 4, 184 Va. 984—Willard Stores v. Cornnell, 23 S.E.2d 761, 181 Va. 143—Frazier v. Stout, 181 S.E. 377, 165 Va. 68.

42 C.J. p 1182 note 59, p 1183 note 66. Recovery under last clear chance doctrine generally where plaintiff is concurrently negligent see the C. J.S. title Negligence § 139, also 45 C.J. p 993 note 35-p 995 note 41.

Nature of plaintiff's negligence

In order to bar recovery on ground that injured person negligently or voluntarily caused himself to be placed in dangerous position in the highway, which proximately contributed to the accident, the dangerous condition which he allegedly created negligently, must have continued to be so to the time of the accident, and thereby concurred with act of the defendant inducing the result. This is so regardless of whether defendant's negligence was primary or subsequent negligence.—Hoffelinger v. Lane, 196 So. 720, 239 Ala. 659.

Guest and driver falling asleep

Where deceased, in spite of knowledge that driver of automobile was very drowsy and had consumed some liquor, and in spite of warning to keep driver awake, fell asleep himself and was killed when driver dozed and automobile left highway, doctrine of last clear chance had no application.—Rennolds' Adm'x v. Waggener, 111 S.W.2d 647, 271 Ky. 300.

72. Mich.—Morrison v. Hall, 22 N. W.2d 838, 314 Mich. 522—Howell v. Hakes, 232 N.W. 218, 251 Mich. 372. Ohio.—Brock v. Marlatt, 191 N.E. 703, 128 Ohio St. 435—Seccombe v. Slicker, 174 N.E. 788, 37 Ohio App. 389.

Subsequent care by injured person

Last clear chance doctrine applies to pedestrian struck by automobile only when pedestrian negligently brings himself into perilous position, and thereafter commits no negligent act materially changing situation.—Correnti v. Catino, 160 A. 892, 115 Conn. 213.

73. La.—General Exchange Ins Corporation v. Carp, App., 176 So. 145—Jordan v. Katz & Besthoff, 132 So. 380, 15 La.App. 500.

74. Cal.—Folger v. Richfield Oil Corp., 182 P.2d 337, 80 Cal.App.2d 655—Dalley v. Williams, 166 P.2d 595, 73 Cal.App.2d 427—Akoboff v. Dusenbury, 106 P.2d 33, 41 Cal.App. 2d 173—Sichterman v. R. M. Hollingshead Co., 271 P. 372, 94 Cal. App. 486, rehearing denied 271 P. 1111, 94 Cal App. 486.

D.C.—Hocheisen v. Smith, 158 F.2d 100, 81 U.S.App.D.C. 323.

Md.—Legum v. State, for Use of Moran, 173 A. 565, 167 Md. 339.

Neb.—Long v. Guilliatt, 288 N.W. 689, 137 Neb. 199.

R.I.—Zielinski v. Riley, 199 A. 693, 61 R.I. 14.

Utah.—Martin v. Sheffield, 189 P.2d 127.

42 C.J. p 1184 note 67.

If both parties could have avoided a collision, the doctrine does not apply to permit recovery

Cal.—Folger v. Richfield Oil Corp., 182 P.2d 337, 80 Cal.App.2d 655.

S.D.—Iverson v. Knorr, 298 N.W. 28, 68 S.D. 23

Wash.—Erickson v. Barnes, 107 P.2d 348, 6 Wash.2d 251.

Failure to observe danger

In action for injuries to motorist who, while recklessly proceeding at excessive speed on highway on foggy night, struck rear of truck making left turn at intersection when by exercise of reasonable care motorist could have observed the truck and have avoided the collision, doctrine of last clear chance was not available to motorist.—Folger v. Richfield Oil Corp., 182 P.2d 337, 80 Cal.App.2d 655.

Pedestrian caught in traffic

In action by pedestrian for injuries sustained when struck by truck at intersection in pedestrian lane, when traffic light, which had been in favor of pedestrian, changed after pedestrian had entered intersection, last clear chance doctrine was held to apply, where pedestrian was prevented from crossing street by automobiles coming through intersection from same direction as that from which truck approached.—Wendell v. Ross, 62 P.2d 1157, 99 Colo. 365.

75. Cal.—Center v. Yellow Cab Co., 13 P.2d 918, 216 Cal. 205—Girdner v. Union Oil Co., 13 P.2d 915, 216 Cal. 197—Box v. Van Slooten, 101 P.2d 780, 38 Cal.App.2d 554—Yates v. Morotti, 8 P.2d 519, 120 Cal.App. 710.

42 C.J. p 1184 note 68.

Reliance on injured person

Last clear chance doctrine was held applicable where automobile driver observed pedestrian oblivious of his peril, but nevertheless relied on pedestrian's stopping.—O'Farrell v. Andrus, 260 P. 957, 86 Cal.App. 474.

76. Md.—Caple v. Amoss, 28 A.2d 566, 181 Md. 56.

77. La.—Jackson v. Cook, 181 So. 195, 189 La. 195—Rottman v. Beverly, 165 So. 153, 183 La. 947—Young v. Creegan, App., 23 So.2d 820—Neyrey v. Maillet, App., 21 So. 2d 158—Stansbury v. Drillon, App., 2 So.2d 662—Fontenot v. Freudenstein, App., 199 So. 677—Rutter v. Norman, App., 189 So. 609—Young v. Thompson, App., 189 So. 487—Iglesias v. Campbell, App., 175 So. 145.

42 C.J. p 1183 note 65.

Apparent peril

Driver of motor vehicle, who sees traveler in dangerous situation and should appreciate danger, has last clear chance to avoid accident, irrespective of traveler's continuing negligence.—Merchants' Transp. Co. v. Daniel, 149 So. 401, 109 Fla. 496.

Violation of traffic signal

A motorist proceeding on favorable traffic light after having looked in both directions before entering intersection and failing to see approaching bicyclist could not be charged with having constructively seen bicyclist entering intersection in violation of traffic light within sufficient time to have avoided accident, and hence was not liable for death of bicyclist under last clear chance doctrine.—Clark v. De Beer, La.App., 188 So. 517.

78. La.—Rottman v. Beverly, 165 So. 153, 183 La. 947—Langley v. Viguerie, App., 189 So. 606.

Pedestrian on wrong side of road

A pedestrian, notwithstanding his continuing negligence in walking on wrong side of roadway, may recover

where the injured person was unaware of his peril.⁷⁹ In these cases the negligence of the driver is considered the proximate and immediate cause of the injury and that of the person injured the remote cause.⁸⁰

In at least one jurisdiction it has been held that, if the driver of a motor vehicle fails to exercise ordinary care to avoid injuring one after actually becoming aware of his peril, the person injured may recover, notwithstanding his negligence, continued up to the moment of injury;⁸¹ it is otherwise, however, if plaintiff's peril was not actually seen, although it should have been seen,⁸² unless plaintiff's negligence had culminated in a situation from which he could not extricate himself by the exercise of due care.⁸³

In the case of two vehicles the obligations of the two drivers have been said to be relative,⁸⁴ each

being charged with using due care to avoid a collision.⁸⁵

§ 493(3). Danger or Peril

- a. In general
- b. Knowledge or ignorance of peril

a. In General

As a general rule, in order to invoke the doctrine of last clear chance, the person injured must have been in a position of peril or danger.

The peril or danger of the injured person has been held to constitute the chief factor and foundation on which the last clear chance or humanitarian doctrine rests.⁸⁶ This peril must be something more than a bare possibility of an injury occurring from the operation of the vehicle; it must be certain peril.⁸⁷ Accordingly, the doctrine does not apply in the operation of a motor vehicle and the duty

from motorist if motorist had last clear chance to avert injury and failed to avail himself of it.—Herbert v. Stephenson, 35 S.E.2d 753, 184 Va. 457.

Pedestrian standing in road

Where automobile struck deceased who was standing near middle of street with back toward approaching automobile, driver of automobile had last clear chance to avoid accident.—Bennett v. Spencer, 189 S.E. 169, 167 Va. 268.

Grossly negligent pedestrian

La.—Law v. Osterland, App., 3 So.2d 674, affirmed 3 So.2d 680, 198 La. 421.

79. La.—Jackson v. Cook, 181 So. 195, 189 La. 860—Hanson v. Great American Indemnity Co., App., 33 So.2d 549—Bouillon v. Bonin, App., 2 So.2d 535, followed in Mott v. Bonin, 2 So.2d 541.

Static negligence

Where motorist was cognizant of inattention of his approach by boy playing football in street in violation of ordinance and failed to give boy timely warning to put him on attention, boy's negligence, although continuing, was static, while motorist, by his control of agency of approaching danger, had the last clear chance to avoid effect of boy's negligence and could be held liable under the last clear chance doctrine.—Graham v. Johnson, 172 P.2d 665, 109 Utah 365.

80. La.—Rottman v. Beverly, 165 So. 153, 183 La. 947—Carroll v. Louisiana Iron & Supply Co., App., 17 So.2d 650—Bouillon v. Bonin, App., 2 So.2d 535, followed in Mott v. Bonin, 2 So.2d 541—Rector v. Allied Van Lines, App., 198 So. 516—Frevost v. Smith, App., 197 So. 905—Iglesias v. Campbell, App., 175 So. 145.

Va.—Crawford v. Hite, 10 S.E.2d 561, 176 Va. 69.

81. Wash.—Thompson v. Porter, 151 P.2d 433, 21 Wash.2d 449—Huber v. Hemrich Brewing Co., 62 P.2d 451, 188 Wash. 235—Smith v. Gamp, 35 P.2d 40, 178 Wash. 451.
42 C.J. p 1183 note 64.

82. Wash.—Everest v. Riecken, 193 P.2d 353—Thompson v. Porter, 151 P.2d 433, 21 Wash.2d 449—Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117—Warner v. Keebler, 94 P.2d 175, 200 Wash. 608—Huber v. Hemrich Brewing Co., 62 P.2d 451, 188 Wash. 235—Smith v. Gamp, 35 P.2d 40, 178 Wash. 451.

Jaywalker

Where pedestrian crossing street midway between street intersections was struck by motorist's backing toward parking space, last clear chance doctrine was held inapplicable, motorist not having seen pedestrian.—Cook v. Carleton, 4 P.2d 1098, 165 Wash. 232.

Standing on highway

Where driver of automobile did not see motorists standing on highway until moment of collision, and at that time the negligence of motorists in so standing had not ceased, recovery for death of one and for injury sustained by the other could not be based on the doctrine of last clear chance.—Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117.

Injury to cows on highway

Driver of automobile who kept on driving, although highway was obscured by lights from passing car, was not chargeable with negligence under last clear chance doctrine, on striking cows permitted to roam in highway at dusk unaccompanied by person.—Frowd v. Marchbank, 283 P. 467, 154 Wash. 634.

83. Wash.—Everest v. Riecken, 193 P.2d 353—Thompson v. Porter, 151 P.2d 433, 21 Wash.2d 449—Smith v. Gamp, 35 P.2d 40, 178 Wash. 451.

Negligence held not continuing

Truck driver, permitting exhaustion of gasoline, improperly securing tow chain, and failing to post lookout when chain became unhooked, was held not guilty of negligence, continuing until automobile struck rear of standing truck, so as to render last clear chance doctrine inapplicable.—Chapin v. Stickel, 22 P.2d 290, 173 Wash. 174.

84. Utah—Hickok v. Skinner, 190 P. 2d 514.

85. Utah—Hickok v. Skinner, *supra*.

Plaintiff first at point of impact

Plaintiff, whose negligence continues to point of impact, cannot assert that both parties were negligent, but that defendant alone is chargeable because plaintiff arrived at point of impact first and that defendant should have missed him.—Hickok v. Skinner, *supra*.

86. Mo.—Partney v. Agers, 187 S.W. 2d 743, 238 Mo.App. 764.

87. Mo.—Cameron v. Howerton, 174 S.W.2d 206—Kirkham v. Jenkins Music Co., 104 S.W.2d 234, 340 Mo. 911—Partney v. Agers, 187 S.W.2d 743, 238 Mo.App. 764.

Nature of plaintiff's peril in order to invoke last clear chance doctrine generally see the C.J.S. title Negligence §§ 136-139, also 45 C.J. p 992 notes 23-26.

Imminent peril

"The humanitarian doctrine does not operate until the injured is in imminent peril."—Kimbrough v. Chervitz, 186 S.W.2d 461, 465, 353 Mo. 1154.

Merely approach to position of imminent peril is insufficient to bring

of the driver thereunder to take measures to avoid injuring plaintiff does not begin unless and until the latter actually comes into or is actually in or entering a position of peril or danger.⁸⁸ The limits of the danger zone are determined by the facts of the particular case.⁸⁹ Some authorities have held that the required point of danger or peril is reached only when plaintiff has reached a point from which he cannot escape by the exercise of ordinary care.⁹⁰

Plaintiff's knowledge of the approach of defendant's automobile restricts the limits of the danger zone,⁹¹ while his obliviousness to his danger may extend the danger zone.⁹² It has been held that, where plaintiff knows of the approach of defendant's vehicle, the driver's duty to act is postponed until plaintiff is actually in the path of the vehicle or so close to it that it should be reasonably apparent to the driver under the facts of the situation that plaintiff will continue on his way and not stop before he comes into defendant's path.⁹³ Where

the pedestrian pauses before entering the traffic lane, the driver's duty to act does not arise until after the pedestrian enters the lane, and, oblivious of his peril, continues to walk toward the point where he must be struck unless the driver does something to avoid doing so.⁹⁴

b. Knowledge or Ignorance of Peril

- (a) By injured person
- (b) By defendant

(a) By Injured Person

The last clear chance doctrine may be applicable notwithstanding the injured person was aware of his peril, if it was apparent that he could not extricate himself therefrom.

The last clear chance doctrine may be applicable notwithstanding the injured person was aware of his peril, if it was apparent that he could not extricate himself therefrom.⁹⁵ The humanitarian rule

the humanitarian doctrine into operation.—*Kimbrough v. Chervitz*, supra.
Anticipating unusual conduct

Where plaintiff was not in the path of defendant's truck, as it backed toward gravel bin, until truck was within a few inches of plaintiff when, in response to a shout from third person, plaintiff jumped backward into the path of the truck and sustained injuries complained of, the possibility that plaintiff might do the unusual and jump backward was not such certainty of peril as was required to create a position of peril under the humanitarian doctrine.—*Partney v. Agers*, 187 S.W.2d 743, 238 Mo.App. 764.

88. Mo.—*Gosney v. May Lumber & Coal Co.*, 179 S.W.2d 51, 352 Mo. 693.—*Chastain v. Winton*, 152 S.W.2d 165, 347 Mo. 1211.—*Evans v. Farmers Elevator Co.*, 147 S.W.2d 593, 347 Mo. 326.—*Smithers v. Barker*, 111 S.W.2d 47, 341 Mo. 1017.—*Kirkham v. Jenkins Music Co.*, 104 S.W.2d 234, 340 Mo. 911.—*Partney v. Agers*, 187 S.W.2d 743, 238 Mo.App. 764.—*Bauer v. Wood*, 154 S.W.2d 356, 236 Mo.App. 266.—*Kasperski v. Rainey*, App., 135 S.W.2d 11.
N.C.—*Van Dyke v. Atlantic Greyhound Corporation*, 10 S.E.2d 727, 218 N.C. 283.

Tex.—*Elder v. Panhandle Stages Shuttle Service*, 193 S.W.2d 170, 144 Tex. 638.

Automobile host could not be held liable under the humanitarian rule for injuries sustained by guest in collision without a finding that guest was in a position of peril.—*Stitzell v. Arthur Morgan Trucking Co.*, Mo. App., 118 S.W.2d 49.

Injury by other vehicle

A bus company was not liable, under the discovered peril doctrine, for in-

juries to pedestrian, struck by company's bus, which he negligently failed to see, on ground of negligence of driver of another of company's busses, approaching from opposite direction, in failing to stop such bus or drive it onto shoulder of street as soon as he realized pedestrian's perilous position near center of street.—*Elder v. Panhandle Stages Shuttle Service*, 193 S.W.2d 170, 144 Tex. 638.
Person alighting from moving vehicle

It has been held that a duty under the discovered peril doctrine does not arise as to one, not immature or lacking in discretion, who alights from the vehicle on command of the driver while it is moving at a pace not creating an obvious or imminent danger.—*Magnolia Petroleum Co. v. Winkler*, Tex.Civ.App., 40 S.W.2d 831.

89. Mo.—*Gerran v. Minor*, App., 192 S.W.2d 57.—*Kasperski v. Rainey*, App., 135 S.W.2d 11.—*Gambell v. Irvine*, App., 102 S.W.2d 784.

At intersection

In action under humanitarian rule for injuries sustained in collision between trucks at intersection, defendant's contention that plaintiff was not in position of imminent peril until plaintiff's truck was athwart middle line of intersection directly in path of defendant's truck, which was then only twenty-five feet away, was held erroneous, where danger zone was wider than path of defendant's truck.—*Villinger v. Nighthawk Freight Service*, Mo.App., 104 S.W.2d 740.

New path of an automobile is its path for the purposes of the humanitarian doctrine when its operator freely and knowingly changes its ap-

parent path.—*Smith v. Fine*, 175 S.W.2d 761, 351 Mo. 1179.

90. Cal.—*Brown v. McCuan*, 132 P.2d 838, 56 Cal.App.2d 35.—*Johnson v. Sacramento Northern Ry.*, 129 P.2d 503, 54 Cal.App.2d 528.

91. Mo.—*Kasperski v. Rainey*, App., 135 S.W.2d 11.

92. Mo.—*Melenson v. Howell*, 130 S.W.2d 555, 344 Mo. 1137.—*Kasperski v. Rainey*, App., 135 S.W.2d 11.—*Gambell v. Irvine*, App., 102 S.W.2d 784.—*Roemich v. Wilson*, App., 28 S.W.2d 430.

Obliviousness not shown

Mo.—*Gosney v. May Lumber & Coal Co.*, 179 S.W.2d 51, 352 Mo. 693.

93. Mo.—*Smithers v. Barker*, 111 S.W.2d 47, 341 Mo. 1017.—*Kasperski v. Rainey*, App., 135 S.W.2d 11.

Vehicles approaching intersection

Where motorist who saw truck approaching from the right, when motorist stopped before entering intersection, motorist was not in position of imminent peril under humanitarian doctrine until he had started his automobile and proceeded so far that he could no longer stop short of path of oncoming truck.—*Gosney v. May Lumber & Coal Co.*, 179 S.W.2d 51, 352 Mo. 693.

94. Mo.—*Putnam v. Unionville Granite Works*, App., 122 S.W.2d 389.

95. Cal.—*Yates v. Moroti*, 8 P.2d 519, 120 Cal.App. 710.

Colo.—*Woods v. Siegrist*, 149 P.2d 241, 112 Colo. 257.

Tex.—*Wichita Coca Cola Bottling Co. v. Levine*, Civ.App., 68 S.W.2d 310, error refused.

Effect of injured person's obliviousness of peril on application of doctrine generally see the C.J.S. title

may be invoked where the injured person was oblivious of his peril.⁹⁶

(b) By Defendant

It is essential to the application of the doctrine of the last clear chance that the defendant had knowledge or that, by the exercise of ordinary care, he could have acquired knowledge that the person injured was in a position of peril prior to the accident.

It is essential to the application of the doctrine of last clear chance that defendant had knowledge

or that, by the exercise of ordinary care, he could have acquired knowledge that the person injured was in a position of peril prior to the accident,⁹⁷ in time to have been able to have avoided the accident, in accordance with the rules discussed *infra* § 493 (4).

In a number of jurisdictions the doctrine is applicable if the peril, although not actually discovered, could have been discovered by the driver in the exercise of ordinary care,⁹⁸ at least where the

Negligence §§ 136-139, also 45 C.J. p 994 note 37-p 995 note 41.

96. Mo.—Hanks v. Anderson-Parks, Inc., App., 143 S.W.2d 314.

Duty to warn

Knowledge of truck approaching intersection by automobilist who had right of way did not relieve truck driver of duty under humanitarian rule to warn automobilist of peril, of which he was oblivious.—Crane v. Sirkin & Needles Moving Co., App., 85 S.W.2d 911, certiorari quashed 101 S.W.2d 50, 340 Mo. 211.

97. Ala.—Griffith Freight Lines v. Benson, 176 So. 370, 234 Ala. 613.

Cal.—Brown v. McCuan, 132 P.2d 838, 56 Cal.App.2d 35—Moeller v. Packard, 261 P. 315, 86 Cal.App. 459.

Conn.—Porto v. Consolidated Motor Lines, 169 A. 48, 117 Conn. 681.

Del.—Baker v. Reid, 57 A.2d 103.

Fla.—Ward v. City Fuel Co., 2 So.2d 586, 147 Fla. 320.

Iowa.—Ward v. Zerzanek, 289 N.W. 443, 227 Iowa 918—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27.

Ky.—Lyons v. Great Atlantic & Pacific Tea Co., 193 S.W.2d 450, 301 Ky. 827—Arthur v. Rose, 158 S.W. 2d 652, 289 Ky. 402—Howell v. Standard Oil Co., 28 S.W.2d 3, 234 Ky. 347—Peak v. Arnett, 26 S.W.2d 1035, 233 Ky. 756—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Rottman v. Beverly, 165 So. 153, 183 La. 947—Bailey v. Reggie, App., 22 So.2d 698—Thompson v. Dyer, App., 1 So.2d 433—Boissac v. Kleinpeter, App., 191 So. 157—Jones v. American Mut. Liability Ins. Co., App., 189 So. 169—Guillory v. Shaddock, App., 158 So. 681—Carter v. Carraway, 138 So. 143, 18 La.App. 249—Hayes v. Gunter Bros. Lumber Co., 129 So. 401, 14 La.App. 402—Hardee v. Nevers, 120 So. 227, 10 La.App. 537.

Md.—Jones v. Dickerson, 41 A.2d 492, 184 Md. 499.

Mo.—Duckworth v. Dent, 142 S.W.2d 85, 846 Mo. 518—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517—Stitzell v. Arthur Morgan Trucking Co., App., 118 S.W.2d 49—White v. Missouri Motors Distributing Co., 47 S.W.2d 245, 226 Mo.App. 453.

N.Y.—Maranta v. Wenzelberg, 272 N.

Y.S. 710, 241 App.Div. 420, affirmed 196 N.E. 554, 267 N.Y. 510.

Ohio.—Morris v. Bloomgren, 187 N.E. 2, 127 Ohio App. 147, 89 A.L.R. 831.

Tex.—Parks v. Airline Motor Coach- es, 193 S.W.2d 967, 145 Tex. 44.

Wyo.—Rienecker v. Lampman, 96 P. 2d 561, 55 Wyo. 159—Jackson v. W. A. Norris, Inc., 93 P.2d 498, 54 Wyo. 403—O'Malley v. Eagan, 2 P.2d 1063, 43 Wyo. 233, 77 A.L.R. 582, rehearing denied O'Malley v. Eagan, 5 P. 2d 276, 43 Wyo. 350.

42 C.J. p 1184 note 71.

Knowledge and appreciation of plaintiff's peril as essential to application of last clear chance doctrine generally see the C.J.S. title Negligence § 137, also 45 C.J. p 989 note 11-p 992 note 26

Duty on private property

Where defendant's trucks were engaged in hauling gravel from bins on private property where the only persons likely to be encountered were workmen familiar with the continuous movement of the trucks which had to be backed into a narrow space under the bins, the truck drivers were not under a duty to maintain constant lookout, and where truck driver failed to see workman who suddenly jumped into path of the truck, recovery for injuries sustained could not be had under humanitarian doctrine.—Partney v. Agers, 187 S.W.2d 743, 238 Mo.App. 764.

Motorist as insurer of safety

The duty to exercise care to discover a pedestrian under the last clear chance doctrine does not make motorist at a street intersection an absolute insurer of safety of pedestrians regardless of contributory negligence of such pedestrian.—Payne's Adm'r v. Stone, 187 S.W.2d 267, 299 Ky. 704.

98. U.S.—Cheek v. Thompson, 28 F. Supp. 391, affirmed, C.C.A., 140 F. 2d 186.

Ariz.—Casey v. Marshall, 168 P.2d 240, 64 Ariz. 232, rehearing denied 169 P.2d 84, 64 Ariz. 260.

Del.—Baker v. Reid, 57 A.2d 103.

D.C.—Boase v. Windridge & Handy, 102 F.2d 628, 70 App.D.C. 24.

Fla.—Merchants' Transp. Co. v. Daniel, 149 So. 401, 109 Fla. 496.

Ky.—Weintraub v. Cincinnati, N. & C. Ry. Co., 184 S.W.2d 345, 299 Ky.

114—Heskamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky. 618—Pedigo v. Osborne, 129 S.W.2d 996, 279 Ky. 85—Dixon v. Stringer, 126 S.W.2d 448, 277 Ky. 347—Brad- en's Adm'r v. Liston, 79 S.W.2d 241, 258 Ky. 44.

La.—Hanson v. Great American In- demnity Co., App., 33 So.2d 549—Bernstein v. Cathey & Carrell Truck Lines, App., 32 So.2d 403—Paquet v. Renken, App., 30 So.2d 218—Gauthier v. Foote, App., 12 So.2d 9—Bouillon v. Bonin, App., 2 So.2d 535, followed in Mott v. Bonin, 2 So.2d 541—Rutter v. Nor- man, App., 189 So. 609—Jones v. American Mut. Liability Ins. Co., App., 189 So. 169—Hantel v. Serv- ice Drayage Co., App., 177 So. 425—Iglesias v. Campbell, App., 175 So. 145—Harlow v. Owners' Auto- mobile Ins. Co. of New Orleans, App., 160 So. 169—Moreau v. Southern Bell Telephone & Tele- graph Co., App., 158 So. 412—Lake v. Employers' Liability Assur. Cor- poration, App., 152 So. 600—Abel v. Gulf Refining Co., App., 143 So. 82—Wyble v. Putfork, App., 141 So. 776—Guillot v. Baton Rouge Yel- low Cab Co., 138 So. 219, 18 La. App. 202—Guinn v. Kemp, 136 So. 764, 18 La.App. 3—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564—Abate v. Hirdes, 121 So. 775, 9 La.App. 688—Baader v. Driverless Cars, 120 So. 515, 10 La.App. 310.

Mo.—Bowman v. Standard Oil Co. of Indiana, 169 S.W.2d 384, 350 Mo. 958—Fitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—Smithers v. Barker, 111 S.W.2d 47, 341 Mo. 1017—Schulz v. Smercina, 1 S.W. 2d 113, 318 Mo. 486—Kimbrough v. Chervitz, App., 180 S.W.2d 772, reversed on other grounds 186 S. W.2d 461, 353 Mo. 1154.

Vt.—Brooks v. Holmes, 35 A.2d 374, 113 Vt. 456.

Va.—Yellow Cab Corporation of Abingdon v. Henderson, 16 S.E.2d 389, 178 Va. 207—Crawford v. Hite, 10 S.E.2d 561, 176 Va. 69—State of Maryland, for Use of Joynes v. Coard, 9 S.E.2d 454, 175 Va. 571—Bennett v. Spencer, 189 S.E. 169, 167 Va. 268—Kinsey v. Brugh, 161 S.E. 41, 157 Va. 407.

driver was under a specific obligation to look out for other persons or vehicles.⁹⁹ In order to bring a situation within the operation of this rule, it is necessary that the driver became, or in the exercise of ordinary care ought to have become, aware not only of the position of peril of the person injured, but also that he either reasonably could not escape from it, or apparently would not avail himself of opportunities open to him for so doing.¹ The driver's duty to act has been held to arise when the injured person approached so near the ultimate point

of collision that it was, or reasonably should have been, apparent that he either could not, or would not, stop or otherwise save himself before coming into the driver's path.²

In some jurisdictions, however, the doctrine is applicable only where defendant had actual knowledge that the person injured was in a position of peril from which he could not extricate himself;³ and in such jurisdictions defendant may not be held liable on the theory that he would have discovered the peril but for remissness on his part.⁴ Under

W.Va.—Smith v. Gould, 159 S.E. 53, 110 W.Va. 579, 91 A.L.R. 28. 42 C.J. p 1182 note 62.

"Apparent peril" doctrine

La.—Thompson v. Dyer, App., 1 So. 2d 433—Fontenot v. Freudenstein, App., 199 So. 677.

Apparent negligence

Where plaintiff's negligence is so apparent as to apprise defendant of the danger, the doctrine applies.—Keltner v. Patton, 185 N.E. 270, 204 Ind. 550.

Discoverable peril comes within doctrine.—Robinson v. O'Shanksy, Mo.App., 96 S.W.2d 895.

Defendant must act on reasonable appearances

Mo.—Branson v. Abernathy Furniture Co., 130 S.W.2d 562, 344 Mo. 1171—Melenson v. Howell, 130 S.W.2d 555, 344 Mo. 1137.

Guest occupant of vehicle

Whether driver of truck involved in intersectional collision with automobile saw or could have seen occupants of automobile was immaterial as respects liability under humanitarian negligence doctrine for injuries sustained by guest occupant of automobile.—Teague v. Plaza Exp. Co., 205 S.W.2d 563, 356 Mo. 1186.

Right of way as factor

(1) In action for injuries received when defendants' truck struck automobile in which plaintiff was a guest, question of which vehicle had right of way was circumstance to be considered on issue of time when defendants' driver was properly to be charged with knowledge of plaintiff's peril, until which time he was not obligated to have taken appropriate steps to avoid collision.—Dean v. Mocer, Mo.App., 87 S.W.2d 218.

(2) A motorist proceeding on favorable traffic light after having looked in both directions before entering intersection and failing to see approaching bicyclist could not be charged with having constructively seen bicyclist entering intersection in violation of traffic light within sufficient time to have avoided accident, and hence was not liable for death of bicyclist under last clear

chance doctrine.—Clark v. De Beer, La.App., 188 So. 517.

99. U.S.—Arnold v. Owens, C.C.A. N.C., 78 F.2d 495.

La.—Jackson v. Cook, 181 So. 195, 189 La. 860—Rottman v. Beverly, 165 So. 153, 183 La. 947—Hanson v. Great American Indemnity Co., App., 33 So.2d 549.

Duty to keep lookout

Motorist whose automobile struck pedestrian who stepped into the street beyond a parked automobile was required to keep a lookout under the humanitarian rule.—Shields v. Keller, 153 S.W.2d 60, 348 Mo. 326.

Persons using private driveway

In action for death of trashman struck by automobile being backed out of driveway, use of the driveway once each month by the trashman and sporadic use by delivery men did not constitute such public use as to invoke extended humanitarian rule as to discoverable peril.—State ex rel. Brosnahan v. Shain, 126 S.W.2d 1193, 344 Mo. 404.

1. Del.—Baker v. Reid, 57 A.2d 103. Kan.—Anthony v. Costello Motor Co., 88 P.2d 1025, 149 Kan. 690.

La.—Thompson v. Dyer, App., 1 So. 2d 433.

42 C.J. p 1182 note 63.

Knowledge of obliviousness to peril

(1) In collision case, where plaintiff drove automobile into intersection without noticing stop sign, there must have been something in plaintiff's actions or manner to indicate to driver of defendant's truck that plaintiff was oblivious to the stop sign, in order to bring case within humanitarian rule.—Hanks v. Anderson-Parks, Inc., Mo.App., 143 S.W.2d 314.

(2) In order to be held to have seen what he should have seen, it must appear that there was something about the actions and conduct of the person injured to indicate to the motorist that the person injured was unaware of the danger and would for that reason be unlikely to change his position.—Thompson v. Dyer, La.App., 1 So.2d 433—Fontenot v. Freudenstein, La. App., 199 So. 677.

2. Mo.—Teague v. Plaza Exp. Co., 190 S.W.2d 254, 354 Mo. 582—Kasperski v. Rainey, App., 135 S.W.2d 11—Gerran v. Minor, App., 192 S.W.2d 57—Crawford v. Byers Transp. Co., App., 186 S.W.2d 756—Housley v. Berberich Delivery, App., 87 S.W.2d 209.

3. Cal.—Johnson v. City of Santa Monica, 66 P.2d 433, 8 Cal.2d 473—Johnson v. Southwestern Engineering Co., 107 P.2d 417, 41 Cal. App.2d 623—Akoboff v. Dusenbury, 106 P.2d 33, 41 Cal.App.2d 173—Yates v. Moroti, 8 P.2d 519, 120 Cal.App. 710—Lorry v. Englander Drayage & Warehouse Co., 291 P. 467, 108 Cal.App. 116—Giovannoni v. Union Ice Co., 291 P. 461, 108 Cal.App. 190—Sichterman v. R. M. Hollingshead Co., 271 P. 372, 94 Cal.App. 486, rehearing denied 271 P. 1111, 94 Cal.App. 486—Sharkey v. Sheets, 261 P. 1049, 87 Cal.App. 99—Glorgetti v. Wollaston, 257 P. 109, 83 Cal.App. 358.

Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44—Ruggles v. John Deere Plow Co., Civ.App., 146 S.W.2d 456, error refused—Surkey v. Smith, Civ. App., 136 S.W.2d 893, error refused—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed—Wichita Coca Cola Bottling Co. v. Levine, Civ.App., 68 S.W.2d 310.

Doctrine of discovered peril means peril that is actually discovered and not peril that might be discovered.—Sylvester v. U-Drive-Em System, 90 S.W.2d 232, 192 Ark. 75.

Realization of peril

Under last clear chance doctrine, for knowledge of plaintiff's peril to be imputed to motorist it must appear that circumstances were such that reasonable man would realize peril caused by unawareness.—Brown v. McCuan, 132 P.2d 838, 56 Cal.App.2d 35.

Child crossing away from intersection

Cal.—Akoboff v. Dusenbury, 106 P.2d 33, 41 Cal.App.2d 173.

4. Cal.—Berton v. Cochran, 185 P.2d 349, 81 Cal.App.2d 776—Dalley v.

this rule, the fact that the injured person was unaware of his peril does not eliminate the requirement of actual knowledge.⁵

In some jurisdictions a driver of a motor vehicle is required to exercise the highest degree of care to discover a pedestrian in peril or danger. In these jurisdictions the duty to use the means at hand to avoid injuring the pedestrian arises when the motorist sees or in the exercise of such care should see the danger into which the pedestrian is entering,⁶ and his apparent obliviousness to the peril,⁷ and this is true regardless of whether or not the peril was created by the negligence of the pedestrian.⁸

Where a pedestrian is in a position of safety just before the accident, the driver's duty to take care to avoid injuring the pedestrian does not arise until he is in a position to discover by the exercise of the requisite care that the pedestrian intended

to step out from his position of safety.⁹ When a motorist driving on a highway sees a pedestrian walking toward the highway, the driver may assume, in the absence of knowledge to the contrary, that the pedestrian will not negligently continue on into the path of the vehicle.¹⁰

§ 493(4). Ability and Opportunity to Avoid Injury

In order that the doctrine of last clear chance may apply, it must appear that the driver had an opportunity to avoid the accident, with safety to himself and others.

In order that the doctrine of last clear chance may apply, it must appear that the driver had an opportunity to avoid the accident,¹¹ with safety to himself and others.¹² A mere showing that there was a possibility that defendant could have avoided the injury is insufficient to justify recovery under the doctrine.¹³ Accordingly, in order that the doc-

Williams, 166 P.2d 595, 73 Cal.App. 2d 427.

Tex.—Surkey v. Smith, Civ.App., 136 S.W.2d 893, error refused—Wichita Coca Cola Bottling Co. v. Levine, Civ.App., 68 S.W.2d 310, error refused.

5. Cal.—Johnson v. Southwestern Engineering Co., 107 P.2d 417, 41 Cal.App.2d 623.

6. Mo.—Wright v. Osborn, 201 S.W. 2d 935, 356 Mo. 382—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26—Kirkham v. Jenkins Music Co., 104 S.W.2d 234, 340 Mo. 911—Borgstede v. Waldbauer, 88 S.W.2d 373, 337 Mo. 1205—Iman v. Walter Freund Bread Co., 58 S.W.2d 477, 332 Mo. 461—Martin v. Fehse, 55 S.W.2d 440, 331 Mo. 861—Duckworth v. Dent, App., 135 S.W.2d 28, reversed on other grounds 142 S.W.2d 85, 346 Mo. 518—Taylor v. Kelder, 88 S.W.2d 436, 229 Mo.App. 1117.

Persons approaching danger

Motorist on city street must take note not only of persons who are actually in pathway of danger, but of those who are approaching and apparently about to go into danger, and to act on such appearances.—Oliver v. Morgan, Mo., 73 S.W.2d 993.

7. Mo.—Putnam v. Unionville Granite Works, App., 122 S.W.2d 389—Taylor v. Kelder, 88 S.W.2d 436, 229 Mo.App. 1117.

8. Mo.—Borgstede v. Waldbauer, 88 S.W.2d 373, 337 Mo. 1205.

9. La.—Coleman v. Terrebonne Ice Co., App., 8 So.2d 813.

Mo.—Kirkham v. Jenkins Music Co., 104 S.W.2d 234, 340 Mo. 911.

Doctrine held inapplicable where pedestrian, in position of compara-

tive safety, knows of defendant's approach and suddenly runs into path of vehicle.—Colwell v. Nygaard, 112 P.2d 838, 8 Wash.2d 462.

Vehicle turning corner

Where driver observed pedestrian standing in place of safety when he commenced making right turn, driver was not liable under the last clear chance doctrine for injuries sustained by pedestrian who without looking to left started across street and collided with side of bus at a point opposite and to rear of driver's seat.—Cooper v. Baton Rouge Bus Co., La.App., 4 So.2d 619.

10. Md.—Legum v. State, for Use of Moran, 173 A. 565, 167 Md. 339. Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44.

Wash.—Colwell v. Nygaard, 112 P.2d 838, 8 Wash.2d 462.

11. La.—Gulf Ins. Co. v. Robins, App., 15 So.2d 552—Daly v. Employers Liability Assur. Corporation, Limited, of London, England, App., 15 So.2d 396—Gauthier v. Foote, App., 12 So.2d 9—Thrash v. Continental Casualty Co., App., 6 So.2d 75—Murphy v. City of Alexandria, App., 2 So.2d 103—Roberts v. Duracher, App., 196 So. 576—Jones v. American Mut. Liability Ins. Co., App., 185 So. 509, annulled on other grounds 189 So. 169—Rodriguez v. Abadie, App., 168 So. 515—Moreau v. Garrington, App., 166 So. 660—Culotta v. Teche Lines, App., 163 So. 552—James v. Fidelity & Casualty Co. of New York, App., 163 So. 421—Burthe v. Lee, App., 152 So. 100, rehearing refused 152 So. 589—Pigott v. Bates, App., 143 So. 535—Probst v. Smith Hardware Co., App., 141 So. 508, followed in Maitre v.

Smith Hardware Co., 141 So. 512, and Probst v. Smith Hardware Co., 141 So. 512—Hayes v. Gunter Bros. Lumber Co., 129 So. 401, 14 La. App. 402—Walker v. Hunt, 128 So. 550, 13 La. App. 524—Neville v. Postal Telegraph Cable Co., 126 So. 720, 13 La. App. 76—Williams v. Lykes Bros. S. S. Co., 125 So. 153, 12 La. App. 127—Bass v. Means, 124 So. 553, 12 La. App. 260—Buckley v. Featherstone Garage, 123 So. 446, 11 La. App. 564—Bazile v. J. F. Landry & Co., 122 So. 901, 10 La. App. 747.

Neb.—Moses v. Mitchell, 298 N.W. 338, 139 Neb. 606—Diehm v. Dargaczewski, 280 N.W. 898, 135 Neb. 251—Nielsen v. Yellow Cab & Baggage Co., 265 N.W. 420, 130 Neb. 457.

N.H.—Grealish v. Odell, 193 A. 219, 89 N.H. 130.

Where neither driver could extricate himself from the danger created by their combined negligence in operating their vehicles, the doctrine was inapplicable to permit recovery.—Baker v. Travelers Ins. Co., La. App., 13 So.2d 768.

12. D.C.—Hochelsen v. Smith, 158 F.2d 100, 81 U.S.App.D.C. 323.

Kan.—Anthony v. Costello Motor Co., 88 P.2d 1025, 149 Kan. 690.

Mo.—Spoeneman v. Uhr, 60 S.W.2d 9, 332 Mo. 821.

13. U.S.—McElwee v. Curtiss-Wright Corp., D.C.Mo., 70 F.Supp. 97.

Cal.—Ex parte Martin, 185 P.2d 644, 82 Cal.App.2d 143—Dalley v. Williams, 166 P.2d 595, 73 Cal.App.2d 427—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554.

Mo.—Power v. Frischer, 87 S.W.2d 692, 229 Mo.App. 1056.

trine may be applicable, it is essential that defendant became, or should have become, aware of the injured person's peril at a time when he could have avoided the injury.¹⁴ The doctrine may not be applied to permit recovery where the driver, by the

exercise of requisite care, could not have become aware that the person injured was in a position of peril in time to make any effort to avoid injuring him,¹⁵ or, in those jurisdictions in which the application of the rule is limited to cases where the driv-

Wash.—Everest v. Riecken, 193 P.2d 353, 356.

W.Va.—Juergens v. Front, 163 S.E. 618, 111 W.Va. 670.

Element of doubt

It must appear that the situation was such, when relative positions of parties were changing with fair rapidity, that the element of doubt as to whether one of them had an opportunity to avoid accident, and therefore a duty to do so, must not be great.—Graham v. Johnson, 172 P.2d 665, 109 Utah 365.

14. U.S.—Schoen v. Western Union Telegraph Co., C.C.A.Fla., 135 F. 2d 967—Arnold v. Owens, C.C.A. N.C., 78 F.2d 495.

Cal.—Berton v. Cochran, 185 P.2d 349, 81 Cal.App.2d 776—Folger v. Richfield Oil Corp., 182 P.2d 337, 80 Cal.App.2d 655—Johnson v. Southwestern Engineering Co., 107 P.2d 417, 41 Cal.App.2d 623—Shaw v. Robertson, 48 P.2d 128, 8 Cal. App.2d 520—Magarian v. Moser, 42 P.2d 385, 5 Cal.App.2d 208—Lorry v. Englander Drayage & Warehouse Co., 291 P. 467, 108 Cal.App. 116.

Conn.—Rowe v. English, 160 A. 897, 115 Conn. 179.

Iowa.—Ward v. Zerzanek, 289 N.W. 443, 227 Iowa 918.

Ky.—Arnold v. Sauer, 202 S.W.2d 1001, 305 Ky. 48.

La.—Hanson v. Great American Indemnity Co., App., 33 So.2d 549—Harrell v. Goodwin, App., 32 So.2d 758—Bechtold v. Commercial Standard Ins. Co., App., 31 So.2d 894—Paquet v. Renken, App., 30 So.2d 218—Bailey v. Reggle, App., 22 So.2d 698—Hebert v. Melbaum, App., 19 So.2d 629, affirmed 24 So. 2d 297, 209 La. 156—Dean v. Allied Underwriters, App., 11 So.2d 93—Solomon v. Davis Bus Line, App., 1 So.2d 816—Clark v. De Beer, App., 188 So. 517—Lake v. Employers' Liability Assur. Corporation, App., 152 So. 600—Thomas v. Natural Gas Producing Co. of Louisiana, 121 So. 649, 9 La.App. 680.

Md.—Caple v. Amos, 28 A.2d 566, 181 Md. 56.

Mich.—Morrison v. Hall, 22 N.W.2d 838, 314 Mich. 522—Boerema v. Cook, 239 N.W. 314, 256 Mich. 266.

Mo.—Teague v. Plaza Exp. Co., 205 S.W.2d 563, 356 Mo. 1186—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26—Rafferty v. Levy, App., 153 S.W.2d 765—Hanks v. Anderson-Parks, Inc., App., 143 S. W.2d 314—Power v. Frischer, 87

S.W.2d 692, 229 Mo.App. 1056—Housley v. Berberich Delivery, App., 87 S.W.2d 209.

Neb.—Moses v. Mitchell, 298 N.W. 338, 139 Neb. 606.

N.C.—Van Dyke v. Atlantic Greyhound Corporation, 10 S.E.2d 727, 218 N.C. 283.

R.I.—Correia v. Cambra, 155 A. 667, 51 R.I. 472.

Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44—Adams v. Stefferman, Civ. App., 197 S.W.2d 506—Kimble v. Comet Motor Freight Lines, Civ.App., 169 S.W.2d 760—Ruggles v. John Deere Plow Co., Civ.App., 146 S.W. 2d 456, error refused—Schumacher v. Missouri Pac. Transp. Co., Civ. App., 116 S.W.2d 1136, error dismissed.

Utah.—Hickok v. Skinner, 190 P.2d 514—Graham v. Johnson, 172 P.2d 665, 109 Utah 365.

Va.—Kinsey v. Brugh, 161 S.E. 41, 157 Va. 407.

Wash.—Erickson v. Barnes, 107 P. 2d 348, 6 Wash.2d 251—Warner v. Keebler, 94 P.2d 175, 200 Wash. 608—Steen v. Hedstrom, 63 P.2d 507, 189 Wash. 75.

W.Va.—Lynch v. Alderton, 20 S.E.2d 657, 124 W.Va. 446—Milby v. Diggs, 189 S.E. 107, 118 W.Va. 56—Wyo.—O'Malley v. Eagan, 2 P.2d 1063, 43 Wyo. 233, 77 A.L.R. 582, rehearing denied—O'Malley v. Eagan, 5 P.2d 276, 43 Wyo. 350.

Doctrine presupposes time for action
Neb.—Moses v. Mitchell, 298 N.W. 338, 139 Neb. 606—Diehm v. Dargaczewski, 280 N.W. 898, 135 Neb. 251.

Last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to act effectually on the impulse to save another from injury.

U.S.—Schoen v. Western Union Telegraph Co., C.C.A.Fla., 135 F.2d 967.

Fla.—Merchants' Transp. Co. v. Daniel, 149 So. 401, 109 Fla. 496.

Wash.—Erickson v. Barnes, 107 P.2d 348, 6 Wash.2d 251—Steen v. Hedstrom, 63 P.2d 507, 189 Wash. 75—W.Va.—Vaughan v. Oates, 37 S.E.2d 479, 128 W.Va. 554—Lynch v. Alderton, 20 S.E.2d 657, 124 W.Va. 446—Milby v. Diggs, 189 S.E. 107, 118 W.Va. 56—Juergens v. Front, 163 S.E. 618, 111 W.Va. 670.

Time is computed from the moment defendant became aware, or should have become aware, of plaintiff's peril.—Vaughan v. Oates, 37 S. E.2d 479, 128 W.Va. 554.

Splitting of seconds

The doctrine of last clear chance does not require a splitting of seconds when emergencies arise, since the doctrine presupposes time for effective action and is not applicable where the emergency is so sudden that there is no time to avoid the accident.

Cal.—Berton v. Cochran, 185 P.2d 349, 81 Cal.App.2d 776.

Ky.—Payne's Adm'r v. Stone, 187 S. W.2d 267, 299 Ky. 704.

Fast moving vehicle

A motorist, traveling at forty miles per hour when but forty feet from point of collision at highway intersection with automobile which spurted up from approximate distance of twenty feet from intersection on such motorist's right into pathway of his automobile, was held not negligent under humanitarian rule in failing thereafter to sound warning or swerve to right and thus avert collision.—Lowry v. Mohn, Mo., 195 S.W.2d 652.

If pedestrian stepped from safe place in front of or into side of moving vehicle and there was not time after discovery for driver to avoid collision, pedestrian could not recover, the doctrine being inapplicable.

Ala.—Alabama Produce Co. v. Smith, 141 So. 674, 224 Ala. 688.

Cal.—Ralston v. Hewitson, 185 P.2d 644, 82 Cal.App.2d 143.

Mo.—Chastain v. Winton, 152 S.W. 2d 165, 347 Mo. 1211.

Va.—Willard Stores v. Cornnell, 23 S.E.2d 761, 181 Va. 143.

15. Ky.—Peak v. Arnett, 26 S.W.2d 1035, 233 Ky. 756—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Central Surety & Ins. Corp. v. Van Trier, App., 35 So.2d 275—Sanders v. Cascio, App., 24 So.2d 884.

Md.—Caple v. Amoss, 28 A.2d 566, 181 Md. 56—R. & L. Transfer Co. v. State, 153 A. 87, 160 Md. 222.

Mich.—Martin v. Department of St. Rys. of City of Detroit, 22 N.W.2d 78, 314 Mich. 77.

Mo.—Hanks v. Anderson-Parks, Inc., App., 143 S.W.2d 314—Putnam v. Unionville Granite Works, App., 122 S.W.2d 389.

R.I.—Lane v. Beede, 171 A. 371, 54 R.I. 168.

Tex.—Burton v. Billingsly, Civ.App., 129 S.W.2d 439, error refused.

Utah.—Graham v. Johnson, 172 P. 2d 665, 109 Utah 365.

er has actual knowledge of the danger, where the driver did not actually discover the injured person's position of peril in time to do so.¹⁶ Where the injured person does not come into his position of peril until substantially the instant of the accident, the doctrine is inapplicable.¹⁷

The doctrine under consideration is usually inapplicable where the injured person comes to an intersection last and runs into the side of defendant's vehicle, since, in such case, in the absence of exceptional circumstances, the facts show that the injured person was not in a position of imminent peril soon enough for defendant to act effectively,¹⁸ although the doctrine has been held to apply where plaintiff was on a through highway and defendant had slowed down his vehicle leading plain-

tiff to believe that defendant was going to obey a stop sign.¹⁹

§ 493(5). Care Required after Peril Is, or Should Be, Discovered

Under the last clear chance doctrine a motorist, after he becomes aware of the peril of another, must exercise reasonable care to avoid injuring such person.

Liability of the motorist under the last clear chance or humanitarian doctrine is generally determined from what he does or fails to do at the time and after the peril raises,²⁰ and after he discovers, or should discover, such peril.²¹ The doctrine is inapplicable if there is no showing of negligence on the part of defendant after becoming aware of the danger;²² negligence of the motor-

W.Va.—Vaughan v. Oates, 37 S.E.2d 479, 128 W.Va. 554.

Wyo.—Rienecker v. Lampman, 96 P. 2d 561, 55 Wyo. 159—Jackson v. W. A. Norris, Inc., 93 P.2d 498, 54 Wyo. 403.

42 C.J. p 1184 note 71.

"A clear chance to avoid a collision involves the element of sufficient time to appreciate the peril of the party unable to extricate himself and to take necessary steps to avoid injuring him."—Everest v. Riecken, Wash., 193 P.2d 353, 356.

Failure to stop vehicle

Doctrine is not applicable where there is no evidence that driver saw peril in which plaintiff had placed himself at a time when he could have stopped his vehicle.—Thomasson v. Burlington Transp. Co., C.C.A. Colo., 128 F.2d 355.

Pedestrian thrown in path of vehicle

Last clear chance doctrine was inapplicable, notwithstanding driver of defendant's truck saw pedestrian step into path of another truck when forty or fifty feet distant, since defendant's driver was not bound to anticipate that any accident would result in pedestrian being thrown into his path by other truck and evidence showed that defendant's driver did everything possible to avoid accident.—Maranta v. Wenzelberg, 272 N.Y.S. 710, 241 App.Div. 420, affirmed 196 N.E. 554, 267 N.Y. 510.

Sleeping driver

Doctrine is inapplicable where dangerous predicament which injured driver was in was due solely to fact that he had fallen asleep and was unaware of situation, and defendant motorist had no knowledge that such was the fact, and had no opportunity to avoid collision.—Johnson v. Southwestern Engineering Co., 107 P.2d 417, 41 Cal. App.2d 623.

Unlighted bicycle

In action for injuries sustained by

boy when his unlighted bicycle was struck at night by approaching automobile driven on wrong side of street by motorist who did not see the bicycle, doctrine was not applicable where boy's position of peril from which he could not, with reasonable care, have extricated himself, existed only during the instant he passed a parked automobile.—Everest v. Riecken, Wash., 193 P.2d 353.

16. Cal.—Johnson v. City of Santa Monica, 66 P.2d 433, 8 Cal.2d 473—Underhill v. Peterson, 293 P. 861, 110 Cal.App. 221.

Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44.

42 C.J. p 1185 note 73.

17. Conn.—Rix v. Stone, 163 A. 258, 115 Conn. 658—Correnti v. Catino, 160 A. 892, 115 Conn. 213.

Mich.—Sloan v. Ambrose, 1 N.W.2d 505, 300 Mich. 188.

Tex.—Miller v. Rhodius, Civ.App., 153 S.W.2d 491, error refused.

Where both pedestrian and driver of automobile proceed on their course to moment of collision, and pedestrian does not come into position of peril from automobile until substantially the instant he is hit, the doctrine has no application.—Sherman v. William M. Ryan & Sons, 13 A.2d 134, 128 Conn. 574—Redgate v. Doyle, 195 A. 196, 123 Conn. 291—Puza v. Hamway, 193 A. 776, 123 Conn. 205—Lanfear v. Putnam, 161 A. 242, 115 Conn. 267, overruling McLaughlin v. Schreiber, 136 A. 467, 105 Conn. 610.

Collision

If both motorists proceed in their course to the moment of collision and plaintiff motorist does not come into the position of peril until substantially the instant he is hit, the doctrine does not apply.—Germon v. Noe, 27 A.2d 378, 129 Conn. 333.

18. Mo.—Cameron v. Howerton, 174 S.W.2d 206.

If pedestrian ran into side of vehicle, presence of vehicle was but a condition and not a cause of pedestrian's death, precluding application of last clear chance doctrine.—Braden's Adm'r v. Liston, 79 S.W.2d 241, 258 Ky. 44.

19. Mo.—Cameron v. Howerton, 174 S.W.2d 206.

20. Colo.—Woods v. Siegrist, 149 P. 2d 241, 112 Colo. 257.

Ky.—Hewitt's Adm'r v. Central Truckaway System, 194 S.W.2d 999, 302 Ky. 459.

Mo.—Taylor v. Superior Oxy-Acetylene Co., 73 S.W.2d 186, 335 Mo. 379—Power v. Frischer, 87 S.W.2d 692, 229 Mo.App. 1056.

Care required under doctrine generally on discovery of plaintiff's peril see the C.J.S. title Negligence § 138, also 45 C.J. p 992 note 28—p 993 note 34.

Driver's negligent failure to use last clear chance to avoid injury justifies recovery by injured person.—Boynnton v. Richfield Oil Co., 4 P.2d 614, 117 Cal.App. 699.

21. Ky.—Braden's Adm'r v. Liston, 79 S.W.2d 241, 258 Ky. 44.

22. Iowa.—Volles v. Hunt, 240 N.W. 703, 213 Iowa 1234.

Ky.—Finnegan v. Floyd Garage & Auto Livery Co., 283 S.W. 402, 214 Ky. 416.

La.—Hebert v. Meibaum, 24 So.2d 297, 209 La. 156—Bailey v. Reggie, App., 22 So.2d 698—Daly v. Employers Liability Assur. Corporation, Limited, of London, England, App., 15 So.2d 396—Litton v. Richardson, App., 188 So. 439, followed in 188 So. 442—Rodriguez v. Abadie, App., 168 So. 515.

Va.—McGowan v. Tayman, 132 S.E. 316, 144 Va. 358.

Stopping at side of road

Where automobile skidded into

ist in the operation of the vehicle which antecedes the peril which arose is of no concern on the issue of the application of the doctrine.²³

In the absence of a statute imposing on the driver a duty to exercise a higher degree of care,²⁴ the rule does not apply if he is unable by the exercise of ordinary care to avoid the injury after he be-

comes aware, or in the exercise of ordinary care could have become aware, of the injured person's peril.²⁵

In general, the doctrine requires the motorist to follow his discovery of the peril by doing all an ordinarily prudent man would do to avoid the accident in the exercise of the requisite care.²⁶ While

truck about time truck came to a stop on extreme right of its side of road with its right wheels off the pavement, the presence of truck was but a condition and not the cause of deaths of automobile occupants so that last clear chance doctrine was inapplicable.—Hewitt's Adm'r v. Central Truckaway System, 194 S.W.2d 999, 302 Ky. 459.

23. U.S.—McElwee v. Curtiss-Wright Corp., D.C.Mo., 70 F.Supp. 97.

Ky.—Hewitt's Adm'r v. Central Truckaway System, 194 S.W.2d 999, 302 Ky. 459—Braden's Adm'r v. Liston, 79 S.W.2d 241, 258 Ky. 44.

Mo.—Lowry v. Mohn, 195 S.W.2d 652—Teague v. Plaza Express Co., 190 S.W.2d 254, 354 Mo. 582—Kirkham v. Jenkins Music Co., 104 S.W.2d 234, 340 Mo. 911—Pitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—State ex rel. Sirkin & Needles Moving Co. v. Hostetter, 101 S.W.2d 50, 340 Mo. 211—White v. Missouri Motor Distributing Co., 47 S.W.2d 245, 226 Mo.App. 453—Stanton v. Jones, App., 19 S.W.2d 507.

Primary negligence

The humanitarian negligence doctrine is inapplicable where the only negligence involved is the primary negligence of the motorist.—State ex rel. Brosnahan v. Shain, 126 S.W.2d 1193, 344 Mo. 404.

Passenger in vehicle

Doctrine of subsequent negligence in failing to apply brakes immediately after striking loose rock was inapplicable in passenger's action against driver for injuries; such negligence was part of the original negligence.—McDermott v. Sibert, 119 So. 681, 218 Ala. 670.

24. Highest degree of care

In Missouri, under the statutes and the humanitarian doctrine, a motorist is required to exercise the highest degree of care consistent with safety to himself and others.—Blank v. Snider, 111 S.W.2d 163, 342 Mo. 26—Gude v. Weick Bros. Undertaking Co., 16 S.W.2d 59, 322 Mo. 778—Gerran v. Minor, Mo.App., 192 S.W.2d 57—Dickens v. Heitzman, Mo. App., 141 S.W.2d 183—Johnson v. Scheerer, Mo.App., 109 S.W.2d 1231—Gavin v. Forrest, Mo.App., 72 S.W.2d 177—Stelmach v. Saul, Mo.App., 50 S.W.2d 721—Roark v. Stone, 30 S.W.

2d 647, 224 Mo.App. 554—Niehaus v. Schultheis, Mo App., 17 S.W.2d 603—Bruce v. East Side Packing Co., Mo. App., 6 S.W.2d 986—Hults v. Miller, Mo.App., 299 S.W. 85—42 C.J. p 1184 note 69 [a].

25. U.S.—Schoen v. Western Union Telegraph Co., C.C.A.Fla., 135 F.2d 967.

Ala.—Freight Lines v. Benson, 176 So. 370, 234 Ala. 613.

Cal.—Johnson v. City of Santa Monica, 66 P.2d 433, 8 Cal.2d 473—Underhill v. Peterson, 293 P. 861, 110 Cal.App. 221—Moeller v. Packard, 261 P. 315, 86 Cal App. 459.

Ky.—Hewitt's Adm'r v. Central Truckaway System, 194 S.W.2d 999, 302 Ky. 459—Lyons v. Great Atlantic & Pacific Tea Co., 193 S.W.2d 450, 301 Ky. 827—Heskamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky. 618—Dixon v. Stringer, 126 S.W.2d 448, 277 Ky. 347—Bruden's Adm'r v. Liston, 79 S.W.2d 241, 258 Ky. 44.

La.—Webb v. Baton Rouge Bus Co., App., 15 So.2d 646—Kennedy v. Opdenweyer, 121 So. 636, 11 La. App. 532, rehearing denied 123 So. 906, 11 La App. 532.

Mich.—Szekeres v. Detroit Motorbus Co., 232 N.W. 700, 252 Mich. 46.

N.H.—Mack v. Hoyt, 55 A.2d 891, 94 N.H. 492—Lavigne v. Nelson, 18 A.2d 832, 91 N.H. 304.

R.I.—Gardiner v. Romano, 173 A. 84, 54 R.I. 348.

Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44—Kimble v. Comet Motor Freight Lines, Civ.App., 169 S.W.2d 760.

42 C.J. p 1184 note 70.

Reliance on care by plaintiff

(1) Operator of vehicle who sees pedestrian in apparent possession of faculties, with back turned to approaching vehicle or head bowed or turned away, in absence of other evidence of unconsciousness of peril, is not under duty of prevision under last clear chance doctrine; the operator may assume that a normal person in a situation requiring the exercise of prudence will use his faculties in time to prevent injury.—Willard Stores v. Cornell, 23 S.E.2d 761, 181 Va. 143—Green v. Ruffin, 125 S. E. 742, 141 Va. 628, rehearing denied 127 S.E. 486, 141 Va. 628.

(2) Driver of truck may presume that motorist at intersection will not

continue his approach until he arrives at the truck, where it is obvious that motorist can with the least care avoid the impact.—Folger v. Richfield Oil Corp., 182 P.2d 337, 80 Cal.App.2d 655.

(3) In the case of two vehicles approaching each other from opposite directions on a straight, unobstructed highway, one traveling in his proper lane and the other not, the motorist in the proper lane may assume that the other will extricate himself from the danger by swerving into the proper lane.—Erickson v. Barnes, 107 P.2d 348, 6 Wash.2d 251.

Remaining in low gear

Motorist, proceeding recklessly at excessive speed on foggy night, who collided with rear of truck making left turn at street intersection, could not invoke last clear chance doctrine on theory that truck driver could have cleared the intersection more quickly had he not continued in compound low gear, where truck driver knew that by proceeding in any higher gear up incline he would incur more likelihood of killing his motor.—Folger v. Richfield Oil Corp., 182 P.2d 337, 80 Cal.App.2d 655.

Ordinary care held exercised

Ky.—Hewitt's Adm'r v. Central Truckaway System, 194 S.W.2d 999, 302 Ky. 459.

La.—Littin v. Richardson, App., 188 So. 439, followed in 188 So. 442.

26. U.S.—Schoen v. Western Union Telegraph Co., C.C.A.Fla., 135 F.2d 967.

Fla.—Panama City Transit Co. v. Du Vernoy, 33 So.2d 48—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635.

Ind.—Keltner v. Patton, 185 N.E. 270, 204 Ind. 550.

Ky.—Short v. Robinson, 134 S.W.2d 594, 280 Ky. 707—Pedigo v. Osborne, 129 S.W.2d 996, 279 Ky. 85.

La.—Paquet v. Renken, App., 30 So. 2d 218—Stansbury v. Drillon, App., 2 So.2d 662—Bouillon v. Bonin, App., 2 So.2d 535, followed in Moty v. Bonin, 2 So.2d 541—Prevost v. Smith, App., 197 So. 905—Greer v. Ware, App., 187 So. 842—Williams v. Brown, App., 181 So. 679—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.

Miss.—Snyder v. Campbell, 110 So. 678, 145 Miss. 287, 49 A.L.R. 1402. Mo.—State ex rel. Grisham v. Allen, 124 S.W.2d 1080, 344 Mo. 66, man-

it cannot be said as a matter of law that a failure to use all means within the power of the motorist to check the vehicle is a failure to use ordinary care,²⁷ it has been held that the motorist must use all the means available or at his command to avoid the accident,²⁸ consistent with safety to himself and others,²⁹ either by stopping the vehicle, lowering its

speed, changing its course, or sounding an alarm.³⁰

The motorist must act in time for his action to be effective³¹ if he has the time and means to avoid the injury.³² He may not wait until the person in peril takes the last step into the path of the automobile, after which step it would be impossible for the driver to avert the injury.³³

date conformed to, App., 130 S.W. 2d 653—Iman v. Walter Freund Bread Co., 58 S.W.2d 477, 332 Mo. 461—Duckworth v. Dent, App., 135 S.W.2d 28, reversed on other grounds 142 S.W.2d 85, 346 Mo. 518. Pa.—Westcott v. Gelger, 92 Pa. Super. 80.

On failure to give right of way

(1) Even if pedestrian in attempting to cross street between intersections outside of a crosswalk failed to yield right of way to approaching automobile, motorist was not relieved from duty of exercising due care for safety of pedestrian.—Bays v. Clugston, 161 P.2d 953, 71 Cal. App.2d 55.

(2) Driver approaching intersection from right must use ordinary care not to injure driver of converging vehicle after becoming aware of latter's perilous situation from failure to yield right of way.—Morris v. Bloomgren, 187 N.E. 2, 127 Ohio App. 147, 89 A.L.R. 831.

(3) Plaintiffs could not recover for damages sustained in intersectional collision under doctrine of last clear chance, where driver of defendants' automobile did everything possible to avoid collision after discovering plaintiffs' peril, and plaintiffs' negligence in failing to yield right of way had not ceased at time of the collision.—Mancinelli v. Brown, 155 P.2d 497, 22 Wash.2d 299.

Faulty judgment

Fact that intersectional collision would not have occurred had driver of defendants' automobile swerved to right instead of to the left did not justify holding defendants liable for the accident; failure to use better judgment in such case is no basis for recovery.—Mancinelli v. Brown, supra.

Negligence after collision

Illegal act of girl in coasting on street where coasting was prohibited would not preclude recovery for her death from bus driver if evidence would warrant finding that death was caused by driver's negligence in

backing bus after girl's sled had collided with bus and driver had alighted and seen girl under front part of bus.—Rocha v. Alber, 18 N.E.2d 1018, 302 Mass. 155.

Observance of rule of road

Under humanitarian doctrine motorist was required to avoid a collision if possible, and was not entitled to insist upon rule of the road and blindly pursue his way as long as he remained to right of center of highway.—State ex rel. Grisham v. Allen, 124 S.W.2d 1080, 344 Mo. 66, mandate conformed to, App., 130 S.W.2d 653.

Wanton conduct

Recovery may be had if defendant's conduct was wanton and exhibited a reckless disregard for safety of deceased after observing his perilous position.—Pedlow v. Lipkens, 40 A.2d 426, 351 Pa. 259.

27. Iowa.—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27.

R.I.—Smith v. Hopkins, 131 A. 542.

28. Ky.—Braden's Adm'x v. Liston, 79 S.W.2d 241, 258 Ky. 44—Finnegan v. Floyd Garage & Auto Livery Co., 283 S.W. 402, 214 Ky. 416.

La.—Jackson v. Cook, 181 So. 195, 189 La. 860.

Mo.—Payne v. Reed, 59 S.W.2d 43, 332 Mo. 343—Vandenberg v. Snider, App., 83 S.W.2d 201.

Tex.—Schumacher v. Missouri Pac. Transp. Co. Civ.App., 116 S.W.2d 1136, error dismissed.

29. Mo.—Lowry v. Mohn, 195 S.W.2d 652—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326.

Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44.

Dangerous alternative course

Where, on discovery of peril, defendant applied brakes in attempt to stop his car instead of attempting a sharp turn which would have probably resulted in serious injury to defendant, defendant is not liable on the discovered peril theory.—Burton v. Billingsly, Tex.Civ.App., 129 S.W.2d 439, error refused.

30. Mo.—Pennington v. Weis, 184

S.W.2d 416, 353 Mo. 750—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26—Payne v. Reed, 59 S.W.2d 43, 332 Mo. 343—Martin v. Fehse, 55 S.W.2d 440, 331 Mo. 861—Hart v. Weber, 53 S.W.2d 914—Burke v. Pappas, 293 S.W. 142, 316 Mo. 1235—Hudlow v. Langerhans, 91 S.W.2d 629, 230 Mo.App. 1160—Taylor v. Kelder, 88 S.W.2d 436, 229 Mo. App. 1117.

Va.—Yellow Cab Corporation of Abingdon v. Henderson, 16 S.E.2d 389, 178 Va. 207.

Wash.—Gaskill v. Amadon, 38 P.2d 229, 179 Wash. 375.

Warning to pedestrian

Mo.—Althage v. People's Motor Bus Co. of St. Louis, 8 S.W.2d 924, 320 Mo. 598—Johnson v. Scheerer, App., 109 S.W.2d 1231—Bramblett v. Harlow, App., 75 S.W.2d 626.

Failure to stop after collision

Tex.—Younger Bros. v. Ross, Civ. App., 151 S.W.2d 621, error dismissed.

Injury from fright

In pedestrian's action for injuries resulting from a near collision with vehicle, fact that vehicle did not actually hit pedestrian, but merely passed so rapidly and so close to him that he was frightened and involuntarily threw out his hand in which he was holding a dinner bucket, thereby causing dinner bucket to hit vehicle and rebound against his eye, would not prevent recovery.—Chastain v. Winton, 152 S.W.2d 165, 347 Mo. 1211.

31. Mo.—Bowman v. Standard Oil Co. of Indiana, 169 S.W.2d 384, 350 Mo. 958—Branson v. Abernathy Furniture Co., 130 S.W.2d 562, 344 Mo. 1171—Melenson v. Howell, 130 S.W.2d 655, 344 Mo. 1137.

32. Mo.—Melenson v. Howell, supra.

33. Mo.—Martin v. Fehse, 55 S.W.2d 440, 331 Mo. 861—Burke v. Pappas, 293 S.W. 142, 316 Mo. 1235.

Reason for rule

To hold otherwise would render the humanitarian doctrine abortive and ineffectual.—Burke v. Pappas, supra.

J. ACTIONS

1. IN GENERAL

§ 494. Nature and Form

The nature and form of actions to recover for damages occasioned by a motor vehicle are controlled by the principles applicable to civil actions generally.

The nature and form of actions to recover for damages occasioned by a motor vehicle are controlled by the principles applicable to civil actions generally.³⁴ Under the general rules as to the distinction between the actions of trespass and of trespass on the case, in order to support an action of trespass the injury must be direct and immediate.³⁵ While it has been held that, in order to support an action of trespass, the wrong complained of must consist of something more than a mere breach of duty amounting to simple negligence,³⁶ it has also been held that where the injury is direct and immediate, even though the result of negligence, plaintiff has an election to sue either in trespass or in trespass on the case.³⁷ Where the injury is the effect of force; direct and intentional, it has been held that the action must be in trespass, and not on the case.³⁸ Where the plaintiff's injuries are caused by the servants or agents of the defendant, as a general rule, the action is trespass on the case.³⁹

Common-law or statutory action. In a proper case a common-law action may be maintained to recover damages caused by a motor vehicle.⁴⁰ Where an action is based on negligence found in a violation of a statute regulating the operation of motor vehicles which does not provide for a civil action for damages against those violating it, the only penalty being criminal, it is to be construed as a common-law rather than a statutory action,⁴¹ and plaintiff must base his action on the common law and not on the statute,⁴² although he may make proof of negligence by showing a violation of the statute.⁴³

Action in rem. Where by virtue of statutory authority the offending vehicle is made a party and attached, the action, in so far as it is against the vehicle, is an action in rem.⁴⁴

§ 495. Conditions Precedent

The plaintiff must comply with statutory conditions regulating the maintenance of his action for damages caused by a motor vehicle, such as statutes requiring notice of claim or of injury to be filed.

Plaintiff must comply with statutory conditions regulating the maintenance of his action for damages caused by a motor vehicle.⁴⁵ In the absence

34. Pa.—*Davanzo v. Embs*, Com Pl., 23 West.Co.L.J. 81.

R.I.—*McKendall v. National Wholesale Confectionery Co.*, 148 A. 315, 50 R.I. 424.

Nature and form of actions generally see Actions §§ 32-60.

Injury by hired car

Where plaintiff was sprayed with burning gasoline from explosion when driver of automobile hired by plaintiff attempted to start car which had stalled, basis for plaintiff's action against owner of car was negligence, not breach of warranty.—*Dunmire v. Fitzgerald*, 37 A.2d 596, 349 Pa. 511.

Tort or contract

As to one who accepts an invitation to ride on the running board of a car to a certain point failure to stop at the specified point would be at most a breach of promise which would not be a cause of action under tort law as it relates to the operation of motor vehicles.—*Fritz v. Smith*, 46 D. & C. 269.

35. R.I.—*Deming v. Venditti*, 53 A. 2d 498—*Edmonds v. Olson*, 9 A.2d 860, 64 R.I. 39—*McKendall v. National Wholesale Confectionery Co.*, 148 A. 315, 50 R.I. 424.

42 C.J. p 1186 note 2.

Mode of operation

If petition seeks recovery for in-

jury because of mode of operation of motor vehicle, it is held to charge a trespass.—*Waco Cotton Oil Mill of Waco v. Walker*, Tex Civ App., 103 S.W.2d 1071

36. Ala.—*Myers v. Baker*, 135 So. 643, 24 Ala App 387.

42 C.J. p 1186 note 3.

If facts show intentional or grossly negligent act of defendant accompanied by force and resulting in injury to plaintiff, trespass will lie.—*Myers v. Baker*, supra.

37. R.I.—*Edmonds v. Olson*, 9 A.2d 860, 64 R.I. 39—*Salerno v. Sheern*, 3 A.2d 657, 62 R.I. 121—*McKendall v. National Wholesale Confectionery Co.*, 148 A. 315, 50 R.I. 424.

The rule of liability is the same when the basis of the action is negligence whether the action is in trespass or on the case.—*Salerno v. Sheern*, 3 A.2d 657, 62 R.I. 121—*McKendall v. National Wholesale Confectionery Co.*, 148 A. 315, 50 R.I. 424.

38. R.I.—*Edmonds v. Olson*, 9 A.2d 860, 64 R.I. 39—*Salerno v. Sheern*, 3 A.2d 657, 62 R.I. 121—*McKendall v. National Wholesale Confectionery Co.*, 148 A. 315, 50 R.I. 424.

Action for assault and battery will not lie for a negligent injury.—*De*

Lisa v. Scott, 192 N.E. 174, 47 Ohio App. 503.

39. Pa.—*Dreibelbis v. Bowman*, 81 Pa.Dist. & Co. 570, 45 Dauph Co. 24—*Fillman v. Messner*, 17 Pa.Dist. & Co. 717, 23 North Co. 263.

40. N.Y.—*Eldridge v. Pearson*, 27 N. Y.S.2d 111, 261 App.Div. 1103, appeal denied 28 N.Y.S.2d 708, 262 App.Div. 756.

41. Mo.—*Dortch v. Reichel Motor Co.*, App., 223 S.W. 675—*Walden v. Stone*, App., 223 S.W. 136.

42. Mo.—*Dortch v. Reichel Motor Co.*, App., 223 S.W. 675.

43. Mo.—*Dortch v. Reichel Motor Co.*, supra.

44. S.C.—*La Gette v. Carolina Butane Gas Co.*, 43 S.E.2d 472, 210 S.C. 504.

45. S.C.—*Ouzts v. State Highway Department*, 159 S.E. 457, 161 S.C. 21.

Suit against municipal employee

N.Y.—*Eldridge v. Pearson*, 27 N.Y.S. 2d 111, 261 App.Div. 1103, appeal denied 28 N.Y.S.2d 708, 262 App. Div. 756.

of a statute providing otherwise, notice of injury or of claim is not a prerequisite to the maintenance of such actions.⁴⁶ A statute requiring a notice of claim to be filed where the action is based on the dangerous or defective condition of public property has been held not to apply to an action based on the negligent operation of a public motor vehicle.⁴⁷ Under statutes so providing, however, notice of injury or of claim must be filed,⁴⁸ and such requirement frequently exists where the action is against a municipal corporation⁴⁹ or officer thereof,⁵⁰ a county,⁵¹ the state,⁵² or state highway department.⁵³

The requirement of notice has been held to be an indispensable prerequisite to the bringing of an action by any person,⁵⁴ regardless of his age or his physical or mental condition.⁵⁵ It has been held, however, that failure to file a claim against the officer, servant, or agent who is directly responsible for the injury, although essential to the maintenance of an action against such person, is not fatal to the maintenance of an action against his employer,⁵⁶ and does not impair his employer's right of subrogation against him.⁵⁷

46. Cal.—*Jackson v. City of Santa Monica*, 57 P.2d 226, 13 Cal.App.2d 376.

N.Y.—*Babcock v. McCaffrey*, 300 N.Y.S. 493, 165 Misc. 103.

Claim or notice of injury in action for defect or obstruction in street see *supra* § 215.

Failure to file not a waiver

Failure of injured person to file with person responsible for the injury a written claim, has been held not to constitute waiver of right to recover.—*Kadow v. City of Los Angeles*, 87 P.2d 906, 31 Cal.App.2d 321.

Failure to report to authorities

Guest's right to recover held not affected by host's failure to report accident to proper authorities as required by statute.—*Diamond Cab Co. v. Jones*, 174 S.E. 675, 162 Va. 412.

Notice to employer

Plaintiff's failure to give his employer notice of filing of suit against third persons is no concern of defendants.—*Scruggs v. Frank Lynn Co.*, La.App., 6 So.2d 86.

Demand to repair

"Counsel for defendant . . . argues that . . . defendant should have been called upon to repair the damages to plaintiff's automobile and allowed to make the repairs [but] . . . as a matter of first impression we are unresponsive [to the argument]."—*Rosenthal v. Mendez*, 4 La.App. 570, 571.

47. Cal.—*Dillard v. Kern County*, 144 Pa.2d 305, 23 Cal.2d 271, 150 A.L.R. 1048—*Raynor v. City of Arcata*, 77 P.2d 1054, 11 Cal.2d 113.

48. U.S.—*Denver-Chicago Trucking Co. v. Lindeman*, D.C.Iowa, 73 F. Supp. 925.

Wis.—*Bode v. Flynn*, 252 N.W. 284, 213 Wis. 509, 94 A.L.R. 480.

Presentation of claim to personal representative as condition precedent generally see *Executors and Administrators* § 700 c.

49. Ga.—*Atlanta v. Blackman*, 178 S.E. 467, 50 Ga.App. 448.

N.Y.—*Kosiba v. City of Syracuse*, 39 N.E.2d 240, 287 N.Y. 283—*Johannes v. City of New York*, 12 N.Y.S.2d

430, 257 App.Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825—*Miller v. City of New York*, 63 N.Y.S.2d 44, 187 Misc. 926—*Stern v. Stoll*, 29 N.Y.S.2d 311.

Tex.—*City of Waco v. Landingham*, Civ App., 158 S.W.2d 79, certified question answered 157 S.W.2d 631, 138 Tex. 156, error refused.

Accident not on city streets

A statute requiring notice to be filed against the municipality for injuries caused by municipally-owned vehicles while operating on public streets and highways of the municipality has been held not to apply to injuries not sustained in an accident on the public streets and highways of the municipality.—*Babcock v. McCaffrey*, 300 N.Y.S. 493, 165 Misc. 103.

50. Cal.—*Von Arx v. City of Burlingame*, 60 P.2d 305, 16 Cal.App.2d 29.

N.Y.—*Krauss v. Layman*, 26 N.Y.S.2d 32, 261 App.Div. 1026, appeal dismissed 44 N.E.2d 615, 289 N.Y. 641—*Stern v. Stoll*, 29 N.Y.S.2d 311.

A peace officer not on official duty or engaged in some official act within the course and scope of his employment is not a public officer within the meaning of a statute requiring notice to public officers.—*Kadow v. City of Los Angeles*, 87 P.2d 906, 31 Cal.App.2d 324.

51. Cal.—*Artukovich v. Astendorf*, 131 P.2d 831, 21 Cal.2d 329.

N.Y.—*Richardson v. Nassau County*, 26 N.Y.S.2d 644, 261 App.Div. 1002, appeal denied 28 N.Y.S.2d 741, 262 App.Div. 850—*Broome County v. Binghamton Taxicab Co.*, 75 N.Y.S.2d 423, 190 Misc. 172.

Requirement not dispensed with

A statute providing for liability of county for negligent acts of drivers of automobiles of county and authorizing action to be brought against county in "manner directed by law" has been held not to dispense with necessity of complying with statute requiring presentation of claims, since the manner directed by law is found in the statute requiring presentation of claim; and the fact that

statute authorized county to insure against liability of county for negligent acts of drivers of county automobiles, and fact that county acts under such authorization are immaterial on question whether person allegedly injured was required to file claim.—*Artukovich v. Astendorf*, 131 P.2d 831, 21 Cal.2d 329.

Exclusion of workmen's compensation claims

Under a statute so providing, claims arising under the workmen's compensation law are excluded from the requirement of notice, but a claim by the employee of a private person against the county does not fall within the statutory exclusion.—*Broome County v. Binghamton Taxicab Co.*, 75 N.Y.S.2d 423, 190 Misc. 172.

52. N.Y.—*Apropo v. State*, 298 N.Y.S. 839, 252 App.Div. 803.

53. S.C.—*Bynum v. State Highway Department*, 153 S.E. 165, 156 S.C. 232.

54. Cal.—*Artukovich v. Astendorf*, 131 P.2d 831, 21 Cal.2d 329.

Counterclaim

The fact that claim is asserted by way of counterclaim and not by independent action is immaterial with respect to necessity of notice.—*Broome County v. Binghamton Taxicab Co.*, 75 N.Y.S.2d 423, 190 Misc. 172.

Public agency's full knowledge of accident has been held not to relieve person injured of effect of failure to file.—*Broome County v. Binghamton Taxicab Co.*, *supra*—*Apropo v. State*, 291 N.Y.S. 271, 161 Misc. 142, affirmed 298 N.Y.S. 839, 252 App.Div. 803.

55. Cal.—*Artukovich v. Ostendorf*, 131 P.2d 831, 21 Cal.2d 329.

56. U.S.—*Denver-Chicago Trucking Co. v. Lindeman*, D.C.Iowa, 73 F. Supp. 925.

N.Y.—*Kosiba v. City of Syracuse*, 39 N.E.2d 240, 287 N.Y. 283—*Stern v. Stoll*, 29 N.Y.S.2d 311.

57. Cal.—*Von Arx v. City of Burlingame*, 60 P.2d 305, 16 Cal.App.2d 29.

The required notice must be filed at the proper time⁵⁸ and with the proper person, corporation, or authority.⁵⁹ Substantial compliance with the statutory requirements as to the form and contents of the notice has been held to be sufficient,⁶⁰ and the notice need not conform to the strict rules of pleading, but need state only such facts as will enable the person sought to be charged with liability to investigate promptly the merits of the claim.⁶¹ It has been held, however, that a notice of claim omitting to state the date of the accident is fatally defective.⁶² Under a statute so providing, the court may correct, supply, or disregard irregularities and omissions in the notice of claim,⁶³ not involving the manner or time of service.⁶⁴ Where a public agency is required to give notice of its objections if a claim is insufficiently itemized, and fails to do so, but rejects the claim on the merits, it has been held to be barred from later objecting to the sufficiency of the claim.⁶⁵

Action against owner. Unless otherwise provided by statute, one injured by a motor vehicle need not first exhaust his remedy against the operator

before proceeding against the owner.⁶⁶

Payment for repairs which have been made is not essential to the maintenance of an action for the damage sustained in the absence of a statute providing otherwise.⁶⁷

§ 496. What Law Governs

The law of the forum controls as to all matters pertaining to remedial or procedural rights and the public policy of the forum may operate as a limitation on the enforcement of actions arising under the laws of another state.

Where action is brought in one state for damages because of a motor vehicle injury which occurred in another state, while the substantive rights of the parties ordinarily are determined according to the law of the state where the injury occurred, as discussed supra § 259, in accordance with the general rule stated in Conflict of Laws § 22, the *lex fori*, or law of the jurisdiction in which relief is sought, controls as to all matters pertaining to remedial or procedural, as distinguished from substantive, rights.⁶⁸ This is true as to matters of

Reason for rule

"Any other rule might lead to connivance between the plaintiff and the officer to mulct the government."—*Von Arx v. City of Burlingame*, 60 P.2d 305, 309, 16 Cal.App.2d 29

58. N.Y.—*Richardson v. Nassau County*, 28 N.Y.S.2d 644, 261 App. Div. 1002, appeal denied 28 N.Y.S.2d 741, 262 App.Div. 850.

Expiration of time; amendment of statute

A claimant is not entitled to file claim where statutory time for filing has expired prior to amendment to statute—*Aprupo v. State*, 298 N.Y.S. 839, 252 App.Div. 803.

59. N.Y.—*Broome County v. Binghamton Taxicab Co.*, 75 N.Y.S.2d 423, 190 Misc. 172.

Wis.—*Rode v. Flynn*, 252 N.W. 284, 213 Wis. 509, 94 A.L.R. 480.

Board or person authorized to incur liability

(1) Under a provision requiring claims to be presented to the board, officer, or employee authorized to incur the expenditure or liability represented thereby, it has been held that in the case of a claim arising out of an injury caused by a municipal employee in the operation of a municipal motor vehicle it is not necessary to present the claim to the board having jurisdiction over the agency which committed the tortious act, but that the claim should be presented to the board or officer authorized to pay the claim.—*Rogers v. City of Los Angeles*, 44 P.2d 466, 4 Cal.App.2d 294—*Robertson v.*

City of Los Angeles, 44 P.2d 461, 6 Cal.App.2d 289.

(2) A police surgeon has been held not an employee authorized to incur expenditure or liability represented by claim for damages caused by ambulance within such provision—*Rogers v. City of Los Angeles*, supra.

60. Cal.—*Dillard v. Kern County*, 144 P.2d 365, 23 Cal.2d 271, 150 A.L.R. 1048.

Notice held sufficient

Cal.—*Dillard v. Kern County*, supra Ga.—*City of Atlanta v. Blackmon*, 178 S.E. 467, 50 Ga.App. 448

N.Y.—*Stoddard v. New York*, 201 N.Y.S. 681.

Notice held insufficient

Where notice of injuries given by city employee to city did not allege that truck causing injuries belonged to city or that its brakes were defective, but expressly charged that it belonged to named person and that injuries were caused by its driver's starting it while employee was attempting to alight therefrom, but petition and proof in action against city indicated that truck belonged to city and moved because of defective brakes, the variance defeated purpose of the notice and precluded recovery.—*City of Waco v. Landingham*, 158 S.W.2d 79, certified question answered 157 S.W.2d 631, 138 Tex. 156, error refused.

61. Ga.—*Atlanta v. Blackmon*, 178 S.E. 467, 50 Ga.App. 448.

Claim not naming agents and servants causing injury or describing

their duties or official capacities was not demurrable for uncertainty, since defendants were in superior position to know such matters.—*Dillard v. Kern County*, 144 P.2d 365, 23 Cal.2d 271, 150 A.L.R. 1048.

62. N.Y.—*Johannes v. City of New York*, 12 N.Y.S.2d 430, 257 App. Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825.

63. N.Y.—*Broome County v. Binghamton Taxicab Co.*, 75 N.Y.S.2d 423, 190 Misc. 172.

Verification and itemization

N.Y.—*Miller v. City of New York*, 63 N.Y.S.2d 44, 187 Misc. 926.

64. N.Y.—*Broome County v. Binghamton Taxicab Co.*, 75 N.Y.S.2d 423, 190 Misc. 172.

65. Cal.—*Dillard v. Kern County*, 144 P.2d 365, 23 Cal.2d 271, 150 A.L.R. 1048.

66. Cal.—*Garrison v. Williams*, 17 P.2d 1072, 128 Cal.App. 598.

A previous judgment against the operator of the vehicle need not be obtained before bringing action against the owner unless the statute so provides.—*Johnson v. Sergeant*, 134 N.W. 468, 168 Mich. 444.

67. La.—*Bianchi v. Mussachi*, 1 La. App. 291.

Receipted bill held not prerequisite to maintenance of action in particular court.—*Orlosky v. Haskell*, 155 A. 112, 304 Pa. 57—*Strouse v. Muratore*, Pa.Com.Pl., 28 North.Co. 23.

68. U.S.—*Boyle v. Ward*, C.C.A.Pa., 126 F.2d 672.

joinder of parties,⁶⁹ pleading,⁷⁰ burden of proof,⁷¹ and evidence,⁷² including the sufficiency of the evidence to raise an issue to go to the jury.⁷³ So, it has been held that a provision of the organic law of the state in which the accident occurred to the effect that the defense of contributory negligence or assumption of risk shall be left for the jury in all cases is inapplicable to an action brought in another state.⁷⁴

In an action under the Federal Employers' Liability Act against a motorist and a railroad for injuries to a railroad employee crushed against a locomotive which was struck by an automobile, the suit against the motorist was determinable by state laws.⁷⁵

Amount of damages. It has been held or stated that the law of the place where the injury occurred controls as to the amount of damages.⁷⁶

Public policy of forum as limitation on enforcement. In accordance with the general rule discussed in Courts § 70 b (3), the courts of one state will not aid in the enforcement of actions arising under the laws of another state involving injuries resulting from the operation of motor vehicles where enforcement thereof would be against the public policy of the jurisdiction in which the action is brought.⁷⁷ However, the mere fact that the law of the place where the accident occurred differs from the law of the forum does not preclude enforcement of the foreign law as contrary to public policy,⁷⁸ and it has been held that the fact that the

Ill.—O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 574.

Iowa.—Kingery v. Donnell, 268 N.W. 617, 222 Iowa 241.

Me.—Winslow v. Tibbetts, 162 A. 785, 131 Me. 318.

Mass.—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64.

Mich.—Slayton v. Boesch, 23 N.W.2d 134, 315 Mich. 1—Meyer v. Weimaster, 270 N.W. 715, 278 Mich. 370—Eskovitz v. Berger, 268 N.W. 883, 276 Mich. 536.

Miss.—D'Antoni v. Teche Lines, 143 So. 415, 163 Miss. 668.

Ohio.—Freas v. Sullivan, 200 N.E. 639, 130 Ohio St. 486—Collins v. McClure, 26 N.E.2d 780, 63 Ohio App 312.

Wis.—Bourestom v. Bourestom, 285 N.W. 426, 231 Wis. 666.

69. S.C.—Mobley v. Bland, 21 S.E. 2d 22, 200 S.C. 448.

Wis.—Oertel v. Williams, 251 N.W. 465, 214 Wis. 68.

70. Me.—Winslow v. Tibbetts, 162 A. 785, 131 Me. 318.

Freedom from contributory negligence

Statute relieving plaintiff from necessity of alleging or proving want of contributory negligence is rule of practice, and hence applicable in action for motor vehicle injury occurring outside the state.—Midland Trail Bus Lines v. Martin, 194 N.E. 862, 100 Ind.App. 206.

Guest's assumption of risk

Law of forum that injured automobile guest's assumption of risk must be specially pleaded, being rule of procedure, applied although accident occurred outside the state.—Slobodnjak v. Coyne, 165 A. 681, 116 Conn. 545.

71. Contributory negligence

Mass.—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64.

N.Y.—Clark v. Harnischfeger Sales Corporation, 264 N.Y.S. 873, 238 App.Div. 493—Wright v. Palmison, 260 N.Y.S. 812, 237 App.Div. 22.

72. Iowa.—Kingery v. Donnell, 268 N.W. 617, 222 Iowa 241.

Me.—Winslow v. Tibbetts, 162 A. 785, 131 Me. 318.

Mass.—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64.

Ohio.—Collins v. McClure, 26 N.E.2d 780, 63 Ohio App 312.

Facts constituting prima facie evidence

Statutes providing that violation of certain speed laws, and law relating to manner of operating automobile when motorist's view if obstructed, should constitute prima facie evidence of improper operation of automobile, have been held to pertain to rules of evidence and hence not applicable in a foreign state where action is brought.—Collins v. McClure, supra.

73. Wis.—Hutzler v. McDonnell, 2 N.W.2d 207, 239 Wis. 668.

Negligence

(1) The rule stated in the text applies to the sufficiency of the evidence to go to the jury on the issue of negligence.

U.S.—Boyle v. Ward, C.C.A.Pa., 125 F.2d 672.

Mass.—Pilgrim v. MacGibbon, 47 N.E.2d 299, 313 Mass. 290.

Pa.—O'Hagan v. Byron, 33 A.2d 779, 153 Pa.Super. 372.

(2) However, in applying substantive rules of recovery in another jurisdiction, it has been stated that the conclusions of the courts of that other jurisdiction as to sufficiency of evidence which will support charge of gross negligence are entitled to great weight.—Winslow v. Tibbetts, 162 A. 785, 131 Me. 318.

Contributory negligence

Minn.—Franklin v. Minneapolis, St.

P. & S. S. M. R. Co., 229 N.W. 797, 179 Minn. 480.

Pa.—Singer v. Messina, 167 A. 583, 312 Pa 129, 89 A.L.R. 1271.

Res ipsa loquitur

N.C.—Clodfelter v. Wells, 195 S.E. 11, 212 N.C. 823.

Assumption of risk

Wis.—Bourestom v. Bourestom, 285 N.W. 426, 231 Wis. 666.

74. Wis.—Bourestom v. Bourestom, supra.

75. Ark.—Missouri Pac. R. Co. v. Eubanks, 207 S.W.2d 610, 212 Ark. 652, dissenting opinion 208 S.W. 161, 212 Ark. 652, reversed on other grounds 68 S.Ct. 1528, 334 U.S. 854, 92 L.Ed. —, rehearing denied 69 S.Ct. 14.

76. D.C.—Giddings v. Zellan, 160 F.2d 585, 82 U.S.App.D.C. 32, certiorari denied Zellan v. Giddings, 68 S.Ct. 61, 332 U.S. 759, 92 L.Ed. —.

Iowa.—Kingery v. Donnell, 268 N.W. 617, 222 Iowa 241.

Damages for injuries caused by motor vehicles generally see infra § 560.

Lex loci delicti as governing measure and elements of damages generally see Damages § 4.

77. Pa.—Carney v. Carney, 35 Pa. Dist. & Co. 221.

78. Mich.—Kaiser v. North, 289 N.W. 325, 292 Mich. 49.

A foreign statute imposing liability on the owner of a motor vehicle based on the negligence of the operator using the motor vehicle with the owner's permission has been held not unenforceable as contrary to public policy as against an owner residing in the state of the forum and not present in the foreign state at the time of the accident.

U.S.—Scheer v. Rockne Motors Corporation, C.C.A.N.Y., 68 F.2d 942.

N.J.—Masci v. Young, 162 A. 623, 109

law of the place where the accident occurred imposes a higher degree of care than obtains under the law of the forum does not bar enforcement of the foreign law as contrary to public policy.⁷⁹ So, the enforcement of the common-law liability of a host to his guest for personal injuries sustained by the guest in a motor vehicle accident in another state has been held not contrary to the public policy of a state wherein the common-law basis of liability is not in force,⁸⁰ and similarly it has been held that it is not contrary to the public policy of a state wherein the common-law or statutory liability of a host to a guest is in force to recognize and give effect to a guest statute in force in the jurisdiction where the accident occurred.⁸¹

§ 497. Defenses in General

Various matters have been held to constitute or not to constitute valid defenses to actions to recover damages

for injuries resulting from the operation of motor vehicles.

In addition to matters of defense involving questions of substantive law, considered supra §§ 246-493, various other matters have been held to constitute⁸² or not to constitute⁸³ defenses to actions to recover damages for injuries resulting from the operation of motor vehicles. In an action brought to recover damages caused by the operation of a motor vehicle, it has been held that a defendant having a right of action growing out of the collision may assert it by way of counterclaim.⁸⁴

Violation of law by plaintiff. The driver of a motor vehicle is not ordinarily regarded as being deprived of the right to recover for an injury negligently inflicted on him by reason of the fact that at the time of the injury he was disobeying a statute, where his violation of the statute in no way contributed to the injury.⁸⁵ So the fact that plain-

N.J.Law 453, 83 A.L.R. 869, affirmed *Young v. Masci*, 53 S.Ct. 593, 289 U.S. 253, 77 L.Ed. 1158, 88 A.L.R. 170.

79. Iowa.—*Klingery v. Donnell*, 268 N.W. 617, 222 Iowa 241.

80. Cal.—*Loranger v. Nadeau*, 10 P.2d 63, 215 Cal. 362, 84 A.L.R. 1264. Del.—*Skillman v. Conner*, 193 A. 563, 88 W.W.Harr. 402.

Kan.—*Pool v. Day*, 40 P.2d 396, 141 Kan. 195.

Mich.—*Eskovitz v. Berger*, 268 N.W. 883, 276 Mich. 536.

Ohio.—*Collins v. McClure*, App., 49 N.E.2d 181, affirmed 56 N.E.2d 171, 143 Ohio St. 569.

Parties residents of forum

The fact that both parties were residents or citizens of the state of the forum at the time the accident occurred does not alter the text rule.—*Collins v. McClure*, supra.

81. Mich.—*Kaiser v. North*, 289 N.W. 325, 292 Mich. 49.

Pa.—*Carney v. Carney*, 35 Pa.Dist. & Co. 221.

82. N.Y.—*Eldridge v. Pearson*, 27 N.Y.S.2d 111, 261 App.Div. 1103, appeal denied 28 N.Y.S.2d 708, 262 App.Div. 756.

83. U.S.—*Dealer's Transport Co. v. Reese*, C.C.A.Ala., 138 F.2d 638, certiorari denied 64 S.Ct. 939, 321 U.S. 798, 88 L.Ed. 1086.

Cal.—*Stoltz v. Converse*, 172 P.2d 78, 75 Cal.App.2d 909.

Iowa.—*Graby v. Danner*, 18 N.W.2d 595, 236 Iowa 700.

La.—*Inge v. Ellis*, App., 144 So. 625.

Pa.—*Wright v. Butler*, Com.Pl., 28 Del.Co. 313.—*Hutchinson v. Brumbaugh*, Com.Pl., 24 West.Co.L.J. 113.

Assumption of risk

(1) In action by one who was an

employee of defendant by sufferance for injuries resulting from the negligent operation of defendant's vehicle by driver, who asked for plaintiff's assistance, defendant could not escape liability on the defense of assumption of risk.—*Krull v. Triangle Dairy*, 17 N.E.2d 291, 59 Ohio App. 107.

(2) A person injured by a motor vehicle, even though guilty of contributory negligence does not assume the risk of the sudden negligent act or omission of the party who caused the injury.—*Freedman v. Hurwitz*, 164 A. 647, 116 Conn. 283.

Fellow-servant rule

(1) The fellow servant doctrine cannot be relied on as a defense where the relationship does not exist.—*Krull v. Triangle Dairy*, 17 N.E.2d 291, 59 Ohio App. 107.

(2) In claim for injuries to National Guard truck driver by another National Guard truck, fellow-servant rule held not a defense.—*Spence v. State*, 288 N.Y.S. 1009, 159 Misc. 797.

Independent negligence of others held not to relieve defendant of liability for own negligence.

Ga.—*Thrash v. LaGrange Coach Co.*, 38 S.E.2d 814, 74 Ga.App. 81.

La.—*Rockefeller v. Shreveport Yellow Cabs*, App., 183 So. 141, followed in *Everett v. Shreveport Yellow Cabs*, 183 So. 144.

Intoxication is no defense to action for injury caused by negligent operation of motor vehicle.—*Tolbert v. Jackson*, C.C.A.Ga., 99 F.2d 513, rehearing denied 100 F.2d 909.

Payment of damages to another

In action by passenger of automobile for injury sustained when motor vehicle in which he was rid-

ing collided with motor vehicle ahead because of impact from motor vehicle behind, fact that owner of middle vehicle paid for damages to vehicle ahead was held not available as defense to driver of vehicle behind.—*Coppock v. Pacific Gas & Electric Co.*, 30 P.2d 549, 137 Cal.App. 80.

The relationship of plaintiff and defendant does not affect plaintiff's right to recover if the law and the facts justify it.

La.—*Hamburger v. Katz*, 120 So. 391, 10 La.App. 215.

Tenn.—*Petway v. Hoover*, 12 Tenn. App. 618.

Riding in carrier without authority

Regulation of Interstate Commerce Commission, prohibiting driver of a motor carrier not designed for the transportation of passengers from transporting any person other than an employee without specific authority in writing by employer, is directed solely against driver and the violation thereof does not prevent a suit by illegally carried passenger or his administrator for injuries or death caused by negligence of driver.—*Kuharski v. Somers Motor Lines*, 43 A.2d 777, 132 Conn. 269.

84. N.Y.—*Bandyach v. Ross*, 36 N.Y.S.2d 830.

85. Mass.—*Janusis v. Long*, 188 N.E. 228, 284 Mass. 403.

42 C.J. p 1187 note 28.

Effect of failure to comply with law as to driver's or chauffeur's license see supra §§ 161-164.

Rights and liabilities as to third persons as affected by failure to comply with law as to license or registration of motor vehicle see supra § 134.

tiff was at the time of the accident operating a motor vehicle in violation of the statute providing that no person under sixteen years of age should operate a motor vehicle unless accompanied by an adult does not in itself bar his recovery.⁸⁶ Likewise, the operation of a motor vehicle with improper number plates affixed thereto will not of itself preclude recovery.⁸⁷ The fact that a motor vehicle is unlawfully used without the knowledge or consent of the owner does not preclude the operator of such vehicle from recovering for injuries sustained in a collision with another motor vehicle⁸⁸ unless it is shown that such unlawful use was the proximate cause of the collision.⁸⁹

Usage or custom. Since a usage or custom will not justify a negligent act, it constitutes no defense in an action based on negligence.⁹⁰

Insurance. The fact that the plaintiff is insured against the loss which he has suffered or that his damages have been paid by his insurer cannot be set up by the person causing the injury in mitigation of plaintiff's damages, as discussed in Damages § 99. Further, the fact that an insurer may be ultimately liable is not a defense on the ground that the court is without jurisdiction of the proceeding because it is amicable and pretended and only for the purpose of affecting the rights of strangers not parties to the suit.⁹¹

Willful or wanton acts. Where the injury is caused by willful or wanton acts of the person operating the motor vehicle, recovery may be had

therefor, notwithstanding contributory negligence on the part of the person injured, as discussed supra § 258, and in such case the absence of intention on the part of defendant to injure plaintiff has been held not to constitute a defense.⁹²

§ 498. Jurisdiction and Venue

- a. Jurisdiction
- b. Venue

a. Jurisdiction

In the absence of an express provision as to jurisdiction of actions for tort arising out of the operation of a motor vehicle, jurisdiction of such actions is controlled by the general principles applicable to tort actions.

The jurisdiction of an action for tort arising out of the operation of a motor vehicle may be regulated by express statutory provisions,⁹³ and such provisions, where they exist, control and supersede any general rules or statutory provisions as to jurisdiction that might otherwise be applicable.⁹⁴ In the absence of such a statute, an action for tort arising out of the operation of a motor vehicle, not being different in its character from other actions of tort, jurisdiction over it is controlled by the general principles applicable to tort actions,⁹⁵ and the jurisdiction of any particular court is not enlarged or diminished by a statute affecting merely the venue of actions.⁹⁶ Where each party to a collision asserts that it was due to the negligence of the other and brings his suit for damages based on allegations to that effect, the rule that where two

Fact that alien was unlawfully within country did not constitute him trespasser on public ways, which would prevent recovery for injury when struck by automobile.—Janusis v. Long, supra.

86. Wis.—Benesch v. Pagel, 177 N. W. 861, 171 Wis. 620.

87. Conn.—Bohmann v. Perrett, 118 A. 42, 97 Conn. 571.

Failure to use dealer's markers

Where a statute permits a dealer to lend his number plates to a purchaser for a limited period and is construed to permit the purchaser to operate the vehicle for such period by virtue of the dealer's certificate of registration, the failure of the purchaser to place the dealer's markers upon the vehicle will not preclude him from recovering for an injury received from the negligent act of another while he is operating the vehicle upon the highway.—Bohmann v. Perrett, 118 A. 42, 97 Conn. 571.

88. Tex.—Pyeatt v. Stroud, Civ.App., 264 S.W. 307, affirmed, Com.App.,

269 S.W. 430—Pyeatt v. Anderson, Civ.App., 264 S.W. 302, affirmed, Com.App., 269 S.W. 429.

Ordinary care must be exercised to avoid injury to the operator of vehicle unlawfully operating it without the knowledge or consent of the owner.—Pyeatt v. Anderson, Tex. Com.App., 269 S.W. 429.

89. Tex.—Pyeatt v. Stroud, Civ.App., 264 S.W. 307, affirmed, Com.App., 269 S.W. 430—Pyeatt v. Anderson, Civ.App., 264 S.W. 302, affirmed, Com.App., 269 S.W. 429.

90. Neb.—Koehn v. Hastings, 206 N.W. 19, 114 Neb. 106.

91. Md.—Fitzjarrell v. Boyd, 91 A. 547, 123 Md. 497.

42 C.J. p 1187 note 39. Insurance as affecting party's status as real party in interest see infra § 500 a.

Suit against insured relative

Tenn.—Petway v. Hoover, 12 Tenn. App. 618.

92. Ill.—Land v. Backman, 223 Ill. App. 473.

93. Mass.—Pinson v. Potter, 10 N.E. 2d 136, 298 Mass. 109.

94. Mass.—Pinson v. Potter, supra. Pa.—Orlosky v. Haskell, 155 A. 112, 304 Pa. 57—Walsh v. Martin, 21 Pa. Dist. & Co. 98, 44 Lanc. L. Rev. 137—Glose v. Setzer, Com.Pl., 19 Lehigh Co. L.J. 161.

95. D.C.—Sansbury v. Schwartz, D. C.D.C., 41 F.Supp. 302. Mass.—Pinson v. Potter, 10 N.E.2d 136, 298 Mass. 109.

Pa.—Sellers v. Romberger, 19 Pa. Dist. & Co., 382, 37 Dauph. Co. 169—Reinhart v. Shirm, 18 Pa. Dist. & Co. 151—Fillman v. Messner, 17 Pa. Dist. & Co. 717, 23 North. Co. 263—Faunce v. Rowan, 13 Pa. Dist. & Co. 109—Sharpless v. Hardy, Com.Pl., 28 Del. Co. 73—Glose v. Setzer, Com.Pl., 19 Lehigh Co. L.J. 161—Strouse v. Muratore, Com.Pl., 28 North. Co. 23—Yoder v. Universal Credit Co., Com.Pl., 8 Sch. Reg. 76—Deaver v. Dorsey, Com.Pl., 48 Lanc. Rev. 55, 56 York Leg. Rec. 3.

42 C.J. p 1187 note 43.

96. Pa.—Garrett v. Turner, 84 A. 354, 235 Pa. 383.

42 C.J. p 1188 note 44.

courts have concurrent jurisdiction of the parties and of the subject matter the court first acquiring jurisdiction has the right to proceed to its final determination without interference from the other does not apply, and the pendency of one action is no bar to proceeding with the other.⁹⁷

Nonresidents. A nonresident motorist may be subjected to the jurisdiction of the state for wrongs done within the state in the operation of his motor vehicle,⁹⁸ and by using the highways of the state he is deemed to have voluntarily submitted to the jurisdiction of a court to whose jurisdiction he might not otherwise be subject.⁹⁹ A general statutory provision conferring jurisdiction of transitory actions between nonresident plaintiffs and nonresident defendants, regardless of whether the cause of action arose within or without the state, has been held not to be limited by other provisions specifically regulating the venue of actions for tort arising out of the operation of motor vehicles where either plaintiff or defendant or both are residents of the

state.¹

Jurisdiction in rem. Where by statute a motor vehicle is subject to a lien for the damages done by it and an action in rem is a proper method of enforcing such lien, jurisdiction of such action may be acquired by seizure or attachment of the motor vehicle.²

b. Venue

Specific statutory provisions regulating the venue of actions for injuries caused by the operation of motor vehicles control and supersede general rules or statutory provisions.

In the absence of a constitutional prohibition, the venue of actions for injuries caused by the operation of motor vehicles may be regulated by specific statutory provisions,³ and such provisions control and supersede any general rules or statutory provisions as to venue that might otherwise be applicable,⁴ and, being remedial in character,⁵ should be construed and applied with liberality in order to accomplish their clear and obvious purpose.⁶ The

97. Vt.—*Gilley v. Jarvis*, 109 A. 41, 94 Vt. 135.
42 C.J. p 1188 note 45.

98. Wis.—*State v. Belden*, 211 N.W. 916, 193 Wis. 145, 57 A.L.R. 1218, rehearing denied 214 N.W. 460, 193 Wis. 145, 57 A.L.R. 1218.

99. N.Y.—*Arthur J. Olsen Planos v. Kyle*, 50 N.Y.S.2d 692, 182 Misc. 399.

1. Mass.—*Pinson v. Potter*, 10 N.E. 2d 136, 298 Mass. 109.

2. S.C.—*Williams v. Garlington*, 127 S.E. 20, 131 S.C. 289.

3. Ark.—*Alexander v. Bush*, 134 S.W.2d 619, 199 Ark. 562.

42 C.J. p 1188 note 51.

Application of general statutory provisions to actions for injuries caused by operation of motor vehicles see the C.J.S. title Venue § 17 et seq. also 67 C.J. p 11 et seq.

4. U.S.—*Panzram v. O'Donnell*, D. C.Minn., 48 F.Supp. 74.

Ark.—*Alexander v. Bush*, 134 S.W. 2d 619, 199 Ark. 562—*Highway Steel & Manufacturing Co. v. Kincannon*, 127 S.W.2d 816, 198 Ark. 134, appeal dismissed *Highway Steel & Mfg. Co. v. Crawford County Circuit Court*, 60 S.Ct. 88, 308 U.S. 504, 84 L.Ed. 431, rehearing denied 60 S.Ct. 134, 308 U.S. 635, 84 L.Ed. 528—*Kelso v. Bush*, 89 S.W.2d 594, 191 Ark. 1044.

Minn.—*Blankholm v. Fearing*, 22 N.W.2d 853, 222 Minn. 51—*State ex rel. Helmes v. District Court of Ramsey County*, 237 N.W. 876, 206 Minn. 367.

Ohio.—*Inter Ins. Exchange of Chicago Motor Club v. Wagstaff*, 59

N.E.2d 373, 144 Ohio St. 457—*Pappas v. Jeffrey Mfg. Co.*, 41 N.E.2d 864, 139 Ohio St. 637—*Snavely v. Wilkinson*, 33 N.E.2d 999, 138 Ohio St. 125, followed in *Carrier v. Neal*, 33 N.E.2d 1002, 138 Ohio St. 131—*Ward v. Swartz*, 158 N.E. 318, 25 Ohio App. 175.

Process statutes not venue statutes

(1) A statute authorizing service of summons on any one driving bus as defendant's servant or employee in action for injuries caused by operation of bus is not a venue statute.—*Missouri Pacific Transp. Co. v. Pipkin*, 133 S.W.2d 851, 199 Ark. 339.

(2) Likewise, a statute authorizing service of process outside the county where the injury occurred does not operate to change the venue of actions for injuries caused by the negligent operation of motor vehicles.—*Garrett v. Turner*, 84 A. 354, 235 Pa. 383.

5. Minn.—*Blankholm v. Fearing*, 22 N.W.2d 853, 222 Minn. 51.

Ohio.—*Inter Ins. Exchange of Chicago Motor Club v. Wagstaff*, 59 N.E.2d 373, 144 Ohio St. 457—*Pappas v. Jeffrey Mfg. Co.*, 41 N.E.2d 864, 139 Ohio St. 637—*Snavely v. Wilkinson*, 33 N.E.2d 999, 138 Ohio St. 125, followed in *Carrier v. Neal*, 33 N.E.2d 1002, 138 Ohio St. 131—*Ward v. Swartz*, 158 N.E. 318, 25 Ohio App. 175.

6. Minn.—*Blankholm v. Fearing*, 22 N.W.2d 853, 222 Minn. 51.

Ohio.—*Inter Ins. Exchange of Chicago Motor Club v. Wagstaff*, 59 N.E.2d 373, 144 Ohio St. 457—*Pappas v. Jeffrey Mfg. Co.*, 41 N.E.2d 864, 139 Ohio St. 637—*Snavely v.*

Wilkinson, 33 N.E.2d 999, 138 Ohio St. 125, followed in *Carrier v. Neal*, 33 N.E.2d 1002, 138 Ohio St. 131. Pa.—*Orlosky v. Haskell*, 155 A. 112, 304 Pa. 57.

Corporation as "operator"

The term "operator" within the meaning of a statute regulating the venue of actions for injury to person or property caused by the negligence of the owner or operator of a motor vehicle has been held to include not only a driver or chauffeur, but also any firm or corporation operating a motor vehicle through the instrumentality of its agents or employees in view of the statutory definition of "operator" as any person who drives or operates a motor vehicle upon the public highways.—*Pappas v. Jeffrey Mfg. Co.*, 41 N.E. 2d 864, 139 Ohio St. 637.

Corporation as owner causing injury

A statute regulating the venue of actions caused by the negligence of the owner of a motor vehicle has been held to apply to an action for an injury caused by the negligent operation of a motor vehicle by the agent or servant of a corporation owning the motor vehicle causing the damage.—*Little v. Linder Bros. Sanitary Milk Co.*, 23 Ohio N.P.,N.S., 422.

Action against personal representative

A statute regulating the venue of actions for injury caused by the negligence of the owner or operator of a motor vehicle governs such action where the owner or operator dies before the action is commenced and the action is brought against his personal representatives, not-

statutes have been held to apply to all actions brought after their effective date regardless of the time when the cause of action arose,⁷ but they will not be extended to control the venue of actions not within their purview.⁸ Under some statutes, in a proper case, an action for an injury resulting from the operation of a motor vehicle may be brought in the county where plaintiff resides,⁹ or where the cause of action arose or the injury occurred,¹⁰ or where defendant resides.¹¹ It has been held that the right conferred by a statute permitting suit in

the county where plaintiff resides is taken away by an amendment permitting such actions to be brought in the county where the injury occurred.¹²

Actions against nonresidents. It is within the power of the state to regulate the venue of actions for injuries against nonresident motorists provided in doing so it does not unreasonably discriminate against nonresidents.¹³ Under some statutes the action must be brought in the county where the injury occurred,¹⁴ but under other statutes the action may be brought in any county of the state¹⁵ and need

withstanding the statute makes no specific provision therefor.

Minn.—Blankholm v. Fearing, 22 N. W.2d 853, 222 Minn. 51.

Ohio.—Snively v. Wilkinson, 33 N. E.2d 999, 138 Ohio St. 125, followed in Carrier v. Neal, 33 N.E.2d 1002, 138 Ohio St. 131.

The assignee of a claim succeeds to the right of his assignor under a statute regulating the venue of actions for injury to a person or property caused by the negligence of the owner or operator of a motor vehicle.—Inter Ins. Exchange of Chicago Motor Club v. Wagstaff, 59 N.E.2d 373, 144 Ohio St. 457.

7. Minn.—State ex rel. Helmes v. District Court of Ramsey County, 287 N.W. 875, 206 Minn. 357.

Ohio.—Ward v. Swartz, 158 N.E. 318, 25 Ohio App. 175.

8. Wash.—State ex rel. Antonsen v. Superior Court for Grays Harbor County, 189 P.2d 219, 29 Wash.2d 725.

Spraying car not motor vehicle accident

An action for damages to automobile, sprayed with paint by defendant while operating paint-spraying outfit in painting bridge over which plaintiff was driving automobile, was not for recovery of damages arising from motor vehicle accident, within statute regulating venue in such actions.—State ex rel. Antonsen v. Superior Court for Grays Harbor County, *supra*.

9. Ohio.—Stern v. Gimbel, 25 Ohio N.P.N.S., 211—Little v. Linder Bros. Sanitary Milk Co., 23 Ohio N.P.N.S., 422.
42 C.J. p 1188 note 51.

Joint liability of owner and another

Under a statute authorizing actions for injury caused by the negligence of the owner of a motor vehicle to be brought against such owner in the county wherein the injured person resides, an action may be brought against the owner and one who is alleged to be jointly liable with him in the county wherein the injured person resides notwithstanding a contention that the statute permits the action to be so

brought against the owner only.—Gorey v. Black, 125 N.E. 126, 100 Ohio St. 73.

If two persons, residing in different counties, are injured in the same accident, it has been held that the one bringing the action for damages first, in the county in which he resides, cannot thereby compel the other party to set up his cause of action by way of counterclaim, but each has the right to sue in his own county setting up his own cause of action.—Jones v. Goldfredrick, 23 Ohio N.P.N.S., 419.

Suit outside county not authorized

A statute of the type referred to in the text does not allow the injured person to go into another county and there sue an owner who does not reside in that county or who cannot be summoned there.—Marsch v. Brawley, 22 Ohio N.P.N.S., 365.

Suit by nonresident not authorized

A statute authorizing suit in the county where plaintiff resides does not permit a nonresident of the state to sue for an injury in a county wherein defendant does not reside and wherein he cannot be summoned.—Marsch v. Brawley, *supra*.

10. U.S.—Panzram v. O'Donnell, D. C.Minn., 48 F.Supp. 74.

Minn.—Blankholm v. Fearing, 22 N. W.2d 853, 222 Minn. 51.

Ohio.—Inter Ins. Exchange of Chicago Motor Club v. Wagstaff, 59 N.E.2d 373, 144 Ohio St. 457—Pappas v. Jeffrey Mfg. Co., 41 N.E.2d 864, 139 Ohio St. 637—Snively v. Wilkinson, 33 N.E.2d 999, 138 Ohio St. 125, followed in Carrier v. Neal, 33 N.E.2d 1002, 138 Ohio St. 131—Ward v. Swartz, 158 N.E. 318, 25 Ohio App. 175.

Pa.—Orlosky v. Haskell, 155 A. 112, 304 Pa. 57.

Wash.—State ex rel. Antonsen v. Superior Court for Grays Harbor County, 189 P.2d 219, 29 Wash.2d 725.

As enlarging general venue statute

A statute providing that an action for injuries caused by the negligent operation of a motor vehicle may be brought in the county where

such injury occurs has been held not to limit the venue of such actions to such county, but to enlarge the general venue statute to provide for a situation which arose with the coming of the motor vehicle.—Uthoff v. Du Brle, 23 N.E.2d 854, 62 Ohio App. 285.

11. U.S.—Panzram v. O'Donnell, D. C.Minn., 48 F.Supp. 74.

Wash.—State ex rel. Antonsen v. Superior Court for Grays Harbor County, 189 P.2d 219, 29 Wash.2d 725.

12. Ohio.—Klein v. Lust, 143 N.E. 527, 110 Ohio St. 197.

13. Statute held invalid

Statute permitting plaintiff in action against nonresident to elect to institute action in county of plaintiff's residence or in county in which injury occurred held unconstitutional where actions against residents were required to be brought in the county of defendant's residence or in which injury occurred.—Turner v. Manos, 164 S.W.2d 962, 291 Ky. 431—Kennedy v. Lee, 113 S.W.2d 1125, 272 Ky. 237—Henry Fisher Packing Co. v. Mattox, 90 S.W.2d 70, 262 Ky. 318.

Statute not fixing venue

Statute permitting substituted service in actions against nonresidents arising from automobile accidents within state was held not invalid as to nonresidents with respect to venue where it did not attempt to fix the venue of such actions.—Moore v. Payne, D.C.La., 35 F.2d 232.

14. Ky.—Turner v. Manos, 164 S. W.2d 962, 291 Ky. 431.

15. Ark.—Alexander v. Bush, 134 S. W.2d 519, 199 Ark. 562.

Ga.—Lloyd Adams, Inc., v. Liberty Mut. Ins. Co., 10 S.E.2d 46, 190 Ga. 633—Lowe v. Roberts, 2 S.E. 2d 748, 59 Ga.App. 890.

Statutes held not invalid

Ark.—Alexander v. Bush, 134 S.W.2d 519, 199 Ark. 562—Highway Steel & Manufacturing Co. v. Kincannon, 127 S.W.2d 816, 198 Ark. 434, appeal dismissed Highway Steel & Mfg. Co. v. Crawford County Circuit Court, 60 S.Ct. 88, 208 U.S. 504,

not be brought in the county where the injury occurred;¹⁶ and it has been held that a statute providing that an action for injuries caused by the operation of a motor vehicle may be brought in the county where the action arose or in the county of the residence of defendant does not limit plaintiff's right to designate the place of trial of an action against a nonresident motorist.¹⁷ The statutory appointment of a state official as agent of a nonresident motorist to accept service of process does not in and of itself fix the venue¹⁸ or limit the suit to the county of the accident,¹⁹ and does not operate to give such nonresident a residence for venue purposes in the county of the official residence of such state official.²⁰

Change of venue. Under a statute so providing, where the proper venue is laid in an action for injuries caused by the operation of a motor vehicle, the venue cannot be changed without the written consent of plaintiff filed with the court unless the court changes the venue pursuant to statutory au-

thority.²¹

Actions against motor carriers. Specific statutory provisions governing the venue of actions against motor carriers control and supersede any general rules or statutory provisions as to venue.²² Under some provisions the action may be brought in any county where the action could be brought if defendant were a railroad corporation being sued on a like cause of action.²³ Others permit the action to be brought in any county in which any part of the motor transportation line or route may be.²⁴

§ 499. Time to Sue and Limitations

Actions for damages occasioned through the operation of motor vehicles must be brought within the time specifically provided therefor.

Different periods within which actions for the recovery of damages occasioned through the operation of motor vehicles must be brought are prescribed by statute in the various states, and such statutes are controlling.²⁵ The application of gen-

84 L.Ed. 431, rehearing denied 60 S.Ct. 134, 308 U.S. 635, 84 L.Ed. 528—*Kelso v. Bush*, 89 S.W.2d 594, 191 Ark. 1044.

Ga.—*Lloyd Adams, Inc., v. Liberty Mut. Ins. Co.*, 10 S.E.2d 46, 190 Ga. 633.

16. Ga.—*Lloyd Adams, Inc., v. Liberty Mut. Ins. Co.*, 10 S.E.2d 46, 190 Ga. 633.

17. U.S.—*Panzram v. O'Donnell, D. C. Minn.*, 48 F.Supp. 74.

Minn.—*Claseman v. Feeney*, 300 N.W. 818, 211 Minn. 266.

18. Tenn.—*Carter v. Schackne*, 114 S.W.2d 787, 173 Tenn. 44.

19. Pa.—*Aversa v. Aubry*, 154 A. 311, 303 Pa. 139.

Right to serve state official designated as agent of nonresident where suit not brought in county where accident occurred see *infra* § 502 a.

20. Ga.—*Lloyd Adams, Inc., v. Liberty Mut. Ins. Co.*, 10 S.E.2d 46, 190 Ga. 633.

S.C.—*Courtney v. Meyer*, 25 S.E.2d 481, 202 S.C. 437.

Tenn.—*Carter v. Schackne*, 114 S.W.2d 787, 173 Tenn. 44.

21. U.S.—*Panzram v. O'Donnell, D. C. Minn.*, 48 F.Supp. 74.

Minn.—*Blankholm v. Fearing*, 22 N.W.2d 853, 222 Minn. 51.

22. Ga.—*American Fidelity & Cas. Co. v. Farmer, App.*, 48 S.E.2d 122.

Miss.—*M. & A. Motor Freight Lines v. Villere*, 1 So.2d 788, 190 Miss. 848.

Statute held invalid

The statutory provision that action against resident of state or domestic corporation operating as motor vehicle carrier may be brought

in any county through which carrier operates but that action against nonresident or foreign corporation may be brought in any county of state, is unconstitutional.—*Windham v. Pace*, 6 S.E.2d 270, 192 S.C. 271.

23. Ga.—*American Fidelity & Cas. Co. v. Farmer, App.*, 48 S.E.2d 122.

24. Miss.—*M. & A. Motor Freight Lines v. Villere*, 1 So.2d 788, 190 Miss. 848.

S.C.—*Windham v. Pace*, 6 S.E.2d 270, 192 S.C. 271.

Statute not unconstitutional

Statute authorizing action against motor carrier in any county through which carrier operates is not unconstitutional.—*Windham v. Pace*, *supra*.

Action arising out of general operation

The phrase, "the owner of the operated motor carrier," in statutory provision that if such owner is resident of state or domestic corporation action may be brought against such party in any county through which motor carrier operates, refers to and includes generally the motor vehicle line or service conducted by carrier and is not restricted to vehicle as carrier of persons or property, so that operation of act is not confined to buses and trucks actually being used in carrier's business, but extends to carrier's general business.—*Windham v. Pace*, *supra*.

25. Mass.—*Read v. Huber*, 11 N.E.2d 121, 298 Mass. 428.

Bodily injuries covered by liability insurance

(1) A statute providing that actions of tort for bodily injuries, the

payment of judgments in which are required to be secured by compulsory motor vehicle liability insurance, must be brought within a fixed time, requires only such actions to be so brought as may be for bodily injuries.—*Barbate v. La Vallee*, 12 N.E.2d 815, 299 Mass. 411—*Pierce v. Tiernan*, 182 N.E. 292, 280 Mass. 180.

(2) An action for personal injuries falls within the purview of such statute even though plaintiff attempts to recover for medicine and medical attendance.—*Ford v. Rogovin*, 194 N.E. 719, 289 Mass. 519.

(3) On the other hand, an action for consequential injuries to plaintiff's wife in automobile accident has been held not to be limited by such statute.—*Bartlett v. Hall*, 193 N.E. 360, 288 Mass. 532.

(4) Moreover, such statute has been held to be modified by a general statute extending the time for the commencement of actions by minors.—*Decosta v. Ye Craftsman Studio*, 180 N.E. 151, 278 Mass. 315.

(5) Further, it has been held that under a soldiers' and sailors' civil relief act the period of military service of defendant should not be included in computing period of limitations for bringing action of tort for bodily injuries, the payment of judgment in which is required to be secured by compulsory insurance.—*Blazejowski v. Stadnicki*, 58 N.E.2d 164, 317 Mass. 352.

Vehicles subject to public control

A statute prescribing the period of limitation for actions for injuries caused by the operation of motor vehicles subject to the supervision

eral statutes of limitation to such actions is discussed in Limitations of Actions §§ 73-81, 103.

§ 500. Parties

- a. Plaintiffs
- b. Defendants
- c. Addition of parties

a. Plaintiffs

- (1) In general
- (2) Real party in interest

(1) In General

Generally speaking, questions with reference to parties plaintiff in actions for damages growing out of the operation of a motor vehicle are determined according to the general rules applicable to civil actions.

Generally speaking, questions with reference to parties plaintiff in actions for damages growing out of the operation of a motor vehicle are determined according to the general rules applicable to civil actions.²⁶ Under the strict rules of common law, each person injured in a motor vehicle accident must sue separately where the damages, as well as the interest, are several.²⁷ However, the effect of the common-law rule has been overcome by statutory provisions under which, in a proper case, persons injured in the same motor vehicle accident may

join, as plaintiffs, in one civil action,²⁸ although the court may order a severance.²⁹ A joint action by husband and wife may be maintained where the suit is for injuries sustained by the wife and damages sustained by the husband, growing out of defendant's negligence in operating a motor vehicle.³⁰

(2) Real Party in Interest

An action to recover damages arising out of a motor vehicle accident must generally be prosecuted in the name of the real party in interest.

An action to recover damages arising out of a motor vehicle accident or collision generally must be prosecuted in the name of the real party in interest.³¹ An injured person's status as the real party in interest has been held not to be affected by the fact that he has received compensation or indemnity for his loss from a third person where the circumstances are such that a satisfied judgment against the wrongdoer will protect him from future annoyance or loss, and where, as against the party suing, the wrongdoer can urge any defenses he could make against the third person.³²

While the mere payment by an insurer of all damages sustained by the owner of a motor vehicle because of its injury has been held not to deprive the owner of his status as the real party in inter-

and control of a state regulatory commission has been held not to apply to actions for injuries caused by a truck subject to such control in view of the legislative history of the statute, the fact that the statute appeared under a chapter entitled "Motor Vehicles Carrying Passengers for Hire," and the fact that a separate act provided for the regulation of vehicles carrying property for hire.—*Steele v. Smalley*, 44 A. 2d 213, 141 Me. 355.

Statute impliedly repealed

Mich.—*Soule v. Grimshaw*, 247 N.W. 730, 262 Mich. 504.

26. Cal.—*Ralph v. Anderson*, 200 P. 940, 187 Cal. 45.
42 C.J. p 1188 note 56 [a].

27. U.S.—*Dranoff v. Railway Express Agency*, D.C.Pa., 28 F.Supp. 325.

28. U.S.—*Dranoff v. Railway Express Agency*, supra.

Ark.—*Home Ins. Co. v. Lack*, 120 S.W.2d 355, 196 Ark. 888.

Pa.—*Mishkin v. Drucker Bros.*, 81 Pa.Dist. & Co. 594—*Karcher v. Downes*, 81 Pa.Dist. & Co. 386—*Ellis v. Prebish*, 18 Pa.Dist. & Co. 389, 27 Luz.Leg.Reg. 15.

Owner and holder of lien on motor vehicle were properly joined as plaintiffs in action for damages to

vehicle although their interests were not identical.—*Wilson v. Horton Motor Lines*, 176 S.E. 750, 207 N.C. 263.

Guest may join in action by driver Pa.—*Karcher v. Downes*, 81 Pa.Dist. & Co. 386.

29. Pa.—*Scymour v. Folberg*, 46 Pa. Dist. & Co. 292, 31 Del.Co. 161—*Stokes v. Giarraputo & Son*, 42 Pa. Dist. & Co. 161.

Plaintiff as additional defendant

(1) It has been held that the court may, in its discretion, order a severance where defendant desires to bring in one of the plaintiffs as an additional defendant but is unable to do so because he is already a party of record.—*Stokes v. Giarraputo & Son*, supra.

(2) However, it has also been held that the court has no power to order a severance where two or more persons injured in the same motor vehicle accident join as plaintiffs.—*Freeman v. MacDonald*, 42 Pa.Dist. & Co. 158.

30. U.S.—*Porter v. Buckley*, N.J., 147 F. 140, 78 C.C.A. 138.

La.—*Granier v. Bourgeois*, App., 188 So. 423, rehearing denied 189 So. 474.

Under the community property system where money recovered for

damages to the wife is community property the husband has an interest in an action for damages to the wife and is a proper party plaintiff.—*Johnson v. Hendrick*, 187 P. 782, 45 Cal.App. 317.

31. Ark.—*Home Ins. Co. v. Lack*, 120 S.W.2d 355, 196 Ark. 888.

N.Y.—*Purdy v. McGarity*, 30 N.Y.S. 2d 966, 262 App.Div. 623, followed in *Scarborough v. Bartholomew*, 30 N.Y.S.2d 971, 263 App.Div. 765, and appeal denied 32 N.Y.S.2d 807, 263 App.Div. 905.

32. Cal.—*Anheuser-Busch, Inc. v. Starley*, 170 P.2d 448, 28 Cal.2d 347.

Ind.—*Williamson v. Purity Bakeries of Indiana*, 193 N.E. 717, 101 Ind. App. 441.

Payment without intent to become subrogated

The fact that a third person has advanced to the person injured the amount of his damages without any intent to become fully subrogated to the rights of the person injured has been held not to deprive the person injured of his interest in prosecuting an action to recover the damages suffered.

La.—*Ball v. Home Oil Co.*, App., 4 So.2d 579.

Okl.—*McCoy v. Moore*, 91 P.2d 87, 185 Okl. 253.

est,³³ there is also authority to the contrary,³⁴ especially where he has assigned all his right, title, and interest in the cause of action to the insurer,³⁵ and it has been held that an action against the wrongdoer must be prosecuted in the name of the insurer³⁶ or in the name of the insured for the use of the insurer.³⁷ However, the facts that the owner has been indemnified by an insurance company for part of his loss and the insurer has become subrogated to his rights to the extent of such payment will not preclude his maintaining an action in his own name.³⁸ In such a case the insurer has been held not to be a necessary party,³⁹ but it is a proper party,⁴⁰ and on application of defendant the insurer should be joined as a party plaintiff,⁴¹ although, if personal injury or derivative claims are to be tried with or at the same time as the property damage case, it has been held that the insurer should be joined as party plaintiff only if it refuses to execute and deliver to defendant an instrument showing that the claim has not been assigned, that there is no claim for subrogation and that the insurer will be bound by the determination in the action.⁴²

The purchaser of an automobile under a contract

whereby the seller retains legal title until full payment of the purchase price, such as a conditional sales contract, having paid part of the sale price and being in possession of the property, may sue for injury thereto.⁴³ A party in whose name a motor vehicle is registered may maintain an action for injury to it, although it was purchased with the funds of another.⁴⁴ On the other hand, it has been held that a person claiming ownership of a motor vehicle cannot maintain an action for injury to it where the vehicle is registered in the name of another.⁴⁵ Without reference to any question of registered ownership, it has been held that the bailee of a vehicle may maintain an action for an injury thereto while in his possession⁴⁶ and that a conditional seller⁴⁷ or one to whom the conditional seller has assigned his interest in the contract and purchase-money note⁴⁸ may sue for damages for injuries to his respective interest.

Vehicle repaired by third person. Where a vehicle injured while in the hands of a garage keeper has been fully repaired before being returned to the owner, it has been held that the owner cannot recover in his own name against the person causing the injury, since he is not the real party in inter-

33. Ind.—Williamson v. Purity Packages of Indiana, 193 N.E. 717, 101 Ind.App. 441.

34. Ga.—Joy Floral Co. v. Norris, 131 S.E. 920, 34 Ga.App. 796.

35. N.Y.—Purdy v. McGarity, 30 N.Y.S.2d 966, 262 App.Div. 623, followed in Scarborough v. Bartholomew, 30 N.Y.S.2d 971, 263 App.Div. 765, and appeal denied 32 N.Y.S.2d 807, 263 App.Div. 905.

Ohio.—Barnhill v. Brown, 16 N.E.2d 478, 58 Ohio App. 188.

Effect of "loan receipt"

(1) An instrument designated as a "loan receipt" reciting that plaintiff received a stipulated sum from insurer "as a loan and repayable only to the extent of any net recovery," and in which plaintiff agrees to prosecute an action against the wrongdoer "at the expense and under the exclusive direction and control" of the insurer, has been held not to constitute a loan but to have the effect of subrogating the insurer to the rights of plaintiff.—Purdy v. McGarity, 30 N.Y.S.2d 966, 262 App.Div. 623, appeal denied 32 N.Y.S.2d 807, 263 App.Div. 905.

(2) The same view has been taken of other similar instruments designated as loan receipts.—Woodard v. Marx, N.Y.Sup., 41 N.Y.S.2d 398, 181 Misc. 333—Humphrey v. Gawelm, 86 N.Y.S.2d 620.

Unless and until plaintiff has assigned his alleged claim against de-

fendant to his insurer, it is not necessary to set forth the name of the insurer as a party plaintiff.—Hemminger v. Johnson, 39 Pa.Dist. & Co. 13, 3 Fay.L.J. 236.

36. Ohio.—Barnhill v. Brown, 16 N.E.2d 478, 58 Ohio App. 188.

37. Ga.—Joy Floral Co. v. Norris, 131 S.E. 920, 34 Ga.App. 796.

38. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

Ark.—Home Ins. Co. v. Lack, 120 S.W.2d 355, 196 Ark. 888.

Ill.—Osgood v. Chicago & N. W. Ry. Co., 253 Ill.App. 465.

Iowa.—Rursch v. Gee, 25 N.W.2d 312, 237 Iowa 1391—Calligiuri v. Des Moines Ry., 288 N.W. 702, 227 Iowa 466.

Ky.—Barr v. Searcy, 133 S.W.2d 714, 280 Ky. 535.

N.Y.—Steinhaus v. New York, 179 N.Y.S. 195.

Ohio.—Barnhill v. Brown, 16 N.E.2d 478, 58 Ohio App. 188.

Pa.—Hopkins v. Bailey, 44 Pa.Dist. & Co. 26, 52 Dauph.Co. 140—Ott v. Cassidy, Com.Pl., 30 Del Co. 526—Smyth v. Bluestone Co., 88 Pittsb.Leg.J. 597.

39. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

Iowa.—Rursch v. Gee, 25 N.W.2d 312, 237 Iowa 1391.

Ohio.—Barnhill v. Brown, 16 N.E.2d 478, 58 Ohio App. 188.

Pa.—Hopkins v. Bailey, 44 Pa.Dist.

& Co. 26, 52 Dauph.Co. 140—Smyth v. Bluestone Co., 88 Pittsb.Leg.J. 597.

Unless and until plaintiff has assigned part of his alleged claim against defendant to his insurer it is not necessary to set forth the name of the insurer as a party plaintiff.—Hemminger v. Johnson, 39 Pa.Dist. & Co. 13, 3 Fay.L.J. 236.

40. Ark.—Home Ins. Co. v. Lack, 120 S.W.2d 355, 196 Ark. 888.

Ohio.—Barnhill v. Brown, 16 N.E.2d 478, 58 Ohio App. 188.

41. N.Y.—Woodard v. Marx, 41 N.Y.S.2d 398, 181 Misc. 333.

42. N.Y.—Woodard v. Marx, supra.

43. Ga.—Harper v. Donalson, 176 S.E. 535, 49 Ga.App. 608.

42 C.J. p 1188 note 62.

44. Cal.—Whitworth v. Jones, 209 P. 60, 58 Cal.App. 492.

42 C.J. p 1189 note 65.

45. N.Y.—Scholick v. Fifth Ave. Coach Co., 68 N.Y.S.2d 208, 188 Misc. 476.

46. Ohio.—Carelli v. Toepfer, 30 Ohio N.P.N.S., 353.

Pa.—Falsey v. Park, 20 Pa.Dist. & Co. 346.

47. Md.—Barnes v. Baltimore United R., etc., Co., 116 A. 855, 140 Md. 14.

48. Md.—Barnes v. Baltimore United R., etc., Co., supra.

est, having been fully compensated,⁴⁹ although the contrary has also been held in such a case in the absence of further facts showing legal subrogation.⁵⁰

b. Defendants

Questions with reference to the parties defendant in actions for damages arising out of the operation of a motor vehicle are usually determined according to the general rules applicable to civil actions.

Questions with reference to the parties defendant in actions for damages arising out of the operation of a motor vehicle are usually determined accord-

ing to the general rules applicable to civil actions.⁵¹ While independent tort-feasors each of whom causes some damage cannot be sued jointly,⁵² where the negligence of two or more persons concurs in causing an injury by a motor vehicle it is generally held that any or all may be joined as defendants in an action brought by the person injured,⁵³ or each may be sued separately.⁵⁴ Thus, where a collision between vehicles is due to the negligence of two drivers, a third person injured by reason thereof may join both drivers as defendants, and any other persons responsible for their negligence,⁵⁵ or he may sue each separately.⁵⁶

49. Wash.—Broderick v. Puget Sound Tract., etc., Co., 150 P. 616, 86 Wash. 399.

50. Okl.—McCoy v. Moore, 91 P.2d 87, 185 Okl. 253.

51. Ga.—Neve v. Graves, 106 S.E. 305, 26 Ga.App. 378.
42 C.J. p 1188 note 56 [b].

Interstate and terminal carrier

The federal statute, providing that motor transportation by any person for interstate motor carrier in performance of transfer or delivery services within terminal area shall be considered performed by such carrier as part of transportation to which such services are incidental, has been held not to affect procedural question of joinder of parties defendant primarily and secondarily liable in state court action for injuries sustained in such area through fault of local carrier acting for interstate carrier.—Albers v. Great Central Transport Corp., 60 N.E.2d 669, 145 Ohio St. 129.

The father is not a necessary party in an action against his son who was operating the motor vehicle at the time of the accident, within the provisions of a venue statute.—Moore v. Hoover, Tex.Civ.App., 150 S.W.2d 96.

52. Ohio.—Bethel v. Taxicabs of Cincinnati, Inc., 30 Ohio N.P.N.S., 425.

Collision after collision

The driver of an oncoming automobile which collided with plaintiff's automobile, and driver of automobile which was following plaintiff's automobile and which collided with plaintiff's automobile after it had come to a stop as result of the collision with the oncoming automobile could not be joined in single action for injuries sustained by plaintiff allegedly as result of the negligence of the drivers of the oncoming and the following automobiles.—Leishman v. Brady, 3 A.2d 118, 9 W.W.Harr., Del., 559.

53. U.S.—Copley v. Stone, D.C.S.C., 75 F.Supp. 203.

Colo.—Alden v. Watson, 102 P.2d 479, 106 Colo. 103.

Fla.—Stanley v. Powers, 166 So. 843, 123 Fla. 359.

Ga.—Shepherd v. Amos, 42 S.E.2d 775, 75 Ga.App. 221.

Ill.—Gleason v. Cunningham, 44 N.E. 2d 940, 316 Ill.App. 286.

N.C.—Grant v. McGraw, 46 S.E.2d 849, 228 N.C. 745—Charnock v. Taylor, 26 S.E.2d 911, 223 N.C. 360, 148 A.L.R. 1126—Freeman v. Thompson, 5 S.E.2d 434, 216 N.C. 484—Anthony v. Knight, 191 S.E. 323, 211 N.C. 637.

Joint or several liability generally see supra § 427.

In Ohio

(1) The rule stated in the text has been recognized and applied.—Wery v. Seff, 25 N.E.2d 692, 136 Ohio St. 307—Tamplin v. Pennsylvania R. Co., App., 51 N.E.2d 736—Dash v. Fairbanks, Morse & Co., 195 N.E. 413, 49 Ohio App. 57.

(2) Thus, it has been held that it is proper in a negligence action to join as defendants persons who, while traveling in opposite directions on a highway, so negligently operated their automobiles as to cause plaintiff to veer the course of his automobile off the highway causing the injuries complained of, the court stating that it is appropriate to speak of concert of action and common purpose in actions wherein volition or purpose is one of the essentials, but that common negligence is a failure to exercise ordinary care, and the purpose of the wrongdoer has nothing whatever to do with its commission.—Dash v. Fairbanks, Morse & Co., 195 N.E. 413, 49 Ohio App. 57.

(3) However, in a subsequent opinion it was declared that the rule that joint liability for tort lies only where wrongdoers have acted in concert in the execution of a common purpose and where the want of care of each is of the same character as the want of care of the other applies in the case of injuries resulting from a collision between two motor vehicles and precludes a joint suit

against both drivers where it appears that they were not acting in concert in the execution of a common purpose.—Davies v. Seasley, App., 34 N.E.2d 265.

54. Fla.—Stanley v. Powers, 166 So. 843, 123 Fla. 359.

Ill.—Gleason v. Cunningham, 44 N.E. 2d 940, 316 Ill.App. 286.

N.C.—Charnock v. Taylor, 26 N.E.2d 911, 223 N.C. 360, 148 A.L.R. 1126. S.D.—Fusfield v. Smith, 282 N.W. 523, 66 S.D. 309.

Right of defendant to bring in other persons jointly liable with him see infra subdivision c of this section.

55. U.S.—Copley v. Stone, D.C.S.C., 75 F.Supp. 203.

Colo.—Alden v. Watson, 102 P.2d 479, 106 Colo. 103.

Ga.—Shepherd v. Amos, 42 S.E.2d 775, 75 Ga.App. 221.

Ill.—Gleason v. Cunningham, 44 N.E. 2d 940, 316 Ill.App. 286

Mo.—Camden v. St. Louis Public Service Co., App., 206 S.W.2d 699.

N.C.—Anthony v. Knight, 191 S.E. 323, 211 N.C. 637.

Ohio—Uthoff v. Du Brie, 23 N.E.2d 854, 62 Ohio App. 285.

Pa.—Parker, to Use of Bunting, v. Rodgers, 189 A. 693, 125 Pa.Super. 48.

42 C.J. p 1189 note 69.

Personal representative of one driver and person responsible for conduct of driver of other vehicle held properly joined—Stafford v. Central Greyhound Lines, Ohio App., 31 N.E.2d 587.

56. Cal.—Tracy v. Brecht, 39 P.2d 498, 3 Cal.App.2d 105.

Ill.—Gleason v. Cunningham, 44 N.E. 2d 940, 316 Ill.App. 286.

Ky.—Roberts v. White, 99 S.W.2d 447, 266 Ky. 483.

La.—Brady v. Hollandsworth, App., 25 So.2d 113—Woodruff v. Stewart, App., 6 So.2d 796.

Wash.—Thornton v. Eneroth, 30 P. 2d 951, 177 Wash. 1—Graves v. Flesher, 28 P.2d 297, 176 Wash. 130.

Joinder of the person responsible for a motor vehicle injury and his insurer is discussed supra § 118.

Family purpose doctrine. In jurisdictions where the family purpose doctrine is applied so as to impose liability on the head of the family for the negligence of a member of the family having general authority to drive, discussed supra § 433, the head of the family and the member of the family operating the vehicle at the time the injury occurred may be joined as defendants,⁵⁷ or the head of the family may be sued separately.⁵⁸

Husband and wife. In jurisdictions where husband and wife are jointly liable for torts committed by the wife, as discussed in Husband and Wife § 219 a (3), it has been held that the husband is a necessary party in an action to recover damages for injuries caused by a motor vehicle driven by the wife.⁵⁹ The husband need not be joined, however, in an action against the wife for an injury for which she alone is answerable.⁶⁰ Where an injury is caused by the negligent operation of a vehicle owned jointly by a husband and wife, it has been held that the injured person may sue either the husband or wife or both.⁶¹

Owner and bailee. It has been held that a joint action may be maintained against the owner and bailee of a vehicle if, and only if, the owner and bailee exercised joint control at the time of the accident.⁶²

Owner and operator. Where, under statutes, the owner of a motor vehicle may be held liable for injuries caused by the negligent operation of the vehicle by another operating the vehicle with the owner's consent, express or implied, as discussed supra § 442, it has been held that the owner and the operator may be sued either jointly⁶³ or severally.⁶⁴ Apart from such statutes, in actions to recover damages for personal injuries predicated on the negligent operation of a motor vehicle wrongfully intrusted to an incompetent driver, it has been held proper to join the owner and driver as parties defendant.⁶⁵

Principal and agent and master and servant. In some jurisdictions it is held that the principal or master cannot be sued jointly with the driver where the master's liability is based solely on the rule of respondeat superior,⁶⁶ although the injured person may bring a suit against the driver or against

57. Ill.—Martin v. Starr, 255 Ill. App. 189.

58. Ga.—Miller v. Straus, 145 S.E. 501, 38 Ga App. 781.

59. Tex.—Levy v. Rogers, Civ.App. '75 S.W.2d 304, error granted.

60. Tenn.—Foster v. Ingle, 246 S.W. 530, 147 Tenn. 217, 27 A.L.R. 1214.

61. Fla.—Stanley v. Powers, 166 So. 843, 123 Fla. 359.

62. Pa.—Lang v. Hanlon, 153 A. 143, 302 Pa. 173.

If joint control was not exercised by owner and bailee case must be treated as individual action against one having supervision and control.—Lang v. Hanlon, 153 A. 143, 302 Pa. 173.

63. N.Y.—Sarine v. Maher, 63 N.Y. S.2d 241, 187 Misc. 199.

If the alleged owner is not in fact the owner, it is improper to join him.—Kearns v. Atkins, La.App., 2 So.2d 507.

64. N.Y.—Sarine v. Maher, 63 N.Y. S.2d 241, 187 Misc. 199.

Joint and several liability of owner and operator see supra § 397.

Operator not necessary party

(1) The operator is not a necessary party in an action against the owner.—Davidson v. Ealey, 158 P.2d 1000, 69 Cal.App.2d 254—Sayles v. Peters, 54 P.2d 94, 11 Cal.App.2d 401—Carver v. Donin, 50 P.2d 835, 9

Cal.App.2d 634—Milburn v. Foster, 47 P.2d 1106, 8 Cal.App.2d 478.

(2) This is true notwithstanding provisions of imputed liability statute providing that operator of vehicle whose negligence is imputed to owner shall be made a party defendant if personal service of process can be made on him within the state, and that on recovery of judgment recourse shall first be had to operator's property, and subrogating owner to all rights of person injured against operator, such provisions being intended to protect owner from results of operator's negligence in so far as possible as between operator and owner without interfering with rights of injured party.—Davidson v. Ealey, 158 P.2d 1000, 69 Cal. App.2d 254.

65. Ohio.—Wery v. Seff, 25 N.E.2d 692, 136 Ohio St. 307.

66. D.C.—Knox v. Redwine, 59 F.2d 304, 61 App.D.C. 179, certiorari denied Redwine v. Knox, 53 S.Ct. 86, 287 U.S. 636, 77 L.Ed. 551.

Me.—Hobbs v. Hurley, 104 A. 815, 117 Me. 449.

Ohio.—Albers v. Great Central Transport Corp., 60 N.E.2d 669, 145 Ohio St. 129—Wery v. Seff, 25 N.E.2d 692, 136 Ohio St. 307—Kaiser v. Rodenbaugh, Com.Pl., 68 N.E.2d 239—King v. Corporation of Liberty, Ind., 12 Ohio Supp. 147. Vt.—Raymond v. Capobianco, 178 A. 896, 107 Vt. 295, 98 A.L.R. 1051.

"The theory upon which this rule

rests is that while the law makes the master answerable for the negligent or wrongful act of the servant done within the scope of the agency, the negligent or wrongful act of the servant is neither in fact nor in legal intentment the joint act of the master and servant."—Raymond v. Capobianco, 178 A. 896, 898, 107 Vt. 295, 98 A.L.R. 1051.

Liability not based solely on respondeat superior

(1) Where the owner is an occupant of the car at the time of the accident, he and the operator may be joined, since the operator may have been negligent in the manner of operation and the owner in permitting it to be so operated.—Hoge v. Soissons, 192 N.E. 860, 48 Ohio App. 221.

(2) So, in action against master and servant, where petition, after alleging the relationship and the negligence of servant, also alleged that the master was negligent in employing the servant to drive automobile because latter was an incompetent driver, which fact was known to master, there was no misjoinder of parties.—Kaiser v. Rodenbaugh, Ohio Com.Pl., 68 N.E.2d 239.

(3) Similarly, it has been held that a petition charging that defendants were engaged in jointly operating vehicle causing injury is not demurrable as joining principal and agent in same action involving tort liability.—King v. Corporation of Liberty, Ind., 12 Ohio Supp. 147.

the principal or master.⁶⁷ In other jurisdictions the person injured is allowed to sue the principal and agent or master and servant jointly,⁶⁸ although he is not required to do so, and either may be sued separately.⁶⁹ Where a driver is employed by two or more persons, all may be joined as defendants.⁷⁰

Enforcement of lien. In an action to enforce a statutory lien for damages, it has been held that the owner of the vehicle is a necessary party,⁷¹ but the driver of the automobile, who was using it with the owner's permission, is not,⁷² unless a personal judgment is sought against him.⁷³

c. Addition of Parties

Under some statutes the original defendants may join or add other persons as defendants.

67. Me.—Hobbs v. Hurley, 104 A. 815, 117 Me. 449.

68. U.S.—Norwalk v. Air-Way Electric Appliance Corporation, C.C.A. N.Y., 87 F.2d 317, 110 A.L.R. 183. Ala.—Hawkins v. Barber, 163 So. 608, 231 Ala. 53.

Colo.—Drake v. Hodges, 161 P.2d 338, 114 Colo. 10.

Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71—Skula v. Lehon, 175 N.E. 832, 343 Ill. 602—Martin v. Starr, 255 Ill. App. 189—Richardson v. Moore, 254 Ill. App. 511—Barran v. Adanick, 251 Ill. App. 481.

Ind.—Cushman Motor Delivery Co. v. McCabe, 36 N.E.2d 769, 219 Ind. 156.

Ky.—Sherwood v. Huber & Huber Motor Exp. Co., 151 S.W.2d 1007, 286 Ky. 775, 135 A.L.R. 263.

N.Y.—All v. Delaware & H. R. Corporation, 29 N.Y.S.2d 439, 176 Misc. 977.

W.Va.—Lee v. Standard Oil Co., 144 S.E. 292, 105 W.Va. 579.

42 C.J. p 1189 note 77.

Action against city and policeman

In action for injuries sustained when struck by automobile driven by a policeman employed by city, city was properly joined with the policeman as a defendant, in view of the fact that, in event of a recovery against the policeman, the city would be liable over to the policeman under statute.—Kosiba v. City of Syracuse, 24 N.Y.S.2d 37, 260 App. Div. 557, reargument denied 25 N.Y.S.2d 1021, 261 App. Div. 884, modified on other grounds 39 N.E.2d 240, 287 N.Y. 283.

If the alleged master is not in fact the operator's master, it is improper to join him on the theory that he is.—Kearns v. Atkins, La.App., 2 So.2d 507.

In Pennsylvania

(1) Under a statute in effect so providing, the person injured is allowed to sue the master and servant jointly, whatever the basis of their

respective liabilities.—East Broad Top Transit Co. v. Flood, 192 A. 401, 326 Pa. 353—Parker, to Use of Bunting, v. Rodgers, 189 A. 693, 125 Pa. Super. 48—Kuhn v. Bishop, Com.Pl., 86 Pittsb. Leg. J. 36, 51 York Leg. Rec. 176.

(2) Prior to the passage of this statute, master and servant could not be sued jointly where the liability of the master was based on the doctrine of respondent superior.—Cicco v. Wiltshire, 20 Pa. Dist. & Co. 558, 35 Lack. Jur. 65.

69. Cal.—Sanderson v. Niemann, 110 P.2d 1025, 17 Cal.2d 563.

Ky.—Sherwood v. Huber & Huber Motor Exp. Co., 151 S.W.2d 1007, 286 Ky. 775, 135 A.L.R. 263.

N.Y.—All v. Delaware & H. R. Corporation, 29 N.Y.S.2d 439, 176 Misc. 977—Schwartz v. City of New York, 25 N.Y.S.2d 964.

70. La.—Calamia v. Mayer, App., 174 So. 668.

71. Tenn.—Keller v. Federal Bob Brannon Truck Co., 269 S.W. 914, 151 Tenn. 427.

72. Tenn.—Keller v. Federal Bob Brannon Truck Co., supra.

73. Tenn.—Keller v. Federal Bob Brannon Truck Co., supra.

74. At any stage of the cause, under a statute so providing, new parties may be added by order of the court as the ends of justice may require.—Long Ben v. Eastern Motor Co., 109 A. 286, 94 N.J. Law 34.

75. N.C.—Grant v. McGraw, 46 S.E.2d 849, 228 N.C. 745.

Pa.—McCauley v. First Nat. Bank of Greensburg, 37 Pa. Dist. & Co. 143—Turner v. Atlantic Refining Co., 28 Pa. Dist. & Co. 337.

42 C.J. p 1189 note 79.

Plaintiff cannot alter defendant's rights

The right of the original defendant to join a person not a party to the original action who is, or may be, liable to him for all, or part, of

General rules and statutory provisions relating to the addition of new parties apply in actions to recover damages for injuries caused by the operation of a motor vehicle.⁷⁴ Under some statutes other persons may properly be added as defendants,⁷⁵ and the persons who may be joined depend on the terms of the statute invoked.⁷⁶ In the absence of a specific provision making it a matter of right, the bringing in of a third party has been held to rest in the discretion of the court.⁷⁷ Depending on the terms of the statute, additional defendants may be joined on the theory of sole liability,⁷⁸ liability over,⁷⁹ or, likewise, additional defendants may

plaintiff's claim against him may not be altered by a plaintiff who merely brings on the record in the first instance one of the parties who may be liable.—Adam v. Vacquier, D.C. Pa., 48 F. Supp. 275.

76. Party joined as plaintiff held not subject to joinder as additional defendant at instance of original defendant.—Stokes v. Giarraputo & Son, 42 Pa. Dist. & Co. 161.

77. N.Y.—Jackson v. Bickelhaupt, 219 N.Y.S. 601, 128 Misc. 610.

S.D.—Fusfield v. Smith, 282 N.W. 523, 66 S.D. 309.

78. Pa.—Seymour v. Folberg, 46 Pa. Dist. & Co. 292, 31 Del. Co. 161—Atkinson v. McClain, 35 Pa. Dist. & Co. 49.

Nonresident allegedly responsible for accident held properly joined by original defendants.—McCauley v. First Nat. Bank of Greensburg, 37 Pa. Dist. & Co. 143—McCauley v. Thomas' Estate, Com.Pl., 88 Pittsb. Leg. J. 59, 54 York Leg. Rec. 109.

79. Pa.—Seymour v. Folberg, 46 Pa. Dist. & Co. 292, 31 Del. Co. 161.

The fact that there is an insurance policy covering original defendant and operator does not preclude impleading operator against whom original defendant might ultimately have right to indemnity.—Barrett v. Bowen, 27 N.Y.S.2d 693.

Liability over not shown

N.Y.—Coyle v. Mason, 33 N.Y.S.2d 694, 263 App. Div. 1041—Parness v. Halpern, 15 N.Y.S.2d 109, 257 App. Div. 678.

Facts wholly defeating plaintiff's claim

Under a statute permitting a defendant to bring in a third person if he shows that some third person, not a party to the action, is or will be liable to defendant, wholly or in part, for the claim made against defendant in the action where the showing made by defendant on a motion to bring in an additional de-

be joined on the theory of joint liability.⁸⁰ Where the third person is charged with liability as a several, rather than as a joint, tort-feasor, it has been held that no order should be granted bringing in such third person as an additional defendant except on notice to him.⁸¹

§ 501. Process

- a. In general
- b. Motor carriers

a. In General

As a general rule, process must be served in the manner authorized by statute.

Rules as to the nature, necessity, and modes of service in civil actions generally have been applied in actions for damages for injuries sustained as a result of the operation of a motor vehicle.⁸² Ordini-

narly, service of process in such actions is a statutory matter,⁸³ and unless a defendant is served with process in some manner authorized by statute the court is without authority to proceed.⁸⁴ The summons should clearly set forth the name of the one sued.⁸⁵ It is also generally true that a court's jurisdiction is confined to persons within the territorial jurisdiction of the court and service of process beyond such limits is ineffective to confer jurisdiction, in the absence of a statute providing otherwise.⁸⁶

A statute authorizing state-wide venue in certain actions involving motor vehicle accidents does not by necessary implication authorize state-wide service of process.⁸⁷ However, some statutes authorize service beyond the territorial limits of the court in which suit is properly brought.⁸⁸ Under a statute permitting an action against the owner to be

defendant is that the original defendant will probably be able to adduce evidence that will result in wholly defeating plaintiff's claim, rather than evidence that may result in a joint judgment against the original defendant and the defendant sought to be added, it has been held that the motion should be denied—*Shuler v. Whitmore, Rauber & Vicinus*, 246 N.Y.S. 528, 138 Misc. 814, affirmed 251 N.Y.S. 886, 233 App.Div. 892.

Locus delicti as governing contribution

Where the law of the place where the accident occurred does not allow contribution between joint tort-feasors, it has been held that the original defendant cannot add other alleged joint tort-feasors as parties.—*Charnock v. Taylor*, 26 S.E.2d 911, 823 N.C. 360, 148 A.L.R. 1126.

80. N.C.—*Freeman v. Thompson*, 5 S.E.2d 434, 216 N.C. 484—*Powell v. Smith*, 4 S.E.2d 524, 216 N.C. 242.

Pa.—*Seymour v. Folberg*, 46 Pa.Dist. & Co. 292, 31 Del.Co. 161.

81. N.Y.—*Jackson v. Bickelhaupt*, 219 N.Y.S. 601, 128 Misc. 610, 42 C.J. p 1189 note 80.

82. U.S.—*Doggett v. Peck*, D.C.Tex., 32 F.Supp. 889.

Ark.—*Lindley v. Kincannon*, 140 S.W.2d 1005, 200 Ark. 772.

Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309.

N.Y.—*Kuris v. Pepper Poultry Co.*, 21 N.Y.S.2d 791, 174 Misc. 801—*Scott v. Dickerson*, 8 N.Y.S.2d 656, 169 Misc. 1047.

Service on resident agent of foreign corporation held to confer jurisdiction.

Ark.—*Viking Freight Co. v. Keck*, 153 S.W.2d 166, 202 Ark. 663, reheard 153 S.W.2d 167, 202 Ark. 656

—*Viking Freight Co. v. Keck*, 153 S.W.2d 163, 202 Ark. 656, reheard 153 S.W.2d 167, 202 Ark. 656.

Iowa.—*Schoulte v. Great Lakes Forwarding Corporation*, 298 N.W. 914, 230 Iowa 812.

83. U.S.—*Doggett v. Peck*, D.C.Tex., 32 F.Supp. 889.

Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309.

Process not directed to officer serving summons

Under a statute so providing, it is no objection to service that the process was not directed to the officer making the service.—*American Fidelity & Cas. Co. v. Farmer*, Ga.App., 48 S.E.2d 122.

84. Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309.

Ohio.—*Klein v. Lust*, 143 N.E. 527, 110 Ohio St. 197—*Osmus v. Baumhardt*, 192 N.E. 134, 47 Ohio App. 491.

Pa.—*Shaffer v. Burkhardt*, Com.Pl., 60 York Leg.Rec. 53.

A summons directed to a bailiff of a municipal court in the county of defendant's residence has been held to be defective—*Klein v. Lust*, 143 N.E. 527, 110 Ohio St. 197.

85. Summons construed

Where summons, in action for death of person killed because of allegedly defective automobile which he had hired from lessee of corporation engaged in licensing equipment necessary in business of renting automobiles for hire to the public, commanded sheriff "to summon (corporation) operated by (lessee), R.B. S., Mgr., 812 Market St., Chattanooga, Tenn." and summons was served on lessee's manager, it was apparent that plaintiff was proceeding against lessee and not against corporation.—*Stansell v. Hertz Driv-*

erself System, 144 S.W.2d 784, 176 Tenn. 612.

86. Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309.

Pa.—*Koll v. Pickford*, 44 A.2d 276, 353 Pa. 118—*Hartman v. Donahue*, 16 A.2d 691, 142 Pa.Super. 382.

87. Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309.

88. Ohio.—*Uthoff v. Du Brie*, 23 N.E.2d 854, 62 Ohio App. 285—*McKee v. Liming*, 165 N.E. 304, 31 Ohio App. 303.

Pa.—*Snyder v. Temple*, 16 Pa.Dist. & Co. 712.

Tenn.—*Chickasaw Wood Products Co. v. Lane*, 125 S.W.2d 164, 22 Tenn.App. 596.

Statute liberally construed

Ohio.—*Osmus v. Baumhardt*, 192 N.E. 134, 47 Ohio App. 491.

Necessary facts must appear

The petition must allege that plaintiff is a resident of the county and that defendant is the owner of the vehicle, or a motion will lie to quash service.—*Stern v. Gimbel*, 25 Ohio N.P., N.S., 211.

Action brought in county where damages occurred

(1) In actions for damages brought in the county where the alleged damages were sustained, under some statutes service may be made anywhere within the state.—*Koll v. Pickford*, 44 A.2d 276, 353 Pa. 118—*Gossard v. Gossard*, 178 A. 837, 319 Pa. 123—*Wiesheier v. Kessler*, 165 A. 854, 311 Pa. 380—*Hartman v. Donahue*, 16 A.2d 691, 142 Pa.Super. 382—*Pickering v. Snyder*, 27 Pa.Dist. 9.

(2) Such a statute has been held constitutional.—*Garrett v. Turner*, 84 A. 354, 235 Pa. 383.

(3) When officer of county other

brought in the county wherein the injured person resides, and allowing process to issue against defendant or defendants in other counties, where an action is properly brought against the owner in the county in which the injured person resides, process may issue to another county as against one alleged to be jointly liable with the owner,⁸⁹ and, where defendant owner voluntarily appears and answers to the merits without service of summons on him, the action being rightly brought as to him, summons may issue to any other county to a joint defendant.⁹⁰ Under such statute, where joint defendants are nonresidents of the county wherein suit is brought and summons has been issued for them to another county, the averments of the petition and the proof on the trial must show that plaintiff has a valid joint cause of action against the defendants on whom valid service is had as well as against the nonresident defendants.⁹¹

Statute authorizing service on driver or custodian. A statute authorizing service on a nonresident owner of a motor vehicle by service on the chauffeur, operator, or custodian of the vehicle, and not containing any provision making it reasonably probable that notice of service will be communicated to the owner, has been held invalid.⁹²

Additional defendants. Any service of process authorized on an original defendant may be used to serve an additional defendant.⁹³ Under some rules of practice a defendant seeking to bring in additional defendants, has no greater rights in se-

curing service than plaintiff had for service in the action.⁹⁴

b. Motor Carriers

In the absence of specific statutory provisions providing otherwise, the service of process in actions against motor carriers for injuries sustained as a result of the operation of a motor vehicle belonging to such carrier is governed by the rules applicable to civil actions generally.

In the absence of specific statutory provisions providing otherwise, the service of process in actions against motor carriers for damages for injuries sustained as a result of the operation of a motor vehicle belonging to such carrier is governed by the rules and statutory provisions applicable to civil actions generally.⁹⁵ Statutes specifically providing for the mode of service have been held valid,⁹⁶ and, being procedural, apply to causes of action arising prior thereto.⁹⁷ Some statutes authorize service on the carrier by service on certain agents or servants of the carrier.⁹⁸ Such a statute has been construed as not impairing or taking away any of the means for service already existing by law,⁹⁹ but, on the contrary, to be limited to cases where there is no other ample legal facility for the service of process.¹

§ 502. — Appointment of State Official as Agent

a. In general

b. Residence of plaintiff as affecting right

than that where writ issues serves writ, he serves it by legislative authority, and not as deputy of officer of county where it issues.—Fackenthall v. Wight, 158 A. 580, 104 Pa. Super. 215.

Venue statute held not to restrict process statute authorizing service outside county where action brought.—Uthoff v. Du Brie, 23 N.E.2d 854, 62 Ohio App. 285.

89. Ohio.—Gorey v. Black, 125 N.E. 126, 100 Ohio St. 73.

90. Ohio.—Gorey v. Black, *supra*.

91. Ohio.—Gorey v. Black, *supra*.

92. N.J.—Lepre v. Real Estate-Land Title Trust Co., 168 A. 858, 11 N.J. Misc. 887.

93. Pa.—Cirelli v. Good Distributors Inc., 20 Pa. Dist. & Co. 651.

94. Pa.—Koll v. Pickford, 44 A.2d 276, 353 Pa. 118.—Hartman v. Donahue, 16 A.2d 691, 142 Pa. Super. 382.

95. Mo.—State ex rel. Minihan v. Aronson, 165 S.W.2d 404, 350 Mo. 309.

96. Ark.—Yocum v. Oklahoma Tire

& Supply Co., 89 S.W.2d 919, 191 Ark. 1126.

Neb.—Schwartz v. Ogram, 242 N. W. 273, 123 Neb. 76, 81 A.L.R. 769. Statute authorizing service on driver or custodian of motor vehicle as invalid see *supra* subdivision a of this section.

97. Ark.—Yocum v. Oklahoma Tire & Supply Co., 89 S.W.2d 919, 191 Ark. 1126.

98. Ark.—Viking Freight Co. v. Keck, 153 S.W.2d 166, 202 Ark. 663, reheard 153 S.W.2d 167, 202 Ark. 656.—Viking Freight Co. v. Keck, 153 S.W.2d 163, 202 Ark. 656, reheard 153 S.W.2d 167, 202 Ark. 656.—Bryant Truck Lines v. Nance, 134 S.W.2d 555, 199 Ark. 556.—Yocum v. Oklahoma Tire & Supply Co., 89 S.W.2d 919, 191 Ark. 1126. Neb.—Schwartz v. Ogram, 242 N. W. 273, 123 Neb. 76, 81 A.L.R. 769. Statute authorizing service on state official as agent for motor carrier see *infra* § 502 a.

Injury not due to operation of vehicle

Service on agent or servant held not sufficient to confer jurisdiction

where plaintiff's injury was not occasioned by operation of vehicle, since statute applies only to actions for damages occasioned by negligent operation of a vehicle.—Bryant Truck Lines v. Nance, 134 S.W.2d 555, 199 Ark. 556.

Individually owned carrier

A statute authorizing service on bus companies or trucking companies engaged in the business of common carriers by service of a summons on a driver engaged in such business has been held to authorize service on the driver of an individually owned company, it being clear that the legislature intended the statute to apply to every owner of such business, whether such owner be an individual or a company.—Schwartz v. Ogram, 242 N.W. 273, 123 Neb. 76, 81 A.L.R. 769.

99. Ark.—Missouri Pacific Transp. Co. v. Pipkin, 133 S.W.2d 851, 199 Ark. 339.

1. Ark.—Lindley v. Kincannon, 140 S.W.2d 1005, 200 Ark. 772.—Bryant Truck Lines v. Nance, 134 S.W.2d 555, 199 Ark. 556.—Dixie Motor Coach Corporation v. Toler, 126 S.W.2d 618, 197 Ark. 1097.

- c. Necessity of accident being within state upon highway
- d. Persons subject to constructive service
- e. Form of process and mode of service
- f. Proceedings to vacate service
- g. Application and effect of statutes in courts of limited jurisdiction

a. In General

Statutes authorizing the commencement of a suit against a nonresident motorist by service on a state official as agent of the nonresident are within the power of the legislature to enact, and their validity has generally been upheld. Such statutes, being in derogation of common law, are strictly construed and must be strictly followed in order to secure the intended benefits.

The state may, as a condition precedent to the use of its highways by a nonresident motorist, re-

quire him to consent to the appointment of a state official as his agent for the acceptance of service of process in actions arising out of the operation of his motor vehicle within the state,² or it may exclude a nonresident until a formal appointment is made,³ or declare that the use of its highways by the nonresident is the equivalent of the appointment of a state official as agent for the acceptance of the service of process;⁴ and the statutes usually make the mere operation of a motor vehicle upon the highway by a nonresident the equivalent of a formal appointment of a public officer as agent.⁵ The power of the state in the premises and the validity of statutes enacted pursuant thereto rest on the right of the state, in the exercise of its police powers, to prescribe regulations necessary for public safety and order in the operation of motor vehicles,⁶ and the validity of such statutes has generally been upheld,⁷ provided they contain provisions

2. U.S.—Hess v. Pawloski, Mass., 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091.

Ky.—Mann v. Humphrey's Adm'x, 79 S.W.2d 17, 257 Ky. 647, 96 A.L.R. 584—Hirsch v. Warren, 68 S.W.2d 767, 253 Ky. 62.

Mont.—State ex rel. Thompson v. District Court of Fourth Judicial Dist. in and for Missoula County, 91 P.2d 422, 108 Mont. 362.

Nev.—Kroll v. Nevada Indus. Corp., 191 P.2d 889.

N.Y.—Freedman v. Poirier, 236 N.Y. S. 96, 134 Misc. 253, affirmed 237 N.Y.S. 618, 227 App.Div. 320.

Pa.—Sipe v. Moyers, 44 A.2d 263, 353 Pa. 75.

Wis.—State v. Belden, 211 N.W. 916, 193 Wis. 145, 57 A.L.R. 1218, rehearing denied 214 N.W. 460, 193 Wis. 145, 57 A.L.R. 1218.

3. U.S.—Hess v. Pawloski, Mass., 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091—Kane v. New Jersey, N.J., 37 S.Ct. 30, 242 U.S. 160, 61 L.Ed. 222.

N.J.—Cleary v. Johnston, 74 A. 538, 79 N.J.Law 49.

4. U.S.—Hess v. Pawloski, Mass., 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091.

Ky.—Hirsch v. Warren, 68 S.W.2d 767, 253 Ky. 62.

La.—Spearman v. Stover, App., 170 So. 259.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269.

Nev.—Kroll v. Nevada Indus. Corp., 191 P.2d 889.

Or.—State ex rel. Pardee v. Latour-ette, 125 P.2d 750, 168 Or. 584.

Pa.—Sipe v. Moyers, 44 A.2d 263, 353 Pa. 75.

5. U.S.—Denver-Chicago Trucking Co. v. Lindeman, D.C.Iowa, 73 F. Supp. 925—Andrews v. Joseph Co-

hen & Sons, D.C.Tex., 45 F.Supp. 732—Williams v. James, D.C.Ia., 34 F.Supp. 61—Carby v. Greco, D. C.Ky., 31 F.Supp. 251.

Ill.—Jones v. Pebler, 20 NE2d 592, 371 Ill. 309, 125 A.L.R. 451

Ky.—Hirsch v. Warren, 68 S.W.2d 767, 253 Ky. 62.

Nev.—Kroll v. Nevada Indus. Corp., 191 P.2d 889.

N.J.—Yarborough v. Slokum, 33 A.2d 905, 130 N.J.Law 565.

N.Y.—Cooper v. Amehler, 35 N.Y.S. 2d 917, 178 Misc. 844—Praete v. Adams, 8 N.Y.S.2d 235, 169 Misc. 776.

Or.—State ex rel. Pardee v. Latour-ette, 125 P.2d 750, 168 Or. 584.

Pa.—Sipe v. Moyers, 44 A.2d 263, 353 Pa. 75—Minchert v. Shaffer, Com. Pl., 86 Pittsb.Leg.J. 317.

Tenn.—Carter v. Schackne, 114 S.W. 2d 787, 173 Tenn. 44.

42 C.J. p 640 note 51.

Disaffirmance because of infancy

(1) Appointment of state official for service of process, implied by law from operation of automobile by nonresident within state, cannot be disaffirmed because of infancy.—Gessell v. Wells, 173 N.E. 885, 254 N.Y. 604.

(2) This is true whether a minor's delegation of power is generally regarded as void or merely voidable.—Silver Swan Liquor Corporation v. Adams, 110 P.2d 1097, 43 Cal.App.2d Supp. 851.

6. U.S.—Wood v. Wm B. Reilly & Co., D.C.Ga., 40 F.Supp. 507.

Mont.—State ex rel. Charette v. District Court of Second Judicial Dist. in and for Silver Bow County, 86 P.2d 750, 107 Mont. 489.

42 C.J. p 640 note 52.

Power not limited to agency rules
The state's police power is not

limited to rules of agency and contract—Oviatt v. Garretson, 171 S.W. 2d 287, 205 Ark. 792.

Situation of both parties should be considered in determining the validity of statutes authorizing service on a nonresident motorist by service on a state official—Wuchter v. Pizzutti, N.J., 48 S.Ct. 259, 276 U.S. 13, 72 L.Ed. 446, 57 A.L.R. 1230.

7. U.S.—Hess v. Pawloski, Mass., 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091—Tubltitz v. Hirschfeld, C.C.A. N.Y., 118 F.2d 29—Morrow v. Asher, D.C.Tex., 55 F.2d 365—Cohen v. Plutschak, D.C.N.J., 40 F.2d 727—Moore v. Payne, D.C.Ia., 35 F.2d 232—Jones v. Paxton, D.C.Minn., 27 F.2d 364—Panzram v. O'Donnell, D.C.Minn., 48 F.Supp. 74—Bouchillon v. Jordan, D.C.Miss., 40 F.Supp. 354—Sussan v. Strasser, D.C.Pa., 36 F.Supp. 266—Boss v. Irvine, D.C.Wash., 28 F.Supp. 983—Weiss v. Magnussen, D.C.Va., 13 F.Supp. 948—Carr v. Tennis, D.C. Pa., 4 F.Supp. 142.

Ark.—Oviatt v. Garretson, 171 S.W. 2d 287, 205 Ark. 792—Alexander v. Bush, 134 S.W.2d 519, 199 Ark. 562—Highway Steel & Manufacturing Co. v. Kincannon, 127 S.W. 2d 816, 198 Ark. 134, appeal dismissed Highway Steel & Mfg. Co. v. Crawford County Circuit Court, 60 S.Ct. 88, 308 U.S. 504, 84 L.Ed. 431, rehearing denied 60 S.Ct. 134, 308 U.S. 635, 84 L.Ed. 528—Kelso v. Bush, 89 S.W.2d 594, 191 Ark. 1044.

Conn.—Barbieri v. Pandiscio, 163 A. 489, 116 Conn. 48—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

Ky.—Hoagland v. Dolan, 81 S.W.2d 869, 259 Ky. 1—Hirsch v. Warren, 68 S.W.2d 767, 253 Ky. 62.

making it reasonably probable that notice of suit or agent will be communicated to the nonresident defendant who is sued.⁸

La.—Roper v. Brooks, 9 So.2d 485, 201 La. 135—Maddry v. Moore Bros. Lumber Co., App., 197 So. 653—Galloway v. Wyatt Metal & Boiler Works, App., 180 So. 206, annulled on other grounds 181 So. 187, 189 La. 837.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269.

Minn.—Seltz v. Claybourne, 231 N.W. 714, 181 Minn. 4—Schilling v. Odlebak, 224 N.W. 694, 177 Minn. 90.

Mont.—State ex rel. Charette v. District Court of Second Judicial Dist. in and for Silver Bow County, 86 P.2d 750, 107 Mont. 489.

Neb.—Herzoff v. Hommel, 233 N.W. 458, 120 Neb. 475.

Nev.—Kroll v. Nevada Indus. Corp., 191 P.2d 889, upholding California statute.

N.H.—Potl v. New England Road Mach. Co., 140 A. 587, 83 N.H. 232.

N.J.—Rubin v. Goldberg, 154 A. 535, 9 N.J. Misc. 460.

N.Y.—Shushereba v. Ames, 175 N.E. 187, 255 N.Y. 490—Hand v. Fraser, 250 N.Y.S. 947, 233 App.Div. 800—Maquire v. Reiss, 249 N.Y.S. 469, 139 Misc. 886.

N.C.—Alberts v. Alberts, 8 S.E.2d 523, 217 N.C. 443—Wynn v. Robinson, 4 S.E.2d 884, 216 N.C. 347—Smith v. Haughton, 174 S.E. 506, 206 N.C. 587.

Ohio.—Harris v. Owens, 52 N.E.2d 522, 142 Ohio St. 379—Wilgoren v. Youngerman, 31 Ohio N.P.N.S. 225, upholding Massachusetts statute.

Pa.—Sipe v. Moyers, 44 A.2d 263, 353 Pa. 75—Dubin v. City of Philadelphia, 34 Pa.Dist. & Co. 61—Reinhart v. Shirm, 18 Pa.Dist. & Co. 151.

Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43.

Wis.—State v. Belden, 211 N.W. 916, 193 Wis. 145, 57 A.L.R. 1218, rehearing denied 214 N.W. 460, 193 Wis. 145, 57 A.L.R. 1218.

Statutes as not violating provisions of constitution guaranteeing: Equal protection see Constitutional Law § 559.

Due process see Constitutional Law § 619.

Fact that no venue is provided does not render statute unconstitutional.—Bouchillon v. Jordan, D.C. Miss., 40 F.Supp. 354.

Limited to accidents on highway

It has been held that a statute providing for substituted or constructive service on nonresident motorists would be invalid if not limited to actions or proceedings growing out of accidents or collisions on the highways.

U.S.—Finn v. Schreiber, D.C.N.Y., 35 F.Supp. 638.

Ill.—Brauer Machine & Supply Co. for Use of Bituminous Casualty Corporation v. Parkhill Truck Co., 50 N.E.2d 836, 383 Ill. 569, 148 A.L.R. 1208.

Application to resident becoming nonresident

The application of the statute to one who was a resident of the state when the injury occurred and thereafter became a resident of another state does not render it unconstitutional.

Mont.—State ex rel. Thompson v. District Court of Fourth Judicial Dist. in and for Missoula County, 91 P.2d 423, 108 Mont. 362.

Ohio.—Hendershot v. Ferkel, 56 N.E.2d 205, 144 Ohio St. 112.

Exclusion of nonresident plaintiffs from benefits of statute held not to render it unconstitutional.—State ex rel. Cochran v. Lewis, 159 So. 792, 118 Fla. 536, 99 A.L.R. 123.

Application to nonresident plaintiff held not to render statute invalid.—State v. Circuit Court for Dane County, 244 N.W. 766, 209 Wis. 246. Residence of plaintiff as affecting right see infra subdivision b of this section.

8. U.S.—Wuchter v. Pizzutti, N.J., 48 S.Ct. 259, 276 U.S. 13, 72 L.Ed. 446, 57 A.L.R. 1230—Hess v. Pawloski, 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091—Powell v. Knight, D.C.Va., 74 F.Supp. 191—Halliday v. Burlington Transp. Co., D.C.Mo., 36 F.Supp. 108—Smyrniotis v. Weintraub, D.C.Mass., 3 F.Supp. 439. Conn.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr. 22.

Ky.—Schaaf v. Brown, 200 S.W.2d 909, 304 Ky. 466—Hirsch v. Warren, 68 S.W.2d 767, 253 Ky. 62.

La.—Spearman v. Stover, App., 170 So. 259.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269—Grote v. Rogers, 149 A. 547, 158 Md. 685, followed in 149 A. 551, 158 Md. 695.

Mont.—State ex rel. Charette v. District Court of Second Judicial Dist. in and for Silver Bow County, 86 P.2d 750, 107 Mont. 489.

Nev.—Kroll v. Nevada Indus. Corp., 191 P.2d 889.

N.J.—Weiner v. Wittman, 27 A.2d 866, 129 N.J.Law 35.

N.Y.—Freedman v. Poirier, 237 N.Y.S. 618, 227 App.Div. 320—Horvath v. Brettschneider, 227 N.Y.S. 109, 131 Misc. 618, New Jersey statute

—Harris v. Equitable Surety Co., 226 N.Y.S. 263, 131 Misc. 85.

Ohio.—Harris v. Owens, 52 N.E.2d 522, 142 Ohio St. 379.

Or.—State ex rel. Pardee v. Latourrette, 125 P.2d 750, 168 Or. 584.

Wis.—State v. Belden, 211 N.W. 916, 193 Wis. 145, 57 A.L.R. 1218, rehearing denied 214 N.W. 460, 193 Wis. 145, 57 A.L.R. 1218.

Reason for rule

Unless the statute contains a provision making it reasonably probable that the nonresident will receive actual notice, it will be entirely possible for a person injured to sue any nonresident he chooses, and through service on the state official obtain a default judgment against a nonresident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody, and a provision of law for service that leaves open such a clear opportunity for the commission of fraud or injustice is not a reasonable provision.—Wuchter v. Pizzutti, N.J., 48 S.Ct. 259, 276 U.S. 13, 72 L.Ed. 446, 57 A.L.R. 1230.

Presumption that agent will inform

A reasonable probability of communication of notice does not arise from the mere presumption that the statutory agent will inform his principal.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr., Del., 22.

Actual notice does not cure invalidity

(1) The fact that nonresident has actual notice of suit does not render valid a statute under which the suit is brought, which permits service of process on state official without providing for notice to nonresident.—Kroll v. Nevada Indus. Corp., Nev., 191 P.2d 889.

(2) So, personal service on nonresident has been held not to supply constitutional validity to service on state official under invalid statute.—Wuchter v. Pizzutti, N.J., 48 S.Ct. 259, 276 U.S. 13, 72 L.Ed. 446, 57 A.L.R. 1230.

Plaintiff may mail notice

A statute is not invalid because permitting plaintiff himself to mail notice to motorist by registered mail.—State ex rel. Charette v. District Court of Second Judicial Dist. in and for Silver Bow County, 86 P.2d 750, 107 Mont. 489.

Absence of provision requiring return receipt held not to render statute unconstitutional.

Conn.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in Mac-

The purpose of such statutes is to further the safety of highway traffic within the state,⁹ and to facilitate the enforcement of civil remedies by those injured in their person or property by nonresidents,¹⁰ by permitting such persons to enforce their rights in the courts of the state where the injury occurred instead of in the forums of defendant's domicile.¹¹ Although it has been said that such

statutes were not intended for the benefit of the nonresident motorist,¹² he may benefit to some extent.¹³ The statutes are in derogation of common law,¹⁴ and must be strictly construed,¹⁵ except where such rule of construction has been abrogated,¹⁶ and a strict compliance with every requirement of such statutes is necessary in order to secure the benefits intended.¹⁷ It has been held that,

Donald v. Newman, 154 A. 259, 113 Conn. 756.

Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43.

Delivery of complaint not required
A statute is not invalid because it does not require delivery of complaint to motorist, where notice states where copy of complaint might be found.—State ex rel. Charette v. District Court of Second Judicial Dist. in and for Silver Bow County, 86 P.2d 750, 107 Mont. 489.

9. Ill.—Brauer Machine & Supply Co. v. Parkhill Truck Co., 47 N.E. 2d 521, 318 Ill.App. 56, affirmed Brauer Machine & Supply Co. for Use of Bituminous Casualty Corporation v. Parkhill Truck Co., 50 N.E.2d 836, 383 Ill. 569, 148 A.L.R. 1208.

Mont.—State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County, 114 P.2d 1047, 112 Mont. 253.

10. Cal.—Briggs v. Superior Court of Alameda County, 183 P.2d 758, 81 Cal.App.2d 240.

D.C.—Seymour v. Hawkins, 133 F.2d 15, 76 U.S.App.D.C. 376.

Kan.—Kelley v. Koetting, 190 P.2d 361, 184 Kan. 542.

La.—Roper v. Brooks, 9 So.2d 485, 201 La. 135—Galloway v. Wyatt Metal & Boiler Works, 181 So. 187, 189 La. 837.

Mont.—State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County, 114 P.2d 1047.

S.D.—Halverson v. Sonotone Corp., 27 N.W.2d 596.

11. Cal.—Briggs v. Superior Court of Alameda County, 183 P.2d 758, 81 Cal.App.2d 240.

Ill.—Jones v. Pebler, 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.

La.—Maddry v. Moore Bros. Lumber Co., App., 197 So. 653.

Mont.—State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County, 114 P.2d 1047, 112 Mont. 253.

Due process on defendant

The purpose of the statute is to accomplish due process on defendant.—State ex rel. Dresden v. District Court of Second Judicial Dist. in and for Bernalillo County, 112 P.2d 506, 45 N.M. 119.

Giving notice

The purpose of the statute provid-

ing for substituted service of process on nonresident motorists was to give the classes named therein notice of any action brought against them, that they might submit themselves to the jurisdiction of the court and offer such defense as they may be advised.—Cherry v. Heffernan, 182 So. 427, 132 Fla. 386.

12. U.S.—Zavis v. Warren, D.C. Wis., 35 F.Supp. 689.

D.C.—Seymour v. Hawkins, 133 F.2d 15, 76 U.S.App.D.C. 376.

13. Ill.—Nelson v. Richardson, 15 N.E.2d 17, 295 Ill.App. 504.

Statutes providing for service of process on statutory agent of nonresident motorist as affecting provisions tolling statute of limitations where defendant is nonresident see Limitations of Actions § 212.

14. U.S.—Commonwealth of Kentucky for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 122 F.2d 852 —Warner v. Maddox, D.C.Va., 68 F.Supp. 27—Dusminski v. Ladenheim, D.C.N.Y., 43 F.Supp. 139—Finn v. Schreiber, D.C.N.Y., 35 F.Supp. 638—Kirchner v. N. & W. Overall Co., D.C.S.C., 16 F.Supp. 915.

D.C.—Wood v. White, App.D.C., 97 F.2d 646, 68 App.D.C. 341, certiorari denied White v. Wood, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541.

Ga.—Mull v. Taylor, 23 S.E.2d 595, 68 Ga.App. 663.

Iowa.—Jermaine v. Graf, 283 N.W. 428, 225 Iowa 1063.

La.—Galloway v. Wyatt Metal & Boiler Works, App., 180 So. 206, annulled on other grounds 181 So. 187, 189 La. 837—Spearman v. Stover, App., 170 So. 259—Day v. Bush, 139 So. 42, 18 La.App. 682.

Mich.—Flynn v. Kramer, 261 N.W. 77, 271 Mich. 500—Brown v. Cleveland Tractor Co., 251 N.W. 557, 265 Mich. 475.

N.J.—Thomas v. Green, Sup., 58 A.2d 539.

N.Y.—Vecchione v. Palmer, 291 N.Y.S. 537, 249 App.Div. 661—Kornfeld v. Hurwitz, 32 N.Y.S.2d 820, 178 Misc. 216—Balter v. Webner, 23 N.Y.S.2d 918, 175 Misc. 184—Haughey v. Mineola Garage, 20 N.Y.S.2d 857, 174 Misc. 332.

Ohio.—Hendershot v. Ferkel, 56 N.E. 2d 205, 144 Ohio St. 112.

15. U.S.—Commonwealth of Kentucky for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 122 F.2d 852 —Warner v. Maddox, D.C.Va., 68 F.Supp. 27—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773—Dusminski v. Ladenheim, D.C.N.Y., 43 F.Supp. 139—Finn v. Schreiber, D.C.N.Y., 35 F.Supp. 638.

Del.—Syracuse Trust Co. v. Keller, 185 A. 327, 5 W.W.Harr. 304.

D.C.—Wood v. White, 97 F.2d 646, 68 App.D.C. 341, certiorari denied White v. Wood, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541.

Ga.—Mull v. Taylor, 23 S.E.2d 595, 68 Ga.App. 663.

Ill.—Jones v. Pebler, 16 N.E.2d 438, 296 Ill.App. 460, reversed on other grounds 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.

La.—Galloway v. Wyatt Metal & Boiler Works, App., 180 So. 206, annulled on other grounds 181 So. 187, 189 La. 837—Spearman v. Stover, App., 170 So. 259—Day v. Bush, 139 So. 42, 18 La.App. 682.

Mich.—Flynn v. Kramer, 261 N.W. 77, 271 Mich. 500—Brown v. Cleveland Tractor Co., 251 N.W. 557, 265 Mich. 475.

Neb.—Rose v. Gist, 298 N.W. 333, 139 Neb. 593.

N.J.—Thomas v. Green, Sup., 58 A.2d 539.

Ohio.—Donnelly v. Carpenter, 9 N.E. 2d 885, 55 Ohio 463—Parr v. Gregg, 42 N.E.2d 922, 170 Ohio App. 235—Carrier v. Neal, App., 35 N.E.2d 870, affirmed 33 N.E.2d 1002, 138 Ohio St. 131.

Pa.—Minehart v. Shaffer, Com.Pl., 86 Pittsb.Leg.J. 317.

In New York

(1) The rule stated in the text has been followed.—Vecchione v. Palmer, 291 N.Y.S. 537, 249 App.Div. 661—Balter v. Webner, 23 N.Y.S.2d 918, 175 Misc. 184—Haughey v. Mineola Garage, 20 N.Y.S.2d 857, 174 Misc. 332.

(2) It has also been stated, however, that the statute should be liberally construed.—Salzman v. Attrean, 254 N.Y.S. 288, 142 Misc. 245.

16. Mont.—State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County, 114 P.2d 1047, 112 Mont. 253.

17. U.S.—Burdick v. Powell Bros. Truck Lines, C.C.A.Ill., 124 F.2d 694.

where an action for injuries sustained in a motor vehicle accident is instituted in a county other than that in which the accident occurred, no right of service on the state official designated as agent for the acceptance of service of process on nonresident motorists is allowed.¹⁸

Such statutes primarily relate to jurisdiction,¹⁹ and have the effect of placing a nonresident motorist summoned thereunder on a parity with one actually summoned within the state.²⁰ They affect substantial rights,²¹ and cannot be applied retroactively to actions arising prior to their effective date

Del.—Syracuse Trust Co. v. Keller, 165 A. 327, 5 W.W.Harr. 304—Fellstead v. Eastern Shore Express, 160 A. 910, 5 W.W.Harr. 171.

Iowa.—Jermaine v. Graf, 283 N.W. 428, 225 Iowa 1063.

Ky.—Mann v. Humphrey's Adm'x, 79 S.W.2d 17, 257 Ky. 647, 96 A.L.R. 584.

La.—Spearman v. Stover, App., 170 So. 259.

Minn.—Schilling v. Odlebak, 224 N.W. 694, 177 Minn. 90.

N.J.—Thomas v. Green, Sup., 58 A.2d 539.

N.Y.—Kornfeld v. Hurwitz, 32 N.Y.S.2d 820, 178 Misc. 216.

Ohio.—Hendershot v. Ferkel, 56 N.E.2d 205, 144 Ohio St. 112.

Pa.—Reinhart v. Shirm, 18 Pa.Dist. & Co. 151.

Wis.—State ex rel. Stevens v. Grimm, 213 N.W. 475, 192 Wis. 601, followed in 213 N.W. 476, 192 Wis. 605.

Power of equity to correct defects

The legislature, when it passed the statute regarding service of summons on nonresident motorists, did not intend that the court should apply such rigidity to observance of inconsequential procedural provisions of the law as to deprive equity of its inherent power to set aright in a judicial proceeding that which by inadvertence has become disarranged, and where plaintiff's counsel, through inadvertence, had omitted to file summons, complaint and affidavit of service within time prescribed by statute and there was no showing that defendant would be prejudiced, plaintiff's motion for leave to file summons, complaint, and affidavit of service would be granted "nunc pro tunc."—Kornfeld v. Hurwitz, 32 N.Y.S.2d 820, 178 Misc. 216.

18. Pa.—McCall v. Gates, 47 A.2d 211, 354 Pa. 158—Nathan v. McGinley, 16 A.2d 2, 340 Pa. 10—Williams v. Meredith, 192 A. 924, 326 Pa. 570, 115 A.L.R. 890—Koll v. Pickford, Com.Pl., 94 Pittsb.Leg.J. 357.

However, in an early case it was held that the statute did not limit suit to the county where the accident occurred or provide that service of process can be made only by an officer of that county.—Aversa v. Aubry, 154 A. 311, 303 Pa. 139.

Rules of civil procedure held to define the limits of service of process on nonresident motorists in view of the rule making rules of civil procedure

applicable if the law authorizes such service.—McCall v. Gates, 47 A.2d 211, 354 Pa. 158.

Resident and nonresident defendant

(1) Where action against original defendant, in whose automobile plaintiff was riding at time of collision, was brought in county where original defendant resided, and collision, which involved automobiles of original defendant and a nonresident, occurred in another county, service of process on nonresident, as additional defendant, by serving process on state official under original defendant's petition to bring in nonresident as an additional defendant, was held invalid.—Nathan v. McGinley, 16 A.2d 2, 340 Pa. 10.

(2) However, it has also been held that in such action the original defendants may properly join as additional defendant, by writ of scire facias, a nonresident allegedly responsible for the accident, and cause service of the writ of scire facias to be made on him under the nonresident service act.—McCauley v. First Nat. Bank of Greensburg, 37 Pa.Dist. & Co. 143.

19. Ohio.—Harris v. Owens, 52 N.E.2d 522, 142 Ohio St. 379—Donnelly v. Carpenter, 9 N.E.2d 885, 65 Ohio 463—Parr v. Gregg, 42 N.E.2d 922, 170 Ohio App. 235—Carrier v. Neal, App., 35 N.E.2d 870, affirmed 33 N.E.2d 1002, 138 Ohio St. 131.

To amend record of judgment

Where judgment was rendered in action against nonresident motorist and another for damages growing out of accident or collision, service of process in suit to amend record of the judgment in such action at law on commissioner of motor vehicles gave court jurisdiction of nonresident.—Hubley v. Goodwin, 4 A.2d 665, 90 N.H. 54.

Face of petition as determinative

(1) Under nonresident motorist statute, acquisition of jurisdiction by service of process authorized by its terms depends on what is disclosed on face of petition itself.—Kelley v. Koetting, 190 P.2d 361, 164 Kan. 542.

(2) An allegation, that defendant "at the time of the accident hereinabove referred to and at this time is a nonresident of this state," sufficiently alleged jurisdictional fact of nonresidence.—Mann v. Humphrey's Adm'x, 79 S.W.2d 17, 257 Ky. 647, 96 A.L.R. 584.

20. Ky.—Riggs v. Schneider's Ex'r, 130 S.W.2d 816, 279 Ky. 361.

La.—Roper v. Brooks, 9 So.2d 485, 201 La. 135—Galloway v. Wyatt Metal & Boiler Works, 181 So. 187, 189 La. 837.

N.Y.—Cooper v. Amehler, 35 N.Y.S.2d 917, 178 Misc. 844.

Court acquires jurisdiction of person of nonresident by service in compliance with statute.

U.S.—Williams v. James, D.C.La., 34 F.Supp. 61.

Conn.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74.

La.—Roper v. Brooks, App., 9 So.2d 497, vacated on other grounds 9 So.2d 485, 201 La. 135.

N.Y.—Gesell v. Wells, 173 N.E. 885, 254 N.Y. 604—Cook v. Nelson, 62 N.Y.S.2d 875, 186 Misc. 1018.

Personal judgment can be rendered against nonresident defendant when he is served with process by service on state official in compliance with statute.—Mann v. Humphrey's Adm'x, 79 S.W.2d 17, 257 Ky. 647, 96 A.L.R. 584.

Duty of nonresident to inquire

On receipt of copy of writ and complaint, nonresident defendant must inquire into statutory provisions of state before whose court he is summoned.—Barbieri v. Pandiscio, 163 A. 469, 116 Conn. 48.

Process does not run outside state

Constructive process does not run into the other state, but finds defendant within the state of the action and there makes service on him through the agent appointed by his act, accompanied by due notice to himself.—Kroll v. Nevada Indus. Corp., Nev., 191 P.2d 889.

Removal to federal court

Once jurisdiction of the person of a nonresident motorist is acquired by the state courts by virtue of constructive service under the nonresident motorists' service statute, such courts are in no different position than in any other case where jurisdiction of the person has been acquired, in so far as the provisions of law dealing with the removal of causes from the state courts to the federal courts are concerned.—Cook v. Nelson, 62 N.Y.S.2d 875, 186 Misc. 1018.

21. D.C.—Wood v. White, 97 F.2d 646, 68 App.D.C. 341, certiorari denied White v. Wood, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541.

in the absence of an express requirement.²² While including all actions or proceedings fairly intended to be covered thereby,²³ they should not be extended by implication²⁴ to include causes of action not described therein.²⁵ On the other hand, the legislature must be presumed to have intended a reasonable and practical result from the enactment of such statutes,²⁶ and they must be read together with

other cognate statutory provisions.²⁷ Such statutes must be given effect in accordance with their obvious meaning,²⁸ and without reading into them conditions or exceptions which do not fairly appear.²⁹

Motor carriers. Under a statute so providing, jurisdiction of a motor carrier may be acquired

22. Mass.—O'Donnell v. Registrar of Motor Vehicles, 186 N.E. 657, 283 Mass. 375.—Paraboschi v. Shaw, 155 N.E. 445, 258 Mass. 531.

N.C.—Ashley v. Brown, 151 S.E. 725, 198 N.C. 369.

Ohio.—Schaeffer v. Alva West & Co., 4 N.E.2d 720, 53 Ohio App. 270.—Wilson v. Silverman, 31 Ohio N.P., N.S., 252.

Even if the statute is remedial only, and does not impair any vested rights, it has been held that it will not be applied retroactively in the absence of any requirement in the statute that it be so applied.—Hartley v. Utah Const. Co., C.C.A.Or., 106 F.2d 953.

Retroactive operation not implied

Mass.—O'Donnell v. Registrar of Motor Vehicles, 186 N.E. 657, 283 Mass. 375.

Procedural amendments

(1) A nonresident defendant had no substantive right requiring process to be served on the particular state official designated by statute as it existed when accident occurred rather than on state official designated by statute as it existed when action was commenced, since designation of the state official was a matter of procedure.—Zavis v. Warren, D.C.Wis., 35 F.Supp. 689.

(2) Where nonresident statute in force at time of accident provided for substituted service on commissioner of motor vehicle department, and between the time of accident and time action was commenced, legislature by amendment subsequently designated commissioner of public safety as officer on whom process should be served, and provided that department of public safety under commissioner thereof should constitute motor vehicle department for administration of the statute, it was held that there was no need for a retroactive operation of the amendment since remedy afforded by nonresident statute was not interrupted and service of process on commissioner of public safety was sufficient to give court jurisdiction.—Green v. Brinegar, 292 N.W. 229, 228 Iowa 477.

(3) So an amendment authorizing personal service of the required notices as an alternative to mailing has been held to be procedural and, therefore, applicable to actions brought

after the adoption of the amendment, although the cause of action may have arisen prior thereto.—Duggan v. Ogden, 180 N.E. 301, 278 Mass. 432, 82 A.L.R. 765

Amendment providing for notice

Where the original statute was held unconstitutional by reason of the absence of provisions for probable notice to the nonresident, and was subsequently amended to supply the defect in the original act, service of process under the original act as amended in a cause of action arising before the amendment has been held to be valid, the language of amendment expressly referring to effect to be given original act.—Dwyer v. Volmar Trucking Corporation, 146 A. 685, 105 N.J. Law 518.—Rubin v. Goldberg, 154 A. 535, 9 N.J. Misc. 460.

23. Pa.—Reinhart v. Shirm, 18 Pa. Dist. & Co. 151.—Badera v. Goeringer Const. Co., Com.Pl., 34 Luz. Leg. Reg. 173.

Third party defendant proceeding growing out of automobile collision held within purview of statute.—Malkin v. Arundel Corporation, D.C. Md., 36 F.Supp. 948.

24. U.S.—Kirchner v. N. & W. Over-all Co., D.C.S.C., 16 F.Supp. 915. D.C.—Wood v. White, 97 F.2d 646, 68 App.D.C. 341, certiorari denied White v. Wood, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541.

N.Y.—Scott v. Dickerson, 8 N.Y.S.2d 656, 169 Misc. 1047.

25. U.S.—Finn v. Schreiber, D.C.N.Y., 35 F.Supp. 638.

Ohio.—Mercer Casualty Co. v. Perlman, 23 N.E.2d 502, 62 Ohio App. 133.

An action based on an assignment by insured under accident policy to the insurer which had paid a loss by reason of accidental injuries in automobile collision to the insured was not one arising out of, or by reason of, an accident or collision in which a motor vehicle was involved within meaning of statute.—Mercer Casualty Co. v. Perlman, supra.

26. N.Y.—Hand v. Frazer, 248 N.Y.S. 557, 139 Misc. 446, affirmed Hand v. Frazer, 250 N.Y.S. 947, 233 App. Div. 800.

Vehicles, whether stationary or in motion, held in "operation" within meaning of statute.—Hand v. Frazer, 248 N.Y.S. 557, 139 Misc. 446, affirmed

Hand v. Frazer, 250 N.Y.S. 947, 233 App. Div. 800.

Nonresident cannot defeat purpose

A nonresident motorist cannot employ the terms of the act providing for substituted service of process on nonresident motorists to defeat the purpose of the act.—Cherry v. Heffernan, 182 So. 427, 132 Fla. 386.

27. Conn.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

28. Del.—Beach v. D. W. Perdue Co., 163 A. 265, 5 W.W.Harr. 285.

La.—Messina v. Bomicino, App., 27 So.2d 397.—Galloway v. Wyatt Metal & Boiler Works, App., 180 So. 206, annulled on other grounds 181 So. 187, 189 La. 837.

Letter not disregarded

Where the language of statute is unambiguous, the letter thereof is not to be disregarded under the pretext of pursuing its spirit.—Maddy v. Moore Bros Lumber Co., 197 So. 651, 195 La. 979, answer to certified question conformed to 197 So. 653.

Statute should be uniformly applied for most beneficial result.—Bessan v. Public Service Co-Ordinated Transport, 237 N.Y.S. 689, 135 Misc. 368.

"Process" as summons

(1) The term "process," as used in a nonresident motorists' service statute, has been held to include summons.—Schilling v. Odlebak, 224 N.W. 694, 177 Minn. 90.

(2) Similarly, it has been stated that "process" is used in such statute "in the sense of summons"—State ex rel. Dresden v. District Court of Second Judicial Dist. in and for Bernalillo County, 112 P.2d 506, 45 N.M. 119.

29. Del.—Beach v. D. W. Perdue Co., 163 A. 265, 5 W.W.Harr. 285.

License of no effect

Nonresident was held subject to service of process by service on state official irrespective of whether nonresident had taken out or had been required to procure state license.

Fla.—State ex rel. Penick & Ford v. Civil Court of Record of Duval County, 171 So. 516, 126 Fla. 550, 127 Fla. 331.

Ky.—Mann v. Humphrey's Adm'x, 79 S.W.2d 17, 257 Ky. 647, 96 A.L.R. 534.

by service of process on a designated state official.³⁰

b. Residence of Plaintiff as Affecting Right

In the absence of any provision in a statute authorizing service of process on a state official in an action against a nonresident motorist disclosing an intent to restrict the benefits of the statute to resident plaintiffs, the statute will not be so restricted.

A nonresident plaintiff may effect service on a nonresident motorist by means of service on a state official as agent for the nonresident defendant,³¹ unless the statute authorizing service of process on a state official in an action against a nonresident motorist discloses an intent on the part of the legislature to restrict the benefits of the statute to resident plaintiffs.³² A statutory amendment which omitted a provision limiting the right to use constructive service to residents has been held to have the effect of impliedly extending such right to nonresidents.³³ It is, of course, of no consequence that the benefits of the statute are restricted to resident plaintiffs where the proofs show that plaintiff is a resident,³⁴ and a foreign corporation registered and authorized to transact business within the state has been held to qualify as a resident,³⁵ as has a non-

resident who has qualified as personal representative of the estate of a deceased resident.³⁶ It has also been held that, where one of two or more joint plaintiffs is a resident and the other or others are nonresidents, the one who is a resident may effect service under the statute.³⁷ Under a statute limited to the use of resident plaintiffs, it has been held that residence at the time the cause of action arose is the test of whether or not plaintiff is entitled to the statutory benefits,³⁸ and a nonresident plaintiff who falsely states in his complaint that he is a resident is estopped to assert that the defect was cured by defendant's general appearance, even though it appears that defendant knew that plaintiff resided outside the state at the time of suit.³⁹

c. Necessity of Accident Being within State upon Highway

Generally, statutes authorizing constructive service on nonresident motorists can be invoked only in actions involving accidents arising out of the use of public highways within the state.

Statutes providing for constructive or substituted service on nonresident motorists have been held to be limited to accidents or collisions occurring within the state.⁴⁰ Although there is authority to the

30. Failure to procure license

Where domestic corporation had complied with statutory provisions so that it was authorized to engage in business of contract carrier of freight, but corporation had failed to procure additional license for truck involved in accident, the corporation could not take advantage of such failure to defeat court's jurisdiction based on service of summons and complaint on state official as authorized by statute.—*Muckenfuss v. Southern Transp.*, 29 S.E.2d 486, 204 S.C. 369.

31. U.S.—*Peeples v. Ramspacher*, D.C.S.C., 29 F.Supp. 632.
Conn.—*Fine v. Wencke*, 169 A. 58, 117 Conn. 683.
Del.—*Beach v. D. W. Perdue Co.*, 163 A. 265, 5 W.W.Harr. 285.
Iowa.—*Welsh v. Ruopp*, 289 N.W. 760, 228 Iowa 70.
Ky.—*Hoagland v. Dolan*, 81 S.W.2d 869, 259 Ky. 1.
Mont.—*State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County*, 114 P.2d 1047, 112 Mont. 253.
N.H.—*Garon v. Poirier*, 164 A. 765, 86 N.H. 174.
N.Y.—*Sobeck v. Koellmer*, 265 N.Y.S. 778, 240 App.Div. 736—*Malak v. Upton*, 3 N.Y.S.2d 248, 166 Misc. 817.
N.C.—*Alberts v. Alberts*, 8 S.E.2d 523, 217 N.C. 443.
Wis.—*State v. Circuit Court for Dane County*, 244 N.W. 766, 209 Wis. 246. Inclusion or exclusion of nonresident

plaintiffs within statute as affecting its validity see *supra* subdivision a of this section.

Accident outside state

In an action against a motor carrier which had authorized the secretary of state under a statute to receive service for it, it was held that plaintiff was not entitled to the benefit of the statute where he was not a resident and the cause of action did not arise within the state.—*Glazier v. Van Sant*, D.C.Mo., 33 F.Supp. 113.

In Pennsylvania

(1) There is authority for the view that the statute cannot be employed by a nonresident plaintiff.

U.S.—*Lambert v. Doyle*, D.C.Pa., 70 F.Supp. 990.
Pa.—*Haddonleigh Estates, Inc. v. Spector Motor Service, Inc.*, 41 Pa. Dist. & Co. 246.

(2) However, there is also authority to the contrary.—*Neff v. Hindman*, D.C.Pa., 77 F.Supp. 4.

32. Fla.—*State ex rel. Cochran v. Lewis*, 159 So. 792, 118 Fla. 536, 99 A.L.R. 123.

N.J.—*Charles v. Fischer Baking Co.*, 187 A. 175, 117 N.J.Law 115—*Leibfried v. Rhodes*, 12 A.2d 679, 18 N.J.Misc. 464—*Rubin v. Goldberg*, 164 A. 535, 9 N.J.Misc. 460.

33. N.J.—*Leibfried v. Rhodes*, 12 A. 2d 679, 18 N.J.Misc. 464—*Gender v. Rayburn*, 194 A. 441, 15 N.J.Misc. 704, affirmed 195 A. 513, 119 N.J. 243.

Such amendment will not be applied retroactively to a cause of action arising prior thereto.—*Gender v. Rayburn*, *supra*.

34. N.J.—*Rubin v. Goldberg*, 164 A. 535, 9 N.J.Misc. 460.

35. Pa.—*Haddonleigh Estates, Inc. v. Spector Motor Service, Inc.*, 41 Pa. Dist. & Co. 246.

36. U.S.—*Hunt v. Noll*, C.C.A.Tenn., 112 F.2d 288, certiorari denied *Noll v. Hunt*, 61 S.Ct. 71, 311 U.S. 690, 85 L.Ed. 446.

Reason for rule

The personal representative's suit was to enforce a cause of action belonging to a deceased resident of the state, and, while it is true that the cause of action is prosecuted for the benefit of deceased's heirs, a recovery would be in the right of deceased himself and, if deceased had survived and brought suit, or if on his death a suit had been brought by a resident administrator, in either case process would have been valid.—*Hunt v. Noll*, C.C.A.Tenn., 112 F.2d 288, certiorari denied *Noll v. Hunt*, 61 S.Ct. 71, 311 U.S. 690, 85 L.Ed. 446.

37. Pa.—*Haddonleigh Estates, Inc. v. Spector Motor Service, Inc.*, 41 Pa. Dist. & Co. 246.

38. N.J.—*Gender v. Rayburn*, 195 A. 513, 119 N.J.Law 243.

39. N.J.—*Gender v. Rayburn*, *supra*.

40. U.S.—*Glazier v. Van Sant*, D.C. Mo., 33 F.Supp. 113—*O'Brien v. Richtarsic*, D.C.N.Y., 2 F.R.D. 42.

contrary,⁴¹ it has also been held that the statutes are limited to actions involving accidents or negligent operation of a motor vehicle upon the public highways.⁴² In this connection, a public highway is a place to which the public has the right to go, and the use of which it has the right to have, under reasonable restrictions at all times,⁴³ and includes roads⁴⁴ and streets⁴⁵ open to the public. Under some statutes any road or alley, even if privately owned, is for the purposes of the statute considered a public highway,⁴⁶ but the only driveway which is considered as a public highway is a public driveway.⁴⁷ Of course, where the statute defines the term "public highway," it is controlling.⁴⁸ The fact that the operation of the statute is limited to the area within the boundaries of the highways does not mean that the causative force from which the damages flow must actually be limited to the confines of the highway;⁴⁹ it is only necessary that the

causative force originate in the use or operation of the vehicle upon the highway.⁵⁰

d. Persons Subject to Constructive Service

- (1) In general
- (2) Personal representatives of deceased nonresident
- (3) Who are nonresidents
- (4) Time of nonresidence

(1) In General

Generally speaking, the terms of the statute authorizing constructive service on nonresident motorists determine the persons subject to constructive service thereunder.

While statutes authorizing service of process on a state official in an action against a nonresident motorist will not be extended by implication to include persons not clearly within their terms,⁵¹ the per-

N.Y.—Hume v. Rogers, 49 N.Y.S.2d 209.

Accident on interstate bridge

Service in action against nonresident for damages from collision on out-of-state side of center line of interstate bridge was held not authorized on ground that treaty between the states in question gave the state where the action was instituted exclusive jurisdiction over the waters between the states including the waters over which the bridge passed, since "exclusive jurisdiction" referred to police jurisdiction and was not intended to deprive the state yielding such exclusive jurisdiction of its prerogatives of sovereignty or any of territory granted by treaty.—Clarke v. Ackerman, 278 N.Y.S. 75, 243 App.Div. 446.

41. Pa.—Sipe v. Moyers, 44 A.2d 263, 353 Pa. 75.

42. U.S.—Finn v. Schreiber, D.C.N.Y., 35 F.Supp. 638—Dworkin v. Spector Motor Service, D.C.Conn., 3 F.R.D. 340.

Ill.—Brauer Machine & Supply Co., for use of Bituminous Casualty Corporation v. Parkhill Truck Co., 50 N.E.2d 836, 383 Ill. 569, 148 A.L.R. 1208.

Kan.—Kelley v. Koetting, 190 P.2d 361, 164 Kan. 542.

La.—Galloway v. Wyatt Metal & Boiler Works, 181 So. 187, 189 La. 837.

N.Y.—Zielinski v. Lyford, 23 N.Y.S.2d 489, 175 Misc. 517—Haughey v. Mineola Garage, 20 N.Y.S.2d 857, 174 Misc. 332.

Privately owned lot used for parking is not a "highway."—Harris v. Hanson, D.C.Idaho, 75 F.Supp. 481.

Collision on World's Fair grounds was held not within purview of stat-

ute.—Catalano v. Maddux, 22 N.Y.S.2d 149, 175 Misc. 24.

43. U.S.—Finn v. Schreiber, D.C.N.Y., 35 F.Supp. 638.

Similar definition

The term "public highways" includes every way for travel by persons on foot or with vehicles which the public has the right to use either conditionally or unconditionally.—Galloway v. Wyatt Metal & Boiler Works, 181 So. 187, 189 La. 837.

44. La.—Galloway v. Wyatt Metal & Boiler Works, supra.

Road not dedicated to public

The fact that a road which was used by the general public had never been dedicated or expropriated as a public road and was on private property owned by corporation which could close road to public use at any time could not deprive the road of its character as a "public highway."—Galloway v. Wyatt Metal & Boiler Works, supra.

45. U.S.—Finn v. Schreiber, D.C.N.Y., 35 F.Supp. 638.

46. N.Y.—Zielinski v. Lyford, 23 N.Y.S.2d 489, 175 Misc. 517.

47. A public driveway in this connection does not mean a driveway which some members of the general public may use from time to time because such use is common to all driveways, but means a driveway in which the public has some right and over which some public officers have control.—Zielinski v. Lyford, supra.

48. N.Y.—Zielinski v. Lyford, supra.

49. Ill.—Brauer Machine & Supply Co., for Use of Bituminous Casualty Corporation v. Parkhill Truck Co., 50 N.E.2d 836, 383 Ill. 569, 148 A.L.R. 1208.

50. Ill.—Brauer Machine & Supply Co., for Use of Bituminous Casual-

ty Corporation v. Parkhill Truck Co., supra.

51. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352. Iowa.—Jermaine v. Graf, 283 N.W. 428, 225 Iowa 1063.

La.—Brassett v. U. S. Fidelity & Guaranty Co., App., 153 So. 471.

Mich.—Flynn v. Kramer, 261 N.W. 77, 271 Mich. 500—Brown v. Cleveland Tractor Co., 251 N.W. 557, 265 Mich. 475.

Neb.—Rose v. Gisl, 298 N.W. 333, 139 Neb. 593.

N.J.—Thomas v. Green, 58 A.2d 539—Josephson v. Siegel, 165 A. 869, 110 N.J.Law 374.

Ohio.—Donnelly v. Carpenter, 9 N.E.2d 885, 55 Ohio 463.

Or.—State ex rel. Pardee v. Latourrette, 125 P.2d 750, 168 Or. 584.

Pa.—Midora v. Alderi, 17 A.2d 873, 341 Pa. 27—Burns v. Philadelphia Transp. Co., 44 Pa.Dist. & Co. 654—Darling v. Paramount Line, Inc., Com.Pl., 24 Erie Co. 109.

More liberal construction cannot, for the purpose of embracing other persons than those to whom the statute is expressly made applicable, supply that which the legislature has, either deliberately, or inadvertently, or through lack of foresight, omitted.—Downing v. Schwenck, 293 N.W. 278, 138 Neb. 395.

Foreign insurance association

Statute was held not to authorize service on foreign insurance association in which motorist carried automobile liability insurance where association was not licensed and had never done business within the state, and had never appointed anyone on whom service of process might be made.—State ex rel. Ledin v. Davi-

sons included within the terms of such statutes depend on the language of the particular statute taken as a whole,⁵² and a court is not warranted, under the guise of strict construction, in nullifying the plain legislative intent by unduly limiting the persons subject thereto.⁵³ A statute which merely authorizes constructive service on a nonresident operating a motor vehicle within the state has been held to authorize constructive service on a nonresident only where he was personally engaged in the operation of the mechanism of the vehicle,⁵⁴ and not to authorize constructive service on nonresidents whose vehicles are driven within the state by their agents, servants, or employees.⁵⁵

On the other hand, a statute authorizing constructive service in case of a nonresident's "use and operation" of a motor vehicle within the state has been held to evidence an intent to include persons other than the actual operator of the vehicle,⁵⁶ and to authorize constructive service on nonresidents operating vehicles through their agents, servants, or employees.⁵⁷ The same result has been reached under a statute authorizing constructive service on a nonresident in charge of the use and operation of a vehicle,⁵⁸ or where the vehicle is being operated for the nonresident or under his control or direction, express or implied,⁵⁹ and under other statutes manifesting an intent, expressed

son, 256 N.W. 718, 216 Wis. 216, 96 A.L.R. 589.

The lessee of an automobile for whom and on whose business it is being operated within the state by the owner has been held not to be a person having the automobile operated within the meaning of the law.—Burns v. Philadelphia Transp. Co., 44 Pa. Dist. & Co. 654.

Owner of a semitrailer drawn by a motor tractor held not subject to constructive service as owner of "motor vehicle" in view of distinction drawn in the statutes between auto-trucks, tractors, and trailers and semitrailers.—Lowe v. Western Exp. Co., 68 N.Y.S.2d 873, 189 Misc. 177.

Where one of defendants is a resident of state where accident occurred, constructive service on such defendant was ineffective.—Weaver v. Marcus, D.C.Va., 73 F.Supp. 736.

52. U.S.—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773.
Ill.—Jones v. Pebler, 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.

53. Ill.—Jones v. Pebler, supra.
Ohio.—Parr v. Gregg, 42 N.E.2d 922, 170 Ohio App. 235.

Additional defendant

"One is no less a defendant because he is named an additional defendant, and any service of process authorized on a defendant may be used to serve an additional defendant."—Cirelli v. Good Distributors Inc., 20 Pa. Dist. & Co. 651, 652.

Persons passing through state, as well as those merely coming into state, held subject to nonresident motorists' service statute.—Dealer's Transport Co. v. Reese, C.C.A.Ala., 138 F.2d 638, certiorari denied 64 S. Ct. 939, 321 U.S. 798, 88 L.Ed. 1086—Cohen v. Plutschak, D.C.N.J., 40 F.2d 727.

Fact that vehicle was not brought into state by nonresident defendant is immaterial.—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773.

Defendants engaged in war work

The fact that defendants were engaged in work in aid of winning war did not make them immune from process.—Dealer's Transport Co. v. Reese, C.C.A.Ala., 138 F.2d 638, certiorari denied 64 S.Ct. 939, 321 U.S. 798, 88 L.Ed. 1086.

54. U.S.—Morrow v. Asher, D.C.Tex., 55 F.2d 365.

Mich.—Flynn v. Kramer, 261 N.W. 77, 271 Mich. 500.

N.Y.—O'Tier v. Sell, 169 N.E. 624, 252 N.Y. 400—Wallace v. Smith, 265 N.Y.S. 253, 238 App. Div. 599—Gesell v. Wells, 240 N.Y.S. 628, 229 App. Div. 11, affirmed 173 N.E. 885, 254 N.Y. 604—Jones v. Newman, 239 N.Y.S. 265, 135 Misc. 473.

Tex.—Beard v. Clark, Civ. App., 83 S. W.2d 1023, construing Oklahoma statute.

Owner-passenger as operating vehicle

Where a gratuitous passenger is driving defendant's vehicle, for defendant's convenience and purposes, with his consent and authority, and defendant is an occupant of the vehicle at the time, it has been held that the vehicle is being operated by defendant.—Wheat v. White, D.C.La., 38 F.Supp. 791.

In Ohio

(1) It has been held that the term "operator" within the meaning of the statute authorizing constructive service on nonresident owners and operators means one for whose purposes motor vehicle is being operated, as well as one physically operating it, so as to render nonresident employer of one driving his own automobile for such employer's purposes in state amenable to constructive service of process.—Pray v. Meier, 40 N.E.2d 850, 69 Ohio App. 141, dissenting opinion 48 N.E.2d 318, 69 Ohio App. 141.

(2) It has also been held, however, that the term "operator," as used in such statute, applies only to person actually controlling driving and steering mechanism of ve-

hicle.—Parr v. Gregg, 42 N.E.2d 922, 70 Ohio App. 235.

55. U.S.—Hartley v. Utah Const. Co., C.C.A.Or., 106 F.2d 953—Morrow v. Asher, D.C.Tex., 55 F.2d 365.
N.Y.—Wallace v. Smith, 265 N.Y.S. 253, 238 App. Div. 599.

56. Ill.—Jones v. Pebler, 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.

Neb.—Rose v. Gisl, 298 N.W. 333, 139 Neb. 593.

"Use and operation" means more than "operation"

Iowa.—Skutt v. Dillavou, 13 N.W.2d 322, 234 Iowa 610, 155 A.L.R. 327.

Neb.—Rose v. Gisl, 298 N.W. 333, 139 Neb. 593.

57. U.S.—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521—Edwards v. Gisl, D.C.Neb., 45 F.Supp. 17—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773.

Ill.—Jones v. Pebler, 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.

Neb.—Rose v. Gisl, 298 N.W. 333, 139 Neb. 593.

58. Iowa.—Skutt v. Dillavou, 13 N.W.2d 322, 234 Iowa 610, 155 A.L.R. 327.

"And" construed as "or"

A statute authorizing constructive service on "any person who is in charge of the vehicle and of the use and operation thereof" includes any person in charge of the vehicle and any person in charge of its use and operation.—Skutt v. Dillavou, supra.

59. N.C.—Queen City Coach Co. v. Chattanooga Medicine Co., 17 S.E.2d 478, 220 N.C. 442—Wynn v. Robinson, 4 S.E.2d 884, 216 N.C. 347.
S.C.—Moorer v. Underwood, 9 S.E.2d 29, 194 S.C. 73.

Furtherance of defendant's business

In order to sustain service under such a statute, it must appear that vehicle was being operated for defendant on allegation that it was being used to further and transact defendant's business.—Kirchner v. N. & W. Overall Co., D.C.S.C., 16 F.Supp. 915.

or implied, to authorize constructive service on nonresidents operating motor vehicles through their agents, servants, or employees.⁶⁰ Under such statutes, it has been held that the fact that the agent or servant is a resident of the state does not preclude service on his nonresident principal or master,⁶¹ and that the question of the master's or principal's liability vel non is not required to be determined in advance in order to obtain process.⁶²

The statutes do not authorize constructive service on a nonresident where no contractual relationship whatever exists between the nonresident and the driver of the vehicle causing the injury;⁶³ nor do they authorize service on a nonresident employing an independent contractor to work for him.⁶⁴

While the fact that the vehicle involved in the accident was being operated with the permission of the owner, express or implied, does not of itself make the driver thereof the agent or employee of the owner within a statute authorizing constructive service in such cases,⁶⁵ under a statute so providing, nonresidents whose vehicles are being operated within the state by another with the permission of the owner, express or implied, are subject to constructive service of process.⁶⁶ Some statutes have been held not to be limited to nonresident natural persons, but to include every nonresident, individual, member of a partnership, or corporation using and operating a motor vehicle over the state highways.⁶⁷

60. U.S.—Dealer's Transport Co. v. Reese, C.C.A.Ala., 138 F.2d 638, certiorari denied 64 S.Ct. 939, 321 U.S. 798, 88 L.Ed. 1086—Banks v. Travelers Ins. Co., D.C.La., 66 F.Supp. 801—Wheat v. White, D.C.La., 38 F.Supp. 791.

Mont.—State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County, 114 P.2d 1047, 112 Mont. 253.

S.D.—Halverson v. Sonotone Corp., 27 N.W.2d 596.

"Chauffeur," within act providing for service of civil process against nonresidents involved in automobile accidents within state, was used in restrictive sense of operator for hire, and in a different sense from "chauffeurs," within act regulating jitneys, and a salesman operating employer's automobile in performing duties has been held not to be a "chauffeur," within former act.—Day v. Bush, 139 So. 42, 18 La.App. 682.

Statute applicable to "owner, chauffeur or operator"

Tenn.—Producers' & Refiners' Corporation v. Illinois Cent. R. Co., 73 S.W.2d 174, 168 Tenn. 1.

61. U.S.—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773.

62. U.S.—Dealer's Transport Co. v. Reese, C.C.A.Ala., 138 F.2d 638, certiorari denied 64 S.Ct. 939, 321 U.S. 798, 88 L.Ed. 1086—Kirchner v. N. & W. Overall Co., D.C.S.C., 16 F.Supp. 915.

Action within scope of employment presumed

It has been held that, when it is shown that a master and servant or principal and agent relationship exists, a presumption arises that the servant or agent causing the injury was acting within the scope of his employment and that this presumption is sufficient to sustain the court's jurisdiction over his nonresident master or principal.—Rose v. Gisl, 298 N.W. 333, 139 Neb. 593.

63. Wis.—State ex rel. Oak Park Country Club v. Goodland, 7 N.W.2d 828, 242 Wis. 320, 144 A.L.R. 1451.

Agent employing another to drive

Where an agent acting outside the scope of his employment and without authority employs another to drive, the agent's principal is not subject to constructive service.—Blake v. Allen, 20 S.E.2d 552, 221 N.C. 445.

Family purpose doctrine inapplicable

Where petition did not state a cause of action against defendant under the family purpose doctrine, attempted service on state official as defendant's agent was void and of no effect.—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352.

64. U.S.—Kirchner v. N. & W. Overall Co., D.C.S.C., 16 F.Supp. 915. **Cal.**—Fuller v. Lindenbaum, 84 P.2d 155, 29 Cal.App.2d 227. **Wis.**—State ex rel. J. A. Sexauer Mfg. Co. of New York v. Grimm, 259 N.W. 262, 217 Wis. 422.

Commission salesman

(1) Commission salesman, working on own time and in own way, using and operating his own automobile, not subject to control of nonresident for which salesman was making sales, has been held to be an independent contractor and not an agent.—Kirchner v. N. & W. Overall Co., D.C.S.C., 16 F.Supp. 915.

(2) On the other hand, where a commission, salesman was engaged only in the pursuit of business of his employer, and employer was in control of manner and continuance of the particular service to be rendered by salesman and the final result thereof, he was held to be an agent and not an independent contractor.—Halverson v. Sonotone Corp., S.D., 27 N.W.2d 596.

Driver held agent

Iowa.—Skutt v. Dillavou, 13 N.W.2d 322, 234 Iowa 610, 155 A.L.R. 327. **Va.**—Barber v. Textile Machine Works, 17 S.E.2d 359, 178 Va. 435.

65. La.—Brassett v. U. S. Fidelity & Guaranty Co., App., 153 So. 471.

Owner in vehicle operated by son

Where the owner himself is an occupant of a vehicle being driven by his son, it has been held that the son is an authorized employee notwithstanding son received no compensation for driving.—Duncan v. Ashwander, D.C.La., 16 F.Supp. 829.

66. In New York

(1) Under a statute formerly in force, constructive service could not be had on nonresidents whose vehicles were being operated within the state with the permission of the owner, express or implied.—O'Tier v. Sell, 169 N.E. 624, 252 N.Y. 400—Zurich General Accident & Liability Ins. Co., Limited, of Zurich, Switzerland, v. Brooklyn & Queens Transit Corporation, 241 N.Y.S. 465, 137 Misc. 65—Jones v. Newman, 239 N.Y.S. 265, 135 Misc. 473.

(2) Under an amendment of the statute, however, constructive service in such cases is authorized.—Lamere v. Franklin, 267 N.Y.S. 310, 149 Misc. 371.

67. Ill.—Jones v. Pebler, 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.

Corporations

(1) Foreign corporations have been held subject to constructive service under such statutes.

U.S.—Dealer's Transport Co. v. Reese, C.C.A.Ala., 138 F.2d 638, certiorari denied 64 S.Ct. 939, 321 U.S. 798, 88 L.Ed. 1086—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.

Iowa.—Skutt v. Dillavou, 13 N.W.2d 322, 234 Iowa 610, 155 A.L.R. 327. **N.J.**—McLeod v. Birnbaum, 185 A. 667, 14 N.J.Misc. 485.

N.Y.—Bischoff v. Schnepp, 249 N.Y. S. 49, 139 Misc. 293—Bessan v.

Ownership of vehicle. A statute, the title of which limited its application to nonresident owners, has been held not to authorize constructive service of process on nonresident operators or drivers who are not owners.⁶⁸ Under other statutes, the nonresident's ownership or lack of ownership of the vehicle involved in an accident has been held to be immaterial as respects his amenability to constructive service of process,⁶⁹ and the fact that the vehicle is owned by the agent or servant driving it has been held not to preclude constructive service on the driver's principal or master.⁷⁰ Under still other statutes, however, this fact has been held to preclude such service on the nonresident principal or master.⁷¹

(2) Personal Representatives of Deceased Nonresident

Unless otherwise provided, a nonresident's personal representative is not amenable to constructive service under a statute relating to service of process on nonresident motorists.

The agency created by a statute permitting service on a nonresident motorist by serving a state official has been held to be terminated by the death of the motorist,⁷² the agency not being one coupled with an interest,⁷³ so that a nonresident's personal representative is not amenable to service under such statute.⁷⁴ However, the state in the exercise of its police power is not bound or limited by the doctrine that the death of the principal terminates the agency,⁷⁵ and, under a statute so providing, service

Public Service Co.—Ordinated Transport, 237 N.Y.S. 689, 135 Misc. 368 N.C.—Wynn v. Robinson, 4 S.E.2d 884, 216 N.C. 347.

Pa.—Strosser v. Universal Atlas Cement Co., 28 Pa. Dist. & Co. 646, 45 Lanc.L.Rev. 425.

Va.—Barber v. Textile Machine Works, 17 S.E.2d 359, 178 Va. 435.

(2) The manner of service under such statutes has been said to differ from that under general statutes dealing with service of process on foreign corporations.—Schlago v. Seaboard Freight Lines, 65 N.Y.S.2d 369, 187 Misc. 732.

(3) Service of process on foreign corporations generally see Corporations §§ 1937-1949.

Individuals

Ark.—Alexander v. Bush, 134 S.W.2d 519, 199 Ark. 562.

68. Or.—State ex rel. Pardee v. Latourette, 125 P.2d 750, 168 Or. 584.

69. U.S.—Dealer's Transport Co. v. Reese, C.C.A. Ala., 138 F.2d 638, certiorari denied 64 S.Ct. 939, 321 U.S. 798, 88 L.Ed. 1086.—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773.

Mont.—State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County, 114 P.2d 1047, 112 Mont. 253.

S.D.—Halverson v. Sonotone Corp., 27 N.W.2d 596.

70. U.S.—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773.

N.C.—Queen City Coach Co. v. Chattanooga Medicine Co., 17 S.E.2d 478, 220 N.C. 442.—Wynn v. Robinson, 4 S.E.2d 884, 216 N.C. 347.

S.D.—Halverson v. Sonotone Corp., 27 N.W.2d 596.

71. U.S.—Kirchner v. N. & W. Overall Co., D.C.S.C., 16 F.Supp. 915.

Mich.—Brown v. Cleveland Tractor Co., 251 N.W. 557, 265 Mich. 475.

N.Y.—Wallace v. Smith, 265 N.Y.S. 253, 238 App.Div. 599.

Employment of licensed and registered owner

(1) It has been held that an indirect acceptance by nonresident of rights and privileges conferred by state laws, permitting operation of motor vehicles in state, as follows from such nonresident's employment of duly licensed and registered resident owner of motor vehicle, does not permit constructive service on employer under a statute authorizing such service in suit against nonresident operator or user of highway for any collision in which he may be involved by reason of the operation "by him, for him, or under his control or direction, express or implied."

U.S.—Wood v. Wm. B. Reilly & Co., D.C.Ga., 40 F.Supp. 507.—Myers v. Katz, 21 S.E.2d 482, 67 Ga.App. 640.

(2) The same view has been taken under a statute providing that the acceptance by a nonresident of the privilege of operating a vehicle within the state, as evidenced by the operation of a vehicle by such nonresident, his agent, or servant on a public highway within the state shall be deemed to operate as the appointment of a state official as attorney for the acceptance of process in any action arising out of an accident in which such nonresident, his agent, or servant, may be involved.—Ciesas v. Hurley Mach. Co., 157 A. 426, 52 R. I. 69.

72. U.S.—Buttson v. Arnold, D.C.Pa., 4 F.R.D. 492.

Conn.—Brogan v. Macklin, 9 A.2d 499, 126 Conn. 92.

N.J.—Lepre v. Real Estate-Land Title Trust Co., 168 A. 858, 11 N.J. Misc. 887.

Ohio.—Harris v. Owens, 52 N.E.2d 522, 142 Ohio St. 379.

73. Ohio.—Harris v. Owens, supra.

74. U.S.—Warner v. Maddox, D.C. Va., 68 F.Supp. 27.—Buttson v. Arnold, D.C.Pa., 4 F.R.D. 492.

Conn.—Brogan v. Macklin, 9 A.2d 499, 126 Conn. 92.

Neb.—Downing v. Schwenck, 293 N. W. 278, 138 Neb. 395.

N.J.—Young v. Potter Title & Trust Co., 181 A. 44, 115 N.J. Law 518.—Lepre v. Real Estate-Land Title Trust Co., 168 A. 858, 11 N.J. Misc. 887.—Boyd v. Lemmerman, 168 A. 47, 11 N.J. Misc. 701.

N.Y.—Vecchione v. Palmer, 291 N.Y. S. 537, 249 App. Div. 661.—Balter v. Webner, 23 N.Y.S.2d 918, 175 Misc. 184.

N.C.—Dowling v. Winters, 181 S.E. 751, 208 N.C. 521.

Ohio.—Harris v. Owens, 52 N.E.2d 522, 142 Ohio St. 379.—Donnelly v. Carpenter, 9 N.E.2d 888, 55 Ohio 463.

Pa.—Arlotta v. McCauley, 16 Pa. Dist. & Co. 657, 79 Pittsb. Leg. J. 132.—Minehart v. Shaffer, Com. Pl., 86 Pittsb. Leg. J. 317.

Wis.—State ex rel. Ledin v. Davison, 256 N.W. 718, 216 Wis. 216, 96 A.L. R. 589.

Revival of action against representative

Action against nonresident motorist who was served by executing service on state official cannot be revived against foreign executor of motorist on motorist's death during pendency of action.—Riggs v. Schneider's Ex'r, 130 S.W.2d 816, 279 Ky. 361.

Statute providing for continuing action

Statute providing that actions for injuries to person or property may be continued against executors or administrators was held not to permit service on personal representative of deceased nonresident owner or operator of automobile.—Vecchione v. Palmer, 291 N.Y.S. 537, 249 App. Div. 661.

75. Ark.—Oviatt v. Garretson, 171 S. W.2d 287, 205 Ark. 792.

on the personal representatives of a deceased non-resident motorist may be validly effected by service on the proper state official,⁷⁶ although it has been stated that, if a statute was amended to permit such service, it would be futile, since it would assume to subject such personal representative to a suit in personam.⁷⁷

(3) Who Are Nonresidents

Whether or not a particular person is a nonresident within the meaning of a statute authorizing constructive service on nonresident motorists depends on the application of the general rules consistent with the purpose of the statutes.

76. Ark.—Oviatt v. Garretson, supra.

77. N.Y.—Vecchione v. Palmer, 291 N.Y.S. 537, 249 App.Div. 661.

78. U.S.—Suit v. Shaller, D.C.Md., 18 F.Supp. 568.

Colo.—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.

Tex.—United Services Automobile Ass'n v. Harman, Civ.App., 151 S.W.2d 609, error dismissed, judgment correct, certiorari denied 62 S.Ct. 640, 315 U.S. 807, 86 L.Ed. 1206.

"Nonresident," within statute, refers to an out-of-state person who comes to state for a temporary sojourn, whether he is a transient who is merely journeying through the state or one who has come for temporary purposes, which might or might not, later, result in the determination to remain for a considerable period, if not permanently, and, while it is not necessary that a person from out-of-state acquire a domiciliary residence in order not to be classified as a nonresident, a stay in the state of such length coupled with an intention to remain long enough, that presence in the state cannot be classified as merely temporary, is essential.—Briggs v. Superior Court of Alameda County, 183 P.2d 758, 81 Cal.App.2d 240.

Domicile

(1) "Residence" has been held synonymous with "domicile" within such statutes.—Northwestern Mortgage & Security Co. v. Noel Const. Co., 300 N.W. 28, 71 N.D. 256.

(2) It has also been held, however, that actual residence and not domicile is the proper test in applying the statute.—Uslan v. Woronoff, 18 N.Y.S.2d 222, 173 Misc. 693, affirmed 21 N.Y.S.2d 613, 259 App.Div. 1093, reargument denied 22 N.Y.S.2d 464, 259 App.Div. 1117.

Out-of-state license

(1) The mere fact that a person's motor vehicle bears an out-of-state

license does not make him a nonresident.—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.

(2) Such fact, however, together with other facts, may be sufficient to establish nonresidence.—Bigham v. Foor, 158 S.E. 548, 201 N.C. 14.

Military personnel and wives

(1) Where member of armed forces from another state was stationed in state of forum for a long time prior to date of automobile collision, and he stated that he became a resident of state of forum several months before collision and continued to be such until after collision, and there was no evidence that he was a nonresident, he was not a "nonresident."—Berger v. Superior Court in and for Yuba County, 179 P.2d 600, 79 Cal.App.2d 425.

(2) So, the wife of a member of the armed forces temporarily assigned to duty within state and living there for several years has been held not to be a "nonresident," although she and her husband may have retained their citizenship in some other state and may not have acquired citizenship in state of forum, and fact that at time of automobile accident she was driving her father's car which was registered in another state or that she did or did not hold a local operator's license, does not affect the question of her residence.—Suit v. Shaller, D.C.Md., 18 F.Supp. 568.

(3) It has been held, however, that a member of the armed forces domiciled in one state, who was pursuant to military orders transferred to a military reservation within territorial boundaries of another state and who had no place of abode except the barracks on reservation, was a "nonresident" of the latter state, the court distinguishing the Suit case in the preceding note in that there the wife did not live on a military reservation and was not subject to military orders.—United Services Automobile Ass'n v. Harman, Tex.Civ.

The question whether or not a particular person is a nonresident within the meaning of a statute authorizing constructive service on nonresident motorists depends on the application of general principles and rules consistent with the purpose of the statutes and the evil to be remedied.⁷⁸ A foreign corporation having an office and place of business within the state, in charge of an agent on whom service of a suit against it can be lawfully made, has been held not to be a nonresident within the meaning of the law,⁷⁹ but the mere fact that a foreign corporation is registered under the laws of the state in which suit is brought has been held not to deprive it of its status as a nonresident.⁸⁰

App., 151 S.W.2d 609, error dismissed, judgment correct, certiorari denied 62 S.Ct. 640, 315 U.S. 807, 86 L.Ed. 1206.

(4) Husband and wife who came to state after husband as a member of the navy received permanent duty orders and who stated that they then intended to reside permanently in the state but who, in fact, remained in the state only one month and twelve days altogether and left the state two days after his discharge from the navy without awaiting outcome of application for a civil service position, and later took up permanent residence in another state, were "nonresidents" within statute authorizing service of process on director of motor vehicles when a nonresident is sued for damages arising out of an automobile accident within the state.—Briggs v. Superior Court of Alameda County, 183 P.2d 758, 81 Cal.App.2d 240.

Person attending college outside of state was held to be a "nonresident."—Uslan v. Woronoff, 18 N.Y.S.2d 222, 173 Misc. 693, affirmed 21 N.Y.S.2d 613, 259 App.Div. 1093, reargument 22 N.Y.S.2d 464, 259 App.Div. 1117.

79. Ga.—Hirsch v. Shepherd Lumber Corp., 20 S.E.2d 575, 194 Ga. 113, answer to certified question conformed to 21 S.E.2d 110, 67 Ga. App. 474.

Nonresident law not exclusive

The provisions with respect to jurisdiction of a nonresident using the highways are not exclusive, but give to aggrieved party a choice regarding the manner in which an original notice may be served in action against nonresident corporation for damages growing out of an automobile accident, one of which is by service on agent appointed by corporation.—Schoulte v. Great Lakes Forwarding Corporation, 298 N.W. 914, 230 Iowa 812.

80. Pa.—Strosser v. Universal Atlas Cement Co., 28 Pa.Dist. & Co. 646, 45 Lanc.L.Rev. 425.

(4) Time of Nonresidence

Unless otherwise provided, the application of statutes authorizing constructive service on nonresident motorists depends on whether or not defendant was a nonresident at the time the cause of action accrued.

Unless otherwise provided,⁸¹ the application of statutes authorizing constructive or substituted service on nonresident motorists depends on whether or not defendant was a nonresident at the time the injury giving rise to the cause of action occurred, and his residence or nonresidence at a time subsequent thereto is immaterial.⁸² Thus, unless it is otherwise provided, either expressly or by necessary implication,⁸³ such statutes do not apply to one who was a resident of the state wherein the action is commenced at the time the injury occurred, but became a nonresident thereafter prior to the time of the attempted service.⁸⁴ This has been held to be true notwithstanding it was defendant's intention when he started the journey during which the injury occurred to establish a residence outside the state.⁸⁵

e. Form of Process and Mode of Service

(1) In general

81. Ohio.—Hendershot v. Ferkel, 56 N.E.2d 205, 144 Ohio St. 112.

82. Colo.—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.

Ill.—Netter v. King, 73 N.E.2d 798, 331 Ill. App. 619.

Iowa.—Welsh v. Ruopp, 289 N.W. 760, 228 Iowa 70.

N.M.—Fisher v. Terrell, 187 P.2d 387, 51 N.M. 427.

83. Mont.—State ex rel. Thompson v. District Court of Fourth Judicial Dist. in and for Missoula County, 91 P.2d 422, 108 Mont. 362.
Ohio.—Hendershot v. Ferkel, 56 N.E.2d 205, 144 Ohio St. 112.

In New York

(1) Under a statute so providing, constructive service may be had on a resident who departs from the state subsequent to the accident or collision and remains absent therefrom continuously for more than a prescribed period, whether such absence is intended to be temporary or permanent.—Reed v. Lombardi, 44 N.Y.S.2d 382, 181 Misc. 805.

(2) Such statute has been held to apply to a resident whose departure and absence from the state have resulted from entrance into the armed services.—Lerman v. Copperman, 52 N.Y.S.2d 50, 183 Misc. 352.—Reed v. Lombardi, *supra*.—McNally v. Howard, 45 N.Y.S.2d 7.

(3) An earlier statute authorizing constructive service on residents removing from the state for more

than a prescribed period had been held to require more than a temporary absence.—Marano v. Finn, 281 N.Y.S. 440, 155 Misc. 793.

(4) This earlier statute had been held not to apply to persons removing from the state before the statute became effective.—Kurland v. Chernobil, 183 N.E. 380, 260 N.Y. 254.—Continental Casualty Co. v. Nelson, 264 N.Y.S. 560, 147 Misc. 821.

84. U.S.—Suit v. Shaller, D.C.Md., 18 F.Supp. 568.

D.C.—Wood v. White, 97 F.2d 646, 68 App.D.C. 341, certiorari denied White v. Wood, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541.

Fla.—Red Top Cab & Baggage Co., for Use and Benefit of Fountaine, v. Holt, 16 So.2d 649, 154 Fla. 77.

Iowa.—Welsh v. Ruopp, 289 N.W. 760, 228 Iowa 70.

N.M.—Fisher v. Terrell, 187 P.2d 387, 51 N.M. 427.

N.D.—Northwestern Mortgage & Security Co. v. Noel Const. Co., 300 N.W. 28, 71 N.D. 256.

85. N.D.—Northwestern Mortgage & Security Co. v. Noel Const. Co., *supra*.

86. Ga.—Mull v. Taylor, 23 S.E.2d 595, 68 Ga.App. 663.

Iowa.—Welsh v. Ruopp, 289 N.W. 760, 228 Iowa 70.

Failure to set out jurisdictional facts was held not to render original notice defective.—Welsh v. Ruopp, 289 N.W. 760, 228 Iowa 70.

(2) Notice to nonresident

(3) Affidavit of compliance

(1) In General

Statutes authorizing constructive service on nonresident motorists have been held not to contemplate that the process be other than that issued where the defendant is a resident, but statutory provisions governing the mode of service on the state official must be observed.

Statutes authorizing constructive service on nonresident motorists have been held not to contemplate that the process or original notice be other than that issued where defendant is a resident.⁸⁶ The process need name only the nonresident motorist as defendant,⁸⁷ and need not be directed to the state official as agent or attorney in fact for the nonresident.⁸⁸ A mistake in the name of defendant may be corrected by an appropriate motion.⁸⁹

Mode of service on state official. Statutory provisions governing the mode of service on the state official must be observed,⁹⁰ and under some statutory provisions service may be effected either by mail or by personal service.⁹¹ It has been held that the summons may be served on the proper state official by plaintiff, himself, notwithstanding

Copy of court order directing service pursuant to statute was held not required to be served on state official.—State ex rel. Dresden v. District Court of Second Judicial Dist. in and for Bernalillo County, 112 P.2d 506, 45 N.M. 119.

Defendant's address

Statute governing service on nonresident motor vehicle owners in accident cases was held not to require summons to give defendant's address, or contain information enabling sheriff to ascertain it.—Carr v. Tennis, D.C.Pa., 4 F.Supp. 142.

87. Ga.—Mull v. Taylor, 23 S.E.2d 595, 68 Ga.App. 663.

88. Ga.—Mull v. Taylor, *supra*.

89. N.C.—Propst v. Hughes Trucking Co., 27 S.E.2d 152, 223 N.C. 490.

90. U.S.—Iser v. Brockway, D.C.Pa., 25 F.Supp. 221.—Corbitt v. Stolwein, D.C. Ohio, 17 F.Supp. 760.

N.C.—Propst v. Hughes Trucking Co., 27 S.E.2d 152, 223 N.C. 490.

Pa.—Aversa v. Aubry, 154 A. 311, 303 Pa. 139.—Werner v. Clingerman, 28 Pa. Dist. & Co. 200.—Poplosky v. Knauer, Com.Pl., 7 Sch.Reg. 33.

Correction of return

Opportunity should be given to make a true and accurate return if service in fact was in accordance with statute.—Propst v. Hughes Trucking Co., 27 S.E.2d 152, 223 N.C. 490.

91. N.Y.—Salzman v. Attrean, 254 N.Y.S. 288, 142 Misc. 245.

the provisions of a general statute prohibiting the service of a summons by a party to the action.⁹² Service on an assistant to the officer designated by statute as the agent for the service of process has been held to be sufficient where such assistant is clothed with all the powers of the designated officer.⁹³

When service complete. Service on a nonresident motorist has been held to be complete when service is made on the state official without regard to when the nonresident motorist receives notice.⁹⁴ Service on the state official has been held not to be complete when process is deposited in the mails addressed to him, but is complete only when it is in fact received by him.⁹⁵

(2) Notice to Nonresident

Statutory provisions requiring notice to the nonresident motorist must be complied with.

Under the various statutes relating to construc-

tive service of process on nonresident motorists, unless personal service is required,⁹⁶ a copy of the complaint,⁹⁷ summons or citation,⁹⁸ and notice of service on the proper state official⁹⁹ must be sent by mail to defendant at his last known address. Where the statute merely directs that the required papers be sent by mail, it has been held that either registered or regular mail may be employed,¹ and under some statutes personal service is a substitute for mailing.² Such provisions are calculated to give defendant adequate notice of the pendency of the action or proceeding,³ and to make it reasonably certain that notice will reach defendant.⁴ Unless there is compliance with these provisions, the court is without jurisdiction;⁵ the giving of notice is an indispensable step in completing service on a nonresident motorist,⁶ and it has been held that actual knowledge acquired in any other than the specified manner will not suffice to confer jurisdiction,⁷ but the statutes have been held not to re-

92. N.Y.—Hart v. Wiener, 17 N.Y.S. 2d 87, 258 App.Div. 371.

93. Del.—Felstead v. Eastern Shore Express, 160 A. 910, 5 W.W.Harr. 171—Creadick v. Keller, Del Super., 160 A. 909, 5 W.W.Harr. 169—Derickson v. Barnett, 160 A. 907, 5 W.W.Harr. 165.

Person designated by secretary of state

Under a statute directing service to be made on the secretary of state or someone designated by him in his office, it has been held that the intentment of the statute is met by the service of process, in the absence of the secretary of state, on the official who, in his absence, by the direction of the secretary of state and in accordance with the established practice of the department, acts for and in the place of the secretary of state within the department and particularly with respect to the service of process under the statute, and a designation in writing is unnecessary.—Rubin v. Goldberg, 154 A. 535, 9 N.J.Misc. 460.

94. La.—Allen v. Campbell, App., 141 So. 827.

N.Y.—Bessan v. Public Service Co-Ordinated Transport, 237 N.Y.S. 689, 135 Misc. 368.

95. Wis.—State ex rel. Stevens v. Grimm, 213 N.W. 475, 192 Wis. 601, followed in 213 N.W. 476, 192 Wis. 605.

96. N.M.—State ex rel. Dresden v. District Court of Second Judicial Dist. in and for Bernalillo County, 112 P.2d 506, 45 N.M. 119.

97. N.Y.—Stewart v. Transcontinental Car Forwarding Co. of Akron, Ohio, 7 N.Y.S.2d 926, 169 Misc. 427.

98. N.Y.—Stewart v. Transcontinen-

tal Car Forwarding Co. of Akron, Ohio, supra.

99. U.S.—Dusminski v. Ladenheim, D.C.N.Y., 43 F.Supp. 139.

La.—Spearman v. Stover, App., 170 So. 259.

N.Y.—Stewart v. Transcontinental Car Forwarding Co. of Akron, Ohio, 7 N.Y.S.2d 926, 169 Misc. 427.

Plaintiff himself may mail notice
N.Y.—Hart v. Wiener, 17 N.Y.S.2d 87, 258 App.Div. 371.

1. Wis.—Sorenson v. Stowers, 29 N.W.2d 512, 251 Wis. 398.

2. U.S.—Smyrniot v. Weintraub, D.C.Mass., 3 F.Supp. 439.

Cal.—Silver Swan Liquor Corporation v. Adams, 110 P.2d 1097, 43 Cal.App.2d Supp. 851.

Mass.—Duggan v. Ogden, 180 N.E. 301, 278 Mass. 432, 82 A.L.R. 765.

Service in foreign country

(1) A nonresident motorist, on whom personal service was made in foreign country by duly qualified officer, was properly served with process under provision that personal service of notice of service and copy of summons and complaint on defendant wherever found outside state is equivalent of mailing.—Silver Swan Liquor Corporation v. Adams, 110 P.2d 1097, 43 Cal.App.2d Supp. 851.

(2) However, a statute authorizing delivery of the required papers to defendant personally "without the state" by an attorney qualified to practice in that "state" has been held not to authorize service on a defendant in a foreign country, since the mention of the specific territory embraced within the statute implied the exclusion of other territories.—

Scott v. Dickerson, 8 N.Y.S.2d 656, 169 Misc. 1047.

Documents which may be served

(1) Under some statutes personal service outside the state is a substitute for mailing a copy of the summons and process.—Boss v. Irvine, D.C.Wash., 28 F.Supp. 983.

(2) However it has been held that personal service is not available as a substitute for mailing notice of service on the proper state official.—Smith v. Belmore, D.C.Wash., 1 F.R.D. 633.

3. U.S.—Zavis v. Warren, D.C.Wis., 35 F.Supp. 689.

Wis.—State ex rel. Cronkhite v. Bel-den, 211 N.W. 916, 214 N.W. 460, 193 Wis. 145, 57 A.L.R. 1218.

4. Ohio.—Hondershot v. Ferkel, 56 N.E.2d 205, 144 Ohio St. 112.

5. Del.—Webb Packing Co. v. Harmon, 193 A. 596, 8 W.W.Harr. 476. Pa.—McAteer v. Hayward, 36 Pa. Dist. & Co. 394.

6. Letter returned

Where copies of process addressed to nonresident automobile driver were sent by registered mail, but letter was returned, service on registrar of motor vehicles was held insufficient.—Smyrniot v. Weintraub, D.C.Mass., 3 F.Supp. 439.

7. U.S.—Smith v. Belmore, D.C.Wash., 1 F.R.D. 633.

Del.—Webb Packing Co. v. Harmon, 193 A. 596, 8 W.W.Harr. 22.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269.

N.J.—Weiner v. Wittman, 27 A.2d 866, 129 N.J.Law 35.

Pa.—McAteer v. Hayward, 36 Pa. Dist. & Co. 394.

Wis.—State ex rel. Stevens v.

quire that notice actually be delivered to defendant in every case.⁸ However, if defendant is fairly apprised by notice that an action has been commenced against him and is given a fair opportunity to defend, substantial compliance with the provisions for giving notice will suffice to confer juris-

diction.⁹ The required notice must be seasonably given,¹⁰ and must comply with the statutory requirements as to contents,¹¹ but, unless otherwise provided by statute, need not use any specific words or language, or be in any particular form.¹² Where the acts of compliance are such as to make it rea-

Grimm, 213 N.W. 475, 192 Wis. 601, followed in 213 N.W. 476, 192 Wis. 605.

A special appearance, entered to vacate the service for invalidity, cannot operate to cure the invalidity.—Syracuse Trust Co. v. Keller, Del., 165 A. 327, 5 W.W.Harr. 304.

8. U.S.—Morris v. Argo-Collier Truck Line, D.C.Ky., 39 F.Supp. 602.

Ohio—Hendershot v. Ferkel, 56 N.E. 2d 205, 144 Ohio St. 112.

"Plaintiffs cannot be charged with responsibility to see that the postal department makes delivery of mail properly addressed"—Sorenson v. Stowers, Wis., 29 NW 2d 512, 514, 251 Wis. 398.

Actual notice

It has been broadly stated that actual notice to defendant is necessary.—Alexander v. Bush, 134 S. W. 2d 519, 199 Ark. 562.

Receipt by defendant personally

(1) The fact that a letter containing the required notice is not handed to defendant personally has been held to be immaterial—Gesell v. Wells, 240 N.Y.S. 628, 229 App. Div. 11, affirmed 173 N.E. 885, 254 N.Y. 604—O'Tier v. Sell, 235 N.Y.S. 534, 226 App. Div. 434, reversed on other grounds 169 N.E. 624, 252 N.Y. 400, followed in Uda v. Yale Upholstering Mfg. Co., 242 N.Y.S. 862, 229 App. Div. 842.

(2) A nonresident may by his conduct adopt or ratify the act of another in receiving the notice for him.—Gesell v. Wells, supra.

In Virginia

(1) It has been stated that the statute provides for the process or notice to be forthwith sent to defendant or defendants and that plaintiff does not meet the requirement by showing that anything less than that was done, as, for instance, by showing that the director of motor vehicles sent a copy of the summons or notice addressed to defendant at his last known post-office address.—Weiss v. Magnussen, D.C.Va., 13 F. Supp. 948.

(2) However, it has also been stated that a reasonable interpretation of the legislative intent would appear to be that such notice be sent to a place or address at which it is probable the notice will be received by the addressee.—Powell v. Knight, D.C.Va., 74 F.Supp. 191.

9. N.Y.—Gesell v. Wells, 240 N.Y.S. 628, 229 App. Div. 11.

Although citations to employer and employee were switched in letters addressed to each separately, where letters contained copies of petition, sufficient compliance with the statutory requirements was held shown.—Allen v. Campbell, La.App., 141 So. 827.

Omission of complaint

Mailing of summons of service has been held sufficient to confer jurisdiction over defendant, although complaint was not mailed with the summons, omission being a mere irregularity.—Stewart v. Transcontinental Car Forwarding Co. of Akron, Ohio, 7 N.Y.S. 2d 926, 169 Misc. 427.

What constitutes notice "sent by plaintiff"

(1) A provision requiring that notice be "sent by the plaintiff" has been held not to require that the letter be posted by plaintiff personally.

La—Allen v. Campbell, App., 141 So. 827.

Vt—Brammell v. LaRose, 165 A. 916, 105 Vt. 345, followed in 165 A. 918, 105 Vt. 352.

(2) Under such provision notice may be sent by plaintiff's attorney.—Brammell v. LaRose, supra.

10. Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr. 22. N.Y.—Spitalny v. Le Cakes, 68 N.Y.S. 2d 100, 187 Misc. 763.

Reasonable dispatch

Under statute silent as to time of mailing, it has been held that mailing must be made with all reasonable dispatch.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

Notice before service

Notice of the serving and filing of process on the proper state official cannot be mailed prior to the performance of that act.—State ex rel. Stevens v. Grimm, 213 N.W. 475, 192 Wis. 601, followed in 213 N.W. 476, 192 Wis. 605.

"Forthwith"

(1) "Forthwith", as used in a statute requiring notice of service on the state official to be mailed to the nonresident forthwith, has been held to mean with due diligence under all the circumstances.—Reynolds v. Dorrance, C.C.A.Va., 94 F.2d 184.

(2) Similarly, such statute has been construed as meaning notice must be sent with all reasonable dispatch after return of service, and, in any event, before the rule day for filing declaration.—Webb Packing Co. v. Harmon, Del., 196 A. 158, 9 W.W.Harr. 22.

(3) So, where notices were originally sent to wrong address, but were promptly mailed to defendant's correct address when it was ascertained, and were received by defendant in ample time for him to appear, notices were sent "forthwith."—Reynolds v. Dorrance, C.C.A.Va., 94 F.2d 184.

(4) A delay of three days has been held not to constitute a failure to mail "forthwith"—Devier v. George Cole Motor Co., D.C.Va., 27 F.Supp. 978.

11. U.S.—Dusinski v. Ladenheim, D.C.N.Y., 43 F.Supp. 139.

Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr. 22.

Notice of effect of service on statutory agent must be regarded as a material and inseparable part of process where legislature has directed it.—Webb Packing Co. v. Harmon, supra—Webb Packing Co. v. Harmon, 193 A. 596, 8 W.W.Harr., Del., 476—Biddle v. Boyd, 193 A. 593, 8 W.W.Harr., Del., 469—Felstead v. Eastern Shore Express, 160 A. 910, 5 W.W.Harr., Del., 171.

12. N.Y.—Continental Casualty Co. v. Nelson, 264 N.Y.S. 560, 147 Misc. 821.

Notice of service held sufficient

Notice informing defendant that suit had been brought against her that copy of summons was being inclosed, and that under law that was as effectual as if service had been made on her personally in this state, although not expressly informing defendant that summons had been served on state official under statute, was sufficient compliance with statute where copy of summons inclosed revealed fact.—Biddle v. Boyd, 193 A. 593, 8 W.W.Harr., Del., 469.

The omission of the middle initial or the insertion of an erroneous initial in the place of the correct one of a defendant will not of itself operate to invalidate notice given by mail.—Schaaf v. Brown, 200 S.W.2d 909, 304 Ky. 466.

sonably probable that defendant will receive actual notice, he should not be permitted to evade the statute on technical grounds by acts of his own.¹³

Address. Where the statute directs that notice or process be mailed to the nonresident motorist, it has been held that a letter mailed to his last known or supposed address does not meet the requirements of the statute,¹⁴ but a letter mailed to an address at which, it is probable, delivery will be made satisfies the statutory requirements.¹⁵ The requirement that notice be mailed to his "last known address" does not mean his present address;¹⁶ nor does it mean his last address known to plaintiff,¹⁷ but the last known address to persons who would be expected to know it.¹⁸ Plaintiff must exercise due diligence to ascertain the last known address of the nonresident motorist,¹⁹ and, as far as it is reasonably possible to ascertain the address, plaintiff must do so at his peril.²⁰ It has been held, however, that

plaintiff has a right to rely on the address given by the nonresident motorist to the proper public authority at the time of the accident.²¹ Where the nonresident motorist actually receives the notice mailed, service is not invalid by reason of the fact that it was addressed to him at a place other than his residence,²² such as his place of business,²³ or at the place of business of a third person.²⁴ A letter addressed to the nonresident motorist, care of general delivery in the city or town of his residence, has been held insufficient in the absence of evidence that he knew of the presence of the letter at the post office and failed or refused to call for it.²⁵

Return receipt. Under some statutes, where notice is attempted by registered mail, the nonresident's return receipt is required to be filed in the proceedings,²⁶ and such receipt must comply with the statutory requirements.²⁷ Where the nonresi-

13. Ky.—Schaaf v. Brown, *supra*.

14. Del.—Syracuse Trust Co. v. Keller, 165 A. 327, 5 W.W.Harr. 304.

15. U.S.—Powell v. Knight, D.C.Va., 74 F.Supp. 191.

16. Pa.—Wiest v. Heffernan, 17 Pa. Dist. & Co. 212.

17. U.S.—Glenn v. Holub, D.C.Iowa, 36 F.Supp. 941.

Conn.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

Ohio.—Hendershot v. Ferkel, 57 N.E. 2d 819, 74 Ohio App. 106, reversed on other grounds 56 N.E.2d 205, 144 Ohio St. 112.

Wis.—State v. Belden, 211 N.W. 916, 193 Wis. 145, 57 A.L.R. 1218, rehearing denied 214 N.W. 460, 193 Wis. 145, 57 A.L.R. 1218.

18. Conn.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

Ohio.—Hendershot v. Ferkel, 57 N.E. 2d 819, 74 Ohio App. 106, reversed on other grounds 56 N.E.2d 205, 144 Ohio St. 112.

19. Ohio.—Hendershot v. Ferkel, *supra*.

It is not duty of officer to hunt up address of defendant after process is put into his hands for service.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

How discovered

If the letter is mailed to defendant's last known address, it is immaterial how such address was discovered.—Carr v. Tennis, D.C.Pa., 4 F.Supp. 142.

20. Conn.—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756.

Unqualified statement

(1) It has been held that plaintiff is required to ascertain at his peril the last known address of defendant as a matter of fact, and his failure to do so will amount to a failure to comply with the statute and render the service invalid.—State v. Belden, 211 N.W. 916, 193 Wis. 145, 57 A.L.R. 1218, rehearing denied 214 N.W. 460, 193 Wis. 145, 57 A.L.R. 1218.

(2) This holding or statement has been quoted with approval.—Glenn v. Holub, D.C.Iowa, 36 F.Supp. 941.

(3) The Belden case, *supra*, has been overruled, however, in so far as it required plaintiff to ascertain at his peril defendant's last known address.—Sorenson v. Stowers, 29 N.W.2d 512, 251 Wis. 398.

Dismissal unnecessary

Failure to serve proper notice did not require dismissal of cause, but plaintiff was entitled to correct defect.—Glenn v. Holub, D.C.Iowa, 36 F.Supp. 941.

21. Wis.—Sorenson v. Stowers, 29 N.W.2d 512, 251 Wis. 398.

22. Wis.—State ex rel. Nelson v. Grimm, 263 N.W. 583, 219 Wis. 630, 102 A.L.R. 220.

23. Wis.—State ex rel. Nelson v. Grimm, *supra*.

Letter mailed to employer's address held to meet statutory requirement where the nonresident motorist actually received it.—Burdick v. Powell Bros. Truck Lines, C.C.A.Ill., 124 F.2d 694.

24. Wis.—State ex rel. Nelson v.

Grimm, 263 N.W. 583, 219 Wis. 630, 102 A.L.R. 220.

25. Ga.—Stone v. Sinkfield, 29 S.E. 2d 310, 70 Ga.App. 787.

26. U.S.—Smith v. Belmore, D.C. Wash., 1 F.R.D. 633.

Del.—Syracuse Trust Co. v. Keller, 165 A. 327, 5 W.W.Harr. 304.

La.—Spearman v. Stover, App., 170 So 259

N.Y.—Dwyer v. Shalck, 248 N.Y.S. 355, 232 App.Div. 780.

Pa.—Lewis v. James, 19 Pa.Dist. & Co. 16, 81 Pittsb.Leg.J. 207, 47 York Leg.Rec. 50.

Time and manner of filing

Under statute requiring defendant's return receipt to be appended to summons or other process and filed with summons, complaint, and other papers, the return receipt need not be appended to, and filed simultaneously with, the summons and complaint but may be filed subsequently.—Peeples v. Ramspacher, D.C.S.C., 29 F.Supp. 632.

27. Mont.—State ex rel. Charette v. District Court of Second Judicial District in and for Silver Bow County, 86 P.2d 750, 107 Mont. 489.

Receipt signed by agent of nonresident defendant was held sufficient.

N.Y.—Shushereba v. Ames, 175 N.E. 187, 255 N.Y. 490—Gesell v. Wells, 240 N.Y.S. 628, 229 App.Div. 11, affirmed 173 N.E. 885, 254 N.Y. 604—O'Tier v. Sell, 235 N.Y.S. 534, 226 App.Div. 434, reversed on other grounds 169 N.E. 624, 252 N.Y. 400, followed in Uda v. Yale Upholstering Mfg. Co., 242 N.Y.S. 862, 229 App.Div. 842.

Pa.—Wiest v. Heffernan, 17 Pa.Dist. & Co. 212.

dent motorist refuses to accept a registered letter containing the required documents, he will not be heard to complain that he has not received actual notice or that there has not been strict compliance with all the provisions of the act,²⁸ such as the filing of a return receipt.²⁹ A nonresident motorist who refuses to accept delivery of a letter containing the required notice cannot complain of the alleged failure to comply with a statutory requirement that the receipt bear the motorist's signature.³⁰

(3) Affidavit of Compliance

Under statutes so providing, constructive service on a nonresident motorist is valid only if an affidavit of compliance with the statutory requirements is duly made and filed.

Under statutes so providing, constructive service on a nonresident motorist is valid and effective only if an affidavit of compliance with the statutory requirements is made by the proper person,³¹ and is properly filed.³² Under some statutes, such affidavit is required to be made by plaintiff or someone

in his behalf,³³ but, under others, the statutory agent or someone acting on his behalf is the proper person to make the affidavit.³⁴ Where defendant refuses to receive a registered letter containing the requisite notice and instruments, an affidavit of compliance in the exact terms of the statute cannot and need not be filed.³⁵

f. Proceedings to Vacate Service

If the constructive service or return of process is defective, a motion may be made to vacate or quash the service or return, and on such motion a showing of the necessary jurisdictional facts is necessary to defeat the motion.

If the constructive service or return of process is defective, a motion may be made to vacate or quash the service or return.³⁶ On such motion, a showing of the facts essential to jurisdiction is necessary in order to defeat the motion,³⁷ and the nonresidence of defendant cannot be assumed,³⁸ but must be proved.³⁹ It has been held that issues arising on such motions may be determined on the basis of the pleadings and affidavits presented.⁴⁰ If, however,

Receipt signed by wife

Fact that registered letter was delivered to defendant's wife and that she signed return receipt was held not fatal to court's jurisdiction, especially where defendant did not repudiate wife's act but retained possession of registered matter.—*Employers' Liability Assur. Corporation v. Perkins*, 181 A. 436, 169 Md 269.

28. U.S.—*Boss v. Irvine*, D.C.Wash., 28 F.Supp 983.

Del.—*Creadick v. Keller*, 160 A. 909, 5 W.W.Harr. 169.

Fla.—*Cherry v. Heffernan*, 182 So. 427, 132 Fla. 386.

Ga.—*Mull v. Taylor*, 23 S.E.2d 595, 68 Ga.App. 663.

Ky.—*Schaaf v. Brown*, 200 S.W.2d 909, 304 Ky. 466.

Mont.—*State ex rel. Charette v. District Court of Second Judicial Dist. in and for Silver Bow County*, 86 P.2d 750, 107 Mont. 489.

29. U.S.—*Boss v. Irvine*, D.C.Wash., 28 F.Supp 983.

Del.—*Creadick v. Keller*, 160 A. 909, 5 W.W.Harr. 169.

Ga.—*Mull v. Taylor*, 23 S.E.2d 595, 68 Ga.App. 663.

Letter marked "refused"

Service was sufficient, although the letter was returned marked "Refused" and there was no registered mail return receipt to attach to the return of service as required by statute, and, if refusal was by a third person, defendant may apply to the court to set aside the service or open the judgment against him.—*Wax v. Van Marter*, 189 A. 537, 124 Pa.Super. 673.

30. Mont.—*State ex rel. Charette v.*

District Court of Second Judicial Dist. in and for Silver Bow County, 86 P.2d 750, 107 Mont. 489.

31. U.S.—*Smith v. Belmore*, D.C. Wash., 1 F.R.D. 633.

Del.—*Felstead v. Eastern Shore Express*, 160 A. 910, 5 W.W.Harr. 171.

32. Time of filing

(1) The affidavit of compliance must be filed within the time provided by statute.—*Carlson v. District Court of City and County of Denver*, 180 P.2d 525, 116 Colo. 330.

(2) Under statute requiring affidavit of compliance to be "appended" to summons or other process and filed with summons, complaint, and other papers, affidavit may be filed at any time before trial and need not be appended to, and filed simultaneously with, other papers.—*Peeples v. Ramspacher*, D.C.S.C., 29 F.Supp. 632.

33. Iowa.—*Welsh v. Ruopp*, 289 N.W. 760, 228 Iowa 70.

Minn.—*Schilling v. Odlebak*, 224 N.W. 694, 177 Minn. 90.

N.C.—*Propst v. Hughes Trucking Co.*, 27 S.E.2d 152, 223 N.C. 490.

Affidavit in plaintiff's behalf

A statute providing that plaintiff shall mail the notice, and that plaintiff's affidavit of compliance is to be attached to the summons, has been construed as meaning that plaintiff may cause such affidavit to be made by the person mailing the summons who is not necessarily plaintiff himself, it being his act when done by others on his behalf.

Minn.—*Schilling v. Odlebak*, 224 N.W. 694, 177 Minn. 90.

Vt.—*Brammall v. LaRose*, 165 A. 916, 105 Vt. 345, followed in 165 A. 918, 105 Vt. 352.

Plaintiff's counsel held a proper person to make affidavit.

Iowa.—*Welsh v. Ruopp*, 289 N.W. 760, 228 Iowa 70.

Vt.—*Brammall v. LaRose*, 165 A. 916, 105 Vt. 345, followed in 165 A. 918, 105 Vt. 352.

34. U.S.—*Reynolds v. Dorrance*, C.C.A.Va., 94 F.2d 184.

Plaintiff's counsel was held not required to make and file affidavit.—*Reynolds v. Dorrance*, C.C.A.Va., 94 F.2d 184.

35. Ga.—*Mull v. Taylor*, 23 S.E.2d 595, 68 Ga.App. 663.

36. Iowa.—*Welsh v. Ruopp*, 289 N.W. 760, 228 Iowa 70.

N.J.—*Josephson v. Siegel*, 165 A. 869, 110 N.J.Law 374.

Pa.—*Midora v. Alfieri*, 17 A.2d 873, 341 Pa. 27.

37. Iowa.—*Welsh v. Ruopp*, 289 N.W. 760, 228 Iowa 70.

38. Iowa.—*Welsh v. Ruopp*, supra.

39. Iowa.—*Welsh v. Ruopp*, supra.

40. Colo.—*Carlson v. District Court of City and County of Denver*, 180 P.2d 525, 116 Colo. 330.

Agency

(1) The issue whether driver was agent of nonresident constructively served can be decided by trial court on affidavits presented on motion to quash service of summons.—*Fuller v. Lindenbaum*, 84 P.2d 155, 29 Cal. App.2d 227.

(2) Affidavits were held insufficient to justify vacation of service

the affidavits and pleadings leave the issues in doubt, they should be determined on the trial of the case.⁴¹ Plaintiff is aided, however, by any statutory presumption in his favor.⁴²

g. Application and Effect of Statutes in Courts of Limited Jurisdiction

The operation of a statute authorizing constructive service on nonresident motorists has been held not to be limited to courts of general original jurisdiction.

The operation of a statute authorizing constructive service on nonresident motorists has been held not to be limited to courts of general original jurisdiction, but to apply as well to courts of limited or inferior jurisdiction,⁴³ and by statute in at least

one state the territorial jurisdiction of inferior courts has been extended so that service of summons can be made on a nonresident motorist by service on the state official designated as the agent for the acceptance of service of process of nonresident motorists.⁴⁴ Under an amendment to a statute authorizing constructive service on nonresident motorists, which amendment added the words "and within the territorial jurisdiction of the court from which the summons issues," any court having jurisdiction of the subject matter can acquire jurisdiction over the person of a nonresident when service is made in the prescribed manner on the designated state official, even though such service is made outside the territorial limits of the court from which the summons issues.⁴⁵

on ground of insufficiency of pleadings to show that automobile owned by defendant was being operated by or for her or under her control or direction at time of collision.—*Moorer v. Underwood*, 9 S.E.2d 29, 194 S.C. 73.

41. N.Y.—*Lamere v. Franklin*, 267 N.Y.S. 310, 149 Misc. 371—*Staunton v. Robbins*, 239 N.Y.S. 565, 136 Misc. 197.

Consent of owner

Question of fact whether automobile owned by nonresident was operated on highways of state with express or implied consent of owner.—*Lamere v. Franklin*, 267 N.Y.S. 310, 149 Misc. 371.

42. Tex.—*Johnson v. Henderson*, Civ.App., 132 S.W.2d 458.

Attestation of copy of petition

Presumption that officer did his duty and that, therefore, copy of petition was attested as required by statute is not overcome by mere fact that sheriff's return and letter of state official failed to state that copy of petition was attested.—*Fischer v. Eby*, 114 S.W.2d 763, 272 Ky. 545.

43. N.Y.—*La Placa v. Hutcheson*, 79 N.Y.S.2d 355, 191 Misc. 27—*Salzman v. Attrean*, 254 N.Y.S. 283, 142 Misc. 245—*Strausberg v. Murphy*, 248 N.Y.S. 777, 139 Misc. 573—*Marcus v. Day*, 248 N.Y.S. 649, 139 Misc. 283—*Stoiber v. Marinacci*, 248 N.Y.S. 397, 139 Misc. 338, affirmed 254 N.Y.S. 620, 142 Misc. 345, affirmed 255 N.Y.S. 932, 235 App.Div. 714—*Bessan v. Public Service Co-Ordinated Transport*, 237 N.Y.S. 689, 135 Misc. 368.

Pa.—*Reinhart v. Shirm*, 18 Pa.Dist. & Co. 151.

44. N.J.—*Mohr v. Sonnet*, 8 A.2d 109, 17 N.J.Misc. 226.

Prior to the statute extending the territorial jurisdiction of the district courts, it was held that proc-

ess of the district courts could not be served on the state official designated as agent for the service of process on nonresident motorists outside the territorial jurisdiction of the district court in which the action was commenced.—*Wall Rope Works v. Sperling*, 185 A. 477, 116 N.J.Law 449—*MacPhail v. Nassau*, 184 A. 633, 14 N.J.Misc. 292.

45. N.Y.—*La Placa v. Hutcheson*, 79 N.Y.S.2d 355, 191 Misc. 27—*Arthur J. Olsen Pianos Inc. v. Kyle, Co. Ct.*, 50 N.Y.S.2d 692, 182 Misc. 399—*Uslan v. Woronoff*, 18 N.Y.S.2d 222, 173 Misc. 693, affirmed 21 N.Y.S.2d 613, 259 App.Div. 1093, reargument denied 22 N.Y.S. 464, 259 App.Div. 1117—*Praete v. Adams*, 8 N.Y.S.2d 235, 169 Misc. 776.

Amendment held not invalid

Such amendment, as applied to county courts, has been held not unconstitutional as an attempt by legislature to confer jurisdiction on county courts which they do not possess under constitution.—*La Placa v. Hutcheson*, 79 N.Y.S.2d 355, 191 Misc. 27.

Amendment held not retroactive

N.Y.—*Gruber v. Wilson*, 11 N.E.2d 568, 276 N.Y. 135.

Prior to amendment

(1) Prior to the amendment, it was held that the statute did not authorize the process of courts of inferior jurisdiction to go beyond their territorial jurisdiction and that the process of such courts, outside of the county where the state official designated as agent for the acceptance of service of process against nonresidents maintained his official office, was ineffective when served on him at such office.—*Gruber v. Wilson*, 11 N.E.2d 568, 276 N.Y. 135—*Skyer v. Williamson*, 278 N.Y.S. 668, 155 Misc. 18—*Bischoff v. Schnepf*, 249 N.Y.S. 49, 139 Misc. 293—*Heils v. Reinberg*, 243 N.Y.S. 284, 136 Misc. 815—*Osterhoudt v.*

Horowitz, 240 N.Y.S. 683, 135 Misc. 744—*Tannenbaum v. Wehrle*, 233 N.Y.S. 316, 133 Misc. 577.

(2) However, there was authority to the effect that the state official designated as agent for the acceptance of service of process against nonresidents was deemed to be constructively present in every part of the state and that service on such official by mailing the summons to him at his principal office was deemed to have been made within the territorial jurisdiction of the inferior court.—*Bessan v. Public Service Co-Ordinated Transport*, 237 N.Y.S. 689, 135 Misc. 368.

Branch office

(1) An amendment authorizing the service of summons in actions against a nonresident at a branch office of the designated state official was held not to permit the process of a local court to be served on such state official beyond the territorial limits of the court.—*Gruber v. Wilson*, 11 N.E.2d 568, 276 N.Y. 135.

(2) However, even prior to this amendment, it was held that service on the proper state official at a branch office maintained by him within the territorial limits of the inferior tribunal was effective to confer jurisdiction.—*Recktenwalt v. Donovan*, 290 N.Y.S. 890, 161 Misc. 109—*Teplitzky v. Lippman*, 256 N.Y.S. 410, 143 Misc. 244—*Stoiber v. Marinacci*, 254 N.Y.S. 620, 142 Misc. 345, affirmed 255 N.Y.S. 932, 235 App.Div. 714—*Salzman v. Attrean*, 254 N.Y.S. 283, 142 Misc. 245—*Berkowitz v. Dunphy*, 253 N.Y.S. 327, 141 Misc. 561—*Maguire v. Reiss*, 249 N.Y.S. 469, 139 Misc. 886—*Strausberg v. Murphy*, 248 N.Y.S. 777, 139 Misc. 573—*Marcus v. Day*, 248 N.Y.S. 649, 139 Misc. 283—*Stoiber v. Marinacci*, 248 N.Y.S. 397, 139 Misc. 338, affirmed 254 N.Y.S. 620, 142 Misc. 345, affirmed 255 N.Y.S. 932, 235 App.Div. 714.

2. PLEADING

§ 503. In General

The rules with respect to particular pleadings are discussed infra §§ 504-507, and with respect to issues, proof, and variance infra § 508.

Examine Pocket Parts for later cases.

§ 504. Declaration, Complaint, or Petition

The general rules of pleading in civil actions, parti-

cularly actions for negligence, apply to declarations, petitions, or complaints in actions for damages arising from the operation of motor vehicles.

The rules relating to declarations, complaints, or petitions in civil actions in general, particularly in actions for negligence, ordinarily apply in an action for damages or injuries caused by a motor vehicle.⁴⁶ The declaration, petition, or complaint must state a cause of action⁴⁷ with reasonable defi-

46. Cal.—*Courvlosier v. Burger*, 215 P. 93, 61 Cal.App. 470.
42 C.J. p 1190 note 1.

Form of declaration approved as meeting all essential requirements of pleadings.—*Lynch v. Walker*, Fla., 31 So.2d 268.

47. La.—*Fontenot v. Freudenstein*, App., 199 So. 677.

Mich.—*Hartley v. A. I. Rodd Lumber Co.*, 276 N.W. 712, 282 Mich. 652.
Pa.—*Medico v. Medico*, Com.Pl., 38 Luz.Leg.Reg. 418—*Huff v. Reinhart*, Com.Pl., 86 Pittsb Leg.J. 331.
Wash.—*Bradley v. S. L. Savidge, Inc.*, 123 P.2d 780, 13 Wash.2d 28.

Declaration, petition, or complaint held sufficient to state cause of action

(1) Generally.

Ala.—*Bennett v. Bennett*, 140 So. 378, 224 Ala. 335—*Drummonds v. Donahoo*, 114 So. 277, 22 Ala.App. 215.

Fla.—*Boyle v. Dolan*, 120 So. 334, 97 Fla. 253.

Ga.—*Southern Stages v. Clements*, 30 S.E.2d 429, 71 Ga.App. 169—*Holtsinger v. Scarbrough*, 24 S.E. 2d 869, 169 Ga.App. 117—*Glover v. Dixon*, 11 S.E.2d 402, 63 Ga. App. 592—*Brady v. Fruehauf Trailer Co.*, 10 S.E.2d 133, 63 Ga. App. 60—*Jones v. Jones*, 195 S.E. 311, 57 Ga.App. 349—*Houston v. Taylor*, 179 S.F. 207, 50 Ga.App. 811—*Pickleselmer v. Duke*, 154 S. E. 457, 41 Ga.App. 614.

Idaho.—*Burns v. Getty*, 24 P.2d 31, 53 Idaho 347.

Kan.—*Howse v. Weinrich*, 298 P. 766, 133 Kan. 132.

La.—*Duke v. Adkins*, App., 197 So. 157—*Rhodes v. Jordan*, App., 157 So. 811—*Reggie v. Karre*, 139 So. 532, 19 La.App. 477, followed in 139 So. 536, 19 La.App. 476, *Karre v. Karre*, 139 So. 536, 19 La.App. 476, and *Zwan v. Karre*, 139 So. 536, 19 La.App. 475—*Campbell v. Haas*, 2 La.App. 753.

Mont.—*Burns v. Eminger*, 261 P. 613, 81 Mont. 79.

N.Y.—*Brown v. Gold*, 285 N.Y.S. 980, 247 App.Div. 721.

N.C.—*Killian v. Hanna*, 136 S.E. 246, 193 N.C. 17.

Ohio.—*Davis v. Montel*, App., 49 N. E.2d 584—*Logan v. Canton Struc-*

tural Steel Co., 42 N.E.2d 910, 69 Ohio App. 48—*Flink v. Young*, 177 N.E. 286, 39 Ohio App. 95—*Boyd v. Hadley*, 16 Ohio Supp. 95, affirmed, App., 69 N.E.2d 676.

Okl.—*Tibbets & Pleasant v. Cook*, 287 P. 1014, 143 Okl. 101.

R.I.—*Cullinan v. Kooharian*, 153 A. 877, 51 R.I. 250.

S.C.—*Boyd v. Maxwell*, 2 S.E.2d 395, 190 S.C. 103.

Tenn.—*Wilson v. Moudy*, 123 S.W. 2d 828, 22 Tenn.App. 356.

42 C.J. p 1190 note 2 [a]

(2) Against automobile dealer furnishing defective car to prospective purchaser.

Ga.—*Holt v. Eastern Motor Co.*, 15 S.E.2d 895, 65 Ga.App. 502.

Mo.—*Standard Oil Co. of Ind. v. Leaverton*, App., 192 S.W.2d 681.

(3) Against municipality or municipal employee.

Fla.—*Barth v. City of Miami*, 1 So. 2d 574, 146 Fla. 542.

Ga.—*City of Rome v. Justice*, 149 S.E. 88, 40 Ga.App. 196.

Hawaii.—*Kim Chul Soon v. City and County of Honolulu*, 31 Hawaii 453.

Ill.—*Hansen v. Raleigh*, 63 N.E.2d 851, 391 Ill. 536, 163 A.L.R. 1425.

N.Y.—*Miller v. City of Albany*, 286 N.Y.S. 326, 247 App.Div. 848.

Wash.—*Hadley v. Arms & Scott*, 241 P. 26, 136 Wash. 632.

(4) For damages from colliding with unlighted vehicle—*Lanier v. Turner*, 38 S.E.2d 55, 73 Ga.App. 749.

—*Adams v. Jackson*, 166 S.F. 258, 45 Ga.App. 860, followed in *Adams v. Price*, 166 S.E. 260, 45 Ga.App. 862.

(5) For damages sustained in motor vehicle collisions.

Ala.—*Brown v. Rush*, 124 So. 300, 220 Ala. 130—*William E. Harden, Inc. v. Harden*, 197 So. 94, 29 Ala.App. 411—*Myers v. Baker*, 135 So. 643, 24 Ala.App. 387.

Ariz.—*Reinhardt v. Doyle*, 6 P.2d 428, 39 Ariz. 318.

Fla.—*Schwenck v. Jacobs*, 35 So.2d 123—*Thigpen v. City of Miami*, 4 So.2d 365, 148 Fla. 304.

Ga.—*Rodgers v. Watson*, 45 S.E.2d 708, 76 Ga.App. 220—*Allen v. Golden*, 44 S.E.2d 268, 75 Ga.App. 675.

—*Pollard v. Harbin*, 192 S.E. 234, 56 Ga.App. 172—*Laseter v. Clark*,

189 S.E. 265, 54 Ga.App. 669—*Hudgins Contracting Co. v. Corley*, 188 S.E. 736, 54 Ga.App. 694—*Kinney v. Turnipseed*, 164 S.E. 225, 45 Ga. App. 269.

Iowa.—*Sutton v. Moreland*, 242 N. W. 75, 214 Iowa 337.

Kan.—*Gibson v. Rodley*, 133 P.2d 112, 156 Kan. 338—*Le Clair v. Hubert*, 107 P.2d 703, 152 Kan. 706.

Ky.—*White v. Crouch*, 133 S.W.2d 753, 280 Ky. 637.

La.—*Cantrell v. Roberts*, App., 12 So. 2d 491—*Robinson v. Miller*, App., 177 So. 440—*Smith's Tutorship v. Perrin*, App., 145 So. 685—*McDonald v. Stellwagon*, App., 140 So. 133, followed in *McConnell v. Stellwagon*, 140 So. 138.

Mo.—*Spoeneman v. Uhrl*, 60 S.W.2d 9, 332 Mo. 821—*Yontz v. Shernaman*, App., 94 S.W.2d 917—*Rogers v. Crown Coach Co.*, App., 68 S.W. 2d 729.

N.M.—*Veale v. Eavenson*, 192 P.2d 312.

N.C.—*Presnell v. Beshears*, 41 S.E.2d 835, 227 N.C. 279.

Okl.—*Dierksen v. Hollingworth*, 89 P.2d 358, 184 Okl. 611.

Tenn.—*Caldwell v. Hodges*, 77 S.W.2d 817, 18 Tenn.App. 355.

Tex.—*Universal Transp. Co. v. Ramos*, Civ.App., 37 S.W.2d 238, error dismissed.

Va.—*Gilley v. Simmons*, 134 S.E. 550, 145 Va. 549.

42 C.J. p 1190 note 2 [a] (15).

(6) For injuries to pedestrian.

Ala.—*Eady v. Heaton*, 140 So. 408, 224 Ala. 327.

Fla.—*Pillet v. Ershick*, 126 So. 784, 99 Fla. 483.

Ga.—*Aristocrat Dairy Products Co. v. George*, 34 S.E.2d 107, 72 Ga. App. 494—*Fender v. Drost*, 7 S.E.2d 800, 62 Ga.App. 345—*Sprayberry v. Snow*, 1 S.E.2d 756, 59 Ga.App. 744, reversed on other grounds 10 S.E.2d 179, 190 Ga. 723, mandate conformed to 11 S.E.2d 431, 63 Ga. App. 489—*Huckabee v. Grace*, 173 S.E. 744, 48 Ga.App. 621.

Ill.—*McKirchy v. Van Sweringen*, 63 N.E.2d 132, 326 Ill.App. 583.

Ind.—*Hill v. Boggs*, 185 N.E. 300, 98 Ind.App. 506.

La.—*Hollins v. Crawford*, App., 11 So.2d 641.

niteness and certainty.⁴⁸ Also a complaint in an automobile accident case should state how the accident happened⁴⁹ or show that plaintiff was not in a position to know;⁵⁰ but a failure to do so does not necessarily render it demurrable.⁵¹ Where it is essential to recovery from a county or municipality that a claim be presented as required by statute, the

complaint must allege presentation of such claim.⁵² The theory of the complaint must be determined by its leading allegations.⁵³

Improper or unnecessary allegations. The declaration, petition, or complaint need not allege venue,⁵⁴ the liability of a person other than defendant,⁵⁵ or that the automobile was registered.⁵⁶ It

Mass.—Gallo v. Foley, 11 N.E.2d 803, 299 Mass. 1.

Mich.—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128.

Mo.—Robinson v. O'Shansky, App., 86 S.W.2d 895.

Mont.—Autio v. Miller, 11 P.2d 1039, 92 Mont. 150.

N.Y.—Sandy v. Wicks, 11 N.Y.S.2d 110, 256 App.Div. 1007.

Pa.—Alberts v. Miller, Com.Pl., 35 Luz.L.Reg. 268.

Tenn.—Walkup v. Covington, 73 S.W.2d 718, 18 Tenn.App. 117.

Wis.—Weber v. Naas, 250 N.W. 436, 212 Wis. 537.

43 C.J. p 1190 note 2 [a] (19).

(7) For physical injuries allegedly suffered by ambulance owner caused by overexertion in effort to rescue the persons injured in the collision.—Blanchard v. Reliable Transfer Co., 32 S.E.2d 420, 71 Ga.App. 843.

(8) For simple negligence and for willful misconduct.—Crapps v. Mangham, 44 S.E.2d 133, 75 Ga.App. 563.

(9) For willful and wanton conduct.—American Oil Co. v. Arrington, 48 S.E.2d 732, 75 Ga.App. 447—Bales v. Wright, 200 S.E. 192, 59 Ga.App. 191.

(10) On theory of common-law negligence.—Flagg v. Russell, 168 N.E. 672, 87 Ind.App. 110.

Declaration, petition, or complaint held insufficient to state cause of action

(1) Generally.

Ga.—Buchanan v. Ellis, 149 S.E. 100, 39 Ga.App. 840.

Ill.—McKirchy v. Van Sweringen, 63 N.E.2d 132, 326 Ill.App. 583.

N.Y.—Carlin v. Carlin, 29 N.Y.S.2d 925.

Pa.—Reid Tobacco Co. v. Pardoe, Com.Pl., 13 Northumb.L.J. 268. 42 C.J. p 1190 note 2 [b].

(2) Against a municipality.

Ga.—Granat v. Mayor, etc., of Savannah, 200 S.E. 311, 59 Ga.App. 276.

N.Y.—Kelly v. City of Niagara Falls, 229 N.Y.S. 328, 131 Misc. 934.

(3) For injuries not associated with effort to rescue persons in collision.—Blanchard v. Reliable Transfer Co., 32 S.E.2d 420, 71 Ga.App. 843.

Allegation of impossibility

Complaint alleging that plaintiff was riding as guest of defendant and

that defendant negligently collided car in which defendant was riding with car in which plaintiff was riding alleges an impossibility, and is not self-correcting.—Lawson v. Norris, 112 So. 129, 215 Ala. 666.

48. Test of sufficiency

The sufficiency of an allegation in a declaration for personal injuries by a pedestrian struck by a motorist is covered by a statute and court rule providing that a declaration containing information reasonably informing defendant of the nature of the case is sufficient.—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128.

Pleadings held sufficiently definite and certain

(1) Generally.

Ala.—W. F. Covington Planter Co. v. Roberson, 194 So. 171, 239 Ala. 70.

—Foster v. Byrd, 180 So. 125, 28 Ala.App. 168—Duncan v. Robertson, 132 So. 57, 24 Ala.App. 157, reversed on other grounds 132 So. 58, 222 Ala. 131.

Cal.—Meier v. Wagner, 150 P. 797, 27 Cal.App. 579.

Ga.—Cochran v. Kendrick, 153 S.E. 57, 43 Ga.App. 135.

Idaho.—Adkins v. Zalasky, 81 P.2d 1090, 59 Idaho 292.

Ind.—Flagg v. Russell, 166 N.E. 672, 87 Ind.App. 110.

La.—Adams v. Burnett, App., 150 So. 403—Smith v. Silvio, App., 150 So. 38.

Or.—Weinstein v. Wheeler, 296 P. 1079, 135 Or. 518.

Tex.—Lone Star Gas Co. v. Haire, Civ.App., 41 S.W.2d 424.

42 C.J. p 1190 note 3 [a].

(2) Allegations as to time and place of occurrence.

Ala.—Eady v. Heaton, 140 So. 408, 224 Ala. 327—Birmingham Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342—Gray v. Cooper, 114 So. 139, 216 Ala. 684—Tillery v. Walker, 114 So. 137, 216 Ala. 676—Hackney v. Dudley, 113 So. 401, 216 Ala. 400—Mobile Pure Milk Co. v. Coleman, 161 So. 826, 26 Ala.App. 402, certiorari denied 161 So. 829, 230 Ala. 432.

Mont.—Johnson v. Herring, 295 P. 1100, 89 Mont. 156.

42 C.J. p 1190 note 3 [b].

Typographical error held immaterial

Or.—Klein v. Miller, 77 P.2d 1103, 159 Or. 27, 116 A.L.R. 820.

Use of "and/or" disapproved

Iowa.—Popham v. Case, 271 N.W. 226, 223 Iowa 52.

49. Puerto Rico.—Rodriguez v. Nicole, 7 Puerto Rico Fed. 418.

42 C.J. p 1191 note 9.

50. Puerto Rico.—Rodriguez v. Nicole, supra.

51. Puerto Rico.—Rodriguez v. Nicole, supra.

52. Cal.—Artukovich v. Astendorf, 131 P.2d 831, 21 Cal.2d 329.

SC—Ouzts v. State Highway Department, 159 S.E. 457, 161 S.C. 21.

Complaint held sufficient notwithstanding absence of allegation that notice of claim had been served.—Schwartz v. City of New York, 25 N.Y.S.2d 964.

53. Ind.—Pittman-Rice Coal Co. v. Hansen, 73 N.E.2d 364, 117 Ind. App. 508.

Common-law negligence

In action for injuries sustained in automobile accident, complaint, which was in one paragraph, alleging that plaintiff was riding with defendant as a guest, without alleging that plaintiff was being transported without payment therefor, and that defendant carelessly, negligently, wantonly and willfully failed to observe a stop sign, failed to stop and look for approaching cars on an intersecting road, and drove directly into the path of an oncoming car, alleged a cause of action on theory of common-law negligence.—Ott v. Parrin, 63 N.E.2d 163, 116 Ind.App. 315.

54. Ala.—C. C. Snyder Cigar, etc., Co. v. Stutts, 107 So. 73, 214 Ala. 132.

Under statutes requiring suit to be brought where the injury occurred or where defendant resides, a petition which described location of collision generally by reference to named towns without alleging in what county defendant resided or injury occurred was not fatally defective as showing that action was not filed in proper forum.—Hoskins v. Bloomer, 201 S.W.2d 716, 304 Ky. 548.

55. Conn.—Tower v. Camp, 130 A. 86, 103 Conn. 41.

42 C.J. p 1191 note 13.

56. Fla.—McNell v. Webeking, 83 So. 728, 66 Fla. 407.

42 C.J. p 1191 note 14.

is not necessary to allege the ownership of a car operated by plaintiff⁵⁷ or the manner of appointment of a guardian suing on behalf of a minor.⁵⁸ It has been held to be improper to allege that defendant was insured,⁵⁹ that he failed to register his automobile and place a number thereon,⁶⁰ or, in an action by a passenger, that the driver of the automobile lost his life by reason of the accident.⁶¹ Sometimes allegations of unnecessary matters are treated as harmless or immaterial surplusage,⁶² while others are regarded as improper and prejudicial.⁶³

Demurrer. The general rules and statutes governing demurrers to declarations, petitions, or complaints in civil actions generally, discussed in the C.J.S. title Pleading §§ 231-238, also 49 C.J. p 387 note 16 et seq, are applicable to a demurrer interposed in an action to recover damages occasioned by the negligent operation of a motor vehicle.⁶⁴

Amendment. The rules governing the amendment of pleadings in civil actions generally are applicable to the amendment of a petition, declaration, or complaint in an action to recover damages arising from the negligent operation of a motor vehicle.⁶⁵ Where a complaint is merely defective, it has been held that it may be amended, even after the statute of limitations has run, if it seeks to declare on the same cause of action involved in the original complaint.⁶⁶

§ 505. — Allegations of Particular Matters

- a. Duty and responsibility of defendant
- b. Breach of duty or negligence
- c. Proximate cause
- d. Negating defenses

a. Duty and Responsibility of Defendant

- (1) In general
- (2) Duty at place of accident or collision
- (3) Relation between plaintiff and defendant
- (4) Relation between defendant and driver

(1) In General

The plaintiff's pleading must sufficiently aver the duty of the defendant to use due care not to injure him, and the responsibility of the defendant for failure so to do. What are necessary and proper averments depend largely on the facts and circumstances of the particular case.

In an action to recover damages for injuries occasioned by the negligent operation of a motor vehicle, the declaration, petition, or complaint must show that defendant owed plaintiff a duty to use due care not to injure him.⁶⁷ This duty should be shown, not by direct averment,⁶⁸ but by a statement of facts from which the law raises or implies a duty owing by defendant to plaintiff⁶⁹ at the time of the accident.⁷⁰ The complaint must allege facts showing that the automobile was under the control of defendant,⁷¹ or that he owed plaintiff a duty of

57. Pa.—Wasilchak v. National Biscuit Co., 40 Pa.Dist. & Co. 531, 43 Lack.Jur. 19.

58. Pa.—Wasilchak v. National Biscuit Co., supra.

59. Iowa.—Seleine v. Wisner, 206 N. W. 130, 200 Iowa 1389.

Pa.—Mocarsky v. General Baking Co., 42 Pa.Dist. & Co. 472.

60. Tex.—Mumme v. Sutherland, Civ.App., 198 S.W. 395.

61. Iowa.—Seleine v. Wisner, 206 N. W. 130, 200 Iowa 1389.

62. Cal.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332—Wiley v. Cole, 199 P. 550, 52 Cal.App. 617.

Ga.—A. G. Boone Co. v. Owens, 187 S.E. 899, 54 Ga.App. 379.

Or.—Clarkson v. Wong, 42 P.2d 763, 150 Or. 406, motion denied 45 P.2d 914, 150 Or. 406, 42 C.J. p 1191 note 18.

63. Tex.—Norris Bros. v. Mattinson, Civ.App., 118 S.W.2d 460, error dismissed.

64. Ala.—Barfield v. Evans, 65 So. 928, 187 Ala. 579, 42 C.J. p 1198 note 54.

Complaint held not demurrable Cal.—Fraher v. Eisenmann, 270 P. 704, 94 Cal.App. 48.

Fla.—City of Tampa v. Easton, 198 So. 753, 145 Fla. 188.

65. Discretion

Granting of particular amendments held to be within the discretion of the trial court.

Conn.—Martin J. McEvoy, Inc., v. Iannantuoni, 132 A. 895, 104 Conn. 372.

Or.—Schassen v. Columbia Gorge Motor Coach System, 270 P. 530, 126 Or. 363.

Amendments held not to state new cause of action

Ga.—Laing v. Perryman, 120 S.E. 646, 31 Ga.App. 239.

N.C.—Williams v. May, 91 S.E. 604, 173 N.C. 78.

Or.—Hanna v. Royce, 249 P. 173, 119 Or. 450.

42 C.J. p 1196 note 27 [c].

Amendments held properly refused

Conn.—Evans v. Byrrolly Transp. Co., 197 A. 758, 124 Conn. 10.

Ohio.—Hatsio v. Red Cab Co., 67 N. E.2d 553, 77 Ohio App. 301.

66. Ind.—Butler v. Domer, 32 N.E. 2d 594, 218 Ind. 260.

67. Ala.—Ritter v. Gibson, 116 So. 158, 217 Ala. 304.

42 C.J. p 1191 note 19.

68. Ind.—Wellington v. Reynolds, 97 N.E. 155, 177 Ind. 49.

69. Ala.—Ritter v. Gibson, 116 So. 158, 217 Ala. 304.

42 C.J. p 1191 note 21.

Allegations held sufficient

Ala.—Ritter v. Gibson, supra.

42 C.J. p 1191 note 21 [b].

70. Ala.—Maddox v. Jones, 89 So. 38, 205 Ala. 598.

71. Puerto Rico.—Rodriguez v. Nicole, 7 Puerto Rico Fed. 418.

Complaint held insufficient

A complaint, alleging that individual defendant was an officer, servant, agent, or employee of corporate defendant, and while acting within scope of his authority caused, allowed, or permitted an automobile truck under his control to come in contact with truck occupied by plaintiff's intestate, was demurrable for failure to allege that individual defendant had actual manual control of truck or was present directing its movements.—Smith v. Tripp, 20 So. 2d 870, 246 Ala. 421.

controlling its operation,⁷² and that he is responsible for its negligent operation.⁷³

In order to show a duty of control resting on defendant, it is necessary to allege either ownership⁷⁴ or operation⁷⁵ of the automobile by him. Where the action is against the owner of the car and the complaint shows that the car was operated by a person other than the owner at the time of the injury, it must allege facts to show defendant's ownership of the car,⁷⁶ or what, if any, relation defendant or his servant had to the vehicle,⁷⁷ and that the driver was responsible for the accident;⁷⁸ but an allegation of ownership of the automobile by defendant is of itself sufficient to show his responsibility for its operation⁷⁹ and need not be accompanied by allegations showing whether, at the time of the accident, it was being driven by him or someone else,⁸⁰ or with his knowledge or consent.⁸¹ An allegation that injury was caused by a vehicle negligently operated by defendant, his agents, servants, or employees is sufficient without alleging ownership by defendant.⁸² Where the action is against the driver of the vehicle, no averment of ownership is necessary.⁸³

Use of automobile in defendant's business. In an action against the owner of an automobile it is not necessary to allege that the automobile was being

used in defendant's business at the time of the injury, whether the action is based on the negligence of the owner,⁸⁴ or where it is alleged that the car was operated by an agent, servant, or employee,⁸⁵ although in the latter case it is better pleading to aver distinctly that the car was being operated at the time on defendant's business.⁸⁶

Duty to make and enforce rules. A count based on defendant's duty to make and enforce rules restricting or regulating the speed of its vehicle when driven upon the streets of a city is defective where it does not allege such facts as would give rise to the duty relied on.⁸⁷

(2) Duty at Place of Accident or Collision

As a general rule the declaration, petition, or complaint must sufficiently aver that at the time of the accident or collision the plaintiff or his property was at a place where the defendant owed him a duty to use due care to avoid injuring the plaintiff or his property.

As a general rule, the declaration, petition, or complaint must allege facts showing that, at the time of the accident or collision, plaintiff or his property was at a place where defendant owed plaintiff a duty to use due care not to injure the person or property of plaintiff;⁸⁸ but where the requisite facts are alleged it is not necessary to charge the legal conclusion that the duty existed.⁸⁹

72. Ala.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

73. N.Y.—Brone v. Sours Carting & Storage Co., 58 N.Y.S.2d 413, 186 Misc. 1.

42 C.J. p 1191 note 26.

Joint negligence

Where it is charged that defendant had the right to control and direct the use of an automobile and was assisting in driving it, using the driver as an instrumentality, such charge is an allegation of joint action and joint negligence and amounts to a charge of negligence against the defendant personally based on his own acts.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256.

74. Ala.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

75. Ala.—Reed v. Ridout's Ambulance, Inc., supra.

76. Iowa.—Putnam v. Busing, 266 N.W. 559, 221 Iowa 871.

Pa.—Huff v. Reinhart, Com.Pl., 86 Pittsb.Leg.J. 331.

Tex.—Boydston v. Jones, Civ.App., 177 S.W.2d 303.

42 C.J. p 1191 note 29.

77. Ala.—Britling Cafeteria Co. v. Irwin, 159 So. 228, 229 Ala. 687.

78. Tex.—Boydston v. Jones, Civ. App., 177 S.W.2d 303.

79. Iowa.—Halfpap v. Gruis, 202 N.W. 592, 199 Iowa 757.

Individual ownership of several defendants

Colo.—Conner v. Sullivan, 272 P. 623, 84 Colo. 572.

Ownership by municipality

(1) A declaration alleging that city owned certain automobile truck, that truck was being operated by certain individual with knowledge and consent of city, on city streets, and that the driver negligently operated the truck into plaintiff's automobile, injuring plaintiff and his automobile, stated a cause of action against the city.—City of Tampa v. Easton, 198 So. 753, 146 Fla. 188.

(2) A declaration, alleging that a fire engine truck, owned by city, while being operated on streets of the city by city employee, acting within scope of his employment, and with knowledge and consent of the city, was negligently and recklessly driven into plaintiff's motorcycle, stated a cause of action against city for resulting damages to motorcycle and injuries to plaintiff.—Barth v. City of Miami, 1 So.2d 574, 146 Fla. 542.

80. Cal.—Randolph v. Hunt, 183 P. 358, 41 Cal.App. 739.

N.Y.—Shepard v. Wood, 103 N.Y.S. 306, 116 App.Div. 861.

81. Iowa.—Halfpap v. Gruis, 202 N.W. 592, 199 Iowa 757.

42 C.J. p 1191 note 32.

82. Ky.—Kelly v. Marcum, 114 S.W. 2d 1102, 272 Ky. 609.

83. Pa.—Kuster v. Stahl, 11 Pa.Dist. & Co. 518.

84. Kan.—Tannahill v. Depositors' Oil, etc., Co., 203 P. 909, 110 Kan. 254.

85. Ala.—Jones v. Strickland, 77 So. 562, 201 Ala. 138.

Pa.—Myers v. Pfeiffer, 84 Pa.Super. 505.

86. Pa.—Myers v. Pfeiffer, supra.

87. Ala.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

88. Ala.—C. C. Snyder Cigar, etc., Co. v. Stutts, 107 So. 73, 214 Ala. 132.—Maddox v. Jones, 89 So. 38, 205 Ala. 598.

Complaint held sufficient

Ala.—W. F. Covington Planter Co. v. Roberson, 194 So. 171, 238 Ala. 70.—Ritter v. Gibson, 116 So. 158, 217 Ala. 304.—Smith v. Clemmons, 112 So. 442, 216 Ala. 52.

Mont.—Johnson v. Herring, 295 P. 1100, 89 Mont. 156.

89. Ala.—Maddox v. Jones, 89 So. 38, 205 Ala. 598.

When the injuries were sustained on a highway, it is necessary⁹⁰ and sufficient⁹¹ to allege facts showing that the highway was a public highway. An allegation that plaintiff was lawfully using a public sidewalk need not allege the purpose for which it was being used.⁹²

(3) Relation between Plaintiff and Defendant

There must be sufficient averment of a relationship between the plaintiff and the defendant giving rise to a duty owing by the defendant to the plaintiff.

A relationship between plaintiff and defendant giving rise to a duty to exercise care owing by defendant to plaintiff must be averred.⁹³ In an action against the owner of an automobile by a person who was riding therein, plaintiff must aver some relation to defendant other than the mere fact that he was riding in the automobile when injured;⁹⁴ in such case it is necessary and sufficient

to aver plaintiff's relation to defendant as that of passenger,⁹⁵ guest,⁹⁶ or employee engaged in service at the time.⁹⁷ Allegations merely that plaintiff was lawfully riding in defendant's vehicle import only that plaintiff was a licensee of the owner⁹⁸ and that the only duty owed by defendant to plaintiff was not willfully or wantonly to injure him.⁹⁹ In an action for negligence, a petition admitting that the injured person was a trespasser does not state a case.¹

(4) Relation between Defendant and Driver

Where the defendant was not the driver of the vehicle at the time of the injury, his relationship to, and responsibility for the acts of, the driver must be properly pleaded.

Where the action is against the owner and the complaint shows that the vehicle was operated by another at the time of the injury, it must ordinarily allege facts showing that the operator was an agent, servant, or employee,² or, where such is the case,

90. Ala.—Ruffin Coal, etc., Co. v. Rich, 108 So. 600, 214 Ala. 622.
42 C.J. p 1192 note 52.

91. Cal.—Villegas v. Strohm, 297 P. 588, 112 Cal App 633.
42 C.J. p 1192 note 53.

92. Fla.—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.

93. Ala.—Feore v. Trammel, 102 So. 529, 212 Ala. 325.

Complaint held sufficient

N.C.—Dark v. Johnson, 36 S.E.2d 237, 225 N.C. 651.

Driver acting outside scope of employment

Under the rule that the owner of a vehicle is not liable to one riding therein as guest of the driver who is acting outside the scope of his employment, a petition showing that plaintiff was injured while such a guest states no cause of action against the owner.—Beard v. Oliver, 182 S.E. 921, 52 Ga.App. 229.

94. Ala.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

Pa.—Murphy v. Omwake, 18 Pa.Dist. & Co. 594.
42 C.J. p 1192 note 38.

95. Ala.—Garner v. Baker, 108 So. 38, 214 Ala. 385.

Cal.—Fairman v. Mors, 130 P.2d 448, 55 Cal.App.2d 216.

"Passenger"

(1) The word "passenger" in declaration sufficiently designates plaintiff's relationship.—Elmer v. Miller, 255 Ill.App. 465.

(2) Averment that occupant was a passenger in automobile at time of accident does not preclude recovery against driver, since "passenger" in-

cludes status of invitee as well as that of licensee.—Cafaro v. Cafaro, 184 A 779, 14 N.J.Misc 331, reversed on other grounds 191 A. 472, 118 N.J.Law 123.

96. Ill.—Garner v. Baker, supra—Barnett v. Levy, 213 Ill App. 129.

Pleading held sufficient to show relationship

Ga.—Monroe Motor Exp v. Jackson, 38 S.E.2d 863, 74 Ga.App. 148.

97. Ala.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

Allegations held sufficient

Tex.—Marsh v. Williams, Civ App., 154 S.W.2d 201, error refused.

Allegations held insufficient

(1) A count is demurrable where, although it alleges that plaintiff was an employee of defendant corporation, and that the driver of the car was vice president or assistant manager of defendant, it does not show any act of superintendence or control by the driver over plaintiff.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

(2) In action for injuries allegedly caused by truck owned by employee of produce company and driven by employee's guest, pleadings proceeding on theory that guest was servant of produce company within doctrine of respondeat superior, was error.—West Texas Produce Co. v. Pate, Tex.Civ.App., 64 S.W.2d 381.

98. Ala.—Mi-Lady Cleaners v. McDaniel, 179 So. 908, 235 Ala. 469, 116 A.L.R. 639.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

99. Ala.—Reed v. Ridout's Ambulance, Inc., supra.

1. Ga.—Turner v. Fuller, 146 S.E. 494, 39 Ga.App. 184.

2. Ala.—Drennen Motor Car Co. v. Webb, 147 So 143, 226 Ala. 353.
Conn.—Leitzes v. F. L. Caulkins Auto Co., 196 A. 145, 123 Conn. 459.
Fla.—McDougald v. Couey, 200 So. 391, 145 Fla. 689.
Tex.—Miller v. Pettigrew, Civ App., 10 S.W.2d 168.
42 C.J. p 1192 note 45.

Alternative allegations

N.Y.—Johansson v. Kemp, 207 N.Y. S. 468, 211 App Div. 276.

Effect of statute

A statute making registration of automobile prima facie evidence of ownership and proof that operation was for owner's benefit, related entirely to matters of evidence, and did not dispense with necessity for proper pleadings as essential predicate of judgment against owner for injury resulting from driver's negligent operation of automobile.—Curtis v. Kyte, 106 S.W.2d 234, 21 Tenn. App. 115.

Necessary allegations

Where declaration of automobile occupant in action for personal injuries did not allege that stated owner of automobile was negligent operator or allege the relationship between alleged owner and operator so as to invoke operation of respondeat superior doctrine and did not allege that operator was using automobile with knowledge, permission, acquiescence, or authority of owner, so as to make owner liable for negligent operation of automobile, the declaration was fatally defective.—McDougald v. Couey, 200 So. 391, 145 Fla. 689.

that the operator was a partner,³ of defendant, and that he was acting within the scope of his employment at the time,⁴ and the pleading must show whether the negligence relied on is that of defendant or of his agent.⁵ A further allegation that the driver was using his own car does not negative liability of the employer.⁶ A special custom permit-

ting an employee to use the employer's cars, in order to be relied on, must be pleaded.⁷

It is sufficient to allege that the owner of the automobile, with knowledge of the incompetency of another person, intrusted the automobile to the latter person;⁸ and this rule constitutes an exception to the general rule that the relation of principal

Relevant allegations

In stating cause of action against automobile owner for damage sustained in collision with automobile on theory that driver was owner's agent, allegations as to damage to property and injury to person, as to ownership of automobile, and as to operation of automobile by driver with owner's consent, were relevant in alleging agency.—*Parks v. Mathews*, 69 P.2d 781, 58 Idaho 8.

Several employers

A petition against several defendants jointly is not invalid for vagueness because of failure to allege which defendant was the employer of the driver, where it alleges that all were employers.—*Calamia v. Mayer*, La.App., 174 So. 668.

Allegations held sufficient

Ala.—*Moore v. Cruitt*, 191 So. 252, 233 Ala. 414.
Ark.—*Van Bibber v. Strong*, 160 S.W. 2d 861, 203 Ark. 1090.
Cal.—*Shields v. Oxnard Harbor Dist.*, 116 P.2d 121, 46 Cal.App.2d 477.
La.—*Goff v. Sinclair Refining Co.*, App., 162 So. 452—*Wardlaw v. Harvey & Jones*, App., 138 So. 892—*Howell v. Robinson*, 130 So. 666, 14 La.App. 632.
N.Y.—*Taksen v. Kramer*, 263 N.Y.S. 609, 239 App.Div. 756.
Pa.—*Horn v. Langerio*, Com.Pl., 1 Lebanon Co. 173.
Tex.—*Mann v. Cook*, Civ.App., 11 S.W.2d 572.
42 C.J. p 1192 note 45 [a].

Allegations held insufficient

Ala.—*Langis v. Byrne*, 131 So. 444, 222 Ala. 183.
Ill.—*Van Meter v. Gurney*, 240 Ill. App. 145.
La.—*Eames v. Alexandria Contracting Co.*, App., 154 So. 510—*Griffin v. Motor Transit Co.*, 127 So. 438, 13 La.App. 151.
Mo.—*Humphrey v. Ownby*, App., 104 S.W.2d 398.
Or.—*Bowerman v. Columbia Gorge Motor Coach System*, 284 P. 579, 132 Or. 106.
Tenn.—*Curtis v. Kyte*, 106 S.W.2d 234, 21 Tenn.App. 115.
Tex.—*Kirklin v. Standard Coffee Co.*, Civ.App., 114 S.W.2d 263.
42 C.J. p 1192 note 45 [b].

3. Ga.—*Rogers v. Carmichael*, 192 S.E. 39, 184 Ga. 496.

4. Ala.—*Drennen Motor Car Co. v.*

Webb, 147 So. 143, 226 Ala. 353—*Gilliland v. Harris*, 150 So. 184, 25 Ala.App. 549.

Kan.—*Willett v. McCormick*, 170 P. 2d 821, 161 Kan. 658.

La.—*Gaubert v. Ed. E. Hebert Co.*, App., 174 So. 716.

Pa.—*Henry v. Beck*, 56 York Leg. Rec. 209, affirmed 36 A.2d 734, 154 Pa.Super. 555.

Tex.—*Boydston v. Jones*, Civ.App., 177 S.W.2d 303—*Gause-Ware Funeral Home v. McGinley*, Civ.App., 41 S.W.2d 433, error refused—*Miller v. Pettigrew*, Civ.App., 10 S.W. 2d 168.

42 C.J. p 1192 note 46.

Ratification

In the absence of any direct allegation of ratification, a mere averment that the person so employed was arrested and fined for violating a municipal ordinance with respect to the driving of automobiles in the city, and that the master gave bond for the appearance of such assistant after his arrest, and paid the fine imposed on him, will not suffice to sustain the petition against a general demurrer.—*White v. Levi*, 73 S.E. 376, 137 Ga. 269.

Allegations held sufficient

Ala.—*Harrison v. Wright*, 111 So. 642, 215 Ala. 607—*Mobile Pure Milk Co. v. Coleman*, 161 So. 826, 26 Ala.App. 402, certiorari denied 161 So. 829, 230 Ala. 432.
Ga.—*Yellow Cab Co. v. General Lumber Co.*, 134 S.E. 190, 35 Ga. App. 620.
Hawaii.—*Taba v. Jardin*, 30 Hawaii 452—*Ellis v. Mutual Telephone Co.*, 29 Hawaii 604.
La.—*Pearce v. U. S. Fidelity & Guaranty Co.*, App., 8 So.2d 743—*Antoine v. Louisiana Highway Commission*, App., 188 So. 443—*Andrus v. S. J. Boudreaux & Son*, App., 158 So. 679—*Bordelon v. T. L. James & Co.*, App., 148 So. 484—*Perroux v. Murray-Brooks Hardware Co.*, 119 So. 453, 9 La.App. 189.

N.J.—*Voshell v. Freihofer Baking Co.*, 136 A. 328, 5 N.J.Misc. 270.

Pa.—*Uhr v. Motor Age Transit Lines*, Com.Pl., 28 Erie Co. 169.

Tex.—*American Produce Co. v. Gonzales*, Com.App., 1 S.W.2d 602—*Pena v. Lovett*, Civ.App., 114 S.W. 2d 397—*Lightsey Black & White Cab Corporation v. Littlefield*, Civ. App., 48 S.W.2d 766, error refused

—*Magnolia Petroleum Co. v. Winkler*, Civ.App., 40 S.W.2d 831.

42 C.J. p 1192 note 46 [c].

Allegations held insufficient

Ga.—*Aycock v. Peaslee Gaulbert Paint & Varnish Co.*, 5 S.E.2d 598, 60 Ga.App. 897—*Dilbeck v. Alderman*, 187 S.E. 124, 53 Ga.App. 656—*Braselton v. Brazell*, 175 S.E. 254, 49 Ga.App. 269.

Iowa.—*Rowley v. City of Cedar Rapids*, 212 N.W. 158, 203 Iowa 1245, 53 A.L.R. 375.

Ky.—*Brook v. Bennett*, 200 S.W.2d 745, 304 Ky. 338.

La.—*Boyce v. Greer*, App., 15 So.2d 404.

Ohio.—*Leisgang v. City of Cincinnati*, 15 N.E.2d 158, 57 Ohio App. 513.

Tex.—*Wittkower v. Dallas Ry. & Terminal Co.*, Civ.App., 73 S.W.2d 867, error refused.

Wis.—*Philipsky v. Scheffow & Monahan*, 263 N.W. 171, 219 Wis. 313.

5. Ala.—*Gilliland v. Harris*, 150 So. 184, 25 Ala.App. 549.

6. Okl.—*Corn v. City of Sapulpa*, 110 P.2d 290, 188 Okl. 418.

7. Tex.—*Thannisch Chevrolet Co. v. Kline*, Civ.App., 134 S.W.2d 433, error refused.

8. Ariz.—*Lutty v. Lockhart*, 295 P. 975, 37 Ariz. 488.

Mich.—*Tanis v. Eding*, 251 N.W. 367, 265 Mich. 94.

42 C.J. p 1192 note 47.

Allegation of incompetence held essential

(1) In action against auto agency and its insurer for damages resulting from collision caused by negligence of prospective purchaser to whom automobile was intrusted for use.—*Massony v. Truett Nash Motor Co.*, La.App., 177 So. 829.

(2) Where driver was a bailee.—*Drennen Motor Car Co. v. Webb*, 147 So. 143, 226 Ala. 353.

Knowledge as to intoxication or habit of drinking

U.S.—Department of Water and Power of City of Los Angeles v. *Anderson*, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

Kan.—*Pennington v. Davis-Child Motor Co.*, 57 P.2d 428, 143 Kan. 753.

Pa.—*Shargay v. Lawrence*, 31 Pa. Dist. & Co. 239.

and agent or master and servant between the owner and operator of the automobile must be alleged.⁹ It is not sufficient to allege that the driver had a reputation for being reckless.¹⁰

Where the driver of the vehicle is the wife of defendant, in order to be sufficient the complaint or petition must state facts which disclose his liability for her acts;¹¹ and a mere allegation that the vehicle belonged to defendant and was operated by his wife is insufficient, where under the statutes a husband is not liable for the torts of his wife not committed by his command or with his consent and in which he in no way participates,¹² or where the family purpose doctrine does not apply so as to obviate the necessity of allegations of agency.¹³ The agency of the wife need not be alleged where there is a statutory presumption that she is her husband's agent,¹⁴ but the fact of the relationship must be alleged.¹⁵

In order to state a cause of action under the family purpose doctrine, it has been held that plaintiff must allege that defendant owned or controlled the automobile and maintained it for the use and benefit of his family,¹⁶ and that the person who operated it at the time of the injury was a minor or a person whom defendant was under a legal or moral obligation to support¹⁷ and that such person was

using the automobile pursuant to the family purpose.¹⁸ Where a minor lends the parent's car to another, in order to hold the parent liable under the family purpose doctrine it has been held to be necessary to allege that such other was not on a mission of his own but on a mission of the owner, or that the minor was a passenger in the car.¹⁹ Likewise, a declaration, in an action by the injured person against the owner, which alleges that the automobile was negligently operated by a person not a member of the family "at the direction and under the management, supervision and control" of a member of the family has been held to state a cause of action under the family purpose doctrine.²⁰ The statement of a cause of action based solely on the family purpose doctrine has been held to destroy a general allegation of agency of the driver.²¹

In order to state a cause of action under the civil-law doctrine, or statutes based thereon, that a parent is liable for the acts of a minor residing with him, it is not necessary to allege that the minor was a reckless or incompetent driver or that he was on a mission for his parent.²²

Liability for aiding in procurement of license by minor. Under a statute making a person who signs a minor's application for a driver's license liable for the negligence of the minor, it is necessary to al-

Allegations held sufficient

Cal.—McCalla v. Grosse, 109 P.2d 358, 42 Cal.App.2d 546.

N.Y.—Golembe v. Blumberg, 27 N.Y.S.2d 692, 262 App.Div. 759—Gillner v. Wallace, 268 N.Y.S. 279, 240 App.Div. 1003.

Ohio.—Williams v. Husted, App., 54 N.E.2d 165.

Pa.—Eachus v. Cadillac Motor Car Co., 18 Pa.Dist. & Co. 754, 23 Del. Co. 308.

42 C.J. p 1192 note 47 [b].

Allegations held insufficient

Ala.—Spurling v. Fillingim, 12 So.2d 740, 244 Ala. 172.

Cal.—Clement v. Dunn, 299 P. 545, 114 Cal.App. 60.

Ga.—Graham v. Cleveland, 200 S.E. 184, 58 Ga.App. 810.

N.Y.—Schneider v. Van Wyckhouse, 54 N.Y.S.2d 446.

9. Ala.—Gardiner v. Solomon, 75 So. 621, 200 Ala. 115, L.R.A.1917F 380.

10. La.—Bailey v. Simon, App., 199 So. 185—Davis v. Shaw, App., 142 So. 301.

11. Ky.—New York Indemnity Co. v. Ewen, 298 S.W. 182, 221 Ky. 114.

12. Ga.—Dodgen v. De Borde, 158 S.E. 64, 43 Ga.App. 131.

13. Ill.—Lowdermilk v. Gibel, 263 Ill.App. 384.

14. Conn.—Smith v. Furness, 166 A. 759, 117 Conn. 97.

15. Conn.—Smith v. Furness, supra.

16. U.S.—Commonwealth of Kentucky for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352.

Petition held to allege family purpose doctrine

Idaho.—Gordon v. Rose, 33 P.2d 351, 54 Idaho 502, 93 A.L.R. 984.

17. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352. Ky.—Ludwig v. Johnson, 49 S.W.2d 347, 243 Ky. 533, followed in Van Galder v. Foster, 49 S.W.2d 352, 243 Ky. 543.

Son-in-law of owner

Petition for injuries by automobile driven by defendant's son-in-law not alleging driver was engaged in master's service was held insufficient, since family car doctrine does not apply to a son-in-law living in the owner's home.—Bryant v. Keen, 158 S.E. 445, 43 Ga.App. 251.

18. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352.

Allegations held sufficient

Conn.—Baker v. Paradiso, 169 A. 272, 117 Conn. 539.

Ga.—Mitchell v. Mullen, 164 S.E. 278, 45 Ga.App. 285.

N.D.—Carpenter v. Dunnell, 237 N.W. 779, 61 N.D. 263.

19. Tenn.—Messer v. Reid, 208 S.W. 2d 528.

Complaint held insufficient

Where widow, as head of family, permitted minor son to drive her automobile for his own convenience, an allegation in action for damages sustained in collision, that minor son lent automobile to his friend in order that friend might drive into another town and come back later to join widow's minor son at night club, was insufficient to render widow liable under family purpose doctrine.—Messer v. Reid, supra.

20. W.Va.—Eagon v. Woolard, 11 S.E.2d 257, 122 W.Va. 565, 134 A.L.R. 970.

21. Idaho.—Gordon v. Rose, 33 P.2d 351, 54 Idaho 502, 93 A.L.R. 984.

22. La.—Honeycutt v. Carver, App., 25 So.2d 99.

Widow

Petition alleging that automobile driver involved in collision was a minor residing with mother, a widow, sufficiently alleged that minor was unemancipated and that father was deceased, making mother liable.—Storts v. New Orleans Public Service, La.App., 141 So. 814.

lege that an automobile was being operated on the public highways of the state²³ by a person under the minimum age²⁴ who procured a license on an application signed by defendant,²⁵ that the licensee operated the automobile in such a negligent or willfully improper manner as to cause injury to plaintiff,²⁶ and that plaintiff was injured.²⁷ The relationship of the signer as parent, guardian, or otherwise should be alleged.²⁸

b. Breach of Duty or Negligence

- (1) In general
- (2) Violation of statute or ordinance
- (3) Wanton or willful acts or gross negligence

(1) In General

The plaintiff must allege negligence or breach of duty

on the part of the defendant in accordance with the rules of pleading in negligence actions generally.

In an action to recover damages occasioned by the negligent operation of a motor vehicle, the declaration, petition, or complaint must aver negligence,²⁹ or a breach of duty,³⁰ or facts from which negligence may be inferred;³¹ but it is not necessary to aver negligence *eo nomine* where there are averments of facts showing a breach of duty³² or giving rise to a necessary and irresistible inference of negligence;³³ and where the action is for negligence on the part of the owner of the car, and not for that of an employee, it is unnecessary to allege that there was negligence on the part of the employee.³⁴

It is not enough to allege in general terms that the accident was caused by the negligence of defendant, but the facts constituting the negligence must be alleged.³⁵ The act done or omitted must

23. Fla.—Padgett v. Thompson, 27 So.2d 909, 158 Fla. 138.

24. Del.—Faulkner v. Marozzi, 185 A. 471, 7 W.W.Harr. 500—Townsend v. Harmon, 171 A. 178, 5 W.W.Harr. 562.

Fla.—Padgett v. Thompson, 27 So.2d 909, 158 Fla. 138.

Allegations held sufficient, when read with references to statute, in trespass for direct and immediate injuries to truck.—Townsend v. Harmon, 171 A. 178, 5 W.W.Harr., Del., 562.

26. Fla.—Padgett v. Thompson, 27 So.2d 909, 158 Fla. 138.

Failure to allege issuance of license

In action for injuries caused by automobile driven by defendant's minor son, declaration failing to allege that any license had ever been issued to the son, but merely that "application for an automobile driver's license then and there in his possession had been signed" by defendant, failed to state a cause of action against defendant.—Padgett v. Thompson, *supra*.

26. Fla.—Padgett v. Thompson, *supra*.

27. Fla.—Padgett v. Thompson, *supra*.

28. Del.—Faulkner v. Marozzi, 185 A. 471, 7 W.W.Harr. 500—Townsend v. Harmon, 171 A. 178, 5 W.W.Harr. 562.

29. Idaho.—Stanger v. Hunter, 291 P. 1060, 49 Idaho 723.

Ky.—Gess v. Wilder, 36 S.W.2d 617, 237 Ky. 830.

La.—Siren v. Montague, App., 142 So. 196.

Tex.—Duff v. Roesser & Pendleton, Civ.App., 96 S.W.2d 682.

42 C.J. p 1193 note 65.

Degree of care

When the facts on which recovery is relied on are alleged, the degree of care which defendant was required to exercise need not be alleged.—Woodward v. Spring Canyon Coal Co., 63 P.2d 267, 90 Utah 578.

30. Ala.—Stewart v. Smith, 78 So. 724, 16 Ala.App. 461.

Ind.—Wellington v. Reynolds, 97 N.E. 155, 177 Ind. 49.

R.I.—McCoy v. Frutiger, 182 A. 494, 55 R.I. 492.

Complaint held to state no cause of action

In action for injuries to boy falling or thrown from defendant's ice truck driven by codefendant, petition alleging that defendant knew, or by exercise of ordinary care should have known, that plaintiff was on truck stated no cause of action, as defendants owed no duty to exercise ordinary care to discover such fact.—Ice Delivery Co v. Thomas, 160 S.W.2d 605, 290 Ky. 230.

Intoxication of driver

Complaint held sufficient to state cause of action within statute authorizing recovery by guest where injury proximately results from intoxication of driver.—Frisvold v. Leahy, 60 P.2d 151, 15 Cal.App.2d 752.

Licenses

Allegations showing that plaintiff was a mere licensee and charging only simple negligence fail to show any breach of duty.—Reed v. Ridout's Ambulance, Inc., 102 So. 906, 212 Ala. 428.

Use of word "guest" in the complaint does not of itself prevent the complaint from stating a cause of action for breach of the common-law duty to exercise ordinary care.

—Long v. Archer, 46 N.E.2d 818, 221 Ind. 186

31. Cal.—South v. San Benito County, 180 P. 354, 40 Cal.App. 13.

Res ipsa loquitur

Allegations held sufficient to raise a presumption of negligence under the doctrine of *res ipsa loquitur*.—Loprestie v. Roy Motors, Inc., 185 So. 11, 191 La. 239—Pearce v. U. S. Fidelity & Guaranty Co., La. App., 3 So.2d 743—Kemper v. Land, La.App., 2 So.2d 248.

Allegations held insufficient

Complaint for injuries to passenger by explosion in arsenal, alleging that defendant negligently drove automobile past arsenal containing explosives, was held demurrable.—Schweitzer v. Mindlin, 162 N.E. 524, 248 N.Y. 560.

32. Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71.

La.—Muse v. Chambley, App., 16 So. 2d 276.

42 C.J. p 1193 note 68.

Allegation that defendant was negligent would add nothing to sufficiency of the complaint, since, if facts stated disclosed negligence on defendant's part, averment was surplusage, and, if they did not it was useless.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71.

33. Cal.—Herrick v. Oakland Motor Co., 155 P. 1006, 29 Cal.App. 414.

34. Kan.—Tannahill v. Depositors' Oil, etc., Co., 203 P. 909, 110 Kan. 254.

35. La.—Lewis v. Jeffress, App., 3 So.2d 477.

42 C.J. p 1193 note 71.

Inability to state facts

A complaint alleging that plaintiff

be stated with sufficient clearness and fullness to inform defendant of the charge he must meet at the trial,³⁶ and, as discussed in the C.J.S. title Pleading § 23, also 42 C.J. p 1193 note 73, it is not permissible to state mere conclusions as to defendant's negligence. However, where facts showing a duty owing by defendant to plaintiff are sufficiently alleged,³⁷ it is sufficient to aver negligence or breach of duty generally.³⁸ In such a case it has been held sufficient to state generally that the act causing the injury,³⁹ such as the running or propelling of a motor vehicle by defendant, or by his agent, servant, or employee as the case may be, on or against plaintiff,⁴⁰ or decedent,⁴¹ or another motor vehicle,⁴² was carelessly and negligently done. Indeed, it is sufficient to allege that defendant or his

servant negligently drove a motor vehicle on or against plaintiff,⁴³ or plaintiff's automobile,⁴⁴ or horse and buggy,⁴⁵ or wagon,⁴⁶ or the automobile in which plaintiff was riding;⁴⁷ and additional terms employed to characterize the negligent act may be disregarded as surplusage.⁴⁸

Where defendant's conduct is negligent, it is not necessary to specify whether it was intentional⁴⁹ or that it was habitual.⁵⁰ A general charge of negligence following a specific charge has been held to be merged in the specific,⁵¹ and, if plaintiff undertakes to set out the particular facts on which he relies as constituting negligence, he is bound thereby and if such facts do not constitute a cause of action a general allegation will not make the petition good.⁵²

cannot allege the specific act or acts of negligence of defendant which caused the injury fails to state a cause of action on the theory of negligence.—*Emigh v. Andrews*, 191 P. 2d 901, 164 Kan. 732.

36. Del.—*Cooper v. Ajax Distributors*, 192 A. 614, 8 W.W.Harr. 361.—*Starr v. Starr*, 170 A. 924, 5 W.W.Harr. 556.

Ga.—*Kellett v. Templeton*, 6 S.E.2d 392, 61 Ga.App. 230.

Mich.—*Breker v. Rosema*, 4 N.W.2d 57, 301 Mich. 685, 141 A.L.R. 867.—*Arnold v. Krug*, 273 N.W. 322, 279 Mich. 702.

N.Y.—*Turner v. Craney*, 5 N.Y.S.2d 641, 254 App.Div. 919.

Pa.—*Robinson v. Van Mos*, 37 Pa. Dist. & Co. 286.—*Loftus v. Richards*, 21 Pa. Dist. & Co. 105, 35 Lack Jur. 40, 48 York Leg Rec. 88.—*Spohr v. Delcorse*, 9 Pa. Dist. & Co. 312, 40 Lanc.L.Rev. 265.—*Rizzutti v. Oliveri*, Com.Pl., 41 Lack. Jur. 99.—*Babusko v. Chapin Lumber Co.*, Com.Pl., 33 Luz.L.Reg. 63. 42 C.J. p 1193 notes 71, 72.

Driver as defendant

Where defendant was the driver of the vehicle, plaintiff need not be as particular in his pleading as he would have to be if the accident occurred through the negligence of a servant or agent.—*Apfelbaum v. Markley*, 26 Pa. Dist. & Co. 605, 13 Northumb.L.J. 22.

37. Ala.—*W. F. Covington Planter Co. v. Roberson*, 194 So. 171, 239 Ala. 70.—*Burns v. Bythwood*, 184 So. 346, 28 Ala.App. 335, certiorari denied 184 So. 349, 236 Ala. 639. 42 C.J. p 1193 notes 74, 76.

38. Ala.—*W. F. Covington Planter Co. v. Roberson*, 194 So. 171, 238 Ala. 70.—*Buffalo Rock Co. v. Davis*, 154 So. 556, 228 Ala. 603.—*McQueen v. Jones*, 145 So. 440, 226 Ala. 4.—*Eady v. Heaton*, 140 So. 408, 224 Ala. 327.—*Strickland v. Davis*, 128 So. 233, 221 Ala. 247.—*Birmingham*

Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342.

Colo.—*Campbell v. Trate*, 149 P.2d 380, 112 Colo. 265.

Fla.—*Erlachstein v. Roney*, 20 So.2d 254, 155 Fla. 333.

Iowa.—*Pettijohn v. Weede*, 258 N.W. 72, 219 Iowa 465.

Kan.—*Burnett v. Kansas City Public Service Co.*, 72 P.2d 72, 146 Kan. 474.

Ky.—*Marsee v. Bates*, 29 S.W.2d 632, 235 Ky. 60.

Tenn.—*Kemp v. Caruthers*, 11 Tenn. App. 201.

Tex.—*Metzger v. Gambill*, Civ.App., 37 S.W.2d 1077, error refused. 42 C.J. p 1193 notes 74, 75.

Allegations following federal form

Where the Federal Rules of Civil Procedure have been adopted by a state with but slight change, a complaint containing general allegations of negligence following the federal form 9, Appendix of Forms, form 9, 28 U.S.C.A. following § 723c, is sufficient, even though the federal forms have not been adopted, since such forms are highly persuasive in interpreting the meaning of the rules.—*Kauffroath v. Wilbur*, 185 P.2d 522, 66 Ariz. 152.

39. Mo.—*Alley v. Wall*, App., 272 S.W. 999.

40. Cal.—*Opitz v. Schenck*, 174 P. 40, 178 Cal. 636.

42 C.J. p 1193 note 78.

41. Mo.—*Schrader v. Burkel*, 260 S. W. 63.

42. Cal.—*Carnahan v. Motor Transit Co.*, 224 P. 143, 65 Cal.App. 402. 42 C.J. p 1193 note 80.

43. Ala.—*Graham v. Werfel*, 157 So. 201, 229 Ala. 385.

42 C.J. p 1193 note 81.

44. Ala.—*Hill v. Almon*, 141 So. 625, 224 Ala. 658.—*William E. Harden, Inc. v. Harden*, 197 So. 94, 29 Ala. App. 411.

Fla.—*Potts v. Mulligan*, 193 So. 767, 141 Fla. 685.

La.—*Vaccaro v. Favrot*, 125 So. 296, 13 La.App. 120, affirmed 128 So. 284, 170 La. 483.

Mo.—*Spoeneman v. Uhri*, 40 S.W.2d 9, 332 Mo. 821.

N.Y.—*Wyllie v. Stevens*, 26 N.Y.S.2d 484, 261 App.Div. 1031, appeal dismissed 38 N.E.2d 225, 287 N.Y. 557.

Tenn.—*Central Produce Co. v. General Cab Co. of Nashville*, 129 S. W.2d 1117, 23 Tenn.App. 209—

Kemp v. Caruthers, 11 Tenn.App. 201.

W.Va.—*Loudin v. Kanawha Ice Co.*, 117 S.E. 225, 93 W.Va. 538.

42 C.J. p 1193 note 82.

45. Ala.—*Mullins v. Lemley*, 88 So. 831, 205 Ala. 593.

46. Ga.—*City of Rome v. Justice*, 149 S.E. 88, 40 Ga.App. 196.

47. Ala.—*Moore v. Cruitt*, 191 So. 252, 238 Ala. 414.—*Strickland v. Davis*, 128 So. 233, 221 Ala. 247—

Ruffin Coal, etc., Co. v. Rich, 108 So. 600, 214 Ala. 622.

Ind.—*Lindley v. Sink*, 30 N.E.2d 456, 218 Ind. 1.

48. Cal.—*Wiley v. Cole*, 199 P. 550, 52 Cal.App. 617, 618.

42 C.J. p 1193 note 85.

49. R.I.—*Edmonds v. Olson*, 9 A.2d 860, 64 R.I. 39.

50. Fla.—*Thigpen v. City of Miami*, 4 So.2d 365, 148 Fla. 304.—*City of Miami v. McCorkle*, 199 So. 675, 145 Fla. 109.

51. Mo.—*Stermolle v. Brainard*, App., 24 S.W.2d 712.

Allegations held specific

Allegation that defendant, carelessly and negligently disregarding signal, operated car against that of plaintiff, was specific charge of negligence.—*Stermolle v. Brainard*, supra.

52. Ky.—*Consolidated Coach Corpo-*

In applying the foregoing rules various allegations of negligence have been held proper,⁵³ or have been held sufficient,⁵⁴ or have been condemned as insufficient.⁵⁵ Also various allegations have been

held to be complete⁵⁶ to charge two or more acts of negligence,⁵⁷ to charge one compound act of negligence,⁵⁸ to include the element of excessive speed,⁵⁹ or to be statements of conclusions rather

ration v. Phillips, 34 S.W.2d 722, 286 Ky. 823.

Allegations held general rather than specific.—Consolidated Coach Corporation v. Phillips, supra.

53. Ala.—Galloway v. Perkins, 73 So. 956, 198 Ala. 458.

42 C.J. p 1193 note 86.

54. Allegations held sufficient

(1) In general.

Ala.—Buffalo Rock Co. v. Davis, 154 So. 556, 228 Ala. 603—Smith v. Clemmons, 112 So. 442, 216 Ala. 52.

Cal.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1—Cook v. Maier, 92 P.2d 434, 33 Cal.App.2d 581.

Fla.—Ryder v. Plumley, 189 So. 422, 138 Fla. 378—City of Hollywood v. Bair, 186 So. 818, 136 Fla. 100.

Ga.—Salmon v. Rogers, 149 S.E. 52, 40 Ga.App. 73.

Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521—Flamion v. Dawes, 169 N.E. 60, 91 Ind.App. 394.

Kan.—Knight v. Hackett, 87 P.2d 505, 149 Kan. 492—Davidow v. Bold, 57 P.2d 100, 143 Kan. 913.

Ky.—Gray v. Golden, 192 S.W.2d 371, 301 Ky. 477—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554.

La.—Morales v. Employers' Liability Assur. Corporation, App., 7 So.2d 660, affirmed 12 So.2d 804, 202 La. 755.

Mich.—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128.

Mo.—State ex rel. and to Use of Brancato v. Trimble, 18 S.W.2d 4, 322 Mo. 318—Crupe v. Spicuzza, App., 86 S.W.2d 347—Myers v. Nissenbaum, App., 6 S.W.2d 993.

Mont.—McCulloch v. Horton, 56 P.2d 1344, 102 Mont. 135—Johnson v. Herring, 295 P. 1100, 89 Mont. 156.

N.Y.—Sandy v. Wicks, 11 N.Y.S.2d 110, 256 App.Div. 1007.

Ohio.—Armour & Co. v. Yoter, 178 N.E. 596, 40 Ohio App. 225.

Or.—Peters v. Johnson, 264 P. 459, 124 Or. 237.

Pa.—Singley v. Glatfelter, 10 Pa.Dist. & Co. 225, 41 York Leg. Rec. 29—Sharp v. Kariak, Com.Pl., 14 Northumb.L.J. 385.

Tenn.—Tennessee Coach Co. v. Reece, 156 S.W.2d 404, 178 Tenn. 126—Smith v. Fisher, 11 Tenn.App. 273.

Tex.—Hansen v. Houston Electric Co., Civ.App., 41 S.W.2d 77, error dismissed.

42 C.J. p 1193 note 87 [a].

(2) To charge actionable negligence.

Ill.—Elmer v. Miller, 255 Ill.App. 465.

N.C.—Piner v. Richter, 163 S.E. 561, 302 N.C. 573.

Pa.—Alberts v. Miller, Com.Pl., 65 Luz.L.Reg. 268.

42 C.J. p 1193 note 87 [a] (1).

(3) To charge failure to maintain proper speed and control.

Ga.—Sanders v. Sisk, 23 S.E.2d 503, 68 Ga.App. 572.

Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind. 394—Rea Riggins & Sons v. Scott, 50 N.E.2d 664, 114 Ind.App. 4—Flagg v. Russell, 166 N.E. 672, 87 Ind.App. 110.

Ky.—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554.

N.C.—Anthony v. Knight, 191 S.E. 323, 211 N.C. 637—Piner v. Richter, 163 S.E. 561, 202 N.C. 573.

Or.—Red Top Taxi Co. v. Cooper, 263 P. 64, 123 Or. 610.

Tex.—Phoenix Refining Co. v. Walker, Civ.App., 108 S.W.2d 323, error dismissed.

Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

(4) To charge failure to yield right of way.

Ill.—Walters v. Ind., 48 N.E.2d 791, 319 Ill.App. 162.

La.—Long v. White, App., 146 So. 368, affirmed 149 So. 133.

(5) To charge negligence in parking.

Ga.—Williams v. Grier, 26 S.E.2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75—Spravberry v. Snow, 10 S.E.2d 179, 190 Ga. 723, mandate conformed to 11 S.E.2d 431, 63 Ga.App. 489—Reliable Transfer Co. v. May, 29 S.E.2d 187, 70 Ga.App. 613.

Tex.—Hommel v. Southwestern Greyhound Lines, Civ.App., 195 S.W.2d 803.

(6) To charge negligence in parking or stopping on highway without lights or other warnings.

Ga.—Minnick v. Jackson, 13 S.E.2d 891, 64 Ga.App. 554.

Ind.—Cushman Motor Delivery Co. v. McCabe, 38 N.E.2d 769, 219 Ind. 156—Western & Southern Life Ins. Co. v. Davis, 8 N.E.2d 393, 104 Ind.App. 397.

Iowa.—Knaus Truck Lines v. Commercial Freight Lines, 29 N.W.2d 204, 238 Iowa 1356.

Utah.—Nielsen v. Watanabe, 63 P.2d 117, 90 Utah 401.

55. Conn.—Black v. Hunt, 115 A. 429, 96 Conn. 663.

42 C.J. p 1194 note 88.

Allegations held insufficient

(1) In general.

Ala.—Gilliland v. Harris, 150 So. 184, 25 Ala.App. 549.

Cal.—Buzby v. Lewis, 283 P. 958, 103 Cal.App. 124.

Del.—Starr v. Starr, 170 A. 924, 5 W. W.Harr. 556.

Ky.—Todd v. Hargis, 187 S.W.2d 739, 299 Ky. 841.

Mass.—Foley v. John H. Bates, Inc., 4 N.E.2d 349, 295 Mass. 557.

Mo.—Berry v. City of Springfield, 13 S.W.2d 652.

Mont.—Dickason v. Dickason, 274 P. 145, 84 Mont. 52.

Pa.—Ffall v. Kauffman, Com.Pl., 41 Sch.Leg.Rec. 106.

Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

(2) To charge actionable negligence.

Ala.—Capital Motor Lines v. Loring, 189 So. 897, 238 Ala. 260.

Del.—Cooper v. Ajax Distributors, 192 A. 614, 8 W.W.Harr. 361.

Ga.—Kellett v. Templeton, 6 S.E.2d 392, 61 Ga.App. 230.

Ind.—Lee Bros. v. Jones, 54 N.E.2d 108, 114 Ind.App. 688.

La.—Lewis v. Jeffress, App., 3 So.2d 477.

N.Y.—Smith v. Levison, 226 N.Y.S. 311, 222 App.Div. 310.

Pa.—Flitter v. Hershey, 11 Pa.Dist. & Co. 643, 41 Lanc.L.Rev. 219, 42 York Leg.Rec. 192.

S.C.—Jones v. American Fidelity & Cas. Co., 43 S.E.2d 355, 210 S.C. 470.

Tex.—Robert Oil Corporation v. Garrett, Civ.App., 22 S.W.2d 508, affirmed, Com.App., 37 S.W.2d 135—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 299 S.W. 665, reversed on other grounds, Com.App., 7 S.W.2d 521.

W.Va.—Cooper v. Teter, 15 S.E.2d 152, 123 W.Va. 372.

(3) To charge duty to warn.—Hill v. Day, 199 A. 920, 9 W.W.Harr., Del., 400.

(4) To charge negligent parking.

—Kimble v. Standard Oil Co., 30 S.W.2d 890, 235 Ky. 169.

56. Mo.—McMath v. Holekamp Lumber Co., App., 259 S.W. 843.

42 C.J. p 1194 note 89.

57. W.Va.—Jones v. Berry, 45 S.E.2d 1.

42 C.J. p 1194 note 90.

Common-law negligence and violation of statute

W.Va.—Jones v. Berry, supra.

58. Mo.—Bongner v. Zeigenhein, 147 S.W. 182, 165 Mo.App. 228.

42 C.J. p 1194 note 91.

59. Ill.—Greenberg v. Conrad, 220 Ill.App. 508.

than of fact.⁶⁰ General negligence may be alleged against one defendant and specific negligence against another.⁶¹

(2) Violation of Statute or Ordinance

The plaintiff may by his pleading allege both common-law negligence and negligence consisting in violation of a statute or ordinance, which may be expressly charged, or the facts showing such violation may be set out.

In an action to recover damages occasioned by the negligent operation of a motor vehicle, the pe-

tition, complaint, or declaration may,⁶² and sometimes does,⁶³ charge both common-law negligence and negligence consisting of a failure to comply with a statute or ordinance regulating the operation of motor vehicles; and where a petition sufficiently alleges common-law negligence it is immaterial whether it charges a violation of a penal law.⁶⁴ The violation of a statute or ordinance may be charged by an express allegation thereof,⁶⁵ by setting out the facts showing violation,⁶⁶ by alleging

La.—Robinson v. Miller, App., 177 So. 440—Richard v. Roquevert, 137 So. 364, 17 La.App. 677.

Rate of speed

(1) Allegations as to speed have been held sufficient without alleging the rate of speed.

Del.—O'Brien v. Wilmington Provision Co., 148 A. 294, 4 W.W.Harr. 214.

Pa.—Kahler v. Landis Stone Meal Co., Com.Pl., 50 Lanc.Rev. 90—Wayne v. Davis, Com.Pl., 50 Lanc.Rev. 55.

(2) However, where the statement alleged excessive speed, it was indicated that the actual rate operated must be set forth—Orton v. Jordan, Pa.Com.Pl., 29 Erie Co. 80.

(3) A criminal statute requiring complaints to state the speed of the vehicle at the time of collision did not require such allegation in a civil action.

N.C.—Piner v. Richter, 163 S.E. 561, 202 N.C. 573.

N.D.—Hausken v. Coman, 268 N.W. 430, 66 N.D. 633.

60. Ohio—Harris v. Webb, 22 Ohio N.P.N.S. 359.

42 C.J. p 1194 note 93.

61. Mo.—Peters v. Matthews-Thomson Freight & Express Co., App., 51 S.W.2d 139.

62. Ga.—Reliable Transfer Co. v. May, 29 S.E.2d 187, 70 Ga.App. 613. Tenn.—Cumberland Tel., etc., Co. v. Burns, 1 Tenn.Civ.A. 148.

Immaterial allegations may be stricken.—Pollard v. Harbin, 192 S.E. 234, 56 Ga.App. 172.

63. Tenn.—American Trust & Banking Co. v. Fairbanks, 5 Tenn.App. 296.

42 C.J. p 1194 note 98.

Statute violation held not alleged

Where petition alleged that defendant was driving at a rate of speed less than the statutory limit and alleged that it was excessive at the time and place of the accident considering the nature of the traffic, this is an allegation of common-law negligence alone, and the declaration does not come within the rule that if by fair intentment the declaration alleges a violation of the statutes and thus puts defendant on

notice it will be sufficient.—Blue Bird Coaches, Inc. v. McGregor, 14 Tenn. App. 23.

64. Tex.—Peveto v. Smith, Civ.App., 113 S.W.2d 216, modified on other grounds 133 S.W.2d 572, 134 Tex. 308.

Averments not prejudicial

In action for death of passenger of automobile which collided with defendant's gasoline truck, allegations of complaint charging that defendant's servant was operating truck while he was in such an intoxicated condition that he was unable to control the truck and to operate it with due regard for the safety of others using the public highway were proper allegations of fact and were not prejudicial to defendant although such operation was a violation of law, where defendant admitted that without those allegations evidence of intoxication of the driver was competent.—Ruddenberg v. Morgan, 38 N.E.2d 287, 110 Ind.App. 609.

65. Ala.—Edwards v. Earnest, 89 So. 729, 206 Ala. 1, 22 A.L.R. 1387. 42 C.J. p 1194 note 99.

Allegation in language of statute not essential, although preferable—Foster v. Flaugh, 271 N.W. 503, 223 Iowa 40.

Conspiracy to violate law

In action for injuries against an automobile dealer and a purchaser of automobile from dealer, wherein it was alleged that defendants conspired to permit a newly-purchased automobile to be operated before title had been transferred to purchaser and without legal licenses, charge of conspiracy was no part of statement of cause of action but was merely a convenient method of charging that defendants were jointly and severally liable for acts of each of them.—Wheat v. Alderson, 130 S.W.2d 650, 234 Mo.App. 346.

Operation by one not defendant's agent

In action by administratrix against automobile dealer for death of guest who, without dealer's consent or knowledge, was riding with prospective purchaser of automobile, where there was no evidence that automobile was being operated by dealer, or

its agent, at time of accident, liability of dealer growing out of violation of statute as to brakes was required to be specially pleaded.—Foley v. John H. Bates, Inc., 4 N.E.2d 349, 295 Mass. 557.

Parking on highway

(1) Where the injury resulted from collision with a vehicle parked without rear lights the complaint must allege it was parked on a public highway.—Littlejohn v. Staggers, 125 So. 61, 23 Ala.App. 322.

(2) Allegations held sufficient—Newell Contracting Co. v. Berry, 134 So. 870, 223 Ala. 109—Newell Contracting Co. v. Berry, 134 So. 868, 223 Ala. 111.

66. Ill.—Leideck v. City of Chicago, 248 Ill.App. 545.

42 C.J. p 1192 notes 54, 55, p 1194 note 1.

Violation of rules of commission

In action by occupant of ambulance struck by gasoline truck at intersection, where view was obstructed by transfer truck allegedly improperly parked, the petition was sufficient to invoke rules of public service commission relative to parking and relative to lights.—Reliable Transfer Co. v. May, 29 S.E.2d 187, 70 Ga.App. 613.

Allegations held sufficient with respect to:

(1) Keeping to right.

Del.—Ierardi v. Farmers' Trust Co. of Newark, 151 A. 822, 4 W.W. Harr. 246.

Ga.—Macon Busses v. Dashiell, 35 S.E.2d 666, 73 Ga.App. 108.

Iowa.—Lange v. Bedell, 212 N.W. 354, 203 Iowa 1194.

(2) Making turns

Ga.—Eidson v. Felder, 22 S.E.2d 523, 68 Ga.App. 188—Cochran v. Kendrick, 158 S.E. 57, 43 Ga.App. 135—Idle Hour Club v. Robinson, 157 S.E. 125, 42 Ga.App. 650.

Tex.—O K. Theater Corporation v. Rehmyer, Civ.App., 115 S.W.2d 985, error dismissed.

(3) Parking.

Ga.—Williams v. Grier, 26 S.E.2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75.

Iowa.—Blessing v. Welding, 286 N.W. 436, 226 Iowa 1178.

that the automobile was being operated unlawfully,⁶⁷ or by making allegations of negligence broad enough to include a violation of a statute or ordinance;⁶⁸ but an allegation that defendant, after crossing a bridge, failed to comply with statutory requirements governing a person approaching a bridge does not set forth a ground of negligence.⁶⁹ The fact that ordinances alleged to have been violated are invalid does not render the petition insufficient where it alleges violations not only of ordinances but also of statutes;⁷⁰ and, even though invalid, the fact that an ordinance was adopted and published may be alleged, since publication may amount to a warning requiring one who sees it to exercise a greater degree of care.⁷¹ Where the violation of the law is not alleged to be the cause of the injury, the petition is demurrable.⁷²

Allegations that the driver of the vehicle did not

possess a license to operate the vehicle are properly stricken as not being specifications of negligence of the driver or owner,⁷³ but, where a statute prohibits and makes the lending, knowingly, of a vehicle to an unlicensed driver a misdemeanor, plaintiff may allege that the driver was unlicensed and the owner knew it.⁷⁴

(3) Wanton or Willful Acts or Gross Negligence

In an action to recover damages for a willful or wanton injury, the complaint, petition, or declaration must allege that the injury was willfully or wantonly inflicted.

In an action to recover damages for a willful or wanton injury, the complaint, petition, or declaration must allege that the injury was willfully or wantonly inflicted.⁷⁵ While general averments of

- (4) **Parking without lights.**
 Ala.—Newell Contracting Co. v. Berry, 134 So. 868, 223 Ala. 111.
 Ga.—Tallman v. Green, 41 S.E.2d 339, 74 Ga.App. 731—Hudgins Contracting Co. v. Smith, 188 S.E. 732, 54 Ga.App. 687.
 Ind.—Gerlot v. Swartz, 7 N.E.2d 960, 212 Ind. 292.
 N.C.—Lee v. Caveness Produce Co., 150 S.E. 363, 197 N.C. 714, followed in Smithwick v. Colonial Pine Co., 154 S.E. 917, 199 N.C. 431.
 Ohio.—Kronenberg v. Whale, 153 N.E. 302, 21 Ohio App. 322.
- (5) **Passing streetcar or bus.**
 Mont.—Hill v. Haller, 90 P.2d 977, 108 Mont. 251.
 N.C.—Morgan v. Carolina Coach Co., 36 S.E.2d 263, 225 N.C. 668.
- (6) **Right of way.**
 Del.—Kent County Motor Co. v. Pure Oil Co., 140 A. 646, 3 W.W.Harr. 538.
 Ind.—Gagle v. Heath, 53 N.E.2d 547, 114 Ind.App. 566.
- (7) **Speeding.**
 U.S.—City Ice & Fuel Co. v. Dankmer, C.C.A.W.Va., 52 F.2d 929.
 Cal.—Buzby v. Lewis, 283 P. 958, 103 Cal.App. 124.
 Del.—Hill v. Day, 199 A. 920, 9 W.W.Harr. 400.
 Iowa.—James v. Roach, 290 N.W. 87, 228 Iowa 129.
 Mo.—Hoffman v. People's Motorbus Co. of St. Louis, App., 288 S.W. 948.
 N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.
 Tenn.—Caldwell v. Hodges, 77 S.W. 2d 817, 18 Tenn.App. 355.
 Wash.—Clason v. Velguth, 11 P.2d 249, 168 Wash. 242—Halseeth v. Rogers, 4 P.2d 862, 165 Wash. 40, 42 C.J. p 1195 note 2 [a].
- (8) **Stopping at intersections.—**

Salmon v. Rogers, 149 S.E. 52, 40 Ga. App. 73.

(9) **Traffic signals.**—Moore v. Christoffersen, La.App., 147 So. 914.

Complaint held insufficient

Cal.—Buzby v. Lewis, 283 P. 958, 103 Cal.App. 124.

Del.—Zink v. Kessler Trucking Co., 190 A. 637, 8 W.W.Harr. 271.

Ga.—Williams v. Grier, 26 S.E.2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75—O'Donnely v. Stapler, 131 S.E. 91, 34 Ga. App. 637.

Mo.—Lee v. Shryack-Wright Grocery Co., App., 53 S.W.2d 406.

Tex.—White v. Akers, Civ.App., 125 S.W.2d 388—Belzung v. Owl Taxi, Civ.App., 70 S.W.2d 288, error dismissed.

Where statute not applicable

A pedestrian, who claimed to have been struck by a motorist who suddenly swerved into the left-hand traffic lane to pass a preceding motorist, could not properly allege that motorist was on the wrong side of the street, in violation of a general regulation where statute authorized motorist to pass on his left of the center line, provided he exercised reasonable care.—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128.

67. Conn.—Butler v. Hyperion Theatre Co., 124 A. 220, 100 Conn. 551.

68. Cal.—Optiz v. Schenck, 174 P. 40, 178 Cal. 636.

Mich.—Matla v. Rapid Motor Vehicle Co., 125 N.W. 708, 160 Mich. 639.

69. Ga.—Laing v. Perryman, 120 S.E. 646, 31 Ga.App. 239.

70. Mo.—Carradine v. Ford, 187 S.W. 285, 195 Mo.App. 684.

71. N.Y.—Lockwood v. Hugo, 61 N.Y.S.2d 793, 187 Misc. 159.

72. Ga.—Springer v. Adams, 140 S.E. 390, 37 Ga.App. 344—Holbrooks

v. Ford Rental System, 130 S.E. 363, 34 Ga.App. 588.

73. Ohio.—Sours v. Sours, 73 N.E.2d 226.

74. Tex.—Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587.

75. Wash.—Price v. Gabel, 298 P. 444, 162 Wash. 275.

42 C.J. p 1195 note 7.

Simple negligence

Complaint alleging that plaintiff drove his automobile into defendants' truck parked on side of highway at night without statutory lights and that defendants willfully or wantonly permitted the truck to be so parked was a sufficient allegation of simple negligence, even though not good as a wanton or willful count in absence of allegations that defendants were conscious of the danger likely to result in so doing.—Claude Jones & Son v. Lair, 17 So.2d 577, 245 Ala. 441.

Cause of action for punitive damages

(1) Pleading showing joint and concurrent negligence, willfulness, and wantonness of defendants permits recovery of punitive damages.—Bowers v. Carolina Public Service Co., 145 S.E. 790, 148 S.C. 161.

(2) Petition, alleging that truck driver was grossly and wantonly negligent in driving truck into rear of wagon when the way for clear and free passage around the wagon was open to the truck driver, alleged sufficient acts to authorize recovery of punitive damages if substantiated by the evidence.—American Fidelity & Cas. Co. v. Farmer, Ga.App., 48 S.E.2d 122.

Allegations held sufficient

Ala.—Jack Cole, Inc., v. Walker, 200 So. 768, 240 Ala. 683—Graham v. Werfel, 157 So. 201, 229 Ala. 385—Buffalo Rock Co. v. Davis, 154

willfulness or wantonness may be sufficient,⁷⁶ where the pleader goes further and attempts to aver the facts showing wanton or willful injury he must allege facts sufficient to support his conclusion.⁷⁷ In the absence of appropriate and sufficient allegations, a petition or complaint will not be held to charge gross negligence;⁷⁸ but, after judgment, generalizations of defendant's gross negligence will be held sufficient to support it.⁷⁹ Where gross negligence is not recognized as a separate basis for liability, an allegation of gross negligence adds nothing to the allegation of negligence.⁸⁰

Under guest statutes. Where plaintiff was a guest, in order to recover under some guest statutes the petition, declaration, or complaint must allege facts which reveal on their face willfulness or wantonness⁸¹ or gross negligence.⁸² It is not sufficient to characterize mere negligence of defendant by the use of the word "wanton,"⁸³ but failure to allege specifically that the act was wanton does not render the pleading bad where it otherwise sufficiently alleges wantonness.⁸⁴ Gross negligence must be expressly pleaded⁸⁵ unless the allegations are sufficient to demand an inference of gross neg-

So. 556, 228 Ala. 603—Daniel v. Motes, 153 So. 727, 228 Ala. 454.
Conn.—Mooney v. Wabrek, 27 A.2d 631, 129 Conn. 302.

Ga.—Crapps v. Mangham, 44 S.E.2d 133, 75 Ga.App. 563—American Oil Co v. Arrington, 43 S.E.2d 732, 75 Ga.App. 447.

Ill.—Revell, for Use of Haskin, v. Central Illinois Electric & Gas Co., 45 N.E.2d 500, 317 Ill.App. 106—Robeson v. Greyhound Lines, 257 Ill.App. 278—Williams v. Kaplan, 242 Ill.App. 166.

Ind.—Rea Riggins & Sons v. Scott, 50 N.E.2d 664, 114 Ind.App. 4.

Tenn.—Consolidated Coach Co. v. McCord, 102 S.W.2d 53, 171 Tenn. 253.

42 C.J. p 1195 note 7 [b]

Allegations held insufficient

Conn.—Brook v. Waldron, 14 A.2d 713, 127 Conn. 79.

Hawaii.—Darcy v. Harmon, 30 Hawaii 12—Ellis v. Mutual Telephone Co., 29 Hawaii 604.

Ill.—Harris v. Pikel, Wiggly Stores, 236 Ill.App. 392.

Kan.—Elliott v. Peters, 185 P.2d 139, 163 Kan. 631.

42 C.J. p 1195 note 7 [c].

76. Ala.—Jackson v. Vaughn, 86 So. 469, 204 Ala. 543.

42 C.J. p 1195 note 8.

77. Ala.—Harrison v. Formby, 142 So. 572, 225 Ala. 260—Jones v. Keith, 134 So. 630, 223 Ala. 36—Jackson v. Vaughn, 86 So. 469, 204 Ala. 543.

78. Ga.—Peavy v. Peavy, 136 S.E. 96, 36 Ga.App. 202.

Wis.—Bentson v. Brown, 203 N.W. 380, 186 Wis. 629, 38 A.L.R. 1417.

Allegations held sufficient

Ky.—Wilder v. Cadle, 13 S.W.2d 497, 227 Ky. 486.

Allegations held insufficient

Wis.—Good v. Schiltz, 218 N.W. 727, 195 Wis. 481.

79. Conn.—Kearns v. Widman, 108 A. 661, 94 Conn. 257.

80. Conn.—Decker v. Roberts, 3 A. 2d 855, 125 Conn. 150.

81. Cal.—Bartlett v. Jackson, 56 P. 2d 1298, 13 Cal.App.2d 435.

Fla.—Jackson v. Edwards, 197 So. 833, 144 Fla. 187.

Ill.—Miller v. Illinois Cent. R. Co., 65 N.E.2d 597, 328 Ill.App. 171—McGraw v. Oelg, 33 N.E.2d 758, 309 Ill.App. 628.

Ohio.—Cunningham v. Bell, 77 N.E. 2d 918, 149 Ohio St. 103—Vecchio v. Vecchio, 1 N.E.2d 624, 131 Ohio St. 59—Haacke v. Lease, App., 41 N.E.2d 590—Henderson v. Daniels, App., 36 N.E.2d 876—Delk v. Young, App., 35 N.E.2d 969—Thomas v. Foody, 7 N.E.2d 820, 54 Ohio App. 423.

Characterization of acts

Allegation that fatal injury was wantonly inflicted by so heedlessly or recklessly operating automobile as to cause a collision was not demurrable on ground that the words "heedlessly or recklessly" were repugnant to "wantonly" and reduced charge to a mere negligence count insufficient under guest statute, since the words "heedlessly or recklessly" do not always mean "negligently," and although, taken alone, they do not contain all elements of wantonness, because they do not necessarily apply knowledge of danger, they denote a status which is an element of wantonness, and without which wantonness could not exist—Brooks v. Liebert, 33 So.2d 321, 250 Ala. 142.

Knowledge of existing conditions

(1) In an action under the automobile guest statute, the guest must plead unequivocally that the motorist had knowledge of existing conditions, otherwise no liability is fixed.—Vecchio v. Vecchio, 1 N.E.2d 624, 131 Ohio St. 59—Haacke v. Lease, Ohio App., 41 N.E.2d 590.

(2) In action for injuries sustained by guest in automobile, petition alleging that operator insecurely fastened door and drove automobile at excessive rate of speed around sharp turn to left, whereby guest was thrown against door, causing it to open, and precipitating guest to ground, was demurrable for failure

to allege unequivocally that prior to accident operator had knowledge of fact that door was insecurely fastened—Vecchio v. Vecchio, *supra*.

Allegation of intent

When motorist's intent to harm guest is alleged, by doing or refraining from doing a specific act constituting willful misconduct, complaint is sufficient against general demurrer.—Frisvold v. Leahy, 60 P.2d 151, 15 Cal.App.2d 752.

82. Fla.—Erlichstein v. Roney, 20 So.2d 254, 155 Fla. 333—Jackson v. Edwards, 197 So. 833, 144 Fla. 187.

Mich.—Naudzius v. Lahr, 234 N.W. 581, 253 Mich. 216, 74 A.L.R. 1189. Neb.—Belik v. Warsocki, 253 N.W. 689, 136 Neb. 560.

N.D.—Schwager v. Anderson, 249 N. W. 305, 63 N.D. 579.

Tex.—Glassman v. Feldman, Civ. App., 106 S.W.2d 721—Munres v. Buckley, Civ App., 70 S.W.2d 605, error dismissed.

Relevant matters

Allegation respecting guest's calling automobile driver's attention to defective condition of windshield wiper on rainy night was germane to guest's cause of action for driver's gross negligence.—West v. Rosenberg, 160 S.E. 808, 44 Ga.App. 211.

Prior to statute plaintiff suing for death of guest riding in automobile was not required to plead or prove driver's gross negligence.—Dermer v. Pistorci, 293 P. 78, 109 Cal.App. 310.

83. Ohio.—Haacke v. Lease, App., 41 N.E.2d 590.

84. Ala.—Dean v. Adams, 30 So.2d 903, 249 Ala. 319.

Ohio.—Marietta v. Nichol, 52 N.E.2d 647, 72 Ohio App. 387.

Pa.—Slothier v. Jaffe, 51 A.2d 747, 356 Pa. 238.

85. Ga.—Wilder v. Steel Products Co., 195 S.E. 226, 57 Ga.App. 255—Capers v. Martin, 188 S.E. 465, 54 Ga App. 555—Moore v. Bryan, 183 S.E. 117, 52 Ga.App. 272—Townsend v. Minge, 161 S.E. 661, 44 Ga. App. 453.

ligence.⁸⁶ Where the gravamen of the action is gross negligence, characterization of the act of negligence as willful or wanton may be treated as surplusage.⁸⁷ Under a statute limiting a guest's recovery to intentional injury, a complaint alleging gross negligence will not be sufficient.⁸⁸ Where plaintiff is not a guest, willfulness need not be alleged⁸⁹ and in an action for willful misconduct, negligence need not be alleged.⁹⁰

Where it appears from plaintiff's pleading that a guest relationship probably existed, and where a guest is not entitled to recover for simple negligence, the relationship must be denied or negatived in order to state a cause of action based on simple negligence.⁹¹ A mere allegation that the injured person and defendant were engaged in a mutual en-

terprise is a conclusion and is not sufficient to take the case out of the operation of a guest statute, at least where subordinate facts do not support it.⁹² Allegations as to false representations of defendant as to his marital status have been held immaterial and not to take the case out of a guest statute denying recovery except for gross and wanton negligence.⁹³

Within the foregoing rules various declarations, petitions, and complaints have been held sufficient to permit recovery by a guest,⁹⁴ or insufficient to permit such recovery.⁹⁵

Where recovery is sought in one state for injuries sustained in another state having a guest statute, the pleading must state a cause of action under such statute.⁹⁶ It has been held that the pleading

86. Cal.—Castro v. Singh, 21 P.2d 169, 131 Cal.App. 106.

Ga.—Wildner v. Steel Products Co., 195 S.E. 226, 57 Ga.App. 255—Capers v. Martin, 188 S.E. 465, 54 Ga.App. 555—Rowe v. Camp, 165 S.E. 894, 45 Ga.App. 794—Townsend v. Minge, 161 S.E. 661, 44 Ga.App. 453.

87. Ga.—Frye v. Pyron, 181 S.E. 142, 51 Ga.App. 613.

Petition held sufficient

To show gross negligence, although characterizing host's conduct as willful and wanton negligence and as constituting intention to injure guest.—Frye v. Pyron, supra.

88. Wash.—Carufel v. Davis, 61 P.2d 1005, 188 Wash. 156.

89. Tex.—Hernandez v. Almendarez, Civ.App., 137 S.W.2d 1059.

90. Cal.—Frisvold v. Leahy, 60 P.2d 151, 15 Cal.App.2d 752.

91. Mass.—Walker v. Lloyd, 4 N.E.2d 308, 295 Mass. 507.

Mich.—Baker v. Costello, 2 N.W.2d 881, 300 Mich. 686.

Tex.—Rowe v. Rowe, Civ.App., 119 S.W.2d 194, error refused.

Allegations held sufficient

Ind.—Liberty Mut. Ins. Co. v. Stitzle, 41 N.E.2d 133, 220 Ind. 180.

Allegations held insufficient

Ind.—Albert McGann Securities Co. v. Coen, 48 N.E.2d 58, 114 Ind.App. 60, dissenting opinion 48 N.E.2d 1000, 114 Ind.App. 60.

92. Conn.—Bradley v. Clarke, 174 A. 72, 118 Conn. 641.

93. Kan.—Bryan v. Enyart, 168 P.2d 89, 161 Kan. 337.

94. Allegations held sufficient

(1) To charge gross negligence. U.S.—Hollander v. Davis, C.C.A.Fla., 120 F.2d 131.

Cal.—Gibson v. Easley, 32 P.2d 983, 138 Cal.App. 302—Malone v. Clemow, 295 P. 70, 111 Cal.App. 12.

Fla.—Erlachstein v. Roney, 20 So.2d

254, 155 Fla. 333—Shams v. Sapor-tas 10 So.2d 715, 152 Fla. 48—Mc-Millan v. Nelson, 5 So.2d 867, 149 Fla. 334—Cormier v. Williams, 4 So.2d 525, 148 Fla. 201—Jackson v. Edwards, 197 So. 833, 144 Fla. 187.

Ga.—Slaton v. Hall, 158 S.E. 747, 172 Ga. 675, appeal dismissed Clemmons v. Hall, 52 S.Ct. 5, 284 U.S. 691, 76 L.Ed. 583—Jones v. Jones, 195 S.E. 311, 57 Ga.App. 349—Duncan v. Ross, 192 S.E. 638, 56 Ga.App. 394—Capers v. Martin, 188 S.E. 465, 54 Ga.App. 555—Frank v. Horowitz, 183 S.E. 835, 52 Ga.App. 651—Moore v. Bryan, 183 S.E. 117, 52 Ga.App. 272—Ragsdale v. Love, 178 S.E. 755, 50 Ga.App. 900—McGinnis v. Shaw, 167 S.E. 533, 46 Ga.App. 248—Rowe v. Camp, 165 S.E. 894, 45 Ga.App. 794—Smith v. Hodges, 161 S.E. 284, 44 Ga.App. 318—Pitcher v. Curtis, 159 S.E. 783, 43 Ga.App. 622—McDuffie v. Childs, 157 S.E. 900, 43 Ga.App. 37—Rosenhoff v. Schaul, 157 S.E. 215, 42 Ga.App. 776—Blanchard v. Ogletree, 152 S.E. 116, 41 Ga.App. 4.

Mont.—Baatz v. Noble, 69 P.2d 579, 105 Mont. 59.

Neb.—Gilbert v. Bryant, 251 N.W. 823, 125 Neb. 731.

(2) To charge willfulness or wantonness.

U.S.—Hollander v. Davis, C.C.A.Fla., 120 F.2d 131—Weaver v. Mark, C.C.A.Ohio, 112 F.2d 917.

Cal.—Frisvold v. Leahy, 60 P.2d 151, 15 Cal.App.2d 752—Browne v. Fernandez, 36 P.2d 122, 140 Cal.App. 689—Gibson v. Easley, 32 P.2d 983, 138 Cal.App. 303.

Ill.—Winson v. Fischer, 77 N.E.2d 48, 333 Ill.App. 222—Dyreson v. Hughes, 76 N.E.2d 809, 333 Ill. App. 198.

Ohio.—Major v. Liggatt, 50 N.E.2d 795, 72 Ohio App. 71.

(3) To show reckless disregard of guest's rights.

Ind.—Armstrong v. Binzer, 199 N.E. 863, 102 Ind.App. 497.

SC—Ralls v. Saleeby, 182 S.E. 750, 178 S.C. 431.

95. Allegations held insufficient

(1) To charge gross negligence.

Cal.—Nichols v. Smith, 28 P.2d 693, 136 Cal.App. 272.

Fla.—Koger v. Hollahan, 198 So. 685, 144 Fla. 779, 131 A.L.R. 886.

Ga.—Hopkins v. Sipe, 199 S.E. 246, 58 Ga.App. 511—Wildner v. Steel Products Co., 195 S.E. 226, 57 Ga.App. 255—Moore v. Bryan, 183 S.E. 117, 52 Ga.App. 272—Sheffield v. Studor, 178 S.E. 409, 50 Ga.App. 429.

Kan.—Leaho v. Willett, 175 P.2d 109, 162 Kan. 236—Murrell v. Janders, 44 P.2d 218, 141 Kan. 906.

Mich.—Quinlan v. Wells, 289 N.W. 135, 291 Mich. 214.

Tex.—Raub v. Rowe, Civ.App., 119 S.W.2d 190, followed in 119 S.W.2d 194, error refused—Glassman v. Feldman, Civ.App., 106 S.W.2d 721.

(2) To charge willfulness or wantonness.

Cal.—Bartlett v. Jackson, 56 P.2d 1298, 13 Cal.App.2d 435.

Fla.—Koger v. Hollahan, 198 So. 685, 144 Fla. 779, 131 A.L.R. 886.

Kan.—Kokenge v. Holthaus, 194 P.2d 482, 165 Kan. 300.

Ohio.—Levine v. McFarlin, 4 N.E.2d 927, 53 Ohio App. 304.

96. Allegations held sufficient

Fla.—Garvie v. Cloverleaf, Inc., 187 So. 360, 136 Fla. 899.

Ga.—Boxikis v. Kolgakis, 184 S.E. 764, 52 Ga.App. 804.

Ill.—Harper v. Malandrone, 48 N.E.2d 789, 319 Ill.App. 247—Runyan v. Bland, 264 Ill.App. 265.

La.—Polmer v. Polmer, App., 181 So. 200.

Pa.—O'Hagan v. Byron, 88 Pittsb. Leg.J. 180, reversed on other grounds 33 A.2d 779, 153 Pa.Super. 372.

is not defective where it does not contain a recital of the statute and decisions of the state where the injury occurred,⁹⁷ although it has also been held that the pleading is demurrable if it fails to set forth the law of such jurisdiction⁹⁸ or to aver that the facts alleged constituted gross negligence under such law.⁹⁹ If the jurisdiction in which the injury occurred has no guest statute, it is not necessary to allege a cause of action under the guest statute of the state in which suit is brought.¹

c. Proximate Cause

In an action to recover damages for injuries caused by the negligent operation of a motor vehicle, the declaration, complaint, or petition must allege that the injuries were the proximate consequence of the negligence or breach of duty alleged.

In an action to recover damages for injuries caused by the negligent operation of a motor vehicle, the declaration, complaint, or petition must allege that the injuries were the proximate consequence of the negligence or breach of duty alleged;² and a complaint merely alleging facts showing that defendant's negligence was a remote cause is insufficient;³ but the exact manner of the injury need not be described.⁴ Two or more specified acts of negligence may be,⁵ and sometimes are,⁶ alleged as the proximate cause of the injury, and a complaint may be sufficient which shows concurrent negligence of several defendants.⁷ A complaint which shows that the proximate cause of the injury was the independent negligence of someone other than defendant is demurrable.⁸

Allegations held insufficient

Ga.—Bolton v. Bluestein, 191 S.E. 388, 55 Ga.App. 782—Lee v. Lott, 177 S.E. 92, 50 Ga.App. 39, followed in Lee v. Moore, 177 S.E. 97, 50 Ga.App. 49.
La.—Surgan v. Parker, App., 181 So. 86.

97. Ill.—Harper v. Malandrone, 48 N.E.2d 789, 319 Ill.App. 247.

98. Ala.—Gilliland v. Harris, 150 So. 184, 25 Ala.App. 549.

99. Ala.—Gilliland v. Harris, supra.

1. Del.—Skillman v. Conner, 193 A. 563, 8 W.W.Harr. 402.

2. Del.—Beacom v. Fraim, 172 A. 447, 6 W.W.Harr. 154—Ierardi v. Farmers' Trust Co. of Newark, 151 A. 822, 4 W.W.Harr. 246.

Ga.—Holbrooks v. Ford Rental System, 130 S.E. 363, 34 Ga.App. 588
Kan.—Kokenge v. Holthaus, 194 P.2d 482, 165 Kan. 300.

La.—Lewis v. Jeffress, App., 3 So.2d 477—Davis v. Shaw, App., 142 So. 301.

42 C.J. p 1195 note 12.

Declaration, petition, or complaint held sufficient

U.S.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

Ala.—Moore v. Cruik, 191 So. 252, 238 Ala. 414—Leeper Cleaning & Dyeing Co. v. McKinney, 161 So. 529, 230 Ala. 462—Graham v. Werfel, 157 So. 201, 229 Ala. 385—Allison Coal & Transfer Co. v. Davis, 129 So. 9, 221 Ala. 384—Conway v. Robinson, 113 So. 531, 216 Ala. 495—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala. App. 179, certiorari denied 156 So. 865, 229 Ala. 276.

Cal.—Cook v. Maier, 92 P.2d 434, 33 Cal.App.2d 581.

Del.—Hill v. Day, 199 A. 920, 9 W.W.Harr. 449.

Fla.—Florida Motor Lines Corp. v. Shontz, 32 So.2d 248.

Ga.—Monroe Motor Exp. v. Jackson, 38 S.E.2d 863, 74 Ga.App. 148—Minnick v. Jackson, 13 S.E.2d 891, 64 Ga.App. 554—McDaniel v. Brown, 6 S.E.2d 382, 61 Ga.App. 243, followed in McDaniel v. Richards, 6 S.E.2d 383, 61 Ga.App. 245, and 6 S.E.2d 384, 61 Ga.App. 245.
Ill.—Denton v. Midwest Dairy Products Corporation, 1 N.E.2d 807, 284 Ill.App. 279.

Ind.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179—Terre Haute Union Transfer & Storage Co. v. Pickett, 15 N.E.2d 765, 106 Ind.App. 82, rehearing denied 15 N.E.2d 778, 106 Ind.App. 82.

Ky.—Saxton v. Tucker, 134 S.W.2d 590, 280 Ky. 777.

La.—Reggie v. Karre, 139 So. 532, 19 La.App. 477, followed in Karre v. Karre, 139 So. 536, 19 La.App. 476, and Zwan v. Karre, 139 So. 536, 19 La.App. 475—Vaccaro v. Favrot, 128 So. 284, 170 La. 483.

Mo.—Wooldridge v. Scott County Milling Co., App., 102 S.W.2d 958—Weber v. Evans, App., 15 S.W.2d 370.

Mont.—Johnson v. Herring, 295 P. 1100, 89 Mont. 156.

N.C.—Hobbs v. Queen City Coach Co., 34 S.E.2d 211, 225 N.C. 323—Hinnant v. Atlantic Coast Line R. Co., 163 S.E. 555, 202 N.C. 489.

Tex.—Peveto v. Smith, Civ.App., 113 S.W.2d 216, modified on other grounds 133 S.W.2d 572, 134 Tex. 308.

42 C.J. p 1195 note 12 [a].

Declaration, petition, or complaint held insufficient

Ala.—David v. Templeton, 188 So. 239, 237 Ala. 649.

Cal.—McAllister v. Brown, 299 P. 753, 114 Cal.App. 239.

Del.—Ierardi v. Farmers' Trust Co. of Newark, 151 A. 822, 4 W.W.Harr. 246.

Ga.—Luxenburg v. Aycock, 154 S.E. 460, 41 Ga.App. 722.

La.—Picou v. J. B. Luke's Sons, 16 So.2d 466, 204 La. 881.

Mo.—Andrews v. Parker, App., 259 S.W. 807.

N.Y.—Bugle v. McMahon, 37 N.Y.S.2d 540, 265 App.Div. 830—Apropo v. State, 291 N.Y.S. 271, 161 Misc. 142, affirmed 298 N.Y. 839, 262 App.Div. 803.

Tex.—Gouna v. O'Neill, Civ.App., 149 S.W.2d 138.

W.Va.—Cooper v. Teter, 15 S.E.2d 152, 123 W.Va. 372.

Particular allegations construed

Del.—Zink v. Kessler Trucking Co., 190 A. 637, 8 W.W.Harr. 271.
42 C.J. p 1195 note 12 [c].

3. Ga.—Whitaker v. Jones, McDougald, Smith, Pew Co., 26 S.E.2d 545, 69 Ga.App. 711.

4. Cal.—Kilbride v. Swafford, 278 P. 448, 99 Cal.App. 303.

42 C.J. p 1195 note 13.

5. Mo.—Walden v. Stone, App., 260 S.W. 526.

6. Mo.—Walden v. Stone, supra.

42 C.J. p 1195 note 15.

7. Ga.—Shepherd v. Amos, 42 S.E. 2d 775, 75 Ga.App. 221.

Declaration, petition, or complaint held sufficient

Fla.—Barnes v. Liebig, 1 So.2d 247, 146 Fla. 219.

Ga.—Sprayberry v. Snow, 10 S.E.2d 179, 190 Ga. 723, mandate conformed to 11 S.E.2d 431, 63 Ga.App. 489—Eldson v. Felder, 22 S.E.2d 523, 68 Ga.App. 188—Brady v. Fruehauf Trailer Co., 10 S.E.2d 133, 63 Ga. App. 60—Bozeman v. Blue's Truck Line, 7 S.E.2d 412, 62 Ga.App. 7—Speed Oil Co. v. Jones, 1 S.E.2d 760, 59 Ga.App. 625.

N.C.—Cunningham v. Haynes, 199 S. E. 627, 214 N.C. 456.

8. Cal.—De Vito v. Peterson, 25 P. 2d 19, 134 Cal.App. 100.

Ga.—Horton v. Sanchez, 195 S.E. 873,

d. Negating Defenses

In general, the plaintiff need not negative matters of defense.

Matters of defense to be alleged by defendant need not be negated by plaintiff in his declaration, petition, or complaint.⁹ Since contributory negligence is usually a matter of defense to be pleaded

by defendant, the fact of contributory negligence ordinarily need not be negated by plaintiff in his original pleading,¹⁰ especially where the statute so provides,¹¹ unless the facts stated in such pleading suggest the inference that he may have been guilty of contributory negligence,¹² although, in such case, the complaint is good if it is drawn on the theory

57 Ga.App. 612—Scott v. Edwards, 178 S.E. 175, 50 Ga.App. 373.

Declaration, petition, or complaint held not objectionable as showing intervening negligence of independent agency.

Ga.—Williams v. Grier, 26 S.E.2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75—Wilson v. Ray, 13 S.E.2d 848, 64 Ga.App. 540—Fender v. Drost, 7 S.E.2d 800, 62 Ga.App. 345.

N.C.—Montgomery v. Blades, 12 S.E.2d 217, 218 N.C. 680—Anthony v. Knight, 191 S.E. 323, 211 N.C. 637.

9. Ala.—McBride v. Baggett Transp. Co., 35 So.2d 101.

Tex.—Checker Cab & Baggage Co. v. Crone, Civ.App., 117 S.W.2d 503, affirmed Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 134 Tex. 412.

42 C.J. p 1195 note 17.

10. Conn.—Robertson v. Viens, 149 A. 140, 110 Conn. 685—Genshevsky v. Fishbone, 145 A. 54, 109 Conn. 58.

Del.—Hill v. Day, 199 A. 920, 9 W.W.Harr. 400—Le Gates v. Ennis, 180 A. 325, 7 W.W.Harr. 31.

Fla.—Muse v. Kaler Bros., 162 So. 507, 120 Fla. 221.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

Kan.—Leabo v. Willett, 175 P.2d 109, 162 Kan. 236—Riner v. Collins, 296 P. 713, 132 Kan. 613.

La.—Althaus v. Toye Bros. Yellow Cab Co., 191 So. 717—Loprestie v. Roy Motors, Inc., 185 So. 11, 191 La. 239—Hardtner v. Aetna Casualty & Surety Co., App., 189 So. 365—Cuneo v. Waddell, App., 189 So. 619—Saks v. Eichel, App., 167 So. 464.

Md.—Wintrobe v. Hart, 13 A.2d 365, 178 Md. 289.

42 C.J. p 1195 note 19.

Compliance with law

Petition for injuries sustained by defendant's negligence in failing to stop automobile need not allege plaintiff's compliance with laws.—Salmon v. Rogers, 149 S.E. 52, 40 Ga.App. 73.

Under guest statutes

Kan.—Leabo v. Willett, 175 P.2d 109, 162 Kan. 236.

11. Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507—American Carloading Corporation

v. Voight, 21 N.E.2d 453, 107 Ind.App. 267.

12. Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.

La.—Arbo v. Schulze, App., 178 So. 560.

Pa.—Thomas v. Fisher, Com Pl., 1 Lebanon Co. 169.

42 C.J. p 1196 note 20.

Negating contributory negligence

Allegation that boy struck by truck was under seven years negated idea that boy was contributorily negligent—Johnson v. Herring, 295 P. 1100, 89 Mont. 156.

Pleading unusual circumstances

The requirement that unusual circumstances which will excuse a driver from his failure to see obstruction ahead must be pleaded does not mean that there must be an allegation using the words "unusual circumstances" or referring expressly to every detail of facts which are said to constitute such unusual circumstances, and all that is necessary is that facts be alleged which, if shown to be true, will constitute unusual circumstances which will explain failure of driver to see—Bohland Mach. & Mfg. Co. v. Highway Ins. Underwriters, La.App., 22 So. 2d 307.

Complaint held to show negligence of plaintiff

Del.—Zink v. Kessler Trucking Co., 190 A. 637, 8 W.W.Harr. 271.

Ga.—Reid v. Southern Ry. Co., 183 S.E. 849, 52 Ga.App. 508.

Ky.—Brock v. Bennett, 200 S.W.2d 745, 304 Ky. 338.

La.—Louisiana Power & Light Co. v. Sala, 177 So. 238, 188 La. 358—General Exchange Ins. Corporation v. M. Romano & Son, App., 190 So. 168—Arbo v. Schulze, App., 173 So. 660.

N.Y.—Hilsker v. Adams, 9 N.Y.S.2d 9, 256 App.Div. 889.

Complaint held not to show negligence of plaintiff

U.S.—Nehrbass v. Home Indemnity Co., D.C.La., 37 F.Supp. 123.

Ala.—Claude Jones & Son v. Lair, 17 So.2d 577, 245 Ala. 441—Moore v. Cruik, 191 So. 252, 238 Ala. 414—Harrison v. Wright, 111 So. 642, 215 Ala. 407—Jones v. Colvard, 109 So. 877, 215 Ala. 216.

Cal.—Sharick v. Galloway, 66 P.2d 185, 19 Cal.App.2d 693.

Fla.—Muse v. Kaler Bros., 162 So.

507, 120 Fla. 221—Snapp v. Polk Canning Co., 161 So. 269, 119 Fla. 245.

Ga.—Lanier v. Turner, 38 S.E.2d 55, 73 Ga.App. 749—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18—Eldson v. Felder, 22 S.E.2d 523, 68 Ga.App. 188—Georgia Stages v. Miller, 19 S.E.2d 337, 67 Ga.App. 27—Minnick v. Jackson, 13 S.E.2d 891, 64 Ga.App. 554—State Highway Department v. Stephens, 167 S.E. 788, 46 Ga.App. 359—Chapman v. Independent Laundry Co., 144 S.E. 127, 38 Ga.App. 424.

Ill.—Crawford v. Bauer-Johnson & Co., 269 Ill.App. 185.

Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507—Indianapolis Glove Co. v. Fenton, 166 N.E. 12, 89 Ind.App. 173.

Kan.—Crawford v. Miller, 186 P.2d 116, 163 Kan. 718—Bull v. Miller, 186 P.2d 115, 163 Kan. 724—Lawrence v. Travelers Mut. Casualty Co., 130 P.2d 622, 155 Kan. 884—Riner v. Collins, 296 P. 713, 132 Kan. 613.

La.—Lynch v. Fisher, App., 34 So.2d 513—Trahan v. Lantier, App., 33 So.2d 136, followed 33 So.2d 139 and Comeaux v. Lantier, 33 So.2d 139—Cole v. Burgess, App., 31 So.2d 450—Golden v. Creole Delicacies, App., 28 So.2d 99—Muse v. Chambley, App., 16 So.2d 276—Cuneo v. Waddell, App., 189 So. 619—Hardtner v. Aetna Casualty & Surety Co., App., 189 So. 365—Broussard v. Krause & Managan, App., 186 So. 384—Gray v. De Bretton, App., 184 So. 390, affirmed 188 So. 722, 192 La. 628—Vassar v. Levy, App., 184 So. 255—Savoie v. Walker, App., 183 So. 530—Hantel v. Service Drayage Co., App., 177 So. 425—Coats v. Buie's Estate, App., 157 So. 560—Smith v. Vellino, App., 156 So. 61—Crescent Cigar & Tobacco Co. v. Mire, App., 145 So. 17—Rossville Commercial Alcohol Corporation v. Dennis Sheen Transfer Co., 138 So. 183, 18 La.App. 725.

Ohio.—Myers v. Norfolk & W. Ry. Co., 172 N.E. 666, 122 Ohio St. 557.

S.D.—McKeon v. Delbridge, 226 N.W. 947, 55 S.D. 579, 67 A.L.R. 311.

Tex.—Phoenix Refining Co. v. Walker, Civ.App., 108 S.W.2d 223, error dismissed.

of the last clear chance or humanitarian doctrine.¹³ Where plaintiff need not negative contributory negligence, the petition, in an action to recover damages for injury or death caused by a motor vehicle, need not allege that plaintiff or deceased was oblivious of his danger or peril,¹⁴ not only where the case is not based on any last chance or humanitarian doctrine or theory,¹⁵ but also where plaintiff attempts to state a cause of action under the humanitarian rule.¹⁶ On the other hand, in some jurisdictions plaintiff must negative contributory negligence,¹⁷ although it may not be necessary where the complaint alleges willful and wanton conduct causing the injury.¹⁸

Utah.—Nielsen v. Watanabe, 62 P.2d 117, 90 Utah 401.

13. Idaho.—Adkins v. Zalasky, 81 P.2d 1090, 59 Idaho 292.

Allegations held sufficient to show injury avoidable notwithstanding contributory negligence.

Ala.—Alabama Produce Co. v. Smith, 141 So. 674, 224 Ala. 688.

Idaho.—Adkins v. Zalasky, 81 P.2d 1090, 59 Idaho 292.

La.—Crescent Cigar & Tobacco Co. v. Mire, App., 145 So. 17.

Mo.—Iman v. Walter Freund Bread Co., 58 S.W.2d 477, 332 Mo. 461—Davis v. Howell, 27 S.W.2d 13, 324 Mo. 1227—Edwards v. Bell, App., 103 S.W.2d 315, rehearing denied 123 S.W.2d 83, 343 Mo. 824—Hudlow v. Langerhans, 91 S.W.2d 629, 230 Mo.App. 1160—Stevens v. Westport Laundry Co., 25 S.W.2d 491, 224 Mo.App. 955.

Tex.—Houston Electric Co. v. Montgomery, Civ.App., 123 S.W.2d 943, reversed on other grounds Montgomery v. Houston Electric Co., 144 S.W.2d 251, 135 Tex. 538—Byerley v. Bauer, Civ.App., 99 S.W.2d 641, error dismissed.

42 C.J. p 1190 note 2 [a] (24).

Allegations held insufficient

To bring case within humanitarian rule.—Sanford v. Gideon-Anderson Co., Mo.App., 31 S.W.2d 580—42 C.J. p 1190 note 2 [b] (5).

14. Mo.—Arnold v. Manzella, App., 186 S.W.2d 882.

42 C.J. p 1196 note 23.

15. Mo.—Vaughn v. Davis, App., 221 S.W. 782.

16. Mo.—Arnold v. Manzella, App., 186 S.W.2d 882—Banks v. Empire Dist. Electric Co., App., 4 S.W.2d 875.

42 C.J. p 1196 note 25.

17. Ill.—Schilling v. Holding, 248 Ill.App. 488.

Iowa.—Scheldorf v. Cherry, 264 N.W. 54, 220 Iowa 1101.

42 C.J. p 1196 note 21.

Injury to property

In Indiana, where the action is

one for damages to plaintiff's vehicle, he must negative his own negligence.—Clemens v. Lowe, 196 N.E. 363, 100 Ind.App. 645.

Equivalent allegation

In New York, under the rule that the complaint must allege freedom from contributory negligence or its equivalent that defendant's negligence was the cause of the injury, a claim against state for damages for injuries sustained when struck by automobile operated by state trooper failed to allege complete cause of action by not showing that claimant was free from contributory negligence.—Apropo v. State, 298 N.Y.S. 839, 252 Misc. 803

18. Ill.—Trust Co. of Chicago v. Ancaateau, 46 N.E.2d 125, 317 Ill.App. 186.

19. Ind.—Pfisterer v. Key, 33 N.E. 2d 330, 218 Ind. 521.

Iowa.—Falt v. Krug, 32 N.W.2d 781.

Kan.—Turner v. George Rushton Baking Co., 11 P.2d 746, 135 Kan. 484.

Allegations held insufficient to state a cause of action on theory of last clear chance.—Gibson v. Bodley, 133 P.2d 112, 156 Kan. 338.

Factual basis of claim

In order to take advantage of the "last clear chance" doctrine, plaintiff must allege facts affording a basis for a finding of the negligent conduct on which he bases his claim for liability under the doctrine.—Correnti v. Catino, 160 A. 892, 115 Conn. 213.

20. Ga.—Economy Gas & Appliance Co. v. Kinslow, 39 S.E.2d 899, 74 Ga.App. 418.

Petition held not demurrable

Petition, alleging that plaintiff motorist after seeing defendant's truck approaching on highway three hundred feet to the left, made a left turn onto highway and proceeded at ten miles per hour, forty-six feet along highway before collision, almost head-on, with defendant's truck which had crossed onto left side of

Where plaintiff seeks to rely on the last clear chance doctrine, he must plead it.¹⁹

A petition, the allegations of which show assumption of risk by plaintiff, is demurrable.²⁰

§ 506. Plea or Answer

The rules of pleading in negligence cases generally, including the rules as to pleading affirmative defenses or contributory negligence, govern pleas or answers in actions for injuries from the operation of motor vehicles.

The rules relating to pleas or answers in civil actions generally, particularly in actions for negligence, govern the plea or answer in an action for injuries caused by a motor vehicle.²¹ The plea or

highway, did not establish as a matter of law that plaintiff assumed the risk of being injured in going upon highway and failed to avoid consequences of defendant's negligence.—Economy Gas & Appliance Co. v. Kinslow, supra.

21. Fla.—Florida Motor Transp. Co. v. Hillman, 101 So. 31, 87 Fla. 512. 42 C.J. p 1196 note 33.

Form of pleas approved as meeting all essential requirements of pleadings.—Lynch v. Walker, 31 So. 2d 268, 159 Fla. 188.

Affidavit of defense

Pa.—Gazdik v. Girhing, Com.Pl., 87 Pittsb Leg J. 68

Inconsistent defenses

(1) In action by owner-occupant for injuries sustained while riding in automobile driven by plaintiff's husband in another state, who, plaintiff alleged, was engaged in defendant's business, defendant pleading common-law attribution of operator's negligence to owner-occupant was also entitled to plead guest statute of such other state, since, if plaintiff could establish control in defendant, as by lease or agreement, defendant would be put to necessity of establishing protection under guest statute.—Willis v. Fitzgerald Bros. Brewing Co., 25 N.Y.S.2d 647, 261 App.Div. 357.

(2) In action for injuries sustained by boy when run over by city's truck, defenses alleging that boy was ten years old and that he was contributorily negligent in riding on rear bumper, in violation of ordinance, were not inconsistent or did not impose unwarrantable degree of accountability on ten-year-old boy.—Bown v. City of Tacoma, 27 P.2d 711, 175 Wash. 414.

Last clear chance

In automobile collision case, trial court properly invoked the last clear chance doctrine in favor of defendant where facts warranted application of the principle, even though such doctrine was not invoked by

answer must not be ambiguous,²² or too broad,²³ and irrelevant and redundant matter may properly be stricken.²⁴

Defendant should specially plead matters of justification or excuse,²⁵ including assumption of risk,²⁶ or that defendant was not legally responsible for the conduct of the driver of his vehicle,²⁷ and infancy, if available as a defense.²⁸ Unavoidable accident need not be specially pleaded.²⁹ While it may be proper to plead that some act of a third person was the sole proximate cause of the accident,³⁰ it is not necessary in such case to allege that the third person, not a party to the suit, was negligent in the act pleaded.³¹

Ordinarily, statutes and ordinances relating to speed and rules of the road are not matters of de-

fense to be affirmatively pleaded,³² although, in a proper case, an ordinance may be pleaded as a defense,³³ but an answer relying on an ordinance, but not setting out the ordinance and facts bringing defendant's case within it, is demurrable as pleading a conclusion.³⁴

Contributory negligence. The rules relating to pleas of contributory negligence in actions for negligence in general ordinarily apply to such a plea in actions for injuries caused by negligence in the operation of a motor vehicle.³⁵ In most jurisdictions such negligence is not available as a defense unless it is specially pleaded³⁶ or appears from plaintiff's evidence.³⁷ Also, according to the weight of authority, the facts constituting the contributory negligence must be set out,³⁸ and the facts stated

defendant as a defense.—*Daw v. Matthews, Texas Indem. Ins. Co., Intervenor, La.App., 34 So.2d 666.*

Plea or answer held sufficient

Ill.—*Taylor v. City of Berwyn, 22 N. E.2d 930, 372 Ill. 124.*

Minn.—*Bentley v. Kral, 26 N.W.2d 532, 223 Minn. 248.*

Mo.—*Anderson v. Kraft, App., 129 S.W.2d 85, certiorari quashed State ex rel. Anderson v. Hostetler, 140 S.W.2d 21, 346 Mo. 249.*

Tex.—*Tarver v. Vallance, Civ.App., 97 S.W.2d 748.*

Plea or answer held insufficient

Ky.—*Bessire & Co. v. Day's Adm'x, 103 S.W.2d 644, 268 Ky. 87.*

22. Fla.—*Fain v. Cartwright, 182 So. 302, 132 Fla. 855.*

23. Fla.—*Town of Palm Beach v. Vlahos, 15 So.2d 848, 154 Fla. 159.*

24. N.C.—*Brown v. Hall, 40 S.E.2d 412, 226 N.C. 732.*

25. R.I.—*McKendall v. National Wholesale Confectionery Co., 148 A. 315, 60 R.I. 424.*

26. Conn.—*Slobodnjak v. Coyne, 165 A. 681, 116 Conn. 545.*

27. Mass.—*Wilson v. Grace, 173 N. E. 524, 273 Mass. 146.*

28. Ind.—*Juszczak v. Lewis, 41 N.E. 2d 627, 112 Ind.App. 34.*

29. Tex.—*Rosenthal Dry Goods Co. v. Hillebrandt, Com.App., 7 S.W.2d 521.*

30. Tex.—*Thweatt v. Ocean Accident & Guarantee Corporation, Civ. App., 62 S.W.2d 250, error refused.*

Plea of general issue

A special plea that the accident was caused by a third person has been held to amount to a plea of the general issue.—*Cella v. Roth, 174 A. 703, 113 N.J.Law 458.*

31. Tex.—*Thweatt v. Ocean Accident & Guarantee Corporation, Civ. App., 62 S.W.2d 250, error refused.*

32. N.Y.—*Lofaro v. Bee Cab Corporation, 43 N.Y.S.2d 737, 180 Misc. 756.*

Motorist's compliance with War Emergency Act was not a matter of defense to be affirmatively pleaded in action against motorist for negligence in operation of automobile, and allegation of such defense was stricken from answer.—*Lofaro v. Bee Cab Corporation, supra.*

33. Mont.—*Carey v. Guest, 258 P. 236, 78 Mont. 415.*

34. Ky.—*Mann v. Woodward, 290 S. W. 333, 217 Ky. 491.*

35. Ala.—*Terrill v. Walker, 59 So. 775, 5 Ala.App. 535.*
42 C.J. p 1197 note 35.

36. U.S.—*Ralston Purina Co. v. Bausau, C.C.A.III., 73 F.2d 430.*
Ariz.—*Lutty v. Lockhart, 295 P. 975, 37 Ariz. 488.*

Cal.—*Gutknecht v. Johnson, 144 P. 2d 854, 62 Cal.App.2d 315—Enos v. Norton, 292 P. 276, 109 Cal.App. 19.*

Kan.—*Leabo v. Willett, 175 P.2d 109, 162 Kan. 236.*

La.—*Golden v. Creole Delicacies, App., 28 So.2d 99—Hea v. Russo, App., 21 So.2d 530, followed in Douglas v. Russo, 21 So.2d 536—Meyer v. Rein, App., 18 So.2d 69—Althaus v. Toye Bros. Yellow Cab Co., App., 191 So. 717—Calamia v. National Hosiery Mills, App., 164 So. 146.*

Me.—*Stone v. Roger, 154 A. 73, 130 Me. 512.*

Wash.—*Boyle v. Lewis, 193 P.2d 332.*
42 C.J. p 1197 note 37.

Evidence admissible under general denial or general issue see *infra* § 508.

Exception of no cause of action cannot take the place of a plea of contributory negligence.—*Golden v. Creole Delicacies, La., 28 So.2d 99.*

Duty of plaintiff

A plea which seeks to place too high a duty on plaintiff is demurrable.—*Landham v. Lloyd, 136 So. 815, 223 Ala. 487.*

37. Ariz.—*Bruno v. Grande, 251 P. 550.*
42 C.J. p 1197 note 38.

38. Ala.—*Townsend v. Adair, 134 So. 637, 223 Ala. 150—Ogburn v. Montague, 155 So. 633, 26 Ala.App. 166, certiorari denied 155 So. 636, 229 Ala. 78.*

42 C.J. p 1197 note 39.

Violation of ordinance

(1) In bicyclist's action against motorist for injuries sustained in intersectional collision, plea that plaintiff's conduct in propelling bicycle into intersection in violation of traffic ordinance proximately contributed to his injuries states good defense to count based on simple negligence.—*Alabama Lumber & Building Material Ass'n v. Mason, 160 So. 232, 230 Ala. 168.*

(2) Plea of excessive speed as contributory negligence need not allege ordinance or its violation.—*Smith v. Baggett, 118 So. 283, 218 Ala. 227.*

Plea or answer held sufficient

Ala.—*Green v. City of Birmingham, 4 So.2d 394, 241 Ala. 684—Francis v. Imperial Sanitary Laundry & Dry Cleaning Co., 2 So.2d 388, 241 Ala. 327—Heffelfinger v. Lane, 196 So. 720, 239 Ala. 659—Landham v. Lloyd, 136 So. 815, 223 Ala. 487—Alabama Power Co. v. Kendrick, 123 So. 215, 219 Ala. 692.*

Cal.—*Petersen v. Devine, 156 P.2d 936, 68 Cal.App.2d 387.*

Or.—*Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.*

Plea or answer held insufficient

Ala.—*Bradford v. Carson, 137 So. 426, 223 Ala. 594—L. Hammel Dry Goods Co. v. Hinton, 112 So. 638.*

must be such that the conclusion of negligence follows as a matter of law,³⁹ but in some cases general allegations have been held sufficient in the absence of a motion to make the answer more definite and certain.⁴⁰ A plea of contributory negligence on the part of a child of such an age as to be prima facie incapable of contributory negligence is insufficient,⁴¹ unless it alleges facts necessary to fix the responsibility of the infant for his alleged careless or negligent acts.⁴² While allegations that the collision or accident and the consequences thereof were due solely to the negligence of plaintiff and not to any fault or negligence on the part of defendant do not constitute a plea of contributory negligence⁴³ in the sense that a plea of contributory negligence is one of confession and avoidance,⁴⁴ nevertheless such allegations are a sufficient plea to put in issue plaintiff's negligence as the sole cause of the accident from which his injuries arose.⁴⁵ Contributory negligence may be sufficiently pleaded by an allegation in a cross complaint.⁴⁶ A special plea of contributory negligence is no answer to a count alleging wanton injury.⁴⁷

§ 507. Replication or Reply

In accordance with the general rules of pleading, the plaintiff may and should file a replication or reply.

- 216 Ala. 127—Ogburn v. Montague, 155 So. 633, 26 Ala.App. 166, certiorari denied 155 So. 636, 229 Ala. 78.
 Fla.—C. W. Zaring & Co. v. Dennis, 19 So.2d 701, 155 Fla. 150.
 La.—Meyer v. Rein, App., 18 So.2d 69—Althans v. Toye Bros. Yellow Cab Co., App., 191 So. 717.
 Mo.—Schlue v. Missouri Pacific Transp. Co., App., 62 S.W.2d 934.
 N.M.—Bell v. Carter Tobacco Co., 71 P.2d 683, 41 N.M. 513.
 Tex.—Tarry Warehouse & Storage Co. v. Duvall, Civ.App., 94 S.W.2d 1249, reversed on other grounds 115 S.W.2d 401, 131 Tex. 466.
 39. Ala.—Townsend v. Adair, 134 So. 637, 223 Ala. 150—Cook v. Standard Oil Co., 73 So. 763, 15 Ala.App. 448.
 40. Kan.—Broman v. Kimball, 210 P. 191, 112 Kan. 186.
 41. Ala.—McGough Bakeries Corp. v. Reynolds, 35 So.2d 332.
 42 C.J. p 1197 note 42.
 42. Ala.—Jones v. Strickland, 77 So. 562, 201 Ala. 138.
 43. Cal.—Coffman v. Singh, 193 P. 259, 49 Cal.App. 342.
 Ohio.—Augusta v. Paradis, 22 N.E.2d 578, 61 Ohio App. 323—Duncan v. Evans, 20 N.E.2d 729, 60 Ohio App. 265, affirmed 17 N.E.2d 913, 134 Ohio St. 486—Benning v. Schlemmer, 14 N.E.2d 941, 57 Ohio App. 457.

Exonerating defense

Averment of answer in death action that deceased negligently ran into defendant's truck was not an allegation of contributory negligence, but affirmatively advanced exonerating defense.—Guillory v. Horrecky, App., 162 So. 89, affirmed 165 So. 159, annulled 168 So. 481, 185 La. 21.

Allegation of sole negligence of plaintiff was improper and presented only an immaterial issue.—Duncan v. Evans, 20 N.E.2d 729, 60 Ohio App. 265, affirmed 17 N.E.2d 913, 134 Ohio St. 486.

44. Cal.—Brkljaca v. Ross, 213 P. 290, 60 Cal.App. 431.

45. Cal.—Brkljaca v. Ross, supra.

46. Cal.—Grover v. Morrison, 190 P. 1078, 47 Cal.App. 521.

Pa.—Hughes v. Ostroskie, Com.Pl., 38 Luz.Leg.Reg. 93.

Allegations held to charge primary negligence

La.—Folse v. Flynn, App., 200 So. 160.

47. Ala.—Britling Cafeteria Co. v. Irwin, 159 So. 228, 229 Ala. 687.

48. Fla.—Porter v. Jacksonville Electric Co., 60 So. 188, 64 Fla. 409.

49. Ala.—Gardiner v. Solomon, 75 So. 421, 200 Ala. 115, L.R.A.1917F 380.

50. Ala.—Gardiner v. Solomon, supra.

Allegations of a replication that plaintiff was a passenger in the automobile, and had no interest in, or control over, the automobile or the driver thereof, are a sufficient reply to averments of pleas that the negligence of the operator of the automobile contributed to plaintiff's injury.⁴⁸ It is unnecessary,⁴⁹ but not improper,⁵⁰ to set up, by way of a replication, matters which could have been proved under the original counts without any replication, such as the negligence of the driver of the automobile after he saw plaintiff or deceased in a position of peril from which he could not escape.⁵¹

§ 508. Issues, Proof, and Variance

- a. Issues
- b. Proof
- c. Variance

a. Issues

In an action to recover damages caused by the operation of a motor vehicle, the issues are confined to those raised by the pleadings.

As in civil actions generally, in an action to recover damages caused by the operation of a motor vehicle, the issues are confined to those raised by the pleadings of the parties;⁵² the only matters in

51. Ala.—Gardiner v. Solomon, supra.

52. Colo.—Bragdon v. Hexter, 282 P. 568, 86 Colo. 435.

La.—Oliphant v. Town of Lake Providence, App., 193 So. 516, conforming to answers to certified questions 192 So. 95, 193 La. 675.
 Mo.—Anderson v. Kraft, App., 129 S.W.2d 85, certiorari quashed State ex rel. Anderson v. Hostetter, 140 S.W.2d 21, 346 Mo. 249.

Or.—Snyder v. Portland Traction Co., 185 P.2d 563.

Tenn.—Harbor v. Wallace, App., 211 S.W.2d 172—Zamora v. Shappley, 173 S.W.2d 721, 27 Tenn.App. 768.

Wis.—Maurer v. Fesing, 290 N.W. 191, 233 Wis. 565.

42 C.J. p 1198 note 62.

Pleadings held to raise issue

(1) In general.

Ark.—Ellis & Lewis v. Warner, 32 S.W.2d 167, 182 Ark. 613.

Iowa.—White v. McVicker, 259 N.W. 465, 219 Iowa 834.

Mo.—Allison v. Dittbrenner, App., 50 S.W.2d 199.

Or.—Heinrich v. Booth, 73 P.2d 696, 158 Or. 16.

Tex.—Morrison v. Antwine, Civ.App., 51 S.W.2d 820.

(2) Of contributory negligence.—Hicks v. Cramer, 277 P. 299, 85 Colo. 409.

(3) Of doctrine of respondeat superior.—May v. Yellow Cab Co., 114

issue are those alleged by plaintiff⁵³ and sufficiently denied by defendant⁵⁴ or new matter alleged by defendant⁵⁵ and controverted, or deemed to be controverted, by plaintiff.⁵⁶ An unnecessary allegation by plaintiff that he was free from negligence has been held to bring the issue of his negligence before the court regardless of defendant's pleading,⁵⁷ although it has also been held that such an allegation, being surplusage, does not put the defense of contributory negligence in issue.⁵⁸ No material issue is created by denial of immaterial allegations.⁵⁹

b. Proof

- (1) Matters to be proved
- (2) Evidence admissible under pleadings

(1) Matters to Be Proved

All material allegations which are properly put in issue and which are not admitted must be proved.

Plaintiff must prove every material allegation in issue that is necessary to establish his cause of action;⁶⁰ but he need not prove allegations in the pe-

So. 836, 164 La. 920, conformed to 8 La.App. 498.

(4) Of last clear chance.
Fla.—Dunn Bus Service v. McKinley, 178 So. 865, 130 Fla. 778.

Idaho.—McKinley v. Wagner, 170 P. 2d 796, 67 Idaho 104—Evans v. Davidson, 77 P.2d 661, 58 Idaho 600.

N.D.—Hausken v. Coman, 268 N.W. 430, 66 N.D. 633.

S.D.—Nielsen v. Richman, 299 N.W. 74, 68 S.D. 104.

Tex.—M. System Stores v. Davenport, Civ.App., 36 S.W.2d 243, error dismissed.

Wash.—Mosso v. E. H. Stanton Co., 134 P. 941, 75 Wash. 220, L.R.A. 1916A 943.

53. U.S.—Sugg v. Hendrix, C.C.A. Miss., 153 F.2d 240.

Colo.—Small v. Clark, 263 P. 933, 83 Colo. 211.

Mass.—Zarski v. Creamer, 59 N.E.2d 704, 317 Mass. 744—Foley v. John H. Bates, Inc., 4 N.E.2d 349, 295 Mass. 557.

Mo.—Krelitz v. Calcaterra, 33 S.W.2d 909—Galentine v. Borglum, 150 S.W.2d 1088, 235 Mo.App. 1141—Ellis v. Wolfe-Shoemaker Motor Co., 55 S.W.2d 309, 227 Mo.App. 508.

Or.—Hamilton v. Finch, 111 P.2d 81, 166 Or. 156.

Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.

Vt.—Landry v. Hubert, 137 A. 97, 100 Vt. 268.

42 C.J. p 1198 note 63.

Discovered peril

(1) In action for injuries sustained in collision between automobile and truck, pleading which omitted affirmative statement that plaintiff was in perilous position, that defendant discovered peril in time to have avoided collision by exercise of ordinary care, and that failure was proximate cause of collision, did not raise issue of discovered peril.—Cantu v. South Texas Transp. Co., Tex.Civ.App., 110 S.W.2d 995.

(2) Other allegations see 42 C.J. p 1198 note 63 [d].

Under general allegation of negligence

- (1) Inadequacy of equipment of an

automobile is in issue under a general allegation of negligent operation.—Hernandez v. Murphy, 115 P. 2d 565, 46 Cal.App.2d 201.

(2) Where ordinary negligence alone was alleged by occupant seeking to recover from driver's employer for injuries sustained when automobile crashed into wall, and there was complete lack of any allegation of facts constituting either willful or wanton misconduct as recognized by automobile guest statute, such issue could not be raised.—Kilgore v. U-Drive-It Co., Ohio App., 79 N.E.2d 785, affirmed 79 N.E.2d 908, 149 Ohio St. 505.

54. Mo.—McKissick v. Interstate Transit Lines, App., 201 S.W.2d 189.

Tex.—Lincoln v. Stone, Civ.App., 42 S.W.2d 128, reversed on other grounds, Com App.1933, 59 S.W.2d 100.

42 C.J. p 1198 note 64.

Negligence of plaintiff as proximate cause

Fla.—Fain v. Cartwright, 182 So. 302, 132 Fla. 855.

Relation of master and servant

Ill.—Connelly v. Schutte, 79 N.E.2d 79, 334 Ill.App. 227—Dennehy v. W. A. Wood Co., 2 N.E.2d 586, 285 Ill.App. 598.

42 C.J. p 1198 note 64 [a].

Under general denial or general issue

La.—Wright v. Texas & N. O. R. Co., App., 19 So.2d 894, rehearing denied 20 So.2d 558.

Ohio.—Augusta v. Paradis, 22 N.E.2d 578, 61 Ohio App. 323.

Tex.—Heard & Heard v. Kuhnert, Civ.App., 155 S.W.2d 817—Neely v. Woolley, Civ.App., 154 S.W.2d 973.

Flee of not guilty

Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

42 C.J. p 1198 note 64 [c].

55. Conn.—Vultz v. Orange Volunteer Fire Ass'n, 172 A. 220, 118 Conn. 307.

Mass.—Herman v. Gladofsky, 17 N.E. 2d 879, 301 Mass. 534.

42 C.J. p 1198 note 65.

Invocation of right of way statute raises fact issue whether man of reasonable prudence in position of person on left would reasonably have concluded that he could cross without danger.—Gendron v. Glidden, 148 A. 461, 84 N.H. 162.

Contributory negligence

Cal.—O'Dea v. Leland, 52 P.2d 510, 10 Cal.App.2d 551.

Idaho.—Dillon v. Brooks, 6 P.2d 851, 51 Idaho 510.

Kan.—Brugh v. Albers, 40 P.2d 380, 141 Kan. 223.

Tex.—Glazer v. Wheeler, Civ.App., 130 S.W.2d 353, reversed on other grounds Wheeler v. Glazer, 153 S.W.2d 449, 137 Tex. 341, 140 A.L.R. 1301.

56. Cal.—Kelley v. Hodge Transp. System, 242 P. 76, 197 Cal. 598.

Replication, alleging that printed instruction, averred in plea of contributory negligence to have appeared on truck causing minor plaintiff's injuries, was waived by defendant permitting others than driver to ride thereon, contrary to such instruction, presented no issuable fact.—Dupuis v. Heider, 152 So. 659, 113 Fla. 679.

57. U.S.—Levine v. Shell Eastern Petroleum Products, C.C.A.N.Y., 73 F.2d 292, certiorari denied 55 S. Ct. 545, 294 U.S. 719, 79 L.Ed. 1251.

58. La.—Althaus v. Toye Bros. Yellow Cab Co., App., 191 So. 717.

59. Ohio.—Green v. Silpher, 34 N.E.2d 254, 66 Ohio App. 396.

60. Ala.—Birmingham Ice & Cold Storage Co. v. Alley, 25 So.2d 37, 247 Ala. 503.

D.C.—Old Dominion Stages v. Connor, 90 F.2d 403, 67 App.D.C. 158.

Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Ill.—Keeshn v. Braubach, 30 N.E.2d 156, 307 Ill.App. 339—Kovell v. North Roseland Motor Sales, 275 Ill.App. 666.

La.—Gondolfo v. O'Berry, App., 12 So.2d 636—Fontenot v. Freudenstein, App., 199 So. 877—Toole v. Morris-Webb Motor Co., App., 195 So. 863.

Mich.—Hartley v. A. I. Rodd Lumber Co., 276 N.W. 712, 282 Mich. 652.

tion, declaration, or complaint which are immaterial,⁶¹ or surplusage,⁶² not essentially descriptive of a cause of action,⁶³ not the gravamen of the complaint,⁶⁴ or which are admitted by defendant either expressly or by a failure to deny.⁶⁵

An allegation that a vehicle was being operated as a joint business or enterprise of the owner and the driver does not require proof of joint operation in order to establish the owner's liability.⁶⁶ Where plaintiff has made two or more allegations of negligence or alleged two or more acts of negligence, it is necessary⁶⁷ and sufficient⁶⁸ for him to prove one of them. A pedestrian, injured in connection

with a collision of automobiles at a street intersection, is not bound to point out the exact way in which the accident occurred,⁶⁹ or to exclude the possibility that it might have happened in some manner other than that which he claims.⁷⁰ Where plaintiff has not alleged a willful or wanton injury, he must, in some jurisdictions, prove that he was exercising ordinary care for his own safety.⁷¹

(2) Evidence Admissible under Pleadings

- (a) In general
- (b) Evidence of statute or ordinance and violation thereof or rights thereunder

Mont.—McDonough v. Smith, 284 P. 542, 86 Mont. 545.

Pa.—Drazenovich v. Ernst, Com.Pl. 8 Sch.Reg. 206.

Tenn.—Central Produce Co. v. General Cab Co. of Nashville, 129 S.W.2d 1117, 23 Tenn.App. 209.

Tex.—Wilhite v. Horton, Civ.App. 116 S.W.2d 807—Robert Oil Corporation v. Garrett, Civ.App. 22 S.W.2d 508, affirmed, Com.App. 37 S.W.2d 135.

42 C.J. p 1198 note 69.

Matters to be proved

(1) In automobile accident case, where petition contained merely a general charge of negligence which was limited to nonobservance of duties relating to operation of defendants' automobile at time of accident, and defendants denied the general charge, plaintiff must establish every provable act of negligence under charges in petition—Clifton v. McMakin, 157 S.W.2d 85, 288 Ky. 806.

(2) Recovery cannot be had under automobile guest statute for death of guest passenger unless it is proved that defendant's misconduct was proximate cause of death.—Denton v. Midwest Dairy Products Corporation, 1 N.E.2d 807, 284 Ill.App. 279.

(3) One seeking to hold owner of automobile, driven by another with owner's consent, for damages on account of negligence, must prove such ownership.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.

(4) Relationship of owner and operator, if duly alleged and denied by special plea, must be proved as required by law.—McDougald v. Couey, 200 So. 391, 145 Fla. 689.

(5) Where action is brought on theory that defendant knowingly permitted habitually reckless driver to operate his automobile, plaintiff must prove that driver was reckless, and that such fact was known or should have been known to defendant.—Vanner v. Dalton, 159 So. 558, 172 Miss. 183.

61. Ind.—Schlarb v. Henderson, 4 N.E.2d 205, 211 Ind. 1.

Ohio—Green v. Slipper, 34 N.E.2d 254, 66 Ohio App. 396.

Vt.—Senecal v. Blleau, 189 A. 139, 108 Vt. 486.

42 C.J. p 1199 note 70.

Ownership of vehicle

In action for damages resulting from collision between automobile and bus, failure to prove ownership of bus was immaterial, where plaintiff relied on fact that driver was employed by bus company who would be answerable for driver's negligent operation within scope of his employment.—Ackerman v. Somerset Bus Co., 174 A. 343, 12 N.J.Misc. 660.

62. Cal.—Smith v. McLaughlin, 184 P.2d 177, 81 Cal.App.2d 460.

63. Mass.—Royal Steam Heater Co. v. Hilchey, 154 N.E. 335, 257 Mass. 512.

64. Cal.—Townsend v. Butterfield, 143 P. 760, 168 Cal. 564.

42 C.J. p 1199 note 72.

65. Md.—Gutierrez, on Behalf and to Use of Ring Engineering Co. v. Gorsuch, 8 A.2d 885, 177 Md. 109.

Ohio.—Cook v. Hunter, 3 N.E.2d 680, 52 Ohio App. 354.

Or.—Foster v. Farra, 243 P. 778, 117 Or. 286.

42 C.J. p 1199 note 73.

Extent of admissions

(1) In personal injury action against owner and operator of automobile and against insurance company employing him, failure of company, which denied allegation that automobile was under its control at time of accident, to deny further allegation that the employee was an agent in the operation of the automobile on behalf of the company would not preclude the company from contending that, in the operation of his automobile, the employee was not the servant of the company, or that employee was not acting within the scope of his employment.—Dunne v. Contenti, 4 N.Y.S.2d 148, 167 Misc. 925, affirmed 9 N.Y.S.2d 248, 256 App.Div. 833.

(2) Other admissions considered see 42 C.J. p 1199 note 73 [b].

General issue of husband and wife, improperly joined in action arising from wife's operation of automobile, did not admit joint operation of the automobile.—McHale v. McQuigg, 236 Ill.App. 295.

Contributory negligence

(1) Where plaintiffs in automobile accident case pleaded defendant's negligence, and defendant pleaded a general denial and contributory negligence, which was denied by plaintiffs, defendant, by pleading contributory negligence, did not admit his own negligence.—Seele v. Purcell, 113 P.2d 320, 45 N.M. 176—42 C.J. p 1199 note 73 [e] (2).

(2) However, there is also authority holding that a plea of contributory negligence constitutes an admission of negligence on the part of defendant.—Young v. Campbell, 177 P. 19, 20 Ariz. 71.

66. Ohio—Mavromates v. Hutchinson, 183 N.E. 291, 43 Ohio App. 365.

67. Mo.—Murphy v. Mack, App., 239 S.W. 595.

68. Ill.—Flickerle v. Herman Seekamp, Inc., 274 Ill.App. 310.

Or.—Pointer v. Osborne, 76 P.2d 1134, 158 Or. 573.

42 C.J. p 1199 note 75.

Gross negligence and intoxication

In action for injuries sustained by guest when host's automobile left road and overturned, where complaint alleged that guest was injured due to host's gross negligence and because of host's intoxication, guest's recovery did not require proof of intoxication, but merely required proof of either intoxication or gross negligence.—Pointer v. Osborne, supra.

69. Mass.—Fraser v. Flanders, 142 N.E. 836, 248 Mass. 62.

70. Mass.—Fraser v. Flanders, supra.

71. Ill.—Hanson v. Trust Co. of Chicago, 43 N.E.2d 931, 380 Ill. 194—O'Donnell v. Snyder, 231 Ill.App. 681.

(a) In General

As in civil actions generally, the evidence must be limited and confined to that admissible under the pleadings and bearing on the issues raised thereby.

The evidence received must be limited and confined to that admissible under the pleadings,⁷² and bearing on the issues raised by the pleadings.⁷³ An

72. La.—Shell v. Nelson, App., 161 So. 639—Folse v. Hannagriff & Edmondson, App., 127 So. 663, 14 La. App. 249.

Md.—Nelson v. Seiler, 139 A. 564, 154 Md. 63.

N.D.—Hausken v. Coman, 268 N.W. 430, 66 N.D. 633—Blackstead v. Kent, 247 N.W. 607, 63 N.D. 246.

Tex.—Highway Motor Freight Lines v. Slaughter, Civ.App., 84 S.W.2d 533.

Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

42 C.J. p 1199 note 80.

Averments held to admit proof

(1) In general.

U.S.—Braman v. Wiley, C.C.Ind., 119 F.2d 991—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

Cal.—Robertson v. Brown, 99 P.2d 288, 37 Cal.App.2d 189.

Colo.—Roltz v. Bonner, 35 P.2d 1015, 95 Colo. 350, followed in 35 P.2d 1019, first case, 95 Colo. 358, and 35 P.2d 1019, second case, 95 Colo. 359.

Ga.—Maner v. Dykes, 190 S.E. 189, 55 Ga.App. 436.

Ind.—Jones v. Cary, 37 N.E.2d 944, 219 Ind. 268—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 621—Terre Haute Union Transfer & Storage Co. v. Pickett, 15 N.E.2d 765, 106 Ind.App. 82, rehearing denied 16 N.E.2d 778, 106 Ind.App. 82.

Kan.—Blosser v. Wagner, 59 P.2d 37, 144 Kan. 318.

La.—Boland Mach & Mfg Co. v. Highway Ins Underwriters, App., 22 So.2d 307—Savole v. Walker, App., 183 So 530—Smith v. Silvio, App., 150 So. 38.

Md.—Miller v. Hall, 155 A. 327, 161 Md. 111.

Miss.—McLean v. Culpepper, 155 So. 344, 170 Miss. 239.

Mo.—Nash v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 570 N.J.—Hala v. Worthington, 31 A.2d 844, 130 N.J.Law 162.

Or.—Kitchel v. Gallagher, 270 P. 488, 126 Or. 378.

Pa.—Slother v. Jaffe, 51 A.2d 747, 356 Pa. 238.

S.D.—Alendal v. Madsen, 275 N.W. 562, 65 S.D. 502.

Vt.—Landry v. Hubert, 137 A. 97, 100 Vt. 268.

(2) Of condition of brakes, and of speed.

U.S.—Mid-Continent Pipe Line Co. v. Whiteley, C.C.A.Okl., 116 F.2d 871. Idaho.—Asumendi v. Ferguson, 65 P. 2d 713, 57 Idaho 450.

(3) Of negligence in parking without lights—Pfeiffer v. Schec, Mo. App., 107 S.W.2d 170—Ridenhour v. Oklahoma Contracting Co., Mo.App., 45 S.W.2d 108.

(4) Of relationship between driver and defendant.

Kan.—Revell v. Bennett, 176 P.2d 538, 162 Kan. 345.

La.—Truxillo v. De Lerno, App., 146 So. 71.

(5) Of consumption of intoxicating liquor by driver.

Tex.—Southwestern Bell Telephone Co. v. Ferris, Civ.App., 89 S.W.2d 229, error dismissed

Wash.—Shepard v. Smith, 88 P.2d 601, 198 Wash. 395.

Evidence of joint defendant

Where guests of motorist sued both motorist and truck driver with whom motorist collided, jointly, for injuries, evidence of truck driver placing the blame for accident on motorist is competent against motorist, whether such negligence was fully pleaded by the guests or not.—Jinks v. Currie, 188 A. 356, 324 Pa. 532.

Rebuttal evidence

In action against owner of motor vehicle for injuries to pedestrian, evidence that possession of motor vehicle had been secured from garage by discharged chauffeur by misrepresentation, and was being driven by another at time of accident, was held not incompetent as proof of unpleaded defense—Kimbles v. Kelly, 43 P.2d 871, 6 Cal.App.2d 91.

Under plea of plaintiff's sole negligence

La.—Nezat v. General Outdoor Advertising Co., App., 24 So.2d 482.

Plea of general issue

A plea of the general issue does not put in issue ownership and operation of defendant's car so as to permit evidence of ownership.—Tarka v. Pratt, 257 Ill.App. 403—Paterson v. Aitken, 244 Ill.App. 264—42 C.J. p 1199 note 80 [c].

Under general denial

(1) In action for injuries to guest in truck which collided with parked truck on highway, under defendant's general denial of all allegations which alleged that defendant's negligence was proximate cause of injury, defendant could show that injury was caused by anything else which included complete defense that, if guest had not exercised ordinary care to avoid injury, guest could not recover.—Donahoo v. Goldin, 7 S.E.2d 820, 61 Ga.App. 841.

(2) Fact that defendant motor vehicle driver had right of way of intersection may be shown under general denial.—Mann v. Woodward, 290 S.W. 333, 217 Ky. 491.

(3) The negligence of plaintiff's husband in driving motor vehicle in which plaintiff was riding, as sole cause of collision and injury, was not an "affirmative defense" and could be shown under general denial.—Easterly v. American Institute of Steel Construction, 162 S.W.2d 825, 349 Mo. 604.

(4) In action of guest in motor vehicle for injuries sustained when motor vehicle collided with defendant's bus which stopped on highway in front of motor vehicle, defendant under its general denial could show any facts tending to establish that it was not guilty of negligence charged.—Rishel v. Kansas City Public Service Co., Mo.App., 129 S.W.2d 851.

(5) Defendant could prove unavoidable accident under general denial—Schmoker v. French, Tex.Civ. App., 7 S.W.2d 177.

Pleading in short by consent

In action by passenger of motor vehicle against driver for injuries, where agreement to permit defendant to plead, in short, did not show that defendant would rely on defense of assumption of risk and evidence did not show defects in motor vehicle, or that plaintiff had knowledge of defects, such defense was not available to defendant.—Dunklin v. Hanna, 156 So. 768, 229 Ala. 242.

73. Ala.—Berry v. Dannelly, 145 So. 663, 226 Ala. 151.

La.—James v. J. S. Williams & Son, 150 So. 9, 177 La. 1033—Masarachia v. Inter-City Express Lines, App., 162 So. 221—Smith's Tutorship v. Perrin, App., 145 So. 685.

Mich.—Park v. Gaudio, 281 N.W. 665, 286 Mich. 133.

Mo.—Nyberg v. Wells, App., 14 S.W. 2d 529.

N.Y.—Parker v. Helfert, 252 N.Y.S. 35, 140 Misc. 905.

Tenn.—Kemp v. Caruthers, 11 Tenn. App. 201.

Wash.—Child v. Hill, 283 P. 1076, 155 Wash. 133.

Vt.—Milligan v. Clogston, 138 A. 739, 100 Vt. 455.

42 C.J. p 1199 note 81.

Evidence not material to issues

(1) In general.

Ala.—Townsend v. Adair, 134 So. 637, 228 Ala. 150.

Conn.—Brangi v. Marshall, 168 A. 21, 117 Conn. 675.

allegation of gross negligence does not preclude plaintiff from proving that he was not a guest.⁷⁴ In jurisdictions where general allegations of negligence are sufficient, any evidence tending to prove a general allegation of negligence is admissible.⁷⁵ On the other hand, the rule obtaining in negligence actions generally that, where specific acts constituting negligence are alleged, evidence of other acts of negligence is not admissible, is applicable in an action to recover damages for injuries occasioned by negligence in operating a motor vehicle;⁷⁶ but the rule is to be reasonably construed.⁷⁷ According to some decisions, where the general averment of negligence is followed by an enumeration and averment of specific acts of negligence, plaintiff's evidence will be confined to the acts of negligence specifically assigned.⁷⁸ Under a petition or complaint alleging negligence generally on the part of defendant, plaintiff may introduce evidence of negligence under the humanitarian rule,⁷⁹ even though he denies that he was guilty of contributory negli-

gence;⁸⁰ but he cannot do so where he has charged only specific acts of negligence.⁸¹

Evidence of lack of proper equipment on defendant's motor vehicle is admissible under a general allegation of negligence in driving a car upon a highway,⁸² as well as under allegations of negligence consisting of careless and reckless driving,⁸³ failure to keep a proper lookout for persons upon the highway,⁸⁴ failure to give notice or warning to persons traveling upon the street that the motor vehicle was standing in the street,⁸⁵ or a violation of an ordinance requiring lights on both the front and rear of the motor vehicle.⁸⁶

Even though lack of chains on defendant's motor vehicle is not specially pleaded, evidence relative thereto may be admitted as tending to show the care required of him in operating the automobile under the existing conditions.⁸⁷

Evidence of competency or incompetency of the driver or chauffeur of a motor vehicle is inadmissi-

Okl.—Yellow Taxicab & Baggage Co. v. Alsop, 52 P.2d 724, 175 Okl. 332.
Or.—Cano v. Zidell, 10 P.2d 365, 140 Or. 11, rehearing denied 12 P.2d 1118, 140 Or. 11.

(2) Evidence purporting to show that driver was under the influence of intoxicating liquor.

Del.—Law v. Gallagher, 197 A. 479, 9 W.W.Harr 189.

Tex.—Surkey v. Smith, Civ.App., 136 S.W.2d 893, error refused.

Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881.

(3) Evidence of custom.

Mo.—Christman v. Reichholdt, App., 150 S.W.2d 527.

Tex.—Huey & Philp Hardware Co. v. McNeil, Civ.App., 111 S.W.2d 1205, error dismissed.

Wash.—Wright v. Zido, 276 P. 642, 151 Wash. 486.

74. Or.—Albrecht v. Safeway Stores, 80 P.2d 62, 159 Or. 331.

75. Cal.—Fenstermacher v. Johnson, 32 P.2d 1106, 138 Cal.App. 691.

Colo.—Drumright v. Goldberg, 19 P.2d 764, 92 Colo. 271.

Conn.—Doerr v. Woodland Transp. Co., 136 A. 693, 105 Conn. 689.

Ga.—Batchelor v. Anglin, 13 S.E.2d 110, 64 Ga.App. 342.

Ill.—Schwartz v. Lindquist, 251 Ill. App. 320.

Ky.—Clifton v. McMakin, 157 S.W.2d 85, 288 Ky. 806—Diamond Taxicab Co. v. McDaniel, 80 S.W.2d 562, 258 Ky. 478—Hart v. Roth, 217 S.W. 893, 186 Ky. 535.

La.—Webb v. Dunn, App., 15 So.2d 129.

Md.—Parr v. Peters, 150 A. 34, 159 Md. 106.

Mo.—Miller v. W. E. Callahan Const. Co., App., 46 S.W.2d 948.

N.Y.—Gillman v. Grimm, 278 N.Y.S. 569, 154 Misc. 575.

Or.—Fiebigler v. Rambo, 284 P. 565, 132 Or. 115.

Pa.—Noakes v. Lattavo, 37 A.2d 711, 349 Pa. 463—Altman v. Kelly, 9 A.2d 423, 336 Pa. 481—McNulty v. Joseph Horne Co., 148 A. 105, 298 Pa. 244.

S.D.—Parger v. Chelpon, 243 N.W. 97, 60 S.D. 66.

42 C.J. p 1200 note 83.

Simple negligence

In action for death of motorist who was thrown from his motor vehicle when it overturned and was struck by defendant's motor vehicle, although count was in terms for simple negligence, it might be sustained by proving either primary or subsequent negligence.—Hofflinger v. Lane, 196 So. 720, 239 Ala. 659.

Intoxication

S.C.—Milhouse v. Stroud, 131 S.E. 619, 134 S.C. 17.

42 C.J. p 1200 note 83 [a].

76. Iowa.—Luther v. Jones, 261 N.W. 817, 220 Iowa 95.

Ky.—Malcolm v. Nunn, 10 S.W.2d 817, 226 Ky. 275.

Mont.—West v. Willson, 4 P.2d 469, 90 Mont. 522.

R.I.—Pontes v. United Electric Rys. Co., 170 A. 674, 54 R.I. 139.

42 C.J. p 1200 note 85.

77. Conn.—Mezzi v. Taylor, 120 A. 871, 99 Conn. 1.

Allegations held not controlling as specific

Minn.—Baufield v. Warburton, 233 N.W. 237, 181 Minn. 506.

78. Ky.—Lang v. Cooper, 90 S.W.2d

382, 262 Ky. 407—American Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 249 Ky. 8.

12 C.J. p 1200 note 87.

Allegations held not general within rule

Allegation that defendant's driver negligently drove across center line of highway and into ditch on opposite side thereof where plaintiff was located, running down plaintiff and causing specified injuries, did not constitute a general allegation of negligence.—Cherry v. Dealers Transport Co., D.C.Mo., 64 F.Supp. 682.

79. Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 307.

42 C.J. p 1200 note 89.

80. Mo.—Wittenberg v. Hyatt's Supply Co., App., 219 S.W. 686, overruling Hough v. St. Louis Car Co., 123 S.W. 83, 146 Mo.App. 58.

81. Mo.—Sculley v. Rolwing, App., 88 S.W.2d 394.

82. Cal.—Hernandez v. Murphy, 115 P.2d 565, 46 Cal.App.2d 201—Carnahan v. Motor Transit Co., 224 P. 143, 65 Cal.App. 402.

83. Conn.—Mezzi v. Taylor, 120 A. 871, 99 Conn. 1.

84. Conn.—Mezzi v. Taylor, supra.

85. Ohio.—Kronenberg v. Whale, 163 N.E. 302, 21 Ohio App. 322.

86. Ohio.—Kronenberg v. Whale, supra.

87. Mo.—Rettlia v. Salomon, 274 S.W. 366, 308 Mo. 673.

Wash.—Carlson v. Herbert, 203 P. 30, 118 Wash. 82.

ble where there is no allegation⁸⁸ or issue⁸⁹ relative thereto, or where, although there is an allegation of incompetency, it is immaterial.⁹⁰

Contributory negligence. Defendant in proving contributory negligence has been held to be entitled to introduce evidence only of such acts or omissions as he has specially pleaded;⁹¹ but it has also been held that, even where there is no plea of contributory negligence, it is competent for defendant to prove, as absolving himself from any imputation of negligence,⁹² that the accident was wholly due to plaintiff's fault and negligence⁹³ or was a mere accident for which no one was to blame.⁹⁴ Evidence to prove contributory negligence has been held admissible under a plea of the general issue,⁹⁵ and such evidence may be admitted under a pleading alleging in general terms that plaintiff's injuries were proximately caused solely by his own negligence.⁹⁶ Plaintiff is entitled to introduce evidence to overcome a defense of contributory negligence;⁹⁷ and it has been held not to be prejudicial error to allow plaintiff, on the question of contributory negligence, to testify to matters concerning which defendant

could not offer evidence.⁹⁸

(b) Evidence of Statute or Ordinance and Violation Thereof or Rights Thereunder

Evidence of negligence, consisting of violation of a statute or ordinance, is admissible under allegations of such a violation or, in a proper case, under a general allegation of negligence.

Negligence on the part of defendant may be proved by evidence of violation of a statute or ordinance⁹⁹ under an allegation of such a violation,¹ or even under a general allegation of negligence.² Also, under the general issue, defendant may introduce evidence of facts showing that he had the right of way under a statute;³ and in some jurisdictions evidence tending to show a violation of certain ordinances by plaintiff's driver is admissible under a general denial as establishing contributory negligence,⁴ or under an answer setting up contributory negligence.⁵ Excuse for failure to comply with a statute has been held admissible under a general denial.⁶ An ordinance is admissible on the issue of negligence⁷ where a violation thereof has been

88. Ga.—Orange Crush Bottling Co. v. Smith, 132 S.E. 259, 35 Ga.App. 92.

89. Ala.—Adler v. Martin, 59 So. 597, 179 Ala. 97.

42 C.J. p 1200 note 98.

90. Conn.—Black v. Hunt, 115 A 429, 96 Conn. 663.

42 C.J. p 1200 note 99.

91. La.—Quatray v. Wicker, 134 So. 313, 16 La App. 515.

Tex.—Yanowski v. Fort Worth Transit Co., Civ.App., 204 S.W.2d 1001.

42 C.J. p 1200 note 1.

Evidence held admissible

Testimony that decedent had been drinking beer immediately before motor vehicle accident was admissible under answer alleging that decedent was contributorily negligent in failing to keep proper lookout and to exercise reasonable care for his own safety.—Lynn v. Stinnette, 31 P. 2d 764, 147 Or. 105.

92. Mo.—Dignum v. Weaver, App., 204 S.W. 566.

93. Mo.—Geisendorf v. Brashear Truck Co., App., 54 S.W.2d 72—Dignum v. Weaver, App., 204 S.W. 566.

94. Mo.—Dignum v. Weaver, supra.

95. Ill.—Streeter v. Humrichouse, 191 N.E. 684, 357 Ill. 234.

96. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Daniel, Civ. App., 151 S.W.2d 877.

97. Cal.—Scott v. Gallot, 138 P.2d 685, 59 Cal.App.2d 421.

Iowa.—Haines v. Mahaska Bottling Works, 288 N.W. 70, 227 Iowa 228

La.—Rouillon v. Bonin, App., 2 So 2d 535, followed in Motty v. Bonin, 2 So.2d 541

Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 307.

Or.—Koski v. Anderson, 71 P.2d 1009, 157 Or. 349.

42 C.J. p 1200 note 5.

98. Mo.—Garvey v. Ladd, App., 266 S.W. 727

42 C.J. p 1200 note 6.

99. Mo.—Lenz v. Seibert, 259 S.W. 829—Dortch v. Reichel Motor Co., App., 223 S.W. 675.

42 C.J. p 1200 note 8.

Common-law action

The rule is applicable in a common-law action.—Hawley v. Rivolta, 41 A. 2d 104, 131 Conn. 540—42 C.J. p 1200 note 8 [a].

Violation of speed statute

Mich.—Grud v. Warren, 298 N.W. 276, 297 Mich. 546.

1. Cal.—Henry v. Lingsweiler, 253 P. 357, 81 Cal.App. 142.

42 C.J. p 1200 note 9.

2. Conn.—De Antonio v. New Haven Dairy Co., 136 A. 567, 105 Conn. 663.

Ga.—Hall v. Ponder, 179 S.E. 243, 50 Ga.App. 627.

Ill.—Scally v. Flannery, 11 N.E.2d 123, 292 Ill.App. 349.

Mo.—McPherson v. Premier Service Co., App., 38 S.W.2d 277.

42 C.J. p 1200 note 10.

3. Ky.—Mann v. Woodward, 290 S. W. 333, 217 Ky. 491.

4. Ind.—Horace F. Wood Transfer Co. v. Shelton, 101 N.E. 718, 180 Ind 273.

5. Mass.—Baggs v. Hirschfield, 199 N.E. 136, 293 Mass. 1.

Mo.—Collins v. Leahy, App., 102 S.W. 2d 801.

Ohio.—City of Cincinnati v. Bachmann, 199 N.E. 853, 51 Ohio App 108.

Vehicle not legally registered

Answer alleging plaintiff's contributory negligence opened defense of contributory negligence in permitting operation of plaintiff's motor vehicle without lawful registration, although answer did not set up want of legal registration.—Munson v. I'ay State Dredging & Contracting Co., 50 N.E. 2d 633, 314 Mass. 485—Burns v. Winchell, 25 N.E.2d 752, 305 Mass. 276—MacInnis v. Morrissey, 11 N.E.2d 472, 298 Mass. 505—MacDonald v. Boston Elevated Railway Co., 160 N. E. 327, 262 Mass. 475.

6. Iowa.—Townsend v. Armstrong, 280 N.W. 17, 220 Iowa 396.

7. Mo.—Dortsch v. Reichel Motor Co., App., 223 S.W. 675.

Ordinance held admissible

Resolution of police jury respecting operation of motor vehicles on bridge was not inadmissible for absence of allegation that it was in force and unrepealed, where allegation was not excepted to.—Lemoine v. Thomas, La.App., 157 So. 170.

Common-law allegation

Where there was no contention made in trial court that streets on

pleaded;⁸ but not where it is not relevant⁹ or applicable¹⁰ to the facts of the case. It is not error to exclude evidence of a violation of law where it is not contended that such violation contributed to the accident.¹¹ Where excessive speed is one of the acts of negligence pleaded, proof of violation of a special ordinance is some evidence of excessive speed with respect to the admissibility of the ordinance.¹² A motor vehicle statute of another state is not admissible in evidence when it is not pleaded.¹³ Where plaintiff brings his action under a statute, it has been held that he must confine his proof

to statutory negligence.¹⁴

c. Variance

In accordance with the general rules of pleading, there must be no material variance between the pleadings and the proof.

The general rules governing the question of variance between allegations and proof in similar actions are applicable in an action to recover damages caused by the negligent operation of a motor vehicle,¹⁵ but an immaterial variance does not prevent recovery.¹⁶ As in civil actions generally, the pe-

which motor vehicles, involved in intersectional collision, were traveling were boulevards or through streets, and plaintiff offered evidence that defendant was traveling thirty-five to forty miles per hour as he went through intersection, ordinance limiting speed through intersection to twenty miles per hour, except in case of through street or boulevard, was admissible as evidence that defendant was operating motor vehicle at negligent rate of speed, in support of common-law allegation of negligence contained in petition.—Hart v. Skeets, 145 S.W.2d 143, 346 Mo. 1118.

8. La.—Driefus v. Levy, App., 140 So. 259—Wolfe v. Toye Bros. Auto & Taxicab Co., 138 So. 453, 18 La. App. 321.

Mich.—Van Goosen v. Barlum, 183 N.W. 8, 214 Mich. 595.

Pleading defective in form did not preclude admission of evidence as to violation of ordinance.—Flynn v. Helena Cab & Bus Co., 21 P.2d 1105, 94 Mont. 204.

Existence of ordinance

In intersectional collision case, admission in evidence of traffic ordinance giving right of way to vehicle on right was not error, although certificate attached to ordinance was dated some eleven months before accident, in view of facts that state law was substantially identical with ordinance, and petition relied on state law as well as on ordinance.—Brooks v. Carver, 190 S.E. 389, 66 Ga.App. 362.

Number of ordinance

Where city had one traffic ordinance, an allegation that driver operated motor vehicle in violation of city traffic laws, without giving number of ordinance, was sufficient compliance with rules of pleading to admit ordinance in evidence.—Jones v. American Mut. Liability Ins. Co., La. App., 185 So. 509, annulled on other grounds 189 So. 169.

9. Or.—Hanna v. Royce, 249 P. 173, 419 Or. 450.
43 C.J. p 1201 note 15.

10. Ill.—Delehery v. Quinlan, 210 Ill.App. 321.

42 C.J. p 1201 note 16.

11. Mass.—Belleveau v. S. C. Lowe Supply Co., 86 N.E. 301, 200 Mass. 237.

12. Mo.—Lach v. Buckner, 86 S.W. 2d 954, 229 Mo.App. 1066.

13. R.I.—Commonwealth v. Martin, 125 A. 219.

14. Mo.—Dortch v. Reichel Motor Co., App., 223 S.W. 675.

15. Fla.—Engleman v. Traeger, 136 So. 527, 102 Fla. 756.

Mich.—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128.

42 C.J. p 1201 note 22.

Pleading and proof held not at variance

Cal.—Manica v. Smith, 33 P.2d 418, 138 Cal.App. 495.

Fla.—Gittleman v. Dixon, 4 So.2d 859, 148 Fla. 583.

Ill.—Summers v. Hendricks, 21 N.E. 2d 635, 300 Ill.App. 498—Rich v. Albrecht, 21 N.E.2d 633, 300 Ill. App. 493.

Mass.—Pochi v. Brett, 65 N.E.2d 195, 319 Mass. 197.

Mo.—Browne v. Creek, 209 S.W.2d 900—Kourik v. English, 100 S.W. 2d 901, 340 Mo. 367.

W.Va.—Utt v. Herold, 34 S.E.2d 357, 127 W.Va. 719.

Variance held material

Fla.—Engleman v. Traeger, 136 So. 527, 102 Fla. 756.

Ga.—Eastern Carolina Service Corporation v. Roberds, 157 S.E. 916, 43 Ga.App. 87.

Ill.—Buckley v. Mandel Bros., 164 N.E. 657, 333 Ill. 368—Robbins v. Illinois Power & Light Corporation, 255 Ill.App. 106—Maly v. landola, 249 Ill.App. 501.

La.—Lemoine v. Thomas, App., 157 So. 170.

N.C.—Whitchard v. Lipe, 19 S.E.2d 14, 221 N.C. 53, 139 A.L.R. 1147.

N.D.—Zimprich v. Coman, 234 N.W. 69, 60 N.D. 297.

42 C.J. p 1201 note 22 [a].

16. U.S.—Venuto v. Robinson, C.C. A.N.J., 118 F.2d 679, certiorari denied C. O. Raso, Agent, Inc. v.

Venuto, 62 S.Ct. 53, 314 U.S. 627, 86 L.Ed. 504.

Conn.—Keheley v. Uhl, 26 A.2d 357, 129 Conn. 30.

Ill.—Raimondi v. Ziffrin Truck Lines, 70 N.E.2d 221, 329 Ill.App. 650.

Ind.—Lindley v. Skidmore, 33 N.E. 2d 797, 109 Ind.App. 178.

Ky.—Watson v. Bailey, 132 S.W.2d 53, 279 Ky. 671.

Pa.—Jinks v. Currie, 188 A. 356, 324 Pa. 532.

S.C.—Le Gette v. Carolina Butane Gas Co., 43 S.E.2d 472, 210 S.C. 504.

Vt.—Senecal v. Bleau, 189 A. 139, 108 Vt. 486.

Variance held not material

Cal.—Beck v. Sirota, 109 P.2d 419, 42 Cal.App.2d 551—Lombera v. Union Paving Co., 38 P.2d 871, 3 Cal.App.2d 268.

Conn.—Tierney v. Correia, 180 A. 282, 120 Conn. 140—Lionetti v. Coppola, 161 A. 797, 115 Conn. 499.

Ga.—Trawick v. Chambliss, 156 S.E. 268, 42 Ga.App. 333.

Idaho.—Paris v. Burroughs Adding Mach. Co., 282 P. 72, 48 Idaho 310.

Ill.—Foale v. Linsky, 279 Ill.App. 58—Layton v. Ogonoski, 256 Ill. App. 461.

Ky.—Brady v. B. & B. Ice Co., 45 S.W.2d 1051, 242 Ky. 138—Consolidated Coach Corporation v. Phillips, 34 S.W.2d 722, 236 Ky. 823.

La.—Parker v. Baker Gasoline Co., 3 La.App. 711.

Mass.—Greenburg v. Gorvine, 181 N.E. 128, 279 Mass. 339.

Mich.—Barkman v. Montague, 298 N.W. 273, 297 Mich. 538—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128—Gaufrin v. Valind, 256 N.W. 335, 268 Mich. 289.

Miss.—Avent v. Tucker, 194 So. 596, 188 Miss. 207—Gower v. Strain, 145 So. 244, 169 Miss. 344.

Mo.—Counts v. Thomas, App., 63 S.W.2d 416—Trimble v. Yard, App., 41 S.W.2d 907—Bowles v. Eisenmayer, App., 23 S.W.2d 884—Powell v. Schofield, 15 S.W.2d 876, 223 Mo.App. 1041—Underwood v. Hall, App., 3 S.W.2d 1044.

Mont.—Kelly v. Lowney & Williams, 126 P.2d 486, 113 Mont. 385—Jones

tition and the answer are to be read together in determining whether there is a variance between the pleadings and proof.¹⁷ A variance may, in a prop-

er case, be cured by amendment of the pleading.¹⁸ Ordinarily, an objection to a variance must be timely interposed.¹⁹

3. EVIDENCE

§ 509. Presumptions and Burden of Proof

In an action to recover damages for injuries inflicted by a motor vehicle, the burden is on the plaintiff to establish each material fact which constitutes his cause of action.

The general rules relating to presumptions and burden of proof, particularly those which apply in

actions for negligence in general, ordinarily govern and control the presumptions and burden of proof in an action for injuries caused by a motor vehicle.²⁰ In accordance with such rules, the burden ordinarily is on plaintiff to establish each material fact which constitutes his alleged cause of action,²¹

v. Northwestern Auto Supply Co., 18 P.2d 305, 93 Mont. 224—Burns v. Eminger, 261 P. 613, 81 Mont. 79.

N.M.—Mayfield v. Crowder, 35 P.2d 291, 38 N.M. 471.

N.C.—Harper v. Harper, 34 S.E.2d 185, 225 N.C. 260.

Ohio.—Ruffo v. Randall, 52 N.E.2d 750, 72 Ohio App. 396.

Pa.—Obenauer v. Hunter, 89 Pa.Super.Ct. 204—Young v. Quaker City Cab Co., 87 Pa.Super. 294—Rhoades v. Terminal Warehouse Co., 10 Pa. Dist. & Co. 522.

R.I.—Maher v. Concannon, 185 A. 907, 56 R.I. 395.

Tenn.—Mason v. James, 89 S.W.2d 910, 19 Tenn.App. 479.

Tex.—Williams v. Creighton, Civ. App., 93 S.W.2d 195.

Wash.—Child v. Hill, 283 P. 1076, 155 Wash. 133.

Va.—Lipscomb v. O'Brien, 25 S.E.2d 261, 181 Va. 471.

42 C.J. p 1201 note 22 [b].

17. Ga.—Mann v. Harmon, 8 S.E.2d 549, 62 Ga.App. 231.

18. Ind.—Lindley v. Skidmore, 33 N.E.2d 797, 109 Ind.App. 178.

Me.—Hill v. Janson, 31 A.2d 236, 139 Me. 344.

19. Ala.—Hill v. Almon, 141 So. 625, 224 Ala. 658.

20. Ind.—Lathrop v. Frank Bird Transfer Co., 142 N.E. 868, 81 Ind. App. 549.

Me.—Lyons v. Jordan, 102 A. 976, 117 Me. 117.

"Burden of proof", in a case involving negligence and contributory negligence in automobile collision, means merely the obligation resting upon a party to prove an allegation.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.

Operation of statute

Statute relating to presumptions and burden of proof amended after automobile accident but before trial was one of applicable rules of evidence.—Randall v. Evans, 41 P.2d 561, 4 Cal.App.2d 575.

Rule in cases involving dangerous instrumentalities

The general rule in cases involv-

ing dangerous instrumentalities that the duty devolves on defendant to introduce proof to rebut any unfavorable inferences which might be deduced from facts in evidence does not apply in cases involving automobiles—Elmore v. Thompson, 14 Tenn.App. 78.

Performance of official duty presumed

Cal.—Collard v. Love, 61 P.2d 458, 17 Cal.App.2d 72.

Motorist is presumed to have been conscious and aware of his conduct

Tenn.—Richards v. Parks, 93 S.W.2d 639, 19 Tenn.App. 615.

21. Ala.—International Harvester Co. v. Williams, 133 So. 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595—Ray v. Terry, 28 So. 2d 916, 32 Ala.App. 582, certiorari dismissed, 28 So.2d 918, 248 Ala. 640.

Cal.—Isaacs v. City and County of San Francisco, 167 P.2d 221, 73 Cal. App.2d 621—Curry v. Williams, 293 P. 623, 109 Cal.App. 649.

Fla.—De Salvo v. Curry, 33 So.2d 215—Rassett v. Edwards, 30 So.2d 374, 158 Fla. 848—Powell v. Wilson Lumber Co. of Florida, 155 So. 116, 115 Fla. 13.

Ill.—Tennes v. Tennes, 50 N.E.2d 132, 320 Ill.App. 19—Painter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill.App. 557.

Ind.—Bates Motor Transport Lines v. Mayer, 14 N.E.2d 91, 213 Ind. 664.

Ky.—Spencer's Adm'r v. Fisel, 71 S.W.2d 955, 254 Ky. 503.

La.—Kruta v. Gibbon, App., 21 So.2d 744—Anderson v. Struve, App., 152 So. 814—Baden v. Globe Indemnity Co., App., 146 So. 784—Connors v. Houma Packing Co., 125 So. 294, 12 La.App. 167—Wald v. Board of Com'rs of Port of New Orleans, 124 So. 701, 14 La.App. 337—Plick v. Tusa, 124 So. 678, 14 La.App. 330—Thomas v. Natural Gas Producing Co. of Louisiana, 121 So. 649, 9 La.App. 680—Middleton v. Jordan, 120 So. 668, 10 La.App. 189.

Me.—Elliott v. Montgomery, 197 A.

322, 135 Me. 372—Chaisson v. Williams, 156 A. 154, 130 Me. 341.

Md.—Baltimore Transit Co. v. Young, 56 A.2d 140.

Mich.—Collar v. Maycroft, 264 N.W. 407, 274 Mich. 376.

Mo.—Cook v. Day, 172 S.W.2d 648—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104.

N.J.—Cella v. Roth, 174 A. 703, 113 N.J.Law 458.

Ohio.—Tighe v. Diamond, 80 N.E.2d 122, 149 Ohio St. 520—Hopkins v. Kissinger, 166 N.E. 918, 31 Ohio App. 229.

Tex.—Comet Motor Freight Lines v. Holmes, Civ.App., 175 S.W.2d 464, error refused—Ruggl's v. John Deere Plow Co., Civ.App., 146 S.W.2d 456, error refused—Owl Taxi Service v. Saludis, Civ.App., 122 S.W.2d 225, error dismissed.

Va.—Brown v. Parker, 189 S.E. 339, 167 Va. 286.

Wash.—Wappenstein v. Schrepel, 142 P.2d 897, 19 Wash.2d 371.

42 C.J. p 1202 note 48.

Facts not material to plaintiff's cause of action need not be proved by him—Sheehan v. Gorlansky, 56 N.E.2d 883, 317 Mass. 10—Gartland v. Freeman, 178 N.E. 732, 277 Mass. 520.

Nongovernmental function

In action against city for injuries received when relief worker was thrown from city's truck being used to haul wood for maintenance and operation of city's almshouse and farm, worker had burden to prove that operation and maintenance of institution constituted enterprise partly commercial in character and productive of profit or corporate benefit to city.—Orlando v. City of Brockton, 3 N.E.2d 794, 295 Mass. 205.

Venue

Where owners who resided in Lampasas County were sued in Bastrop County for personal injuries to plaintiff because of defendant owners' negligent operation of truck in Bastrop County, plaintiff as requisite to action in Bastrop County had duty to prove by competent evidence affirmative negligent act in Bastrop

such as to show the fact of the accident²² and the details thereof,²³ that it resulted from the particular cause contended for by him where it might have resulted from several causes,²⁴ that defendant or one for whose conduct he is responsible was guilty of negligence or other misconduct, as discussed *infra* § 511, that such negligence or misconduct was the proximate cause of the injury complained of, discussed *infra* § 510, that plaintiff suffered some injury or damage,²⁵ the extent of such injuries,²⁶ and the amount of the damages.²⁷

The burden of proof in respect of the material facts which constitute plaintiff's alleged cause of action does not shift,²⁸ although the burden of evidence may, from time to time, shift.²⁹ Thus, where plaintiff makes out a *prima facie* case, the burden of going forward with the evidence shifts to de-

fendant,³⁰ but no duty rests on defendant to explain his connection with an accident until plaintiff has proved a *prima facie* case against him.³¹

Affirmative defenses and counterclaims. The burden is on defendant to establish matters of affirmative defense³² and the allegations of his cross complaint.³³

§ 510. — Proximate Cause of Injury

The burden is generally on the plaintiff to show that the negligence or other misconduct of the defendant was the proximate cause of the injury.

The burden of showing that the negligence or other misconduct of defendant was the proximate cause of the injury complained of is generally on plaintiff,³⁴ and ordinarily it will not be presumed that the misconduct of defendant was the cause of

County.—Stokes Bros. v. Thornton, Tex.Civ.App., 91 S.W.2d 756.

Service on nonresident

In action for injuries arising out of an automobile accident wherein defendants are served by leaving copies of summons and complaint with director of motor vehicles, on theory that defendants are nonresidents within statute, burden is on plaintiff, when such service is challenged, but plaintiff need not necessarily offer evidence if the facts stated in defendants' affidavits support plaintiff's contention.—Briggs v. Superior Court of Alameda County, 183 P.2d 758, 81 Cal.App.2d 240

22. Ky.—Willis v. Harbell Coach Co., 47 S.W.2d 1030, 243 Ky. 262. La.—Davis v. Texas Lumber Co., App., 146 So. 788.

Pa.—Martin v. Marateck, 27 A.2d 42, 345 Pa. 103—Hulmes v. Keel, 6 A.2d 64, 335 Pa. 117.

Va.—Sanders v. Newsome, 19 S.E.2d 883, 179 Va. 582. 42 C.J. p 1204 note 79.

23. La.—Lee v. Coulon, App., 180 So. 182.

Mo.—Carlson v. Kansas City, etc., Auto Transit Co., 282 S.W. 1037, 221 Mo.App. 537.

N.Y.—Carp v. Wilson, 9 N.Y.S.2d 90, 256 App.Div. 165, affirmed 24 N.E.2d 992, 282 N.Y. 579.

Pa.—Martin v. Marateck, 27 A.2d 42, 345 Pa. 103—Lithgow v. Lithgow, 5 A.2d 573, 334 Pa. 262.

Place where accident occurred

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

24. Va.—Kendricks v. Norfolk, 124 S.E. 210, 139 Va. 702—Hicks v. Romaine, 82 S.E. 71, 116 Va. 401. Defendant's negligence or wrong as proximate cause see *infra* § 510.

25. Ky.—Myers v. Salyer, 137 S.W.2d 158, 277 Ky. 696. 42 C.J. p 1205 note 82.

Both injury and damage must be proved

Pa.—Rosenthal v. Carson, 27 A.2d 499, 149 Pa.Super. 428.

26. Mo.—Young v. Bacon, App., 183 S.W. 1079.

27. Ariz.—Young v. Campbell, 177 P. 19, 20 Ariz. 71. 42 C.J. p 1203 note 56.

Presumption as to damages

Although damages, beyond nominal damages, must be proved and cannot be presumed in action for negligence, proof of actual damages was not essential to maintenance of action for damage caused by automobile collision which defendant admitted was his fault, since proof of actual damage is not an element of a cause of action for negligence.—Edwards v. Ely, 47 N.E.2d 344, 317 Ill.App. 599.

28. Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379. Mo.—Rath v. Knight, 55 S.W.2d 682. N.Y.—Barber v. Jewel Tea Co., 300 N.Y.S. 302, 252 App.Div. 362, affirmed 16 N.E.2d 94, 278 N.Y. 540. Tenn.—Hansard v. Ferguson, 132 S.W.2d 221, 23 Tenn.App. 306. 42 C.J. p 1203 note 57.

29. Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 285 Ky. 841. 42 C.J. p 1203 note 58.

30. Ky.—R. L. Jeffries Truck Line v. Brown, 197 S.W.2d 904, 303 Ky. 405.

31. Tex.—Comet Motor Freight Lines v. Holmes, Civ.App., 175 S.W.2d 464, error refused.

32. Fla.—Union Bus Co. v. Matthews, 192 So. 811, 141 Fla. 99. S.C.—McCabe v. Sloan, 191 S.E. 905, 184 S.C. 158.

Tex.—Willis v. Smith, Civ.App., 120 S.W.2d 899, error dismissed.

Wash.—Skates v. Conniff, 280 P. 15, 153 Wash. 538.

42 C.J. p 1203 note 59.

Inevitable or unavoidable accident

(1) Plea of unavoidable accident does not put burden of proof on defendant.

Ky.—Humphries v. Gray, 203 S.W.2d 8, 305 Ky. 205.

Tex.—Sullins v. Pace, Civ.App., 208 S.W.2d 583.

(2) Defendant, asserting inevitable accident as affirmative defense, had burden of proving inevitable accident.—State Compensation Insurance Fund v. Lamb, 273 P. 1080, 96 Cal.App. 236.

Immunity from liability

Officer of volunteer wartime organization claiming statutory immunity from liability for death of driver of another automobile with which he collided while proceeding to city hall in response to order of superior officer and air raid warnings had the burden of proving that he was in good faith attempting to comply with order at time of collision.—Jankowski v. Welch, 52 A.2d 771, 135 N.J.Law 437.

33. Wash.—Skates v. Conniff, 180 P. 15, 153 Wash. 538.

Wis.—Frankland v. De Broux, 28 N.W.2d 256, 251 Wis. 210.

Demand in reconvention

La.—Heath v. Baudin, 122 So. 726, 11 La.App. 40.

34. U.S.—Railway Express Agency v. Finn, C.C.A.Mass., 124 F.2d 892 —Doggett v. Peek, C.C.A.Tex., 116 F.2d 273—McLean v. Donoghue Transp. Co., C.C.A.Me., 97 F.2d 356 —Proel v. Nugent, C.C.A.N.H., 97 F.2d 853—Ryan-Richards, Inc., v. Whitesides, C.C.A.Okl., 96 F.2d 826 —Wright v. Wilson, D.C.Pa., 64 F.Supp. 694, affirmed, C.C.A., 154 F.2d 616, 170 A.L.R. 1237, certiorari denied Wright v. Lohr, 67 S.

- Ot. 50, 329 U.S. 743, 91 L.Ed. 640—O'Hara v. Dodge Bros., D.C.Nev., 35 F.Supp. 792.
- Ala.—Britt v. Daniel, 159 So. 684, 230 Ala. 79—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala.App. 179, certiorari denied 156 So. 865, 229 Ala. 278.
- Cal.—Farmer v. Fairbanks, 162 P.2d 26, 71 Cal.App.2d 70—Noble v. Key System, 51 P.2d 887, 10 Cal.App.2d 132—Morris v. Morris, 258 P. 616, 84 Cal.App. 599.
- Colo.—Denver-Los Angeles Trucking Co. v. Ward, 164 P.2d 730, 114 Colo. 343.
- Conn.—Farquhar v. Larson, 186 A. 498, 121 Conn. 709—Williams v. Smith, 181 A. 622, 120 Conn. 521—Montagna v. Jewell, 175 A. 570, 119 Conn. 178—Anderson v. Colucci, 163 A. 610, 116 Conn. 67—Bryll v. Bryll, 159 A. 884, 114 Conn. 668—Genishevsky v. Fishbone, 145 A. 54, 109 Conn. 58.
- Del.—Lynch v. Lynch, 195 A. 799, 9 W.W.Harr. 1—Elliott v. Camper, 194 A. 130, 8 W.W.Harr. 504.
- D.C.—Jackson v. Capital Transit Co., Mun.App., 38 A.2d 108, affirmed 149 F.2d 839, 80 U.S.App.D.C. 162, 161 A.L.R. 1110, certiorari denied 66 S.Ct. 143, 326 U.S. 762, 90 L.Ed. 459.
- Fla.—Babcock v. Flowers, 198 So. 326, 144 Fla. 479.
- Ga.—Gossett v. Kraft Phenix Cheese Corporation, 198 S.E. 298, 58 Ga. App. 265.
- Ill.—Ripke v. Bernstein, 76 N.E.2d 352, 332 Ill.App. 658—Wolfe v. Railway Exp. Agency, 62 N.E.2d 564, 326 Ill.App. 515—Szalachala v. Landsman, 60 N.E.2d 643, 325 Ill. App. 691—Tennet v. Tennes, 50 N.E.2d 132, 320 Ill.App. 19—Johnson v. Mueller, 41 N.E.2d 125, 314 Ill. App. 204—Engstrom v. Olson, 248 Ill.App. 480.
- Ind.—Montgomery v. Polk Milk Co., App., 79 N.E.2d 108—Pontiac-Chicago Motor Exp. Co. v. George Cassons & Son, 34 N.E.2d 171, 109 Ind.App. 248.
- Iowa.—Welch v. Greenberg, 14 N.W. 2d 286, 235 Iowa 159—McDonald v. Dodge, 1 N.W.2d 230, 231 Iowa 325—Murchland v. Jones, 279 N.W. 382, 225 Iowa 149—Reimer v. Muesel, 264 N.W. 47, 220 Iowa 1095—Westenburg v. Johnson, 264 N.W. 18, 221 Iowa 134—Shannahan v. Borden Produce Co., 263 N.W. 39, 220 Iowa 702—Harvey v. Knowles Storage & Moving Co., 244 N.W. 660, 215 Iowa 35.
- Kan.—Waugh v. Kansas City Public Service Co., 143 P.2d 788, 157 Kan. 690—Jacobs v. Hobson, 79 P.2d 841, 148 Kan. 107—Crowe v. Moore, 62 P.2d 846, 144 Kan. 794.
- Ky.—Myers v. Salyer, 127 S.W.2d 158, 277 Ky. 696—Consolidated Coach Corporation v. Bryant, 86 S.W.2d 88, 260 Ky. 452.
- La.—Tucker v. Snyder, App., 30 So. 2d 160—Perret v. Toye Bros. Yellow Cab Co., App., 20 So.2d 377—Ellis v. Edwards, App., 183 So. 116—Thibodeaux v. Star Checker Cab Co., App., 143 So. 101—Hennessy v. Daigle, 123 So. 900, 11 La.App. 474—Romano v. Davidson, 128 So. 411, 11 La.App. 286.
- Me.—Barlow v. Lowery, 59 A.2d 702—Elliott v. Montgomery, 197 A. 322, 135 Me. 372.
- Md.—Baltimore Transit Co. v. Young, 56 A.2d 140—Finney v. Frevel, 37 A.2d 923, 183 Md. 355—Gloyd v. Willis, 23 A.2d 665, 180 Md. 161—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299—Slaysman v. Gerst, 150 A. 728, 159 Md. 292—Sudbrook v. State, 138 A. 12, 153 Md. 194.
- Mass.—Savin v. Block, 9 N.E.2d 536, 297 Mass. 487—Caverno v. Houghton, 1 N.E.2d 4, 294 Mass. 110—Clark v. C. E. Fay Co., 183 N.E. 423, 281 Mass. 240—Marlow v. Dike, 168 N.E. 154, 269 Mass. 38.
- Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—Mitchell v. Stroh Brewery Co., 15 N.W.2d 144, 309 Mich. 231—Hazen v. Rockefeller, 8 N.W.2d 770, 303 Mich. 536—Valenti v. Mayer, 4 N.W.2d 5, 301 Mich. 551—Benedict v. Rinna, 241 N.W. 200, 257 Mich. 349.
- Minn.—White v. Cochrane, 249 N.W. 328, 189 Minn. 300.
- Mo.—Schroeder v. Rawlings, 155 S.W.2d 189, 348 Mo. 824—Gardner v. Turk, 123 S.W.2d 158, 343 Mo. 899—Vanausdall v. Schorr, App., 168 S.W.2d 110—Saunders v. Pruc, 151 S.W.2d 478, 235 Mo.App. 1245—Kneezle v. Scott County Milling Co., App., 113 S.W.2d 817—Miller v. Wilson, App., 288 S.W. 997.
- Mont.—Cowden v. Crippen, 53 P.2d 98, 101 Mont. 187—Johnson v. Herring, 300 P. 535, 89 Mont. 420.
- Neb.—Tews v. Ramrick, 26 N.W.2d 499, 148 Neb. 59—Miller v. Abel Const. Co., 300 N.W. 406, 140 Neb. 482—Bixby v. Ayers, 298 N.W. 533, 139 Neb. 652—In re O'Byrne's Estate, 277 N.W. 74, 133 Neb. 750.
- Nev.—Nyberg v. Kirby, 188 P.2d 1006, rehearing denied 193 P.2d 850.
- N.J.—Wisniewski v. Weinstock, 50 A. 2d 894, 135 N.J.Law 202.
- N.Y.—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App. Div. 1007—Tryon v. Willbank, 255 N.Y.S. 27, 234 App.Div. 335—Bush v. Goodno, 251 N.Y.S. 271, 233 App. Div. 152, affirmed 182 N.E. 171, 259 N.Y. 538—Higgins v. Mason, 243 N.Y.S. 630, 230 App.Div. 149, affirmed 174 N.E. 77, 255 N.Y. 104—Burkes v. Lieberman, 218 N.Y.S. 593, 218 App.Div. 600, affirmed 187 N.E. 865, 245 N.Y. 579—Franklin v. Marsh, 218 N.Y.S. 155, 218 App. Div. 220.
- N.C.—Cole v. Asheville Funeral Home, 176 S.E. 553, 207 N.C. 271—Dempster v. Fite, 167 S.E. 33, 203 N.C. 697—Rountree v. Fountain, 166 S.E. 329, 203 N.C. 381—Jeffrey v. Osage Mfg. Co., 150 S.E. 503, 197 N.C. 724, followed in Lewis v. Basketaria Stores, 161 S.E. 924, 201 N.C. 849.
- N.D.—Anderson v. Anderson, 285 N.W. 294, 69 N.D. 229—Stockfeld v. Sayre, 283 N.W. 788, 69 N.D. 42.
- Ohio—Tighe v. Diamond, 80 N.E.2d 122, 149 Ohio St. 520—Augusta v. Paradise, 23 N.E.2d 578, 61 Ohio App. 323.
- Okl.—O'nnelly v. Loub, 38 P.2d 555, 169 Okl. 627.
- Or.—Maneff v. Lamer, 54 P.2d 287, 152 Or. 619—Ross v. Willamette Valley Transfer Co., 248 P. 1088, 119 Or. 395.
- Pa.—Martin v. Marateck, 27 A.2d 42, 345 Pa. 103—Wenhold v. O'Dea, 12 A.2d 115, 338 Pa. 33—Circuitella v. C. C. Callaghan, Inc., 200 A. 588, 331 Pa. 465—Pfendler v. Specr, 185 A. 618, 323 Pa. 443—Stark v. Fullerton Trucking Co., 179 A. 84, 318 Pa. 541—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537—Valley Motor Transit Co. v. Allison, 33 A.2d 485, 153 Pa.Super. 221—Rosenfeld v. Stauffer, 182 A. 714, 121 Pa.Super. 103—Goldenberg v. Philadelphia Rural Transit Co., 170 A. 360, 112 Pa.Super. 163—Ebey v. Schwartz, 158 A. 291, 104 Pa.Super. 181.
- R.I.—Randall v. Holmes, 31 A.2d 17, 69 R.I. 41.
- S.D.—Christensen v. Krueger, 278 N.W. 171, 66 S.D. 66—Stalb v. Tarbell, 273 N.W. 652, 65 S.D. 304.
- Tenn.—Richards v. Parks, 93 S.W.2d 639, 19 Tenn.App. 615.
- Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, Com.App., 7 S.W.2d 521—Ruggles v. John Deere Plow Co., Civ.App., 146 S.W.2d 456, error refused—Sproles Motor Freight Lines v. Juge, Civ.App., 123 S.W.2d 919, error dismissed, judgment correct—Burks v. Dallas Ry. & Terminal Co., Civ.App., 116 S.W.2d 884—Gersdorf-Sloan Ambulance Service v. Kenty, Civ.App., 46 S.W. 2d 469.
- Va.—Mausser v. Hebb, 48 S.E.2d 257, 187 Va. 876—Dinges v. Hannah, 40 S.E.2d 179, 185 Va. 744—Cooke v. Griggs, 33 S.E.2d 764, 183 Va. 851—Williams v. Greene, 26 S.E.2d 89, 181 Va. 707—Sanders v. Newsome, 19 S.E.2d 883, 179 Va. 583—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.
- Vt.—Johnson v. Burke, 183 A. 495, 108 Vt. 164.
- Wash.—Paddock v. Tons, 173 P.2d 481, 25 Wash.2d 940—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354.
- Wis.—Jensen v. Jensen, 279 N.W. 628, 228 Wis. 77.

the injury.³⁵ Where, however, defendant relies on the defense that the negligence of one other than himself was the proximate cause of the accident, it has been held that the burden of proof in that respect is on defendant,³⁶ but it has been held that setting up the negligence of another does not affect the burden of proof as to defendant's negligence being the proximate cause.³⁷ Where there is a presumption of negligence under the doctrine of *res ipsa loquitur* or by reason of the violation of a statute or regulation or a rule of the road, it has been held that the burden is on defendant to establish that his fault was not the cause of the injury,³⁸ but there is also authority for the view that the burden is still on plaintiff to show that the wrong complained of was the proximate cause of the injury.³⁹

§ 511(1). — Negligence or Other Wrong of Defendant in General

In an action for injuries arising from the operation of a motor vehicle, as a general rule negligence will not be presumed but must be proved, although negligence may be inferred from the facts and circumstances of the accident.

In an action for injuries arising from the operation of a motor vehicle, negligence is a fact which, as a general rule, will not be presumed but which must be proved.⁴⁰ Negligence, however, may be established by circumstantial evidence, and the facts and circumstances of a particular accident may be such as to warrant an inference or presumption of negligence,⁴¹ and it will be presumed as bearing on the negligence of the driver of a motor vehicle that

Wyo.—O'Mally v. Eagan, 2 P.2d 1063, 43 Wyo. 233, 77 A.L.R. 582, rehearing denied O'Malley v. Eagan, 5 P.2d 276, 43 Wyo. 350.
42 C.J. p 1203 note 61.

Existence of other causes

Plaintiff need not disprove the existence of all other possible causes.—Brenahan v. Manchester Coal & Ice Co., 188 A. 10, 88 N.H. 273.

Presumption of lack of contributory negligence does not affect plaintiff's burden of proving that defendant's conduct was the proximate cause of the injury.—LeBlanc v. Grillo, 28 A.2d 127, 129 Conn. 378.

35. Mo.—Bibb v. Grady, App., 231 S.W. 1020.
42 C.J. p 1203 note 62.

Concurrent cause

Where defendant's fault concurred with another cause to effect the injury, the burden is on defendant to establish that his fault was not the proximate cause.—Cummings v. Kendall, 107 P.2d 282, 41 Cal.App.2d 549.

36. U.S.—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.
Ill.—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265.
Iowa.—Johnson v. McVicker, 247 N.W. 488, 216 Iowa 654.
Or.—Ross v. Willamette Valley Transfer Co., 248 P. 1088, 119 Or. 395.
Tex.—Dodd v. Burkett, Civ.App., 160 S.W.2d 1016, error refused.

37. Ohio.—Montanari v. Haworth, 140 N.E. 319, 108 Ohio St. 8.
42 C.J. p 1203 notes 64, 73 [h].

38. Colo.—Seeing Denver Co. v. Morgan, 185 P. 339, 66 Colo. 565.
Ky.—Moore v. Hart, 188 S.W. 861, 171 Ky. 725.
La.—Miller v. Hayes, App., 29 So.2d 396.—Watson v. Hightower, App., 181 So. 612.—Armour & Co. v. Hicks Co., 188 So. 676, 18 La.App. 504.—Ford, Bacon & Davis v. Shaw,

8 La.App. 751.—Frierson v. Shreveport Grocery Co., 3 La.App. 44.
42 C.J. p 924 note 64.

Violation of statute presumed to cause injury

Me.—Coombs v. Markley, 143 A. 261, 127 Me. 335.
S.C.—Tinsley v. Parris, 178 S.E. 496, 174 S.C. 412.
Wash.—Zurduh v. Lewis County, 91 P.2d 1002, 199 Wash. 378.—Olson v. Rose, 151 P.2d 454, 21 Wash.2d 464.

39. U.S.—Blaszky v. Eastern Auto Forwarding Co., C.C.A.N.Y., 134 F.2d 600.—Cram v. Eveloff, C.C.A. Minn., 127 P.2d 486.

Ala.—Rochelle v. Lide, 180 So. 257, 235 Ala. 596.

Colo.—Hertz Drive-Your-Self System of Colorado v. Hendrickson, 121 P.2d 483, 109 Colo. 1.

Me.—Elliot v. Montgomery, 197 A. 322, 135 Me. 372.

Md.—Askin v. Long, 6 A.2d 246, 176 Md. 545.

Miss.—Whately v. Boolas, 177 So. 1, 180 Miss. 372.

Mo.—Huger v. Doerr, App., 170 S.W.2d 689.—Svehla v. Taxi Owners Ass'n, App., 157 S.W.2d 225.—Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo.App. 380.

Mont.—Autio v. Miller, 11 P.2d 1039, 92 Mont. 150.

N.C.—Conley v. Pearce-Young-Angel Co., 29 S.E.2d 740, 224 N.C. 211.

Pa.—Green v. Gantz, Com.Pl., 31 Del. Co. 476.

S.C.—Leek v. New South Express Lines, 7 S.E.2d 459, 192 S.C. 527.

Tex.—Ruggles v. John Deere Plow Co., Civ.App., 146 S.W.2d 456, error refused.

Va.—Hamilton v. Glemming, 46 S.E.2d 438, 187 Va. 309.

42 C.J. p 1203 note 69.

In California

(1) The text rule has been followed.—Petersen v. Lewis, 42 P.2d 311, 2 Cal.2d 569.—Gaston v. Hisashi

Tsuruda, 48 P.2d 355, 5 Cal.App.2d 639.

(2) However, it has also been held that violation of a motor vehicle traffic ordinance casts the burden on the one guilty thereof to show that such violation did not proximately contribute to the accident.—Yates v. Morotti, 8 P.2d 519, 120 Cal.App. 770.

40. U.S.—Griffith-Consumers Co. v. Rollings, C.C.A.Va., 79 F.2d 452.

Del.—Elliot v. Camper, 194 A. 130, 8 W.W.Harr. 504.

Ky.—Cook v. Gillespie, 82 S.W.2d 347, 259 Ky. 281.—Stephenson's Adm'x v. Sharp's Ex'rs, 1 S.W.2d 957, 222 Ky. 496.

La.—Hamburger v. Katz, 120 So. 391, 10 La App 215.

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Mich.—School Dist. of City of Ionia for Use and Benefit of Employers' Liability Assur. Corporation v. Dodd, 13 N.W.2d 268, 308 Mich. 220.

42 C.J. p 1203 note 71.

41. Ky.—Stark's Adm'x v. Herndon's Adm'r, 166 S.W.2d 828, 292 Ky. 469.

Mich.—Hazen v. Rockefeller, 6 N.W.2d 770, 303 Mich. 536.

Mo.—Holmes v. McNeil, 204 S.W.2d 303, 356 Mo. 846.

S.C.—Lynch v. Pee Dee Express, 80 S.E.2d 449, 204 S.C. 537.

Willful misconduct of automobile driver may be inferred, in action for injuries to guests from circumstances surrounding accident.—Walker v. Bacon, 23 P.2d 520, 132 Cal.App. 625.

Stalling of automobile, in attempting to shift gears on steep, unknown road, gives rise to no inference that it was avoidable by exercise of ordinary care.—Clune v. Mercereau, 1 P.2d 101, 89 Colo. 227.

he saw whatever he should have seen if properly performing his duties.⁴² A motorist ordinarily is presumed to be operating his vehicle with due care,⁴³ but this presumption is, of course, rebuttable.⁴⁴ Proof of lack of contributory negligence⁴⁵ or the presumption that the injured person was acting with due care⁴⁶ does not warrant a presumption or inference that the person operating the vehicle which inflicted the injury was negligent. It has been held that there is no room for presumptions where the evidence discloses what actually happened.⁴⁷

Willfulness or wantonness may be presumed or

inferred from gross negligence or a lack of regard for the safety of others.⁴⁸

§ 511(2). — Burden of Proof as to Negligence or Misconduct

In an action to recover for injuries resulting from the operation of a motor vehicle, the burden is on the plaintiff to prove that the defendant or one for whose conduct he is responsible was guilty of negligence or other misconduct as alleged.

In an action to recover for injuries resulting from the operation of a motor vehicle, plaintiff has the burden of proving that defendant, or one for whose conduct he is responsible, was guilty of neg-

Inference of negligence not warranted

Wis.—Ledvina v. Ebert, 296 N.W. 110, 237 Wis. 358.

Wyo.—O'Malley v. Eagan, 5 P.2d 276, 43 Wyo. 350.

Presumption of recklessness

Fact that motorist did not know what happened immediately preceding accident and what caused it does not raise presumption he was reckless in operation of automobile.—Giddings v. Honan, 159 A. 271, 114 Conn. 473, 79 A.L.R. 1215.

Knowledge of danger

(1) In action for injuries to guests in automobile driven by defendant, plaintiffs' testimony that defendant became angry when requested by plaintiffs to decelerate speed did not justify inference that she acted with knowledge that such speed would probably lead to injuries to plaintiffs and herself under circumstances, the presumption being otherwise.—Katz v. Kuppin, 112 P.2d 681, 44 Cal. App.2d 406.

(2) Defendant's knowledge of probable injuries to plaintiffs cannot be implied from fact of right-hand curve in road, in absence of evidence that he was driving in erratic manner or knew that he was approaching dangerous curve.—Katz v. Kuppin, *supra*.

42. U.S.—Car & General Ins. Corp., Limited, U. S. Branch, v. Thibaut, C.C.A.La., 161 F.2d 657, reversed 68 S.Ct. 79, 332 U.S. 751, 92 L.Ed. —, vacated 68 S.Ct. 205, 332 U.S. 828, 92 L.Ed. —, certiorari denied 68 S.Ct. 205, 332 U.S. 828, 92 L.Ed. —.

Colo.—Brickey v. Herring, 41 P.2d 298, 96 Colo. 181.

Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.

La.—Gross v. Teche Lines, 21 So.2d 378, 207 La. 354—Rose-Neath Funeral Home v. Cudahy Packing Co. of Louisiana, App., 12 So.2d 717—Tassin v. Downs, App., 190 So. 232—Clark v. De Beer, App., 188 So. 517—Mathews v. Hayne, App., 188 So. 462—Austin v. Baker-Lawhon &

Ford, App., 188 So. 416, followed in Standard Gin & Manufacturing Co. v. Baker-Lawhon & Ford, 188 So. 420 and Employers Casualty Co. v. Baker-Lawhon & Ford, 188 So. 421—Savoie v. Walker, App., 183 So. 530—Iglesias v. Campbell, App., 170 So. 265, reinstated 175 So. 145—Prudhomme v. Continental Casualty Co., App., 169 So. 147—Michiels v. Oser, 139 So. 497, 19 La. App. 24—Sexton v. Stiles, 130 So. 821, 15 La. App. 148.

Miss.—Lee v. Reynolds, 1 So.2d 487, 190 Miss. 692.

Mo.—Allen v. Kessler, 64 S.W.2d 630—Kaley v. Huntley, 63 S.W.2d 21, 333 Mo. 771.

Pa.—Haas v. Wesley, 14 A.2d 179, 140 Pa. Super. 453.

Tex.—Turner v. Texas Co., 159 S.W. 2d 112, 138 Tex. 380.

Vt.—Rich v. Hall, 181 A. 113, 107 Vt. 455—Beattie v. Parkhurst, 163 A. 589, 105 Vt. 91.

Wash.—Stanley v. Allen, 180 P.2d 90, 27 Wash.2d 770—West Coast Transport Co. v. Landin, 60 P.2d 704, 187 Wash. 556.

42 C.J. p 1203 note 72.

Conclusive presumption

Generally, a driver of an automobile is conclusively presumed to have seen such surrounding circumstances as he would have seen had he exercised his faculty of vision.—Dashiell v. Moore, 11 A.2d 640, 177 Md. 657.

Fact that motorist and guests were singing as they drove, up to moment of collision with oncoming car, did not sustain inference of negligent lookout.—Clark v. Bolton, 246 N.W. 326, 210 Wis. 631.

43. Cal.—Tarasco v. Moyers, 185 P. 2d 86, 81 Cal.App.2d 804—Rode v. Roberts, 54 P.2d 498, 11 Cal.App.2d 638.

N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.

Ohio.—Bohnenkamp v. Hibberd, 41 N.E.2d 259, 70 Ohio App. 278—General Exchange Ins. Co. v. Elizer, App., 31 N.E.2d 147.

Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

Wis.—Bohren v. Lautenschlager, 1 N.W. 2d 792, 239 Wis. 400—Ledvina v. Ebert, 296 N.W. 110, 237 Wis. 358.

Proper lookout presumed

Va.—Temple v. Ellington, 12 S.E.2d 826, 177 Va. 134.

Wis.—Ray v. Milwaukee Automobile Ins. Co., Limited, Mutual, 283 N.W. 799, 230 Wis. 323.

Presumption against risk of injury

A motorist driving with a friend would be presumed not to have been taking a chance of seriously injuring the friend or himself.—Sparrer v. Kersgard, Cal., 85 P.2d 449.

44. Cal.—Tarasco v. Moyers, 185 P. 2d 86, 81 Cal.App.2d 804—Edgar v. Citraro, 297 P. 645, 112 Cal. App. 163, followed in 297 P. 651, 112 Cal. App. 764, and 297 P. 652, 112 Cal. App. 762.

N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.

Wis.—Dekeyser v. Milwaukee Automobile Ins. Co., 295 N.W. 755, 236 Wis. 419.

45. S.D.—Christensen v. Krueger, 278 N.W. 171, 66 S.D. 66.

Injured person's negligence need not be established in order to exonerate driver from allegation of negligence.—Watson v. Home Mut. Ins. Ass'n of Iowa, 246 N.W. 655, 215 Iowa 670.

46. Pa.—Skrutski v. Cochran, 19 A. 2d 106, 341 Pa. 289—Wenhold v. O'Dea, 12 A.2d 115, 338 Pa. 33—Hadhazi v. Zero Ice Corporation, 194 A. 908, 327 Pa. 558—Pfendler v. Speer, 185 A. 618, 323 Pa. 443—Sajatovich v. Traction Bus Co., 172 A. 148, 314 Pa. 589—Fox v. Shoemaker, 193 A. 353, 127 Pa. Super. 264.

Presumption that injured person was acting with due care see infra § 512.

47. Ill.—Rzeszewski v. Barth, 58 N.E.2d 269, 324 Ill. App. 345.

48. Ill.—Dosssett v. Anderson, 41 N.E.2d 313, 314 Ill. App. 376—Reed v. Zellers, 273 Ill. App. 18.

ligence or other misconduct as alleged,⁴⁹ and the burden is not on defendant to acquit himself of the charge.⁵⁰ This rule applies where the injury results from a collision between motor vehicles⁵¹ at

49. U.S.—Warlich v. Miller, C.C.A. Pa., 141 F.2d 168—Demers v. Railway Express Agency, C.C.A.Mass., 108 F.2d 107—Griffith-Consumers Co. v. Rollings, 79 F.2d 452.
Cal.—City of Sacramento v. Hunger, 249 P. 223, 79 Cal.App. 234.
Conn.—Genishevsky v. Fishbone, 145 A. 54, 109 Conn. 58.
Del.—Elliot v. Camper, 194 A. 130, 8 W.W.Harr. 504.
Fla.—Babcock v. Flowers, 198 So. 326, 144 Fla. 479.
Ill.—Loeb v. Corrie, 65 N.E.2d 28, 327 Ill.App. 660—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1—Keehn v. Braubach, 30 N.E.2d 156, 307 Ill.App. 339.
Iowa.—DeBuhr v. Taylor, 5 N.W.2d 597, 232 Iowa 792—Rich v. Herry, 269 N.W. 489, 222 Iowa 465—Harvey v. Knowles Storage & Moving Co., 244 N.W. 660, 215 Iowa 35.
Ky.—Clifton v. McMakin, 157 S.W.2d 85, 288 Ky. 806—Rickel Coal Co. v. Louisville Tire Co., 14 S.W.2d 775, 228 Ky. 239.
La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406—Morales v. Employers' Liability Assur. Corporation, 12 So.2d 804, 202 La. 755—Buttitta v. Varino, App., 197 So. 331—Siren v. Montague, App., 142 So. 196—Butler v. Baker, App., 141 So. 780—Di Salvo v. Niccolosi, 4 La. App. 561—Reeves v. Pyle, 3 La. App. 718—Carlisle v. Louisiana Oil Refining Corporation, 3 La.App. 671.
Me.—Elliott v. Montgomery, 197 A. 322, 135 Me. 372—Copp v. Paradis, 157 A. 228, 130 Me. 464—Esponette v. Wiseman, 155 A. 650, 130 Me. 297—Tomlinson v. Clement Bros., 154 A. 355, 130 Me. 189.
Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355—Gloyd v. Willis, 23 A.2d 665, 180 Md. 161—Askin v. Long, 6 A.2d 246, 176 Md. 545.
Mass.—Castano v. Leone, 180 N.E. 312, 278 Mass. 429—Hicks v. H. B. Church Truck Service Co., 156 N.E. 254, 259 Mass. 272—Di Rienzo v. Goldfarb, 153 N.E. 784, 257 Mass. 272.
Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—Faustman v. Hewitt, 264 N.W. 863, 274 Mich. 458—Foote v. Huelster, 261 N.W. 296, 272 Mich. 194—Jacoby v. Schafsnitz, 259 N.W. 322, 270 Mich. 515.
Miss.—Horn v. Guthrie, 21 So.2d 813—Allen v. Friedman, 125 So. 539, 156 Miss. 77.
Mo.—Gildehaus v. Jones, 200 S.W.2d 523, 356 Mo. 8—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26—Bloch v. Kinder, 93 S.W.2d 932, 338 Mo. 1099.

N.J.—Celia v. Roth, 174 A. 703, 113 N.J.Law 458.
N.Y.—Demjanik v. Kultau, 274 N.Y. S. 387, 242 App.Div. 255—Greenspan v. Dillingham, 26 N.Y.S.2d 699.
Ohio.—Collins v. Zimmerman, App., 57 N.E.2d 245.
Okla.—Gideon v. Jones, 70 P.2d 814, 180 Okl. 621.
Pa.—Sargeant v. Ayers, 57 A.2d 881, 358 Pa. 393—Neff v. Firth, 47 A.2d 193, 354 Pa. 308, 165 A.L.R. 1414—Valley Motor Transit Co. v. Allison, 33 A.2d 485, 153 Pa.Super. 221.
R.I.—Kelly v. Davis, 135 A. 602, 48 R.I. 94.
Tenn.—Tinlin v. Siner, 9 Tenn.App. 252.
Tex.—Markusfeld v. Zahn, Civ.App., 99 S.W.2d 438, error dismissed—Duff v. Roesser & Pendleton, Civ. App., 96 S.W.2d 682.
Wash.—Roletto v. Department Stores Garage Co., 191 P.2d 875—Peterson v. Mayham, 116 P.2d 259, 10 Wash. 2d 111.
Wis.—Geyer v. Milwaukee Electric Railway & Light Co., 284 N.W. 1, 230 Wis. 347—Seligman v. Orth, 236 N.W. 115, 205 Wis. 199.
42 C.J. p 1203 note 73.

Action by or on behalf of insurer

Ind.—Pontiac-Chicago Motor Exp. Co. v. George Cassons & Son, 34 N.E.2d 171, 109 Ind.App. 248.
Mich.—School Dist. of City of Ionia, for Use and Benefit of Employers' Liability Assur. Corporation v. Dadd, 13 N.W.2d 268, 308 Mich. 220.
Wis.—General Accident Fire & Life Assur. Corporation v. Henneman, 240 N.W. 863, 207 Wis. 461.

Assault and battery

Ill.—Johnson v. Englehardt, 256 Ill. App. 557.

Emergency justifying or excusing negligent act

Plaintiff need not prove that no emergency justifying defendant's otherwise negligent conduct existed, the duty resting on defendant to support such a defense as well as to prove that such an emergency developed as would constitute a legal excuse.—Luppes v. Harrison, Iowa, 32 N.W.2d 809—Bletzer v. Wilson, 276 N.W. 836, 224 Iowa 884.

Injury to animal

Colo.—Rivers v. Pierce, 103 P.2d 690, 106 Colo. 236.
Me.—Adams v. Richardson, 182 A. 11, 134 Me. 109.

Permitting operation of defective vehicle

(1) Guest, suing lender for injuries sustained when automobile driven by borrower went into ditch, must show, not only that automobile was defective at time of accident, but that it was defective at time of its

delivery to borrower.—Gianopoulos v. Saunders System, Cedar Rapids Co. Iowa, 242 N.W. 53.

(2) Automobile is not presumed to have been defective, where negligent operation is claimed.—Feiss v. Hensch, 162 N.E. 456, 28 Ohio App. 42.

Rescue

A plaintiff, suing defendant for injuries sustained in rescuing defendant from path of defendant's automobile moving down incline from parking place, must establish negligence of defendant toward plaintiff inducing plaintiff to undertake the rescue.—Carney v. Buyea, 65 N.Y.S.2d 902, 271 App.Div. 338, appeal denied 68 N.Y.S.2d 446, 271 App.Div. 949.

Trespass or case

(1) In pedestrian's trespass for injuries sustained when struck by automobile, pedestrian had same burden of proving that motorist was negligent as he would have if action were on the case.—Salerno v. Shearn, 3 A.2d 657, 62 R.I. 121.

(2) In action in trespass quare clausum fregit and on the case for damage to house struck by defendant's truck, where there was no claim or evidence of intentional invasion of or injury to plaintiff's property in possession, it was necessary for plaintiff to show by evidence that truck was operated negligently.—Randall v. Holmes, 31 A.2d 17, 69 R.I. 41.

50. Mo.—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243.
Or.—Holsan v. Johnson, 65 P.2d 661, 155 Or. 583.

51. U.S.—De Bord v. Proctor & Gamble Distributing Co., C.C.A.Ga., 146 F.2d 51.

Ill.—Johnson v. Mueller, 41 N.E.2d 125, 314 Ill.App. 204—Dowson v. Smith, 40 N.E.2d 553, 313 Ill.App. 650.

Iowa.—Tigue Sales Co. v. Reliance Motor Co., 221 N.W. 514, 207 Iowa 567.

Ky.—Tato v. Collins, 98 S.W.2d 938, 266 Ky. 322.

La.—Heath v. Baudin, 122 So. 726, 11 La.App. 40.

Mass.—Browne v. Moran, 14 N.E.2d 119, 300 Mass. 107.

Mich.—Guye v. Dumas, 279 N.W. 902, 284 Mich. 654—Block v. Peterson, 278 N.W. 774, 284 Mich. 88.

Mo.—Kneezle v. Scott County Milling Co., App., 113 S.W.2d 817.

Pa.—Wertz v. Shade, 182 A. 789, 121 Pa.Super. 4.

Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 299 S.W. 665, reversed on other grounds, Com. App., 7 S.W.2d 521.

an intersection,⁵² or where the person injured is a pedestrian,⁵³ motorcyclist,⁵⁴ bicyclist,⁵⁵ one lawfully working in the way,⁵⁶ or an occupant in another motor vehicle,⁵⁷ or where the person injured is a child.⁵⁸ The rule also applies where the injured person has died.⁵⁹

Unavoidable accident

In automobile collision case, plaintiff had burden to establish that collision was not an unavoidable accident.—*Sproles v. Rosen*, 84 S.W.2d 1001, 126 Tex. 51.

52. Colo.—*Aaron v. Wesebaum*, 162 P.2d 232, 114 Colo. 61.

Ill.—*Louis v. Checker Taxi Co.*, 47 N.E.2d 351, 318 Ill.App. 71.

Md.—*Askin v. Long*, 6 A.2d 246, 176 Md. 545.

Mo.—*Gildehaus v. Jones*, 200 S.W.2d 523, 356 Mo. 8—*Miller v. Willson*, App., 288 S.W. 997.

Pa.—*Sargeant v. Ayers*, 57 A.2d 881, 358 Pa. 393.

53. U.S.—*Proel v. Nugent*, C.C.A.N. H., 97 F.2d 353.

Ark.—*Hutson Motor Co. v. Lake*, 98 S.W.2d 947, 193 Ark. 208—*Snow v. Riggs*, 290 S.W. 591, 172 Ark. 835.

Cal.—*Lake v. Churchill*, 67 P.2d 107, 20 Cal.App.2d 411.

Ill.—*Swanson v. Progress Electric Co.*, 67 N.E.2d 426, 329 Ill.App. 188.

La.—*Storey v. Parker*, App., 13 So. 2d 83—*Butler v. Oswald*, App., 4 So.2d 241—*Jones v. American Mut. Liability Ins. Co.*, App., 189 So. 169—*Jordan v. Ortlieb*, App., 148 So. 95—*Caston v. Connell*, App., 144 So. 633, rehearing denied 146 So. 483.

Me.—*House v. Ryder*, 150 A. 487, 129 Me. 135.

Md.—*Barker v. Whitter*, 170 A. 578, 166 Md. 33.

Mass.—*Goltz v. Besarick*, 46 N.E.2d 9, 313 Mass. 14—*Brown v. Henderson*, 189 N.E. 41, 285 Mass. 192.

Mich.—*Hazen v. Rockefeller*, 6 N.W. 2d 770, 303 Mich. 536—*Manley v. Potts*, 282 N.W. 862, 286 Mich. 671—*Leary v. Fisher*, 227 N.W. 767, 248 Mich. 574.

Neb.—*Tews v. Bamrick*, 26 N.W.2d 499, 148 Neb. 59.

N.J.—*Church v. Diffany*, 11 A.2d 55, 124 N.J.Law 100—*Cella v. Roth*, 174 A. 703, 113 N.J.Law 458.

N.Y.—*Carp v. Wilson*, 9 N.Y.S.2d 90, 256 App.Div. 165, affirmed 24 N.E.2d 992, 282 N.Y. 579.

Pa.—*Pfendler v. Speer*, 185 A. 618, 323 Pa. 443—*Sajatovich v. Traction Bus Co.*, 172 A. 148, 314 Pa. 569—*Wiser v. Parkway Baking Co.*, 137 A. 797, 289 Pa. 565.

Va.—*Sanders v. Newsome*, 19 S.E.2d 883, 179 Va. 582—*Darden v. Murphy*, 11 S.E.2d 579, 176 Va. 511.

Wash.—*Paddock v. Tone*, 172 P.2d 481, 25 Wash.2d 940.

Wis.—*Besser v. Hill*, 371 N.W. 921, 224 Wis. 211.

54. Conn.—*Zint v. Wheeler*, 169 A. 52, 117 Conn. 484.

Md.—*U. S. Fidelity & Guaranty Co.*

v. Continental Baking Co., 190 A. 768, 172 Md. 24.

55. Fla.—*McClain v. Swearingen*, 10 So.2d 564, 152 Fla. 11.

Mass.—*Wade v. Buchanan*, 28 N.E.2d 421, 306 Mass. 318.

Minn.—*Carlson v. F. A. Martoccio Co.*, 229 N.W. 341, 179 Minn. 332.

Va.—*McGowan v. Tayman*, 132 S.E. 316, 144 Va. 358.

56. S.D.—*Staib v. Tarbell*, 273 N.W. 652, 65 S.D. 304.

57. U.S.—*Doggett v. Peek*, C.C.A. Tex., 116 F.2d 273—*O'Hara v. Dodge Bros.*, D.C.Nev., 35 F.Supp. 792.

Ark.—*Arkmo Lumber Co. v. Luckett*, 143 S.W.2d 1107, 201 Ark. 140.

Cal.—*Finley v. Steiner*, 104 P.2d 819, 40 Cal.App.2d 331.

Conn.—*Anderson v. Colucci*, 175 A. 681, 119 Conn. 241.

Iowa.—*Welch v. Greenberg*, 14 N.W. 2d 266, 235 Iowa 159.

La.—*Portier v. Picou*, App., 3 So.2d 295—*Bijou v. Long*, App., 199 So. 670—*Herr v. Thames*, App., 165 So. 530.

Mich.—*Valenti v. Mayer*, 4 N.W.2d 5, 301 Mich. 551—*Fabiano v. Carey*, 271 N.W. 754, 279 Mich. 269—*Hale v. Cooper*, 261 N.W. 54, 271 Mich. 348, opinion adhered to 263 N.W. 769, 271 Mich. 348.

Mo.—*Vanausdall v. Schorr*, App., 168 S.W.2d 110.

Neb.—*Miller v. Abel Const. Co.*, 300 N.W. 405, 140 Neb. 482.

Ohio.—*Augusta v. Paradis*, 22 N.E.2d 578, 61 Ohio App. 323.

Or.—*Gwin v. Crawford*, 100 P.2d 1012, 164 Or. 215.

Wash.—*Knight v. Trogdon Truck Co.*, 71 P.2d 1003, 191 Wash. 646.

Wis.—*La Chance v. Stuart*, 288 N.W. 262, 233 Wis. 246—*Wobosel v. Lee*, 243 N.W. 425, 209 Wis. 51.

Streetcar passenger

D.C.—*Jackson v. Capital Transit Co.*, Mun.App., 38 A.2d 108, affirmed 149 F.2d 839, 80 U.S.App.D.C. 162, 161 A.L.R. 1110, certiorari denied 66 S. Ct. 143, 326 U.S. 762, 90 L.Ed. 459.

58. Cal.—*Wilcox v. Epstein*, 151 P.2d 156, 65 Cal.App.2d 581.

Conn.—*Farquhar v. Larson*, 186 A. 498, 121 Conn. 709.

Fla.—*McClain v. Swearingen*, 10 So. 2d 564, 152 Fla. 11.

Iowa.—*Westenburg v. Johnson*, 264 N.W. 18, 221 Iowa 134—*Williams v. Cohn*, 206 N.W. 823, 201 Iowa 1121.

Me.—*Barlow v. Lowery*, 59 A.2d 702.

Mo.—*Gardner v. Turk*, 123 S.W.2d 158, 343 Mo. 899—*Mundinger v. Sewell*, App., 40 S.W.2d 530.

Or.—*Halsan v. Johnson*, 65 P.2d 661, 155 Or. 583.

Pa.—*Miller v. Gutherie*, 191 A. 61, 325 Pa. 495—*Purdy v. Hazeltine*, 184 A. 660, 321 Pa. 459—*De Francisco v. La Face*, 194 A. 511, 128 Pa. Super. 538—*Bradley v. Rhodes*, 188 A. 564, 124 Pa.Super. 161—*Kent v. McFadden*, Com.Pl., 29 Del. Co. 95—*Reynolds v. McCartney*, Com.Pl., 28 Del.Co. 485—*Counihan v. Burns*, Com.Pl., 22 Wash.Co. 185.

S.D.—*Larson v. Loucks*, 6 N.W.2d 436, 69 S.D. 60.

Wash.—*Dunsmoor v. North Coast Transp. Co.*, 281 P. 995, 154 Wash. 229, followed in 281 P. 996, 154 Wash. 700—*Nougulier v. Morgan*, 250 P. 954, 141 Wash. 144.

59. U.S.—*Mikolajczyk v. Allcutt*, C. C.A.Pa., 102 F.2d 82—*McLean v. Donoghue Transp. Co.*, C.C.A.Me., 97 F.2d 356.

Ala.—*Watkins v. Reinhart*, 9 So.2d 113, 243 Ala. 243.

Ark.—*Hutson Motor Co. v. Lake*, 98 S.W.2d 947, 193 Ark. 201—*Roark Transp. v. Sneed*, 68 S.W.2d 996, 188 Ark. 928.

Fla.—*Union Bus Co. v. Matthews*, 192 So. 811, 141 Fla. 99.

Ill.—*Ripke v. Bernstein*, 76 N.E.2d 352, 332 Ill.App. 658.

Iowa.—*Hatfield v. White Line Motor Freight Co.*, 272 N.W. 99, 223 Iowa 7—*Wimer v. M. & M. Star Bottling Co.*, 264 N.W. 262, 221 Iowa 120—*Westenburg v. Johnson*, 264 N.W. 18, 221 Iowa 134—*Taylor v. Wistey*, 254 N.W. 50, 218 Iowa 785—*Reimer v. Musel*, 251 N.W. 863, 217 Iowa 377—*Williams v. Cohn*, 206 N.W. 823, 201 Iowa 1121.

La.—*Caston v. Connell*, App., 144 So. 633, rehearing denied 146 So. 483—*Barabin v. Teche Transfer Co.*, 1 La.App. 197.

Mass.—*Goltz v. Besarick*, 46 N.E.2d 9, 313 Mass. 14—*Wade v. Buchanan*, 28 N.E.2d 421, 306 Mass. 318—*Hicks v. H. B. Church Truck Service Co.*, 156 N.E. 254, 259 Mass. 272.

Minn.—*Carlson v. F. A. Martoccio Co.*, 229 N.W. 341, 179 Minn. 332.

Mo.—*Gardner v. Turk*, 123 S.W.2d 158, 343 Mo. 899.

N.Y.—*Allen v. Stokes*, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App. Div. 1007—*Carp v. Wilson*, 9 N.Y. S.2d 90, 256 App.Div. 165, affirmed 24 N.E.2d 992, 282 N.Y. 579.

Pa.—*Martin v. Marateck*, 27 A.2d 42, 345 Pa. 103—*Wenhold v. O'Dea*, 12 A.2d 115, 338 Pa. 33—*Brooks v. Morgan*, 200 A. 81, 331 Pa. 285—*Fuller v. Palazzolo*, 197 A. 225, 329 Pa. 93—*Pfendler v. Speer*, 185 A. 618, 323 Pa. 443—*Sajatovich v. Traction Bus Co.*, 172 A. 148, 314 Pa. 569—*Fox v. Shoemaker*, 193 A. 353, 127 Pa.Super. 264.

Plaintiff has the burden of proving that defendant had a duty to the injured person and that he breached his duty.⁶⁰ Thus, in an action for injury to one in or on a motor vehicle against the operator of the vehicle or one responsible for his conduct, the burden is on plaintiff to establish the status of

the injured person⁶¹ as guest,⁶² invitee,⁶³ one invited to ride for the benefit of defendant,⁶⁴ passenger for hire,⁶⁵ or as not a "guest" within a "guest statute,"⁶⁶ and to establish such negligence or misconduct as is necessary to impose liability in view of the injured person's status.⁶⁷

S.D.—Larson v. Loucks, 6 N.W.2d 436, 69 S.W. 60—Staib v. Tarbell, 273 N.W. 652, 65 S.D. 304.
Tex.—Wells v. Texas Pac. Coal & Oil Co., 164 S.W.2d 660, 140 Tex. 2.
Va.—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.

Difficulty of meeting burden

(1) Fact that plaintiff suing for death was faced with great difficulty in proving case did not relieve her from burden of establishing a cause of action.—Church v. Dimany, 11 A. 2d 55, 124 N.J.Law 100.

(2) Courts will not permit motorist whose automobile concededly has injured another to assume attitude that he need not explain, if he can, injury inflicted, merely because no witness was present at instant of collision and victim is dead, but in such circumstances only slight evidence is required to shift to motorist burden of explanation.—Herbert v. W. H. Smith Paper Corporation, 276 N.Y.S. 820, 243 App.Div. 260.

60. Mich.—Hale v. Cooper, 261 N.W. 54, 271 Mich. 348, opinion adhered to 263 N.W. 769, 271 Mich. 348.
Okla.—Connelly v. Loub, 38 P.2d 555, 169 Okl. 627.

61. Iowa.—Clendenning v. Simerman, 263 N.W. 248, 220 Iowa 739.
N.J.—Cowan v. Kaminow, 26 A.2d 258, 128 N.J.Law 398.
Ohio.—Simmers v. Vincicator Printing Co., 32 N.E.2d 766, 66 Ohio App. 249.

Change in status

In action for personal injuries resulting from automobile accident where it appeared that plaintiff had accepted an invitation to accompany husband and wife on a trip, burden was on plaintiff to show any change in relationship by virtue of subsequent agreement.—Copp v. Van Hise, C.C.A.Mont., 119 F.2d 691.

62. Mass.—Roiko v. Aijala, 199 N.E. 484, 293 Mass. 149.

63. N.J.—Cowan v. Kaminow, 26 A. 2d 258, 128 N.J.Law 398—Kluber v. Pferdeort, 199 A. 26, 120 N.J.Law 190—Myers v. Sauer, 187 A. 135, 117 N.J.Law 144—Myers v. Sauer, 182 A. 634, 116 N.J.Law 254.
Pa.—Stefan v. New Process Laundry Co., 185 A. 734, 323 Pa. 373.

Invitee status not presumed

There is no presumption that a passenger in an automobile driven by one other than the owner thereof is an invitee of the owner.—Cowan v.

Kaminow, 26 A.2d 258, 128 N.J.Law 398.

64. Mass.—Welda v. MacDougall, 16 N.E.2d 60, 300 Mass. 531—Roiko v. Aijala, 199 N.E. 484, 293 Mass. 149.

65. Cal.—Kruzic v. Sanders, 143 P. 2d 704, 23 Cal.2d 237—Jenkins v. National Paint & Varnish Co., 61 P.2d 780, 17 Cal.App.2d 161.

Fla.—McDougald v. Couey, 9 So.2d 187, 150 Fla. 748.

Ill.—Miller v. Miller, 69 N.E.2d 878, 395 Ill. 273—Leonard v. Stone, 45 N.E.2d 620, 381 Ill. 343—Burns v. Storchak, 73 N.E.2d 168, 331 Ill. App. 347.

Kan.—Pilcher v. Erny, 124 P.2d 461, 155 Kan. 257.

Ohio.—Voelkl v. Latin, 16 N.E.2d 519, 58 Ohio App. 245.

Passenger, rather than guest, status not presumed

Wash.—Kloppfenstein v. Eads, 254 P. 854, 143 Wash. 104, adhered to 256 P. 333, 143 Wash. 104.

66. Mich.—Baker v. Costello, 2 N.W.2d 881, 300 Mich. 686.

A defendant relying on an automobile guest statute has the burden of establishing that plaintiff was a guest within meaning of the statute.—Dobbs v. Sugloka, 185 P.2d 784, 117 Colo. 214.

67. U.S.—State Farm Mut. Automobile Ins. Co. v. Bonacci, C.C.A.Neb., 111 F.2d 412—Huffman v. Buckingham Transp. Co. of Colorado, C.C.A.Wyo., 98 F.2d 916—Liggett & Myers Tobacco Co. v. De l'arcq, C.C.A.Minn., 66 F.2d 678.

Cal.—Caldwell v. Miller, 141 P.2d 745, 61 Cal.App.2d 1—Finley v. Steiner, 104 P.2d 819, 40 Cal.App.2d 331—Turner v. Standard Oil Co. of California, 25 P.2d 988, 134 Cal.App. 622—Taylor v. Cockrell, 3 P.2d 16, 116 Cal.App. 596.

Del.—Elliot v. Camper, 194 A. 130, 8 W.W.Harr. 504.

Ga.—Whitfield v. Wheeler, 47 S.E.2d 658, 76 Ga.App. 857.

Idaho.—Hughes v. Hudelson, 169 P.2d 712, 67 Idaho 10.

Ill.—Tennes v. Tennes, 50 N.E.2d 132, 320 Ill. 19.

Iowa.—Tomasek v. Lynch, 10 N.W.2d 3, 233 Iowa 662—Wright v. What Cheer Clay Products Co., 267 N.W. 92, 221 Iowa 1292—Shenkle v. Mains, 247 N.W. 635, 216 Iowa 1324—Wilde v. Griffel, 243 N.W. 159, 214 Iowa 1177—Nessen v. Armstrong, 239 N.W. 56, 213 Iowa 378.

Kan.—Anderson v. Anderson, 50 P.2d 995, 142 Kan. 463.

La.—Lorance v. Smith, 138 So. 871, 173 La. 883—Lipscomb v. News Star World Pub. Corporation, App., 5 So.2d 41—Bennett v. Pugh, App., 177 So. 112—David v. Joeseeph, App., 164 So. 467—Levy v. Leopold, App., 142 So. 191.

Mich.—Fablano v. Carey, 271 N.W. 754, 279 Mich. 269.

Mo.—Mundinger v. Sewell, App., 40 S.W.2d 530.

Neb.—James v. Krebek, 7 N.W.2d 637, 142 Neb. 757—Belik v. Warsocki, 253 N.W. 689, 126 Neb. 560.

N.H.—Conant v. Collins, 10 A.2d 237, 90 N.H. 434, 136 A.L.R. 1266.

N.Y.—Higgins v. Mason, 243 N.Y.S. 630, 230 App.Div. 149, affirmed 174 N.E. 77, 255 N.Y. 104.

N.C.—Clodfelter v. Wells, 195 S.E. 11, 212 N.C. 823—Taylor v. Rierison, 185 S.E. 627, 210 N.C. 185.

N.D.—Stockfeld v. Sayre, 283 N.W. 788, 69 N.D. 42—Schwager v. Anderson, 249 N.W. 305, 63 N.D. 579.
Ohio.—Tighe v. Diamond, 80 N.E.2d 122, 149 Ohio St. 520.

Or.—Smith v. Lafar, 2 P.2d 18, 137 Or. 230.

Pa.—Riley v. Wooden, 165 A. 738, 310 Pa. 449—De Francisco v. La Face, 194 A. 511, 128 Pa.Super. 538.

Tex.—Crosby v. Strain, Civ.App., 99 S.W.2d 659, error dismissed—Aycock v. Green, Civ.App., 94 S.W.2d 894, error dismissed—Munves v. Buckley, Civ.App., 70 S.W.2d 605.

Va.—Keen v. Harman, 33 S.E.2d 197, 183 Va. 670.

Wis.—Storlie v. Hartford Accident & Indemnity Co., 28 N.W.2d 920, 251 Wis. 340—Kaiser v. Streich, 26 N.W.2d 160, 219 Wis. 615—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400—Jensen v. Jensen, 279 N.W. 628, 328 Wis. 77.

Care required as to persons in or on motor vehicle see supra §§ 397-404.

Guest must establish gross negligence

Ga.—Moore v. Bryan, 183 S.E. 117, 52 Ga.App. 272.

Mass.—Harvey v. Murphy, 30 N.E.2d 854, 308 Mass. 16—Richards v. Donahue, 188 N.E. 389, 285 Mass. 19—Bertora v. Cun.o, 173 N.E. 427, 273 Mass. 181—Bertelli v. Tronconi, 162 N.E. 307, 264 Mass. 235.
Mont.—Westergard v. Peterson, 159 P.2d 518, 117 Mont. 550—Blinn v. Hatton, 114 P.2d 518, 112 Mont. 219.
N.D.—Jacobs v. Nelson, 268 N.W. 873, 67 N.D. 27.

The burden of proof as to negligence or other misconduct does not shift⁶⁸ even though facts sufficient to raise a presumption of negligence or to establish a prima facie case are shown;⁶⁹ but in such case defendant may explain or rebut the presumption of negligence or other wrong,⁷⁰ and the burden is on him to go forward with the evidence and to rebut or overthrow the presumption⁷¹ and to show that the motor vehicle was operated in compliance with the law and with all proper precautions required by the circumstances.⁷²

Competency of driver. The burden is on the injured person to establish a contention made by him that the operator of the vehicle was incompetent to drive,⁷³ and, where it is sought to hold the owner for permitting the operation of his vehicle by an incompetent driver, the burden is on plaintiff to show that the owner knew or ought to have known of the driver's incompetency⁷⁴ and that the owner's negligence in intrusting the vehicle to an incompetent driver concurred with the driver's negligence to cause the injury.⁷⁵ One under the statutory age for driving a motor vehicle is presump-

tively incompetent to drive,⁷⁶ but there is no presumption one way or the other as to the skill or want of skill of the driver of a vehicle when all the facts and circumstances out of which a charge of negligence arose are before the jury,⁷⁷ and, where there is evidence to support the charge of negligence, the facts that the driver was reasonably careful and skillful, and exercised that degree of care and skill which an ordinarily careful and skillful driver would have exercised under the circumstances, are matters of proof by defendant.⁷⁸ The presumption that the owner has not authorized the operation of his car by an unlicensed person⁷⁹ disappears from the case when evidence to the contrary is presented.⁸⁰

§ 511(3). — Happening of Accident or Injury; Res Ipsa Loquitur

- a. In general
- b. Res ipsa loquitur
- c. Application of rules

a. In General

As a general rule no presumption or inference of neg-

Or.—Carlson v. Wagberg, 190 P.2d 926.

Vt.—Hastings v. Murray, 20 A.2d 107, 112 Vt. 37—Kelley v. Anthony, 8 A.2d 641, 110 Vt. 490—Ellison v. Colby, 8 A.2d 637, 110 Vt. 431—Senecal v. Bleau, 189 A. 139, 108 Vt. 486.

Va.—Masters v. Cardi, 42 S.E.2d 203, 186 Va. 261—Mountjoy v. Burton, 40 S.E.2d 803, 185 Va. 936—Dinges v. Hannah, 40 S.E.2d 179, 185 Va. 744—Woodrum v. Holland, 40 S.E.2d 169, 185 Va. 690—Watson v. Coles, 195 S.E. 506, 170 Va. 141—Kent v. Miller, 189 S.E. 332, 167 Va. 422—Grinstead v. Mayhew, 187 S.E. 515, 167 Va. 19.

Guest must establish willful and wanton misconduct

Ill.—Dyreson v. Hughes, 76 N.E.2d 809, 333 Ill.App. 198.

Tex.—Linn v. Nored, Civ.App., 133 S.W.2d 234, error dismissed, judgment correct.

Guest must show premeditated intent to injure him

Wash.—Taylor v. Taug, 136 P.2d 176, 17 Wash.2d 533.

La.—Bennett v. Pugh, App., 177 So. 112.

Mich.—Fabiano v. Carey, 271 N.W. 754, 279 Mich. 269.

Mo.—Dempsey v. Horton, 84 S.W.2d 321, 337 Mo. 379.

Or.—Gwin v. Crawford, 100 P.2d 1012, 164 Or. 215.

Va.—Darden v. Murphy, 11 S.E.2d 579, 176 Va. 511—Anderson v. Sisson, 196 S.E. 688, 170 Va. 178. 42 C.J. p 1204 note 74.

69. Iowa.—Baker v. Zimmerman, 161 N.W. 479, 179 Iowa 272.

Mich.—Weaver v. Motor Transit Management Co. (Greyhound Lines), 233 N.W. 178, 252 Mich. 64

70. Wis.—Meyer v. Niedhoefer & Co., 251 N.W. 237, 213 Wis. 389.

71. Colo.—Seeing Denver Co. v. Morgan, 185 P. 339, 66 Colo. 565.

Mich.—Weaver v. Motor Transit Management Co. (Greyhound Lines), 233 N.W. 178, 252 Mich. 64.

R.I.—Maher v. Concannon, 185 A. 907, 56 R.I. 395.

72. Cal.—Deverchio v. Ricketts, 226 P. 11, 66 Cal.App. 334.

La.—Lawson v. Nossek, 130 So. 669, 15 La App. 207.

73. N.C.—Cook v. Stedman, 186 S. E. 317, 210 N.C. 345.

42 C.J. p 1210 note 87.

Fact that driver was in automobile accident, standing alone, does not raise an inference that driver is inexperienced and incompetent.

Ky.—Wilhelmi v. Berns, 119 S.W.2d 625, 274 Ky. 618.

Me.—Copp v. Paradis, 157 A. 228, 130 Me. 464.

74. Ind.—North Side Chevrolet v. Clark, 25 N.E.2d 1011, 107 Ind.App. 592.

Mo.—Saunders v. Prue, 151 S.W.2d 478, 235 Mo.App. 1245.

N.C.—Cook v. Stedman, 186 S.E. 317, 210 N.C. 345.

Ohio.—Edwards v. Benedict, 70 N.E. 2d 471, 79 Ohio App. 134.

42 C.J. p 1210 note 88.

Permission to use

Fact that father permitted his in-

competent unlicensed minor son to drive father's automobile on father's business, thereby committing a misdemeanor, and that son did so on frequent occasions, tended to deprive father of any presumption that he did not willingly violate law in like manner on night of accident when son was using automobile for own pleasure.—Gossett v. Van Egmond, 155 P.2d 304, 176 Or. 134.

Failure to prevent use

Where evidence sustained finding that defendant knew of his minor son's incompetency to drive automobile, it was not necessary for plaintiff to show that defendant's son's use of defendant's automobile was with defendant's permission, but plaintiff was required to show defendant's negligence in failing to take affirmative measures to prevent use of his automobile by his incompetent son.—Gossett v. Van Egmond, supra.

75. Ala.—Laney v. Blackburn, 144 So. 126, 25 Ala.App. 248.

76. Wis.—Canzoneri v. Heckert, 269 N.W. 716, 223 Wis. 25.

77. Ill.—Devine v. Brunswick-Balke-Collender Co., 110 N.E. 780, 270 Ill. 504, Ann.Cas.1917B 887.

Wis.—Canzoneri v. Heckert, 269 N.W. 716, 223 Wis. 25.

78. Ill.—Devine v. Brunswick-Balke-Collender Co., 110 N.E. 780, 270 N. E. 504, Ann.Cas.1917B 887.

79. Mass.—Wilson v. Grace, 173 N. E. 524, 273 Mass. 146.

80. Mass.—Wilson v. Grace, supra.

ligence or misconduct arises from the mere happening of a motor vehicle accident.

As a general rule no presumption or inference of negligence or misconduct arises from the mere happening of a motor vehicle accident,⁸¹ and this

rule applies where a motor vehicle strikes a pedestrian,⁸² a child,⁸³ or an animal,⁸⁴ where a guest or other occupant of the vehicle is injured,⁸⁵ or where a motor vehicle collides with a bicycle⁸⁶ or another

81. U.S.—Pickering v. Corson, C.C. A.111, 108 F.2d 546—Liggett & Myers Tobacco Co. v. De Parcq, C.C. A.Minn., 66 F.2d 678—Railway Express Agency v. Little, C.C.A.Pa., 50 F.2d 59, 75 A.L.R. 963.
 Ariz.—Sawyer v. People's Freight Lines, 22 P.2d 1080, 42 Ariz. 145.
 Cal.—Hert v. Firestone Tire & Rubber Co. of California, 41 P.2d 369, 4 Cal.App.2d 598.
 Colo.—Clune v. Mercereau, 1 P.2d 101, 89 Colo. 227.
 Fla.—Ward v. Everett, 3 So.2d 879, 148 Fla. 173—Babcock v. Flowers, 198 So. 326, 144 Fla. 479.
 Ga.—Minkovitz v. Fine, 19 S.E.2d 561, 67 Ga.App. 176.
 Ill.—Coulson v. Discerns, 66 N.E.2d 728, 329 Ill.App. 28.
 Me.—Chaisson v. Williams, 156 A. 154, 130 Me. 341.
 Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355—Gloyd v. Wills, 23 A. 2d 665, 180 Md. 161.
 Mass.—Conley v. Town Taxi, 10 N.E. 2d 74, 298 Mass. 130.
 Mich.—Robich v. Rogers, 241 N.W. 854, 258 Mich. 343.
 Mont.—Cowden v. Crippen, 53 P.2d 98, 101 Mont. 187.
 Neb.—Bergendahl v. Rabeler, 276 N. W. 673, 133 Neb. 699.
 N.Y.—Lahr v. Tirrill, 8 N.E.2d 298, 274 N.Y. 112, reargument denied 10 N.E.2d 575, 274 N.Y. 611—Green-span v. Dillingham, 26 N.Y.S.2d 699.
 N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.
 Ohio.—Wardwell v. Cincinnati St. Ry. Co., 67 N.E.2d 630, 77 Ohio App. 397.
 Or.—Navarra v. Jones, 169 P.2d 584, 178 Or. 684.
 Pa.—Martin v. Marateck, 27 A.2d 42, 345 Pa. 103—Wenhold v. O'Dea, 12 A.2d 115, 338 Pa. 33—Hutchinson v. Follmer Trucking Co., 5 A.2d 182, 333 Pa. 424—Brooks v. Morgan, 200 A. 81, 331 Pa. 235—Ranck v. Sauder, 193 A. 269, 327 Pa. 177—Knox v. Simmerman, 151 A. 678, 301 Pa. 1—Miller v. Siebert, 145 A. 909, 296 Pa. 400—Bloom v. Bailey, 141 A. 150, 292 Pa. 348, 57 A.L.R. 585—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa.Super. 463—Cowen v. Katz, 197 A. 516, 130 Pa. Super. 337—Fox v. Shoemaker, 193 A. 553, 127 Pa.Super. 264—O'Brien v. Gray, 182 A. 746, 121 Pa.Super. 27—Smith v. Gross, 173 A. 478, 113 Pa.Super. 568—Green v. Gantz, Com.Pl., 31 Del.Co. 476—Xenos v. White Star Lines, Com.Pl., 19 Wash.Co. 145.

Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.
 Tex.—Comet Motor Freight Lines v. Holmes, Civ.App., 175 S.W.2d 464, error refused.
 Utah.—Morrison v. Perry, 122 P.2d 191, 104 Utah 139, reheard 140 P.2d 772, 104 Utah 151.
 Wash.—Hardman v. Younkers, 131 P. 2d 177, 15 Wash. 483, 151 A.L.R. 868—Reitan v. Crooks, 279 P. 97, 153 Wash. 75.
 42 C.J. p 1205 notes 84–87, p 1237 note 38.

Failure of motor vehicle to operate properly does not warrant an inference that a defect existed which could have been discovered by a reasonable inspection—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1.

Statutory presumption in railroad cases

Statutory presumption of negligence in case of injury inflicted by railroad is inapplicable in action for death resulting from collision between automobile and motorbus—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105.

82. Cal.—Lake v. Churchill, 67 P.2d 107, 20 Cal.App.2d 411.
 Ga.—Gray v. Jackson, 187 S.E. 229, 53 Ga.App. 658.
 Iowa.—Barion v. Armstrong, 23 N.W. 2d 912, 237 Iowa 734.
 Mass.—Baker v. Davis, 12 N.E.2d 816, 299 Mass. 345—Rogers v. Dalton, 10 N.E.2d 68, 298 Mass. 146.
 Mich.—Watrous v. Conor, 254 N.W. 143, 266 Mich. 397.
 Mont.—Johnson v. Herring, 300 P. 535, 89 Mont. 420.
 N.C.—Pack v. Auman, 18 S.E.2d 247, 220 N.C. 704.
 Pa.—Fidelity-Philadelphia Trust Co. v. Staats, 57 A.2d 830, 358 Pa. 344—Balducci v. Cutler, 47 A.2d 643, 354 Pa. 436—Martin v. Marateck, 27 A.2d 42, 345 Pa. 103—Zalec v. Heckel, 16 A.2d 382, 340 Pa. 116—Hadhazi v. Zero Ice Corporation, 194 A. 908, 327 Pa. 558—Koppenhaver v. Swab, 174 A. 393, 316 Pa. 207—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515—Maguire v. Brogin, 171 A. 578, 314 Pa. 306—Whalen v. Yellow Cab Co., 169 A. 97, 313 Pa. 97—Justice v. Weymann, 158 A. 873, 306 Pa. 88—Rhoads v. Herbert, 148 A. 693, 298 Pa. 522—Wiser v. Parkway Baking Co., 137 A. 797, 289 Pa. 565—Hoffmann v. Herman, 163 A. 452, 107 Pa.Super. 92—Gavin v. Bell Telephone Co. of Pa., 87 Pa.Super. 276—Schade v. Engel, Com.Pl., 19 Erie

Co. 510—Skrutski v. Rosar, Com. Pl., 45 Lack.Jur. 130.
 Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.
 42 C.J. p 1205 notes 84 [a], 85 [b], 86 [a].

Injury to pedestrian at intersection or crossing

Md.—Nicholson v. Kreczmer, 13 A.2d 596, 178 Md. 680—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299.
 Mass.—Clark v. C. E. Fay Co., 183 N.E. 423, 281 Mass. 240.
 Or.—Manoff v. Lamer, 54 P.2d 287, 152 Or. 619.
 83. U.S.—Demers v. Railway Express Agency, C.C.A.Mass., 108 F.2d 107.
 Ill.—Roberts v. City of Rockford, 16 N.E.2d 568, 296 Ill.App. 469.
 Mich.—Edgerton v. Lynch, 238 N.W. 322, 255 Mich. 456.
 Mont.—Autio v. Miller, 11 P.2d 1039, 92 Mont. 150.
 N.C.—Rountree v. Fountain, 166 S.E. 329, 203 N.C. 381.
 Pa.—Levchik v. Shaffer, 194 A. 923, 327 Pa. 570—De Francisco v. La Face, 194 A. 511, 128 Pa.Super. 538—Bradley v. Rhodes, 188 A. 564, 124 Pa.Super. 161—Oland v. Kohler, 169 A. 411, 111 Pa.Super. 185—Reynolds v. McCartney, Com.Pl., 28 Del.Co. 485.
 S.D.—Larson v. Loucks, 6 N.W.2d 436, 69 S.D. 60.

84. SC.—Turner v. Elrod, 148 S.E. 701, 151 S.C. 131.

Animals frightened

Mere occurrence of accident when horses were allegedly frightened by truck whose canvas cover was flapping in wind does not alone justify finding of negligence—Buchanan v. Hurd Creamery Co., 246 N.W. 41, 215 Iowa 415.

85. Mo.—State ex rel. and to Use of Brancato v. Trimble, 18 S.W.2d 4, 322 Mo. 318—Estes v. Estes, App., 127 S.W.2d 78.

Pa.—Peterson v. McCauslan, 170 A. 276, 314 Pa. 176—Filer v. Filer, 152 A. 567, 301 Pa. 461.

86. Md.—Miles v. State, for Use of Wistling, 198 A. 724, 174 Md. 292.
 Mass.—Ellis v. Ellison, 175 N.E. 502, 275 Mass. 272.

N.C.—Swainey v. Great Atlantic & Pacific Tea Co., 162 S.E. 557, 202 N.C. 272.

Pa.—Klein v. Philadelphia Rural Transit Co., 183 A. 43, 320 Pa. 548.
 Va.—McGowan v. Tayman, 132 S.E. 316, 144 Va. 358.

42 C.J. p 1205 note 84 [b] (1) (2), [c].

motor vehicle⁸⁷ at an intersection⁸⁸ or while making a turn,⁸⁹ or where motor vehicles traveling in opposite directions collide.⁹⁰

b. Res Ipsa Loquitur

(a) In general

(b) Operation and effect of doctrine

(a) In General

Where the accident or injury is one which in the ordinary course of events does not occur if the person in charge of the motor vehicle uses proper care, proof of the happening of the accident warrants a presumption or inference of negligence under the doctrine of *res ipsa loquitur*.

Under the doctrine of *res ipsa loquitur*, discussed generally in the C.J.S. title Negligence § 220, also 45 C.J. p 1193 note 51 et seq, where the accident or injury is one which in the ordinary course of events does not occur if the person in charge of the motor vehicle uses proper care, proof of the happening of the accident in the absence of evidence to the contrary warrants an inference or presumption of negligence or establishes a *prima facie* case of negligence or is presumptive evidence of negligence on the part of such driver or operator.⁹¹ On the other hand, the doctrine does not apply unless the accident or injury is one that does not normally occur without negligence on the part of the operator of

87. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

Del.—Lynch v. Lynch, 195 A. 799, 9 W.W.Harr. 1—Elliott v. Camper, 194 A. 130, 8 W.W.Harr. 504.

Ind.—Hoesel v. Cain, 53 N.E.2d 165, 222 Ind. 330, rehearing denied 53 N.E.2d 769, 222 Ind. 330.

Iowa.—Armbruster v. Gray, 282 N.W. 342, 225 Iowa 1226—Harvey v. Borg, 257 N.W. 190, 218 Iowa 1228

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355.

Mo.—Miller v. Wilson, App., 288 S.W. 997.

N.C.—Ray v. Post, 32 S.E.2d 168, 224 N.C. 465.

Pa.—Balducci v. Cutler, 47 A.2d 643, 354 Pa. 436—Neff v. Firth, 47 A. 2d 193, 354 Pa. 308, 165 A.L.R. 1414

—Grimes v. Yellow Cab Co., 25 A. 2d 294, 344 Pa. 298—Master v. Goldstein's Fruit & Produce, 23 A. 2d 443, 344 Pa. 1—Pfendler v. Speer, 185 A. 618, 323 Pa. 443—

Green v. Gantz, Com.Pl., 31 Del.Co. 476—Sabatelli v. Scull, Com.Pl., 29 Del.Co. 456—Flowers v. Dolan, Com.Pl., 6 Fay.L.J. 217, affirmed 38 A.2d 429, 155 Pa.Super. 378.

Wis.—Tracy v. Malmstadt, 296 N.W. 87, 236 Wis. 642.

42 C.J. p 1206 note 99.

Vehicles separately owned

N.J.—O'Connor v. Adekman, 115 A. 369, 96 N.J.Law 537, 539.

42 C.J. p 1206 note 1.

Collision may indicate, but does not locate, negligence

Mo.—State ex rel. and to Use of Brancato v. Trimble, 18 S.W.2d 4, 322 Mo. 313.

Collisions between particular vehicles

(1) Automobile and truck.

Cal.—Staples v. L. W. Blinn Co., 275 P. 813, 97 Cal.App. 387.

Iowa.—McIntyre v. O. B. West Co., 281 N.W. 353, 225 Iowa 739.

Ohio.—Pitt v. Nichols, 37 N.E.2d 379, 128 Ohio St. 555.

(2) Bus and automobile.—Burke v. Carolina Coach Co., 150 S.E. 636, 198 N.C. 8.

(3) Bus and taxicab.—Brown v. Pennsylvania Greyhound Lines, 15 Ohio Supp. 1.

Collision with railroad train

Collision at a railroad crossing constitutes *prima facie* evidence of negligence on part of a traveler struck on the crossing by an approaching train, or running into side of a train standing upon, or moving across one.—Plante v. Canadian Nat. Rlys., 23 A.2d 814, 138 Mo. 215.

88. Mass.—Fallovallita v. Johnsyn, 57 N.E.2d 532, 317 Mass. 153.

Ohio.—Pitt v. Nichols, 37 N.E.2d 379, 138 Ohio St. 555.

Pa.—Otis v. Kolsky, 94 Pa.Super. 548.

Inference that at least one negligent

Where a collision occurs in broad daylight at intersection of two streets between two automobiles coming to the intersection at right angles, collision gives rise to inference that at least one of the drivers was negligent.—Jefferis v. Baumann, 221 N.W. 680, 175 Minn. 623.

89. Cal.—Spear v. Leuenberger, 112 P.2d 43, 44 Cal.App.2d 236.

90. Iowa.—Jordan v. Schantz, 264 N. W. 259, 220 Iowa 1251.

91. Ala.—Langley Bus Co. v. Meser, 133 So. 287, 222 Ala. 533—

Corpus Juris cited in Cooper v. Agee, 132 So. 173, 175, 222 Ala. 334—

Sinclair v. Taylor, 173 So. 878, 27 Ala. App. 418.

Cal.—Bodholdt v. Garrett, 10 P.2d 533, 122 Cal.App. 566.

Fla.—Orr v. Avon Florida Citrus Corporation, 177 So. 612, 130 Fla. 306.

Ga.—Minkovits v. Fine, 19 S.E.2d 561, 67 Ga.App. 176.

Ky.—Thompson v. Kost, 181 S.W.2d 445, 298 Ky. 32—Stark's Adm'r v. Herndon's Adm'r, 166 S.W.2d 828, 292 Ky. 469.

La.—Morales v. Employers' Liability Assur. Corporation, 12 So.2d 804, 202 La. 755—Pearce v. U. S. Fidelity & Guaranty Co., App., 8 So.2d 743—Nuss v. MacKenzie, App., 4

So.2d 845—Harrelson v. McCook, App., 198 So. 532.

Me—Chaisson v. Williams, 156 A. 154, 130 Me. 341.

Mo—Adams v. Le Bow, 160 S.W.2d 326, 236 Mo.App. 899.

N.Y.—**Corpus Juris cited in** Tesler v. Kiskes, 32 N.Y.S.2d 38, 40, 263 App.Div. 171, affirmed 42 N.E.2d 739, 288 N.Y. 639.

N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.

Tenn.—Chattanooga-Dayton Bus Line v. Lynch, 6 Tenn App. 470.

Wash.—**Corpus Juris cited in** Hardman v. Younkers, 131 P.2d 177, 180, 15 Wash. 483, 151 A.L.R. 868.

42 C.J. p 1205 note 89, p 1206 notes 89, 91.

Common experiences of ordinarily prudent men under the same or similar circumstances are the proper measuring rod by which it can be determined whether an inference of negligence is permissible under the rule of *res ipsa loquitur*.—Minkovits v. Fine, 19 S.E.2d 561, 67 Ga.App. 176.

Rule equally applicable to plaintiff and defendant

Ohio.—Collins v. Zimmerman, App., 57 N.E.2d 245.

Notice of defect

(1) Where the injury results from a defect in the vehicle, but liability may not be imposed on defendant in the absence of actual or constructive notice, the doctrine of *res ipsa loquitur* is not applicable unless notice is shown.—Bodholdt v. Garrett, 10 P.2d 533, 122 Cal.App. 566.

(2) Where the injury results from a defect in the vehicle and reasonably frequent inspections were made and the defect was not one which could have been discovered by a reasonable inspection, the doctrine of *res ipsa loquitur* does not apply.—Smith v. Fisher, 11 Tenn.App. 273.

In Michigan the doctrine is not followed.—School Dist. of City of Ionia, for Use and Benefit of Employers' Liability Assur. Corporation v. Dadd, 18 N.W.2d 268, 308 Mich. 220.

the motor vehicle, and ordinarily the mere happening of an accident or injury does not make the doctrine of *res ipsa loquitur* applicable.⁹² The accident or injury must be established before the doctrine may be invoked.⁹³ In determining the applicability of the doctrine, the control of the instrument which inflicted the injury is a significant factor,⁹⁴ and, as a general rule, the doctrine is inapplicable unless the instrumentalities involved are exclusively in defendant's control;⁹⁵ but the doctrine has been applied in the case of a collision between moving vehicles.⁹⁶

The doctrine of *res ipsa loquitur* does not apply

where there is no want of evidence as to the cause of the accident and the manner in which it occurred,⁹⁷ where plaintiff apparently knows as much about the accident and its cause as defendant,⁹⁸ where the evidence establishes the cause of the accident,⁹⁹ where the proof leaves room for a different presumption or inference,¹ or where it is shown that the accident might have happened as the result of one of several causes, for some of which defendant is not responsible.² The mere fact that the accident is unexplained does not warrant the application of the doctrine where the negligence of the operator or owner is not a probable explanation.³

92. Cal.—McDonald v. Cantley, 3 P. 2d 552, 214 Cal. 40.

Minn.—Klingman v. Loew's Inc., 296 N.W. 528, 209 Minn. 449.

S.D.—Larson v. Loucks, 6 N.W.2d 436, 69 S.D. 60.

Doctrine held inapplicable to a motor vehicle striking:

(1) Animal.—Adams v. Richardson, 182 A. 11, 134 Me. 109

(2) Another motor vehicle. Ariz.—Hall v. Wallace, 130 P.2d 36, 59 Ariz. 503, followed in 130 P.2d 39, two cases, 59 Ariz. 510, 511, and Hall v. Schuyler, 130 P.2d 40, 59 Ariz. 512.

Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140.

Cal.—Staples v. L. W. Blinn Lumber Co., 275 P. 813, 97 Cal.App. 387.

Ill.—Louis v. Checker Taxi Co., 47 N.E.2d 351, 318 Ill.App. 71.

Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394.

Mo.—Estes v. Estes, App., 127 S.W.2d 78

N.J.—Bettes v. Scott, 192 A. 433, 15 N.J. Misc. 487.

(3) Child. Cal.—Zulim v. Van Ness, 38 P.2d 820, 3 Cal.App.2d 82.

Ill.—Coulson v. Discerns, 66 N.E.2d 728, 329 Ill.App. 28.

Or.—Simpson v. Hillman, 97 P.2d 527, 163 Or. 357.

(4) Horseback rider.—Sawyer v. People's Freight Lines, 22 P.2d 1080, 42 Ariz. 145.

(5) Pedestrian.

Pa.—Fidelity-Philadelphia Trust Co. v. Staats, 57 A.2d 830, 358 Pa. 344—Sajatovich v. Traction Bus Co., 172 A. 148, 314 Pa. 569.

Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.

Injury to guest or other occupant of vehicle

Cal.—Queirolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal.App. 610—Curry v. Williams, 293 P. 623, 109 Cal.App. 649.

Colo.—Clune v. Mercereau, 1 P.2d 101, 89 Colo. 227.

Mass.—Ellis v. Ellison, 175 N.E. 502, 275 Mass. 272.

Mo.—State ex rel. and to Use of Brancato v. Trimble, 18 S.W.2d 4, 322 Mo. 318.

93. La.—Wolfe v. Baumer Food Products Co., App., 171 So. 155.

94. Kan.—Hohmann v. Jones, 72 P. 2d 971, 146 Kan. 578.

N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.

95. Iowa—Welch v. Greenberg, 14 N.W.2d 266, 235 Iowa 159

Mass.—Liberatore v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 538

Mo.—Adams v. Le Row, 160 S.W.2d 826, 236 Mo.App. 899.

96. Iowa.—Harvey v. Borg, 257 N. W. 190, 218 Iowa 1228.

97. Cal.—Gonzalez v. Nichols, 294 P. 750, 110 Cal.App. 738.

Ga.—Minkovitz v. Fine, 19 S.E.2d 561, 67 Ga.App. 176.

Ill.—Pastore v. Sasso, 46 N.E.2d 857, 317 Ill.App. 538.

La.—Scarborough v. St. Paul Mercury Indemnity Co., App., 11 So.2d 52—Coffey v. Ouachita River Lumber Co., App., 191 So. 561—Dunaway v. Maroun, App., 178 So. 710.

Mich.—Noonan v. Volek, 224 N.W. 567, 246 Mich. 377.

Minn.—Marsh v. Hendricksen, 7 N. W.2d 387, 213 Minn. 500.

Ohio.—Collins v. Zimmerman, App., 57 N.E.2d 245—Allen v. Leavick, 182 N.E. 139, 43 Ohio App. 100.

Okl.—Corpus Juris quoted in Southern Kansas Greyhound Lines v. Hicks, 89 P.2d 278, 280, 184 Okl. 581—Corpus Juris cited in Bewley v. Western Creameries, 57 P.2d 859, 860, 177 Okl. 132.

Va.—Darden v. Murphy, 11 S.E.2d 579, 176 Va. 511—Boggs v. Plybon, 160 S.E. 77, 157 Va. 30.

42 C.J. p 1206 note 96.

98. Cal.—Johnson v. Ostrom, 16 P.2d 794, 128 Cal.App. 38.

Pleading held not to show knowledge

La.—B & B Cut Stone Co. v. Uhler, App., 1 So.2d 149.

99. Cal.—Pollard v. Foster, 129 P.2d 448, 54 Cal.App.2d 502—Binns v.

Standen, 5 P.2d 637, 118 Cal.App. 625.

Ga.—Minkovitz v. Fine, 19 S.E.2d 561, 67 Ga.App. 176.

La.—Storey v. Parker, App., 13 So.2d 88.

N.C.—Etheridge v. Etheridge, 24 S. E.2d 477, 222 N.C. 616.

Pa.—Ebeey v. Schwartz, 158 A. 201, 104 Pa.Super. 181.

Tenn.—Granert v. Bauer, 67 S.W.2d 748, 17 Tenn.App. 370.

1. Ga.—Minkovitz v. Fine, 19 S.E.2d 561, 67 Ga.App. 176.

La.—Morales v. Employers' Liability Assur. Corporation, 12 So.2d 804, 202 La. 755.

Mo.—Estes v. Estes, App., 127 S.W. 2d 78.

N.C.—Etheridge v. Etheridge, 24 S. E.2d 477, 222 N.C. 616.

Va.—Arnold v. Wood, 3 S.E.2d 374, 173 Va. 18.

42 C.J. p 1206 note 97.

Negligence of injured person

The doctrine does not apply where the accident might have resulted from the negligence of the injured person.—Hanson v. Weckerle, 63 P.2d 322, 18 Cal.App.2d 214.

Ill.—Roberts v. City of Rockford, 16 N.E.2d 568, 296 Ill.App. 469.

2. Ariz.—Sawyer v. People's Freight Lines, 22 P.2d 1080, 42 Ariz. 145.

Colo.—Corpus Juris cited in Clune v. Mercereau, 1 P.2d 101, 103, 89 Colo. 227.

Ga.—Minkovitz v. Fine, 19 S.E.2d 561, 67 Ga.App. 176.

N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.

Or.—Wilbur v. Home Lumber & Coal Co., 282 P. 236, 131 Or. 180.

Pa.—Riley v. Wooden, 165 A. 738, 310 Pa. 449.

Va.—Vaughn v. Huff, 41 S.E.2d 482, 186 Va. 144.

42 C.J. p 1206 note 98.

3. Cal.—La Porte v. Houston, App., 189 P.2d 544.

Fact that testimony left cause uncertain did not render doctrine applicable.—Keller v. Cushman, 285 P. 399, 104 Cal.App. 186.

It has been held that plaintiff may not rely on the doctrine of *res ipsa loquitur* where he has pleaded specific negligence⁴ or sought to prove it,⁵ but it has also been held that the doctrine is not rendered inapplicable by an unsuccessful attempt to prove specific acts of negligence.⁶

The doctrine of *res ipsa loquitur* may apply in an action against the owners or operators of different vehicles as joint tort-feasors,⁷ and it has been held that, where a collision occurs under such circum-

stances that an inference or presumption arises that one or both of the drivers were negligent, it is the duty of both to exonerate themselves.⁸ The doctrine may also apply in an action by a passenger, guest, or other occupant of a motor vehicle against its operator or owner.⁹

The doctrine of *res ipsa loquitur* has been held not to be available to establish a presumption or inference of recklessness,¹⁰ gross negligence,¹¹ will-

4. Iowa.—*Armbruster v. Gray*, 282 N.W. 342, 225 Iowa 1226—*Luther v. Jones*, 261 N.W. 817, 220 Iowa 95.

La.—*Weddle v. Phelan*, 177 So. 407. Mo.—*Jones v. Central States Oil Co.*, 164 S.W.2d 914, 350 Mo. 91. N.Y.—*Haddix v. Tomlich*, 280 N.Y.S. 56, 245 App.Div. 727.

Ohio.—*Winslow v. Ohio Bus Line Co.*, 73 N.E.2d 504, 148 Ohio St. 101.

Tex.—*National Union Fire Ins. Co. v. Wallace*, Civ.App., 118 S.W.2d 609.

Utah.—*Nelson v. Lott*, 17 P.2d 272, 81 Utah 265.

Fleeing held to permit application of *res ipsa loquitur* doctrine

(1) In general.

Cal.—*Price v. McDonald*, 45 P.2d 425, 7 Cal.App.2d 77—*Cookson v. Fitch*, 3 P.2d 27, 116 Cal.App. 544.

Iowa.—*Savery v. Kist*, 11 N.W.2d 23, 234 Iowa 98.

La.—*Levy v. Indemnity Ins. Co. of North America*, App., 8 So.2d 774—*B & B Cut Stone Co. v. Uhler*, App., 1 So.2d 149.

Me.—*Chaisson v. Williams*, 156 A. 154, 130 Me. 341.

Mo.—*Harke v. Haase*, 75 S.W.2d 1001, 335 Mo. 1104—*Mulanix v. Reeves*, 112 S.W.2d 100, 233 Mo.App. 143, certiorari quashed State ex rel. and to Use of Reeves v. Shain, 122 S.W.2d 885, 343 Mo. 550.

S.D.—*Barger v. Chelpon*, 243 N.W. 97, 60 S.D. 66.

(2) Complaint alleging specific instance of willful misconduct of automobile owners in separate count was held not waiver of right to rely on doctrine of *res ipsa loquitur* where negligence was alleged in general terms in another count—*Ellis v. Jewett*, 64 P.2d 432, 18 Cal.App.2d 629.

(3) Gratuitous passengers suing automobile driver did not, by alleging in alternative a definite act of negligence, forfeit right to rely on *res ipsa loquitur* doctrine.—*Shea v. Hern*, 171 A. 248, 132 Me. 361.

8. La.—*B & B Cut Stone Co. v. Uhler*, App., 1 So.2d 149.

6. Me.—*Shea v. Hern*, 171 A. 248, 132 Me. 361.

Mo.—*Harke v. Haase*, 75 S.W.2d 1001, 335 Mo. 1104.

7. Cal.—*Armstrong v. Pacific Greyhound Lines*, 168 P.2d 457, 74 Cal. App.2d 367.

8. La.—*Weddle v. Phelan*, App., 177 So. 407.

9. Cal.—*Druznich v. Criley*, 122 P.2d 53, 19 Cal.2d 439—*Godfrey v. Brown*, 20 P.2d 165, 220 Cal. 57, 93 A.L.R. 1092—*Fiske v. Wilkie*, 154 P.2d 725, 67 Cal.App.2d 440—*Weddle v. Loges*, 125 P.2d 914, 52 Cal.App.2d 115—*Ellis v. Jewett*, 64 P.2d 432, 18 Cal.App.2d 629—*Cookson v. Fitch*, 3 P.2d 27, 116 Cal.App. 544—*Queirolo v. Pacific Gas & Electric Co.*, 300 P. 487, 114 Cal.App. 610—*Ireland v. Marsden*, 291 P. 912, 108 Cal.App. 632—*Crooks v. White*, 290 P. 497, 107 Cal.App. 304—*Finnegan v. Giffen*, 265 P. 496, 89 Cal.App. 702—*Morris v. Morris*, 258 P. 616, 84 Cal.App. 599—*Brown v. Davis*, 257 P. 877, 84 Cal.App. 180.

Ky.—*Reibert v. Thompson*, 194 S.W.2d 974, 302 Ky. 688—*Ralston v. Dossey*, 157 S.W.2d 739, 289 Ky. 40.

La.—*Galbraith v. Davis*, App., 162 So. 246—*Livaudais v. Black*, 127 So. 129, 13 La.App. 345.

Me.—*Shea v. Hern*, 171 A. 248, 132 Me. 361—*Chaisson v. Williams*, 156 A. 154, 130 Me. 341.

Minn.—*Nicol v. Gettler*, 247 N.W. 8, 188 Minn. 69.

Mo.—*Tabler v. Perry*, 85 S.W.2d 471, 337 Mo. 154—*Vesper v. Ashton*, 118 S.W.2d 84, 233 Mo.App. 204—*Mackler v. Barnert*, App., 49 S.W.2d 244.

Nev.—*Nyberg v. Kirby*, 188 P.2d 1006, rehearing denied 193 P.2d 850.

N.J.—*Spill v. Stoekert*, 15 A.2d 773, 126 N.J.Law 382.

N.Y.—*Kinary v. Taylor*, 276 N.Y.S. 988, 243 App.Div. 651—*Bennett v. Edward*, 267 N.Y.S. 417, 239 App. Div. 157.

Ohio.—*Morrow v. Hume*, 3 N.E.2d 39, 131 Ohio St. 319—*Weller v. Worstall*, 196 N.E. 637, 129 Ohio St. 596—*Zurich v. Zurich*, 163 N.E. 917, 29 Ohio App. 522, petition dismissed 166 N.E. 202, 119 Ohio St. 644.

42 C.J. p 1205 note 89 [b], [d].

Carriers without reward

(1) Doctrine of *res ipsa loquitur* is applicable to carriers without reward as well as to carriers for hire. Cal.—*Crooks v. White*, 290 P. 497, 107 Cal.App. 304.

Mo.—*Estes v. Estes*, App., 127 S.W.2d 78.

S.D.—*Barger v. Chelpon*, 243 N.W. 97, 60 S.D. 66.

(2) Injury to passenger in common carrier as raising presumption or inference of negligence see Carriers § 764.

Door opening

(1) The doctrine has been held inapplicable to a guest who fell out through the side door of an ambulance.—*Morales v. Employers' Liability Assur. Corporation*, 12 So.2d 804, 202 La. 755—*Rushing v. Mulhearn Funeral Home*, La.App., 200 So. 52.

(2) Evidence that driver had exclusive control of automobile when guest fell from seat when door opened suddenly without any apparent reason, and that driver, although having no duty to keep automobile in repair, had knowledge of defective door latch, rendered doctrine of *res ipsa loquitur* applicable in guest's action against driver for injuries.—*Adams v. Le Bow*, 172 S.W.2d 874, 237 Mo.App. 1191—*Adams v. Le Bow*, 160 S.W.2d 826, 236 Mo.App. 899.

10. U.S.—*Russell v. Turner*, D.C. Iowa, 58 F.Supp. 455, affirmed, C. C.A., 148 F.2d 562.

Iowa.—*Harvey v. Clark*, 6 N.W.2d 144, 232 Iowa 729, 143 A.L.R. 1141—*Phillips v. Briggs*, 245 N.W. 720, 215 Iowa 461.

Faulty operation

In order to render *res ipsa loquitur* applicable in action based on reckless automobile operation, accident must be one not ordinarily happening, except through faulty operation of car.—*Giddings v. Honan*, 169 A. 271, 114 Conn. 473, 79 A.L.R. 1215.

11. Cal.—*Lincoln v. Quick*, 24 P.2d 245, 183 Cal.App. 433.

Ga.—*Minkovits v. Fine*, 19 S.E.2d 561, 67 Ga.App. 176.

Me.—*Winslow v. Tibbetts*, 162 A. 786, 131 Me. 315.

Mass.—*Cook v. Cole*, 174 N.E. 271, 273 Mass. 557.

ful misconduct,¹³ or gross negligence or willful and wanton misconduct.¹³

(b) Operation and Effect of Doctrine

The doctrine of *res ipsa loquitur*, where applicable, operates to shift the burden of going forward with the evidence to the defendant, but it does not shift the burden of proof.

The doctrine of *res ipsa loquitur*, where applicable, operates to shift the burden of going forward with the evidence to defendant¹⁴ and relieves plaintiff from showing any particular act of negligence,¹⁵ but it does not operate to shift the burden of proof,¹⁶ nor does it transform the general issue into an affirmative defense.¹⁷ It places on defendant the burden of explaining that the accident did not occur from want of care on his part,¹⁸ but, if defendant shows that he exercised due care under the

circumstances, he does not have the burden of giving a satisfactory explanation of the accident.¹⁹ The presumption of negligence arising from the application of the doctrine of *res ipsa loquitur* is not conclusive but may be rebutted,²⁰ as by proof of freedom from negligence²¹ or by proof as to the cause of the accident.²²

c. Application of Rules

The doctrine of *res ipsa loquitur* ordinarily is held to apply, and a presumption of negligence arises, where without apparent reason a motor vehicle overturns or leaves the highway, where a motor vehicle strikes a clearly visible stationary object or person, or where injury is caused by the movement of an unattended vehicle; but not where a motor vehicle skids or a tire blows out.

The particular facts and circumstances of a variety of motor vehicle accidents have been held to be²³ or not to be²⁴ such as to bring into operation

N.H.—Conant v. Collins, 10 A.2d 237, 90 N.H. 434, 132 A.L.R. 1266.

12. Cal.—Fiske v. Wilkie, 154 P.2d 725, 67 Cal.App.2d 440.

13. Fla.—O'Reilly v. Sattler, 193 So 817, 141 Fla. 770.

14. Ala.—Langley Bus Co. v. Mes-ser, 133 So. 287, 222 Ala. 533—Sin-clair v. Taylor, 173 So. 878, 27 Ala. App. 418.

Ky.—Stark's Adm'r v. Herndon's Adm'r, 166 S.W.2d 828, 292 Ky. 469.

La.—Muhleisen v. Eberhardt, App., 21 So.2d 235—Tymon v. Toye Bros. Yellow Cab Co., App., 10 So.2d 599—Levy v. Indemnity Ins. Co. of North America, App., 8 So.2d 774—Pearce v. U. S. Fidelity & Guaranty Co., App., 8 So.2d 743—Wolfe v. Baumer Food Products Co., App., 171 So. 155.

R.I.—Douglas v. Silvia, 180 A. 859, 65 R.I. 260.

Vt.—Desmarchier v. Frost, 99 A. 782, 91 Vt. 138.

Va.—L. Bromm Baking Co. v. West, 186 S.E. 289, 166 Va. 357.

Wash.—Hardman v. Younkers, 131 P.2d 177, 15 Wash.2d 483, 151 A. L.R. 868.

15. Mass.—Fone v. Ellolian, 7 N.E. 2d 737, 297 Mass. 139.

42 C.J. p 1206 note 92.

16. Cal.—Crooks v. White, 290 P. 497, 107 Cal.App. 304—Smith v. Hollander, 257 P. 577, reheard 259 P. 958, 85 Cal.App. 535.

N.J.—Spill v. Stoeckert, 15 A.2d 773, 125 N.J.Law 382.

N.C.—Etheridge v. Etheridge, 24 S. E.2d 477, 222 N.C. 616.

R.I.—Douglas v. Silvia, 180 A. 859, 65 R.I. 260.

Wash.—Hardman v. Younkers, 131 P. 2d 177, 15 Wash.2d 483, 151 A.L.R. 868.

43 C.J. p 1207 note 2.

17. Vt.—Desmarchier v. Frost, 99 A. 782, 91 Vt. 138.

18. Ala.—Langley Bus Co. v. Mes-ser, 133 So. 287, 222 Ala. 533—Whiddon v. Malone, 134 So. 516, 220 Ala. 220.

Ariz.—Brownell v. Freedman, 6 P. 2d 1115, 39 Ariz. 385.

Cal.—Cooper v. Kellogg, 42 P.2d 59, 2 Cal.2d 504—Smith v. Hollander, 257 P. 577, reheard 259 P. 958, 85 Cal.App. 535.

Ky.—Starks Adm'r v. Herndon's Adm'r, 166 S.W.2d 828, 292 Ky. 469.

La.—Pearce v. U. S. Fidelity & Guar-anty Co., App., 8 So.2d 743.

Pa.—Bernosky v. Greff, 38 A.2d 35, 350 Pa. 59—Riley v. Wooden, 165 A. 738, 310 Pa. 449—Ebey v. Schwartz, 158 A. 291, 104 Pa.Super. 181.

Tenn.—Richards v. Parks, 93 S.W.2d 639, 19 Tenn.App. 615.

Wash.—Hardman v. Younkers, 131 P.2d 177, 15 Wash.2d 483, 151 A. L.R. 868.

37 C.J. p 1206 note 93.

19. Mass.—McFarlane v. McCourt, 2 N.E.2d 17, 295 Mass. 85.

Pa.—Riley v. Wooden, 165 A. 738, 310 Pa. 449.

20. Ala.—Sinclair v. Taylor, 173 So. 878, 27 Ala.App. 418.

Iowa.—Harvey v. Borg, 257 N.W. 190, 218 Iowa 1228.

La.—Adam v. English, App., 21 So. 2d 633.

Mich.—Weaver v. Motor Transit Management Co. (Greyhound Lines), 233 N.W. 178, 252 Mich. 64, 42 C.J. p 1208 note 24.

Res ipsa loquitur rule permits, but does not compel, an inference of negligence.

Minn.—Marsh v. Henriksen, 7 N.W.2d 387, 213 Minn. 500.

N.C.—Etheridge v. Etheridge, 24 S. E.2d 477, 222 N.C. 616.

Presumption becomes conclusive if not rebutted

La.—Nuss v. MacKenzie, App., 4 So. 2d 845.

21. Ala.—Sinclair v. Taylor, 173 So. 878, 27 Ala.App. 418.

La.—Deimel v. Etheridge, App., 198 So. 537.

Tenn.—Chattanooga-Dayton Bus Line v. Lynch, 6 Tenn.App. 470.

Va.—Jones v. Nugent, 180 S.E. 161, 164 Va. 378.

42 C.J. p 1206 note 95.

22. Ky.—Thompson v. Kost, 181 S. W.2d 445, 298 Ky. 32—Gilreath v. Blue & Gray Transp. Co., 108 S. W.2d 1002, 269 Ky. 787, followed in 108 S.W.2d 1004, 269 Ky. 791. La.—Aden v. Allen, App., 3 So.2d 905.

23. Ala.—Langley Bus Co. v. Mes-ser, 133 So. 287, 222 Ala. 533—Sin-clair v. Taylor, 173 So. 878, 27 Ala. App. 418.

Fla.—Orr v. Avon Florida Citrus Corporation, 177 So. 612, 130 Fla. 306.

Ill.—Turner v. Cummings, 48 N.E.2d 964, 319 Ill.App. 225.

Ky.—Thompson v. Kost, 181 S.W.2d 445, 298 Ky. 32.

La.—Bonner v. Boudreaux, App., 8 So.2d 309.

N.Y.—Cunningham v. Exposition Greyhound, 22 N.Y.S.2d 79, 174 Misc. 865.

Unexplained dumping of dump truck
Mass.—Liberatore v. Town of Fram-ingham, 53 N.E.2d 561, 315 Mass. 538.

24. Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140.

Cal.—Hanson v. Weckerle, 63 P.2d 322, 18 Cal.App.2d 214—Gonzalez v. Nichols, 294 P. 768, 110 Cal.App. 738.

the rule of *res ipsa loquitur* or to raise a presumption of negligence.

Blowout. It has been held that the doctrine of *res ipsa loquitur* does not apply, and that an inference or presumption of negligence may not be made, where injury results from the blowout of a tire,²⁵ but that plaintiff must establish that the tire was defective and that the defect was known or could have been discovered by the exercise of reasonable care.²⁶

Falling asleep. Proof that the operator of a motor vehicle fell asleep warrants an inference or presumption of negligence,²⁷ but not of gross negligence.²⁸ This presumption of negligence is not conclusive, but may be rebutted,²⁹ as by proof that the operator, as a careful and cautious person, could not

have foreseen that he was about to fall asleep.³⁰

Injury caused by something projecting from, attached to, or falling from, vehicle. The doctrine of *res ipsa loquitur* has been applied where the injury was caused by something projecting from,³¹ attached to,³² or falling off,³³ a motor vehicle.

Left turn. It has been held that a collision involving a vehicle making a left turn at an intersection is presumed to have been caused by the negligence of the driver of that vehicle.³⁴

Rear-end collision. The circumstances under which a rear-end collision occurs may warrant the application of the doctrine of *res ipsa loquitur* and the indulgence of a presumption or inference of negligence.³⁵ It has been held, however, that the

Idaho.—Quillin v. Colquhoun, 247 P. 740, 42 Idaho 522.

Iowa.—Glanopoulos v. Saunders System, Cedar Rapids Co., 242 N.W. 53.

La.—Nuss v. MacKenzie, App., 4 So. 2d 845—Monkhouse v. Johns, App., 142 So. 347.

Minn.—Marsh v. Henriksen, 7 N.W. 2d 387, 213 Minn. 500.

Mo.—Jones v. Central States Oil Co., 164 S.W.2d 914, 350 Mo. 91.

Car struck on left side

Fact that motorist's car was struck on left side authorized no inference that oncoming car was negligently on wrong side of road—Clark v. Bolton, 246 N.W. 326, 210 Wis. 631.

Cause of damage

Petition alleging that defendant through his employees was in sole control of operation of truck, that wheat fire started at point on land over which truck passed, immediately after truck had passed, and that no other persons or vehicles were near, was insufficient to allege a cause of action based on the doctrine of *res ipsa loquitur*, since petition raised only a presumption that truck caused damage.—Emigh v. Andrews, 191 P.2d 901, 164 Kan. 732.

Hot water

Where plaintiff was injured by hot water from automobile driven by owner's wife, *res ipsa loquitur* doctrine was held inapplicable.—Randazzo v. Wheaton, 180 N.E. 303, 278 Mass. 536.

Previous directions

In action for injuries sustained by subcontractor, when another subcontractor's truck crane backed into him without warning as he sat on a wall from which position he had directed crane operator in all previous movements of crane, the doctrine of *res ipsa loquitur* had no application.

—Pollard v. Foster, 129 P.2d 448, 54 Cal.App.2d 502.

25. Conn.—Giddings v. Honan, 159 A. 271, 114 Conn. 473, 79 A.L.R. 1215.

Me.—Dostie v. Lewiston Crushed Stone Co., 8 A.2d 393, 136 Me. 284
Wis.—Pawlowski v. Eskofski, 244 N.W. 611, 209 Wis. 189—Seligman v. Orth, 236 N.W. 115, 205 Wis. 199—Klein v. Beeten, 172 N.W. 736, 169 Wis. 385, 5 A.L.R. 1237

26. Me.—Dostie v. Lewiston Crushed Stone Co., 8 A.2d 393, 136 Me. 248—Glazer v. Grob, 3 A.2d 895, 136 Me. 123.

27. Ala.—Whiddon v. Malone, 124 So. 516, 220 Ala. 220
Ariz.—Brownell v. Freedman, 6 P.2d 1115, 39 Ariz. 385.

Cal.—Cooper v. Kellogg, 42 P.2d 59, 2 Cal.2d 504.

Del.—Diamond State Tel. Co. v. Hunter, 21 A.2d 286, 2 Terry 336
Pa.—Bernosky v. Greff, 38 A.2d 35, 350 Pa. 59.

Tenn.—Richards v. Parks, 93 S.W.2d 639, 19 Tenn. App. 615.

28. Cal.—Cooper v. Kellogg, 42 P.2d 59, 2 Cal.2d 504

Tenn.—Richards v. Parks, 93 S.W.2d 639, 19 Tenn. App. 615.

29. Ala.—Whiddon v. Malone, 124 So. 516, 220 Ala. 220.

Del.—Diamond State Tel. Co. v. Hunter, 21 A.2d 286, 2 Terry 336.

30. Del.—Diamond State Tel. Co. v. Hunter, supra.

31. Pa.—Dorris v. Bridgman & Co., 145 A. 827, 296 Pa. 198.

Pedestrian struck by open door

(1) Where door suddenly opened, injuring pedestrian properly on sidewalk, foot and half from curb, occurrence of accident authorized inference of negligence.—Young v. Yellow Cab Co., 180 A. 63, 118 Pa. Super. 495.

(2) It has also been held, however,

that mere fact that pedestrian was struck by open rear door of automobile and was injured did not establish motorist's negligence—Hazen v. Rockefeller, 6 N.W.2d 770, 303 Mich. 536.

32. Wis.—Dunham v. Wisconsin Gas & Electric Co., 280 N.W. 291, 228 Wis. 250.

Long piece of wire trailing from truck

Wis.—Dunham v. Wisconsin Gas & Electric Co., supra

33. Cal.—McCole v. Merchants Express Corporation, 64 P.2d 1130, 19 Cal.App.2d 149.

Conn.—Gates v. Crane Co., 139 A. 782, 107 Conn. 201.

Wheel detaching and injuring pedestrian

(1) Where motortruck wheel rolled off injuring pedestrian, owner had burden of showing reasonable care to prevent or discover and remedy defect.

Conn.—Gates v. Crane Co., supra.
La.—Ross v. Tynes, App., 14 So.2d 80.

(2) Truck owner was held not liable for injury to pedestrian when crystallized axle broke while garage-man was testing truck, and wheel rolled ahead, striking pedestrian, where owner did not have any ground for believing truck was in dangerous condition.—Sennett v. Nonantum Coal Co., 187 N.E. 758, 284 Mass. 390.

34. La.—Gaines v. Standard Acc. Ins. Co., App., 32 So.2d 633.

35. U.S.—Mikolajczyk v. Allcutt, C. C.A.Pa., 102 F.2d 82.

Iowa.—Harvey v. Borg, 257 N.W. 190, 218 Iowa 1228.

La.—Loprestie v. Roy Motors, Inc., 185 So. 11, 191 La. 193—Muhleisen v. Eberhardt, App., 21 So.2d 235—Overstreet v. Ober, 130 So. 648,

happening of a rear-end collision does not of itself warrant an inference or presumption of negligence,³⁶ but other authorities hold, sometimes by reason of statute, that in such case it is presumed that the rear vehicle was at fault³⁷ or that a rear-end collision furnishes at least some evidence of negligence on the part of the operator of the rear vehicle.³⁸

Skidding. As a general rule, the mere fact that a motor vehicle skids and inflicts an injury does not

permit the application of the doctrine of *res ipsa loquitur*, nor does it warrant a presumption or inference of negligence,³⁹ particularly where the skidding occurs in bad weather or unusual circumstances.⁴⁰

Striking clearly visible stationary object or person. Where a motorist collides with a clearly visible, stationary object, negligence may be inferred or presumed,⁴¹ and this rule has been applied where

14 La.App. 633—Flick v. New Orleans Item-Tribune, 6 La.App. 864 Pa.—Meek v. Allen, 58 A.2d 370, 162 Pa.Super. 495.
42 C.J. p 1206 note 93 [a].

Slight evidence of the circumstances may place the fault.—Leech v. Escobar, 63 N.E.2d 891, 318 Mass. 711—Buda v. Foley, 19 N.E.2d 537, 302 Mass. 411.

Front vehicle stopped for traffic light.—Nielsen v. Pyles, 54 N.E.2d 753, 322 Ill.App. 574.

Mo.—Jones v. Austin, App., 154 S.W. 2d 378

36. U.S.—Mikolajczyk v. Allcutt, C. C.A.Pa., 102 F.2d 82.

Mass.—Buda v. Foley, 19 N.E.2d 537, 302 Mass. 411—Jennings v. Bragdon, 194 N.E. 697, 289 Mass. 595—Hendler v. Coffey, 179 N.E. 801, 278 Mass. 339.

Pa.—Meek v. Allen, 58 A.2d 370, 162 Pa.Super. 495—Cirquitella v. C. C. Callaghan, Inc., 200 A. 588, 331 Pa. 465—Hasslerick v. Walker, Com. Pl., 55 Montg.Co. 60.

42 C.J. p 1205 note 85 [c].

Sudden stop

Where plaintiff's automobile stopped because of sudden appearance of another automobile, and was hit from rear by automobile owned by defendant, *res ipsa loquitur* did not apply so as to raise presumption of defendant's negligence.—Rankin v. Nash-Texas Co., Tex.Civ.App., 73 S.W.2d 680, error granted.

37. Mich.—Noonan v. Volek, 224 N.W. 657, 246 Mich. 377—Depue v. Schwarz, 192 N.W. 713, 222 Mich. 308.

R.I.—Douglas v. Silvia, 180 A. 359, 55 R.I. 260—Riccio v. Ginsberg, 139 A. 652, 49 R.I. 32—O'Donnell v. United Electric Rys. Co., 134 A. 642, 48 R.I. 18.

Presumption rebuttable

Mich.—Depue v. Schwarz, 192 N.W. 713, 222 Mich. 308.
42 C.J. p 1208 note 24.

Presumption drops out of case where evidence in rebuttal is presented.—Cothran v. Benjamin Cleener & Son, 209 N.W. 132, 235 Mich. 551.

Sudden stop

Bus driver who struck rear end of

car ahead traveling in same direction, when emergency caused car ahead to stop suddenly, was presumed negligent.—Weaver v. Motor Transit Management Co. (Greyhound Lines), 233 N.W. 178, 252 Mich. 64.

38. Cal.—Cartmill v. Arden Farms Co., 189 P.2d 739, 83 Cal.App.2d 787—Wright v. Ponitz, 112 P.2d 25, 44 Cal.App.2d 215—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.

Explanations by both

Prima facie each case involving a rear end collision imports negligence, and explanations by the motorists involved in the collision are in order.—Donahue v. Mazzoli, 80 P.2d 743, 27 Cal.App.2d 102.

39. Conn.—Martin v. Holway, 14 A. 2d 38, 126 Conn. 700.

Ky.—O'Neill & Hearne v. Bray's Adm'x, 90 S.W.2d 353, 262 Ky. 377.

La.—Barret v. Caddo Transfer & Warehouse Co., 116 So. 563, 165 La. 1075, 58 A.L.R. 261—Cosse v. Henley, App., 193 So. 206—Siren v. Montague, App., 142 So. 196

Me.—King v. Wolf Grocery Co., 137 A. 62, 126 Me. 202.

Mo.—Polokoff v. Sanell, App., 52 S.W.2d 443.

N.H.—Wiggin v. Kingston, 20 A.2d 625, 91 N.H. 397.

N.Y.—Lahr v. Tirrill, 8 N.E.2d 298, 274 N.Y. 112, reargument denied 10 N.E.2d 675, 274 N.Y. 611—Hammond v. Hammond, 237 N.Y.S. 557, 227 App.Div. 336—Parsons v. Moss, 13 N.Y.S.2d 865, 171 Misc. 828—Books v. Goldstein, 289 N.Y.S. 1087, 160 Misc. 488.

N.C.—Mitchell v. Melts, 18 S.E.2d 406, 220 N.C. 793—Williams v. Thomas, 14 S.E.2d 797, 219 N.C. 727—Butner v. Whitlow, 161 S.E. 389, 201 N.C. 749—Springs v. Doll, 148 S.E. 251, 197 N.C. 240.

Or.—Wilbur v. Home Lumber & Coal Co., 282 P. 236, 131 Or. 180.

Pa.—Eisenhower v. Hall's Motor Transit Co., 40 A.2d 458, 351 Pa. 200—Valley Motor Transit Co. v. Allison, 33 A.2d 485, 153 Pa.Super. 221—Smith v. Gross, 173 A. 478, 113 Pa.Super. 5—Itch v. Robinson, 99 Pa.Super. 141.

Vt.—Johnson v. Burke, 183 A. 495, 108 Vt. 164—L'Ecuycer v. Farns-

worth, 170 A. 677, 106 Vt. 180—Williamson v. Clark, 153 A. 448, 103 Vt. 288.

Wash.—Wellons v. Willey, 166 P.2d 852, 24 Wash.2d 543—Wilson v. Congdon, 37 P.2d 892, 179 Wash. 400.

Wis.—Zeinemann v. Gasser, 29 N.W. 2d 49, 251 Wis. 238—Linden v. Miller, 177 N.W. 909, 172 Wis. 20, 22.

42 C.J. p 1205 notes 84 [c], 85 [a].

43. Ill.—Bradley v. Thomas M. Madden Co., 76 N.E.2d 797, 333 Ill. App. 153.

Pa.—Master v. Goldstein's Fruit & Produce, 23 A.2d 443, 344 Pa. 1.

42 C.J. p 1205 note 87 [a].

41. Cal.—Morris v. Morris, 258 P. 616, 84 Cal.App. 599.

Ill.—Pearlman v. W. O. King Lumber Co., 23 N.E.2d 826, 302 Ill.App. 190.

La.—Becker, for Use and Benefit of Becker, v. Mattel, App., 165 So. 474.

Mass.—Bryne v. Great Atlantic & Pacific Tea Co., 168 N.E. 540, 269 Mass. 130.

42 C.J. p 1206 note 93 [c].

Particular objects

(1) Balustrade of bridge.—Gomer v. Anding, La.App., 146 So. 704, rehearing denied 147 So. 545.

(2) Excavator parked near curb.—Bryne v. Great Atlantic & Pacific Tea Co., 168 N.E. 540, 269 Mass. 130.

(3) Pole.

Cal.—Morris v. Morris, 258 P. 616, 84 Cal.App. 599.

N.Y.—Kinarty v. Taylor, 276 N.Y.S. 688, 243 App.Div. 651.

Ohio.—Zwick v. Zwick, 163 N.E. 917, 29 Ohio App. 522, petition dismissed 166 N.E. 202, 119 Ohio St. 644.

(4) Street car.—United Electric Rys. Co. v. Cawley, R.I., 159 A. 739.

Unusual circumstances justifying failure to see

A motorist who runs into stationary vehicle or into any object on road is presumed to be guilty of negligence unless there are unusual circumstances justifying failure to see vehicle or object and such rule applies where a fog or dense smoke makes it difficult to see.—Glorlando v. Maitrejean, La.App., 22 So.2d 564.

a motorist strikes a parked motor vehicle⁴² or a pedestrian standing in the highway or crossing it in a normal manner without change of pace or direction where he is in plain view for a sufficient length of time to be seen and avoided.⁴³

Unattended vehicle. Negligence has been presumed and the doctrine of *res ipsa loquitur* applied where injury was inflicted by the movement of a

motor vehicle which was unattended and unoccupied,⁴⁴ and an inference or presumption that it was negligently parked has been indulged.⁴⁵

Vehicle overturning or leaving highway. As a general rule the doctrine of *res ipsa loquitur* applies and a presumption or inference of negligence is warranted where a motor vehicle for no apparent reason overturns⁴⁶ or leaves the roadway⁴⁷ and

42. Cal.—Slappey v. Schiller, 2 P. 2d 577, 116 Cal.App. 274.

D.C.—Bonbrest v. Lewis, Mun.App. 54 A.2d 751—Schwartzbach v. Thompson, Mun.App., 33 A.2d 624

Ill.—Pearlman v. W. O. King Lumber Co., 23 N.E.2d 826, 302 Ill.App. 190.

Mass.—Hendler v. Coffey, 179 N.E. 801, 278 Mass. 339.

Mo.—Hollenshe v. Fevely Dairy Co., App., 33 S.W.2d 273.

R.I.—Byron v. Brown, 163 A. 881, 53 R.I. 91.

Wash.—Hardman v. Younkers, 131 P. 2d 177, 15 Wash.2d 483, 151 A.L.R. 868.

Wyo.—Corson v. Wilson, 108 P.2d 260, 56 Wyo. 218.

43. Pa.—Smith v. Shatz, 200 A. 620, 331 Pa. 453—Glover v. Struble, 48 A.2d 50, 159 Pa.Super. 305—Pinto v. Bell Fruit Co., 24 A.2d 768, 148 Pa.Super. 132—O'Leary v. Willis, 200 A. 125, 131 Pa.Super. 578—Metzszakowski v. Jacobson, 186 A. 227, 122 Pa.Super. 180—Schade v. Engel, Com.Pl., 19 Erie Co. 510.

Child

To run down a child in an unobstructed street in daylight is evidence of negligence, unless child suddenly darts out into pathway of vehicle.—Urbanick v. Croneweth Dairy Co., 35 A.2d 83, 154 Pa.Super. 44.

44. Mass.—Pelland v. D'Allesandro, 73 N.E.2d 590, 321 Mass. 387—McFarlane v. McCourt, 2 N.E.2d 1017, 295 Mass. 85—Glaser v. Schroeder, 168 N.E. 809, 269 Mass. 337. Minn.—Borg & Powers Furniture Co. v. Clark, 260 N.W. 316, 194 Minn. 305.

N.J.—Barbanes v. Brown, 163 A. 148, 110 N.J.Law 6—Sheridan v. Arrow Sanitary Laundry Co., 146 A. 191, 105 N.J.Law 608.

N.Y.—Rintel v. Dairymen's League Co-op. Ass'n, 34 N.Y.S.2d 348, 178 Misc. 348.

Ohio.—Cleveland Ice Cream Co. v. Call, 162 N.E. 812, 28 Ohio App. 521.

Tenn.—Whitaker v. Bandy, 4 Tenn. App. 202.

Tex.—Ketchum v. Gillespie, Civ.App., 145 S.W.2d 215.

In Louisiana

(1) Where plaintiff standing at a bus stop was struck by an unattended automobile rolling from a

lot in which defendants parked customers' cars, one defendant admitted he was notified, had a customer take plaintiff to hospital and later refused to disclose ownership of car indicating that his service station was responsible, doctrine of *res ipsa loquitur* was properly applied to impose liability.—Yates v. Williams, La.App., 32 So.2d 505.

(2) In absence of proof of negligence of one leaving automobile, damages for its running into show window cannot be collected.—Globe Indemnity Co. v. Quesenberry, 1 La. App. 364.

45. Cal.—Price v. McDonald, 45 P. 2d 425, 7 Cal.App.2d 77.

Mass.—Pelland v. D'Allesandro, 73 N.E.2d 590, 321 Mass. 387.

42 C.J. p 1206 note 93 [c].

Brakes not properly set

Where testimony showed that brakes could hold automobile on incline, it was permissible inference that automobile rolled down, injuring plaintiff, because brakes were not properly set.—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.

46. Ala.—Baker v. Baker, 124 So. 740, 220 Ala. 201.

Cal.—Fenstermacher v. Johnson, 32 P.2d 1106, 138 Cal.App. 691—Cookson v. Fitch, 3 P.2d 27, 116 Cal. App. 544—Crooks v. White, 290 P. 497, 107 Cal.App. 304—Brown v. Davis, 257 P. 877, 84 Cal.App. 180. Nev.—Nyberg v. Kirby, 193 P.2d 850. N.Y.—Russo v. State, 2 N.Y.S.2d 350, 166 Misc. 316.

Absence of supervening cause

In absence of obstructions, defect in road or automobile, or other supervening cause, overturning of automobile on curve warrants inference of negligence in operation.—Etheridge v. Etheridge, 24 S.E.2d 477, 222 N.C. 616.

47. Cal.—Druzanich v. Criley, 122 P.2d 53, 19 Cal.2d 439—Fiske v. Wilkie, 154 P.2d 725, 67 Cal.App. 2d 440—Doggett v. Lacey, 9 P.2d 257, 121 Cal.App. 395.

Ill.—Masten v. Cousins, 216 Ill.App. 268.

Ky.—Reibert v. Thompson, 194 S.W. 2d 974, 302 Ky. 688—Ralston v. Dossey, 157 S.W.2d 739, 289 Ky. 40.

La.—Levy v. Indemnity Ins. Co. of North America, App., 8 So.2d 774—Galbraith v. Dreyfus, App., 162 So. 246—Livauda's v. Black, 127 So. 129, 13 La.App. 345—Hamburger v. Katz, 120 So. 391, 10 La. App. 215.

Me.—Shea v. Hern, 171 A. 248, 132 Me. 361.

Minn.—Nicol v. Gettler, 247 N.W. 8, 188 Minn. 69.

Mo.—Tabler v. Perry, 85 S.W.2d 471, 337 Mo. 154—Adams v. Le Bow, 160 S.W.2d 826, 236 Mo.App. 889—Vesper v. Ashton, 118 S.W.2d 84, 233 Mo.App. 204—Mackler v. Barnert, App. 49 S.W.2d 244.

Nev.—Nyberg v. Kirby, 188 P.2d 1006, rehearing denied 193 P.2d 850.

N.J.—Spill v. Stoeckert, 15 A.2d 773, 125 N.J.Law 382—Smith v. Kirby, 178 A. 739, 115 N.J.Law 225—Iannuzzi v. Bishop, 151 A. 477, 8 N.J. Misc. 609.

N.Y.—Bennett v. Edward, 267 N.Y. S. 417, 239 App.Div. 157—Spren v. McCann, 263 N.Y.S. 46, 147 Misc. 41, affirmed 264 N.Y.S. 1008, 240 App.Div. 709, affirmed on other grounds 191 N.E. 558, 264 N.Y. 546.

N.C.—Etheridge v. Etheridge, 24 S. E.2d 477, 222 N.C. 616.

Ohio.—Morrow v. Hume, 3 N.E.2d 39, 131 Ohio St. 319—Weller v. Worstall, 196 N.E. 637, 120 Ohio St. 596—Sprenger v. Braker, 49 N. E.2d 958, 71 Ohio App. 349—Nassar v. Interstate Motor Freight System, 16 N.E.2d 832, 58 Ohio App. 443—Scovanner v. Toelke, 163 N. E. 493, 119 Ohio St. 256.

Pa.—Knox v. Simmerman, 151 A. 678, 301 Pa. 1—Cuntan v. Shirks Motor Exp. Corp., 28 West Co.L.J. 125.

Tenn.—Chattanooga-Dayton Bus Line v. Lynch, 6 Tenn.App. 470.

Inference arises whether injured person in vehicle or its path

Mo.—Tabler v. Perry, 85 S.W.2d 471, 337 Mo. 154.

Defect in vehicle

Where the accident warrants an inference of negligent operation, but it is equally probable that it was caused by a defect in the vehicle and the person injured is a guest as to whom there is no duty to inspect, discover, and repair defects, the doctrine of *res ipsa loquitur* does not apply.—Galbraith v. Busch, 196 N.E. 36, 267 N.Y. 230.

strikes a pedestrian on the sidewalk.⁴⁸

§ 511(4). — Violation of Statutes, Regulations, or Rules of Road

A violation of a rule of the road, or of a statute or regulation governing the operation of motor vehicles, warrants a presumption or inference of negligence.

A violation of a rule of the road, or of a statute or regulation governing the operation of motor vehicles, warrants a presumption or inference of negligence.⁴⁹ Such presumption does not shift the burden of proof as to negligence,⁵⁰ but requires defendant to come forward with evidence justifying or excusing his violation or establishing that he was acting with due care.⁵¹ The burden is on plaintiff to establish the statute, regulation, or rule of

the road,⁵² and defendant's violation thereof.⁵³ The presumption is rebuttable,⁵⁴ and where the presumption is rebutted the burden of going forward with the evidence is again on plaintiff.⁵⁵ The statutory presumption of negligence on the part of one shown to have violated the motor vehicle law has been held to disappear from the case when all of the facts and circumstances are in evidence,⁵⁶ but it has also been held that the presumption of negligence arising from a violation remains as evidence in the case even though rebuttal evidence is presented,⁵⁷ except where the rebutting evidence is conclusive.⁵⁸

Control and speed. A presumption or inference of negligence may be drawn from the fact that a motor vehicle was out of control,⁵⁹ and the burden

48. U.S.—Andruss v. Nieto, C.C.A. Cal., 112 F.2d 250.

Cal.—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal.App. 221 —Smith v. Hollander, 259 P. 958, 85 Cal.App. 535—Smith v. Hollander, App., 257 P. 577, reheard 259 P. 958, 85 Cal.App. 535.

La.—Tymon v. Toye Bros. Yellow Cab Co., App., 10 So 2d 599—Antoine v. Louisiana Highway Commission, App., 188 So. 443—Tymon v. Toye Bros. Yellow Cab Co., App., 180 So. 839—Scott v. Checker Cab Co., 126 So. 341, 12 La App. 598—Bailey v. Fisher, 123 So. 166, 11 La. App. 187.

Mo.—Murray v. St. Louis Public Service Co., App., 201 S.W.2d 775. N.Y.—Locicero v. Messina, 267 N.Y. S. 901, 239 App.Div. 635.

Pa.—Griffith v. V. A. Simrell & Son Co., 155 A. 299, 304 Pa. 165—Matzasoski v. Jacobson, 186 A. 227, 122 Pa.Super. 180—Bell Telephone Co. of Pennsylvania, Com Pl., 19 Lehigh Co L.J. 145—Robbins v. King, Com.Pl., 24 West Co.L.J. 1. Va.—L. Bromm Baking Co. v. West, 186 S.E. 289, 166 Va. 357.

42 C.J. p 1205 note 89 [c], p 1206 notes 90 [a], 93 [b], p 1039 notes 73, 74.

Lawful operation of roadway

Doctrine of *res ipsa loquitur* was inapplicable to accident in which automobile struck and injured manager of parking garage as patron was driving into the garage.—Deimel v. Etheridge, La.App., 198 So. 537.

Blind fence

Doctrine of *res ipsa loquitur* was held to apply where defendant drove truck against, and toppled over on plaintiff, a blind fence alongside path used by public.—Miller v. W. E. Callahan Const. Co., Mo.App., 46 S.W.2d 948.

49. Me.—Rawson v. Stiman, 176 A. 870, 133 Me. 250.

Okl.—Roadway Express v. Baty, 114 P.2d 935, 189 Okl. 180.

Vt.—Palmer v. Marcellie, 175 A. 31, 106 Vt. 500.

Prima facie evidence of negligence

Cal.—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63—Samuelson v. Siefer, 144 P.2d 879, 62 Cal.App. 2d 320.

Fla.—Allen v. Hooper, 171 So. 513, 126 Fla. 458.

Me.—Gold v. Portland Lumber Corporation, 16 A 2d 111, 137 Me 143. Minn.—Flitton v. Daleki, 13 N.W.2d 477, 36 Minn. 549.

50. Iowa.—Baker v. Zimmerman, 161 N.W. 479, 179 Iowa 272.

51. Wash.—Brotherton v. Day & Night Fuel Co., 73 P.2d 788, 192 Wash. 362.

Violation by policeman

Pa.—Mashinsky v. City of Philadelphia, 3 A.2d 790, 333 Pa. 97.

52. Ala.—Rochelle v. Lide, 180 So 257, 235 Ala. 596.

53. Ala.—Rochelle v. Lide, supra. Pa.—Green v. Gantz, Com.Pl., 31 Del Co. 476.

42 C.J. p 1208 note 26.

Right of way

La.—Universal Automobile Ins. Co. v. Manisalco, App., 148 So. 731.

Miss.—Whatley v. Boolas, 177 So. 1, 180 Miss. 372.

Oversize vehicle

Plaintiff is not required to establish that defendant did not have special license to operate oversize vehicle.—Nevin Bus Line v. Paul R. Hostetter Co., 155 A. 872, 305 Pa. 72.

Failure to look into rear-view mirror Ky.—Cook v. Gillespie, 82 S.W.2d 347, 259 Ky. 281.

Reason for failure to keep lookout need not be shown by plaintiff.—Bodin v. Texas Co., La.App., 186 So 390.

Compliance presumed

Where a statute provides a penal-

ty for a violation of the law of the road, a presumption arises that the driver of defendant's car complied with such law.—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

54. Ill.—Miller v. Burch, 254 Ill.App. 387.

Iowa.—McDougal v. Bormann, 234 N. W. 807, 211 Iowa 950.

Mich.—Warwick v. Blackney, 261 N. W. 310, 272 Mich. 231.

S.C.—Bowers v. Carolina Public Service Co., 145 S.E. 790, 148 S.C. 161.

Vt.—Palmer v. Marcellie, 175 A. 31, 106 Vt 500.

55. U.S.—Brown v. Walter, C.C.A. Vt., 62 F.2d 798.

56. Miss.—White v. Weltz, 152 So. 481, 169 Miss. 102.

57. Cal.—Temple v. De Mirjian, 125 P.2d 544, 51 Cal.App.2d 559.

58. Cal.—Temple v. De Mirjian, supra.

59. La.—Giglio v. Toups, App., 192 So. 553.

Pa.—Hasker v. Mease, Com.Pl., 59 Montg.Co. 364.

Loss of, or failure to regain, control

Where the driver of a truck failed to notice a deep rut or depression on each side of the tongue of a street railroad switch and one of the front wheels entered the rut, wrenching the steering gear out of his hands or otherwise causing him to lose control of the truck, which ran wild for about a hundred feet and stopped on the sidewalk, it was held that these circumstances might well raise an inference of negligence either by reason of insufficient control before the rut was encountered or in failing to regain control promptly after it was encountered.—Gelse v. Mercer Bottling Co., 94 A. 24, 87 N.J.Law 224.

The term "control" as used in statute providing that a speed in excess of twenty-five miles an hour through a thickly settled portion of a town

is on defendant to come forward with evidence that the loss of control was not due to fault on his part.⁶⁰ A failure to stop quickly and easily has been held to permit a presumption or inference that the vehicle was traveling too fast or that a proper effort to control it was not made.⁶¹

Where plaintiff's case is based on the violation by

defendant of a statute or other regulation as to speed, he must prove such violation,⁶² although an inference of excessive speed may arise from the facts proved.⁶³ The violation of a regulation as to speed may constitute prima facie evidence of negligence⁶⁴ or raise a presumption of negligence.⁶⁵ This presumption or inference may be rebutted, and

where the buildings average less than one hundred feet apart is deemed prima facie evidence of unreasonable speed by motorist, means not alone the ability to guide the automobile, but comprehends the ability to stop automobile easily and quickly, with the speed being the critical element in determining whether automobile is under control.—Hill v. Day, 199 A. 920, 9 W.W.Harr., Del., 400.

60. La.—McNabb v. Dugas, App., 142 So. 174.

Va.—Driver v. Brooks, 10 S.E.2d 887, 176 Va. 317.

61. Vt.—Page v. McGovern, 3 A.2d 543, 110 Vt. 166—Standard Oil Co. of New York v. Flint, 183 A. 336, 108 Vt. 157—Williamson v. Clark, 153 A. 448, 103 Vt. 288.

Wis.—McGill v. Baumgart, 288 N. W. 799, 233 Wis. 86.

62. Iowa.—Nicolino v. E. O. Dahlquist Const. Co., 235 N.W. 297, 211 Iowa 1190.

La.—Guinn v. Kemp, 136 So. 764, 18 La.App. 3.

Mo.—Boyce v. Donnellan, 168 S.W.2d 120, 237 Mo.App. 63.

N.C.—Smith v. Carolina Coach Co., 199 S.E. 90, 214 N.C. 314.

Tex.—Globe Laundry v. McLean, Civ. App., 19 S.W.2d 94.

42 C.J. p 1208 note 42, p 1203 note 73 [b].

Presumption is that motorist was not speeding.—Haley v. Black, La. App., 152 So. 805.

Speed at intersection

N.C.—Rudd v. Holmes, 152 S.E. 894, 198 N.C. 640.

Or.—Cameron v. Goree, 189 P.2d 596.

Speed limit applicable

(1) In absence of evidence that street intersection is obstructed, located within business or residential district, or signposted, it is conclusively presumed to be outside business or residential district in determining permissive speed limit thereat.—Wheeler v. Buerkle, 58 P.2d 230, 14 Cal.App.2d 368.

(2) Where city had failed to comply with statutory requirements in designating an arterial street, neither a motorist approaching an intersection with, nor a driver on, such street was entitled to assume that the lawful rate of speed at such intersection was other than that permitted by general law.—Huber v.

Hemrich Brewing Co., 62 P.2d 451, 188 Wash. 235.

63. Or.—Wilbur v. Home Lumber & Coal Co., 282 P. 236, 131 Or. 180.

Collision does not warrant presumption of excessive speed

Okl.—National Tank Co. v. Scott, 130 P.2d 316, 191 Okl. 613.

Force of impact

Va.—Temple v. Ellington, 12 S.E.2d 826, 177 Va. 134.

Speed after collision

From evidence of excessive speed immediately after a collision between automobiles, excessive speed immediately before collision can be inferred.—Cedergren v. Hadaway, 18 A.2d 380, 91 N.H. 270.

64. Ark.—Rogers v. Woods, 42 S.W. 2d 390, 184 Ark 392.

Cal.—Wynne v. Wright, 286 P. 1057, 105 Cal.App. 17.

Idaho.—Brixey v. Craig, 288 P. 152, 49 Idaho 319.

Ky.—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666.

Me.—Gold v. Portland Lumber Corporation, 16 A.2d 111, 137 Me. 143.

Miss.—Allen v. Friedman, 125 So. 539, 156 Miss. 77.

N.C.—Kolman v. Silbert, 12 S.E.2d 915, 219 N.C. 134—Morris v. Johnson, 199 S.E. 390, 214 N.C. 402—Latham v. Elizabeth City Orange Crush Bottling Co., 195 S.E. 372, 213 N.C. 158.

R.I.—McWright v. Providence Telephone Co., 131 A. 841, 47 R.I. 196.

Vt.—Higgins v. Metzger, 143 A. 394, 101 Vt. 285.

Depends on circumstances

Under statutes, whether speed of automobile is prima facie evidence of negligence depends on surrounding circumstances.—Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 367.

Speed regulation as rule of evidence

State law and ordinance regarding speed of automobiles present rule of evidence only, and excess speed is not presumptive negligence.—Allen v. Leavick, 182 N.E. 139, 43 Ohio App. 100.

Statute held inapplicable

Ill.—Wedig v. Kroger Grocery & Baking Co., 282 Ill.App. 370.

65. U.S.—Cram v. Eveloff, C.C.A. Minn., 127 F.2d 486—Bauhofer v. Crawford, 117 P. 931, 16 Cal.App. 676.

Idaho.—Hughes v. Hudelson, 169 P.2d 712, 67 Idaho 10—Dawson v. Salt Lake Hardware Co., 136 P.2d 733, 64 Idaho 666.

Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 307.

Minn.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.

Ohio.—Solomon v. Mote, App., 49 N. E.2d 703.

Tex.—Leary v. Oates, Civ.App., 84 S. W.2d 486.

Wis.—Olk v. Marquardt, 234 N.W. 723, 203 Wis. 479.

42 C.J. p 923 note 54, p 968 note 12 [d].

Evidence, but not prima facie evidence, of negligence

Mass.—Gibbons v. Denoncourt, 9 N.E. 2d 633, 297 Mass. 448.

Burden on plaintiff

(1) Under statute the burden is on plaintiff to show that the speed violation was negligence.—Whelan v. Bigelow, 92 P.2d 952, 33 Cal.App.2d 717—Gaston v. Hisashi Tsuruda, 43 P.2d 355, 5 Cal.App.2d 639—Meads v. Deener, 17 P.2d 198, 128 Cal.App. 328.

(2) Statute placing burden of proving motorist's negligence on adversary, even though definite speed limit specified in same section has been exceeded, was held valid.—Potapoff v. Mattes, 19 P.2d 1016, 130 Cal. App. 421.

(3) Statute was rule of evidence on trial, commenced after effective date of act, in action for death of motorist in accident occurring before such date.—Lossman v. City of Stockton, 44 P.2d 397, 6 Cal.App.2d 324.

(4) Statute, however, was held inapplicable to a pending action.—Morris v. Pacific Electric Ry. Co., 43 P. 2d 276, 2 Cal.2d 764.

No speed limit

In action by guest for injuries sustained during automobile trip through another state which had no speed limit in miles per hour, it was not necessary that guest introduce evidence that seventy miles per hour, which was speed at time of accident, was in excess of speed at which prudent drivers in other state were accustomed to drive.—Du Bois v. Owen, 60 P.2d 1019, 16 Cal.App.2d 552.

Where speed violation has no causal relation to injury, the presumption does not arise.—Newton v. Wetherby's Adm'r, 153 S.W.2d 947, 287 Ky. 400.

is only prima facie evidence of negligence,⁶⁶ and does not shift the burden of proof as to negligence,⁶⁷ but the burden is on defendant to overcome such presumption by showing that the speed in excess of the statutory limit was, under the circumstances, reasonable,⁶⁸ and, where there is no proof to overcome the presumption, it becomes conclusive.⁶⁹

Driving on wrong side. The operation of a motor vehicle on the wrong side of the road ordinarily gives rise to a presumption or inference of negligence⁷⁰ in case of a collision with another vehicle⁷¹ or, although as to this there is also contrary authority,⁷² with a pedestrian,⁷³ provided such wrong is shown to have a causal connection with the injury.⁷⁴ The burden is on plaintiff to prove

66. Ala.—Whittaker v. Walker, 135 So. 185, 223 Ala. 167.

Ill.—Buttner v. Richardson, 8 N.E. 2d 217, 290 Ill.App. 601.

Ky.—Forky v. Rutledge, 180 S.W. 90, 167 Ky. 182.

Minn.—Hustvet v. Kuusinen, 238 N.W. 330, 184 Minn. 222.

Miss.—Rhodes v. Fullilove, 134 So. 840, 161 Miss. 41.

42 C.J. p 923 note 54.

Probative value after rebuttal

Evidence being introduced rebutting prima facie case of unlawful conduct arising from violation of speed limit, such conduct loses probative value.—Rogers v. Woods, 42 S.W.2d 390, 184 Ark. 392.

67. Minn.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.

68. Ark.—Rogers v. Woods, 42 S.W.2d 390, 184 Ark. 392.—Herring v. Bollinger, 29 S.W.2d 676, 181 Ark. 925.

Ky.—Utilities Appliance Co. v. Toon's Adm'r, 45 S.W.2d 478, 241 Ky. 823.—Hornek Bros. v. Strubel, 279 S.W. 1087, 212 Ky. 631.

La.—Burthe v. Lee, App., 152 So. 100, rehearing refused 152 So. 589.—Murphy v. Star Checker Cab, App., 150 So. 79.

Minn.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.

Ohio.—Glasco v. Mendelman, 56 N.E. 2d 210, 143 Ohio St. 649.

Or.—Mercer v. Risberg, 188 P.2d 632.

Tex.—Leary v. Oates, Civ.App., 84 S.W.2d 486, error dismissed.

42 C.J. p 924 notes 63, 64.

69. Cal.—Lowery v. Hallett, 287 P. 110, 105 Cal.App. 84.

Ky.—Knecht v. Buckshorn, 25 S.W.2d 727, 233 Ky. 329.—Hornek v. Strubel, 279 S.W. 1087, 212 Ky. 631.

70. U.S.—Evansville Container Corporation v. McDonald, C.C.A.Tenn., 132 F.2d 80.—Brown v. Walter, C.C.A.Vt., 62 F.2d 798.

Cal.—Roberts v. Salmon, 151 P.2d 556, 66 Cal.App.2d 22.—Temple v. De Mirjian, 125 P.2d 544, 51 Cal.App.2d 559.—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55.

Colo.—Drake v. Hodges, 161 P.2d 338, 114 Colo. 10.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.—English v. Georgia Power Co., 17 S.E.2d 891, 66 Ga.App. 363.—*Corpus Juris* cited in Eubanks v. Mullis, 181 S.E. 604, 606, 51 Ga.App. 728.

Me.—Morin v. Carney, 165 A. 166, 132 Me. 25.—Callahan v. Amos D. Bridges Sons, 147 A. 423, 128 Me. 346.

N.Y.—Betts v. Queens Farms Dairy Co., 295 N.Y.S. 78, 162 Misc. 583.

S.C.—Bowers v. Carolina Public Service Co., 145 S.E. 790, 148 S.C. 161.

Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

Wash.—Purdie v. Brunswick, 146 P.2d 809, 20 Wash.2d 292.—Bernard v. Portland Seattle Auto Freight, 118 P.2d 167, 11 Wash.2d 17.—Lauher v. Lyon, 63 P.2d 389, 188 Wash. 644.—Haines v. Pinney, 18 P.2d 496, 171 Wash. 568.

42 C.J. p 1208 note 28, p 904 note 66 [d], p 907 note 87 [a].

Prima facie case of negligence

Cal.—Roller v. Daleys, Inc., 28 P.2d 345, 219 Cal. 542.

Ky.—Stark's Adm'r v. Herndon's Adm'r, 166 S.W.2d 828, 292 Ky. 469.

La.—Travelers Fire Ins. Co. v. Meadows, App., 13 So 2d 537.

Mich.—Warwick v. Blackney, 261 N.W. 310, 272 Mich. 231.

Pa.—Miles v. Myers, 45 A.2d 50, 353 Pa. 316.

Prima facie evidence of negligence

U.S.—Brinegar v. Green, C.C.A.Iowa, 117 F.2d 316.

Cal.—Musgrove v. Zobrist, 187 P.2d 782, 83 Cal.App.2d 101.—Anderson v. Kreis, 142 P.2d 330, 61 Cal.App.2d 159.—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55.—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554.

Ind.—Jones v. Cary, 37 N.E.2d 944, 219 Ind. 268.

Iowa.—Langner v. Caviness, 28 N.W. 2d 421, 238 Iowa 774.—Christenson v. Northwestern Bell Telephone Co., 270 N.W. 394, 222 Iowa 808.—Wilson v. Long, 266 N.W. 482, 221 Iowa 668.—Hoover v. Haggard, 260 N.W. 540, 219 Iowa 1232.—Rainey v. Riess, 257 N.W. 346, 219 Iowa 164.—Despain v. Ballard, 256 N.W. 426, 218 Iowa 863.—Babendure v. Baker, 253 N.W. 834, 218 Iowa 31.—Ryan v. Perry Rendering Works, 245 N.W. 301, 215 Iowa 363.—Kisling v. Thierman, 243 N.W. 552, 214 Iowa 911.

Mo.—Roy v. North Kansas City Dev. Co., App., 209 S.W. 990.

Okl.—Whitworth v. Riley, 269 P. 350, 132 Okl. 72, 59 A.L.R. 584.

42 C.J. p 907 note 87.

Evidence of negligence

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. O'Neill, 200 A. 359, 175 Md. 47.

Inference of fact, not of law

Or.—Haltom v. Fellows, 73 P.2d 680, 167 Or. 514.

Violation presumed not deliberate

Iowa.—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23.

Skidding

Wash.—Wellons v. Wiley, 166 P.2d 852, 24 Wash.2d 543.—Tutewiller v. Shannon, 111 P.2d 215, 8 Wash.2d 23.—Cook v. Rafferty, 93 P.2d 376, 200 Wash. 234.—Weaver v. Windust, 80 P.2d 766, 195 Wash. 240.—Wilson v. Congdon, 37 P.2d 892, 179 Wash. 400.—Haines v. Pinney, 18 P.2d 496, 171 Wash. 568.—Martin v. Bear, 9 P.2d 365, 167 Wash. 327.

Wyo.—Wallis v. Nauman, 157 P.2d 285, 61 Wyo. 231.

71. Cal.—Roller v. Daleys, Inc., 28 P.2d 345, 219 Cal. 542.—Anderson v. Kreis, 142 P.2d 330, 61 Cal.App.2d 159.—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554.

La.—Travelers Fire Ins. Co. v. Meadows, App., 13 So 2d 537.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. O'Neill, 200 A. 359, 175 Md. 47.

Mich.—Warwick v. Blackney, 261 N.W. 310, 272 Mich. 231.

N.Y.—Betts v. Queens Farms Dairy Co., 295 N.Y.S. 78, 162 Misc. 583.

Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

Wash.—Purdie v. Brunswick, 146 P.2d 809, 20 Wash.2d 292.—Bernard v. Portland Seattle Auto Freight, 118 P.2d 167, 11 Wash.2d 17.—Lauher v. Lyon, 63 P.2d 389, 188 Wash. 644.

42 C.J. p 1208 note 29.

72. Conn.—Montagna v. Jewell, 175 A. 570, 119 Conn. 178.

73. Mich.—Winckowski v. Dodge, 149 N.W. 1061, 183 Mich. 303.

74. Ariz.—Haner v. Wilson-Coffin Trading Co., 67 P.2d 487, 49 Ariz. 402.

Wash.—Coerver v. Haab, 161 P.2d 194, 23 Wash.2d 481, 161 A.L.R. 909.

Proximate cause generally see *supra* § 510.

an assertion that defendant was on the wrong side of the road,⁷⁵ and in the absence of such proof the presumption does not apply.⁷⁶ The presumption is not conclusive, but only prima facie evidence of negligence, and may be rebutted;⁷⁷ as by showing that the conditions existing at the time and place of the collision justified the driver's being where he was at the time,⁷⁸ but it imposes on defendant the burden of going forward with the evidence and excusing or justifying his violation.⁷⁹ When the presumption is rebutted, the burden of going forward with the evidence is again on plaintiff.⁸⁰ It has been held that the presumption goes out of the case when rebuttal evidence is presented, but that the proof on which the presumption was based remains.⁸¹

Equipment. Although there is authority to the

contrary,⁸² it has been held that defendant's motor vehicle will be presumed to have been equipped with proper lights and brakes.⁸³ A failure to have proper brakes warrants a presumption or inference of negligence,⁸⁴ and places the burden on defendant to justify or excuse his violation⁸⁵ and to show that he made as adequate an inspection of them as a reasonable man would recognize as necessary.⁸⁶

Hit-and-run driver. Every legitimate inference will be drawn against a hit-and-run driver,⁸⁷ and an inference of an admission of negligence has been drawn against such a driver.⁸⁸

Load of vehicle. The violation of a statute with respect to the loading of a motor vehicle has been held to raise a rebuttable presumption of negligence.⁸⁹ The overcrowding of the front seat of a

75. La.—Birdwell v. Gayle, 127 So. 404, 13 La.App. 421.

Tex.—Harrison-Wright Co. v. Budd, Civ.App., 67 S.W.2d 670, error dismissed.

76. Wash.—Marich v. Moe, 103 P.2d 362, 4 Wash.2d 343.

77. Ark.—Union Securities Co. v. Taylor, 48 S.W.2d 1100, 185 Ark. 737.

Cal.—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55.

Colo.—Drake v. Hodges, 161 P.2d 838, 114 Colo. 10.

Ga.—Corpus Juris cited in Jackson v. Crimer, 24 S.E.2d 603, 608, 69 Ga. App. 13.

Ill.—Pope v. Illinois Terminal R. Co., 67 N.E.2d 284, 329 Ill.App. 62.

Ind.—Lorber v. People's Motor Coach Co., 164 N.E. 859, 172 N.E. 576, 89 Ind.App. 139.

Iowa.—Vandell v. Roewe, 6 N.W.2d 295, 232 Iowa 896—Christenson v. Northwestern Bell Telephone Co., 270 N.W. 394, 222 Iowa 808—Kissling v. Thierman, 243 N.W. 552, 214 Iowa 911—Cooley v. Killingsworth, 228 N.W. 880, 209 Iowa 646—Dickerson v. Lzicar, 225 N.W. 406, 208 Iowa 275.

Miss.—Ripley v. Wilson, 105 So. 476, 140 Miss. 845.

Mo.—Roy v. North Kansas City Dev. Co., App., 209 S.W. 990.

N.J.—Le Bavin v. Suburban Gas Co., 45 A.2d 664, 134 N.J.Law 10.

S.C.—Bowers v. Carolina Public Service Co., 145 S.E. 790, 148 S.C. 161.

42 C.J. p 907 note 87, p 1208 note 35.

78. Me.—Dansk v. Kotimaki, 130 A. 871, 125 Me. 72—Bragdon v. Kellogg, 105 A. 433, 118 Me. 42, 6 A. L.R. 699.

79. U.S.—Evansville Container Corporation v. McDonald, C.C.A.Tenn., 132 F.2d 80.

Cal.—Roller v. Daleys, Inc., 28 P.2d 345, 219 Cal. 542—Musgrove v. Zo-

brist, 187 P.2d 782, 83 Cal.App.2d 101—Roberts v. Salmon, 151 P.2d 556, 66 Cal.App.2d 22—Anderson v. Freis, 142 P.2d 330, 61 Cal.App.2d 159—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55—Parker v. Auschwitz, 47 P.2d 341, 7 Cal.App.2d 693, followed in Bernhard v. Auschwitz, 47 P.2d 343, 7 Cal.App.2d 755—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554.

Ind.—Jones v. Cary, 37 N.E.2d 944, 219 Ind. 268.

Iowa.—Babendure v. Baker, 253 N.W. 834, 218 Iowa 31.

Ky.—Stark's Adm'r v. Herndon's Adm'r, 166 S.W.2d 828, 292 Ky. 469—Hunt v. Whitlock's Adm'r, 82 S.W.2d 364, 259 Ky. 286.

Me.—Callahan v. Amos D. Bridges Sons, 147 A. 423, 128 Me. 346—Coombs v. Markley, 143 A. 261, 127 Me. 335.

Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1—Consolidated Gas, Electric Light & Power Co. of Baltimore v. O'Neill, 200 A. 359, 175 Md. 47.

Mich.—Sanderson v. Barkman, 249 N.W. 492, 264 Mich. 152.

Minn.—Dohm v. R. N. Cardozo & Bro., 206 N.W. 377, 165 Minn. 193.

N.Y.—Betts v. Queens Farms Dairy Co., 295 N.Y.S. 78, 162 Misc. 583.

Wash.—Wellons v. Willey, 166 P.2d 852, 24 Wash.2d 543—Coerver v. Haab, 161 P.2d 194, 23 Wash.2d 481, 161 A.L.R. 909—Purdie v. Brunswick, 146 P.2d 809, 20 Wash.2d 292—Bernard v. Portland Seattle Auto Freight, 118 P.2d 167, 11 Wash.2d 17—Taylor v. Lubetich, 97 P.2d 142, 2 Wash.2d 6—Lauber v. Lyon, 63 P.2d 389, 188 Wash. 644—Smith v. Bratnober, 62 P.2d 455, 188 Wash. 244—Thomas v. Adams, 24 P.2d 432, 174 Wash. 118—Haines v. Pinney, 18 P.2d 496, 171 Wash. 568—Crowe v. O'Rourke, 262 P. 136, 146 Wash. 74.

42 C.J. p 1208 note 32.

Compliance impossible

Violator must prove his assertion that compliance with rule was impossible because of circumstances beyond his control.—Bennett v. Sinclair Refining Co., 57 N.E.2d 776, 144 Ohio St. 139—Ruffo v. Randall, 52 N.E.2d 750, 72 Ohio App. 396.

80. U.S.—Brown v. Walter, C.C.A. Vt., 62 F.2d 798.

81. Utah.—Morrison v. Perry, 140 P. 2d 772, 104 Utah 151.

82. Conn.—Miles v. Sherman, 166 A. 250, 116 Conn. 678.

83. La.—Giglio v. Toups, App., 192 So. 553.

Mo.—Allen v. Kessler, 64 S.W.2d 630.

Vt.—Ellison v. Colby, 8 A.2d 637, 110 Vt. 490—Emerson v. Hickens, 164 A. 381, 105 Vt. 197.

Inference not warranted

Fact that driver of truck-trailer after jackknifing truck across highway when it stalled on icy hill and started slipping backwards kept his foot on brake pedal to prevent truck from rolling backward, did not give rise to inference that brakes on truck were defective.—Denver-Los Angeles Trucking Co. v. Ward, 164 P.2d 730, 114 Colo. 348.

84. Md.—Sothoron v. West, 26 A.2d 16, 180 Md. 539.

Minn.—Lee v. Zaske, 6 N.W.2d 793, 213 Minn. 244.

Mo.—Lochmoeller v. Kiel, App., 137 S.W.2d 625.

85. Mo.—Lochmoeller v. Kiel, supra.

86. Md.—Sothoron v. West, 26 A.2d 16, 180 Md. 539.

87. N.M.—Lopez v. Townsend, 82 P. 2d 921, 42 N.M. 601.

88. Conn.—Grays v. Connecticut Co., 198 A. 259, 133 Conn. 605.

89. La.—Dobrowolski v. Henderson, 130 So. 237, 15 La.App. 79.

motor vehicle in violation of a statute has been held to be prima facie evidence of negligence.⁹⁰

Lookout and lights. The failure to have and operate sufficient lights to maintain a proper lookout warrants a presumption or inference of negligence,⁹¹ but the presumption may be rebutted,⁹² as by a showing that the violation did not proximately cause the injury.⁹³ Where required by law, it is presumed that defendant was operating his lights.⁹⁴

Overtaking and passing another vehicle. It has been held by reason of a statute that, where a collision occurs between motor vehicles while one of them is overtaking and passing another, there is a presumption that the operator of the overtaking vehicle was negligent,⁹⁵ but this presumption applies only where the attempt to pass is made when there is not sufficient distance ahead to permit the passing to be made with safety.⁹⁶ Where a vehicle moves to the left instead of the right to permit another ve-

hicle to overtake and pass him and a collision results, negligence on the part of the overtaken vehicle may be presumed.⁹⁷ Where the overtaking vehicle fails to give the statutory warning before passing, negligence is presumed.⁹⁸ Where a statute forbids overtaking and passing another vehicle at an intersection, a violation of the statute raises a presumption of negligence,⁹⁹ but the burden is on plaintiff to prove the violation.¹

Parking on highway. Ordinarily the parking of a motor vehicle on the highway does not warrant a presumption or inference of negligence,² but under particular circumstances or by reason of statute such conduct may be in violation of law and may warrant a presumption or inference of negligence,³ placing the burden on defendant to show justification or excuse,⁴ or that the case is within an exception provided for by the statute,⁵ but in order to invoke the presumption plaintiff must prove the parking and that it was a violation.⁶

90. N.Y.—Senchack v. Sterling, 300 N.Y.S. 297, 252 App.Div. 894, appeal denied.

91. Miss.—Walker v. Dickerson, 184 So. 438, 183 Miss. 642.

N.Y.—Lewis v. Rowland, 232 N.Y.S. 71, 225 App.Div. 25.

One light instead of two

Miss.—Walker v. Dickerson, 184 So. 438, 183 Miss. 642.

92. Miss.—Walker v. Dickerson, supra.

93. Miss.—Walker v. Dickerson, supra.

94. Pa.—Newman v. Reinish, 163 A. 58, 106 Pa.Super. 351.

Wash.—Ebling v. Nielsen, 186 P. 887, 109 Wash. 355.

No presumption that lights not burning

Wash.—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354.

95. La.—Guillory v. Bordelon Lines, App., 23 So.2d 669—Hardy v. National Mut. Casualty Co., App., 9 So.2d 346—Russo v. Aucoin, App., 7 So.2d 744—Williams v. Geo. A. Hormel & Co., App., 195 So. 634.

Presumption is rebuttable

La.—Coffey v. Baham, App., 29 So.2d 494.

Presumption persists only until facts disclose person responsible

La.—Martin v. Breaux, App., 165 So. 743.

Burden of establishing intersection

In action by automobile owner arising out of collision between automobile and truck which made left turn as automobile started to pass it, defendants had burden of establishing that junction at that point con-

stituted intersection, justifying truck driver in presuming that motorist would not attempt to pass.—Monroe Hardware Co. v. Monroe Transfer & Warehouse Co., La App., 167 So. 498.

96. La.—Guillory v. Bordelon Lines, App., 23 So.2d 669.

97. Neb.—Blxby v. Ayers, 298 N.W. 533, 139 Neb. 652.

98. Cal.—Chapman v. Pickwick Stages System, 4 P.2d 283, 117 Cal. App. 560.

99. La.—Monroe Hardware Co. v. Monroe Transfer & Warehouse Co., App., 167 So. 498.

1. La.—Vernon v. Gillham, App., 179 So. 476.

Mo.—Hornsby v. Fisher, 85 S.W.2d 589.

2. Va.—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.

3. Cal.—Thomson v. Bayless, 150 P. 2d 413, 24 Cal.2d 543—Kline v. Barkell, 158 P.2d 51, 68 Cal.App.2d 765—Callison v. Dondero, 124 P.2d 852, 51 Cal.App.2d 403—Scoville v. Keglor, 80 P.2d 162, 27 Cal.App.2d 17, motion denied 84 P.2d 212, 29 Cal. App.2d 66.

Me.—Tibbetts v. Dunton, 174 A. 453, 133 Me. 128.

Minn.—Medved v. Doolittle, 19 N.W. 2d 788, 220 Minn. 352.

Mo.—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299.

Neb.—Huston v. Robinson, 13 N.W.2d 885, 144 Neb. 553.

Okl.—Roadway Express v. Baty, 114 P.2d 935, 189 Okl. 180.

Or.—Watt v. Associated Oil Co., 260 P. 1012, 123 Or. 50.

Pa.—Bricker v. Gardner, Com.Pl., 56 Dauph.Co. 384, affirmed 48 A.2d 209, 355 Pa. 35.

Vt.—Farren v. McMahon, 1 A.2d 726,

110 Vt. 55—Hall v. Royce, 192 A. 193, 109 Vt. 99.

Presumption is rebuttable

Vt.—Hall v. Royce, supra.

4. Ala.—Cosby v. Flowers, 30 So.2d 694, 249 Ala. 227.

Cal.—Thomson v. Boyless, 150 P.2d 413, 24 Cal.2d 543—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765—Woods v. Walker, 124 P.2d 844, 51 Cal.App.2d 307—Breaux v. Soares, 64 P.2d 146, 18 Cal.App.2d 489.

Mo.—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299.

Okl.—Roadway Express v. Baty, 114 P.2d 935, 189 Okl. 180.

Or.—Watt v. Associated Oil Co., 260 P. 1012, 123 Or. 50.

Pa.—Bricker v. Gardner, Com.Pl., 56 Dauph.Co. 384.

S.C.—Ayers v. Atlantic Greyhound Corp., 37 S.E.2d 737, 208 S.C. 267.

Vt.—Hall v. Royce, 192 A. 193, 109 Vt. 99.

Practicality of parking off highway

Under a statute forbidding parking on the highway when it is practical to park off the highway, the burden is on defendant to prove that it was not practical to park off the highway.—Scoville v. Keglor, 80 P. 2d 162, 27 Cal.App.2d 17, motion denied 84 P.2d 212, 29 Cal.App.2d 66—Casey v. Gritsch, 36 P.2d 696, 1 Cal.App.2d 206.

5. Neb.—Huston v. Robinson, 13 N.W.2d 885, 144 Neb. 553.

Pa.—Bricker v. Gardner, 48 A.2d 209, 355 Pa. 35.

6. Ill.—Jones v. Illinois Iowa Power Co., 41 N.E.2d 115, 314 Ill.App. 204.

Tex.—Galveston Truck Line Corporation v. Moore, Civ.App., 107 S.W.2d 426, error dismissed.

Right of way. A violation of the right of way at an intersection may raise a rebuttable⁷ presumption or inference of negligence⁸ and place the burden of explaining the accident on the violator.⁹ There is authority for the view that, where a pedestrian under an ordinance has the right of way at a street intersection, defendant has the burden of proving that he used reasonable care to avoid inflicting an injury on a pedestrian at a street intersection.¹⁰

Signals. Under a statute requiring a horn or other signal device to be sounded when reasonably necessary, the burden of proof is on plaintiff to show not only that it was necessary to sound the horn or other device,¹¹ but also that it was not sounded.¹² A failure to give or sound a signal or warning of the approach of a motor vehicle when the circumstances are such as to require it has been considered as prima facie evidence of negligence.¹³

Unless district is duly signposted, it is presumed to be outside business or residential district, within statute forbidding parking on highway outside such districts.—*Kline v. Barkett*, 158 P.2d 51, 68 Cal App.2d 765.

7. La.—*Pender v. Bonfanti*, App. 13 So.2d 105.
42 C.J. p 1208 note 35.

8. La.—*Pender v. Bonfanti*, supra.
Me.—*Gregware v. Poliquin*, 190 A. 811, 135 Me. 139.—*Fitts v. Marquis*, 140 A. 909, 127 Me. 75.—*Dansky v. Kotimaki*, 130 A. 871, 125 Me. 72.

All presumptions are against violator

Under statute providing that vehicle entering public highway from private road or drive shall yield right of way to all vehicles approaching on such highway, all presumptions are against violator, who assumes risk of his acts and must use greater care than if he had not violated statute.—*Goff v. Sinclair Refining Co.*, La.App., 162 So. 452.

Presumption of little value

In an action arising out of an intersectional collision, the presumption arising from having the right of way is of little value except in case of entire absence of other evidence.—*Langenegger v. McNally*, 171 P.2d 316, 50 N.M. 96.

9. Colo.—*Brothers v. Chatfield*, 154 P.2d 46, 113 Colo. 7.—*Kracaw v. Micheletti*, 276 P. 333, 85 Colo. 384.—*Boyd v. Close*, 257 P. 1079, 82 Colo. 150.
42 C.J. p 1208 note 33.

10. Wash.—*Elmberg v. Pielow*, 194 P. 549, 113 Wash. 589.

11. Mo.—*Huger v. Doerr*, App, 170 S.W.2d 689.
42 C.J. p 1208 note 40.

12. Conn.—*Paskewicz v. Hickey*, 149 A. 671, 111 Conn. 219.
Mo.—*Huger v. Doerr*, App., 170 S.W. 2d 689.
42 C.J. p 1208 note 41.

Need not prove signal was heard

Okl.—*Banta v. Hestand*, 75 P.2d 415, 181 Okl. 551.
13. Mich.—*Kinsler v. Simpson*, 240 N.W. 98, 257 Mich. 7.
42 C.J. p 919 note 24.

14. Minn.—*Landeem v. De Jung*, 17 N.W.2d 648, 219 Minn. 287.
N.Y.—*Corsack v. Eastern Parkway Brownsville & East New York Transit Relief Ass'n*, 230 N.Y.S. 470, 472, 224 App.Div. 760.

Presumption rebuttable

Violation of statute requiring motorist to give appropriate signal of intention to stop is only prima facie evidence of negligence, but a prima facie case imports negligence and requires explanation.—*Landeem v. De Jung*, 17 N.W.2d 648, 219 Minn. 287.

15. N.Y.—*Corsack v. Eastern Parkway Brownsville & East New York Transit Relief Ass'n*, 230 N.Y.S. 470, 472, 224 App.Div. 760.

16. Va.—*Scott v. Cunningham*, 171 S.E. 104, 161 Va. 367.

17. Conn.—*Seney v. Trowbridge*, 16 A.2d 573, 127 Conn. 284.
Va.—*Scott v. Cunningham*, 171 S.E. 104, 161 Va. 367.

18. Me.—*Rouse v. Scott*, 164 A. 872, 132 Me. 22.—*Bolduc v. Garcelon*, 144 A. 395, 127 Me. 482.

Wash.—*Stack v. L. J. Dowell, Inc.*, 19 P.2d 125, 173 Wash. 9.

Proof that a motor vehicle stopped suddenly without warning may warrant an inference or presumption of negligence,¹⁴ and plaintiff need not show the absence of conditions absolving defendant from fault in doing so.¹⁵ The failure to signal before making a turn may raise a presumption of negligence,¹⁶ but the failure to signal must be established by plaintiff.¹⁷

Turns. A failure to comply with the statutes or rules of the road in making a turn may warrant a presumption or inference of negligence.¹⁸

Violation of traffic signal or sign. The violation of a traffic signal or sign¹⁹ or a violation of a traffic regulation requiring a vehicle to stop before entering or crossing a main highway²⁰ warrants a presumption or inference of negligence. The burden has been held to be on plaintiff to prove the existence of the sign and its visibility,²¹ but it has also

Prima facie evidence

Violation of statute relative to manner of turning at intersection constitutes prima facie evidence of negligence.—*Lein v. John Morrell & Co.*, 224 N.W. 576, 207 Iowa 1271.

19. Conn.—*Olson v. Musselman*, 15 A.2d 879, 127 Conn. 228.
Minn.—*Litman v. Walso*, 1 N.W.2d 391, 211 Minn. 398.
Wash.—*Metzger v. Moran*, 96 P.2d 580, 1 Wash.2d 657.

Violation by fire-fighting apparatus
Cal.—*Isaacs v. City and County of San Francisco*, 167 P.2d 221, 73 Cal. App.2d 621.

Significance of lines

Licensed operators of automobiles are presumed to understand significance of painted lines in center of highway used to denote division of road into one-way lanes.—*Himmel v. Finkelstein*, 4 A.2d 657, 90 N.H. 78.

20. Wash.—*Metzger v. Moran*, 96 P.2d 580, 1 Wash.2d 657.

Subsequent ordinance

In action for personal injuries arising out of collision between defendants' truck with rear end of plaintiff's truck after plaintiff's truck had stopped at stop sign erected at intersection, wherein plaintiff abandoned all assignments of negligence except defendants' failure to stop before crossing the intersecting road, as required by ordinances, and ordinance making the intersecting road a major street did not become law until after the date of the accident, there was failure of proof of negligence.—*Bach v. Diekroeger*, Mo. App., 167 S.W.2d 934.

21. Conn.—*Olson v. Musselman*, 15 A.2d 879, 127 Conn. 228.

been held that a motorist may not be heard to say that he did not know of the sign or see it.²² Traffic signals and signs have been presumed to be lawfully erected and maintained.²³

Warning lights. The burden is on plaintiff to prove an assertion that defendant failed to display warning lights at a time when required,²⁴ but such fact, when established, warrants an inference or presumption of negligence²⁵ which may be rebutted,²⁶ but it casts on defendant the burden of excusing or justifying his violation and showing that he was free from fault.²⁷ It has been held, where a statute requires the placing of warning lights or flares when a motor vehicle is parked on the highway under certain circumstances, that proof of such parking places the burden on defendant to show compliance with the statute,²⁸ and that plaintiff makes out his case by showing a violation of such statute,²⁹ and that the burden is on defendant to show justification for the violation.³⁰ The burden has been held to be on

plaintiff to prove facts establishing the duty to post warnings or flares.³¹

§ 511(5). — Responsibility or Liability for Negligence or Misconduct

- a. In general
- b. Ownership
- c. Possession and control

a. In General

The burden is on the plaintiff to establish the defendant's responsibility or liability for the negligence or misconduct which caused the injury.

The burden is on plaintiff to prove defendant's responsibility or liability for the negligence or misconduct which caused the injury,³² as, for example, that he was the driver³³ or is responsible for the driver's acts, as discussed *infra* § 511(6), and, where such facts are material to a recovery, to establish the identity of the vehicle which caused the injury,³⁴ and to show that defendant was the owner, as

22. Wash.—Metzger v. Moran, 96 P 2d 580, 1 Wash 2d 657.

23. Ala.—Marris v. Blythe, 130 So 548, 222 Ala. 48.

N.Y.—Bailey v. Herrmann, 1 N.Y.S 2d 404, 253 App Div. 125, followed in 1 N.Y.S.2d 405, 253 App Div. 126 —Meadows v. Lewis, 257 N.Y.S 137, 235 App Div. 243.

Vt.—Stone v. Wood, 157 A. 829, 104 Vt. 105.

In absence of question as to validity of stop sign, plaintiff was not required to prove official authorization for erection of sign.—Lindenbaum v. Barbour, 2 P.2d 161, 213 Cal. 277.

Effect on right of way

While stop signs may be presumed to have been erected by proper authority, where it is claimed that a right of way rule is abrogated because a stop sign was near the intersection of the two ways involved, it cannot be assumed without evidence that one of the ways was a through way and that the stop sign was erected under authority of the highway commission.—Hill v. Janson, 31 A.2d 286, 139 Me. 344.

24. Ky.—Roederer's Adm'x v. Gray, 49 S.W.2d 998, 253 Ky. 669.

25. U.S.—Sheehan v. Nims, C.C.A. Vt., 75 F.2d 293.

Me.—Baker v. McGary Transp. Co., 36 A.2d 6, 140 Me. 190.

N.Y.—Gibson v. State, 19 N.Y.S.2d 405, 173 Misc. 893, affirmed 21 N.Y.S.2d 362, 259 App. Div. 1104.

Vt.—Labrecque v. American News Co., 58 A.2d 873.

Prima facie evidence

Failure to have statutory load

lights and taillight on trailer with which vehicle collided was prima facie evidence of negligence.—Takahashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal App.2d 107.

Taillights

Presumption obtained that taillights met requirements of statute and burden was on plaintiff to show that they did not.—Sumner v. Thomas, 33 S.E.2d 825, 72 Ga.App. 351.

26. U.S.—Sheehan v. Nims, C.C.A. Vt., 75 F.2d 293.

Tex.—Taber v. Smith, Civ.App., 26 S.W.2d 722.

27. U.S.—Sheehan v. Nims, C.C.A. Vt., 75 F.2d 293.

Ala.—Cosby v. Flowers, 30 So.2d 694, 249 Ala. 227.

Ill.—Piper v. Speroni, 47 N.E.2d 120, 317 Ill.App. 540.

Minn.—Martin v. Tracy, 246 N.W. 6, 187 Minn. 529.

Vt.—Labrecque v. American News Co., 58 A.2d 873.

Sufficiency of substitute light

In action against state for death of occupant of automobile which ran into the rear of an unlighted army truck, burden was on state to show that flashlight employed by a guardman to give warning was substantially as efficient as lights required by statute.—Gibson v. State, 19 N.Y.S.2d 405, 173 Misc. 893, affirmed 21 N.Y.S.2d 362, 259 App. Div. 1104.

28. Cal.—Barone v. Jones, 177 P.2d 30, 77 Cal.App.2d 656.

29. N.H.—MacDonald v. Appleyard, 53 A.2d 434.

30. N.H.—MacDonald v. Appleyard, *supra*.

31. Ky.—Basham's Adm'x v. Witt, 159 S.W.2d 990, 289 Ky. 639.

32. Ala.—Hawkins v. Barber, 163 So. 608, 231 Ala. 53.

Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Ind.—Franklin v. Kirkpatrick, 33 N.E.2d 111, 218 Ind. 397.

Pa.—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa Super 125—Alfandre v. Bream, 7 A.2d 502, 135 Pa Super. 538—Mitchell v. Ellmaker, 4 A.2d 592, 134 Pa. Super. 583

33. Ill.—Nelson v. Stutz Chicago Factory Branch, 173 N.E. 394, 341 Ill. 387.

Mass.—Hinds v. Brown, 167 N.E. 332, 268 Mass. 55.

Presence in vehicle

Defendant's presence in the vehicle does not warrant a presumption that he was driving at the time.—McCanna v. Silke, 134 P. 1063, 75 Wash. 383.

Owner shown to have been driving is presumed to have continued driving during balance of trip.—Ohio Bell Telephone Co. v. Lung, 196 N.E. 371, 129 Ohio St. 505.

34. Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Pa.—Bowling v. Roberts, 83 A. 600, 235 Pa. 89.

Tex.—Corpus Juris quoted in Longhorn Drilling Corporation v. Padilla, Civ.App., 138 S.W.2d 164, 166.

Admission of ownership does not relieve plaintiff of burden.—Florida Motor Lines v. Millian, 24 So.2d 710, 157 Fla. 21.

discussed infra subdivision b of this section, or had possession and control of the vehicle as discussed infra subdivision c of this section.

b. Ownership

- (a) In general
- (b) Ownership as raising presumption of liability
- (c) Registration as raising presumption of liability

(a) In General

The burden is on the plaintiff to establish the de-

fendant's ownership of the vehicle which inflicted the injury, but ownership may be presumed from possession or registration of the vehicle or, in the case of a business vehicle, from the fact that it bears the defendant's name.

The burden is on plaintiff to establish defendant's ownership of the motor vehicle which inflicted the injury where such fact is material to a recovery.³⁵

A presumption that a particular person is the owner may be based on the fact that he had possession,³⁶ or, in the case of a commercial vehicle, that his name appeared on the motor vehicle,³⁷ or on any other facts or circumstances reasonably

35. Ala.—*Mi-Lady Cleaners v. McDaniel*, 179 So 908, 235 Ala. 469, 116 A.L.R. 639—*Hawkins v. Barber*, 163 So. 608, 231 Ala. 53.
Fla.—*Fletcher Motor Sales v. Cooney*, 27 So.2d 289, 158 Fla. 223.

Iowa.—*Putnam v. Bussing*, 266 N.W. 559, 221 Iowa 871—*Tigue Sales Co. v. Reliance Motor Co.*, 221 N.W. 514, 207 Iowa 567.

N.Y.—*Bennett v. Nazzaro*, 258 N.Y. S. 828, 144 Misc. 450, affirmed *Bennett v. Nazzaro*, 261 N.Y.S. 1018, 237 App.Div. 866.

N.C.—*Cook v. Stedman*, 186 S.E. 317, 210 N.C. 345—*Cole v. Asheville Funeral Home*, 176 S.E. 553, 207 N.C. 271—*Jeffrey v. Osage Mfg. Co.*, 150 S.E. 503, 197 N.C. 724, followed in *Lewis v. Basketeria Stores*, 161 S.E. 924, 201 N.C. 849.
Okla.—*Connelly v. Loub*, 38 P.2d 555, 169 Okl. 627.

Pa.—*Little v. Four Wheel Drive Sales Co.*, 179 A. 550, 319 Pa. 409—*Chamberlain v. Riddle*, 38 A.2d 521, 155 Pa.Super. 507—*Murphy v. Wolverine Express*, 38 A.2d 511, 155 Pa.Super. 125—*Morris v. Ward*, 24 A.2d 775, 148 Pa.Super. 28, reversed on other grounds 26 A.2d 926, 345 Pa. 226—*Alfandre v. Bream*, 7 A.2d 502, 135 Pa.Super. 538—*Mitchell v. Ellmaker*, 4 A.2d 592, 134 Pa.Super. 583—*Axelrod v. Franklin*, 167 A. 239, 109 Pa.Super. 300—*Preston v. Schroeder*, Com.Pl., 27 Del.Co. 350
Tenn.—*Forman v. Washington*, 3 Tenn.App. 567.

Tex.—*Corpus Juris* quoted in *Longhorn Drilling Corporation v. Padilla*, Civ.App., 138 S.W.2d 164, 166—*Wilhite v. Horton*, Civ.App., 116 S.W.2d 807—*Waco Cotton O.I. Mill of Waco v. Walker*, Civ.App., 103 S.W.2d 1071—*Harper v. Highway Motor Freight Lines*, Civ.App., 89 S.W.2d 448, error dismissed.
42 C.J. p 1208 note 51.

Community property

Property standing in the name of a husband or wife is presumed to be community property and a husband denying that a motor vehicle owned by his wife is community property has the burden of proving

it—*U. S. Fidelity & Guaranty Co. v. Moore*, 119 So 886, 9 La App. 429.

36. Neb.—*Finegold v. Union Outfitting Co.*, 193 N.W. 331, 110 Neb. 202.

Tenn.—*Forman v. Washington*, 3 Tenn.App. 567.

Possession by married woman

The presumption is just as strong that the wife owns the automobile as it is that the husband owns it; the common-law rule presuming that the property in the possession of the wife is the property of the husband has been abrogated.—*Forman v. Washington*, supra.

37. U.S.—*Constitution Pub. Co. v. Dale*, C.C.A.Ala., 164 F.2d 210—*Falstaff Brewing Corporation v. Thompson*, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—*Domarek v. Bates Motor Transport Lines*, C.C.A.Ill., 93 F.2d 523—*Liberty Baking Co. v. Kellum*, C.C.A. Pa., 79 F.2d 931—*Young v. Wilky Carrier Corporation*, D.C.Pa., 54 F. Supp. 912, affirmed, C.C.A., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Cal.—*Nash v. Wright*, 186 P.2d 686, 78 Cal App.2d 63.

Fla.—*Florida Motor Lines v. Millian*, 24 So.2d 710, 157 Fla. 21.

Ky.—*Webb v. Dixie-Ohio Express Co.*, 165 S.W.2d 539, 291 Ky. 692.

Mo.—*Frohoff v. Adams*, App., 108 S.W.2d 615.

Mont.—*Ashley v. Safeway Stores*, 47 P.2d 53, 100 Mont. 312.

Neb.—*Myers v. McMaken*, 276 N.W. 167, 133 Neb. 524.

Pa.—*Sweeney v. City of Pittsburgh*, 34 A.2d 67, 348 Pa. 80—*Sefton v. Valley Dairy Co.*, 28 A.2d 313, 345 Pa. 324—*Nalevanko v. Marie*, 195 A. 49, 328 Pa. 586—*Talarico v. Baker Office Furniture Co.*, 149 A. 883, 298 Pa. 211—*Henry v. Beck*, 36 A.2d 734, 154 Pa.Super. 585—*Alfandre v. Bream*, 7 A.2d 502, 135 Pa.Super. 538—*Reed v. Horn's Motor Express*, 187 A. 275, 123 Pa. Super. 411—*Rhoades v. Terminal Warehouse Co.*, 10 Pa. Dist. & Co. 522.

Tex.—*Farley v. Nix*, Civ.App., 199 S.W.2d 670—*Gladewater Laundry & Dry Cleaners v. Newman*, Civ. App., 141 S.W.2d 951, error dismissed, judgment correct—*Lewis v. J. P. Word Transfer Co.*, Civ. App., 119 S.W.2d 106, error refused—*Wilhite v. Horton*, Civ.App., 116 S.W.2d 807—*Kirklín v. Standard Coffee Co.*, Civ.App., 114 S.W.2d 263—*Freeman v. Texas Bread Co.*, Civ.App., 111 S.W.2d 307.

Trade-name or trade-mark

D.C.—*Callas v. Independent Taxi Owners' Ass'n*, 66 F.2d 192, 62 App. D.C. 212, certiorari denied *Independent Taxi Owners' Ass'n v. Callas*, 54 S.Ct. 89, 290 U.S. 669, 78 L.Ed. 578.

Pa.—*Nalevanko v. Marie*, 195 A. 49, 328 Pa. 586—*Talarico v. Baker Office Furniture Co.*, 149 A. 883, 298 Pa. 211—*Hartig v. American Ice Co.*, 137 A. 867, 290 Pa. 21—*Alfandre v. Bream*, 7 A.2d 502, 135 Pa. Super. 538.

Tex.—*J. A. & E. D. Transport Co. v. Rusin*, Civ.App., 202 S.W.2d 693, set aside on other grounds 206 S.W.2d 95.

Exact correspondence of name and designation on vehicle

(1) In order to raise presumption of ownership of automobile, it is not necessary that there should be an exact correspondence between designation on vehicle and actual name of alleged owner.—*M. dora v. Alfieri*, 17 A.2d 873, 341 Pa. 27—*Reed v. Horn's Motor Express*, 187 A. 275, 123 Pa.Super. 411—*Vance v. Freedom Oil Works Co.*, 173 A. 496, 113 Pa. Super. 280.

(2) The words "Farmers Dairy" on truck involved in accident did not create presumption that "Farmers Dairy Association" of another state owned the truck, since quoted words seem to be a generic term designating a type of establishment rather than name of a particular concern, especially where legend on truck indicated that truck was owned and operated by an individual not connected with the association.—*M. dora v. Alfieri*, supra.

warranting an inference of ownership.³⁸ His ownership may also be presumed from the fact that he holds the license,³⁹ that the tag number on the car corresponds to the number of a car registered in his name,⁴⁰ that it bears license plates issued to,

or owned by, him,⁴¹ or that it is registered in his name,⁴² even though he is a dealer in motor vehicles.⁴³

This presumption of ownership of the motor vehicle is not conclusive⁴⁴ and may be rebutted,⁴⁵ but

Corporate or individual ownership

The rule that fact that name of defendant was painted or inscribed in some manner on motor vehicle raises a presumption or is prima facie evidence that defendant owned such vehicle applies to any business, regardless of whether it is incorporated, is a partnership, or is one owned by one or more individuals.—*J. A. & E. D. Transport Co. v. Rusin*, Tex. Civ.App., 202 S.W.2d 693, set aside on other grounds 206 S.W.2d 95.

Two names

Where vehicle had the names of corporate defendant and of an individual on it, there was a presumption of ownership and agency as to both.—*Young v. Wilky Carrier Corporation*, D.C.Pa., 54 F.Supp. 912, affirmed, C.C.A., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Name on contents of vehicle, but not on vehicle, is not sufficient to raise presumption of ownership of vehicle.—*Henry v. Beck*, 36 A.2d 734, 154 Pa.Super. 585.—*Henry v. Beck*, Pa.Com.Pl., 56 York Leg.Rec. 209.

Absence of other testimony

Testimony merely showing that truck had defendant's name painted on its side followed by words "Ice Cream" did not make out a prima facie case of ownership sufficient to force defendant to go forward with his evidence, especially where there was no testimony that defendant was in ice cream business or used a truck similarly lettered.—*Dufresne v. Cooper*, 11 A.2d 3, 64 R.I. 120.

38. Mich.—*O'Brien v. Loeb*, 201 N.W. 488, 229 Mich. 405.

Listing as defendant's property by tax official

Tex.—*Lewis v. J. P. Word Transfer Co.*, Civ.App., 119 S.W.2d 106, error refused.

More fact that person was in motor vehicle at time of accident does not raise presumption that he was owner.—*McCanna v. Silke*, 134 P. 1063, 75 Wash. 383.

Presumption or inference of ownership not warranted

Ala.—*Mi-Lady Cleaners v. McDaniel*, 179 So. 908, 235 Ala. 469, 116 A.L.R. 639.

39. N.Y.—*Bogorad v. Dix*, 162 N.Y.S. 992, 176 App.Div. 774.

Or.—*Henry v. Condit*, 53 P.2d 722, 152 Or. 348, 103 A.L.R. 131.

Tex.—*Corpus Juris* quoted in Long-

horn Drilling Corporation v. Padilla, Civ.App., 138 S.W.2d 164, 166 Wis.—*Kruse v. Weigand*, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, 235 N.W. 431, 204 Wis. 207, 235 N.W. 431, 204 Wis. 208, two cases, and *Wood v. Weigand*, 235 N.W. 432, 204 Wis. 209.

40. Tex.—*Corpus Juris* quoted in Longhorn Drilling Corporation v. Padilla, Civ.App., 138 S.W.2d 164 166.

42 C.J. p 1209 note 54.

41. Ala.—*Shipp v. Davis*, 141 So. 366, 25 Ala.App. 104.

Pa.—*Walker v. Hornbeck*, Com.Pl., 45 Lack.Jur. 257.

S.C.—*Craig v. Clearwater Mfg. Co.*, 200 S.E. 765, 189 S.C. 176.

Tex.—*Empire Gas & Fuel Co. v. Muegge*, 143 S.W.2d 763, 135 Tex 520.

Sale of vehicle

Under a statutory provision that on the sale of a motor vehicle the delivery thereof shall not be deemed to have been made until the seller has removed his license number plates, where the vendor has failed to remove his plates for the year in which he sold the car, it will be conclusively presumed, as far as the rights of the public are concerned, that he was the owner and operator of the car, at least for such year.—*Peters v. Casualty Co. of America*, 172 P. 220, 101 W. Va. 208 —42 C.J. p 1209 note 65.

42. Ala.—*Cox v. Roberts*, 27 So.2d 617, 248 Ala. 372.

Fla.—*Farrelly v. Heuacker*, 159 So. 24, 118 Fla. 340.

Ky.—*Vansant v. Holbrook's Adm'r*, 146 S.W.2d 337, 285 Ky. 88.

La.—*Brunning v. Brock*, App., 191 So. 551.

N.Y.—*Gerald v. Simpson*, 299 N.Y.S. 348, 252 App.Div. 340.—*Scholick v. Fifth Ave. Coach Co.*, 68 N.Y.S.2d 208, 188 Misc. 476.

S.C.—*Hewitt v. Fleming*, 173 S.E. 808, 172 S.C. 266.

Tenn.—*English v. George Cole Motor Co.*, 111 S.W.2d 386, 21 Tenn. App. 408.—*Phillips-Buttorff Mfg. Co. v. McAlexander*, 15 Tenn.App. 618.

Tex.—*Empire Gas & Fuel Co. v. Muegge*, 143 S.W.2d 763, 135 Tex. 520.—*Corpus Juris* quoted in Longhorn Drilling Corporation v. Padilla, Civ.App., 138 S.W.2d 164, 166.

42 C.J. p 1209 notes 53, 66.

43. N.Y.—*Buono v. Stewart Motor Trucks*, 26 N.Y.S.2d 986, 261 App. Div. 1095.

Okl.—*Norton v. Harmon*, 133 P.2d 206, 192 Okl. 36.

Or.—*Henry v. Condit*, 53 P.2d 722, 152 Or. 348, 103 A.L.R. 131.

Pa.—*Frew v. Barto*, 26 A.2d 905, 345 Pa. 217.—*Frew v. Barto*, Com.Pl., 52 Dauph.Co. 147, affirmed 26 A.2d 905, 345 Pa. 217.—*Preston v. Schroeder*, Com.Pl., 27 Del.Co. 350.

—*Seman v. Schwartz*, Com.Pl., 4 Sch.Reg. 394, 51 York 143.

Wis.—*Borkenhagen v. Baertschi*, 300 N.W. 742, 239 Wis. 21.

Sale of vehicle
The fact that a tag, bearing the license number of the manufacturer, is left on a vehicle which has been sold and paid for does not raise an inference that the vehicle is not owned or controlled by the person to whom it has been sold.—*Janik v. Ford Motor Co.*, 147 N.W. 510, 180 Mich. 557, 52 L.R.A.N.S., 294, Ann. Cas.1916A 669.

44. N.Y.—*Gerard v. Simpson*, 299 N.Y.S. 348, 252 App.Div. 340.

Or.—*Henry v. Condit*, 53 P.2d 722, 152 Or. 348, 103 A.L.R. 131.

45. Ala.—*Shipp v. Davis*, 141 So. 366, 25 Ala.App. 104.

Fla.—*Farrelly v. Heuacker*, 159 So. 24, 118 Fla. 340.

La.—*Brunning v. Brock*, App., 191 So. 551.

Mont.—*Ashley v. Safeway Stores*, 47 P.2d 53, 100 Mont. 312.

N.Y.—*Gerald v. Simpson*, 299 N.Y.S. 348, 252 App.Div. 340.

Pa.—*Sweeney v. City of Pittsburgh*, 34 A.2d 67, 348 Pa. 80.—*Sefton v. Valley Dairy Co.*, 28 A.2d 313, 345 Pa. 324.—*Frew v. Barto*, 26 A.2d 905, 345 Pa. 217.—*Henry v. Beck*, 36 A.2d 734, 154 Pa.Super. 585.—*Reed v. Horn's Motor Express*, 187 A. 275, 123 Pa.Super. 411.—*Preston v. Schroeder*, Com.Pl., 27 Del.Co. 350.—*Walker v. Hornbeck*, Com.Pl., 45 Lack.Jur. 257.

Tenn.—*Phillips-Buttorff Mfg. Co. v. Alexander*, 15 Tenn.App. 618.

Wis.—*Kruse v. Weigand*, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, Smith v. Weigand, 235 N.W. 421, 204 Wis. 207, 235 N.W. 431, 204 Wis. 208, two cases, and *Woodard v. Weigand*, 235 N.W. 422, 204 Wis. 209.

42 C.J. p 1209 note 57.

Weight and sufficiency of evidence to rebut presumption of ownership see infra § 518.

it establishes a prima facie case of ownership⁴⁶ and puts the burden on defendant to come forward with evidence denying ownership.⁴⁷ It has been held that the presumption of ownership is not evidence,⁴⁸ but merely an administrative assumption or rule of procedure⁴⁹ which drops out of the case when the facts are established by evidence.⁵⁰

Continuance of ownership. Where it is shown that a vehicle once belonged to defendant, a presumption arises that the ownership continues.⁵¹ While this presumption may be rebutted,⁵² ownership is presumed to continue until a change is affirmatively shown by defendant.⁵³

(b) Ownership as Raising Presumption of Liability

As a general rule, ownership of the motor vehicle

which inflicted the injury may warrant a presumption that the owner is liable therefor, that the owner had possession and control of the vehicle, and that its operator was his agent or servant acting within the scope of his employment and on the owner's business and with the authority or consent of the owner.

In a number of jurisdictions, sometimes by reason of statute, it has been held that ownership of a motor vehicle may warrant a presumption that the owner is responsible for the manner in which it is driven and is liable for its negligent or wrongful use.⁵⁴ Proof of defendant's ownership has also been regarded as sufficient to raise the presumption that at the time of the injury the vehicle was in the possession, or under the control, of defendant, either in his own person or in that of one, such as his agent or employee, for whose conduct he is responsible.⁵⁵ Likewise, particularly where a statute

46. La.—*Brunning v. Brock*, App. 191 So. 551.

47. Tex.—*Empire Gas & Fuel Co. v. Muegge*, 143 S.W.2d 763, 135 Tex. 520.

48. U.S.—*Constitution Pub. Co. v. Dale*, C.C.A. Ala., 164 F.2d 210.

Ill.—*Dean v. Ketter*, 65 N.E.2d 572, 328 Ill.App. 206.

Tex.—*Pioneer Mut. Compensation Co. v. Diaz*, 177 S.W.2d 203, 142 Tex. 184—*Empire Gas & Fuel Co. v. Muegge*, 143 S.W.2d 763, 135 Tex. 520—*Haden Co. v. Riggs*, Civ. App., 84 S.W.2d 789, affirmed *Riggs v. Haden Co.*, 94 S.W.2d 152, 127 Tex. 314.

Presumption of ownership as sufficient to raise a question of fact see *infra* § 526.

49. Tex.—*Pioneer Mut. Compensation Co. v. Diaz*, 177 S.W.2d 203, 142 Tex. 184—*Empire Gas & Fuel Co. v. Muegge*, 143 S.W.2d 763, 135 Tex. 520.

50. U.S.—*Domarek v. Bates Motor Transport Lines*, C.C.A. Ill., 93 F.2d 522.

Ill.—*Dean v. Ketter*, 65 N.E.2d 572, 328 Ill.App. 206.

Neb.—*Myers v. McMaken*, 276 N.W. 167, 133 Neb. 524.

Tex.—*Pioneer Mut. Compensation Co. v. Diaz*, 177 S.W.2d 203, 142 Tex. 184—*Empire Gas & Fuel Co. v. Muegge*, 143 S.W.2d 763, 135 Tex. 520—*Haden Co. v. Riggs*, Civ. App., 84 S.W.2d 789, affirmed *Riggs v. Haden Co.*, 94 S.W.2d 152, 127 Tex. 314.

51. Tex.—*Corpus Juris* quoted in *Longhorn Drilling Corporation v. Padilla*, Civ. App., 138 S.W.2d 164, 166.

42 C.J. p 1209 note 61.

Failure to report sale

Presumption of continuing ownership by not notifying county clerk of automobile's sale was held not ap-

plicable, where car had been recently brought into state for sale, and had never been previously used or registered in state—*Leonard v. Finney*, 43 S.W.2d 213, 163 Tenn. 318.

Purchase after accident

Where defendant in automobile collision case claimed to have purchased truck involved subsequent to accident, it must be presumed, in absence of contrary proof, that statute relating to transfer of second-hand motor vehicles was strictly complied with and that bill of sale for truck was in defendant's possession.—*Harper v. Highway Motor Freight Lines*, Tex.Civ.App., 89 S.W.2d 448, error dismissed.

52. Tex.—*Corpus Juris* quoted in *Longhorn Drilling Corporation v. Padilla*, Civ. App., 138 S.W.2d 164, 166.

42 C.J. p 1209 note 62.

53. Neb.—*Finegold v. Union Outfitting Co.*, 193 N.W. 331, 110 Neb. 202.

54. Cal.—*Hathaway v. Matthews*, 258 P. 712, 85 Cal.App. 31.

La.—*Coon v. Monroe Scrap Material Co.*, App., 191 So. 607.

Mo.—*Hampe v. Versen*, 32 S.W.2d 793, 224 Mo. 1144.

N.Y.—*Ermann v. Kahn*, 242 N.Y.S. 573, 229 App.Div. 693, affirmed 175 N.E. 342, 255 N.Y. 627.

Wis.—*Hanson v. Engebretson*, 294 N.W. 817, 237 Wis. 126.

The reason for the rule that proof of ownership of an automobile driven by another makes a prima facie case of owner's liability for injuries caused in its operation is that whether automobile was being operated in prosecution of owner's business is matter peculiarly within owner's knowledge, so that when the reason for the rule fails, the rule does not apply.—*Hanson v. Engebretson*, *supra*.

Doctrine held applicable to both pleasure and business vehicles

Mo.—*Hampe v. Versen*, 32 S.W.2d 793, 224 Mo.App. 1144.

The terms "owner" and "ownership" which are not defined in statute making a person driving an automobile with owner's consent owner's agent in case of accident, and making proof of ownership prima facie evidence that person operated automobile with owner's consent, must be defined by judicial determination, made in a manner giving effect to the objects and purposes of the statute.—*Mason v. Automobile Finance Co.*, 121 F.2d 82, 73 App.D.C. 284.

55. D.C.—*Walsh v. Rosenberg*, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 662, 80 L.Ed. 1388—*Curry v. Stevenson*, 26 F.2d 534, 58 App.D.C. 162.

Iowa.—*Waldman v. Sanders Motor Co.*, 243 N.W. 655, 214 Iowa 1139.

Mo.—*Murphy v. Tumbrink*, App., 25 S.W.2d 133.

N.J.—*Cowan v. Kaminow*, 26 A.2d 258, 128 N.J.Law 398—*Coopersmith v. Kolt*, 196 A. 649, 119 N.J.Law 474—*Efstathopoulos v. Federal Tea Co.*, 196 A. 470, 119 N.J.Law 408—*Onufer v. Strout*, 183 A. 215, 116 N.J.Law 274—*Shields v. Yellow Cab*, 174 A. 567, 113 N.J.Law 479—*Kirrer v. Bromberg*, 172 A. 498, 113 N.J.Law 98—*Fullmer v. Scott-Powell Dairies*, 166 A. 429, 111 N.J.Law 44—*Conway v. Pickering*, 166 A. 76, 111 N.J.Law 15—*Dooley v. Saunders-U-Drive Co.*, 162 A. 556, 109 N.J.Law 295—*Lilly v. Duckworth*, 140 A. 397, 104 N.J.Law 387—*Oklin v. Essex Sales Co.*, 135 A. 821, 103 N.J.Law 217, affirmed 138 A. 922, 104 N.J.Law 181—*Katz v. Essex Sales Co.*, 135 A. 821, 103 N.J.Law 217, affirmed 138 A. 921, 104 N.J.Law 174—*Iannuzzi v. Public Service Interstate Transp. Co.*, 163 A. 31, 10 N.J.Misc.

so provides, proof of ownership has been regarded as sufficient to raise a presumption that the operator of the vehicle was a servant or agent of the owner⁵⁶ and was acting within the scope of his em-

1205—*Le Strange v. Krivit*, 158 A. 117, 10 N.J.Misc. 146—*Owens v. Cerullo*, 155 A. 759, 9 N.J.Misc. 776—*Corsaro v. Ambrose*, 153 A. 712, 9 N.J.Misc. 323—*Iannuzzi v. Bishop*, 151 A. 477, 8 N.J.Misc. 609—*Sadofsky v. Frain*, 147 A. 729, 7 N.J.Misc. 1064—*Winter v. North Jersey Bus Co.*, 135 A. 473, 5 N.J. Misc. 42.

Pa.—*Haring v. Connell*, 90 A. 910, 244 Pa. 439.

Wash.—*Carlson v. Wolski*, 147 P.2d 291, 20 Wash.2d 323—*Davis v. Browne*, 147 P.2d 263, 20 Wash.2d 219—*Moffitt v. Krueger*, 120 P.2d 612, 11 Wash.2d 658—*Van Court v. Lodge Cab Co.*, 89 P.2d 206, 198 Wash. 530.

Wis.—*Kruse v. Weigand*, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, *Smith v. Weigand*, 235 N.W. 431, 204 Wis. 207, 235 N.W. 431, 204 Wis. 208, two cases, and *Woodard v. Weigand*, 235 N.W. 432, 204 Wis. 209. 42 C.J. p 1209 note 70, p 1210 note 94.

Reason for rule

The presumption has been adopted by the courts as a reasonable rule because of inconvenience, difficulty, and in many cases impossibility of otherwise proving by affirmative evidence that driver of vehicle was acting under control and direction of owner—*Kavanaugh v. Wheeling*, 7 S.E.2d 125, 175 Va. 105.

Vehicle left unattended

When automobile is found unattended, in apparent violation of traffic regulations, it is presumed to have been so left by owner, or servant acting within authority.—*Newell Contracting Co. v. Berry*, 134 So. 870, 223 Ala. 109.

Ownership in third person

Pedestrian, having conceded that defendant did not own truck causing injuries, had burden of rebutting presumption that owner was in control, and of establishing that owner had surrendered control to defendant as hirer of truck and driver, mere division of control between owner and defendant being insufficient.—*Richter v. Merola Bros.*, 277 N.Y.S. 288, 243 App.Div. 392.

56. U.S.—*Falstaff Brewing Corporation v. Thompson*, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 69, 305 U.S. 407, 83 L.Ed. 386.

Ala.—*Peoples v. Seamon*, 31 So.2d 88, 249 Ala. 284—*Cox v. Roberts*, 27

So.2d 617, 248 Ala. 372—*Craft v. Koonce*, 187 So. 730, 237 Ala. 552—Alabama Power Co. v. McGehee, 154 So. 105, 228 Ala. 505—*Newell Contracting Co. v. Berry*, 134 So. 870, 223 Ala. 109—*Jefferson County Burial Soc. v. Cotton*, 133 So. 256, 222 Ala. 578—*Walker v. Stephens*, 127 So. 668, 221 Ala. 18—*Cruse-Crawford Mfg. Co. v. Rucker*, 123 So. 897, 220 Ala. 101—*Tullis v. Blue*, 114 So. 185, 216 Ala. 577—*Deaton Truck Line v. Tillman*, 30 So.2d 584, 33 Ala.App. 143—*United Wholesale Grocery Co. v. Minge Floral Co.*, 142 So. 586, 25 Ala.App. 153, certiorari denied 142 So. 587, 225 Ala. 160.

Cal.—*Malmstrom v. Bridges*, 47 P.2d 336, 8 Cal.App.2d 5—*Hughes v. Quackenbush*, 37 P.2d 99, 1 Cal.App.2d 349—*Kanananaka v. Badalamente*, 6 P.2d 338, 119 Cal.App. 231—*Strasburger v. Prescott*, 295 P. 357, 111 Cal.App. 104—*Maberto v. Wolfe*, 289 P. 218, 106 Cal.App. 202.

Contra *Wilson v. Droge*, 294 P. 726, 110 Cal.App. 578.

D.C.—*Simon v. City Cab Co.*, 78 F.2d 506, 64 App.D.C. 364, certiorari denied 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455—*Simmons v. Brooks*, 72 F.2d 86, 63 App.D.C. 293—*Gasque v. Saldman*, Mun App, 44 A.2d 537.

Idaho—*Willi v. Schaefer*, *Hitchcock Co.*, 25 P.2d 167, 53 Idaho 367.

Ill.—*McCarty v. O. H. Yates & Co.*, 14 N.E.2d 254, 294 Ill.App. 474—*Paulsen v. Cochfield*, 278 Ill.App. 596—*Howard v. Amerson*, 236 Ill. App. 587.

La.—*Norman v. Little*, 129 So. 459, 14 La.App. 298.

Md.—*Finney v. Frevel*, 37 A.2d 923, 183 Md. 355—*Wagner v. Page*, 20 A.2d 164, 179 Md. 465—*Guthrieke, on Behalf and to Use of Ring Engineering Co. v. Gorsuch*, 8 A.2d 885, 177 Md. 109—*Phipps v. Milligan*, 199 A. 498, 174 Md. 438—*Pennsylvania R. Co. v. Lord*, 151 A. 400, 159 Md. 518.

Mo.—*Benson v. Smith*, App., 38 S.W.2d 743.

N.J.—*Hoffman v. Lasseff*, 164 A. 293, 110 N.J.Law 122.

N.Y.—*St. Andrassy v. Mooney*, 186 N.E. 867, 262 N.Y. 368—*Traub v. Blum*, 31 N.Y.S.2d 735, 263 App. Div. 92—*Irolla v. City of New York*, 280 N.Y.S. 873, 155 Misc. 908.

Okl.—*Norton v. Harmon*, 133 P.2d 206, 192 Okl. 86.

Or.—*Bunnell v. Parelius*, 111 P.2d 88, 166 Or. 174—*Ellenberger v. Fremont Land Co.*, 107 P.2d 837, 165 Or. 375—*Lehl v. Hull*, 54 P.2d 290, 152 Or. 470—*Miller v. Semler*,

2 P.2d 233, 137 Or. 610, rehearing denied *Millar v. Semler*, 3 P.2d 987, 137 Or. 610—*Judson v. Bee Hive Auto Service Co.*, 297 P. 1050, 136 Or. 1, 74 A.L.R. 944.

Pa.—*Sweeney v. City of Pittsburgh*, 34 A.2d 67, 348 Pa. 80—*Sefton v. Valley Dairy Co.*, 28 A.2d 313, 345 Pa. 324—*Frew v. Barto*, 26 A.2d 905, 345 Pa. 217—*McFadden v. Pennzoll Co.*, 9 A.2d 412, 336 Pa. 301—*Henry v. Beck*, 36 A.2d 734, 154 Pa.Super. 585.

Tex.—*Farley v. Nix*, Civ.App., 199 S.W.2d 670—*Boydston v. Jones*, Civ.App., 177 S.W.2d 303—*Alfano v. International Harvester Co. of America*, Civ.App., 121 S.W.2d 466, error dismissed—*Kirklin v. Standard Coffee Co.*, Civ.App., 114 S.W.2d 263—*Freeman v. Texas Bread Co.*, Civ.App., 111 S.W.2d 307—*Harper v. Highway Motor Freight Lines*, Civ.App., 89 S.W.2d 448, error dismissed.

Va.—*Sydnor & Hundley v. Bonifant*, 164 S.E. 403, 158 Va. 703.

Wash.—*Pickering v. Hanson*, 183 P.2d 487, 28 Wash.2d 603—*Bradley v. S. L. Savidge, Inc.*, 123 P.2d 780, 13 Wash.2d 28—*Handley v. Anacortes Ice Co.*, 105 P.2d 505, 5 Wash.2d 381.

W.Va.—*Lacewell v. Lampkin*, 13 S.E.2d 583, 123 W.Va. 138—*Shahan v. Jones*, 177 S.E. 774, 115 W.Va. 749—*Freole v. Daniel*, 141 S.E. 631, 105 W.Va. 118.

Wis.—*Sevey v. Jones*, 292 N.W. 436, 235 Wis. 109—*Laurent v. Plain*, 281 N.W. 660, 229 Wis. 75—*Hahn v. Smith*, 254 N.W. 750, 215 Wis. 277.

42 C.J. p 1210 note 90.

Inference, not presumption

Cal.—*Pozzobon v. O'Donnell*, 36 P.2d 236, 1 Cal.App.2d 151.

Or.—*Jasper v. Wells*, 144 P.2d 505, 173 Or. 114—*Bunnell v. Parellis*, 111 P.2d 88, 166 Or. 174.

In Connecticut

(1) Statute providing that, in action to recover damages for negligent operation of defendant's automobile by another, operator shall be presumed to be defendant's agent and that defendant shall have burden of rebutting such presumption, is not unconstitutional as arbitrary or unreasonable.—*Koops v. Gregg*, 32 A.2d 653, 130 Conn. 185.

(2) Prior to the statute, it was held that there was no presumption that the operator of a motor vehicle was the owner's agent or servant.—*Smith v. Firestone Tire & Rubber Co.*, 177 A. 524, 119 Conn. 483—*Midtown Trust Co. v. Bregman*, 174 A. 67, 118 Conn. 651—*Matulis v. Gans*, 141 A. 870, 107 Conn. 562.

ployment,⁵⁷ and, at least in the case of commercial vehicles,⁵⁸ on the owner's business or for his purposes.⁵⁹ It has also been presumed, sometimes by reason of statute, that one who operates a vehicle does so with the authority or consent of the owner.⁶⁰

57. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 801, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 49, 305 U.S. 607, 83 L.Ed. 386.

Ala.—Peoples v. Seamon, 31 So.2d 88, 249 Ala. 284—Cox v. Roberts, 27 So.2d 617, 248 Ala. 372—Alabama Power Co. v. McGehee, 154 So. 105, 228 Ala. 505—Newell Contracting Co. v. Berry, 134 So. 870, 223 Ala. 109—Jefferson County Burial Soc. v. Cotton, 133 So. 256, 222 Ala. 578—Walker v. Stephens, 127 So. 668, 221 Ala. 18—Cruse-Crawford Mfg. Co. v. Rucker, 123 So. 897, 220 Ala. 101—Tullis v. Blue, 114 So. 185, 216 Ala. 577—Bruner v. Eubanks, 33 So.2d 374, 33 Ala. App. 266, certiorari denied 33 So.2d 376, 250 Ala. 100—Deaton Truck Line v. Tillman, 30 So.2d 584, 33 Ala. App. 143—Southeastern Const. Co. v. Robbins, 27 So.2d 703, 32 Ala. App. 532, followed in 27 So.2d 708, and 27 So.2d 709, three cases, 248 Ala. 371, 372, certiorari denied 27 So.2d 705, 248 Ala. 367—United Wholesale Grocery Co. v. Minge Floral Co., 142 So. 586, 25 Ala. App. 153, certiorari denied 142 So. 587, 225 Ala. 160.

Cal.—Malmstrom v. Bridges, 47 P.2d 336, 8 Cal.App.2d 5.

D.C.—Simon v. City Cab Co., 78 F.2d 506, 64 App.D.C. 364, certiorari denied 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455.

Ill.—McCarthy v. O. H. Yates & Co., 14 N.E.2d 254, 291 Ill.App. 474—Paulsen v. Cochfield, 278 Ill.App. 596.

La.—Norman v. Little, 129 So. 459, 14 La.App. 298.

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355—Guthridge, On Behalf and to Use of Ring Engineering Co. v. Gorsuch, 8 A.2d 885, 177 Md. 109.

Mo.—Benson v. Smith, App., 38 S.W.2d 743.

N.J.—Dooley v. Saunders-U-Drive Co., 162 A. 556, 109 N.J.Law 295—Nichols v. Grunstein, 144 A. 593, 105 N.J.Law 383.

N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368—Traub v. Blum, 31 N.Y.S.2d 785, 263 App. Div. 92.

Okl.—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36.

Or.—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944.

Pa.—Sweeney v. City of Pittsburgh,

34 A.2d 67, 348 Pa. 80—Sefton v. Valley Dairy Co., 28 A.2d 313, 345 Pa. 324—Frew v. Barto, 26 A.2d 905, 345 Pa. 217—Henry v. Beck, 36 A.2d 734, 154 Pa.Super. 585—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538.

Tex.—Boydston v. Jones, Civ.App., 177 S.W.2d 303—Gladewater Laundry & Dry Cleaners, Civ.App., 141 S.W.2d 951—Alfano v. International Harvester Co. of America, Civ. App., 121 S.W.2d 466, error dismissed—Kirklin v. Standard Coffee Co., Civ.App., 114 S.W.2d 263—Freeman v. Texas Bread Co., Civ. App., 111 S.W.2d 307—Harper v. Highway Motor Freight Lines, Civ. App., 89 S.W.2d 448, error dismissed

Wash.—Bradley v. S L Sledge, Inc., 123 P.2d 780, 13 Wash.2d 28—Handley v. Anacortes Ice Co., 105 P.2d 505, 5 Wash.2d 384.

Wis.—Sevey v. Jones, 292 N.W. 436, 235 Wis. 109—Laurent v. Plain, 281 N.W. 660, 229 Wis. 75.

42 C.J. p 1212 note 22.

58. Ky.—Union Transfer & Storage Co. v. Fryman's Adm'r, 200 S.W.2d 953, 304 Ky. 422.

Pa.—Kunkel v. Vogt, 47 A.2d 195, 354 Pa. 279—Blakey v. Capanna, 36 A.2d 789, 349 Pa. 144—McFadden v. Pennzoll Co., 9 A.2d 412, 336 Pa. 301—Marach v. Koolstra, 198 A. 66, 329 Pa. 324—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa.Super. 125—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538—Reed v. Horn's Motor Express, 187 A. 275, 123 Pa.Super. 411—Fritsch v. Eagle Const. Co., 93 Pittsb.Leg.J. 181.

42 C.J. p 1212 note 23 [c], p 1215 notes 59–61.

Owner's name not on vehicle

The presumption that a truck was being operated on its owners' business at the time of accident since it was a business vehicle arose although truck did not display owner's name.—Marach v. Koolstra, 198 A. 66, 329 Pa. 324.

59. Ark.—Ball v. Hall, 118 S.W.2d 668, 196 Ark. 491.

Cal.—Cope v. Goble, 103 P.2d 598, 39 Cal.App.2d 448—Phillips v. Cuccio, 42 P.2d 1050, 5 Cal.App.2d 520.

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355.

N.J.—Cowan v. Kaminow, 26 A.2d 258, 128 N.J.Law 398.

N.Y.—Christie v. B. F. Vineburg, Inc., 19 N.Y.S.2d 252, 259 App.Div. 342—Glasgow v. Weldt, 218 N.Y. S. 115, 218 App.Div. 749—Schwartz

v. Lawrence, 212 N.Y.S. 494, 214 App.Div. 559—Schadtler v. Sheldow, 24 N.Y.S.2d 586.

Okl.—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36.

Or.—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 375—Kantola v. Lovell Auto Co., 72 P.2d 61, 157 Or. 534—Clark v. Shea, 279 P. 639, 130 Or. 195.

Tex.—Gladewater Laundry & Dry Cleaners v. Newman, Civ.App., 141 S.W.2d 951, error dismissed, judgment correct.

Wash.—Hanford v. Goehry, 167 P.2d 678, 24 Wash.2d 859—Bennett v. King County Cab Co., 27 P.2d 125, 175 Wash. 216—Steiner v. Royal Blue Cab Co., 20 P.2d 39, 172 Wash. 396.

W.Va.—Weismantle v. Petros, 19 S.E.2d 594, 124 W.Va. 180—Hollen v. Reynolds, 15 S.E.2d 163, 123 W.Va. 360—Jenkins v. Spittler, 199 S.E. 368, 120 W.Va. 514—Malcolm v. American Service Co., 191 S.E. 527, 118 W.Va. 637—Shahan v. Jones, 177 S.E. 774, 115 W.Va. 749.

Wis.—Sevey v. Jones, 292 N.W. 436, 235 Wis. 109—Laurent v. Plain, 281 N.W. 660, 229 Wis. 75—Hahn v. Smith, 254 N.W. 750, 215 Wis. 277.

42 C.J. p 1212 note 23.

60. U.S.—Martin v. Burgess, C.C.A.Ala., 82 F.2d 321.

D.C.—Rosenberg v. Murray, 116 F.2d 552, 73 App.D.C. 67—Gasque v. Saidman, Mun App, 44 A.2d 537.

Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Iowa.—Hunter v. Irwin, 263 N.W. 34, 220 Iowa 693—Robinson v. Shell Petroleum Corporation, 251 N.W. 613, 217 Iowa 1253—Heavilin v. Wendell, 241 N.W. 654, 214 Iowa 844, 83 A.L.R. 872.

Mich.—Brkal v. Fletcher, 18 N.W.2d 815, 311 Mich. 258—Rabaut v. Venable, 280 N.W. 129, 285 Mich. 111—Pulford v. Mouw, 272 N.W. 713, 279 Mich. 376—City of St. Joseph, for Use and Benefit of Fidelity Casualty Co. v. Grantham Motor Sales, 257 N.W. 701, 269 Mich. 260.

Minn.—Schultz v. Swift & Co., 299 N.W. 7, 210 Minn. 533—Ewer v. Coppe, 271 N.W. 101, 199 Minn. 78.

Mo.—State ex rel. Vesper-Buick Automobile Co. v. Daus, 19 S.W.2d 700, 323 Mo. 388, 67 A.L.R. 157.

N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368, reargument denied 262 N.Y.S. 907, 238 App.Div. 793—Christie v. B. F. Vineburg, 19 N.Y.S.2d 252, 259 App.Div. 342—Glasgow v. Weldt, 218 N.Y.S. 115, 218 App.Div. 749—Houlihan v. Selengut, 35 N.Y.S.2d 371, 175 Misc.

On the other hand, ownership of a motor vehicle has been held to raise no presumption of liability;⁶¹ proof of ownership has been held to afford no presumption that the vehicle was in the control of the owner or his agent, or engaged in the owner's business, at the time of the accident;⁶² proof of ownership has been held to be insufficient to raise a presumption that the operator of the vehicle was the agent or servant of the owner;⁶³ and the mere fact of a driver's possession of a vehicle has been

held not to support an inference of the owner's consent to such use.⁶⁴

In order to invoke these presumptions from ownership, ownership must be proved⁶⁵ although a presumption of ownership has been held sufficient for this purpose,⁶⁶ as where ownership is presumed from the fact that defendant's name appears on the vehicle⁶⁷ or that the vehicle is licensed or registered in his name, or bears his license plates,⁶⁸ but the contrary has also been held on the ground

854, reversed on other grounds 31 N.Y.S.2d 560, 263 App.Div. 811—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560—Witko v. Polito, 39 N.Y.S.2d 843, reversed on other grounds Winnowski v. Polito, 45 N.Y.S.2d 747, 267 App.Div. 849, reversed on other grounds 61 N.E.2d 425, 294 N.Y. 159, conformed to 55 N.Y.S.2d 669, 269 App.Div. 804.

Or—Clark v. Shea, 279 P. 539, 130 Or. 195

42 C.J. p 1211 note 1.

Presumption of consent arising from use of vehicle by agent or servant see *infra* § 511 (6) b.

Vehicle in army convoy

The presumption is that driver of motor vehicle in a long army convoy was driving with authority, which was not rebutted by mere showing of lack of express authority and of ambiguous printed regulations, in view of the failure of government to disclose the rest of the relevant facts, and government was liable for negligent injury of another by such driver—Cox v. U. S., Ct.Cl., 73 F.Supp. 1022.

Use by another

With respect to presumption, arising under statute from proof of ownership, that automobile was being driven with permission of owner at time of accident, fact that automobile was being driven by some one other than person to whom owner had directly entrusted it was not controlling—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560.

61. Pa.—Martin v. Lipschitz, 149 A. 168, 299 Pa. 211—Axelrod v. Franklin, 167 A. 239, 109 Pa.Super. 300.

62. Mass.—Canavan v. Gibling, 122 N.E. 171, 232 Mass. 297.

63. Ga.—Durden v. Maddox, 37 S.E. 2d 219, 73 Ga.App. 491.

Ind.—Bojrab v. B & B Sand & Gravel Co., 156 N.E. 519, 86 Ind.App. 556.

Ky.—Webb v. Dixie-Ohio Express Co., 155 S.W.2d 539, 291 Ky. 692—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841—Consolidated Coach Corpora-

tion v. Bryant, 86 S.W.2d 88, 260 Ky. 452—Spencer's Adm'r v. Fisel, 71 S.W.2d 955, 254 Ky. 603—Gainesboro Telephone Co. v. Thomas, 28 S.W.2d 34, 234 Ky. 373.

Mass.—Wilson v. Grace, 173 N.E. 524, 273 Mass. 146.

Miss.—Slaughter v. Holsomback, 147 So. 318, 166 Miss. 643.

Ohio—Goodyear Tire & Rubber Co. v. Marhofer, 176 N.E. 120, 38 Ohio App. 143

Utah—Saltas v. Affleck, 102 P.2d 493, 99 Utah 65—Fox v. Lavender, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105.

42 C.J. p 1210 note 89, p 1212 note 20.

64. U.S.—Pariso v. Towse, C.C.A.N.Y., 45 F.2d 962.

In California

(1) Under statute imposing on automobile owner liability for the negligent operation of vehicle with the permission, express or implied, of owner, a permissive use may not be inferred from a showing of ownership alone so as to impose liability on owner—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64.

(2) Presumptions under statute that person is innocent of crime and that law has been obeyed were held insufficient to sustain burden of proof on injured person to establish that automobile injuring him was operated with owner's express or implied permission—Bradford v. Sargent, 27 P.2d 93, 135 Cal.App. 324.

(3) There is, however, a presumption that one operating the automobile of another has necessary consent to make his act lawful—Lanfried v. Bosworth, 114 P.2d 406, 45 Cal.App.2d 408—Hoffmann v. Lane, 54 P.2d 477, 11 Cal.App.2d 655—Phillips v. Cuccio, 42 P.2d 1050, 5 Cal.App.2d 520—Pozzobon v. O'Donnell, 36 P.2d 236, 1 Cal.App.2d 151.

(4) Accordingly, in absence of evidence of relationship between driver and owner of automobile, presumption that driver was innocent of crime or wrong has been held to warrant finding that driver operated automobile with owner's consent so as to make owner liable for damages occasioned by negligence of driver.—

Lanfried v. Bosworth, *supra*—Prickett v. Whapples, 52 P.2d 972, 10 Cal.App.2d 701.

65. Ill.—Ofsars v. Interstate Motor Freight System Co., 43 N.E.2d 309, 314 Ill.App. 673.

NY—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560.

66. Pa.—Sweeney v. City of Pittsburgh, 34 A.2d 67, 348 Pa. 80—Sefton v. Valley Dairy Co., 28 A.2d 313, 345 Pa. 324.

67. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Liberty Baking Co. v. Kellum, C.C.A.Pa., 79 F.2d 931.

D.C.—Simon v. City Cab Co., 78 F.2d 506, 64 App.D.C. 364, certiorari denied 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455.

Pa.—Sweeney v. City of Pittsburgh, 34 A.2d 67, 348 Pa. 80—Sefton v. Valley Dairy Co., 28 A.2d 313, 345 Pa. 324—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Henry v. Beck, 36 A.2d 734, 154 Pa.Super. 685.

Tex.—Gladewater Laundry & Dry Cleaners v. Newman, Civ.App., 141 S.W.2d 951—Kirklin v. Standard Coffee Co., Civ.App., 114 S.W.2d 263—Freeman v. Texas Brad Co., Civ.App., 111 S.W.2d 307.

Vehicle owned by another

A finding of agency arising out of fact that name of carrier from which recovery for damages was sought appeared on trailer truck depended on inference that truck was owned by carrier, but concession of ownership in another removed any evidential value from fact that carrier's name thus appeared—Venuto v. Robinson, C.C.A.N.J., 118 F.2d 679, certiorari denied C. A. Ross, Agent, Inc. v. Venuto, 62 S.Ct. 58, 314 U.S. 627, 86 L.Ed. 504.

68. Mo.—State ex rel. Vesper-Buick Automobile Co. v. Daues, 19 S.W.2d 700, 323 Mo. 388, 67 A.L.R. 157. N.Y.—Bogorad v. Dix, 162 N.Y.S. 992, 176 App.Div. 774.

Okl.—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36.

that one presumption may not be based on another.⁶⁹

These presumptions of liability, control, agency, and consent based on proof of defendant's ownership of the motor vehicle which inflicted the injury

have been held to make a prima facie case as to the owner's liability and responsibility⁷⁰ and to be sufficient to support a verdict against the owner.⁷¹ Ordinarily such presumptions are only prima facie,⁷² are not conclusive,⁷³ and may be rebutted.⁷⁴

Pa.—Coates v. Commercial Credit Co., 165 A. 377, 310 Pa. 330—Harling v. Connell, 90 A. 910, 244 Pa. 439.

Wis.—Buchholz v. Kastner, 213 N. W. 329, 193 Wis. 224, followed in Buchholz v. Breitbach, 218 N.W. 444, 193 Wis. 231.

Conclusive presumption

Under a statutory provision that on the sale of a motor vehicle the delivery thereof shall not be deemed to have been made until the vendor has removed his license number plates, where the vendor has failed to remove his plates for the year when he sold the car it will be conclusively presumed, as far as the rights of the public are concerned, that the person who is operating the car is the agent of the vendor.—Peters v. Casualty Co. of America, 172 P. 220, 101 Wash. 208.

Inert vehicle

Where an inert automobile or trailer is being towed by an automotive vehicle, a license tag on the inert vehicle merely announces its registration as a piece of freight, and raises no presumption that driver of towing vehicle is servant of owner of inert vehicle.—Fuller v. Palazzolo, 197 A. 225, 329 Pa. 93.

69. S.C.—Craig v. Clearwater Mfg. Co., 200 S.E. 765, 189 S.C. 176.

Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520.

70. Ala.—Craft v. Koonce, 187 So. 730, 237 Ala. 552—Deaton Truck Line v. Tillman, 30 So.2d 584, 33 Ala.App. 143.

Cal.—Strasburger v. Prescott, 295 P. 357, 111 Cal.App. 104—Hathaway v. Mathews, 258 P. 712, 85 Cal.App. 31.

D.C.—Senator Cab Co. v. Rothberg, Mun.App., 42 A.2d 245.

Idaho.—Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 367.

Ill.—McCarty v. O. H. Yates & Co., 14 N.E.2d 254, 294 Ill.App. 474—Paulsen v. Cochfield, 278 Ill.App. 596.

Iowa.—Bridges v. Welzien, 300 N.W. 659, 231 Iowa 6—Mitchell v. Automobile Underwriters of Des Moines, 281 N.W. 832, 225 Iowa 906.

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355—Wagner v. Page, 20 A.2d 164, 179 Md. 465.

Mo.—Benson v. Smith, App., 38 S. W.2d 743—Hampe v. Versen, 32 S. W.2d 793, 224 Mo.App. 1144.

N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368—Deyo v. Belotte, 27 N.Y.S.2d 1, 261 App. Div. 1119, reargument denied 29 N.Y.S.2d 910, 262 App.Div. 921, appeal denied.

Tex.—Merryman v. Zeleny, Civ.App., 143 S.W.2d 410—Harper v. Highway Motor Freight Lines, Civ.App., 89 S.W.2d 448, error dismissed.

Va.—Kavanaugh v. Wheeling, 7 S.E. 2d 125, 175 Va. 105.

Wash.—Carlson v. Wolaski, 147 P.2d 291, 20 Wash.2d 323—Davis v. Browne, 147 P.2d 263, 20 Wash.2d 219.

Wis.—Hanson v. Engelbretson, 294 N.W. 817, 237 Wis. 126—Sevey v. Jones, 292 N.W. 436, 235 Wis. 109—Laurent v. Plain, 281 N.W. 660, 229 Wis. 75—Borger v. McKeith, 224 N.W. 102, 198 Wis. 315.

Strength of presumption

The strength of rule that plaintiff makes prima facie case by showing that defendant owned automobile injuring plaintiff necessarily depends on circumstances and evidence in particular case, and rule disappears when surrounding circumstances are such that its recognition is unreasonable.—Arthurs v. Citizens' Coal Co., Ohio App., 47 N.E.2d 654.

71. U.S.—Liberty Baking Co. v. Kelum, C.C.A.Pa., 79 F.2d 931.

Cal.—Heglin v. F. C. B. A. Market, 161 P.2d 976, 70 Cal.App.2d 803.

Ga.—Lee v. Queen, 46 S.E.2d 509, 76 Ga.App. 513.

Md.—Phipps v. Milligan, 199 A. 438, 174 Md. 438—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.

N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368, reargument denied 262 N.Y.S. 907, 238 App. Div. 793.

72. Iowa.—Mitchell v. Automobile Underwriters of Des Moines, 281 N.W. 832, 225 Iowa 906.

Md.—Taylor v. Wesley Freeman, Inc., 47 A.2d 500, 186 Md. 474.

73. Md.—Taylor v. Wesley Freeman, Inc., supra, 42 C.J. p 1209 note 74.

In the absence of other evidence, however, the presumptions are conclusive.

U.S.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 64, 305 U. S. 607, 83 L.Ed. 386.

Or.—Allum v. Ball, 124 P.2d 533, 168 Or. 577.

Wis.—Laurent v. Plain, 281 N.W. 660, 229 Wis. 75.

74. Ala.—Cox v. Roberts, 27 So.2d 617, 248 Ala. 372—Bruner v. Rubbanks, 33 So.2d 374, 33 Ala.App. 266, certiorari denied 33 So.2d 376, 250 Ala. 100—Diaton Truck Line v. Tillman, 30 So.2d 584, 33 Ala. App. 143.

Ariz.—Lutty v. Lockhart, 295 P. 975, 37 Ariz. 488.

Cal.—Hathaway v. Mathews, 258 P. 712, 85 Cal.App. 31.

D.C.—Rice v. Simmons, Mun.App. 63 A.2d 587—Senator Cab Co. v. Rothberg, Mun.App., 42 A.2d 245.

Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Idaho.—Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 367.

Iowa.—Robinson v. Shell Petroleum Corporation, 251 N.W. 613, 217 Iowa 1252—Heavilin v. Wendell, 241 N.W. 654, 214 Iowa 844, 83 A.L.R. 872.

Md.—Maryland Cas. Co. v. Sause, 57 A.2d 801—Taylor v. Wesley Freeman, Inc., 47 A.2d 500, 186 Md. 474—National Trucking & Storage v. Durkin, 39 A.2d 687, 183 Md. 584—Wagner v. Page, 20 A.2d 161, 179 Md. 465—Gutheridge, On Behalf and to Use of Ring Engineering Co. v. Gorsuch, 8 A.2d 885, 177 Md. 109.

Mo.—Benson v. Smith, App., 38 S.W. 2d 743.

N.J.—Coopersmith v. Kalt, 196 A. 649, 119 N.J.Law 474—Onufer v. Strout, 183 A. 215, 116 N.J.Law 274—Dooley v. Saunders-U-Drive Co., 162 A. 556, 109 N.J.Law 295.

N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368—Schwartz v. Lawrence, 212 N.Y.S. 494, 214 App.Div. 559.

Pa.—Sweeney v. City of Pittsburgh, 34 A.2d 67, 348 Pa. 80—Sefton v. Valley Dairy Co., 28 A.2d 313, 346 Pa. 324—McFadden v. Pennzoll Co., 9 A.2d 412, 336 Pa. 301.

Tex.—Merryman v. Zeleny, Civ.App., 143 S.W.2d 410—Alfano v. International Harvester Co. of America, Civ.App., 121 S.W.2d 466, error dismissed.

Va.—Kavanaugh v. Wheeling, 7 S.E. 2d 125, 175 Va. 105—Sydnor & Hundley v. Bonifant, 164 S.E. 408, 158 Va. 703.

Wash.—Pickering v. Hanson, 183 P. 2d 487, 28 Wash.2d 603—Carlson v. Wolaski, 147 P.2d 291, 20 Wash.2d 323—Davis v. Browne, 147 P.2d 263, 20 Wash.2d 219—McMullen v. War-

While the presumptions from the fact of ownership do not shift the burden of proof,⁷⁵ they put the burden on defendant to come forward with evidence that he is not liable or responsible for the operation of his motor vehicle.⁷⁶ It has been held that these presumptions are presumptions of law⁷⁷ or administrative presumptions or rules of procedure,⁷⁸ but it has also been held that they are presumptions of fact.⁷⁹ In any event, although there are some statements apparently to the contrary,⁸⁰ it has been held that these presumptions are not evidence,⁸¹ and go out of the case on proof of the facts,⁸² whether such evidence is presented by plaintiff or defendant.⁸³ Likewise, such presumptions

Studzinski, 291 N.W. 390, 234 Wis. 385.
42 C.J. p 1212 note 23 [a] (1).
Presumptions as sufficient to raise fact question see *infra* § 526.
80. Or.—Clark v. Shea, 279 P. 539, 130 Or. 195.
81. Ala.—Western Union Telegraph Co. v. Gorman, 185 So. 743, 237 Ala. 146—Perfection Mattress & Spring Co. v. Windham, 182 So. 6, 236 Ala. 239—William E. Harden, Inc., v. Harden, 197 So. 94, 29 Ala.App. 411.
Ariz.—Silva v. Traver, 162 P.2d 615, 63 Ariz. 364.
Conn.—Amento v. Mortensen, 37 A.2d 231, 130 Conn. 682.
Iowa.—Hunter v. Irwin, 263 N.W. 34, 220 Iowa 693.
Pa.—Kunkel v. Vogt, 47 A.2d 195, 354 Pa. 279.
Tex.—Boydston v. Jones, Civ.App., 177 S.W.2d 303.
Wash.—Van Court v. Lodge Cab Co., 89 P.2d 206, 198 Wash. 530—McMullen v. Warren Motor Co., 25 P.2d 99, 174 Wash. 454.
42 C.J. p 1212 note 23 [a] (2).

ren Motor Co., 25 P.2d 99, 174 Wash. 454.

W.Va.—Weismantle v. Petros, 19 S.E.2d 594, 124 W.Va. 180—Hollen v. Reynolds, 15 S.E.2d 163, 123 W.Va. 360—Jenkins v. Spittler, 199 S.E. 368, 120 W.Va. 514—Malcolm v. American Service Co., 191 S.E. 527, 118 W.Va. 637.

Wis.—Kowalsky v. Whiskey, 2 N.W.2d 704, 240 Wis. 59—Hanson v. Engebretson, 294 N.W. 817, 237 Wis. 126—Sevey v. Jones, 292 N.W. 436, 235 Wis. 109—Krusse v. Weigand, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, Smith v. Weigand, 235 N.W. 431, 204 Wis. 208 (two cases), and Woodard v. Weigand, 235 N.W. 432, 204 Wis. 209—Buchholz v. Kastner, 213 N.W. 329, 193 Wis. 224, followed in Buchholz v. Breitbach, 218 N.W. 444, 193 Wis. 231.
42 C.J. p 1209 note 75, p 1211 note 9
Weight and sufficiency of evidence required for rebuttal see *infra* § 518.

75. Conn.—Koops v. Gregg, 32 A.2d 653, 130 Conn. 185.

Idaho.—Magee v. Hargrove Motor Co., 296 P. 774, 50 Idaho 442.

Iowa.—Bridges v. Welzien, 300 N.W. 659, 231 Iowa 6—Allbaugh v. Ashby, 284 N.W. 816, 226 Iowa 574—Hunter v. Irwin, 263 N.W. 34, 220 Iowa 693.

Ohio.—Arthurs v. Citizens' Coal Co., App., 47 N.E.2d 654.

Tex.—Merryman v. Zeleny, Civ.App., 143 S.W.2d 410.

Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.

Wis.—Hanson v. Engebretson, 294 N.W. 817, 237 Wis. 126—Burant v. Studzinski, 291 N.W. 390, 234 Wis. 385.

76. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.

Ala.—Cox v. Roberts, 27 So.2d 617, 248 Ala. 372—William E. Harden, Inc. v. Harden, 197 So. 94, 29 Ala. App. 411.

Conn.—Lockwood v. Helfant, 13 A.2d 136, 126 Conn. 584—Leitzes v. F. L. Caulkins Auto Co., 196 A. 145, 123 Conn. 459.

D.C.—Rosenberg v. Murray, 116 F.2d 552, 73 App.D.C. 67—Rice v. Simmons, Mun.App., 53 A.2d 587—Senator Cab Co. v. Rothberg, Mun.

App., 42 A.2d 245—Schwartzbach v. Thompson, Mun.App., 33 A.2d 624.

Ill.—McCarty v. O. H. Yates & Co., 14 N.E.2d 254, 294 Ill.App. 474.

Iowa.—McCann v. Downey, 290 N.W. 690, 227 Iowa 1277—Hunter v. Irwin, 263 N.W. 34, 220 Iowa 693—Wolfson v. Jewett Lumber Co., 227 N.W. 608, 210 Iowa 244, modified on other grounds 230 N.W. 336, 210 Iowa 244.

Mo.—Hampe v. Versen, 32 S.W.2d 793, 224 Mo. 1144.

Or.—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944.

Pa.—Kunkel v. Vogt, 47 A.2d 195, 354 Pa. 279—Blakey v. Capanna, 36 A.2d 789, 349 Pa. 144.

Tex.—Merryman v. Zeleny, Civ.App., 143 S.W.2d 410.

Va.—Kavanaugh v. Wheeling, 7 S.E.2d 125, 175 Va. 105.

Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28—Steiner v. Royal Blue Cab Co., 20 P.2d 39, 172 Wash. 396.

W.Va.—Lacewell v. Lampkin, 13 S.E.2d 583, 123 W.Va. 138.

42 C.J. p 1209 note 77.

77. Ala.—Deaton Truck Line v. Tillman, 30 So.2d 584, 33 Ala.App. 143.

78. U.S.—Martin v. Burgess, C.C.A. Ala., 82 F.2d 321.

Ala.—Craft v. Koonce, 187 So. 730, 237 Ala. 552—Western Union Telegraph Co. v. Gorman, 185 So. 743, 237 Ala. 146—Perfection Mattress & Spring Co. v. Windham, 182 So. 6, 236 Ala. 239—Grimes v. Fulmer, 180 So. 321, 235 Ala. 645, followed in 180 So. 323, 235 Ala. 664, and 183 So. 924, 28 Ala.App. 630—Mobile Pure Milk Co. v. Coleman, 161 So. 829, 230 Ala. 432—Alabama Power Co. v. McGehee, 154 So. 105, 228 Ala. 505—Newell Contracting Co. v. Berry, 134 So. 870, 223 Ala. 109—William E. Harden, Inc., v. Harden, 197 So. 94, 29 Ala.App. 411.

Ariz.—Silva v. Traver, 162 P.2d 615, 63 Ariz. 364.

Tex.—Boydston v. Jones, Civ.App., 177 S.W.2d 303.

79. Ariz.—Lufty v. Lockhart, 295 P. 975, 37 Ariz. 488.

N.J.—Onufer v. Strout, 183 A. 215, 116 N.J.Law 274.

Pa.—Kunkel v. Vogt, 47 A.2d 195, 354 Pa. 279.

Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.

Wis.—Hanson v. Engebretson, 294 N.W. 817, 237 Wis. 126—Burant v.

Studzinski, 291 N.W. 390, 234 Wis. 385.

42 C.J. p 1212 note 23 [a] (1).
Presumptions as sufficient to raise fact question see *infra* § 526.

80. Or.—Clark v. Shea, 279 P. 539, 130 Or. 195.

81. Ala.—Western Union Telegraph Co. v. Gorman, 185 So. 743, 237 Ala. 146—Perfection Mattress & Spring Co. v. Windham, 182 So. 6, 236 Ala. 239—William E. Harden, Inc., v. Harden, 197 So. 94, 29 Ala.App. 411.

Ariz.—Silva v. Traver, 162 P.2d 615, 63 Ariz. 364.

Conn.—Amento v. Mortensen, 37 A.2d 231, 130 Conn. 682.

Iowa.—Hunter v. Irwin, 263 N.W. 34, 220 Iowa 693.

Pa.—Kunkel v. Vogt, 47 A.2d 195, 354 Pa. 279.

Tex.—Boydston v. Jones, Civ.App., 177 S.W.2d 303.

Wash.—Van Court v. Lodge Cab Co., 89 P.2d 206, 198 Wash. 530—McMullen v. Warren Motor Co., 25 P.2d 99, 174 Wash. 454.

42 C.J. p 1212 note 23 [a] (2).

82. Ala.—Peoples v. Seamon, 31 So. 2d 88, 249 Ala. 284—Western Union Telegraph Co. v. Gorman, 185 So. 743, 237 Ala. 743.

Ariz.—Silva v. Traver, 162 P.2d 615, 63 Ariz. 364.

Conn.—Amento v. Mortensen, 37 A.2d 231, 130 Conn. 682—Koops v. Gregg, 32 A.2d 653, 130 Conn. 185—Leitzes v. F. L. Caulkins Auto Co., 196 A. 145, 123 Conn. 459.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618.

Wis.—Hahn v. Smith, 254 N.W. 750, 215 Wis. 277—Philip v. Schlager, 253 N.W. 394, 214 Wis. 370.

Facts

Although the presumption goes out of the case, the facts on which the presumption is based remain.—Weismantle v. Petros, 19 S.E.2d 594, 124 W.Va. 180—Hollen v. Reynolds, 15 S.E.2d 163, 123 W.Va. 360—Jenkins v. Spittler, 199 S.E. 368, 120 W.Va. 514.

83. Idaho.—Magee v. Hargrove Motor Co., 296 P. 774, 50 Idaho 442.

Mich.—Brkal v. Fletcher, 18 N.W.2d 815, 311 Mich. 258.

Pa.—Kunkel v. Vogt, 47 A.2d 195, 354 Pa. 279.

Tex.—Crabb v. Zanes Freight Agency, Civ.App., 123 S.W.2d 752, error dismissed, judgment correct.

42 C.J. p 1211 note 11.

are inapplicable where plaintiff prevents proof of the facts.⁸⁴ Where the presumptions are sufficiently rebutted, the burden of going forward with the evidence is again on plaintiff.⁸⁵

(c) Registration as Raising Presumption of Liability

Under some statutes the registration of the motor vehicle which inflicted the injury in the defendant's name as owner is prima facie evidence of, or raises a presumption that, he is liable and responsible for its operation.

Pleading facts does not waive right to rely on presumption.—*Leitzes v. F. L. Caulkins Auto Co.*, 196 A. 145 123 Conn. 459.

Attempt to prove consent does not preclude reliance on presumption.—*Aarons v. Standard Varnish Works*, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560.

84. Wis.—*Hanson v. Engebretson*, 294 N.W. 817, 237 Wis. 126.

Objection to evidence

Where plaintiff prevented the proof of the facts by objecting to the introduction of such evidence, the rule that proof of ownership of an automobile driven by another makes a prima facie case of owner's liability for injuries caused in its operation was inapplicable.—*Hanson v. Engebretson*, supra.

85. Conn.—*Amento v. Mortensen*, 37 A.2d 231, 130 Conn. 682—*Leitzes v. F. L. Caulkins Auto Co.*, 196 A. 145, 123 Conn. 459.

N.Y.—*Milano v. Stuyvesant Auto Trading Co.*, 164 N.Y.S. 26.
Tex.—*Boydston v. Jones*, Civ.App., 177 S.W.2d 303.

Wis.—*Philip v. Schlager*, 253 N.W. 394, 214 Wis. 370.

86. Mass.—*Bagin v. Craven*, 57 N.E. 2d 563, 316 Mass. 758—*Le Blanc v. Pierce Motor Co.*, 30 N.E.2d 684, 307 Mass. 535—*Dineasoff v. Casey*, 29 N.E.2d 25, 306 Mass. 555—*Boyas v. Raymond*, 20 N.E.2d 411, 302 Mass. 519—*Fallon v. Darney*, 15 N.E.2d 462, 300 Mass. 365—*Karpowicz v. Manasas*, 176 N.E. 497, 275 Mass. 413—*Haun v. Le Grand*, 168 N.E. 180, 268 Mass. 582.

R.I.—*Hill v. Cabral*, 18 A.2d 145, 66 R.I. 145—*Gemma v. Rotondo*, 5 A.2d 297, 62 R.I. 293, 122 A.L.R. 223.
Tenn.—*Racy Cream Co. v. Walden*, 1 Tenn.App. 653.

Purpose of statute

(1) The object of the statute is to protect an innocent victim against financial loss following an accident in case the automobile is operated by a person other than the owner.—*Hill v. Cabral*, 2 A.2d 482, 62 R.I. 11, 121 A.L.R. 1072.

(2) Such statutes manifest intent to do away with the difficulty en-

countered by injured persons in trying to make formal proof that driver was operating in owner's behalf at time of accident.—*Legarry v. Finn Motor Sales*, 23 N.E.2d 1011, 304 Mass. 446.

Statute held valid

Mass.—*Thomes v. Meyer Store*, 168 N.E. 178, 268 Mass. 587.

Retroactive operation

In action for injuries by automobile, statute making registration in defendant's name prima facie evidence of operation under his responsibility was held applicable, even though enacted after cause arose.

Mass.—*Greenburg v. Gorvine*, 181 N.E. 128, 279 Mass. 339—*Wilson v. Grace*, 173 N.E. 524, 273 Mass. 146—*Haun v. Le Grand*, 168 N.E. 180, 268 Mass. 582—*Thomes v. Meyer Store*, 168 N.E. 178, 268 Mass. 587—*Smith v. Freedman*, 167 N.E. 335, 268 Mass. 38.

R.I.—*Hartley v. Johnson*, 175 A. 653, 54 R.I. 477.

Lease transferring exclusive control to lessee

Ruling of bureau of motor carriers of Interstate Commerce Commission that a carrier hiring motor vehicle should do so by lease providing for transfer to lessee of exclusive control over vehicle and operator did not supersede statute making registration of motor vehicle in name of owner prima facie evidence that vehicle is being operated under control of a person for whose conduct registered owner is legally responsible.—*Garfield v. Smith*, 59 N.E.2d 287, 317 Mass. 674, certiorari denied 65 S.Ct. 1568, 325 U.S. 879, 89 L.Ed. 1995, and *D. W. Lines v. Ward*, 65 S.Ct. 1569, 325 U.S. 879, 89 L.Ed. 1995.

Owner as plaintiff

The statute is inapplicable to an action in which the owner is plaintiff.—*Thompson v. Sides*, 176 N.E. 623, 275 Mass. 568.

Consequential damages

Statutory presumption that registered owner of automobile was responsible for driver's conduct was held inapplicable to action for consequential damages.—*Karpowicz v. Manasas*, 176 N.E. 497, 275 Mass. 413

Under some statutes proof of the registration of the motor vehicle in defendant's name as owner is prima facie evidence of, or creates a presumption that, the registrant was liable or responsible for the operation of the vehicle,⁸⁶ or that the person operating the vehicle was doing so as servant or agent of the registrant within the scope of his employment,⁸⁷ and with the owner's consent and authority.⁸⁸ In order to invoke the presumption, registration must be proved,⁸⁹ and it has been held that the presumption may not be based on ownership,⁹⁰

87. Mass.—*Little v. Levison*, 55 N.E.2d 17, 316 Mass. 159—*Morton v. Dobson*, 30 N.E.2d 231, 307 Mass. 394—*Bruce v. Hanks*, 178 N.E. 728, 277 Mass. 268.

Tenn.—*Green v. Powell*, 124 S.W.2d 269, 22 Tenn.App. 481—*English v. George Cole Motor Co.*, 111 S.W.2d 386, 21 Tenn.App. 408.

Strict construction

The statute establishing prima facie agency in registered owner of automobile is in derogation of the common law and must be strictly construed.—*English v. George Cole Motor Co.*, supra.

88. Tenn.—*Green v. Powell*, 124 S.W.2d 269, 22 Tenn.App. 481—*Racy Cream Co. v. Walden*, 1 Tenn.App. 653.

89. Mass.—*Karpowicz v. Manasas*, 176 N.E. 497, 275 Mass. 413.

Tenn.—*English v. George Cole Motor Co.*, 111 S.W.2d 386, 21 Tenn.App. 408—*Maysay v. Hickman*, 97 S.W.2d 662, 20 Tenn.App. 262.

Where automobile dealer has a statutory dealer's certificate and places dealer's license plates upon automobile owned in fact by such dealer, the automobile becomes registered in his name as owner within terms of statute.—*Legarry v. Finn Motor Sales*, 23 N.E.2d 1011, 304 Mass. 446.

90. Mass.—*Bagin v. Craven*, 57 N.E. 2d 563, 316 Mass. 758.

Tenn.—*East Tennessee & Western North Carolina Motor Transp. Co. v. Brooks*, 121 S.W.2d 559, 173 Tenn. 542—*English v. George Cole Motor Co.*, 111 S.W.2d 386, 21 Tenn.App. 408—*Maysay v. Hickman*, 97 S.W.2d 662, 20 Tenn.App. 262—*Jetton v. Polk*, 68 S.W.2d 127, 17 Tenn.App. 395—*Woodfin v. Insel*, 13 Tenn.App. 493.

Failure to comply with statute

Defendant's failure to have license number transferred when it bought automobile involved in accident as required by statute did not entitle plaintiffs to presumption of agency to which they would have been entitled, under statute, from proof of registration of automobile in defendant's name, in absence of showing

at least where the motor vehicle is registered in another's name,⁹¹ but it has also been held that the presumption may be invoked where registration is presumed from proof of ownership.⁹² Such statutes are procedural⁹³ and do not change the substantive law.⁹⁴ The presumption raised by the statute is rebuttable⁹⁵ and does not preclude defendant from showing that he is not liable or responsible for the operation of the vehicle,⁹⁶ but it has been held that in the absence of rebuttal the verdict or finding must be in accordance with the presumption.⁹⁷ Under some statutes the presumption does not shift the burden of proof,⁹⁸ but merely puts on defendant the burden of going forward with the evidence,⁹⁹ and disappears from the case when the facts are proved;¹ but other statutes have been held to create more than a mere presumption² and to make the

owner's lack of responsibility and liability an affirmative defense³ as to which defendant has the burden of proof.⁴

c. Possession and Control

The burden is on the plaintiff to establish the defendant's possession and control of the vehicle which inflicted the injury, and the facts of possession and control may warrant a presumption of the defendant's liability and responsibility for the operation of the vehicle.

The burden is on plaintiff to establish defendant's possession and control of the motor vehicle, where such fact is material to a recovery.⁵

Defendant may be presumed to be responsible and liable for the operation of the motor vehicle by another where he had possession and control of the vehicle,⁶ and, according to the decisions on the

causal connection between failure to comply with statute and injury.—*English v. George Cole Motor Co.*, 111 S.W.2d 386, 21 Tenn.App. 408.

Prior law

(1) Under a prior statute the operator of the vehicle was presumed to be the servant or agent of the owner acting within the scope of his employment.—*Emert v. Wilkerson*, 7 Tenn.App. 269—*Racy Cream Company v. Walden*, 1 Tenn.App. 653.

(2) At common law there was no presumption that the owner was liable for the operation of the vehicle or that its driver was the owner's servant or agent.—*Davis v. Newsome Auto Tire, etc., Co.*, 213 S.W. 914, 141 Tenn. 527.

91. Tenn.—*Maysay v. Hickman*, 97 S.W.2d 662, 20 Tenn.App. 262.

92. Mass.—*Karpowicz v. Manasas*, 176 N.E. 497, 275 Mass. 413.

93. Mass.—*Fittles v. Umlah*, 77 N.E.2d 212—*Dineasoff v. Casey*, 29 N.E.2d 25, 306 Mass. 555—*Wilson v. Grace*, 173 N.E. 524, 273 Mass. 146.

94. Mass.—*Fittles v. Umlah*, 77 N.E.2d 212—*Dineasoff v. Casey*, 29 N.E.2d 25, 306 Mass. 555—*Wilson v. Grace*, 173 N.E. 524, 273 Mass. 146. R.I.—*Hill v. Cabral*, 2 A.2d 482, 62 R.I. 11, 121 A.L.R. 1072.

95. Tenn.—*Southern Motors v. Morton*, 154 S.W.2d 801, 25 Tenn.App. 204—*Long v. Tomlin*, 125 S.W.2d 171, 22 Tenn.App. 607—*Hodges v. West*, 8 Tenn.App. 307.

R.I.—*Hartley v. Johnson*, 175 A. 653, 54 R.I. 477.

96. R.I.—*Conant for Use and Benefit of Indemnity Ins. Co. of America v. Giddings*, 13 A.2d 517, 65 R.I. 79.

97. Mass.—*Thomes v. Meyer Store*, 168 N.E. 178, 268 Mass. 587.

R.I.—*Gemma v. Rotondo*, 5 A.2d 297, 62 R.I. 293, 122 A.L.R. 223.

98. Tenn.—*Pratt v. Duck*, 191 S.W.2d 562, 28 Tenn.App. 502.

99. Tenn.—*Pratt v. Duck*, supra—*Southern Motors v. Morton*, 154 S.W.2d 801, 25 Tenn.App. 204.

1. Tenn.—*Biggert v. Memphis Power & Light Co.*, 80 S.W.2d 90, 168 Tenn. 638—*Pratt v. Duck*, 191 S.W.2d 562, 28 Tenn.App. 502—*Southern Motors v. Morton*, 154 S.W.2d 801, 25 Tenn.App. 204—*English v. George Cole Motor Co.*, 111 S.W.2d 386, 21 Tenn.App. 408.

Purely for consideration of court

The statutory presumption that automobile, registered in name of defendant in action for injuries caused thereby, was being operated by his servant in course and scope of employment, operates primarily on trial judge's power and cannot properly be considered by jury.—*Southern Motors v. Morton*, 154 S.W.2d 801, 25 Tenn.App. 204.

Rebuttal by discredited witnesses

The fact that evidence rebutting statutory presumption comes from impeached or discredited witnesses does not leave such presumption in case, but merely prevents destruction of presumption and permits it to operate in sense that trial judge, by reason thereof, cannot take question from jury, which must pass on credibility of such witnesses without considering or being influenced by presumption.—*Southern Motors v. Morton*, supra.

Presumption is not evidence

Tenn.—*Southern Motors v. Morton*, supra.

2. Mass.—*Thomes v. Meyer Store*, 168 N.E. 178, 268 Mass. 587.

R.I.—*Gemma v. Rotondo*, 5 A.2d 297, 62 R.I. 293, 122 A.L.R. 223—*Hill v. Cabral*, 2 A.2d 482, 62 R.I. 11, 121 A.L.R. 1072.

3. Mass.—*Karpowicz v. Manasas*, 176 N.E. 497, 275 Mass. 413.

R.I.—*Hill v. Cabral*, 2 A.2d 482, 62 R.I. 11, 121 A.L.R. 1072.

4. Mass.—*Fittles v. Umlah*, 77 N.E.2d 212—*Le Blanc v. Pierce Motor Co.*, 30 N.E.2d 684, 307 Mass. 535—*Ferreira v. Franco*, 173 N.E. 529, 273 Mass. 272.

R.I.—*Conant, for Use and Benefit of Indemnity Ins. Co. of North America v. Giddings*, 13 A.2d 517, 65 R.I. 79—*Gemma v. Rotondo*, 5 A.2d 297, 62 R.I. 293, 122 A.L.R. 223—*Hill v. Cabral*, 2 A.2d 482, 62 R.I. 11, 121 A.L.R. 1072.

5. Cal.—*Day v. Western Loan & Bldg. Co.*, 108 P.2d 702, 42 Cal.App. 2d 226.

Mo.—*Rubinelli v. Union Elec. Light & Power Co., App.*, 187 S.W.2d 762—*Reiling v. Missouri Ins. Co.*, 153 S.W.2d 79, 236 Mo.App. 164.

Pa.—*Gozdonovic v. Pleasant Hills Realty Co.*, 53 A.2d 73, 357 Pa. 23.

Presumptions

(1) It must be presumed that persons riding in automobile as driver's invited guests at time of collision between it and truck had no right to control automobile or manner of its operation.—*Russo v. Aucoin*, La.App. 7 So.2d 744.

(2) Where owner of newspaper route orally agreed to deliver bundles of newspapers to carriers in his territory for a specified weekly sum, and nothing was said as to the manner in which the route owner should perform his work, it could not be presumed that right of control was retained by publisher.—*Bass v. Kansas City Journal Post Co.*, 148 S.W.2d 548, 347 Mo. 681.

6. U.S.—*Carroll v. Harrison*, D.C. Va., 49 F.Supp. 283, affirmed, C.C. A., 139 F.2d 427.

Admission of ownership and control made prima facie case of liability for injuries through driver's negligence.—*Bowerman v. Columbia*

question, although he was not the owner.⁷

Presumption of control. Defendant's control of the motor vehicle which inflicted the injury may be presumed where he was its owner, as discussed supra subdivision b of this section, where he was operating the vehicle,⁸ where he was its owner and was present in the vehicle at the time of the accident,⁹ or where the driver was the one regularly employed by the owner to drive.¹⁰ Such presumptions as to control may be rebutted,¹¹ but the burden of coming forward with such evidence is on defendant.¹²

§ 511(6). — Acts of Persons Other than Defendant

- a. In general
- b. Presumption of consent, permission, or authority to use vehicle
- c. Presumption of agency
- d. Presumption of operation within scope of employment and on defendant's business

- e. Authority of operator to invite persons to ride
- f. Acts of members of family

a. In General

Where the plaintiff seeks to charge the defendant with liability for the negligence or misconduct of another in the operation of a motor vehicle, the burden is on the plaintiff to prove that the operator was the servant or agent of the defendant acting within the scope of his employment on the defendant's business or that for some other reason the defendant is responsible for his conduct.

Where plaintiff seeks to charge defendant with liability for the negligence or misconduct of another person who was operating a motor vehicle, the burden is on plaintiff to establish all the facts which are necessary to fix defendant with such liability.¹³ Thus, plaintiff has the burden of proving that defendant is responsible for the acts of the driver or operator,¹⁴ as, for example, that the defendant authorized, permitted, or consented to the use of the motor vehicle by its operator at the time the injury was inflicted,¹⁵ that the operation of the vehicle was pursuant to a partnership or joint enterprise on the

Gorge Motor Coach System, 284 P. 579, 132 Or. 106.

7. U.S.—Carroll v. Harrison, D.C. Va., 49 F.Supp. 283, affirmed, C.C.A., 139 F.2d 427.

Ill.—Kinney v. O'Flaherty, 56 N.E.2d 473, 323 Ill.App. 579.

8. Utah.—Fox v. Lavender, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105.

9. Md.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.

Pa.—Feagles v. Sullivan, 32 Pa.Dist. & Co. 47.

Tenn.—Thompson v. Malone & Hyde, 65 S.W.2d 1079, 16 Tenn.App. 152.

Utah.—Fox v. Lavender, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105. 42 C.J. p 1209 note 70 [a].

Strong presumption

There is strong presumption that owner riding in automobile controls operation thereof, even though another person is driving it.—Thompson v. Malone & Hyde, 65 S.W.2d 1079, 16 Tenn.App. 152.

Joint owners

Where two or more joint owners are in automobile, they will be presumed to have joint right of control, and therefore driver will be presumed to be driving for himself and as agent of other present joint owners.—Nielsen v. Watanabe, 62 P.2d 117, 90 Utah 401—Fox v. Lavender, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105.

10. Cal.—Billig v. Southern Pac. Co., 209 P. 241, 189 Cal. 477. 37 C.J. p 1211 note 95.

11. Tenn.—Thompson v. Malone &

Hyde, 65 S.W.2d 1079, 16 Tenn.App. 152.

Utah.—Fox v. Lavender, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105. 42 C.J. p 1211 note 13.

Presumption that person behind steering wheel of automobile is controlling automobile is not conclusive.—Reetz v. Mansfield, 178 A. 53, 119 Conn. 563.

12. Ariz.—Baker v. Maseeh, 179 P. 53, 20 Ariz. 201.

Neb.—Kinegold v. Union Outfitting Co., 193 N.W. 331, 110 Neb. 202.

13. Cal.—Hathaway v. Siskiyou Union High School Dist., 151 P.2d 861, 66 Cal.App.2d 103.

N.Y.—Johnson v. R. T. K. Petroleum Co., 33 N.Y.S.2d 18, 263 App.Div. 338, reversed on other grounds 44 N.E.2d 6, 289 N.Y. 101, reargument denied 44 N.E.2d 619, 289 N.Y. 646 —Harter v. Richardson Corporation, 12 N.Y.S.2d 180, 257 App.Div. 907.

Pa.—Chamberlain v. Riddle, 38 A.2d 521, 155 Pa.Super. 507—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa.Super. 125—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538—Mitchell v. Ellmaker, 4 A.2d 592, 134 Pa.Super. 583. 42 C.J. p 1210 note 81.

14. Fla.—Fletcher Motor Sales v. Cooney, 27 So.2d 289, 158 Fla. 223.

Ill.—Nelson v. Stutz Chicago Factory Branch, 173 N.E. 394, 341 Ill. 387.

Ind.—Jones v. Kasper, 33 N.E.2d 816, 109 Ind.App. 465.

Mass.—Hinds v. Bowen, 167 N.E. 332, 268 Mass. 55.

42 C.J. p 1210 note 82.

15. Cal.—Henrietta v. Evans, 75 P. 2d 1051, 10 Cal.2d 526—Helmuth v. Frame, 115 P.2d 852, 46 Cal.App.2d 381—Bradford v. Sargent, 27 P.2d 93, 135 Cal.App. 324.

Fla.—Fletcher Motor Sales v. Cooney, 27 So.2d 289, 158 Fla. 223.

Iowa.—Heavilin v. Wendell, 241 N. W. 654, 214 Iowa 844, 83 A.L.R. 872 —Tigue Sales Co. v. Reliance Motor Co., 221 N.W. 514, 207 Iowa 567 Minn.—Ballman v. Brinker, 1 N.W.2d 365, 211 Minn. 322.

N.Y.—Harter v. Richardson Corporation, 12 N.Y.S.2d 180, 257 App.Div. 907—Barber v. Jewel Tea Co., 300 N.Y.S. 302, 252 App.Div. 362, affirmed 16 N.E.2d 94, 278 N.Y. 540.

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114.

Tenn.—Life & Casualty Ins. Co. v. Bradley, 160 S.W.2d 410, 178 Tenn. 526—Tucker v. Home Stores, 91 S. W.2d 296, 170 Tenn. 23.

Tex.—Kennedy v. American Nat. Ins. Co., 107 S.W.2d 364, 130 Tex. 155, 112 A.L.R. 916—Thomas v. Southern Lumber Co., Civ.App., 181 S.W. 2d 111—Way v. Guest, Civ.App., 272 S.W. 217.

42 C.J. p 1210 notes 85, 86.

Use beyond scope of consent

In action against corporate owner of automobile for injuries sustained while owner's manager was driving automobile, burden of proving the cause of action remained at all times on plaintiffs, but, when it was shown that owner gave automobile to manager to use, presumption arose that manager had right to use automobile and duty shifted to owner of showing that manager's actual use was

part of defendant and the operator of the vehicle,¹⁶ or that the driver or operator was a servant or agent of defendant,¹⁷ acting within the scope of his employment or agency,¹⁸ and that the vehicle

not permitted.—*Barber v. Jewel Tea Co.*, 800 N.Y.S. 302, 252 App.Div. 362, affirmed 16 N.E.2d 94, 278 N.Y. 540.

16. *Mo.—King v. Rieth*, 108 S.W.2d 1, 341 Mo. 467.

Pa.—Baugh v. McCallum, 14 A.2d 364, 140 Pa.Super. 276.

Wash.—Iron v. Sauve, 179 P.2d 327, 27 Wash.2d 562.

17. *U.S.—Constitution Pub. Co. v. Dale*, C.C.A.Ala., 164 F.2d 210—*De Bord v. Proctor & Gamble Distributing Co.*, D.C.Ga., 58 F.Supp. 157, affirmed, C.C.A., 146 F.2d 54.

Ala.—Koonce v. Craft, 174 So. 478, 234 Ala. 278—*Reed v. McCracken*, 170 So. 765, 233 Ala. 175—*Hawkins v. Barber*, 163 So. 608, 231 Ala. 53—*Tullis v. Blue*, 114 So. 185, 216 Ala. 577.

Ark.—Pollock Stores Co. v. Chatwell, 90 S.W.2d 213, 192 Ark. 83.

Cal.—Tarasco v. Moyers, App., 185 P.2d 86, 81 Cal.App.2d 804—*Huddy v. Chronicle Pub. Co.*, 103 P.2d 421, 15 Cal.2d 554—*Hathaway v. Siskiyou Union School Dist.*, 151 P.2d 861, 66 Cal.App.2d 103—*Brooks v. Johnson*, 72 P.2d 194, 22 Cal.App.2d 618—*Wilson v. Droege*, 294 P. 726, 110 Cal.App. 578—*Irre v. Roed*, 278 P. 928, 99 Cal.App. 372.

Colo.—Irvin v. Blair, 68 P.2d 28, 100 Colo 349.

Conn.—Dunn v. Santamauro, 175 A. 913, 119 Conn. 307—*Matulis v. Gans*, 141 A. 870, 107 Conn 562.

Del.—Preston v. Schroeder, 27 Del. 350.

Fla.—McAllister v. Miami Daily News, 17 So 2d 613, 154 Fla. 370—*Dowling v. Nicholson*, 135 So. 288, 101 Fla. 672.

Ga.—Minter v. Kent, 8 S.E.2d 109, 62 Ga.App. 265.

Idaho.—Magee v. Hargrove Motor Co., 296 P. 774, 50 Idaho 442.

Ill.—La Prise v. Carr-Leasing, Inc., 62 N.E.2d 26, 326 Ill.App. 514—*Swain v. Hoberg*, 281 Ill.App. 203—*Paulsen v. Cochfield*, 278 Ill.App. 596—*Howard v. Amerson*, 236 Ill. App. 587.

Ky.—Consolidated Coach Corporation v. Bryant, 86 S.W.2d 88, 260 Ky. 452—*Spencer's Adm'r v. Fisel*, 71 S.W.2d 955, 254 Ky. 503—*Broadway Motors v. Bass*, 67 S.W.2d 955, 252 Ky. 628.

La.—Bolton v. Eznack, App., 190 So. 862.

Me.—Stevens v. Frost, 32 A.2d 164, 140 Me. 1.

Mass.—Wilson v. Grace, 173 N.E. 524, 273 Mass. 146—*Kwindias v. Knoel*, 158 N.E. 335, 261 Mass. 91.

Mich.—Holloway v. Nassar, 267 N.W. 619, 276 Mich. 212.

Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.

Neb.—Snyder v. Russell, 1 N.W.2d

125, 140 Neb. 616—*Bainter v. Appel*, 245 N.W. 16, 124 Neb. 40.

N.J.—Johnson v. American Oil Co., 166 A. 135, 110 N.J.Law 456.

N.C.—Cole v. Asheville Funeral Home, 176 S.E. 553, 207 N.C. 271—*Jeffrey v. Osage Mfg. Co.*, 150 S.E. 503, 197 N.C. 724, followed in *Lewis v. Basketeria Stores*, 161 S.E. 924, 201 N.C. 849.

N.D.—Carlson v. Hoff, 230 N.W. 294, 59 N.D. 393—*Clark v. Feldman*, 224 N.W. 167, 57 N.D. 741.

Okl.—Marion Machine, Foundry & Supply Co. v. Duncan, 101 P.2d 813, 187 Okl. 160—*Connelly v. Loub*, 38 P.2d 555, 169 Okl. 627.

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114.

Pa.—Conley v. Mervis, 188 A. 350, 324 Pa. 577, 108 A.L.R. 160—*Double v. Myers*, 157 A. 610, 305 Pa. 266—*Chamberlain v. Riddle*, 38 A.2d 521, 155 Pa.Super. 507—*Murphy v. Wolverine Express*, 38 A.2d 511, 155 Pa. Super. 125—*Morris v. Ward*, 24 A. 2d 775, 148 Pa.Super. 28, reversed on other grounds 26 A.2d 926, 345 Pa. 226—*Alfandre v. Bream*, 7 A. 2d 502, 135 Pa.Super. 538—*Mitchell v. Ellmaker*, 4 A.2d 592, 134 Pa. Super. 583—*Hoch v. Martin*, 188 A. 602, 124 Pa. Super 445—*Axelrod v. Franklin*, 167 A. 239, 109 Pa.Super. 300—*Podejuz v. Berrettini, Com. Pl.*, 37 Luz.Leg. Reg. 96, 11 Som. Leg. J. 336.

R.I.—McIver v. Schwartz, 145 A. 101, 50 R.I. 68—*Callahan v. Weybosset Pure Food Market*, 133 A. 442, 47 R.I. 361.

Tex.—Tinney v. Williams, Civ.App., 144 S.W.2d 344—*Renfro v. Elam, Civ.App.*, 117 S.W.2d 133, error refused—*Harper v. Highway Motor Freight Lines, Civ.App.*, 89 S.W.2d 448—*Commercial Credit Co. v. Groseclose, Civ.App.*, 66 S.W.2d 709, error dismissed—*Edgington v. Southern Old Line Life Ins. Co., Civ.App.*, 55 S.W.2d 579—*Morgan v. Maunders, Civ.App.*, 37 S.W.2d 791, error dismissed—*Wright v. Maddox, Civ.App.*, 288 S.W. 560.

Wash.—Roletto v. Department Stores Garage Co., 191 P.2d 875—*Bradley v. S. L. Savidge, Inc.*, 123 P.2d 780, 13 Wash.2d 28.

42 C.J. p 1210 note 83.

Emergency servant

Pa.—Corbin v. George, 162 A. 459, 308 Pa. 201.

18. *U.S.—Constitution Pub. Co. v. Dale*, C.C.A.Ala., 164 F.2d 210—*Mid-Continent Pipe Line Co. v. Whiteley*, C.C.A.Okl., 116 F.2d 871—*Rutherford v. U. S.*, D.C.Tenn., 73 F.Supp. 867, affirmed, C.C.A., 168 F.2d 70.

Ala.—Smith v. Brown-Service Ins.

Co., 35 So.2d 490—*Mil-Lady Cleaners v. McDaniel*, 179 So. 908, 235 Ala. 469, 116 A.L.R. 639—*Koonce v. Craft*, 174 So. 478, 234 Ala. 278—*Reed v. McCracken*, 170 So. 765, 233 Ala. 175—*Hawkins v. Barber*, 163 So. 608, 231 Ala. 53—*Gulf Refining Co. v. McNeel*, 153 So. 231, 228 Ala. 302.

Cal.—Megowan v. City of Los Angeles, 59 P.2d 1012, 7 Cal.3d 80—*Tarasco v. Moyers*, 185 P.2d 86, 81 Cal.App.2d 804—*Hathaway v. Siskiyou Union High School Dist.*, 151 P.2d 861, 66 Cal.App.2d 103.

Conn.—Dunn v. Santamauro, 175 A. 913, 119 Conn. 307.

Ga.—Minter v. Kent, 8 S.E.2d 109, 62 Ga.App. 265.

Ky.—Williams v. Coleman's Adm'x, 115 S.W.2d 584, 273 Ky. 122—*Consolidated Coach Corporation v. Bryant*, 86 S.W.2d 88, 260 Ky. 452—*Saunders' Ex'rs v. Armour & Co.*, 295 S.W. 1014, 220 Ky. 719.

Me.—Stevens v. Frost, 32 A.2d 164, 140 Me. 1.

Mass.—Wilson v. Grace, 173 N.E. 524, 273 Mass. 146—*Welch v. Checker Taxi Co.*, 159 N.E. 622, 262 Mass. 310.

Neb.—Sutton v. Inland Const. Co., 14 N.W.2d 387, 144 Neb. 721—*Riesland v. Dawson County Irr. Co.*, 279 N.W. 726, 134 Neb. 773.

N.M.—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.

N.C.—Cole v. Asheville Funeral Home, 176 S.E. 553, 207 N.C. 271—*Jeffrey v. Osage Mfg. Co.*, 150 S.E. 503, 197 N.C. 724, followed in *Lewis v. Basketeria Stores*, 161 S.E. 924, 201 N.C. 849.

N.D.—Carlson v. Hoff, 230 N.W. 294, 59 N.D. 393—*Clark v. Feldman*, 224 N.W. 167, 57 N.D. 741.

Ohio.—Arthurs v. Citizens' Coal Co., 47 N.E.2d 654.

Okl.—Connelly v. Loub, 38 P.2d 555, 169 Okl. 627.

Pa.—Gozdonic v. Pleasant Hills Realty Co., 53 A.2d 73, 357 Pa. 23—*Koscelek v. Lucas*, 43 A.2d 550, 157 Pa.Super. 548—*Chamberlain v. Riddle*, 38 A.2d 521, 155 Pa.Super. 507—*Murphy v. Wolverine Express*, 38 A.2d 511, 155 Pa.Super. 125—*Axelrod v. Franklin*, 167 A. 239, 109 Pa.Super. 300.

Tex.—Poe Motor Co. v. Martin, Civ. App., 201 S.W.2d 102—*Thomas v. Southern Lumber Co., Civ.App.*, 181 S.W.2d 111—*Harper v. Highway Motor Freight Lines, Civ.App.*, 89 S.W.2d 448, error dismissed—*Ford Motor Co. v. Whitt, Civ.App.*, 81 S.W.2d 1032, error refused—*Houck v. McDonald, Civ.App.*, 59 S.W.2d 333—*Edgington v. Southern Old Line Life Ins. Co., Civ.App.*, 56 S.W.2d 579,

was at the time of the injury being operated in the business, or for the use or benefit, of defendant.¹⁹ The burden is on plaintiff to establish that the driver of the vehicle was a servant of defendant and not an independent contractor,²⁰ but, where it is shown that the driver was an employee of defendant, it has been held that the burden is on defendant to show that he was an independent contractor and not a servant.²¹ Where a relation of master and servant is proved, the relationship is presumed

to continue and the burden is on the master to show its termination before the accident.²²

b. Presumption of Consent, Permission, or Authority to Use Vehicle

Where it appears that the defendant's motor vehicle was being operated by his agent or servant or on his business, it has been presumed that the defendant authorized or consented to such use of the vehicle.

Where it appears that defendant's motor vehicle was being operated by his agent or servant,²³ or

Vt.—Ronan v. J. G. Turnbull Co., 181 A. 788, 99 Vt. 280.

42 C.J. p 1212 note 19.

19. U.S.—Constitution Pub. Co. v. Dale, C.C.A.Ala., 164 F.2d 210—Mid-Continent Pipe Line Co. v. Whiteley, C.C.A.Okl., 116 F.2d 871—Young v. Wilky Carrier Corporation, D.C.Pa., 54 F.Supp. 912, affirmed, C.C.A., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Ark.—Pollack Stores v. Chatwell, 90 S.W.2d 213, 192 Ark. 83.

Cal.—Hathaway v. Siskiyou Union High School Dist., 151 P.2d 861, 66 Cal.App.2d 103.

Ga.—Minter v. Kent, 8 S.E.2d 109, 62 Ga.App. 265.

Ill.—Stix, Baer & Fuller Co. v. Woesthaus Motor Co., 1 N.E.2d 796, 284 Ill.App. 301—Howard v. Amerson, 236 Ill.App. 587.

Ky.—Williams v. Coleman's Adm'x, 115 S.W.2d 584, 273 Ky. 122—Consolidated Coach Corporation v. Bryant, 86 S.W.2d 88, 260 Ky. 452.

Mass.—Arnold v. Brereton, 158 N.E. 671, 261 Mass. 238—Kwinditz v. Knoel, 158 N.E. 335, 261 Mass. 91.

Neb.—Snyder v. Russell, 1 N.W.2d 125, 140 Neb. 616—Bainter v. Appel, 245 N.W. 16, 124 Neb. 40.

N.J.—Cinque v. Crown Oil Corp., 48 A.2d 777, 135 N.J.Law 38.

Okl.—Connely v. Loub, 38 P.2d 555, 169 Okl. 627.

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114.

Pa.—Conley v. Mervis, 188 A. 350, 324 Pa. 577, 108 A.L.R. 160—Little v. Four Wheel Drive Sales Co., 179 A. 550, 319 Pa. 409—Readshaw v. Montgomery, 169 A. 135, 313 Pa. 206—Double v. Myers, 157 A. 610, 305 Pa. 266—Martin v. Lipschitz, 149 A. 168, 299 Pa. 211—Chamberlain v. Riddle, 38 A.2d 521, 155 Pa. Super. 507—Morris v. Ward, 24 A.2d 775, 148 Pa. Super. 28, reversed on other grounds 26 A.2d 926, 345 Pa. 226—Alfandre v. Bream, 7 A.2d 502, 135 Pa. Super. 538—Mitchell v. Ellmaker, 4 A.2d 592, 134 Pa. Super. 533—Hoch v. Martin, 188 A. 602, 124 Pa. Super. 445—Brown v. George B. Newton Coal Co., Com. Pl., 28 Del.Co. 23—Preston v. Schroeder, Com.Pl., 27 Del.Co. 350.

Tex.—Placencia v. Western Union Telegraph Co., 172 S.W.2d 86, 141 Tex. 247—Renfro v. Elam, Civ. App., 117 S.W.2d 133, error refused—Langford v. El Paso Baking Co., Civ.App., 1 S.W.2d 476, error dismissed.

Wash.—Feldtman v. Russak, 251 P. 572, 141 Wash. 287.

42 C.J. p 1211 note 18.

Concurrent cause of journey

In order to show that motorist was on his employer's business at time of accident, plaintiff must prove that service to the employer was a concurrent cause of the journey.—Cinque v. Crown Oil Corp., 48 A.2d 777, 135 N.J.Law 38.

20. U.S.—Ryan-Richards, Inc., v. Whitesides, C.C.A.Okl., 96 F.2d 826. Mo.—Pfeifer v. United Bakers Supply Co., App., 160 S.W.2d 795.

Tenn.—American Nat. Ins. Co. v. Poole, 148 S.W.2d 14, 24 Tenn.App. 596.

21. Cal.—Robinson v. George, 105 P. 2d 914, 16 Cal.2d 238—Phillips v. Larrabee, 90 P.2d 820, 32 Cal.App. 2d 720.

Ky.—Dennes v. Jefferson Meat Market, 14 S.W.2d 408, 228 Ky. 164—Bowen v. Gradison Const. Co., 6 S.W.2d 481, 224 Ky. 427.

La.—Coon v. Monroe Scrap Material Co., App., 191 So. 607—Rogers v. Silver Fleet System of Memphis, App., 180 So. 445—Taylor v. Victoria Nav. Co., App., 176 So. 519.

Miss.—Mississippi Public Service Co. v. Scott, 174 So. 573, 178 Miss. 859.

Mo.—Mattocks v. Emerson Drug Co., App., 33 S.W.2d 142—Andres v. Cox, 23 S.W.2d 1066, 223 Mo.App. 1139.

N.C.—Lassiter v. Cline, 22 S.E.2d 658, 222 N.C. 271.

N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.

Okl.—Ellis & Lewis v. Trimble, 78 P.2d 312, 182 Okl. 414.

S.D.—Pemberton v. Fritts, 228 N.W. 409, 56 S.D. 374.

Tex.—Winerich Motor Sales Co. v. Ochoa, Civ.App., 58 S.W.2d 193, reversed on other grounds Ochoa

v. Winerich Motor Sales Co., 94 S.W.2d 416, 127 Tex. 542.

Equally reasonable

Where, under given state of facts, theory of agency is as reasonable as that of independent contractor, party asserting relationship of independent contractor has burden to show real relationship of parties—Mitchell v. Maytag-Pacific-Intermountain Co., 51 P.2d 393, 184 Wash. 342.

Express authority

Evidence in action for injuries to automobile passenger that driver was performing service expressly authorized by defendant corporation created presumption that he was defendant's employee, not independent contractor, and cast burden on defendant to show otherwise.—Commercial Credit Co. v. Groseclose, Tex. Civ.App., 66 S.W.2d 709, error dismissed.

Contract sham

Burden was on plaintiff to establish his contention that contract engaging truck owner to haul material for lumber company as independent contractor rather than employee was not bona fide, but was mere sham.—Linden Lumber Co. v. Johnston, Tex.Civ.App., 128 S.W.2d 121, error dismissed.

Surrender of control

One delivering automobile to another to drive it to distant point and deliver it to designated person cannot be presumed to have surrendered control thereof so as to render driver independent contractor.—Commercial Credit Co. v. Groseclose, Tex. Civ.App., 66 S.W.2d 709, error dismissed.

22. Va.—Barnes v. Hampton, 141 S.E. 336, 149 Va. 740.

23. Cal.—Hicks v. Reis, 134 P.2d 788, 21 Cal.2d 654—Blank v. Coffin, 126 P.2d 868, 20 Cal.2d 457—Nash v. Wright, App., 186 P.2d 686, 82 Cal.App.2d 467—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal.App.2d 477.

Minn.—Truman v. United Products Corporation, 14 N.W.2d 120, 217 Minn. 155—Lausche v. Denison-Harding Chevrolet Co., 243 N.W. 52, 185 Minn. 685.

was being used on his business,²⁴ it has been presumed that such operation was with defendant's consent or permission. Likewise, an inference that the vehicle was being used with defendant's consent may be established by other facts reasonably warranting such inference.²⁵ This presumption of authority, permission, or consent does not shift the burden of proof,²⁶ and may be rebutted,²⁷ but where it is not rebutted it is sufficient to support a verdict or finding.²⁸

Presumption of consent to use of vehicle arising from fact of ownership see supra § 511 (5) b.

Use for other than defendant's purposes

(1) Court cannot presume that driver was authorized to use truck for purposes unconnected with employers' business.—*Monnet v. Ullman*, 276 P. 244, 129 Or. 44.

(2) Open and public use of employer's automobile by employee for personal purposes without any objection by employer, however, has been held to permit inference that employer consented thereto.—*Schultz v. Swift & Co.*, 299 N.W. 7, 210 Minn. 533.

24. Mich.—*Morrow v. Trathen*, 284 N.W. 687, 288 Mich. 172—*Christiansen v. Hilber*, 276 N.W. 495, 282 Mich. 403.

25. Minn.—*Koski v. Muccilli*, 277 N.W. 229, 201 Minn. 549.

Prior use

(1) Consent could be implied from past conduct.—*Bridges v. Welzien*, 300 N.W. 659, 231 Iowa 6.

(2) In order to establish such an inference, plaintiff must prove defendant's knowledge of the past conduct.—*McGowin v. Howard*, 21 So 2d 683, 246 Ala. 553.

(3) A statute governing driving without owner's consent, and providing that consent shall not be presumed or implied because of previous consent, should be construed as a whole as defining a misdemeanor, and as not applicable in civil action for damages suffered in automobile collision.—*Abbs v. Redmond*, 132 P. 2d 1044, 64 Idaho 369.

(4) The mere fact that a vehicle is kept where an employee has access to it will not authorize the presumption that he was accustomed to take or use the vehicle with the consent or knowledge of the owner, or had ever done so.—*Stewart v. Lafoe*, 240 S.W. 57, 194 Ky. 655.

(5) If an employee, with knowledge and assent of employer, repeatedly uses an automobile, not

owned by employer, in employer's business, employer will be held to have impliedly authorized its use, and to be liable for negligence in connection therewith, but mere fact that automobile was used on one occasion, unaccompanied by any evidence of other similar acts, does not justify any inference that employee was later authorized to use automobile on employer's business.

Tenn.—*National Life & Accident Ins. Co. v. Morrison*, 162 S.W.2d 501, 179 Tenn. 29.

Va.—*Barber v. Textile Machine Works*, 17 S.E.2d 359, 178 Va. 435.

Knowledge

The fact that a truck owner on passing truck being driven by servant discovered presence of guest in truck was held not to create inference that owner consented to guest's driving truck.—*Copp v. Paradis*, 157 A. 228, 130 Me. 464.

General control of car

Taxicab driver, having general control of car without instructions, is presumed to have authority to do things he considers essential.—*Katz v. Wolff & Reinheimer*, 221 N.Y.S. 476, 129 Misc. 384.

26. Minn.—*Truman v. United Products Corporation*, 14 N.W.2d 120, 217 Minn. 155.

27. Iowa.—*Curry v. Bickley*, 195 N.W. 617, 196 Iowa 827.

Intention

The fact that a servant intended to act in service of master in driving truck does not warrant inference of authority in face of contrary evidence.—*Haining v. Turner Centre System*, 149 A. 376, 50 R.I. 481.

28. Cal.—*Shields v. Oxnard Harbor Dist.*, 116 P.2d 121, 46 Cal.App.2d 477.

29. Cal.—*Hammond v. Hazard*, 180 P. 46, 40 Cal.App. 45.

Ohio.—*Brooks v. Sentele*, 58 N.E.2d 234, 74 Ohio App. 231—*Riley v. Speraw*, 181 N.E. 915, 42 Ohio App. 207.

Mo.—*Brucker v. Gambaro*, 9 S.W.2d 913.

Presumption of consent to use of ve-

c. Presumption of Agency

The operator of a motor vehicle may be presumed to be the owner's agent or servant where the owner authorized or consented to its use or it is being used on the owner's business.

The operator or driver of the motor vehicle may be presumed to be the agent or servant of defendant where defendant was present in the vehicle at the time of the accident,²⁹ or authorized, permitted, or consented to its use,³⁰ or where it was being used on his business or for his purposes,³¹ or where any other facts and circumstances reasonably warranting an inference of agency are established,³²

hicle arising from fact of ownership see supra § 511 (5) b.

Prospective purchaser

The presence in an automobile of an automobile dealer while the automobile was driven by a prospective buyer of the automobile at the dealer's invitation created a rebuttable presumption that the prospective buyer was the dealer's agent.—*Dahnke v. Meggitt*, 26 N.E.2d 223, 63 Ohio App. 252.

30. Cal.—*Ceranski v. Muensch*, 141 P.2d 750, 60 Cal.App.2d 751—*Montanya v. Brown*, 88 P.2d 745, 31 Cal.App.2d 642.

Wash.—*Moore v. Roddie*, 174 P. 648, 103 Wash. 386, 180 P. 879, 106 Wash. 548.

12 C.J. p 1210 note 91.

Employee of another

Where the only evidence showed that automobile was being driven by automobile dealer's employee at time it struck plaintiff's decedent, it could not be inferred that driver was an employee of finance company which became owner of the automobile on its repossession by dealer on behalf of finance company.—*Stewart v. Norsigian*, 149 P.2d 46, 64 Cal.App.2d 540, rehearing denied 15 P.2d 554, 64 Cal.App.2d 540.

Additional facts required

In addition to permissive use of automobile, either employment of operator by automobile owner or that operator was member of family group of owner or was operating automobile under control of or for a member of family group of owner must be established in order to justify inference of agency.—*Stewart v. Norsigian*, 150 P.2d 554, 64 Cal.App.2d 540.

31. Cal.—*Robinson v. George*, 105 P. 2d 914, 16 Cal.2d 238.

Ky.—*Webb v. Dixie-Ohio Express Co.*, 165 S.W.2d 539, 291 Ky. 692. S.C.—*Watson v. Kennedy*, 186 S.E. 649, 180 S.C. 543—*Keen v. Army Cycle Mfg. Co.*, 117 S.E. 531, 124 S.C. 342.

32. U.S.—*Hawthorne v. Eckerson Co.*, C.C.A.Vt., 77 F.2d 844.

but it has also been held that the fact that the driver was in charge of the vehicle with the owner's consent raises no presumption that the driver was the owner's agent.³³ While technically the burden of proof does not shift,³⁴ where a presumption or inference has arisen that the driver of the vehicle at the time of the accident was the servant or agent of defendant, he has the burden of going forward with evidence showing that the driver was not his agent.³⁵

d. Presumption of Operation within Scope of Employment and on Defendant's Business

As a general rule, operation within the scope of employment and on the defendant's business may be presumed where a motor vehicle owned or controlled by the defendant is being operated by his servant or agent.

While there is some authority to the contrary,³⁶ ordinarily the facts that at the time of the accident the vehicle was owned by defendant and that it was driven by his agent or servant raise a presumption that such employee was acting within the scope of his employment,³⁷ and that he was operating the

Bailment

The inference of automobile driver's agency for another, as affecting liability for negligent driving, may be drawn from proof of such other's bailment of automobile, as well as from proof of the other's ownership, and control and custody, rather than title, is material.—*Runnell v. Parelius*, 87 P.2d 230, 160 Or. 673.

Prior conduct

Where automobile involved in collision is shown to belong to defendant and driver to be person accustomed to drive automobile on defendant's business, defendant is required to meet inference that at time of accident driver was acting as defendant's agent.—*Hawthorne v. Eckerson Co.*, C.C.A.Vt., 77 F.2d 844.

Corporation having same officers and stockholders

Where automobile owned by corporation and driven by its president collided with another automobile causing injuries to an occupant and at time of accident corporation's president was returning to work for another corporation after completing a purely personal mission, fact that corporation to which president was returning to work had practically same officers and shareholders as corporation which owned automobile did not give rise to an inference that president was acting as agent of owner corporation at time of accident so as to impose liability on it for automobile occupant's injuries.—*Hillman v. Service Packing Co.*, 36 N.E.2d 433, 67 Ohio App. 254.

33. Okl.—*Randolph v. Schuth*, 90 P.2d 880, 185 Okl. 204.

34. Cal.—*Fahey v. Madden*, 206 P.128, 56 Cal.App. 593.

Utah.—*Fox v. Lavender*, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105.

35. Utah.—*Fox v. Lavender*, supra, 42 C.J. p 1211 note 7.

36. Conn.—*Lane v. Ajax Rubber Co.*, 120 A. 724, 99 Conn. 16.

Mass.—*Arnold v. Brereton*, 158 N.E. 671, 261 Mass. 238—*Kwindias v. Knoel*, 158 N.E. 335, 261 Mass. 91.

Vt.—*Ronan v. J. G. Turnbull Co.*, 181 A. 788, 99 Vt. 280.

37. U.S.—*Terminal Transport Co., Inc. v. Foster*, C.C.A. Ala., 164 F.2d 248—*R. J. Reynolds Tobacco Co. v. Newby*, C.C.A. Idaho, 145 F.2d 768—*Standard Coffee Co. v. Trippet*, C.C.A. Tex., 108 F.2d 161.

Ala.—*Scott v. Birmingham Elec. Co.*, 33 So.2d 344, 250 Ala. 61—*Chandler v. Owens*, 179 So. 256, 235 Ala. 356—*Luquire Funeral Homes Ins. Co. v. Turner*, 178 So. 536, 235 Ala. 305—*Blackmon v. Starling*, 130 So. 782, 222 Ala. 87—*Toronto v. Hattaway*, 122 So. 816, 219 Ala. 520—*McCormack Bros Motor Car Co. v. Holland*, 118 So. 387, 218 Ala. 200—*Jackson v. De Bardelaben*, 118 So. 504, 22 Ala. App. 615.

Ariz.—*Peters v. Pima Mercantile Co.*, 27 P.2d 143, 42 Ariz. 454.

Ark.—*Adkins v. L. L. Cole & Son*, 211 S.W.2d 885—*Ford & Son Sanitary Co. v. Ransom*, 210 S.W.2d 508—*Brooks v. Bale Chevrolet Co.*, 127 S.W.2d 135, 198 Ark. 17—*Casteel v. Yantis-Harper Tire Co.*, 39 S.W.2d 306, 183 Ark. 912—*Rex Oil Corporation v. Crank*, 38 S.W.2d 1093, 183 Ark. 819—*Mullins v. Ritchie Grocer Co.*, 35 S.W.2d 1010, 183 Ark. 218.

Cal.—*Westberg v. Willde*, 94 P.2d 590, 14 Cal.2d 360—*Megowan v. City of Los Angeles*, 59 P.2d 1012, 7 Cal.2d 80—*Nash v. Wright*, 186 P.2d 686, 82 Cal.App.2d 467—*Shields v. Oxnard Harbor Dist.*, 116 P.2d 121, 46 Cal.App.2d 477—*Day v. General Petroleum Corporation*, 89 P.2d 718, 32 Cal.App.2d 220—*Bourne v. Northern Counties Title Ins. Co.*, 40 P.2d 583, 4 Cal.App.2d 69—*Hutson v. Gerson*, 23 P.2d 816, 132 Cal.App. 665—*Vitelli v. Minutoli*, 4 P.2d 818, 118 Cal.App. 120—*Market St. Ry. Co. v. George*, 3 P.2d 41, 116 Cal.App. 572—*Mathe v. White Auto Co.*, 291 P. 599, 108 Cal.App. 286—*Barton v. McDermott*, 291 P. 591, 108 Cal.App. 372—*Wagnitz v. Scharetz*, 265 P. 318, 89 Cal.App. 511.

Ga.—*Atlanta Laundries v. Goldberg*, 30 S.E.2d 349, 71 Ga.App. 130—*Perry v. Lott*, 145 S.E. 479, 38 Ga.App. 729—*Yellow Cab Co. v. Nelson*, 134 S.E. 822, 35 Ga.App. 694.

Idaho.—*Manion v. Waybright*, 86 P.2d 181, 59 Idaho 643.

Ind.—*Frick v. Bickel*, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Ky.—*Hickman v. Strunk*, 197 S.W.2d 442, 303 Ky. 397—*Sharp v. Faulkner*, 166 S.W.2d 62, 292 Ky. 179—*Webb v. Dixie-Ohio Express Co.*, 165 S.W.2d 539, 291 Ky. 692—*Galloway Motor Co. v. Huffman's Adm'r*, 137 S.W.2d 379, 281 Ky. 841—*Davis v. Bennett's Adm'r*, 132 S.W.2d 334, 279 Ky. 799—*Home Laundry Co. v. Cook*, 125 S.W.2d 763, 277 Ky. 8—*Hinternisch v. Brewsough*, 87 S.W.2d 934, 261 Ky. 432—*Gainesboro Telephone Co. v. Thomas*, 28 S.W.2d 34, 234 Ky. 373.

La.—*May v. Yellow Cab Co.*, 114 So. 836, 164 La. 920, conformed to 8 La.App. 498—*Futch v. W. Horace Williams Co., App.*, 26 So.2d 776, rehearing refused—*Culver v. Toye Bros Yellow Cab Co., App.*, 26 So.2d 296—*Murphy v. Henderson, App.*, 23 So.2d 369—*Morales v. Burns, App.*, 21 So.2d 893—*G'Sell v. Cassagne, App.*, 12 So.2d 51—*Townley v. Pomes, App.*, 191 So. 702, annulled on other grounds 194 So. 763, 194 La. 730—*Antoine v. Louisiana Highway Commission, App.*, 188 So. 443—*Hunt v. Chisholm, App.*, 183 So. 132—*Mancuso v. Hurwitz-Mintz Furniture Co., App.*, 181 So. 814, rehearing denied 183 So. 461—*Brown v. Indemnity Ins. Co., App.*, 178 So. 768—*Banks v. Commercial Ins. Co., App.*, 177 So. 488—*Middleton v. Humble, App.*, 172 So. 542—*U-Drive-It-Car Co. v. Texas Pipe Line Co.*, 129 So. 565, 14 La.App. 524—*Griffin v. Motor Transit Co.*, 127 So. 438, 13 La.App. 151—*Johnson v. Jim Brownlee, Inc.*, 127 So. 127, 13 La.App. 86.

Md.—*McDowell, Pyle & Co. v. Magazine Service*, 164 A. 148, 164 Md. 170—*Wells v. Hecht Bros & Co.*, 142 A. 258, 155 Md. 618—*Nattans v. Cotton*, 133 A. 270, 150 Md. 466. Miss.—*Merchants Co. v. Tracy*, 166 So. 840, 175 Miss. 49—*Bourgeois v. Mississippi School Supply Co.*,

vehicle in the business, or for the use or benefit, of the owner.³⁸ A like presumption applies where defendant, although not the owner of the vehicle, has possession and control of it and it is being operated by his servant.³⁹ It has been held that it must be established that the employee was hired to drive the

vehicle in order to invoke the presumption, and that a mere showing of employment is insufficient,⁴⁰ but the presumption applies where the general authority of the employee includes the authority to drive,⁴¹ although ordinarily it may not be his duty to do

155 So. 209, 170 Miss. 310—Slaughter v. Holsomback, 147 So. 318, 166 Miss. 643.

Mo.—Berry v. Emery, Bird, Thayer Dry Goods Co., 211 S.W.2d 35—Collins v. Leahy, 146 S.W.2d 609, 347 Mo. 133—Byrnes v. Poplar Bluff Printing Co., 74 S.W.2d 20—Dennis v. Creek, App., 211 S.W.2d 59—Mauzy v. J. D. Carson Co., App., 189 S.W.2d 829—Madison v. Taxi Owners Ass'n, App., 148 S.W.2d 106—Humphrey v. Hogan, App., 104 S.W.2d 767—Nagle v. Albertier, App., 53 S.W.2d 289.

N.J.—Wallace v. A. R. Perine Co., 172 A. 499, 113 N.J.Law 20.

N.D.—Carlson v. Hoff, 230 N.W. 294, 59 N.D. 393—Clark v. Feldman, 224 N.W. 167, 57 N.D. 741.

Ohio.—Fach v. Canton Yellow Cab Co., 173 N.E. 245, 36 Ohio App. 247—Reichard v. Red Cab Co., 16 Ohio Supp. 3.

Okl.—Claxton v. Page, 124 P.2d 977, 190 Okl. 977—De Camp v. Comerford, 272 P. 475, 134 Okl. 145.

R.I.—Haining v. Turner Centre System, 149 A. 376, 50 R.I. 481—Callahan v. Wegbosset Pure Food Market, 133 A. 442, 47 R.I. 361.

Tex.—Broadus v. Long, 138 S.W.2d 1057, 135 Tex. 353—Eilar v. Theobald, Civ.App., 201 S.W.2d 237—Pyle v. Phillips, Civ.App., 164 S.W.2d 569—Carle Oil Co. v. Owens, Civ.App., 134 S.W.2d 411—Broadus v. Long, Civ.App., 125 S.W.2d 340, affirmed 138 S.W.2d 1057, 135 Tex. 353—Hudson v. Ernest Allen Motor Co., Civ.App., 115 S.W.2d 1167, error dismissed—Stedman Fruit Co. v. Smith, Civ.App., 28 S.W.2d 622, error dismissed—Robert Oil Corporation v. Garrett, Civ.App., 22 S.W.2d 508, affirmed, Com.App., 37 S.W.2d 135—Robertson v. Holden, Civ.App., 297 S.W. 327, reversed on other grounds Robertson & Mueller v. Holden, Com.App., 1 S.W.2d 570.

Va.—Crowell v. Duncan, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425

Wash.—Murray v. Kauffman Buick Co., 85 P.2d 1061, 197 Wash. 469—Templin v. Doan, 59 P.2d 1110, 187 Wash. 68.

42 C.J. p 1213 note 28.

Presumption arising from fact of ownership see supra § 511 (5) b.

Inference, not presumption

Cal.—Westberg v. Willde, 94 P.2d 590, 14 Cal.2d 360—Day v. General Petroleum Corporation, 89 P.2d 718, 82 Cal.App.2d 220.

Facts permit, but do not require, inference of operation within scope of employment.—Montgomery v. Hutchins, C.C.A.Cal., 118 F.2d 661.

Comparison with presumption arising from mere ownership

The presumption, arising from showing that driver of automobile causing injury was employee of owner, that he was acting within scope of his employment at time of accident is stronger than that arising from mere proof of ownership of automobile.—Chandler v. Owens, 179 So. 256, 235 Ala. 356—Toranto v. Hattaway, 122 So. 816, 219 Ala. 520.

Presumptive ownership

The presumption has been held to apply even though ownership is proved by a presumption.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520.

Dissolved corporation

Presumption that a truck owned by corporation and involved in a collision and operated by an agent was being operated in the line and scope of agent's authority is extended to the further presumption that truck owned by corporation, dissolved within five years prior to the collision, was being operated for some purpose not in violation of the statute which continues the existence of corporation for five years which was dissolved for any cause, except by judicial decree.—Southeastern Const. Co. v. Robbins, 27 So.2d 705, 248 Ala. 367.

38. Ark.—Brooks v. Bale Chevrolet Co., 127 S.W.2d 135, 198 Ark. 17—Rex Oil Corporation v. Crank, 38 S.W.2d 1093, 183 Ark. 819—Mullins v. Ritchie Grocer Co., 85 S.W.2d 1010, 183 Ark. 218

Cal.—Nash v. Wright, 186 P.2d 686, 82 Cal.App.2d 467.

Ga.—Perry v. Lott, 145 S.E. 479, 38 Ga.App. 729—Yellow Cab Co. v. Nelson, 134 S.E. 822, 35 Ga.App. 694.

Ind.—Frick v. Bickel, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Ky.—Rawlings v. Clay Motor Co., 154 S.W.2d 711, 287 Ky. 604—Keeling v. Nall, 87 S.W.2d 370, 261 Ky. 232—Ashland Coca Cola Bottling Co. v. Ellison, 66 S.W.2d 52, 252 Ky. 172.

La.—Brown v. Indemnity Ins. Co. of North America, App., 178 So. 768—Middleton v. Humble, App., 172 So. 542.

Md.—Baltimore Transit Co. v. State, to Use of Schriefer, 40 A.2d 678, 184 Md. 250.

Mich.—Ribaut v. Venable, 280 N.W. 129, 285 Mich. 111.

Minn.—Ewer v. Coppe, 271 N.W. 101, 199 Minn. 78—Lausche v. Denison-Harding Chevrolet Co., 243 N.W. 52, 185 Minn. 635.

Miss.—Merchants Co. v. Tracy, 166 So. 340, 175 Miss. 49—Bourgeois v. Mississippi School Supply Co., 155 So. 209, 170 Miss. 310—Southern Bell Telephone & Telegraph Co. v. Quick, 149 So. 107, 167 Miss. 438—Slaughter v. Holsomback, 147 So. 318, 166 Miss. 643.

Mo.—Collins v. Leahy, 146 S.W.2d 609, 347 Mo. 133—Yerger v. Smith, 89 S.W.2d 66, 338 Mo. 140—O'Hare v. Justin T. Flint Laundry & Dry Cleaning Co., App., 170 S.W.2d 95—Halsey v. Metz, App., 93 S.W.2d 41.

Neb.—Ebers v. Whitmore, 241 N.W. 126, 122 Neb. 653.

N.J.—Trojan v. Brennan, 187 A. 138, 117 N.J.Law 110.

R.I.—McIver v. Schwartz, 145 A. 101, 60 R.I. 68.

Tenn.—Auburn Nashville Co. v. Graham, 13 Tenn.App. 444

Tex.—Eilar v. Theobald, Civ.App., 201 S.W.2d 237—Younger Bros. v. Moore, Civ.App., 135 S.W.2d 780, error dismissed, judgment correct—Houston News Co. v. Shavers, Civ.App., 64 S.W.2d 384, error refused.

Wash.—Sullivan v. Associated Dealers, 103 P.2d 489, 4 Wash.2d 352—Feldtman v. Russak, 251 P. 572, 141 Wash. 287.

42 C.J. p 1213 note 29.

39. Ala.—Mobile Pure Milk Co. v. Coleman, 161 So. 826, 26 Ala.App. 402, certiorari denied 161 So. 829, 230 Ala. 432.

Mich.—Rabaut v. Venable, 280 N.W. 129, 285 Mich. 111.

40. Ohio.—White Oak Coal Co. v. Rivoux, 102 N.E. 302, 88 Ohio St. 18, 46 L.R.A., N.S., 1091, Ann.Cas. 1914C 1082.

42 C.J. p 1212 note 21.

41. Cal.—Grantham v. Ordway, 182 P. 73, 40 Cal.App. 758.

Reasonably necessary powers

Employer is presumed to intend employee to have powers reasonably necessary to carry on work for employer.—Ackerson v. Erwin M. Jennings Co., 140 A. 760, 107 Conn. 893, 56 A.L.R. 1127.

so.⁴² The presumption that the person employed to drive is acting within the scope of his employment or authority is indulged where the circumstances surrounding the use of the vehicle are those under which it is usually used,⁴³ and this condition as to usual use is stated as a qualification of the rule by some authorities.⁴⁴ In some jurisdictions this presumption is applicable only in the case of a business vehicle,⁴⁵ and does not apply as to a pleasure car.⁴⁶

Operation within the scope of employment and on defendant's business may also be presumed where defendant is the owner and is present in the vehicle at the time of the accident⁴⁷ or from any other facts and circumstances reasonably warranting such inference.⁴⁸ Where an injury is caused by an automobile bearing a dealer's license tag, the presump-

tion arises that it was being used for the purpose for which the license was issued.⁴⁹ A commercial vehicle owned or controlled by defendant traveling its usual route has been presumed to be engaged in defendant's business.⁵⁰ The mere fact that the vehicle which inflicted the injury was being operated by an employee of defendant does not raise a presumption that he was acting within the scope of his employment or on defendant's business where it is not shown that defendant owned or controlled the vehicle.⁵¹

These presumptions establish a prima facie case as to operation within the scope of employment and on defendant's business⁵² and are sufficient to support a verdict or finding to that effect,⁵³ but the presumptions may be rebutted.⁵⁴ While in a technical

42. Ky.—Wood v. Indianapolis Abattoir Co., 198 S.W. 732, 178 Ky. 188.

43. U.S.—Corpus Juris cited in Woody v. Utah Power & Light Co., C.C.A.Utah, 54 F.2d 220, 223.

Mo.—Steele v. Thomas, 101 S.W.2d 499, 231 Mo App. 855.

Mont.—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165.

Tenn.—D. S. Etheridge Co. v. Peterson, 90 S.W.2d 957, 19 Tenn. App. 530.

42 C.J. p 1213 note 32.

44. Tenn.—Maysay v. Hickman, 97 S.W.2d 662, 20 Tenn.App. 262.

42 C.J. p 1213 note 33.

45. Pa.—Double v. Myers, 157 A. 610, 305 Pa. 266—Preston v. Schroeder, Com.Pl., 27 Del.Co. 350.

42 C.J. p 1213 note 29 [b].

46. Pa.—Deater v. Penn Mach. Co., 166 A. 846, 311 Pa. 291—Martin v. Lipschitz, 149 A. 168, 299 Pa. 211.

42 C.J. p 1213 note 29 [b], p 1215 notes 60, 61.

47. Ala.—Grimes v. Fulmer, 180 So. 321, 235 Ala. 645, followed in 180 So. 323, 235 Ala. 664, and 183 So. 924, 28 Ala App 630.

Mo.—Brucker v. Gambaro, 9 S.W.2d 918.

48. Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520.

Operation on Sunday

Where accident occurred on Sunday while salesman was demonstrating car, salesman was presumably not at work for his employer, but was acting for himself.—O'Halleron v. Miller, 175 N.E. 94, 274 Mass. 508.

Delivery of goods to defendant

Fact that truck striking motorcycle was having milk delivered to defendant did not create presumption that truck owner or driver was defendant's employee.—Freo v. Roed, 278 P. 928, 99 Cal.App. 372.

49. D.C.—Simmons v. Brooks, 72 F. 2d 86, 63 App D.C. 293.

Ohio—Fredericks v. Birkett L. Williams Co., 40 N.E.2d 162, 48 Ohio App. 217.

Or.—Miller v. Service and Sales, 38 P.2d 995, 149 Or. 11, 96 A.L.R. 628.

Pa.—Coates v. Commercial Credit Co., 165 A. 377, 310 Pa. 330.

Wis.—Buchholz v. Kastner, 213 N.W. 329, 193 Wis. 224, followed in Buchholz v. Breitbach, 218 N.W. 444, 193 Wis. 231.

42 C.J. p 1212 note 25.

50. Ky.—Webb v. Dixie-Ohio Express Co., 165 S.W.2d 539, 291 Ky. 692.

51. N.J.—Malfatto v. Goldfiles, 43 A. 2d 681, 133 N.J. Law 199.

Okl.—Nellian Co. v. Miller, 52 P.2d 783, 175 Okl. 104.

Or.—Larkins v. Utah Copper Co., 127 P.2d 354, 169 Or. 499.

52. Ala.—McCormack Bros. Motor Car Co. v. Holland, 118 So. 387, 218 Ala. 200.

Cal.—Mathe v. White Auto Co., 291 P. 599, 108 Cal App. 286—Barton v. McDermott, 291 P. 591, 108 Cal. App. 372.

Ind.—Frick v. Bickel, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841.

La.—Antoine v. Louisiana Highway Commission, App., 188 So. 443—Hunt v. Chisholm, App., 183 So. 132.

Mich.—Rabaut v. Venable, 280 N.W. 129, 285 Mich. 111.

Okl.—Claxton v. Page, 124 P.2d 977, 190 Okl. 422.

Tex.—Broadus v. Long, 138 S.W.2d 1057, 135 Tex. 353—Carle Oil Co. v. Owens, Civ.App., 134 S.W.2d 411.

Wash.—Feldtman v. Russak, 251 P. 572, 141 Wash. 287.

53. Cal.—Shields v. Oxnard Harbor

Dist., 116 P.2d 121, 46 Cal.App.2d 477.

54. U.S.—R. J. Reynolds Tobacco Co. v. Newby, C.C.A.Idaho, 145 F.2d 768.

Ala.—Scott v. Birmingham Elec. Co., 33 So.2d 344, 250 Ala. 61—Chandler v. Owens, 179 So. 256, 235 Ala.

356—Blackmon v. Starling, 130 So. 782, 222 Ala. 87—McCormack Bros Motor Car Co. v. Holland, 118 So.

387, 218 Ala. 200.

Ariz.—Peters v. Pima Mercantile Co., 27 P.2d 143, 42 Ariz. 454.

Ark.—Brooks v. Bale Chevrolet Co., 127 S.W.2d 135, 198 Ark. 17—Castel v. Yantis-Harper Tire Co., 39

S.W.2d 306, 183 Ark. 912—Mullins v. Ritchie Grocer Co., 35 S.W.2d

1010, 183 Ark. 218.

Ga.—Royal Undertaking Co. v. Duffin, 196 S.E. 208, 57 Ga App. 760.

Idaho.—Manion v. Waybright, 86 P. 2d 181, 59 Idaho 643.

Ind.—Frick v. Bickel, 54 N.E.2d 436, 115 Ind. 114, motion denied 57 N.

E.2d 62, 222 Ind. 610.

Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841.

La.—Brown v. Indemnity Ins. Co. of North America, App., 178 So. 768.

Banks v. Commercial Standard Ins. Co., App., 177 So. 488—Kendricks v. Lewis, App., 175 So. 484.

Md.—Baltimore Transit Co. v. State, to Use of Schriefer, 40 A.2d 678.

184 Md. 250—McDowell, Pyle & Co. v. Magazine Service, 164 A. 148, 164

Md. 170—Wells v. Hecht Bros. & Co., 142 A. 258, 155 Md. 618—Nat-

tans v. Cotton, 138 A. 270, 160 Md. 466.

Minn.—Ewer v. Coppe, 271 N.W. 101, 199 Minn. 78.

Miss.—Merchants Co. v. Tracy, 166 So. 340, 175 Miss. 49.

Mo.—Byrnes v. Poplar Bluff Printing Co., 74 S.W.2d 20—O'Hare v.

Justin T. Flint Laundry & Dry Cleaning Co., App., 170 S.W.2d 95

sense the burden of proving that the vehicle was operated in the business of defendant or that the driver was acting within the scope of his employment does not shift from plaintiff,⁵⁵ where a presumption has arisen that at the time of the accident a vehicle was being operated in the business of defendant, or that the servant or agent was acting within the scope of his employment, defendant has the burden of overthrowing such presumption.⁵⁶ It has been held that these presumptions are presumptions of law⁵⁷ or administrative presumptions,⁵⁸ but it has also been held that they are presumptions of fact.⁵⁹ It has been held that these presumptions are not evidence⁶⁰ and go out of the case on proof of the facts,⁶¹ whether such evidence is presented by plaintiff or defendant,⁶² but, although the presumptions may go out of the case, the facts on

which they are based remain.⁶³ Where the presumptions are sufficiently rebutted, the burden of going forward with the evidence is again on plaintiff.⁶⁴

e. Authority of Operator to Invite Persons to Ride

The burden is on the plaintiff to prove the operator's authority to invite persons to ride in the vehicle, and such authority may not be presumed from the fact that the operator is the defendant's agent or is authorized to operate the vehicle.

Where it is sought to charge defendant with liability for the negligence or misconduct of the operator of a motor vehicle toward an occupant of the car, the burden is on plaintiff to establish the operator's authority to invite the occupant to ride.⁶⁵ Such authority may not be presumed from the fact

—Halsey v. Metz, App., 93 S.W.2d 41.
 Mont.—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165.
 N.J.—Wallace v. A. R. Perine Co., 172 A. 499, 118 N.J.Law 20.
 N.D.—Carlson v. Hoff, 230 N.W. 294, 69 N.D. 393.
 Okl.—Claxton v. Page, 124 P.2d 977, 190 Okl. 422.
 Tex.—Poe Motor Co. v. Martin, Civ. App., 201 S.W.2d 102—Houston News Co. v. Shavers, Civ.App., 64 S.W.2d 384.
 Wash.—Murray v. Kauffman Bulck Co., 85 P.2d 1061, 197 Wash. 469, 42 C.J. p 1214 note 36.
 55. Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 101 Colo. 34.
 N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
 42 C.J. p 1213 note 34.
 56. Cal.—Bushnell v. Yoshika Tashiro, 2 P.2d 550, 115 Cal.App. 563.
 Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 101 Colo. 34.
 Ga.—Atlanta Laundries v. Goldberg, 30 S.E.2d 349, 71 Ga.App. 130—Perry v. Lott, 145 S.E. 479, 38 Ga. App. 729.
 Ky.—Rawlings v. Clay Motor Co., 154 S.W.2d 711, 287 Ky. 604—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8—Harrison County Motor Car Co. v. Clarke, 24 S.W.2d 595, 232 Ky. 820.
 La.—Futch v. W. Horace Williams Co., App., 26 So.2d 776, rehearing refused—Culver v. Toye Bros. Yellow Cab Co., App., 26 So.2d 296—Murphy v. Henderson, App., 23 So. 2d 369—G'Sell v. Cassagne, App., 12 So.2d 51—Antoine v. Louisiana Highway Commission, App., 188 So. 443—Lovoi v. R. F. Mestayer

Lumber Co., App., 185 So. 473, rehearing denied 186 So. 101—Mancuso v. Hurwitz-Mintz Furniture Co., App., 181 So. 814, rehearing denied 183 So. 461—U-Drive-It-Car Co. v. Texas Pipe Line Co., App., 129 So. 565, 14 La.App. 524.
 Md.—Erdman v. Henry S. Horkheimer & Co., to Use of World Fire & Marine Ins. Co., 181 A. 221, 169 Md. 204.
 Miss.—Bourgeois v. Mississippi School Supply Co., 155 So. 209, 170 Miss. 310—Southern Bell Telephone & Telegraph Co. v. Quick, 149 So. 107, 167 Miss. 438.
 Tenn.—Auburn Nashville Co. v. Graham, 13 Tenn.App. 444.
 Tex.—Broadus v. Long, 138 S.W.2d 1057, 135 Tex. 353—Carle Oil Co. v. Owens, Civ.App., 134 S.W.2d 411—Hudson v. Ernest Allen Motor Co., Civ.App., 115 S.W.2d 1167, error dismissed—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 299 S.W. 665, reversed on other grounds, Com.App., 7 S.W.2d 521—Wright v. Maddox, Civ.App., 288 S.W. 560.
 Va.—Crowell v. Duncan, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425.
 Wash.—Templin v. Doan, 59 P.2d 1110, 187 Wash. 68.
 42 C.J. p 1213 note 35.
 57. Okl.—Claxton v. Page, 124 P.2d 977, 190 Okl. 422.
 58. Ala.—Scott v. Birmingham Elec. Co., 33 So.2d 344, 250 Ala. 61—Chandler v. Owens, 179 So. 256, 335 Ala. 356.
 59. Ark.—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912.
 42 C.J. p 1213 note 28 [b].
 60. U.S.—Standard Accident Ins. Co. v. Rivet, C.C.A.La., 89 F.2d 74.
 Ind.—Frick v. Bickel, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Mich.—Rabaut v. Venable, 280 N. W. 129, 285 Mich. 111.
 Neb.—Witthauer v. Employers Mut. Cas. Co., 32 N.W.2d 413, 149 Neb. 728.
 Wash.—Sullivan v. Associated Dealers, 103 P.2d 489, 4 Wash.2d 352.
 61. Mo.—Sowers v. Howard, 139 S. W.2d 897, 346 Mo. 10—Humphrey v. Hogan, App., 104 S.W.2d 767.
 R.I.—Smith v. Tompkins, 161 A. 221, 52 R.I. 434—Callahan v. Weybosset Pure Food Market, 133 A. 442, 47 R.I. 361.
 Utah.—Saltas v. Affleck, 102 P.2d 493, 99 Utah 65.
 Wash.—Feldtman v. Russak, 251 P. 572, 141 Wash. 287.
 42 C.J. p 1213 note 26.
 62. Md.—Butt v. Smith, 129 A. 352, 148 Md. 340.
 42 C.J. p 1214 note 42.
 63. Mo.—Sowers v. Howard, 139 S. W.2d 897, 346 Mo. 10—State ex rel. Waters v. Hostetter, 126 S.W. 2d 1164, 344 Mo. 443, mandate of Supreme Court conformed to, App., 130 S.W.2d 220.
 64. La.—Williamson v. De Soto Wholesale Grocery Co., App., 16 So.2d 739.
 Neb.—Witthauer v. Employers Mut. Cas. Co., 32 N.W.2d 413, 149 Neb. 728.
 Tex.—Alfano v. International Harvester Co. of America, Civ.App., 121 S.W.2d 466, error dismissed—Hudson v. Ernest Allen Motor Co., Civ.App., 115 S.W.2d 1167, error dismissed—Houston News Co. v. Shavers, Civ.App., 64 S.W.2d 384, error refused.
 42 C.J. p 1215 note 43.
 Employee shown to have embarked on personal errand is presumed to have continued on it.—Mancuso v. Hurwitz-Mintz Furniture Co., La. App., 183 So. 461.
 65. Mass.—Dineasoff v. Casey, 29 N. E.2d 25, 306 Mass. 555.

that the operator was defendant's servant or agent,⁶⁶ that defendant authorized the driver to operate the vehicle,⁶⁷ or that the vehicle was registered in defendant's name, even though a statute makes such registration prima facie evidence of defendant's liability or proof that the operator is his agent.⁶⁸

f. Acts of Members of Family

Where the plaintiff seeks to charge the defendant with liability for the negligence or misconduct of a member of his family in the operation of a motor vehicle, the burden is on the plaintiff to establish facts necessary to impose such liability.

Where plaintiff seeks to charge defendant with liability for the negligence or misconduct of a member of his family in the operation of a motor ve-

hicle, the burden is on plaintiff to establish facts necessary to impose such liability on defendant,⁶⁹ as, for example, that such member was operating the car as an agent or servant of defendant,⁷⁰ or as part of a joint enterprise with him,⁷¹ or that such operation was with the authority, permission, or consent of defendant,⁷² or under his control,⁷³ or on his business.⁷⁴

It has been held that proof that the vehicle was owned by defendant and was operated at the time of the accident by some member of defendant's family raises a presumption that such member was defendant's agent or servant⁷⁵ and was operating the vehicle for defendant,⁷⁶ with defendant's consent,⁷⁷ and within the scope of the authority conferred.⁷⁸ The presumption has been held to apply

Md.—East Coast Freight Lines v. Mayor and City Council of Baltimore, 58 A.2d 290.

N.Y.—Harter v. Richardson Corporation, 12 N.Y.S.2d 180, 257 App.Div. 907.

Va.—Morris v. Dame's Ex'r, 171 S.E. 662, 161 Va. 545.

Necessary assistance

(1) Where plaintiff sought to recover from employer for injuries sustained in automobile accident while riding with employee forbidden to carry passengers, on ground that plaintiff was rendering necessary assistance to employee who was acting within the course and scope of his employment, burden was on plaintiff to prove such facts.—Siemers v. Vindicator Printing Co., 32 N.E.2d 766, 66 Ohio App. 249.

(2) There is no presumption, where a driver is forbidden to pick up hitchhikers but does have authority to pick up an extra driver or helper at his own expense, that one on vehicle at time of accident is extra driver or helper.—East Coast Freight Lines v. Mayor and City Council of Baltimore, Md., 58 A.2d 290.

66. U.S.—Liggett & Myers Tobacco Co. v. De Paerq, C.C.A.Minn., 66 F.2d 678.

Driver's custom

Knowledge and consent of defendant as to driver's habit of carrying passengers could not be implied so as to support an inference that driver was acting within his ostensible authority in carrying invitee.—Russell v. Cutshall, 26 S.E.2d 866, 223 N.C. 353.

67. N.J.—Cowan v. Kaminow, 26 A. 3d 258, 128 N.J.Law 398.

68. Mass.—Little v. Levison, 55 N.E.2d 17, 316 Mass. 159—Dineasoff v. Casey, 29 N.E.2d 35, 306 Mass.

555—Foley v. John H. Bates, Inc., 4 N.E.2d 349, 295 Mass. 557—Welch v. O'Leary, 191 N.E. 377, 287 Mass. 69.

Registration as raising presumption of liability see supra § 511 (5) c.

69. N.Y.—Duffy v. Ascher, 181 N.Y. S. 934, 191 App.Div. 918, 42 C.J. p 1215 note 45.

70. Ala.—Cox v Roberts, 27 So 2d 617, 248 Ala 372

Ark.—Adams v. Browning, 115 S.W. 2d 868, 195 Ark. 1040.

Mass.—Dennis v. Glynn, 159 N.E. 516, 262 Mass 233.

Tex.—Zwernemann v. Smith, Civ. App., 175 S.W.2d 260—Jacobe v. Goings, Civ App, 3 S.W.2d 535, error dismissed.

42 C.J. p 1215 note 46.

71. Tex.—Jacobe v. Goings, supra.

72. Colo.—Kirkpatrick v. McCarty, 152 P.2d 994, 112 Colo. 588.

La.—Durel v. Flach, 1 La App 758. N.Y.—Atwater v Lober, 233 N.Y.S. 309, 133 Misc. 652.

42 C.J. p 1215 note 47.

Continued and customary use of automobile by nephew prior to accident gave rise to permissible inference that such use was with consent of owner.—Christiansen v. Schenkenberg, 236 N.W. 109, 204 Wis. 323.

73. N.Y.—Legenbauer v. Esposito, 176 N.Y.S. 42, 187 App.Div. 811.

74. Pa.—Warman v. Craig, 184 A. 757, 321 Pa. 481—Mitchell v. Ellmaker, 4 A.2d 592, 134 Pa.Super. 583.

75. N.Y.—Traub v. Blum, 31 N.Y.S. 2d 735, 263 App.Div. 92.

Wis.—Hansberry v. Dunn, 284 N.W. 556, 230 Wis. 626, 42 C.J. p 1215 note 49.

Defendant head of family

N.Y.—Traub v. Blum, 31 N.Y.S.2d 735, 263 App.Div. 92.

Family car

N.J.—Willett v. Heyer, 140 A. 411, 104 N.J.Law 391.

N.Y.—Traub v. Blum, 31 N.Y.S.2d 735, 263 App.Div. 92.

In Oklahoma

(1) Presumption has been held to exist that minor son driving family automobile was acting as servant and agent of owner, but presumption may be overcome by uncontroverted testimony.—Gallagher v Holcomb, 44 P.2d 44, 172 Okl. 1—Carter v. Martin, 250 P. 906, 120 Okl. 179—42 C.J. p 1215 note 49 [f] (1).

(2) Proof that father owned automobile driven by child at time of accident, with his consent, however, has also been held insufficient to raise presumption that child was acting as father's agent and within scope of authority.—Jamar v. Brightwell, 19 P.2d 366, 162 Okl. 124—42 C.J. p 1215 note 49 [f] (2).

76. Cal.—Phillips v. Cuccio, 42 P. 2d 1050, 5 Cal.App.2d 520.

Wash.—Schnebley v. Bryson, 290 P. 849, 158 Wash. 250, 42 C.J. p 1215 note 50

Family car

Ga.—Ficklen v. Helchelhelm, 176 S.E. 540, 49 Ga.App. 777.

77. Cal.—Phillips v. Cuccio, 42 P. 2d 1050, 5 Cal.App.2d 520.

Iowa.—Lange v. Bedell, 212 N.W. 354, 203 Iowa 1194, 42 C.J. p 1215 note 51.

Use presumed rightful

The use of a vehicle by the son of the owner is presumed to have been rightful until the contrary is shown.—Floetz v. Holt, 144 N.W. 745, 124 Minn. 169.

78. Minn.—Johnson v. Evans, 170 N. W. 220, 141 Minn. 356, 3 A.L.R. 891.

42 C.J. p 1215 note 52.

only in the case of a family purpose car,⁷⁹ but under some statutes proof that the vehicle is owned by a specified member of the driver's family raises a presumption that the car is a family car and was being operated with the owner's general authority.⁸⁰ On the other hand, it has also been held that no presumption arises that the member of the family who was operating the car was the agent or servant of defendant,⁸¹ or that such member was acting for defendant,⁸² even though such operation was with defendant's consent.⁸³

Where defendant rides with his wife or minor child, who is driving, according to some cases, he is presumed to exercise some control over the driver.⁸⁴ If at the time he was using the vehicle the husband of defendant was conveying home household supplies, a presumption arises that he, as head of the family, was acting for himself.⁸⁵ The operation of a community car by the wife warrants a presumption that her use was for the community.⁸⁶

A presumption that a member of the family was operating the vehicle as the agent of defendant,⁸⁷ with the consent of defendant,⁸⁸ or within the scope of the authority conferred⁸⁹ is rebuttable. While such presumptions or inferences do not change the ordinary rules as to burden of proof,⁹⁰ defendant

has the burden of meeting the presumption that the operator was his agent,⁹¹ that the operator was acting with defendant's consent,⁹² or that such operator was acting for defendant.⁹³ A presumption that the husband, as head of the family, was acting for himself, is rebuttable.⁹⁴

Indorsement of license. It may be presumed that a parent indorsed a son's application for a license as required by statute, where he is the proper person to have done so.⁹⁵

§ 512. — Negligence of Person Injured

- a. In general
- b. Contributory negligence as affirmative defense
- c. Freedom from contributory negligence as part of plaintiff's case

a. In General

Various presumptions, such as that contributory negligence is not ordinarily to be presumed from the mere happening of the accident, and that the injured person is presumed to have seen what he should have seen, have been indulged on the issue of contributory negligence in actions for injuries inflicted by motor vehicles.

In actions for injuries inflicted by motor vehicles, appropriate presumptions have been indulged on the issue of contributory negligence.⁹⁶ As a

79. Ga.—Durden v. Maddox, 37 S.E. 2d 219, 73 Ga.App. 491.

Family car status not presumed

Ga.—Durden v. Maddox, supra

80. Conn.—O'Dea v. Amodeo, 170 A. 486, 118 Conn. 58.

Retroactive operation

Statute applies to trials of actions accruing or brought before act became effective—Baker v. Paradiso, 169 A. 272, 117 Conn. 539.

81. Del.—Cercchio v. Mullins, 138 A. 277, 3 W.V. Harr. 245.

Mo.—Bolman v. Bullene, 200 S.W. 1068.

42 C.J. p 1215 notes 54, 56.

Adult son

Relationship of father and son, where son was an adult and not a member of father's household, did not so establish son's agency for father as to require father to introduce testimony of express refusal to enter into such relationship in order to prevent father being liable for son's negligence while driving father's automobile.—Lehl v. Hull, 54 P.2d 290, 152 Or. 470.

82. Kan.—Watkins v. Clark, 176 P. 131, 103 Kan. 629.

42 C.J. p 1215 notes 55, 61.

83. Mo.—Mulanix v. Reeves, 112 S.W.2d 100, 233 Mo.App. 143, certiorari quashed State ex rel. and to Use of Reeves v. Shain, 122 S.W.2d 885, 348 Mo. 550.

84. Ark.—Minor v. Mapes, 144 S.W. 219, 102 Ark. 351, 39 L.R.A., N.S., 214.

Ohio—General Exchange Ins. Co. v. Elizer, App., 31 N.E.2d 147.

Pa.—Spegele v. Blumfield, 182 A. 149, 120 Pa. Super. 231.

Husband driving wife's car with wife present is presumably in control of car, and, in absence of evidence to contrary, solely responsible for its operation.—Rodgers v. Saxton, 158 A. 166, 305 Pa. 479, 80 A.L.R. 280.

85. Cal.—Ransford v. Ainsworth, 237 P. 747, 196 Cal. 279.

42 C.J. p 1215 note 57.

86. La.—Vinson v. Picolo, App., 15 So.2d 778.

87. N.J.—Venghis v. Nathanson, 127 A. 175, 101 N.J.Law 110.

42 C.J. p 1215 note 63.

88. Iowa.—Lange v. Redell, 212 N.W. 354, 203 Iowa 1194—Rowland v. Spalti, 194 N.W. 90, 196 Iowa 208.

Mich.—Cebulak v. Lewis, 32 N.W.2d 21, 320 Mich. 710.

89. N.J.—Venghis v. Nathanson, 127 A. 175, 101 N.J.Law 110.

90. Wis.—Hansberry v. Dunn, 284 N.W. 556, 230 Wis. 626.

42 C.J. p 1215 note 66.

91. N.C.—Wilson v. Folk, 95 S.E. 849, 175 N.C. 490.

Wis.—Hansberry v. Dunn, 284 N.W. 556, 230 Wis. 626.

92. Mich.—Cebulak v. Lewis, 32 N.W.2d 21, 320 Mich. 710.

42 C.J. p 1215 note 68.

93. Ga.—Ficklen v. Hefelheim, 176 S.E. 540, 49 Ga.App. 777.

La.—Paderas v. Stauffer, 120 So. 886, 10 La.App. 50.

Wash.—Schnebley v. Bryson, 290 P. 849, 158 Wash. 250.

42 C.J. p 1216 note 69.

94. Cal.—Ransford v. Ainsworth, 237 P. 747, 196 Cal. 279.

95. Cal.—Whitworth v. Jones, 209 P. 60, 58 Cal.App. 492.

96. Pa.—Stewart v. McGarvey, 34 A.2d 901, 348 Pa. 221.

Knowledge of traffic rules

Where traffic ordinance of city permitted left turn at intersection, a motorist approaching intersection must be presumed to know that a left turn might be made by truck driver approaching intersection.—Owen v. O. K. Storage & Transfer Co., La.App., 10 So.2d 649.

Visibility

With respect to contributory negligence of pedestrian who was struck by automobile while crossing busy street on a rainy evening, pedestrian would be presumed to have known that, in the rain, condition of visibility was such that pedestrian might not readily be seen by one

general rule, the mere happening of the accident does not make out a case of contributory negligence on the part of the injured person.⁹⁷ The injured person will be presumed to have seen what, in the exercise of due care, he should have seen.⁹⁸

Violation of regulation or rule of road. Where defendant claims that the injured person violated a statute, regulation, or rule of the road, in those jurisdictions where, as discussed infra subdivision b of this section, contributory negligence is regarded as an affirmative defense, he has the burden of proving the applicability of the regulation or rule,⁹⁹

that the injured person violated it,¹ and that, although as to this there is also authority to the contrary,² such violation was the proximate cause of the injury;³ but it has also been held that the burden is on plaintiff to show that he complied with such statutes and rules.⁴

The violation of such a statute, regulation, or rule of the road has been held to raise a presumption of contributory negligence⁵ casting on plaintiff the burden of coming forward with evidence to rebut the presumption.⁶ According to some cases there is no presumption of negligence from the fail-

operating an automobile.—*L'Heureux v. Desmarais*, 197 A. 327, 89 N.H. 237.

Knowledge

Knowledge may be inferred from circumstances.

N.Y.—*Doherty v. Stewart*, 8 N.Y.S. 2d 423, 256 App.Div. 1004.

Pedestrian lane as position of danger

It cannot be assumed that definitely marked pedestrian lane controlled by traffic signal is per se a position of danger.—*Long v. Barbieri*, 7 P.2d 1082, 120 Cal.App. 207.

97. Mass.—*Lucier v. Norcross*, 37 N.E.2d 493, 310 Mass. 213, 137 A.L.R. 749.

Mich.—*Hinchey v. J. P. Burroughs & Son*, 215 N.W. 346, 240 Mich. 273.—*Petersen v. Lundin*, 211 N.W. 86, 236 Mich. 590.

Mont.—*Autio v. Miller*, 11 P.2d 1039, 92 Mont. 150.

42 C.J. p 1218 note 15.

Happening of accident as raising presumption of negligence generally see supra § 511 (3).

98. Colo.—*Aaron v. Wesebaum*, 162 P.2d 232, 114 Colo. 61.

La.—*Firemen's Ins. Co. v. Boggs*, App., 23 So.2d 630—*Hilderbrand v. Peterson*, App., 7 So.2d 378—*Murphy v. City of Alexandria*, App., 3 So.2d 103—*Butler v. Mississippi Foundation Co.*, App., 175 So. 887.

Mich.—*Ruby v. Buxton*, 8 N.W.2d 913, 305 Mich. 64—*Ackerman v. Advance Petroleum Transport*, 7 N.W.2d 235, 304 Mich. 96—*Savas v. Beals*, 7 N.W.2d 231, 304 Mich. 84—*Heckler v. Laing*, 1 N.W.2d 484, 300 Mich. 139—*Gallagher v. Walter*, 299 N.W. 811, 299 Mich. 69.

Tenn.—*Harbor v. Wallace*, App., 311 S.W.2d 172.

Vt.—*Eagan v. Douglas*, 175 A. 222, 107 Vt. 10, followed in 175 A. 225, 107 Vt. 18.

Wash.—*Davis v. Pinkerton*, 92 P.2d 708, 199 Wash. 579.

Wis.—*Pettera v. Collins*, 233 N.W. 645, 203 Wis. 81.

Fact that several talking with deceased saw oncoming car did not raise presumption that deceased saw

or should have seen car.—*Kern v. Knight*, 127 So. 133, 13 La.App. 194.

99. Cal.—*Tieman v. Red Top Cab Co.*, 3 P.2d 381, 117 Cal.App. 40

1. Cal.—*Armstrong v. Sengo*, 61 P.2d 1188, 17 Cal.App.2d 300—*Brunetto v. Spediacci*, 12 P.2d 151, 124 Cal.App. 252.

Mass.—*Neu v. McCarthy*, 33 N.E.2d 570, 309 Mass. 17, 133 A.L.R. 1291. N.M.—*Clay v. Texas-Arizona Motor Freight*, 159 P.2d 317, 49 N.M. 157. Tex.—*Harrison-Wright Co. v. Budd*, Civ.App., 67 S.W.2d 670, error dismissed.

Compliance presumed

Ind.—*Northwestern Transit v. Wagner*, 61 N.E.2d 591, 223 Ind. 447.

Violation not presumed

Cal.—*Corcoran v. Pacific Auto Stages*, 2 P.2d 225, 116 Cal.App. 35.

Signal for left turn

It has been held, however, that a motorist suing owner and driver of following truck which collided with motorist making left turn had statutory duty to extend his hand and arm and to keep them extended during the last one hundred feet traveled by his automobile before turning left, and had burden of proving that he complied with such law.—*Britt Trucking Co. v. Ringgold*, 192 S.W.2d 532, 209 Ark. 769.

2. U.S.—*H. W. Bass Drilling Co. v. Ray*, C.C.A.N.M., 101 F.2d 316. 42 C.J. p 1217 note 95.

Overcrowding front seat

Where a guest who consented to ride as one of four persons in the front seat of a coupé was guilty of contributory negligence as a matter of law, it was held that it was not necessary to show that overcrowding was the proximate cause of the injury.—*McIntyre v. Pope*, 191 A. 607, 326 Pa. 172.

3. Cal.—*Skaggs v. Wiley*, 292 P. 132, 108 Cal.App. 429.

Idaho.—*Kelly v. Troy Laundry Co.*, 267 P. 222, 46 Idaho 214.

N.H.—*Judd v. Perkins*, 138 A. 812, 83 N.H. 39.

N.M.—*Clay v. Texas-Arizona Motor Freight*, 159 P.2d 317, 49 N.M. 157.

4. Mich.—*Guye v. Domas*, 279 N.W. 902, 284 Mich. 654.

5. U.S.—*H. W. Bass Drilling Co. v. Ray*, C.C.A.N.M., 101 F.2d 316.

Me.—*Atherton v. Crandlemire*, 33 A. 2d 803, 140 Me. 28—*Collins v. Kelley*, 179 A. 65, 133 Me. 410—*Rawson v. Stiman*, 176 A. 870, 133 Me. 250.

42 C.J. p 1217 note 92.

Jay walking

(1) The fact that pedestrian was in street attempting to cross busy street near middle of block and not at crosswalk when struck by backing automobile has been held to be prima facie evidence of negligence to be considered with other facts and circumstances in evidence.—*Hart v. City of Chicago*, 42 N.E.2d 887, 315 Ill.App. 214.

(2) Although a pedestrian may have the right of way at street crossings only, the fact that he is injured between street crossings, however, has also been held not of itself to constitute prima facie evidence of contributory negligence.—*Crunkilton v. Hook*, 42 A.2d 517, 186 Md. 1.

Right of way at intersection

Fact that motor vehicle at street intersection approached from right of vehicle injured was held not of itself sufficient to raise presumption of contributory negligence.—*Taxicab Co. v. Ottenritter*, 135 A. 587, 161 Md. 626.

Hiding in speeding car

Riding with person who is driving automobile at unlawful speed is not of itself prima facie evidence of contributory negligence of guest.—*Waltrovich v. Black*, 254 Ill.App. 49.

6. Cal.—*Satterlee v. Orange Glenn School Dist. of San Diego County*, 177 P.2d 279, 29 Cal.2d 581.

Colo.—*Aaron v. Wesebaum*, 162 P. 2d 232, 114 Colo. 61.

Iowa.—*Anderson v. Holsteen*, 26 N.W.2d 855, 238 Iowa 630.

Md.—*Askin v. Long*, 6 A.2d 246, 176 Md. 545.

Pa.—*Oakley v. Allegheny County*, 193 A. 316, 138 Pa.Super. 8.

ure of a pedestrian to look before crossing a street;⁷ nor is there a conclusive presumption of negligence if a pedestrian did not continuously look or listen while crossing.⁸ Where both plaintiff and defendant were equally guilty of a violation of law, the presumption, if any, is that the accident was the result of the combined fault.⁹

Infants. The rule as to the burden of proof on the issue of contributory negligence, as discussed infra subdivisions b and c of this section, is generally the same where the injured person is an infant as where he is an adult, and in those jurisdictions in which contributory negligence is regarded as an affirmative defense, the burden is on defendant to prove that the injured infant was contributorily negligent,¹⁰ and the injured infant is presumed to have used due care;¹¹ but, in other jurisdictions in an action by an infant, plaintiff must prove his freedom from contributory negligence.¹² In accordance with the rules discussed in the C.J.S. title Negligence § 218, also 45 C.J. p 1186 note 69 et seq, a child under a specified age, usually fourteen, is presumed to be incapable of negligence¹³ and de-

fendant has the burden of going forward with evidence to rebut the presumption,¹⁴ but an infant above such age is presumed to possess sufficient understanding and capacity to be chargeable with contributory negligence.¹⁵ The presence of a child on a street has been held not, of itself, to raise a presumption of negligence against the parents,¹⁶ but, where there is no evidence on which the court can determine whether the infant was sui juris, it has been held that plaintiff does not make out a case where there is no proof of the exercise of any care either by the parents or by the infant.¹⁷

Last clear chance doctrine. Where plaintiff seeks recovery despite his negligence under the last clear chance or humanitarian rule, he has the burden of proving the facts entitling him to recover under such rule.¹⁸

b. Contributory Negligence as Affirmative Defense

In most jurisdictions the burden is on the defendant to establish contributory negligence, and the injured person is presumed to have acted with due care.

Vt.—Steele v. Fuller, 158 A. 666, 104 Vt. 303.

Wash.—Geri v. Bender, 168 P.2d 144, 25 Wash.2d 50.

42 C.J. p 1217 notes 93, 94.

7. Ark.—Minor v. Mapes, 144 S.W. 219, 102 Ark. 351, 39 L.R.A.N.S., 214.

8. U.S.—Taxi Serv. Co. v. Phillips, Mass., 187 F. 734, 109 C.C.A. 482.

Ga.—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga.App. 383.

9. Wash.—Twedt v. Seattle Taxicab Co., 210 P. 20, 121 Wash. 562.

10. Mass.—Birch v. Strout, 20 N.E. 2d 429, 308 Mass. 28—Stacy v. Dorchester Awning Co., 195 N.E. 350, 290 Mass. 356—Jean v. Nester, 158 N.E. 893, 261 Mass. 442—Di Rienzo v. Goldfarb, 153 N.E. 784, 257 Mass. 272.

N.J.—Eastmond v. Wachstein, 135 A. 67, 4 N.J.Misc. 966.

Pa.—Bowman v. Stouman, 141 A. 41, 292 Pa. 293.

11. Utah.—Barker v. Savas, 172 P. 672, 52 Utah 262.

Care reasonably to be expected of infant of that age

Mass.—De Furia v. Mooney, 182 N.E. 828, 280 Mass. 447.

Tenn.—Cheek v. Fox, 7 Tenn.Civ.A. 160.

Defendant has the burden of rebutting such presumption.—Barker v. Savas, 172 P. 672, 52 Utah 262.

Where child is incapable of care, presumption is inapplicable.—Shear v. Rogoff, 193 N.E. 63, 288 Mass. 357

—Minsk v. Pitaro, 187 N.E. 224, 284 Mass. 109.

12. N.Y.—Smith v. Listman, 160 N.Y.S. 129, 96 Misc. 285, affirmed 161 N.Y.S. 1146, 175 App.Div. 960.

13. Iowa.—Hampton v. Burrell, 17 N.W.2d 110, 236 Iowa 79.

Va.—American Tobacco Co. v. Harrison, 27 S.E.2d 181, 181 Va. 800. 42 C.J. p 1217 note 1.

Maturity beyond years

In action for injuries sustained by thirteen-year-old girl when her bicycle collided with defendant's automobile, presumption was that girl had not reached a maturity and discretion beyond her years which would lead her to exercise care of a child who has.—Reaves v. Hoffman, 180 So. 600, 28 Ala.App. 188.

14. Iowa.—Brekke v. Rothermal, 196 N.W. 84, 196 Iowa 1288.

N.Y.—Shulman v. Roseth Corporation, 238 N.Y.S. 575, 227 App.Div. 577.

Presumption

Va.—P. L. Farmer, Inc., v. Cimino, 41 S.E.2d 1, 185 Va. 965.

15. Ga.—Jordan v. Wiggins, 18 S.E. 2d 512, 66 Ga.App. 534—Greenson v. Davis, 9 S.E.2d 690, 62 Ga.App. 667.

16. Pa.—Dattola v. Burt, 135 A. 736, 288 Pa. 134.

17. N.Y.—Popick v. B. B. Neal Hardware Co., 164 N.Y.S. 413. 42 C.J. p 1217 note 5.

18. U.S.—McElwee v. Curtiss-Wright Corp., D.C.Mo., 70 F.Supp. 97.

Cal.—Henslee v. Fox, 51 P.2d 1176, 10 Cal App 2d 202.

Iowa.—Nagel v. Bretthauer, 298 N.W. 852, 230 Iowa 707—Rutherford v. Gilchrist, 255 N.W. 516, 218 Iowa 1169—Hogan v. Nesbit, 246 N.W. 270, 216 Iowa 75.

La.—Gatlin v. Spangler, 6 La.App. 332.

Mo.—Bates v. Brown Shoe Co., 116 S.W.2d 31, 242 Mo. 411—Doty v. Fisher, App., 200 S.W.2d 534—Bauer v. Wood, 154 S.W.2d 356, 236 Mo.App. 266—Swain v. Anders, 140 S.W.2d 730, 235 Mo.App. 125—Schmitt v. American Press, App., 42 S.W.2d 969.

N.H.—Legere v. New England Furniture Co., 1 A 2d 924, 89 N.H. 423—La Coss v. National Casket Co., 190 A 286, 88 N.H. 403.

N.J.—Nolan v. Davis, 112 A. 188, 95 N.J.Law 227.

Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed—Duff v. Rooser & Pendleton, Civ.App., 96 S.W.2d 682—Gersdorf-Sloan Ambulance Service v. Kenty, Civ.App., 46 S.W.2d 469.

Va.—Jenkins v. Johnson, 42 S.E.2d 319, 186 Va. 191—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193—Saunders v. Temple, 153 S.E. 691, 154 Va. 714.

Doctrine of last clear chance generally see supra §§ 493 (1)—493 (5).

In the majority of jurisdictions, sometimes by reason of statute, the burden is on defendant to establish the contributory negligence of the injured person or plaintiff as a defense to an action for injuries inflicted by a motor vehicle,¹⁹ unless it is

19. U.S.—Warlich v. Miller, C.C.A. Pa., 141 F.2d 168—Walkup v. Bardsley, C.C.A.Minn., 111 F.2d 789—Gray v. Dieckmann, C.C.A.N.H., 109 F.2d 382—White v. State of Maryland, C.C.A.Md., to Use of Anderson, 106 F.2d 392—Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528—H. W. Bass Drilling Co. v. Ray, C.C.A.N.M., 101 F.2d 316—Ralston Purina Co. v. Bannau, C.C.A.Ill., 78 F.2d 430—Levine v. Shell Eastern Petroleum Products, C.C.A.N.Y., 73 F.2d 292, certiorari denied 55 S.Ct. 545, 294 U.S. 719, 79 L.Ed. 1261—Gaillard v. Boynton, C.C.A.N.H., 70 F.2d 552—Roberts v. White Star Bus Line, C.C.A.Puerto Rico, 38 F.2d 1, certiorari denied White Star Bus Line v. Roberts, 50 S.Ct. 463, 281 U.S. 764, 74 L.Ed. 1172—Warlich v. Miller, D.C.Pa., 73 F.Supp. 593.

Ala.—Faulkner v. Gilchrist, 143 So 808, 225 Ala. 391.

Ark.—Snow v. Riggs, 290 S.W. 591, 172 Ark. 835

Cal.—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal.2d 480—Ferrula v. Santa Fe Bus Lines, 189 P.2d 294, 83 Cal.App.2d 416—Foerster v. Direito, 170 P.2d 986, 75 Cal.App.2d 323—Samuelson v. Siefert, 144 P.2d 879, 62 Cal. App.2d 320—Satariano v. Sleight, 129 P.2d 35, 54 Cal.App.2d 278—Scaletta v. Silva, 126 P.2d 898, 52 Cal.App.2d 730—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 36 Cal.App.2d 700—Page v. Cuddey Packing Co., 87 P.2d 913, 31 Cal.App.2d 282—Kennedy v. Berg, 62 P.2d 1374, 18 Cal.App.2d 63—Adams v. Warren, 53 P.2d 780, 11 Cal.App.2d 344—Grant v. Ryon, 53 P.2d 170, 11 Cal.App.2d 101—Randall v. Evans, 41 P.2d 561, 4 Cal.App.2d 575—Killough v. Lee, 40 P.2d 897, 4 Cal.App.2d 309—Smyth v. Harris & Devine, 38 P.2d 862, 3 Cal.App.2d 194—Schroeder v. McCargar, 30 P.2d 543, 137 Cal.App. 320—Fischer v. Davis Standard Bread Co., 24 P.2d 538, 134 Cal.App. 1—Cuadrado v. Tarver, 15 P.2d 898, 127 Cal.App. 434—Huber v. Scott, 10 P.2d 150, 122 Cal.App. 334—Corcoran v. Pacific Auto Stages, 2 P.2d 225, 116 Cal.App. 35—Munoz v. Kennedy, 293 P. 173, 109 Cal.App. 463—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671—Gaster v. Hinkley, 258 P. 988, 85 Cal. App. 55—Kinnear v. Martinelli, 268 P. 686, 84 Cal.App. 721—Byrne v. Western Pipe & Steel Co. of

California, 253 P. 776, 81 Cal.App. 270.

Conn.—Kupchunos v. Connecticut Co., 26 A.2d 775, 129 Conn. 160—Stabile v. D. & N. Transp Co., 26 A.2d 12, 129 Conn. 11—Rosen v. Goldstein, 24 A.2d 840, 128 Conn. 605—Gardiner v. Hayes, 22 A.2d 627, 128 Conn. 332—Marini v. Wynn, 20 A.2d 400, 128 Conn. 53—Zint v. Wheeler, 169 A. 52, 117 Conn 484.

D.C.—White v. Corbett, Mun.App., 51 A.2d 676.

Fla.—Brandt v. Dodd, 8 So 2d 471, 150 Fla. 635—Greifer v. Coburn, 190 So. 902, 139 Fla. 293—Bugna v. Taylor, 154 So. 831, 114 Fla. 723.

Hawaii—Anduha v. Maui County, Territory of Hawaii, 30 Hawaii 44.

Idaho—Willi v. Schaefer Hitchcock Co., 35 P.2d 167, 63 Idaho 367.

Kan.—Long v. Shafer, 188 P.2d 646, 164 Kan. 211.

La.—Burns v. Evans Cooperage Co., 23 So 2d 165, 208 La 406—Barro v. Tilbury, App., 24 So 2d 838—Hero v. Toye Bros. Yellow Cab Co., App., 19 So.2d 887—Harrelson v. McCook, App., 198 So. 532—Donovan v. Standard Oil Co. of Louisiana, App., 197 So. 320—Allen v. Metropolitan Casualty Ins. Co. of New York, App., 190 So. 163—Boykin v. Plausche, App., 168 So. 741, rehearing denied and amended 169 So. 131—Rhodes v. Jordan, App., 157 So. 811—Kimbrow v. Holaday, App., 154 So. 369—Leiser v. Thomas, App., 150 So. 81, rehearing refused 150 So. 670—McNabb v. Dugas, App., 142 So. 174—Driefus v. Levy, App., 140 So. 259—Neuman v. Eddy, 130 So. 247, 15 La.App. 45—Kern v. Knight, 127 So. 133, 13 La.App. 194—Sears v. Interurban Transp. Co., 125 So 748, 14 La.App. 343—Brunson v. Barnwell, 124 So. 564, 11 La.App. 663—Fleischman Co. v. Seeling, 119 So. 287, 9 La.App. 391.

Md.—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md 528

Mass.—Boutillier v. Wesinger, 78 N. E.2d 195, 322 Mass 495—Clouatre v. Lees, 75 N.E.2d 242, 321 Mass. 679—Pelland v. D'Allesandro, 73 N.E.2d 590, 321 Mass. 387—Edwards v. Warwick, 59 N.E.2d 194, 317 Mass. 573—Russell v. Berger, 50 N.E.2d 642, 314 Mass 500—Shoobridge v. Callahan, 39 N.E.2d 429, 310 Mass. 632—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457—Shockett v. Akeson, 37 N.E.2d 1015, 310 Mass. 289—Lucier v. Norcross, 37 N.E.2d 498, 310 Mass. 213, 137 A.L.R. 749—Tagerman v. Railway Express Agency, 83 N.E.2d

569, 308 Mass. 517—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394—Runnells v. Cassidy, 29 N.E.2d 732, 307 Mass. 128—Wade v. Buchanan, 28 N.E.2d 421, 306 Mass. 318—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216—Friedman v. Berthiaume, 21 N.E.2d 261, 303 Mass. 159—Pond v. Somes, 20 N.E.2d 449, 302 Mass. 587—Campbell v. Cairns, 20 N.E.2d 427, 302 Mass. 584—Schneider v. De Christopher, 16 N.E.2d 857, 301 Mass. 241—Leveille v. Wright, 15 N.E.2d 247, 300 Mass. 382—Texeira v. Sundquist, 192 N.E. 611, 288 Mass. 93—Horne-man v. Brown, 190 N.E. 735, 286 Mass. 65—Pease v. Lennsen, 190 N.E. 18, 286 Mass. 207—Brown v. Henderson, 189 N.E. 41, 285 Mass. 192—Roselli v. Risseman, 182 N.E. 567, 280 Mass. 338—McGuigan v. Atkinson, 179 N.E. 627, 278 Mass. 264—Palombella v. Foss, 178 N. E. 232, 277 Mass. 143—Martin v. Morin, 172 N.E. 895, 273 Mass. 13—Jones v. Plotkin, 172 N.E. 891, 273 Mass. 24—O'Connell v. McKeown, 170 N.E. 402, 270 Mass. 432—Hicks v. H. B. Church Truck Service Co., 156 N.E. 254, 259 Mass. 272.

Minn.—Jasinuk v. Lombard, 250 N. W. 568, 189 Minn 594—Franklin v. Minneapolis, St P & S. S. M. R. Co., 229 N.W. 797, 179 Minn. 480—Carlson v. F. A. Martocchio Co., 229 N.W. 341, 179 Minn 332.

Mo.—Dennis v. Wood, 211 S.W.2d 470—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518—Everhardt v. Garner, App., 100 S.W.2d 71—Allen v. Wilkerson, App., 87 S.W.2d 1056—Robertson v. Scoggins, App., 73 S.W.2d 430.

Neb.—Fanders v. Davison, 7 N.W. 2d 652, 142 Neb. 745.

Nev.—Burlington Transp. Co. v. Wilson, 114 P.2d 1094, 61 Nev. 22.

N.H.—Labreque v. Childs, 55 A.2d 473, 94 N.H. 451—Holt v. Grimmer, 51 A.2d 149, 94 N.H. 255—Adams v. Severance, 41 A.2d 233, 93 N.H. 289—Manor v. Gagnon, 32 A.2d 688, 92 N.H. 435—Brooks v. Nason, 24 A.2d 493, 92 N.H. 66—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69—Eastman v. Herrick, 173 A. 807, 87 N.H. 58—Gendron v. Glidden, 148 A. 461, 84 N.H. 162.

N.J.—Van Sciver v. Abbott's Alderney Dairies, 143 A. 153, 6 N.J. Misc. 949—Zanzonico v. Yellow Cab Co., 133 A. 84, 4 N.J.Misc. 458.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

N.D.—Fagerlund v. Jensen, 34 N.W. 2d 816, 74 N.D. 766.

Ohio.—Collins v. Zimmerman, App.,

shown by plaintiff's own pleadings²⁰ or evidence,²¹ or may fairly be inferred from all the circumstances;²² and the burden of proving freedom from such

negligence is not on plaintiff.²³ The burden is also on defendant to establish that the contributory negligence was a proximate cause of the injury,²⁴ but

57 N.E.2d 245—Thompson v. Kerr, App., 51 N.E.2d 742—May v. Szwed, 39 N.E.2d 630, 68 Ohio App. 459—Closs v. Ball, 22 N.E.2d 141, 60 Ohio App. 513—Smith v. Cushman Motor Delivery Co., 6 N.E.2d 594, 54 Ohio App. 99—McCombs v. Landes, 171 N.E. 862, 35 Ohio App. 164.

Or.—Lynch v. Clark, 194 P.2d 416—Waller v. Hill, 190 P.2d 147—Watt v. Associated Oil Co., 260 P. 1012, 123 Or. 50.

Pa.—Mellott v. Tuckey, 38 A.2d 40, 350 Pa. 74—Kerr v. Hofer, 32 A. 2d 402, 347 Pa. 356—Reiter v. Andrews, 38 A.2d 508, 155 Pa. Super. 449—Lonick v. Davis, Com.Pl., 37 Luz. Leg. Reg. 192.

S.D.—Alendal v. Madsen, 275 N.W. 352, 65 S.D. 602—Stalb v. Tarbell, 273 N.W. 652, 65 S.D. 304.

Tenn.—Central Produce Co. v. General Cab Co. of Nashville, 129 S. W.2d 1117, 23 Tenn. App. 209.

Tex.—Horton v. Benson, Com. App., 277 S.W. 1050—Pope v. Jackson, Civ. App., 211 S.W.2d 958—Clowe & Cowan v. Morgan, Civ. App., 153 S.W.2d 863, error refused—Martinez v. Pena, Civ. App., 139 S.W.2d 337, error dismissed, judgment correct—Owl Taxi Service v. Saludis, Civ. App., 122 S.W.2d 225, error dismissed—J. S. Abercrombie Co. v. Delcomyn, Civ. App., 116 S.W.2d 1105, reversed on other grounds 135 S.W.2d 978, 134 Tex. 490—Dr. Pepper Bottling Co. v. Rainboldt, Civ. App., 66 S.W.2d 496, reversed on other grounds Schroeder v. Rainboldt, 97 S.W.2d 679, 128 Tex. 269—Trice v. Bridgewater, Civ. App., 51 S.W.2d 797, modified on other grounds 81 S.W.2d 63, 125 Tex. 75, 100 A.L.R. 1014—Texas Landscape Co. v. Longoria, Civ. App., 30 S.W.2d 423, error dismissed—D. & H. Truck Line v. Lavallee, Civ. App., 7 S.W.2d 661, error refused.

Va.—Masters v. Cardl, 42 S.E.2d 203, 186 Va. 261—Cooke v. Griggs, 33 S.E.2d 764, 183 Va. 851—Beard v. Bryant, 26 S.E.2d 61, 181 Va. 739—McQuown v. Phaup, 2 S.E.2d 330, 172 Va. 419—Chick Transit Corporation v. Edenton, 196 S.E. 648, 170 Va. 361—Twyman v. Adkins, 191 S.E. 616, 168 Va. 456—West v. L. Bromm Baking Co., 186 S.E. 291, 166 Va. 530—Angell v. McDaniel, 181 S.E. 370, 165 Va. 1—Waynick v. Walrond, 154 S.E. 523, 155 Va. 400, 70 A.L.R. 1014—Shifflett's Adm'r v. Virginia Ry. & Power Co., 116 S.E. 500, 136 Va. 72.

Wash.—Boyle v. Lewis, 193 P.2d 332—McCoy v. Courtney, 173 P.2d 596,

25 Wash.2d 956—McLean v. Continental Baking Co., 114 P.2d 159, 9 Wash.2d 176—Davidson v. Huebby, 100 P.2d 1035, 3 Wash.2d 460—Perren v. Press, 81 P.2d 867, 196 Wash. 14—O'Neill v. Wilshire, 57 P.2d 1254, 186 Wash. 276—Gaskill v. Amadon, 38 P.2d 229, 179 Wash. 375.

W.Va.—Lee v. Standard Oil Co., 144 S.E. 292, 105 W.Va. 579.

Wis.—Fjelstad v. Walsh, 13 N.W.2d 51, 244 Wis. 295—Eherdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341—Potter v. Potter, 272 N.W. 34, 224 Wis. 251—Rodaks v. Herr, 251 N.W. 453, 213 Wis. 310—Feller v. Leonard, 239 N.W. 498, 207 Wis. 43—Stewart v. Olson, 206 N.W. 909, 188 Wis. 487, 44 A.L.R. 1292. 42 C.J. p 1216 notes 74, 80, p 1218 note 10.

In actions for personal injuries

U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 211, applying Indiana law. Ind.—Snider v. Truex, 51 N.E.2d 477, 222 Ind. 18—Cushman Motor Delivery Co. v. McCabe, 36 N.E.2d 769, 219 Ind. 156—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624—Wickerham v. Woehlecke, 195 N.E. 291, 100 Ind. App. 270. 42 C.J. p 1217 note 81.

Prior to the statute plaintiff had the burden of proving freedom from contributory negligence—Peluso v. De Pasquale, 182 A. 405, 120 Conn. 701—Sigel v. Gordon, 167 A. 719, 117 Conn. 271—Kotler v. Lalley, 151 A. 433, 112 Conn. 86—42 C.J. p 1216 note 80 [a].

Fact that plaintiff failed to utilize the last clear chance is an affirmative defense which defendant has the burden of proving.—Sanders v. Taber, 155 P. 1194, 79 Or. 522.

Assumption of risk

Burden was on defendant to prove the affirmative defense of assumption of risk.—Kakluskas v. Somers Motor Lines, 54 A.2d 692, 134 Conn. 35.

Wanton and willful misconduct

Burden of proving contributory wanton and willful misconduct on part of plaintiffs was on defendant.—Ridgway v. Yenny, 57 S.E.2d 581, 228 Ind. 18.

Exonerating defense

Averment of answer in death action that deceased negligently ran into defendant's truck was not allegation of contributory negligence,

but affirmatively advanced exonerating defense, as to which burden of proof was on defendant.—Guillory v. Horecky, La. App., 162 So. 89, affirmed 165 So. 159, annulled 168 So. 481, 185 La. 21.

20. Tex.—Horton v. Benson, Civ. App., 266 S.W. 213, affirmed, Com. App., 277 S.W. 1050. 42 C.J. p 1216 note 75.

Where plaintiff pleads freedom from contributory negligence, the burden is on him to prove it.—Squires v. Wolcott, 52 A.2d 305, 122 Conn. 449.

21. Cal.—Schurman v. Los Angeles Creamery Co., 254 P. 681, 81 Cal. App. 758.

Fla.—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635—Greiper v. Coburn, 190 So. 902, 139 Fla. 293.

Md.—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.

Mo.—Everhardt v. Garner, App., 100 S.W.2d 71.

Tex.—Gillette Motor Transport v. Fine, Civ. App., 131 S.W.2d 817, error dismissed, judgment correct.

W.Va.—Browning v. Tolley, 163 S.E. 10, 111 W.Va. 648.

42 C.J. p 1216 note 76.

Plaintiff must make out case free from contributory negligence

Pa.—Sargeant v. Ayers, 57 A.2d 881, 358 Pa. 393—Christ v. Hill Metal & Roofing Co., 171 A. 607, 314 Pa. 375—Brown v. Bahl, 170 A. 346, 111 Pa. Super. 598—Vunak v. Walters, 43 A.2d 536, 157 Pa. Super. 660—Andrukut v. Packard Lackawanna Auto Co., 27 A.2d 453, 149 Pa. Super. 550—Morris v. White, Com.Pl., 33 Luz. L. Reg. 437.

22. Va.—Core v. Wilhelm, 98 S.E. 27, 124 Va. 150.

23. Fla.—Schwartz v. Priest, 14 So. 2d 845, 153 Fla. 458.

Mo.—Bloch v. Kinder, 93 S.W.2d 932, 338 Mo. 1099.

Pa.—Bowman v. Stouman, 141 A. 41, 292 Pa. 293—Knies v. Kraftsow, 40 A.2d 122, 156 Pa. Super. 296—Gaskill v. Melella, 18 A.2d 455, 144 Pa. Super. 78—McCandless v. Krut, 14 A.2d 181, 140 Pa. Super. 183—Shaw v. Malone, Com.Pl., 55 York Leg. Rec. 150.

Wash.—Jurisch v. Puget Transp. Co., 258 P. 39, 144 Wash. 409.

W.Va.—Lee v. Standard Oil Co., 144 S.E. 292, 105 W.Va. 579—Dye v. Rathbone, 135 S.E. 274, 102 W.Va. 386.

42 C.J. p 1216 note 78.

24. Conn.—La Femina v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers

there is also some authority apparently to the contrary.²⁵

In these jurisdictions, although there is some authority to the contrary,²⁶ it is generally held, some-

times by reason of statute, that the injured person is presumed to have used due care²⁷ where he was a pedestrian,²⁸ where he is dead,²⁹ or is incapacitated from testifying, as by loss of memory.³⁰ This presumption is rebuttable.³¹ It has been held that

of America, 45 A.2d 153, 132 Conn. 420.

La.—Pender v. Bonfanti, App., 13 So. 2d 105.

Minn.—White v. Cochrane, 249 N.W. 328, 189 Minn. 300.

N.J.—Kelly v. Johnson, 137 A. 849, 5 N.J.Misc. 665.

Ohio.—Collins v. Zimmerman, App., 57 N.E.2d 245.

Or.—Landis v. Wick, 57 P.2d 759, 154 Or. 199, rehearing denied 59 P.2d 403, 154 Or. 199.

Pa.—Rankin v. Carroll, 27 A.2d 487, 149 Pa.Super. 158.

Tex.—Thurman v. Chandler, Civ.App., 52 S.W.2d 315, reversed on other grounds 81 S.W.2d 489, 125 Tex. 34.

Va.—Kinsey v. Brugh, 161 S.E. 41, 157 Va. 407.

42 C.J. p 1217 note 86.

25. Wash.—Twedt v. Seattle Taxicab Co., 210 P. 20, 121 Wash. 562.

42 C.J. p 1217 note 85.

26. Ind.—Atkinson v. Davis, 13 N.E. 2d 355, 105 Ind.App. 375.

27. Cal.—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742—Hauskins v. Buck Co., 298 P. 137, 113 Cal.App. 176.

La.—Hamilton v. Lee, App., 144 So. 249—Willis v. Standard Oil Co. of Louisiana, 135 So. 777, 17 La.App. 217—Brunson v. Barnwell, 124 So. 564, 11 La.App. 663.

Mass.—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457.

Ohio.—General Exchange Ins. Co. v. Elizer, App., 31 N.E.2d 147.

Or.—Waller v. Hill, 190 P.2d 147.

Tex.—Aranda v. Texas & N. O. R. Co., Civ.App., 140 S.W.2d 236, error dismissed, judgment correct.

Wash.—Hirst v. Standard Oil Co. of California, 261 P. 405, 145 Wash. 597.

Wis.—Seligman v. Orth, 236 N.W. 115, 205 Wis. 199.

28. U.S.—White v. State of Maryland, to Use of Anderson, C.C.A. Md., 106 F.2d 392—Aboud v. Turner, C.C.A.Pa., 72 F.2d 880—Railway Express Agency v. Little, C.C. A.Pa., 50 F.2d 59, 75 A.L.R. 963.

Cal.—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70—Eastman v. Rabbeth, 17 P.2d 1009, 128 Cal.App. 534—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671.

Ky.—Downing v. Baucom's Adm'x, 287 S.W. 362, 216 Ky. 108.

Mass.—Regan v. Rosenmark, 172 N.E. 90, 272 Mass. 256.

Md.—Sheriff Motor Co. v. State, for Use of Parker, 179 A. 508, 169 Md. 79.

Mo.—Arnold v. Manzella, App., 186 S. W.2d 882.

Neb.—Cotten v. Stolley, 248 N.W. 384, 124 Neb. 855.

Wash.—Durham v. Crist, 38 P.2d 1054, 180 Wash. 213.

42 C.J. p 1217 note 89.

Affirmative evidence of pedestrian's due care not required

Mass.—Regan v. Rosenmark, 172 N.E. 90, 272 Mass. 256.

42 C.J. p 1217 note 88.

29. U.S.—Dubrock v. Interstate Motor Freight System, C.C.A.Pa., 143 F.2d 304, certiorari denied 65 S.Ct. 119, 323 U.S. 765, 89 L.Ed. 613—Kriesak v. Crowe, C.C.A.Pa., 131 F. 2d 1023—Bell v. Shoff, C.C.A.Pa., 89 F.2d 339—Aboud v. Turner, C.C. A.Pa., 72 F.2d 880.

Cal.—Anthony v. Hobbie, 155 P.2d 826, 25 Cal.2d 814—Wright v. Sniffin, 181 P.2d 675, 80 Cal.App.2d 358

—Paulsen v. Spencer, 177 P.2d 597, 78 Cal.App.2d 268—Barry v. Maddalena, 146 P.2d 974, 63 Cal.App.2d 302—Wiswell v. Shinnars, 117 P.2d 677, 47 Cal.App.2d 156—Duehren v. Stewart, 102 P.2d 784, 39 Cal.App. 2d 201—Cannon v. Kemper, 73 P. 2d 268, 23 Cal.App.2d 239—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App.2d 738—Scalf v. Elcher, 53 P.2d 368, 11 Cal.App.2d 44—Lubenko v. San Joaquin Baking Co., 31 P.2d 1053, 138 Cal.App. 127—Coughman v. Harman, 26 P.2d 851, 135 Cal.App. 49—McLellan v. Cocola, 24 P.2d 200, 133 Cal.App. 9—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal. App. 40—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Del.—Odgers v. Clark, 19 A.2d 724, 2 Terry 232.

Ky.—Downing v. Baucom's Adm'x, 287 S.W. 362, 216 Ky. 108.

Md.—Sheriff Motor Co. v. State, for Use of Parker, 179 A. 508, 169 Md. 79.

Mass.—Lucier v. Norcross, 37 N.E.2d 498, 310 Mass. 213, 137 A.L.R. 749

—Holland v. Pitocchelli, 13 N.E.2d 390, 299 Mass. 554—Capano v. Melchionno, 7 N.E.2d 593, 297 Mass. 1—Wanamaker v. Shaw, 2 N.E.2d 209, 294 Mass. 416.

Mo.—Ruby v. Clark, 208 S.W.2d 251

—State ex rel. Alton R. Co. v. Shain, 143 S.W.2d 233, 346 Mo. 681

—Althage v. People's Motorbus Co. of St. Louis, 8 S.W.2d 924, 320 Mo. 598—Sanford v. Gideon-Anderson Co., App., 31 S.W.2d 580.

N.J.—McConachy v. Skalerew, 171 A. 817, 113 N.J.Law 17—Joyce v. Englehart, 153 A. 96, 9 N.J.Misc. 168

—Klein v. Offen, 136 A. 419, 5 N.J. Misc. 357.

Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657—Bohnenkamp v. Hibberd, 41 N.E.2d 259, 70 Ohio App. 278—Meier v. Joseph R. Peebles Sons Co., 11 N. E.2d 707, 57 Ohio App. 80.

Or.—Greenslitt v. Three Bros. Baking Co., 133 P.2d 597, 170 Or. 345.

Pa.—Silfies v. American Stores Co., 53 A.2d 610, 357 Pa. 176—Atkinson v. Coskey, 47 A.2d 156, 354 Pa. 297

—De Santis v. Maddalon, 35 A.2d 72, 348 Pa. 296—Kelly v. Veneziale, 35 A.2d 67, 342 Pa. 325—Borits v. Tarapchak, 12 A.2d 910, 338 Pa. 289—Wenhold v. O'Dea, 12 A.2d 115, 338 Pa. 33—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Johnson v. Hetrick, 150 A. 477, 300 Pa. 225—Giles v. Bennett, 148 A. 90, 298 Pa. 158—Watson v. Lit Bros., 135 A. 631, 288 Pa. 175.

Tenn.—Walters v. Staton, 111 S.W.2d 381, 21 Tenn.App. 401.

Tex.—Boaz v. White's Auto Stores, 172 S.W.2d 481, 141 Tex. 366—Jennison v. Darnielle, Civ.App., 146 S.W.2d 788, error dismissed—Merritt v. Phoenix Refining Co., Civ.App., 103 S.W.2d 415.

Va.—Stratton v. Bergman, 192 S.E. 813, 169 Va. 249.

Wis.—Stoll v. Andro, 26 N.W.2d 162, 250 Wis. 26—Straub v. Schadeberg, 10 N.W.2d 146, 243 Wis. 257, 147 A.L.R. 476—Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215

—Potter v. Potter, 272 N.W. 34, 224 Wis. 251.

42 C.J. p 1218 note 6.

No presumption that he was negligent

Neb.—Nichols v. Havlat, 1 N.W.2d 829, 140 Neb. 723, opinion set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.

42 C.J. p 1218 note 8.

Failure to hear warning

Wis.—Straub v. Schadeberg, 10 N.W. 2d 146, 243 Wis. 257, 147 A.L.R. 476.

Violation of ordinance

Wash.—Knutson v. McMahan, 58 P. 2d 1033, 186 Wash. 518.

30. Cal.—Douglas v. Hoff, 185 P.2d 607, 82 Cal.App.2d 82—McNear v. Pacific Greyhound Lines, 146 P.2d 34, 63 Cal.App.2d 11—Fiets v. Hubbard, 138 P.2d 315, 59 Cal.App.2d 124—Satariano v. Sleight, 129 P.2d 35, 54 Cal.App.2d 278—Hoppe v. Bradshaw, 108 P.2d 947, 42 Cal.App. 2d 334.

31. Cal.—Barry v. Maddalena, 146 P.

—Klein v. Offen, 136 A. 419, 5 N.J. Misc. 357.

Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657—Bohnenkamp v. Hibberd, 41 N.E.2d 259, 70 Ohio App. 278—Meier v. Joseph R. Peebles Sons Co., 11 N. E.2d 707, 57 Ohio App. 80.

Or.—Greenslitt v. Three Bros. Baking Co., 133 P.2d 597, 170 Or. 345.

Pa.—Silfies v. American Stores Co., 53 A.2d 610, 357 Pa. 176—Atkinson v. Coskey, 47 A.2d 156, 354 Pa. 297

—De Santis v. Maddalon, 35 A.2d 72, 348 Pa. 296—Kelly v. Veneziale, 35 A.2d 67, 342 Pa. 325—Borits v. Tarapchak, 12 A.2d 910, 338 Pa. 289—Wenhold v. O'Dea, 12 A.2d 115, 338 Pa. 33—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Johnson v. Hetrick, 150 A. 477, 300 Pa. 225—Giles v. Bennett, 148 A. 90, 298 Pa. 158—Watson v. Lit Bros., 135 A. 631, 288 Pa. 175.

Tenn.—Walters v. Staton, 111 S.W.2d 381, 21 Tenn.App. 401.

Tex.—Boaz v. White's Auto Stores, 172 S.W.2d 481, 141 Tex. 366—Jennison v. Darnielle, Civ.App., 146 S.W.2d 788, error dismissed—Merritt v. Phoenix Refining Co., Civ.App., 103 S.W.2d 415.

Va.—Stratton v. Bergman, 192 S.E. 813, 169 Va. 249.

Wis.—Stoll v. Andro, 26 N.W.2d 162, 250 Wis. 26—Straub v. Schadeberg, 10 N.W.2d 146, 243 Wis. 257, 147 A.L.R. 476—Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215

—Potter v. Potter, 272 N.W. 34, 224 Wis. 251.

42 C.J. p 1218 note 6.

No presumption that he was negligent

Neb.—Nichols v. Havlat, 1 N.W.2d 829, 140 Neb. 723, opinion set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.

42 C.J. p 1218 note 8.

Failure to hear warning

Wis.—Straub v. Schadeberg, 10 N.W. 2d 146, 243 Wis. 257, 147 A.L.R. 476.

Violation of ordinance

Wash.—Knutson v. McMahan, 58 P. 2d 1033, 186 Wash. 518.

30. Cal.—Douglas v. Hoff, 185 P.2d 607, 82 Cal.App.2d 82—McNear v. Pacific Greyhound Lines, 146 P.2d 34, 63 Cal.App.2d 11—Fiets v. Hubbard, 138 P.2d 315, 59 Cal.App.2d 124—Satariano v. Sleight, 129 P.2d 35, 54 Cal.App.2d 278—Hoppe v. Bradshaw, 108 P.2d 947, 42 Cal.App. 2d 334.

31. Cal.—Barry v. Maddalena, 146 P.

this presumption is not evidence,³² and is said to go out of the case on proof of the facts,³³ but it has also been held that the presumption is evidence,³⁴ and is sufficient to support a verdict or finding in accord with it,³⁵ and that, where the injured person is dead or is unable to testify as from loss of memory, the presumption remains in the case, even though there is proof as to the facts and circumstances of the accident by other witnesses.³⁶

c. Freedom from Contributory Negligence as Part of Plaintiff's Case

In a minority of jurisdictions, the plaintiff has the burden of proof on the issue of contributory negligence, but it is generally held, where the accident results in death, that the defendant has the burden of proof or that the deceased is presumed to have acted with due care.

In a minority of jurisdictions the burden is on plaintiff to show that he or the injured person was free from contributory negligence, or was in the exercise of due care,³⁷ and that such negligence, if it existed, was not a proximate cause of the in-

2d 974, 63 Cal.App.2d 302—Fietz v. Hubbard, 138 P.2d 315, 59 Cal.App. 2d 124—Hoppe v. Bradshaw, 108 P.2d 947, 42 Cal.App.2d 334—Cannon v. Kemper, 73 P.2d 268, 23 Cal. App.2d 239.

Del.—Odgers v. Clark, 19 A.2d 724, 2 Terry 232.

Pa.—Grutski v. Kline, 43 A.2d 142, 352 Pa. 401—Perry v. Ryback, 153 A. 770, 302 Pa. 559.

42 C.J. p 1218 note 9.

32. Tenn.—Walters v. Staton, 111 S. W.2d 381, 21 Tenn.App. 401.

Wash.—Sweazey v. Valley Transport, 107 P.2d 567, 6 Wash.2d 324, opinion adhered to 111 P.2d 1010, 6 Wash.2d 324, 140 A.L.R. 20.

33. Mass.—Hughes v. Torregrossa, 180 N.E. 304, 278 Mass. 530.

Mo.—State ex rel. Alton R. Co. v. Shain, 143 S.W.2d 233, 346 Mo. 681.

Tenn.—Walters v. Staton, 111 S.W.2d 381, 21 Tenn.App. 401.

Wash.—Sweazey v. Valley Transport, 107 P.2d 567, 6 Wash.2d 324, opinion adhered to 111 P.2d 1010, 6 Wash.2d 324, 140 A.L.R. 20—Chadwick v. Ek, 95 P.2d 398, 1 Wash.2d 117.

34. Cal.—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540—Douglas v. Hoff, 185 P.2d 607, 82 Cal. App.2d 82—Paulsen v. Spencer, 177 P.2d 597, 78 Cal.App.2d 268—Schulman v. Los Angeles Ry. Corporation, 111 P.2d 924, 44 Cal.App.2d 122—Duehren v. Stewart, 102 P.2d 784, 39 Cal.App.2d 201—Cannon v. Kemper, 73 P.2d 268, 23 Cal.App.2d 239.

35. Cal.—Paulsen v. Spencer, 177 P. 2d 597, 78 Cal.App.2d 268—Schulman v. Los Angeles Ry. Corporation, 111 P.2d 924, 44 Cal.App.2d 122.

36. Cal.—Douglas v. Hoff, 185 P.2d 607, 82 Cal.App.2d 82—Wright v. Sniffin, 181 P.2d 675, 80 Cal.App.2d 358—Wiswell v. Shinnars, 117 P.2d 677, 47 Cal.App.2d 156.

37. U.S.—Peterson v. Sheridan, C.C. A.Iowa, 115 F.2d 121—Schopp v. Muller, Dairies, D.C.N.Y., 25 F. Supp. 50.

Ill.—Swanson v. Progress Elec. Co., 67 N.E.2d 426, 329 Ill.App. 188—Anderson v. Krancic, 66 N.E.2d 316, 328 Ill.App. 364—Schneiderman v. Interstate Transit Lines, 60 N.E.2d 908, 326 Ill.App. 1, reversed on other grounds 69 N.E.2d 293, 394 Ill. 569—Jirkovsky v. Elfman, 55 N.E. 2d 288, 323 Ill.App. 282—Walker v. Illinois Commercial Tel. Co., 43 N.E.2d 412, 315 Ill.App. 553—Sole v. Richardson, 42 N.E.2d 884, 315 Ill. App. 213—Painter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill.App. 557—Smith v. Courtney, 281 Ill.App. 530—Seiffe v. Seiffe, 267 Ill.App. 23—Crawford v. Cahalan, 259 Ill.App. 14—Hanusik v. Hanlon, 258 Ill.App. 114.

Iowa.—Anderson v. Holsteen, 26 N.W.2d 855, 238 Iowa 630—Richards v. Begenstos, 21 N.W.2d 23, 237 Iowa 398—DeRuhr v. Taylor, 5 N.W.2d 597, 232 Iowa 792—Murchland v. Jones, 279 N.W. 382, 225 Iowa 149—Williams v. Kearney, 278 N.W. 180, 224 Iowa 1006—Kortright v. Strater, 269 N.W. 745, 222 Iowa 603—Schellendorf v. Cherry, 264 N.W. 54, 220 Iowa 1101—Slawsky v. Wheaton, 263 N.W. 313, 220 Iowa 981—Stingley v. Crawford, 258 N.W. 316, 219 Iowa 509—Harvey v. Knowles Storage & Moving Co., 244 N.W. 660, 215 Iowa 35—Waldman v. Sanders Motor Co., 243 N.W. 555, 214 Iowa 1139—In re Hill's Estate, 208 N.W. 334, 202 Iowa 1038, modified on other grounds 210 N.W. 241, 202 Iowa 1038.

Me.—Banks v. Adams, 195 A. 206, 135 Me. 270—Rouse v. Scott, 164 A. 872, 132 Me. 22—Keller v. Banks, 156 A. 817, 130 Me. 397—Esponette v. Wiseman, 155 A. 650, 130 Me. 297—Tomlinson v. Clement Bros., 164 A. 355, 130 Me. 189—Callahan v. Amos D. Bridges Sons, 147 A. 423, 128 Me. 346—Cole v. Wilson, 143 A. 178, 127 Me. 316.

Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—Moore v. Rety, 22 N.W.2d 68, 314 Mich. 52—Malone v. Vining, 21 N.W.2d 144, 313 Mich. 315—Mitchell v. Stroh Brewery Co., 15 N.W.2d 144, 309 Mich. 231—Koehler v. Thom, 281 N.W. 336, 285 Mich. 593—Guye v. Domas, 279 N.W. 902, 284 Mich. 654—Block v.

Peterson, 278 N.W. 774, 284 Mich. 88—Faustman v. Hewitt, 284 N.W. 863, 274 Mich. 458—Jacoby v. Schafsnitz, 259 N.W. 322, 270 Mich. 515—Leary v. Fisher, 227 N.W. 767, 248 Mich. 574—Latsch v. Hilliard, 227 N.W. 547, 248 Mich. 416.

N.Y.—Meyers v. Meyers, 38 N.Y.S.2d 461, 265 App.Div. 939—Nilson v. Oppenheimer, 23 N.Y.S.2d 621, 260 App.Div. 670, affirmed 35 N.E.2d 498, 285 N.Y. 824.

R.I.—Lane v. Beede, 171 A. 371, 54 R.I. 168—Pacheco v. Weybosset Pure Food Market, 171 A. 235—Sarcione v. Outlet Co., 163 A. 741, 53 R.I. 76.

Vt.—Labrecque v. American News Co., 58 A.2d 873—Long v. Leonard, 32 A.2d 679, 113 Vt. 258—McKirryher v. Yager, 24 A.2d 331, 112 Vt. 336—Colburn v. Frost, 9 A.2d 104, 111 Vt. 17—Farrell v. Greene, 2 A.2d 194, 110 Vt. 87—Taylor v. Mayhew, 195 A. 249, 109 Vt. 251—Parro v. Meagher, 184 A. 885, 108 Vt. 182—Palmer v. Marcelle, 175 A. 31, 106 Vt. 500—Steele v. Fuller, 158 A. 666, 104 Vt. 303.

42 C.J. p 1217 note 82.

Claim for injury to property

Ind.—Chicago, I. & L. Ry. Co. v. Downey, 5 N.E.2d 656, 103 Ind. App. 672—Clemens v. Lowe, 196 N.E. 363, 100 Ind.App. 645—Capitol Lumber Co. v. Van Hook, 168 N.E. 471, 90 Ind.App. 135—Heldt v. Thompson, 157 N.E. 60, 86 Ind. App. 270.

42 C.J. p 1217 note 83.

Form of action

In pedestrian's trespass for injuries sustained when struck by automobile, pedestrian had same burden of proving that he was free from contributory negligence and that motorist was negligent as he would have if action were on the case.—Salerno v. Sheern, 3 A.2d 657, 62 R.I. 121.

Burden on plaintiff to show no assumption of risk

Vt.—Bouchard v. Sicard, 35 A.2d 439, 113 Vt. 429.

Willful misconduct

Ill.—Pillow v. Long, 20 N.E.2d 364, 299 Ill.App. 542.

jury.³⁸ Where this view is adhered to, it usually applies, although the injury resulted in death,³⁹ but in some of these jurisdictions, by reason of statute, the burden is on defendant to prove the contributory negligence of deceased.⁴⁰ However, even in jurisdictions where the burden is on plaintiff to establish a lack of contributory negligence on the part of deceased, it is generally presumed, sometimes by reason of statute, that deceased was exercising due care,⁴¹ at least where there were no eyewitnesses,⁴² and a like presumption has been applied where the injured person lost his memory as a result of the accident.⁴³ The presumption that deceased exercised due care is rebuttable,⁴⁴ and has been held to go out of the case on proof of the facts.⁴⁵

§ 513. — Failure to Register Vehicle or to Obtain License

As a general rule the burden of proving that a motor vehicle was not properly registered rests on the party making the assertion.

Where plaintiff seeks to recover for injuries inflicted by a motor vehicle on the ground that such vehicle was not properly licensed or registered, the burden is on plaintiff to prove lack of proper registration,⁴⁶ and, where defendant seeks to avoid liability on the ground that plaintiff's vehicle or the vehicle in which he was riding was not properly registered, the burden of proving such fact rests on defendant,⁴⁷ but it has also been held that the owner must prove registration of the vehicle and that

38. Iowa.—Williams v. Kearney, 278 N.W. 180, 224 Iowa 1006—Bobst v. Hoxie Truck Line, 267 N.W. 673, 221 Iowa 823.

Me.—Banks v. Adams, 195 A. 206, 135 Me. 270—Rouse v. Scott, 164 A. 872, 132 Me. 22—Tomlinson v. Clement Bros., 154 A. 355, 130 Me. 189.

Vt.—Steele v. Fuller, 158 A. 666, 104 Vt. 303.

39. Ill.—Ripke v. Bernstein, 76 N.E.2d 352, 332 Ill.App. 658—Loeb v. Corrie, 65 N.E.2d 28, 327 Ill.App. 660—La Prise v. Carr-Leasing, Inc., 62 N.E.2d 26, 326 Ill.App. 514—Szalacha v. Landsman, 60 N.E.2d 643, 325 Ill.App. 691—Johnson v. Mueller, 41 N.E.2d 125, 314 Ill.App. 204—Johnson v. McKnight, 39 N.E.2d 700, 313 Ill.App. 260—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1—Hand v. Greathouse, 13 N.E.2d 1010, 294 Ill.App. 383.

Iowa.—Wimer v. M. & M. Star Bottling Co., 264 N.W. 262, 221 Iowa 120—Fortman v. McBride, 263 N.W. 345, 220 Iowa 1003—Shannahan v. Borden Produce Co., 263 N.W. 39, 220 Iowa 702—Taylor v. Wistley, 254 N.W. 50, 218 Iowa 785—Lindloff v. Duecker, 251 N.W. 698, 217 Iowa 326—Spaulding v. Miller, 249 N.W. 642, 216 Iowa 948.

Mich.—Slingerland v. Snell, 278 N.W. 672, 283 Mich. 524—Fabiano v. Carey, 271 N.W. 754, 279 Mich. 269.

Vt.—Huestis v. Lapham's Estate, 32 A.2d 115, 113 Vt. 191.

42 C.J. p 1218 note 12.

40. Me.—Stone v. Roger, 154 A. 73, 130 Me. 512—Sturtevant v. Ouellette, 140 A. 368, 126 Me. 558.

N.Y.—Lee v. City Brewing Corporation, 18 N.E.2d 628, 279 N.Y. 380—Lowy v. Green, 70 N.Y.S.2d 547, 272 App.Div. 238—Nilson v. Oppenheimer, 23 N.Y.S.2d 621, 260 App.Div. 670, affirmed 35 N.E.2d 498, 285 N.Y. 824—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App.Div. 1007—Zamenick v. Easman & Co., 290 N.Y.S. 766, 248 App.

Div. 920—Mosher v. Lamora, 283 N.Y.S. 379, 245 App.Div. 903—Smith v. State, 278 N.Y.S. 330, 154 Misc. 849, 851, affirmed 277 N.Y.S. 936, 243 App.Div. 682, affirmed 198 N.E. 400, 268 N.Y. 551—Roistacher v. Hurley, 34 N.Y.S.2d 752, affirmed 41 N.Y.S.2d 220, 266 App.Div. 688, motion denied 41 N.Y.S.2d 955, 266 App.Div. 787.

42 C.J. p 1218 note 11.

Violation of statute or rule of road not presumed

N.Y.—Tyne v. B. F. Goodrich Co., 297 N.Y.S. 425, 252 App.Div. 24.

41. U.S.—Peterson v. Sheridan, C.C. A Iowa, 115 F.2d 121.

Iowa.—Graby v. Danner, 18 N.W.2d 595, 236 Iowa 700—Lindloff v. Duecker, 251 N.W. 698, 217 Iowa 326—Hittle v. Jones, 250 N.W. 689, 217 Iowa 598.

Me.—Field v. Webber, 169 A. 732, 132 Me. 236—Stone v. Roger, 154 A. 73, 130 Me. 512—Sturtevant v. Ouellette, 140 A. 368, 126 Me. 558.

Mich.—Billingsley v. Gulick, 233 N.W. 225, 252 Mich. 235—Hinchey v. J. P. Burroughs & Son, 215 N.W. 346, 240 Mich. 273—Petersen v. Lundin, 211 N.W. 86, 236 Mich. 590.

42. Iowa.—Prewitt v. Rutherford, 30 N.W.2d 141, 238 Iowa 1321.

Mich.—Swartz v. Dahlquist, 30 N.W.2d 809, 320 Mich. 135—Molitor v. Burns, 28 N.W.2d 106, 318 Mich. 261—Faustman v. Hewitt, 264 N.W. 863, 274 Mich. 458—Petersen v. Lundin, 211 N.W. 86, 236 Mich. 590.

42 C.J. p 1218 note 7.

43. Iowa.—Prewitt v. Rutherford, 30 N.W.2d 141, 238 Iowa 1321.

Mich.—Breker v. Rosema, 4 N.W.2d 57, 301 Mich. 685, 141 A.L.R. 867.

Loss of memory not result of injury

One injured in automobile collision was not presumed to have exercised due care merely because of absence of eyewitnesses and of her loss of memory, not resulting from injury.—Thompson v. Southern Michigan

Transp. Co., 246 N.W. 174, 261 Mich. 440.

44. Iowa.—In re Hill, 208 N.W. 334, 202 Iowa 1038.

45. U.S.—Peterson v. Sheridan, C.C. A.Iowa, 115 F.2d 121.

Iowa.—Lindloff v. Duecker, 251 N.W. 698, 217 Iowa 326.

R.I.—Rawding v. Lonsdale Bakery Co., 42 A.2d 275, 71 R.I. 50.

Not excuse for proved negligence

Rule as to instinct of self-preservation merely supplies inference for otherwise deficient record in death action that decedent used due care and does not furnish evidence of affirmative excuses offered for his negligence.—Hittle v. Jones, 250 N.W. 689, 217 Iowa 598.

46. Mass.—Matherson v. Dickson, 36 N.E.2d 382, 310 Mass. 18—Faria v. Veras, 10 N.E.2d 267, 298 Mass. 117—Balian v. Ogassian, 179 N.E. 232, 277 Mass. 525, 78 A.L.R. 1021—Ducharme v. Coe Motors, 175 N.E. 168, 275 Mass. 49.

Mistake

Mass.—Matherson v. Dickson, 36 N.E.2d 382, 310 Mass. 18.

Vehicle registered in other state

In action against wife, who lived in a hotel within the state, for negligent operation of her automobile, allegedly registered illegally in another state where her husband resided, burden of proof as to wife's domicile was on plaintiff.—Rolf v. Walsh, 64 N.E.2d 16, 318 Mass. 733.

47. Me.—Lyons v. Jordan, 102 A. 976, 117 Me. 117.

Mass.—Rummel v. Peters, 61 N.E.2d 57, 314 Mass. 504—Munson v. Bay State Dredging & Contracting Co., 50 N.E.2d 633, 314 Mass. 485—Russell v. Holland, 34 N.E.2d 668, 309 Mass. 187—Dunn v. Merrill, 34 N.E.2d 498, 309 Mass. 174—Burns v. Winchell, 25 N.E.2d 752, 305 Mass. 276—Le Blanc v. Cutler Co., 25 N.E.2d 715, 305 Mass. 283—Bridges v. Hart, 18 N.E.2d 1020, 303 Mass. 283—MacInnis v. Morrissey, 11 N.

it was operated by a licensed person in an action by him to recover for damages.⁴⁸ The presumption is that the owner or person in control of an automobile has complied with a statute requiring its registration by such owner or person;⁴⁹ and a certificate of registration creates a presumption that the holder thereof is lawfully entitled to it in an action against such owner or person,⁵⁰ but such presumption is not conclusive.⁵¹ It has been held, in the absence of evidence to the contrary, that registration of the vehicle in other than the owner's legal name is presumed to be in good faith,⁵² and he is

likewise presumed to have acted in good faith in designating his place of residence.⁵³

§ 514. Admissibility

Evidence which is irrelevant or immaterial is inadmissible in an action to recover damages for death or injuries caused by the operation of a motor vehicle.

The general rules governing the admissibility of the evidence in civil actions in general apply in an action to recover damages for death or injuries caused by the operation of a motor vehicle;⁵⁴ and hence, in accordance with these general rules, evi-

E.2d 472, 298 Mass. 505—Grover v. Smead, 2 N.E.2d 1012, 295 Mass. 11—Kzcowski v. Johnowicz, 192 N.E. 6, 287 Mass. 441—Brewer v. Hayes, 188 N.E. 600, 285 Mass. 144—Potter v. Gilmore, 184 N.E. 373, 282 Mass. 49, 87 A.L.R. 1462—Balian v. Ogassian, 179 N.E. 232, 277 Mass. 525, 78 A.L.R. 1021—Walsh v. Alfred Sears Co., 169 N.E. 805, 270 Mass. 296.

Mistake in registration

Burden of negating a mistake, in application for registration of vehicle, within curative statute, was on defendant as part of its burden of proving that vehicle was not legally registered.—Munson v. Bay State Dredging & Contracting Co., 60 N.E.2d 633, 314 Mass. 485—Le Blanc v. Cutler Co., 25 N.E.2d 715, 305 Mass. 283.

48. Conn.—Dewhurst v. Connecticut Co., 114 A. 100, 96 Conn. 389.

49. Mass.—Trombley v. Stevens-Duryca Co., 92 N.E. 764, 206 Mass. 516.

42 C.J. p 1209 note 66.

50. Mass.—Pierce v. Hutchinson, 136 N.E. 261, 241 Mass. 557.

51. Mass.—Pierce v. Hutchinson, supra.

42 C.J. p 1209 note 68.

52. Mass.—Bridges v. Hart, 18 N.E.2d 1020, 302 Mass. 239.

53. Mass.—Doyle v. Goldberg, 1 N.E.2d 1, 294 Mass. 105.

54. U.S.—Petroleum Carrier Corp. v. Snyder, C.C.A.Ga., 161 F.2d 323.

Ala.—Ex parte Bahakel, 21 So.2d 619, 246 Ala. 527—Crotwell v. Cowan, 184 So. 195, 236 Ala. 578—Birmingham Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342.

Cal.—Cope v. Davison, 180 P.2d 873, 30 Cal.2d 193, 171 A.L.R. 667—Muir v. Cheney Bros., 148 P.2d 138, 64 Cal.App.2d 85—Rhoads v. Studley, 69 P.2d 1082, 15 Cal.App.2d 726.

Colo.—Campbell v. Trate, 149 P.2d 380, 112 Colo. 365.

Ill.—Sullivan v. Heyer, 21 N.E.2d 776, 300 Ill.App. 599—Keehn v.

Braubach, 30 N.E.2d 156, 307 Ill. App. 339—Bouslough v. Schumacher, 270 Ill. App. 79.

Iowa.—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27.

Mass.—Dzura v. Phillips, 175 N.E. 629, 275 Mass. 283—Lekarczyk v. Dupre, 163 N.E. 642, 265 Mass. 33.

Mo.—Shields v. Keller, 153 S.W.2d 60, 348 Mo. 326—Chiles v. Metropolitan Life Ins. Co., 91 S.W.2d 164, 280 Mo. App. 350.

N.Y.—Fitzgerald v. Ladabouch, 299 N.Y.S. 880, 252 App.Div. 912, affirmed 14 N.E.2d 212, 277 N.Y. 669.

N.C.—Carter v. Thurston Motor Lines, 41 S.E.2d 586, 227 N.C. 193. Pa.—Ziehler v. Luckens, Com.Pl., 31 Del.Co. 492.

R.I.—Rucci v. Butler, 53 A.2d 705. Wash.—Nelson v. Bjelland, 95 P.2d 784, 1 Wash.2d 268, 125 A.L.R. 641. 42 C.J. p 1218 note 20.

Admissibility for limited purpose

Protest of automobile guest is not evidence of negligence, wantonness, or willfulness of driver, but may have bearing on state of mind of driver.—Lucas v. Lindner, 269 N.W. 611, 276 Mich. 704.

Evidence held admissible

U.S.—Petroleum Carrier Corp. v. Snyder, C.C.A.Ga., 161 F.2d 323.

Ariz.—Phoenix Baking Co. v. Vaught, 156 P.2d 725, 62 Ariz. 222.

Cal.—Head v. Wilson, 97 P.2d 509, 36 Cal.App.2d 244—Ohlson v. Frazier, 39 P.2d 429, 2 Cal.App.2d 708—Musante v. Guerrini, 13 P.2d 965, 125 Cal.App. 556.

Conn.—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483.

D.C.—Callas v. Independent Taxi Owners' Ass'n, 66 F.2d 192, 62 App. D.C. 212, certiorari denied Independent Taxi Owners' Ass'n v. Callas, 54 S.Ct. 89, 290 U.S. 669, 78 L.Ed. 578.

Ga.—Campbell v. Dysard Const. Co., 149 S.E. 713, 40 Ga.App. 328.

Ill.—Delach v. Schubert, 45 N.E.2d 198, 816 Ill.App. 452—Bouslough v. Schumacher, 270 Ill. App. 79—Robbins v. Illinois Power & Light Corporation, 255 Ill.App. 106—Scott v. Greene, 242 Ill.App. 405.

Iowa.—Judd v. Rudolph, 222 N.W. 416, 207 Iowa 113, 62 A.L.R. 1174.

Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189—McDowell v. Bryden, 162 S.W.2d 2, 290 Ky. 549.

Md.—Feinglos v. Welner, 28 A.2d 577, 181 Md. 38—Stafford v. Zake, 20 A.2d 144, 179 Md. 460—Zulver v. Roberts, 161 A. 9, 162 Md. 636.

Mass.—Campbell v. Ashler, 70 N.E.2d 302, 320 Mass. 475—Dunn v.

Merrill, 34 N.E.2d 498, 309 Mass. 174—Burns v. Winchell, 25 N.E.2d 752, 305 Mass. 276—Ouillette v. Sheerin, 9 N.E.2d 713, 297 Mass.

536—Bellenger v. Nally, 185 N.E. 346, 282 Mass. 523—Lekarczyk v. Dupre, 163 N.E. 642, 265 Mass.

33.

Mich.—Schneider v. Draper, 267 N.W. 831, 276 Mich. 259.

Minn.—Nicol v. Gettler, 247 N.W. 8, 188 Minn. 69—Bergman v. Williams, 217 N.W. 127, 173 Minn.

250—Weekworth v. Proudfoot, 214 N.W. 52, 171 Minn. 321.

Mo.—Jackson v. City of Malden, App., 72 S.W.2d 850—Cox v. Reynolds, App., 18 S.W.2d 575.

N.H.—Abbott v. Hayes, 26 A.2d 842, 92 N.H. 126—Putnum v. Bowman,

195 A. 865, 89 N.H. 200—Reed v. Nashua Buick Co., 147 A. 898, 84 N.H. 156.

N.J.—Bradley v. Shreve, 142 A. 642, 6 N.J. Misc. 729.

N.Y.—Cutter v. Maxweld Corporation, 24 N.E.2d 129, 281 N.Y. 467—Rost v. Kessler, 49 N.Y.S.2d 97,

267 App.Div. 686—Nagel v. Paige, 10 N.Y.S.2d 470, 256 App.Div. 487—Kovitz v. Klein, 237 N.Y.S. 90,

227 App.Div. 31.

N.D.—Olson v. Wetzstein, 225 N.W. 459, 58 N.D. 263.

Ohio.—Meuer v. Doerflehn, 5 N.E.2d 948, 53 Ohio App. 536—Szabo v. Tabor Ice Cream Co., 174 N.E. 18,

37 Ohio App. 42.

Or.—Snyder v. Portland Traction Co., 185 P.2d 563—Albrecht v. Safeway Stores, 80 P.2d 62, 159 Or. 331—

Miller v. Service and Sales, 38 P.2d 995, 149 Or. 11, 96 A.L.R. 628

—Goebel v. Vaught, 269 P. 491,

126 Or. 332.

dence which is irrelevant⁵⁵ or immaterial⁵⁶ may and | should be excluded.

Pa.—Gerbrick v. Henry, Com.Pl., 60 York Leg.Rec. 149.

Tenn.—Smith v. Fisher, 11 Tenn.App. 273.

Tex.—Manning v. Sunshine Bus Lines, Civ.App., 205 S.W.2d 636—Brown v. Kirksey, Civ.App., 145 S.W.2d 217—Globe Laundry v. McLean, Civ.App., 19 S.W.2d 94.

Utah.—Nelson v. Lott, 17 P.2d 272, 81 Utah 265.

Va.—Butler v. Greenwood, 23 S.E.2d 317, 180 Va. 456.

Wash.—Clarke v. Bohemian Breweries, 110 P.2d 197, 74 Wash.2d 487.

Wis.—Eich v. Brennan, 270 N.W. 47, 223 Wis. 174—Olson v. Hermansen, 220 N.W. 203, 196 Wis. 614, 61 A.L.R. 1243.

Evidence held inadmissible

U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

Ala.—Watkins v. Reinhart, 9 So.2d 113, 243 Ala. 243—Crotwell v. Cowan, 184 So. 195, 236 Ala. 678—Brown v. Standard Casket Mfg. Co., 175 So. 358, 234 Ala. 512—Jewel Tea Co. v. Sklivis, 165 So. 824, 281 Ala. 590—Crawford Johnson & Co. v. Pryor Motor Co., 121 So. 388, 219 Ala. 108—Laney v. Blackburn, 144 So. 126, 25 Ala. App. 248.

Cal.—Hastings v. Serleto, 143 P.2d 956, 61 Cal.App.2d 672—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742—Shaver v. United Parcel Service, 266 P. 606, 90 Cal.App. 764.

Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.

Ga.—United Motor Freight Terminal Co. v. Hixon, 47 S.E.2d 171, 76 Ga. App. 653—Eldson v. Felder, 25 S.E.2d 41, 69 Ga. App. 225.

Ill.—Bouslough v. Schumacher, 270 Ill.App. 79.

Ind.—Buddenberg v. Morgan, 38 N.E.2d 287, 110 Ind.App. 609.

Ky.—Basham's Adm'x v. Witt, 159 S.W.2d 990, 289 Ky. 639—Lehr v. Fenton Dry Cleaning & Dyeing Co., 80 S.W.2d 831, 268 Ky. 663—Bradley v. Schmidt, 4 S.W.2d 703, 223 Ky. 784, 57 A.L.R. 1100.

Md.—Bode v. Carroll-Independent Coal Co., 191 A. 685, 172 Md. 406.

Mass.—Sullivan v. Griffin, 61 N.E.2d 330, 318 Mass. 359—Liberatore v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 538—Faria v. Veras, 10 N.E.2d 267, 298 Mass. 117—Gibson v. McGuinness, 192 N.E. 494, 288 Mass. 153.

Minn.—Campbell v. Sargent, 243 N.W. 142, 186 Minn. 293.

N.H.—Sullivan v. Sullivan, 18 A.2d 828, 91 N.H. 341.

N.C.—Woods v. Roadway Express, 25 S.E.2d 856, 223 N.C. 269.

N.D.—Olson v. Wetzstein, 225 N.W. 459, 58 N.D. 262.

Ohio.—Booksbaum v. Cousins, 1 N.E.2d 150, 51 Ohio App. 385, error dismissed 199 N.E. 217, 130 Ohio St. 336.

Okl.—Greenlease-Ledterman, Inc., v. Hawkins, 186 P.2d 318, 199 Okl. 331.

Or.—Brigham v. Munden, 19 P.2d 1096, 142 Or. 471.

Pa.—West v. Morgan, 27 A.2d 46, 345 Pa. 61—Armstrong v. McGraw, 175 A. 279, 115 Pa.Super. 156—Young v. Atlantic States Motor Lines, Com.Pl., 54 Dauph Co. 36—Ziehler v. Luckens, Com.Pl., 31 Del. Co. 492.

R.I.—Segee v. Cowan, 20 A.2d 270, 68 R.I. 445.

Tex.—William Cameron Co. v. Downing, Civ.App., 147 S.W.2d 363—Richardson v. Impey, Civ.App., 94 S.W.2d 490, error dismissed—Kasch v. Anton, Civ.App., 81 S.W.2d 1097.

Utah.—Morrison v. Perry, 140 P.2d 772, 104 Utah 151.

Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.

Va.—Crowell v. Duncan, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425.

55. Cal.—O'Brien v. Schellberg, 140 P.2d 159, 59 Cal.App.2d 764—Foster v. Hudson, 92 P.2d 959, 33 Cal. App.2d 705—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742.

Conn.—Trosser v. Richman, 50 A.2d 85, 133 Conn. 253.

Iowa.—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27.

Ky.—Grant v. Adams, 291 S.W. 785, 218 Ky. 535.

Md.—Marine v. Stewart, 168 A. 891, 165 Md. 698.

Mich.—Haynes v. Clark, 233 N.W. 321, 252 Mich. 295.

N.J.—Hoffman v. Goldfield, 29 A.2d 876, 129 N.J.Law 359—Decker v. Everson, 187 A. 783, 14 N.J.Misc. 860.

N.C.—Riddle v. Whisnant, 16 S.E.2d 698, 220 N.C. 131.

Or.—Albrecht v. Safeway Stores, 80 P.2d 62, 159 Or. 331—Smith v. Laflar, 20 P.2d 391, 143 Or. 65.

Pa.—Potance v. Cipriano, Com.Pl., 39 Luz.Leg.Reg. 63, 13 Som.Leg.J. 73—French v. Benischeck, Com.Pl., 63 Montg.Co. 194—Smith v. Railway Express Agency, Com.Pl., 54 York Leg.Rec. 90.

42 C.J. p 1219 note 24.

Evidence only remotely relevant is properly excluded.—Moran v. Dumas, 18 A.2d 763, 91 N.H. 336.

56. Ark.—Missouri Pac. Transp. Co. v. Brown, 99 S.W.2d 245, 193 Ark. 304.

Cal.—Bramble v. McEwan, 104 P.2d

1054, 40 Cal.App.3d 400—Head v. Wilson, 97 P.2d 509, 36 Cal.App.2d 244—Hilbert v. Olney, 61 P.2d 941, 17 Cal.App.2d 135.

Conn.—Vultz v. Orange Volunteer Fire Ass'n, 172 A. 220, 118 Conn. 307.

Ga.—Daniel v. Richards, 13 S.E.2d 710, 64 Ga.App. 612.

Ind.—Chicago, I. & L. Ry. Co. v. Downey, 5 N.E.2d 656, 103 Ind.App. 672.

La.—Thibodeaux v. Culotta, App., 192 So. 712—Vrazier v. F. Strauss & Son, App., 173 So. 343—Geddes & Moss Undertaking & Embalming Co. v. Dunne, App., 165 So. 879—Provosty v. Christy, App., 152 So. 784.

Md.—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.

Mass.—Garfield v. Smith, 59 N.E.2d 287, 317 Mass. 674, certiorari denied 65 S.Ct. 1568, 325 U.S. 879, 89 L.Ed. 1995, and D. W. Lines v. Ward, 65 S.Ct. 1569, 325 U.S. 879, 89 L.Ed. 1995—Faria v. Veras, 10 N.E.2d 267, 298 Mass. 117.

Mich.—Mullaney v. Woodruff, 273 N.W. 395, 280 Mich. 66.

Mo.—Kaley v. Huntley, App., 88 S.W.2d 200.

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

N.J.—Hoffman v. Goldfield, 29 A.2d 876, 129 N.J.Law 359—Gluck v. Castles Ice Cream Co., 140 A. 419, 104 N.J.Law 397—Decker v. Everson, 187 A. 783, 14 N.J.Misc. 860.

N.C.—Powers v. S. Sternberg & Co., 195 S.E. 88, 213 N.C. 41.

Ohio.—Watt v. Feuerlicht, App., 41 N.E.2d 719.

Pa.—Valente v. Lindner, 17 A.2d 371, 340 Pa. 508—Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 107 Pa.Super. 166.

Tenn.—Lee A. Gridley Const. Co. v. Maryland Casualty Co., 15 Tenn. App. 229—Redding v. Hatcher, 14 Tenn.App. 561.

Tex.—Duff v. Roesser & Pendleton, Civ.App., 96 S.W.2d 682.

Wash.—Mathias v. Eichelberger, 45 P.2d 619, 182 Wash. 185.

Wis.—Nordahl v. Farmers Mut. Auto. Ins. Co., 27 N.W.2d 707, 250 Wis. 609—Waters v. Markham, 235 N.W. 797, 204 Wis. 332.

42 C.J. p 1219 note 25.

Materiality dependent on other evidence

Violation of act providing for punishment of any one who should drive over highway which had been closed by proper authority was material only if unlawful act of traversing closed highway was proximate cause of the collision.—Miller v. Guthrie, 191 A. 61, 325 Pa. 495.

§ 515. — To Prove Due Care, Negligence, or Contributory Negligence Generally

Any competent evidence having a logical and material tendency to prove negligence or the lack thereof on the part of the defendant or the driver of his vehicle, or to prove contributory negligence or the lack thereof on the part of the plaintiff or decedent, at the time and place in question is admissible; but ordinarily evidence of a motor vehicle driver's negligence on other occasions, or of his habitual or customary manner of driving or operating the vehicle, is inadmissible.

In an action to recover damages for death or

injuries occasioned by the operation of a motor vehicle, any competent evidence having a logical and material tendency to prove negligence or the lack thereof on the part of defendant or the operator of his vehicle,⁵⁷ or to prove contributory negligence or the lack thereof on the part of plaintiff or decedent,⁵⁸ at the time and place in question is admissible. On the other hand, evidence that the driver of a motor vehicle is a competent or incompetent,⁵⁹ careful or reckless,⁶⁰ driver generally, as well as evidence of his negligence on other occasions,⁶¹ his

57. Ala.—Laney v. Blackburn, 144 So. 126, 25 Ala.App. 248.

Cal.—Martin, Continental Casualty Co., Intervener, v. Clinton Const. Co., 105 P.2d 1029, 41 Cal.App.2d 35, rehearing denied 106 P.2d 629, 41 Cal.App.2d 35—Flood v. Miura, 8 P.2d 552, 120 Cal.App. 467.

Ga.—Eldson v. Felder, 25 S.E.2d 41, 69 Ga.App. 225.

Iowa.—Robertson v. Carlgren, 234 N.W. 824, 211 Iowa 963.

La.—Falgout v. Younger, App., 192 So. 706.

Mich.—Marciniak v. Sundeen, 270 N.W. 729, 278 Mich. 407.

Mo.—Holmes v. McNeill, 204 S.W.2d 303, 356 Mo. 846.

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

N.H.—Golej v. Varjabedian, 166 A. 287, 86 N.H. 244—Lapolic v. Austin, 157 A. 73, 85 N.H. 244.

N.Y.—Hoffert v. Tisdale Lumber Co., 39 N.Y.S.2d 516, 265 App.Div. 1012.

Ohio.—Metzger v. Yellow Taxicab Co., 193 N.E. 75, 48 Ohio App. 275.

Pa.—Joannides v. Norris, 23 A.2d 53, 146 Pa.Super. 488—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437—Keeler v. Hazlett, Com Pl., 20 Lehigh Co.L.J. 194.

R.I.—McAllister v. Chase, 13 A.2d 690, 65 R.I. 122—Andrews v. Penna Charcoal Co., 179 A. 696, 55 R.I. 215.

42 C.J. p 1220 note 51.

Pure accident

Truck owner may prove, as absolving itself from imputation of negligence, that accident was pure accident.—Schuetter v. Enterprise Commission Corporation, Mo App., 34 S.W.2d 976.

Particular elements of conduct

The particular elements of automobile driver's conduct are proper matters for consideration in determining whether his conduct as a whole was grossly negligent.—Herbert v. Hicks, 13 N.E.2d 428, 299 Mass. 538.

Failure of motorist to obey stop sign at intersection of public highways is element for consideration in determining question of negligence.

—Hartley v. McKee, Mo.App., 86 S.W.2d 359.

58. U.S.—Foresman v. Pepin, D.C. Pa., 71 F.Supp. 772, affirmed, C.C.A., 161 F.2d 872

Ark.—Powell Bros. Truck Lines v. Barnett, 121 S.W.2d 116, 196 Ark 1082.

Cal.—Flood v. Miura, 8 P.2d 552, 120 Cal.App. 467.

Fla.—Pillet v. Ershick, 126 So. 784, 99 Fla. 483.

Ill.—Howard v. Ind, 50 N.E.2d 769, 320 Ill.App. 338—Seiffe v. Seiffe, 267 Ill.App. 23.

Ind.—Mattes v. Brugner, 159 N.E. 156, 88 Ind.App. 36.

Iowa.—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 417.

Mass.—Anzoni v. Gosse, 175 N.E. 57, 274 Mass 522—Payson v. Checker Taxi Co., 159 N.E. 449, 262 Mass. 22 —Di Rienzo v. Goldfarb, 153 N.E. 784, 257 Mass. 272.

Mich.—Marciniak v. Sundeen, 270 N.W. 729, 278 Mich. 407.

Mo.—Schuetter v. Enterprise Commission Corporation, App., 34 S.W.2d 976.

Neb.—Thomison v. Buehler, 25 N.W. 2d 391, 147 Neb. 811.

N.H.—Stowe v. Hartford, 18 A.2d 382, 91 N.H. 261—Mitrich v. Tuttle, 11 A.2d 818, 90 N.H. 512.

Ohio.—Sprung v. E. I. Dupont De Nemours & Co., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94.

R.I.—McAllister v. Chase, 13 A.2d 690, 65 R.I. 122.

Wis.—McDonald v. Wickstrand, 238 N.W. 820, 206 Wis. 58.

42 C.J. p 1220 note 52.

Character of evidence

In action for wrongful death in automobile accident, due care of deceased may be proved in the same manner as negligence and by circumstantial as well as by direct evidence.—Hann v. Brooks, 73 N.E.2d 624, 331 Ill.App. 535.

59. Conn.—Marks v. Dorkin, 136 A. 83, 105 Conn. 521, 61 A.L.R. 1224.

N.C.—Hoke v. Atlantic Greyhound Corp., 42 S.E.2d 593, 227 N.C. 412.

42 C.J. p 1220 note 54.

60. Conn.—Marks v. Dorkin, 136 A. 83, 105 Conn. 521.

Iowa.—Hamilton v. Boyd, 256 N.W. 290, 218 Iowa 885.

Ky.—Ice Delivery Co. v. Thomas, 160 S.W.2d 605, 290 Ky. 230—Siler v. Renfro Supply Co., 26 S.W.2d 12, 233 Ky 487.

Miss.—Murphy v. Burney, 27 So.2d 773.

Neb.—Holberg v. McDonald, 289 N.W. 542, 137 Neb. 405.

42 C.J. p 1220 note 55.

Reasons for rule

The reputation of a driver and his conduct at other times and places are not safe or reliable criteria by which to determine what his conduct was at a particular time and place. Most automobile drivers operate their vehicles many thousands of miles without accident and in the presence of the ever-present hazard of other traffic; but, nevertheless, there are many thousands of serious accidents, and this situation justifies the conclusion that most motor vehicle accidents chargeable to man-failure are due to lapses from the customary skill and care of the drivers involved. A very poor or careless driver may be wholly free from fault in the particular instance involved, and, likewise, the most skillful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion—Holberg v. McDonald, *supra*.

Testimony as to whether decedent was generally fast driver

Tex.—Orchin v. Fort Worth Poultry & Egg Co., Civ App., 43 S.W.2d 308, reformed on other grounds 53 S.W.2d 103.

Where driver had fully described his actual operation of automobile, his testimony that his knowledge of dangerous traffic conditions usually present at scene of accident would make him more cautious, and testimony of driver's witnesses that driver was careful driver, was inadmissible.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.

61. Ark.—Pugsley v. Tyler, 197 S.W. 1177, 130 Ark. 491.

42 C.J. p 1220 note 56.

involvement or lack of involvement in other accidents or collisions,⁶² his habitual carelessness,⁶³ negligence,⁶⁴ or caution,⁶⁵ or his customary manner of driving, operating,⁶⁶ or parking⁶⁷ the vehicle is ordinarily not admissible.

This is also true of evidence respecting an injured or deceased pedestrian's habits while on or approaching a highway or intersection;⁶⁸ but sometimes such evidence is held admissible,⁶⁹ or at least its admission is held not prejudicial,⁷⁰ as where it is elicited on cross-examination and prior testimony of the witness on the same subject matter has been brought out without objection,⁷¹ or there is an is-

sue or contention in the case to which the evidence is relevant,⁷² or the eyewitnesses had no time to view the situation clearly and opposite inferences may reasonably be drawn from their testimony.⁷³ In a death action, evidence of decedent's careful⁷⁴ habits as a driver, pedestrian, or bicyclist, as the case may be, is admissible, in some jurisdictions, as bearing on his due care, where there is no eyewitness to the accident,⁷⁵ except defendant who is incompetent to testify;⁷⁶ but in at least one other jurisdiction evidence of the habits of decedent is not admissible notwithstanding the absence of eyewitnesses to the accident.⁷⁷

Details of conduct on other occasions

The details of motorist's conduct, when he was stopped on other occasions by officer for speeding, have no bearing on the way he was driving on the occasion in question.—Huddleston v. Pound, 68 P.2d 376, 21 Cal. App.2d 128.

62. Ala.—Alaga Coach Line v. McCarrall, 151 So. 834, 227 Ala. 686, 92 A.L.R. 470.

Ga.—United Motor Freight Terminal Co. v. Hixon, 47 S.E.2d 171, 76 Ga. App. 653.

Mass.—Warren v. Hanson, 195 N.E. 121, 290 Mass. 286.

Minn.—Ryan v. International Harvester Co. of America, 283 N.W. 129, 204 Minn. 177.

Ohio.—Bachman v. Ambros, App., 79 N.E.2d 177.

Tex.—Houston Electric Co. v. McLeroy, Civ.App., 153 S.W.2d 617, reversed on other grounds 163 S.W.2d 1062, 139 Tex. 170—William Cameron Co. v. Downing, Civ.App., 147 S.W.2d 963.

W.Va.—Fleming v. McMillan, 26 S.E.2d 8, 125 W.Va. 356.

63. Ala.—Stoudemire v. Davis, 94 So. 498, 208 Ala. 495.

Iowa.—In re Hill, 208 N.W. 334, 202 Iowa 1038, modified on other grounds 210 N.W. 241, 202 Iowa 1038.

64. Tex.—Cobb Brick Co. v. Lindsay, Civ.App., 277 S.W. 1107.

65. Cal.—White v. Shepardson, 3 P.2d 346, 116 Cal.App. 716.

Va.—Jackson v. Chesapeake & O. Ry. Co., 20 S.E.2d 489, 179 Va. 642.

66. Iowa.—Stilson v. Ellis, 225 N.W. 346, 208 Iowa 1157.

42 C.J. p 1220 note 59.
Evidence of customs generally see infra § 516 f.

Holding out hand before stopping

Defendant's testimony, after stating that he had no recollection of holding his hand out as warning, that it was second nature for him to stick his hand out when he was going to stop, was improper.—Collins

v. Hodgson, 42 P.2d 700, 5 Cal.App.2d 366.

Stopping at particular intersection

Testimony that witness had seen deceased drive truck on particular street five or six times, and that, on such prior occasions, deceased stopped at intersection on which collision occurred, was not admissible to show probability that deceased stopped before the fatal collision.—Zimmer v. Hill, 20 N.E.2d 811, 300 Ill.App. 613.

67. Neb.—Koehn v. Hastings, 206 N.W. 19, 114 Neb. 106.

68. Iowa.—Nyswander v. Gonser, 253 N.W. 829, 218 Iowa 136.

S.C.—Holcombe v. W. N. Watson Supply Co., 171 S.E. 604, 171 S.C. 110.

Habit of parent of injured child

In action for injuries sustained by four-year-old child when struck by automobile, cross-examination of child's mother, as to whether she was in habit of letting child play around sidewalk unattended, was immaterial.—Dean v. Feld, 175 P.2d 278, 77 Cal. App.2d 327.

69. N.H.—Abbott v. Hayes, 26 A.2d 842, 92 N.H. 126.

Wash.—Tobin v. Goodwin, 290 P. 215, 157 Wash. 658.

Wis.—Olson v. Hermansen, 220 N.W. 203, 196 Wis. 614, 61 A.L.R. 1243.

42 C.J. p 1220 note 61.

70. Mich.—Werney v. Reid, 189 N.W. 30, 219 Mich. 257.

42 C.J. p 1220 note 62.

71. Pa.—Diehl v. Reiss, 76 Pa.Super. 189.

42 C.J. p 1220 note 63.

72. Ala.—Laney v. Blackburn, 144 So. 126, 25 Ala.App. 248.

Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.

Tex.—Austin v. De George, Civ.App., 55 S.W.2d 585, error dismissed.

42 C.J. p 1220 note 64.

Theory that owner entrusted automobile to driver known to be incompetent

Ala.—Laney v. Blackburn, 144 So. 126, 25 Ala.App. 248.

Mich.—Tanis v. Eding, 264 N.W. 375, 274 Mich. 288.

Mo.—Ross v. Wilson, 163 S.W.2d 342, 236 Mo.App. 1178.

Ohio.—Williamson v. Eclipse Motor Lines, 62 N.E.2d 339, 145 Ohio St. 467, 168 A.L.R. 1356—Clark v. Stewart, 185 N.E. 71, 126 Ohio St. 263.

Or.—Guedon v. Rooney, 87 P.2d 209, 160 Or. 621, 120 A.L.R. 1298.

73. N.H.—Judd v. Perkins, 188 A. 312, 83 N.H. 32.

74. Ill.—Szalacha v. Landsman, 60 N.E.2d 643, 325 Ill.App. 691—Walters v. Ind., 48 N.E.2d 791, 319 Ill. App. 162—Wilson v. Decatur Cartage Co., 39 N.E.2d 379, 313 Ill.App. 148.

75. Ill.—Sturgeon v. Quarton, 44 N.E.2d 766, 316 Ill.App. 308.

76. Ill.—Johnson v. McKnight, 39 N.E.2d 700, 313 Ill.App. 260.

Wash.—Swaczey v. Valley Transport, 107 P.2d 567, 6 Wash.2d 324, 140 A.L.R. 1, opinion adhered to 111 P.2d 1010, 6 Wash.2d 324, 140 A.L.R. 20.

Defendant as eyewitness

(1) Where defendant motorist was called by plaintiff as an eyewitness, testimony as to careful habits of deceased was inadmissible.—Scully v. Plannery, 11 N.E.2d 123, 292 Ill.App. 349.

(2) In a subsequent case, however, where, after the admission of evidence of the careful habits of decedent, an objection that defendant was an incompetent witness was overruled and he testified in his own behalf as to how the accident occurred, it was held that evidence of the careful habits of decedent, being proper when it was admitted, remained so, no motion to strike it having been made and the trial judge, in his written opinion overruling a motion for a new trial, having stated that he was still in doubt as to whether there was an eyewitness to the accident.—Walters v. Ind., 48 N.E.2d 791, 319 Ill.App. 162.

77. Ohio.—Ashdown v. Tresise, 160 N.E. 502, 26 Ohio App. 575, affirmed

Other accidents at same place. Evidence of other accidents or near accidents on other occasions at the same crossing or place,⁷⁸ or in the same vicinity,⁷⁹ may and should be excluded, at least where there are numerous eyewitnesses to the accident in question⁸⁰ or it is not shown that the conditions at the time of another accident or near accident, are similar to those existing at the time of the accident in question.⁸¹

Violation of a traffic law, either state or municipal, may be shown as evidence of negligence;⁸² but, on the question whether the violation of a statute or ordinance constitutes actionable negligence, it is immaterial whether the driver could anticipate or foresee injury⁸³ and no inquiry in respect thereof will be permitted.⁸⁴ A motorist may offer proof excusing his failure to observe a statutory requirement notwithstanding his violation of the requirement is considered negligence per se.⁸⁵

Failure of driver to sound horn. Evidence of the failure of the driver to sound the horn on his motor vehicle may be admissible;⁸⁶ but it is otherwise in respect of a failure to sound the horn while rounding a curve, where the curve did not obstruct the driver's view.⁸⁷ All the circumstances influencing the driver's conduct may be considered in determining whether his failure to sound the horn of his vehicle was negligence.⁸⁸

Status or relation of parties as affecting evidence of negligence. Evidence of one defendant that another defendant or his driver had the last clear chance to avoid the accident is inadmissible;⁸⁹ where plaintiff, as a passenger in an automobile, is not chargeable with the negligence of the driver, such negligence is material in an action against the driver of another automobile only if the driver of the latter automobile was without contributing fault;⁹⁰ and, in an action to recover for the wrongful death of a person riding on defendant's truck,

proof of ordinary negligence is immaterial unless there is further evidence that the relation of deceased to defendant rose higher than that of a bare licensee, volunteer, or trespasser.⁹¹

§ 516. — Evidence of, or Bearing on, Particular Matters

- a. Acts or conduct before or after accident or collision
- b. Age, experience, intelligence, or physical condition
- c. Characteristics, habits, and traits of horses
- d. Conditions, dimensions, equipment, or damage to motor vehicles
- e. Control and ability to stop
- f. Custom or common practice
- g. Death or personal injury
- h. Identification
- i. Insurance
- j. Lack of license, permit, or registration
- k. Lights
- l. Manner and circumstances of accident or collision
- m. Other judicial proceedings
- n. Physical conditions at scene of accident or collision
- o. Relation between plaintiff and driver
- p. Report of, or failure to report, accident
- q. Responsibility of defendant for operation of motor vehicle
- r. Speed
- s. Statutes, ordinances, rules, or regulations

a. Acts or Conduct before or after Accident or Collision

When not too remote, evidence of acts or conduct of

Tresise v. Ashdown, 160 N.E. 898, 118 Ohio St. 307, 58 A.L.R. 1476.

78. U.S.—*Interstate Motor Lines v. Great Western Ry. Co.*, C.C.A.Colo., 161 F.2d 968.

79. Wis.—*Ponietowski v. Harres*, 228 N.W. 126, 200 Wis. 504.

80. Cal.—*Dunham v. Cantlay & Tanzola*, 49 P.2d 332, 9 Cal.App.2d 274.

81. Conn.—*Petrillo v. Kolbay*, 165 A. 346, 116 Conn. 389.

82. Ark.—*Shipp v. Missouri Pac. Transp. Co.*, 122 S.W.2d 593, 197 Ark. 104.

Fla.—*Pillet v. Ershick*, 126 So. 784, 99 Fla. 483.

Me.—*Field v. Webber*, 169 A. 732, 132 Me. 236.

Mass.—*Stiles v. Wright*, 32 N.E.2d 220, 308 Mass. 326.

Neb.—*Mann v. Standard Oil Co.*, 261 N.W. 168, 129 Neb. 226.

R.I.—*Brey v. Rosenfeld*, 48 A.2d 177, 72 R.I. 28, adhered to 50 A.2d 911, 72 R.I. 316.

Tex.—*Schuhmacher Co. v. Bahn, Civ. App.*, 78 S.W.2d 205, error dismissed.

Admissibility of statutes, ordinances, or regulations see *infra* § 516 s.

83. Wis.—*Edwards v. Kohn*, 241 N. W. 331, 207 Wis. 381.

84. Wis.—*Bittner v. Miller*, 270 N. W. 55, 223 Wis. 162.

85. Iowa.—*Kadlec v. Al. Johnson Const. Co.*, 252 N.W. 103, 217 Iowa 299.

86. Ill.—*Williams v. Stearns*, 256 Ill. App. 425.

87. Ky.—*Consolidated Coach Corporation v. Hopkins' Adm'r*, 37 S.W.2d 1, 238 Ky. 136.

88. Wis.—*Hanes v. Hermesen*, 236 N. W. 646, 205 Wis. 16.

89. La.—*Abrego v. Tri-State Transit Co.*, App., 22 So.2d 681.

90. La.—*Marsiglia v. Toye*, App., 158 So. 589.

91. Pa.—*Jacamino v. Harrison Motor Freight Co.*, 5 A.2d 393, 135 Pa. Super. 356.

Evidence showing status of occupant of vehicle see *infra* § 516 o.

a person involved in a motor vehicle accident or collision before or after the accident or collision is admissible.

Evidence of acts or conduct of a person involved in a motor vehicle accident or collision prior to the accident or collision may be admissible,⁹² as where the acts or conduct took place immediately prior to the accident or collision,⁹³ or there is other evidence showing that the conduct continued to the time of the accident or collision,⁹⁴ or the evidence is not so palpably remote as to render its reception an abuse of discretion.⁹⁵ On the other hand, evidence of conduct before the accident or collision may be inadmissible,⁹⁶ as in the case of evidence of conduct a considerable time before,⁹⁷ or a considerable distance from the place of,⁹⁸ the accident

or collision.

Evidence of acts or conduct after the accident or collision may be admissible, as in the case of acts or conduct immediately after the accident or collision,⁹⁹ or where the evidence is offered for a purpose other than that of proving negligence.¹ However, its subject matter may be such that evidence of acts or conduct after the accident or collision is inadmissible.² Evidence held admissible includes: Evidence that defendant's truck went "out of sight" after the accident;³ evidence that a motorist, after leaving his automobile and looking at a bicyclist whom his vehicle had struck, ran back to his automobile and started the motor;⁴ evidence that de-

92. U.S.—Melville v. State of Md. to Use of Morris, C.C.A.Md., 155 F.2d 440.

Ark.—Kittrell v. Wilkerson, 9 S.W. 2d 788, 177 Ark. 1174.

Cal.—Hughes v. Hartman, 273 P. 560, 206 Cal. 199.

Ill.—Howard v. Ind. 50 N.E.2d 769, 320 Ill.App. 338—Walters v. Ind. 48 N.E.2d 791, 319 Ill.App. 162—Popadowski v. Bergaman, 26 N.E. 2d 722, 304 Ill.App. 422.

Iowa.—Waldman v. Sanders Motor Co., 243 N.W. 555, 214 Iowa 1139.

Mass.—Reardon v. Marston, 38 N.E. 2d 644, 310 Mass. 461.

Mich.—Buechel v. Williams, 262 N.W. 759, 273 Mich. 132.

Minn.—Johnson v. Sunshine Creamery Co., 274 N.W. 404, 200 Minn. 428—Nicol v. Gettler, 247 N.W. 8, 188 Minn. 69.

N.H.—Belanger v. Berube, 185 A. 898, 88 N.H. 191.

N.C.—Teasley v. Burwell, 153 S.E. 607, 199 N.C. 18.

Ohio.—Glass v. Miller, App., 51 N.E. 2d 299.

Pa.—Gerhart v. East Coast Coach Co., 166 A. 564, 310 Pa. 535—Shellenger v. Reading Transp. Co., 154 A. 297, 303 Pa. 122.

Tenn.—Faulk v. McPherson, 182 S.W. 2d 130, 27 Tenn.App. 506.

Wis.—Hefeie v. Rotter, 222 N.W. 220, 197 Wis. 300.

Evidence of course of conduct pursued by a truck driver for a considerable distance up to a very short distance and a very brief space of time before the collision is properly admitted, any question as to its remoteness being within the sound discretion of the trial judge as to the admission or rejection of evidence.—Mathews v. Dudley, 297 P. 544, 212 Cal. 58, corrected on other grounds 298 P. 819.

93. Mass.—Reardon v. Marston, 38 N.E.2d 644, 310 Mass. 461.

S.C.—Hallaman v. Cushman, 13 S.E. 2d 498, 196 S.C. 402.
42 C.J. p 1227 note 25.

94. Conn.—Sosnowski v. Lenox, 53 A.2d 388, 133 Conn. 624.

Mass.—Reardon v. Marston, 38 N.E. 2d 644, 310 Mass. 461.

Admissibility to show mental state
Where conduct of defendant immediately before collision was identical in character with what it had been throughout the entire trip, evidence of defendant's conduct before collision occurred was properly admitted to show his mental state.—Kennard v. Palmer, App., 53 N.E.2d 652, reversed on other grounds 53 N.E.2d 908, 143 Ohio St. 1.

95. Cal.—Jennings v. Arata, 188 P. 2d 298, 83 Cal.App.2d 143.

96. Conn.—Shinville v. Hanscom, 166 A. 398, 116 Conn. 672.

Idaho.—Franklin v. Wooters, 45 P.2d 804, 55 Idaho 619.

Mass.—Hoxie v. Hall, 7 N.E.2d 422, 297 Mass. 80.

Ohio.—Rector v. Hyer, App., 41 N.E. 2d 886.

Or.—Frangos v. Edmunds, 173 P.2d 596, 179 Or. 577.

Va.—Butler v. Greenwood, 23 S.E.2d 217, 180 Va. 456.

97. Ky.—Goins v. Slusher, 140 S.W.2d 363, 282 Ky. 710.

Pa.—Becker v. Saylor, 177 A. 804, 317 Pa. 573.

Driver's negligence on other occasions see supra § 515.

98. Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Pa.—Sanders v. Statesbury, 100 Pa. Super. 523.

Conduct too remote to bear on conduct at scene of accident

Conn.—Buonanno v. Cameron, 41 A. 2d 107, 131 Conn. 513.

Unsteady driving one-half to one mile from place of accident

N.Y.—Shaw v. Skopp, 190 N.Y.S. 859, 198 App.Div. 618.

99. Ky.—Fremd v. Glviden, 24 S.W. 2d 915, 233 Ky. 38.

Mass.—Reardon v. Marston, 38 N.E. 2d 644, 310 Mass. 461.

Ohio.—Keeshin Motor Express Co. v. Wagenbach, 13 Ohio Supp. 17.

S.C.—Hallaman v. Cushman, 13 S.E. 2d 498, 196 S.C. 402.

Restriction to res gestæ

The conduct of defendant's chauffeur, subsequent to the accident, has been said not to be relevant or material, except in so far as it is a part of the res gestæ and might tend to throw light on the act which is charged to be negligent.—Minor v. Stevens, 118 P. 213, 65 Wash. 423, 42 L.R.A.N.S., 1178.

1. N.J.—Apgar v. Hoffman Const. Co., 11 A.2d 25, 124 N.J.Law 86.

2. Evidence that defendant drove carefully after accident

Vt.—Desmarchier v. Frost, 99 A. 782, 91 Vt. 138.

Evidence of negligent driving after accident

Vt.—Ronan v. J. G. Turnbull Co., 131 A. 788, 99 Vt. 280.

Evidence of driver's nervousness after accident

N.H.—Christie v. New England Telephone & Telegraph Co., 177 A. 300, 87 N.H. 236.

Evidence of driver's discharge by employer after accident

Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.
42 C.J. p 1227 note 35.

Evidence of failure of officer to arrest driver after accident

Ky.—Allender Co. v. Browning's Adm'x, 46 S.W.2d 116, 242 Ky. 273.
Ohio.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284.

3. Ala.—Ruffin Coal, etc., Co. v. Rich, 108 So. 596, 214 Ala. 633.

4. Mass.—Reardon v. Marston, 38 N.E.2d 644, 310 Mass. 461.

defendant refused to assist plaintiff in going to a hospital for treatment and induced others to refuse assistance;⁵ and evidence of a violation of a "stop and render assistance" statute.⁶ On the other hand, it has been held that evidence that after plaintiff was struck the chauffeur started to run away, was followed, caught, and brought back by one of the witnesses for plaintiff is not admissible as evidence of negligence.⁷ At any rate, where defendant remained at the scene of the accident, evidence that subsequently a police officer made unsuccessful efforts to find him is inadmissible;⁸ where the removal of plaintiff's automobile has been accounted for, evidence concerning a police official's efforts to locate it is immaterial;⁹ and evidence that, some time after the persons involved had left the scene of the accident, one of them did not visit another who was injured,¹⁰ or did not inquire about the injury or offer any assistance,¹¹ should not be admitted.

Where there is evidence that defendant's physical condition has not materially changed, the manner in which he operated his automobile within a reasonable time before and after the accident may be shown to rebut the inference that at the time of the accident he was unfit to stop, regulate, or control an automobile because of alleged disabilities,¹² but not for the purpose of showing that he was operating the automobile carefully at the time of the accident.¹³ It has been held that evidence that other drivers on the same day did not see the sunken place in the road into which defendant drove his vehicle is not admissible;¹⁴ but it has also been held that evidence that during the same night other automobiles collided, or nearly collided, with the parked unlighted truck involved is admissible as

corroborative of testimony that the truck was not clearly discernible to travelers.¹⁵

b. Age, Experience, Intelligence, or Physical Condition

(1) In general

(2) Intoxication or use of intoxicants

(1) In General

Evidence of the physical condition of a person involved in the accident or collision and of such facts as that he was asleep or fatigued, or had defective vision or only one arm or leg, may be admissible. Where a minor is involved, his age and intelligence, and, if he was a driver, his experience or lack thereof in driving, may be considered.

It is proper to show plaintiff's or intestate's physical condition as bearing on the question of contributory negligence¹⁶ or on defendant's claim that plaintiff fell while attempting to climb up on a trailer.¹⁷ An operator's application for a license, in which he failed to disclose any physical incapacity or infirmity, is incompetent against him.¹⁸

Sleep or fatigue. Competent evidence that the operator of a motor vehicle involved in the accident or collision was asleep at the time is admissible,¹⁹ as is also evidence of preceding events showing his condition as to fatigue and alertness of mind.²⁰

Vision. The condition of the eyes of a driver of a motor vehicle may be considered in determining whether his vehicle was on the wrong side of the highway.²¹ Also, evidence that the driver wore no glasses and that an expired operator's license required him to wear adequate glasses is admissible.²² However, where, in an action for a negligent collision, plaintiff admits that his eyes were bad, testimony as to the details or nature of the eye

5. Mo.—Pogue v. Rosegrant, 98 S. W.2d 528.

6. Ga.—Battle v. Kilcrease, 189 S.E. 573, 54 Ga App. 808.

S.C.—Hallman v. Cushman, 13 S.E. 2d 498, 196 S.C. 402.

Failure to report accident see *infra* subdivision p of this section.

Circumstance showing consciousness of responsibility

Failure of the driver of a motor vehicle to stop, as required by law, at the scene of an accident in which he is involved is admissible in evidence as a circumstance tending to show a consciousness on his part of his responsibility for the accident.—Shaddy v. Daley, 76 P.2d 279, 58 Idaho 536.

7. N.Y.—Molino v. New York, 186 N.Y.S. 742, 195 App.Div. 496.

8. Conn.—Tomasko v. Raucci, 155 A. 64, 113 Conn. 274.

9. Md.—Marine v. Stewart, 168 A. 891, 165 Md. 698.

10. Cal.—Hastings v. Serleto, 143 P. 2d 956, 61 Cal App.2d 672.

Ky.—Field v. Collins, 92 S.W.2d 793, 263 Ky. 474.

11. Ky.—Field v. Collins, *supra*.

12. Mass.—O'Hare v. Gloag, 108 N.E. 566, 221 Mass. 24.

13. Mass.—O'Hare v. Gloag, *supra*.

14. Tenn.—Wilkins v. Malone, 13 Tenn.App. 648.

15. Me.—Nadeau v. Perkins 193 A. 877, 135 Me. 215.

Evidence of other accidents or near accidents on other occasions at same place generally see *supra* § 515.

16. Mich.—Madalinski v. Hill, 269 N.W. 147, 277 Mich. 219.

17. Mich.—Deyo v. Detroit Creamery Co., 241 N.W. 244, 257 Mich. 77. Evidence of personal injury see *infra* subdivision g of this section.

18. Mass.—O'Hare v. Gloag, 108 N.E. 566, 221 Mass. 24.

19. Ala.—Whiddon v. Malone, 124 So. 516, 220 Ala. 220.

N.C.—Hobbs v. Queen City Coach Co., 34 S.E.2d 211, 225 N.C. 323.

Vt.—Steele v. Lackey, 177 A. 309, 107 Vt. 192.

20. Vt.—Steele v. Lackey, *supra*. Wash.—Edwards v. Washkuhn, 119 P.2d 905, 11 Wash.2d 425.

21. Colo.—Campbell v. Trate, 149 P. 2d 380, 112 Colo. 265.

22. Cal.—Shiffette v. Walkup Drayage & Warehouse Co., 169 P.2d 996, 74 Cal.App.2d 903.

Evidence of lack of license see *infra* subdivision j of this section.

a person involved in a motor vehicle accident or collision before or after the accident or collision is admissible.

Evidence of acts or conduct of a person involved in a motor vehicle accident or collision prior to the accident or collision may be admissible,⁹² as where the acts or conduct took place immediately prior to the accident or collision,⁹³ or there is other evidence showing that the conduct continued to the time of the accident or collision,⁹⁴ or the evidence is not so palpably remote as to render its reception an abuse of discretion.⁹⁵ On the other hand, evidence of conduct before the accident or collision may be inadmissible,⁹⁶ as in the case of evidence of conduct a considerable time before,⁹⁷ or a considerable distance from the place of,⁹⁸ the accident

or collision.

Evidence of acts or conduct after the accident or collision may be admissible, as in the case of acts or conduct immediately after the accident or collision,⁹⁹ or where the evidence is offered for a purpose other than that of proving negligence.¹ However, its subject matter may be such that evidence of acts or conduct after the accident or collision is inadmissible.² Evidence held admissible includes: Evidence that defendant's truck went "out of sight" after the accident;³ evidence that a motorist, after leaving his automobile and looking at a bicyclist whom his vehicle had struck, ran back to his automobile and started the motor;⁴ evidence that de-

92. U.S.—*Melville v. State of Md.* to Use of Morris, C.C.A.Md., 155 F.2d 440.

Ark.—*Kittrell v. Wilkerson*, 9 S.W. 2d 788, 177 Ark. 1174.

Cal.—*Hughes v. Hartman*, 273 P. 560, 206 Cal. 199.

Ill.—*Howard v. Ind.* 50 N.E.2d 769, 320 Ill.App. 338—*Walters v. Ind.* 48 N.E.2d 791, 319 Ill.App. 162—*Popadowski v. Bergaman*, 26 N.E. 2d 722, 304 Ill.App. 422.

Iowa.—*Waldman v. Sanders Motor Co.*, 243 N.W. 555, 214 Iowa 1139.

Mass.—*Reardon v. Marston*, 38 N.E. 2d 644, 310 Mass. 461.

Mich.—*Buchel v. Williams*, 262 N.W. 759, 273 Mich. 132.

Minn.—*Johnson v. Sunshine Creamery Co.*, 274 N.W. 404, 200 Minn. 428—*Nicol v. Gettler*, 247 N.W. 8, 188 Minn. 69.

N.H.—*Belanger v. Berube*, 185 A. 898, 88 N.H. 191.

N.C.—*Teasley v. Burwell*, 153 S.E. 607, 199 N.C. 18.

Ohio.—*Glass v. Miller*, App., 51 N.E. 2d 299.

Pa.—*Gerhart v. East Coast Coach Co.*, 166 A. 564, 310 Pa. 535—*Shellenberger v. Reading Transp. Co.*, 154 A. 297, 303 Pa. 122.

Tenn.—*Faulk v. McPherson*, 182 S.W. 2d 130, 27 Tenn.App. 506.

Wis.—*Hefele v. Rotter*, 222 N.W. 220, 197 Wis. 800.

Evidence of course of conduct pursued by a truck driver for a considerable distance up to a very short distance and a very brief space of time before the collision is properly admitted, any question as to its remoteness being within the sound discretion of the trial judge as to the admission or rejection of evidence.—*Mathews v. Dudley*, 297 P. 544, 212 Cal. 58, corrected on other grounds 298 P. 819.

93. Mass.—*Reardon v. Marston*, 38 N.E.2d 644, 310 Mass. 461.

S.C.—*Hallaman v. Cushman*, 13 S.E. 2d 498, 196 S.C. 402.

42 C.J. p 1227 note 25.

94. Conn.—*Susnowski v. Lenox*, 53 A 2d 388, 133 Conn. 624.

Mass.—*Reardon v. Marston*, 38 N.E. 2d 644, 310 Mass. 461.

Admissibility to show mental state

Where conduct of defendant immediately before collision was identical in character with what it had been throughout the entire trip, evidence of defendant's conduct before collision occurred was properly admitted to show his mental state.—*Kennard v. Palmer*, App., 53 N.E.2d 652, reversed on other grounds 53 N.E.2d 908, 143 Ohio St. 1.

95. Cal.—*Jennings v. Arata*, 188 P. 2d 298, 83 Cal.App.2d 143.

96. Conn.—*Shinville v. Hanscom*, 166 A. 398, 116 Conn. 672.

Idaho.—*Franklin v. Wooters*, 45 P.2d 504, 55 Idaho 619.

Mass.—*Hoxie v. Hall*, 7 N.E.2d 422, 297 Mass. 80.

Ohio.—*Rector v. Hyer*, App., 41 N.E. 2d 886.

Or.—*Frangos v. Edmunds*, 173 P.2d 596, 179 Or. 577.

Va.—*Butler v. Greenwood*, 23 S.E.2d 217, 180 Va. 456.

97. Ky.—*Goins v. Slusher*, 140 S. W.2d 363, 282 Ky. 710.

Pa.—*Becker v. Saylor*, 177 A. 804, 317 Pa. 573.

Driver's negligence on other occasions see supra § 515.

98. Md.—*Cumberland & Westernport Transit Co. v. Metz*, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md 424, and appeal dismissed *American Oil Co. v. Metz*, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Pa.—*Sanders v. Stotesbury*, 100 Pa. Super. 523.

Conduct too remote to bear on conduct at scene of accident

Conn.—*Buonanno v. Cameron*, 41 A. 2d 107, 131 Conn. 513.

Unsteady driving one-half to one mile from place of accident

N.Y.—*Shaw v. Skopp*, 190 N.Y.S. 859, 198 App.Div. 618.

99. Ky.—*Fremd v. Glviden*, 24 S.W. 2d 915, 233 Ky. 38.

Mass.—*Reardon v. Marston*, 38 N.E. 2d 644, 310 Mass. 461.

Ohio.—*Keeshin Motor Express Co. v. Wagenbach*, 13 Ohio Supp. 17.

S.C.—*Hallaman v. Cushman*, 13 S.E. 2d 498, 196 S.C. 402.

Restriction to res gestæ

The conduct of defendant's chauffeur, subsequent to the accident, has been said not to be relevant or material, except in so far as it is a part of the res gestæ and might tend to throw light on the act which is charged to be negligent.—*Minor v. Stevens*, 118 P. 213, 65 Wash. 423, 42 L.R.A., N.S., 1178.

1. N.J.—*Apgar v. Hoffman Const. Co.*, 11 A.2d 25, 124 N.J.Law 86.

2. **Evidence that defendant drove carefully after accident**

Vt.—*Desmarchier v. Frost*, 99 A. 782, 91 Vt. 138.

Evidence of negligent driving after accident

Vt.—*Ronan v. J. G. Turnbull Co.*, 131 A. 788, 99 Vt. 280.

Evidence of driver's nervousness after accident

N.H.—*Christie v. New England Telephone & Telegraph Co.*, 177 A. 300, 87 N.H. 236.

Evidence of driver's discharge by employer after accident

Ala.—*Coleman v. Hamilton Storage Co.*, 180 So. 553, 235 Ala. 553.

42 C.J. p 1227 note 35.

Evidence of failure of officer to arrest driver after accident

Ky.—*Allender Co. v. Browning's Adm'x*, 46 S.W.2d 116, 242 Ky. 273.

Ohio.—*Wolfe v. Baskin*, 28 N.E.2d 629, 137 Ohio St. 284.

3. Ala.—*Ruffin Coal, etc., Co. v. Rich*, 108 So. 596, 214 Ala. 633.

4. Mass.—*Reardon v. Marston*, 38 N.E.2d 644, 310 Mass. 461.

fendant refused to assist plaintiff in going to a hospital for treatment and induced others to refuse assistance;⁵ and evidence of a violation of a "stop and render assistance" statute.⁶ On the other hand, it has been held that evidence that after plaintiff was struck the chauffeur started to run away, was followed, caught, and brought back by one of the witnesses for plaintiff is not admissible as evidence of negligence.⁷ At any rate, where defendant remained at the scene of the accident, evidence that subsequently a police officer made unsuccessful efforts to find him is inadmissible;⁸ where the removal of plaintiff's automobile has been accounted for, evidence concerning a police official's efforts to locate it is immaterial;⁹ and evidence that, some time after the persons involved had left the scene of the accident, one of them did not visit another who was injured,¹⁰ or did not inquire about the injury or offer any assistance,¹¹ should not be admitted.

Where there is evidence that defendant's physical condition has not materially changed, the manner in which he operated his automobile within a reasonable time before and after the accident may be shown to rebut the inference that at the time of the accident he was unfit to stop, regulate, or control an automobile because of alleged disabilities,¹² but not for the purpose of showing that he was operating the automobile carefully at the time of the accident.¹³ It has been held that evidence that other drivers on the same day did not see the sunken place in the road into which defendant drove his vehicle is not admissible;¹⁴ but it has also been held that evidence that during the same night other automobiles collided, or nearly collided, with the parked unlighted truck involved is admissible as

corroborative of testimony that the truck was not clearly discernible to travelers.¹⁵

b. Age, Experience, Intelligence, or Physical Condition

- (1) In general
- (2) Intoxication or use of intoxicants

(1) In General

Evidence of the physical condition of a person involved in the accident or collision and of such facts as that he was asleep or fatigued, or had defective vision or only one arm or leg, may be admissible. Where a minor is involved, his age and intelligence, and, if he was a driver, his experience or lack thereof in driving, may be considered.

It is proper to show plaintiff's or intestate's physical condition as bearing on the question of contributory negligence¹⁶ or on defendant's claim that plaintiff fell while attempting to climb up on a trailer.¹⁷ An operator's application for a license, in which he failed to disclose any physical incapacity or infirmity, is incompetent against him.¹⁸

Sleep or fatigue. Competent evidence that the operator of a motor vehicle involved in the accident or collision was asleep at the time is admissible,¹⁹ as is also evidence of preceding events showing his condition as to fatigue and alertness of mind.²⁰

Vision. The condition of the eyes of a driver of a motor vehicle may be considered in determining whether his vehicle was on the wrong side of the highway.²¹ Also, evidence that the driver wore no glasses and that an expired operator's license required him to wear adequate glasses is admissible.²² However, where, in an action for a negligent collision, plaintiff admits that his eyes were bad, testimony as to the details or nature of the eye

5. Mo.—Pogue v. Rosegrant, 98 S. W.2d 528.

6. Ga.—Battle v. Kilcrease, 189 S.E. 573, 54 Ga App. 808.

S.C.—Hallman v. Cushman, 13 S.E. 2d 498, 196 S.C. 402.

Failure to report accident see *infra* subdivision p of this section.

Circumstance showing consciousness of responsibility

Failure of the driver of a motor vehicle to stop, as required by law, at the scene of an accident in which he is involved is admissible in evidence as a circumstance tending to show a consciousness on his part of his responsibility for the accident.—Shaddy v. Daley, 76 P.2d 279, 58 Idaho 536.

7. N.Y.—Molino v. New York, 186 N.Y.S. 742, 195 App.Div. 496.

8. Conn.—Tomasko v. Raucci, 155 A. 64, 113 Conn. 274.

9. Md.—Marine v. Stewart, 168 A. 891, 165 Md. 698.

10. Cal.—Hastings v. Serleto, 143 P. 2d 956, 61 Cal App.2d 672

Ky.—Field v. Collins, 92 S.W.2d 793, 263 Ky. 474.

11. Ky.—Field v. Collins, *supra*.

12. Mass.—O'Hare v. Gloag, 108 N.E. 566, 221 Mass. 24.

13. Mass.—O'Hare v. Gloag, *supra*.

14. Tenn.—Wilkins v. Malone, 13 Tenn.App. 648.

15. Me.—Nadeau v. Perkins 193 A. 877, 135 Me. 215.

Evidence of other accidents or near accidents on other occasions at same place generally see *supra* § 515.

16. Mich.—Madalinaki v. Hill, 269 N.W. 147, 277 Mich. 219.

17. Mich.—Deyo v. Detroit Creamery Co., 241 N.W. 244, 257 Mich. 77. Evidence of personal injury see *infra* subdivision g of this section.

18. Mass.—O'Hare v. Gloag, 108 N.E. 566, 221 Mass. 24.

19. Ala.—Whiddon v. Malone, 124 So 516, 220 Ala. 220.

N.C.—Hobbs v. Queen City Coach Co., 34 S.E.2d 211, 225 N.C. 323.

Vt.—Steele v. Lackey, 177 A. 309, 107 Vt. 192.

20. Vt.—Steele v. Lackey, *supra*. Wash.—Edwards v. Washkuhn, 119 P.2d 905, 11 Wash.2d 425.

21. Colo.—Campbell v. Trate, 149 P. 2d 380, 112 Colo. 265.

22. Cal.—Shiffette v. Walkup Drayage & Warehouse Co., 169 P.2d 996, 74 Cal.App.2d 903.

Evidence of lack of license see *infra* subdivision j of this section.

trouble is properly excluded as not throwing any light on his ability to drive a car;²³ and the fact that a driver has only one eye is immaterial where he has a license to drive and it does not appear that he cannot operate an automobile properly or that his having only one eye contributed to the happening of the accident.²⁴

Arms, legs, or feet. It is proper to show that the driver of defendant's automobile had artificial legs,²⁵ as well as any act or omission to act arising from this condition which contributed to the happening of the accident;²⁶ but it is not proper to permit a witness, not knowing all the facts, to state his opinion that a driver so maimed could not act as efficiently in an emergency as a normal person;²⁷ and a claimed fact that defendant driver had a sore foot is immaterial where he had a license to drive and it does not appear that he could not operate an automobile properly or that the sore foot contributed to the happening of the accident.²⁸ Where defendant claims that the fact that plaintiff motorist had only one arm was an impediment contributing to the collision, the testimony of qualified witnesses is admissible to show plaintiff's competency to drive an automobile.²⁹

Where person involved in accident or collision is a minor, it has been held, notwithstanding some authority to the contrary,³⁰ that his age,³¹ intelligence,³² and experience³³ may be considered.

(2) Intoxication or Use of Intoxicants

In connection with other evidence, evidence of the intoxication at or near the time of a motor vehicle accident or collision of a driver or other person involved in the accident or collision is admissible as bearing on the question of negligence or contributory negligence.

Evidence of the intoxication of defendant,³⁴ or of the driver of his motor vehicle,³⁵ at or shortly after the time of the accident is admissible as evidence of a circumstance to be considered with other facts in evidence in determining the question of negligence, at least where other evidence as to negligence is conflicting or subject to different inferences.³⁶ Likewise evidence of the intoxication of plaintiff or decedent,³⁷ or of the driver of the motor vehicle in which plaintiff or decedent was riding as a passenger,³⁸ at or near the time of the accident is admissible as bearing on the question of contributory negligence. Also, evidence of drinking of intoxicating liquor by the driver of a vehicle involved in the accident,³⁹ or by occupants of the vehicle he was

23. Mont.—Knott v. Pepper, 239 P. 1037, 74 Mont. 236.

24. N.Y.—Shepard v. Peck, 5 N.Y.S. 2d 865, 254 App.Div. 421.

25. Wash.—Devoto v. United Auto Transp. Co., 223 P. 1050, 128 Wash. 604.

26. Wash.—Devoto v. United Auto Transp. Co., supra.

27. Wash.—Devoto v. United Auto Transp. Co., supra.

28. N.Y.—Shepard v. Peck, 5 N.Y.S. 2d 865, 254 App.Div. 421.

29. Wash.—O'Neil v. Wllshire, 57 P. 2d 1254, 186 Wash. 276.

30. Conn.—Kurtz v. Morse Oil Co., 158 A. 906, 114 Conn. 336.

31. Mich.—Breger v. Feigenson Bros. Co., 249 N.W. 493, 264 Mich. 37.

Ohio.—Danner v. Avery, 168 N.E. 52, 32 Ohio App. 301.

32. Mich.—Breger v. Feigenson Bros. Co., 249 N.W. 493, 264 Mich. 37.

Capacity to exercise care

In action for death of child when struck by truck while crossing street, evidence that child had often been instructed to look for automobiles both ways before crossing a street, to cross only on a crosswalk, and never to run, was admissible solely on question of child's capacity to exercise care.—Ferris v. Turner, 70 N.E. 2d 715, 320 Mass. 555.

33. Mich.—Breger v. Feigenson Bros. Co., 249 N.W. 493, 264 Mich. 37.

Experience or lack thereof in driving
Ohio.—Danner v. Avery, 168 N.E. 52, 32 Ohio App. 301.

W.Va.—Yuncke v. Welker, 36 S.E.2d 410, 128 W.Va. 299.

34. Ala.—Landham v. Lloyd, 136 So. 815, 223 Ala. 487.

Cal.—Strauss v. Buckley, 65 P.2d 1352, 20 Cal.App.2d 7—Tracy v. Brecht, 39 P.2d 498, 3 Cal.App.2d 105

Ky.—Webb v. Adams, 194 S.W.2d 515, 302 Ky. 335.

42 C.J. p 1226 note 13.

35. Cal.—Ketchum v. Massa, 266 P. 352, 90 Cal App. 762

Ky.—Bray-Robinson Clothing Co. v. Higgins, 276 S.W. 129, 210 Ky. 432.

Tex.—Hicks v. Frost, Civ App., 195 S.W.2d 606, refused no reversible error.—Southwestern Bell Telephone Co. v. Ferris, Civ.App., 89 S. W.2d 229, error dism.

36. Wash.—Bates v. Tirk, 31 P.2d 525, 177 Wash. 286.

37. Ark.—Sylvester v. U-Drive-Em System, 90 S.W.2d 232, 192 Ark. 75.

Cal.—Coakley v. Ajuria, 290 P. 33, 209 Cal. 745.

Iowa.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.

Or.—Lynn v. Stinnette, 31 P.2d 764, 147 Or. 105.

42 C.J. p 1227 note 15.

Time of intoxication held not too remote

(1) Three hours.—Stuart v. McVey, 87 P.2d 446, 59 Idaho 740.

(2) Three and one-half or four hours.—Eads' Adm'r v. Purcifull, 158 S.W.2d 645, 289 Ky. 350.

(3) Twelve hours.—Drury v. Hag-erstrom, 157 P.2d 878, 68 Cal.App.2d 742.

38. Ky.—Whitney v. Penick, 136 S. W.2d 570, 281 Ky. 474.

Me.—Richard v. Neault, 135 A. 524, 126 Me. 17.

39. Iowa.—Pierce v. Hensinkveld, 14 N.W.2d 275, 234 Iowa 1348—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.

Neb.—Callahan v. Prewitt, 13 N.W. 2d 660, 143 Neb. 787.

If shown to have been known to guest, driver's drinking may bear on the question of contributory negligence in an action by the guest.—Metrinko v. Witherell, 188 A. 213, 134 Me. 483.

Extent of drinking

(1) Although there was no claim that defendant motorist was heavily intoxicated, nevertheless, in connection with other circumstances, such as weariness due to lack of sleep, the extent to which he had been drinking was circumstance that jury had right to consider in deciding whether proper lookout had been kept.—Jolley v. Clemens, 33 P.2d 51, 28 Cal.App.2d 55.

driving,⁴⁰ prior to the accident and on the same day is admissible, in connection with other circumstances, as bearing on the care exercised by the driver and the issue of negligence or contributory negligence; and testimony of officers who arrived on the scene shortly after the accident as to drinking by the driver of defendant's taxicab and the fact that the driver's employer took charge of him after the accident has been held admissible.⁴¹

A witness may be permitted to state that a driver's breath smelled of liquor,⁴² as well as to testify to acts and conduct from which an inference that he was under the influence of liquor⁴³ to such an extent as to affect his driving⁴⁴ might be drawn; and, where he had an opportunity to observe a

driver's conduct, a witness may state his opinion that the driver was intoxicated.⁴⁵ However, other evidence,⁴⁶ or the absence of other evidence,⁴⁷ in a particular case may render inadmissible evidence offered to show intoxication or drinking.

Competent evidence in explanation or rebuttal of other evidence previously introduced by the adverse party to show drinking⁴⁸ or lack of drinking⁴⁹ by a person involved in the accident or collision is admissible.

Drinking habitually or on other occasions. Ordinarily evidence that the driver of an automobile involved in an accident or collision was in the habit of drinking intoxicating liquor,⁵⁰ or was intoxicated⁵¹ or used intoxicants⁵² on one or more oc-

(2) Testimony as to number of drinks of intoxicating liquor taken by automobile driver is admissible—Tracy v. Brecht, 39 P.2d 498, 3 Cal. App.2d 105.

40. U.S.—Melville v. State of Md. to Use of Morris, C.C.A Md., 155 F.2d 440.

Iowa.—Pierce v. Heusinkveld, 14 N. W.2d 275, 234 Iowa 1348—Maland v. Tesdall, 5 N.W.2d 327, 232 Iowa 959.

41. Ky.—Randle v. Mitchell, 142 S. W.2d 124, 283 Ky. 501.

42. Cal.—Barrett v. Harman, 1 P.2d 458, 115 Cal.App. 283.

Kan.—Cox v. Kellogg's Sales Co., 95 P.2d 531, 150 Kan. 561.

Mass.—Learned v. Hawthorne, 169 N.E. 557, 269 Mass. 554.

N.Y.—Clyde v. Grill, 172 N.Y.S. 136

Wash.—Garcia v. Moran, 77 P.2d 988, 194 Wash. 328.

Odor of liquor as bearing on question of reasonable speed see *infra* subdivision r of this section.

One to two and one-half hours after accident

Idaho.—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.

In connection with, or absence of, other evidence

(1) Testimony of qualified witnesses that automobile driver had the odor of liquor on his breath at the time of a collision was competent when coupled with evidence that automobile was zigzagging as it approached point of collision and driver had his head drooped over steering wheel.—Cheatham v. Chartrau, 176 S.W.2d 865, 237 Mo.App. 793.

(2) On the other hand, testimony that witness smelled alcohol on breath of driver of truck striking pedestrian is inadmissible where there is no evidence of intoxication and no evidence of conduct or appearance, other than the evidence in question, from which a reasonable inference

of intoxication could be drawn.—Critz v. Donovan, 137 A. 665, 289 Pa. 381.

(3) Where primary negligence is not established, it is not error to reject evidence of the odor of liquor on the breath of defendant driver.—Fleming v. McMillan, 26 S.E.2d 8, 125 W.Va. 356

43. Cal.—Tracy v. Brecht, 39 P.2d 498, 3 Cal App 2d 105.

N.Y.—Clyde v. Grill, 172 N.Y.S. 136.

44. Wash.—Garcia v. Moran, 77 P.2d 988, 194 Wash. 328.

Particular evidence

Evidence that host, after taking several drinks, drove between forty and fifty miles per hour through city, nearly hit school bus, refused to slow down, and swerved out and back in passing cars, was admissible.—Tracy v. Brecht, 39 P.2d 498, 3 Cal.App.2d 105.

45. Ind.—Buddenberg v. Morgan, 38 N.E.2d 287, 110 Ind App. 609.

Tex.—Hicks v. Frost, Civ.App., 195 S.W.2d 606, refused no reversible error.

46. La.—Frazier v. F. Strauss & Son, App., 173 So. 343.

Where defendant testified he drank liquor after collision, excluding testimony of nurses at hospital regarding his drunkenness subsequent to collision was not error.—Goodman v. Lang, 130 So. 50, 158 Miss. 204, suggestion of error overruled 130 So. 311.

47. Or.—Lynch v. Clark, 194 P.2d 416.

Subsequent intoxication

Where the accident occurred before noon, testimony that driver of automobile was under influence of liquor late in afternoon or evening of day of accident was incompetent in absence of evidence that driver had been drinking during the forenoon of that day and before the accident, or that he was to any extent intoxicated, or under the influence of liquor

at the time of, or prior to, the accident.—Tipton v. Estill Ice Co., 132 S. W.2d 347, 279 Ky. 793.

Conduct consistent with sobriety

In the absence of any other evidence of drinking or intoxication during the trip, evidence of conduct of a driver after the collision is inadmissible to prove intoxication where such conduct, although claimed to be peculiar, may be regarded as a natural and probable result of shock and a severe head injury and is as consistent with sobriety as with intoxication—Law v. Gallagher, 197 A. 479, 9 W.W.Harr., Del., 189.

Opinions

(1) Where there is no sufficient evidence of facts showing the likelihood that the driver of an automobile was intoxicated, the opinions of witnesses as to whether or not he was intoxicated are not admissible—Laubach v. Colley, 129 A. 88, 283 Pa. 366.

(2) A witness should not be permitted to state that in his opinion plaintiff driver "had been drinking," particularly where the evidence as a whole shows that he does not mean that plaintiff was intoxicated.—Clyde v. Grill, 172 N.Y.S. 136.

48. Cal.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.

N.H.—Dane v. MacGregor, 52 A.2d 290, 91 N.H. 294.

49. Cal.—Edwards v. McCormick, 181 P.2d 58, 70 Cal.App.2d 800.

50. Ky.—Dawson v. Shannon, 9 S. W.2d 998, 225 Ky. 635.

51. Mich.—Madallinski v. Hill, 269 N.W. 147, 277 Mich. 219.

Tex.—Gordon v. Texas, etc., Mercantile, etc., Co., Civ.App., 190 S.W. 748.

52. D.C.—Radio Cab v. Houser, 128 F.2d 604, 76 U.S.App.D.C. 35.

Minn.—Knutson v. Farmers' Co-op. Creamery of Jenkins, 230 N.W. 270, 180 Minn. 116.

casions remote from the date of the accident or collision, is inadmissible. However, where there is an issue in the case as to defendant's having been negligent in that he intrusted his motor vehicle to a person known by him to be unfit and incompetent to drive the vehicle, evidence of the driver's intoxication at other times,⁵³ or of his habits for many years with respect to the use of liquor,⁵⁴ is admissible.

Intoxication of witness. Evidence as to the intoxication of a witness at the time of the accident which does not show that he was too drunk to know what happened is properly excluded.⁵⁵

Presence of liquor or liquor bottles. Evidence of the presence of liquor in a motor vehicle involved in an accident or collision is admissible⁵⁶ except where there is no evidence that the driver had been drinking prior to the accident or was intoxicated at the time thereof.⁵⁷ A whisky bottle found near the scene of the accident, or evidence of the finding thereof, is inadmissible where there is no evidence identifying the bottle as belonging to the party against whom the evidence is sought to be introduced⁵⁸ or as belonging to any occupant of his vehicle,⁵⁹ or there is no evidence that such party had been drinking on the day of the accident.⁶⁰

c. Characteristics, Habits, and Traits of Horses

Evidence of the habits and traits of a horse is admissible where there is an issue in the case to which it is relevant.

In an action involving the frightening of a horse, evidence of the characteristics, habits, and traits of horses generally,⁶¹ or of the horse in question,⁶² is ordinarily admissible; but, where there is no issue of contributory negligence, evidence of reputation of the horse is properly excluded,⁶³ and, in an action to recover damages for injuries to the occupants of a buggy, evidence of the disposition of the horse is irrelevant where there was no showing that the horse was frightened or was unmanageable before the collision.⁶⁴ The fact that there were hand-holds on the reins is not admissible as evidence of the wildness of a horse.⁶⁵

d. Conditions, Dimensions, Equipment, or Damage to Motor Vehicles

Evidence of the damaged condition of a motor vehicle after the accident or collision and before the condition has changed is generally admissible.

Evidence of the condition⁶⁶ or equipment⁶⁷ of, or damage to,⁶⁸ a motor vehicle or parts thereof may be material, relevant, and admissible; but in some

53. U.S.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577. certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

Ark.—Chaney v. Duncan, 110 S.W.2d 21, 194 Ark. 1076.

54. Ariz.—Powell v. Langford, 119 P.2d 230, 58 Ariz. 281.

55. Ky.—Taylor v. Harding, 206 S.W. 285, 182 Ky. 236.

56. Minn.—Kouri v. Olson-Keogh Produce Co., 253 N.W. 98, 191 Minn. 101.

Wis.—Kull v. Advance-Rumely Thresher Co., 245 N.W. 589, 209 Wis. 565.

57. Ky.—McCulloch's Adm'r v. Abell's Adm'r, 115 S.W.2d 386, 272 Ky. 756.

Wash.—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.

58. Ky.—Whitney v. Penick, 136 S.W.2d 370, 281 Ky. 474.

N.Y.—Wurtzman v. Kalinowski, 251 N.Y.S. 328, 233 App.Div. 187.

59. Ky.—Whitney v. Penick, 136 S.W.2d 670, 281 Ky. 474.

60. Iowa.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 266—Johnston v. Calvin, 5 N.W.2d 840, 232 Iowa 531.

61. Iowa.—Delfs v. Dunshes, 122 N.W. 236, 143 Iowa 381.

62. Md.—Fletcher v. Dixon, 68 A. 875, 107 Md. 420. 42 C.J. p 1229 note 72.

63. Mo.—Cain v. Wintersteen, 128 S.W. 274, 144 Mo.App. 1.

64. Cal.—Oberholzer v. Hubbell, 171 P. 436, 36 Cal.App. 16.

65. Md.—Fletcher v. Dixon, 77 A. 326, 113 Md. 101.

66. Conn.—Bryll v. Bryll, 159 A. 884, 114 Conn. 668.

La.—Lee v. Perrin, App., 192 So. 387. 42 C.J. p 1228 note 64.

Condition of brakes

(1) In general.

U.S.—Mid-Continent Pipe Line Co. v. Whiteley, C.C.A.Okl., 116 F.2d 871.

Ky.—Mellon v. Bryden, 162 S.W.2d 2, 290 Ky. 549.

Me.—Keller v. Banks, 156 A. 817, 130 Me. 397.

Mich.—Kuchelski v. Curtis, 231 N.W. 569, 251 Mich. 210.

Pa.—Johnston v. Cheyney, 146 A. 551, 297 Pa. 199.

Wis.—Georgeson v. Nielsen, 252 N.W. 576, 214 Wis. 191.

(2) Evidence that brakes of automobile were in same condition week or two before collision as they were found to be in after collision.—Newton v. Wilder, 142 So. 831, 225 Ala. 339.

Condition of tire

Mo.—Crupe v. Spicuzza, App., 86 S.W.2d 347.

Condition of door

Mo.—Adams v. Le Bow, 172 S.W.2d 874, 237 Mo.App. 1191.

Ohio.—Lacey v. Heisey, 5 N.E.2d 699, 53 Ohio App. 451.

Noisy character of vehicle

Md.—Fletcher v. Dixon, 77 A. 326, 113 Md. 101.

R.I.—Town of Barrington v. De Stefano, 142 A. 164.

67. Mo.—Andrews v. Parker, App., 269 S.W. 807.

Lighting equipment see infra subdivision k of this section.

Lack of rear vision mirror on right side of truck

N.H.—Marcoux v. Collins, 63 A.2d 322, 94 N.H. 345.

Absence of chains

Pa.—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437—Lute v. Ross, 190 A. 391, 125 Pa.Super. 584.

68. U.S.—Boyle v. Ward, D.C.Pa., 39 F.Supp. 545, affirmed, C.C.A., 125 F.2d 672.

N.Y.—Helder v. Wiesel, 296 N.Y.S. 65, 251 App.Div. 747.

Pa.—Hain v. Ebersole, Com.Pl., 49 Dauph.Co. 122.

42 C.J. p 1228 note 64.

Injury to vehicle as bearing on ques-

cases it is otherwise,⁶⁹ as where the defects or missing equipment had nothing to do with the accident or collision⁷⁰ or plaintiff rests his right to recover on the humanitarian doctrine.⁷¹

Evidence of the condition of the vehicle, or of parts or equipment thereof, after the accident or collision is generally admissible⁷² where there is sufficient evidence of identification⁷³ and the condition has not changed substantially since the accident or collision.⁷⁴ Where defendant owns more than one truck, it is error to admit evidence of repairs to all of his trucks,⁷⁵ or to one of such trucks, without further evidence identifying such truck as the one involved in the accident.⁷⁶

Trailer. Evidence of the width,⁷⁷ length, and weight⁷⁸ of a trailer involved in the accident or collision is admissible; and evidence that two and one-half miles from the place of the accident the trailer was not tracking the truck, but extended too far in one direction, is not objectionable as being too re-

mote where the driver did not stop, readjust the load, or make any effort to remedy the position of the trailer.⁷⁹

Knowledge of defects. Where defects in defendant's vehicle were connected with the accident or collision, evidence showing or tending to show defendant's knowledge of such defects is admissible,⁸⁰ as is also the testimony of the owner of the vehicle or his agents as to inspections and examinations made before the occurrence of the accident or collision.⁸¹

e. Control and Ability to Stop

When relevant, competent evidence bearing on the driver's control of, and ability to stop, a motor vehicle is admissible.

When relevant, competent evidence bearing on the question whether the driver of a motor vehicle had the vehicle under control,⁸² or bearing on his ability to stop the vehicle in a situation necessitating a stop,⁸³ is admissible; but such evidence is

tion of speed see *infra* subdivision r of this section.

Estimated cost of repairs

Md.—Great Eastern Stages v. W. T. Cowan, Inc., 176 A. 613, 167 Md. 690.

69. Cal.—Burch v. Levy Bros. Box Co., 117 P.2d 435, 47 Cal.App.2d 104.

Or.—Frangos v. Edmunds, 173 P.2d 596, 179 Or. 577.

42 C.J. p 1228 notes 62, 65 [a].

Further evidence

Where defendant was permitted to prove that certain parts of his automobile were broken, preventing defendant, on objection being made, from showing what parts had to be replaced with new parts, was not error.—Shellabarger v. Nattler, 7 N.E.2d 365, 289 Ill.App. 473.

70. Ky.—Consolidated Coach Corporation v. Hopkins' Adm'r, 37 S.W.2d 1, 238 Ky. 136.

Wis.—Nordahl v. Farmers Mut. Auto. Ins. Co., 27 N.W.2d 707, 250 Wis. 609.

42 C.J. p 1228 note 65 [a] (2), (3).

71. Ky.—Braden's Adm'r v. Liston, 79 S.W.2d 241, 258 Ky. 44.

72. U.S.—Evansville Container Corporation v. McDonald, C.C.A.Tenn., 132 F.2d 80—Boyle v. Ward, D.C. Pa., 39 F.Supp. 645, affirmed, C.C.A., 125 F.2d 672.

Cal.—Inouye v. Gilboy Co., 300 P. 835, 115 Cal.App. 25.

Ill.—Rapers v. Holmes, 10 N.E.2d 707, 292 Ill.App. 116.

Mass.—Curtin v. Benjamin, 26 N.E.2d 354, 305 Mass. 489, 129 A.L.R. 433.

N.Y.—Scanna v. National Transp. Co., 28 N.Y.S.2d 70, 262 App.Div.

853, reargument denied 29 N.Y.S.2d 723, 262 App.Div. 891.

Ohio—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207.

Or.—Holman v. Uglow, 3 P.2d 120, 137 Or. 358, followed in Hayes v. Uglow, 3 P.2d 126, 137 Or. 373.

Markings made on automobiles by collision

Minn.—Romann v. Bender, 252 N.W. 80, 190 Minn. 419.

Condition same evening

Mich.—Delfosse v. Bresnahan, 9 N.W.2d 866, 305 Mich. 621.

Photographs may be received

U.S.—Boyle v. Ward, D.C. Pa., 39 F.Supp. 645, affirmed, C.C.A., 125 F.2d 672.

Ill.—Hann v. Brooks, 73 N.E.2d 624, 331 Ill.App. 535.

42 C.J. p 1228 note 64 [b].

73. Ky.—Mattingly v. Meuter, 121 S.W.2d 676, 275 Ky. 294.

Evidence held properly admitted, although identification not positive

S.C.—Neese v. Toms, 12 S.E.2d 859, 196 S.C. 67.

74. Mass.—Curtin v. Benjamin, 26 N.E.2d 354, 305 Mass. 489, 129 A.L.R. 433.

N.H.—Rix v. Rix, 161 A. 38, 85 N.H. 529.

Or.—Ragan v. MacGill, 292 P. 1094, 134 Or. 408, 72 A.L.R. 860.

Vehicle not moved

N.C.—Mitchell v. Atkins, 135 S.E. 28, 192 N.C. 376.

75. Ga.—Riggs v. Watson, App., 47 S.E.2d 900.

76. Ky.—Golubic v. Rasnich, 60 S.W.2d 616, 249 Ky. 286—Golubic v. Rasnich, 39 S.W.2d 513, 239 Ky. 355.

77. Pa.—Nevin Bus Line v. Paul R. Hostetter Co., 155 A. 872, 305 Pa. 72.

Wash.—Sweazey v. Valley Transport, 107 P.2d 567, 6 Wash.2d 324, 140 A.L.R. 1, opinion adhered to 111 P.2d 1010, 6 Wash.2d 324, 140 A.L.R. 20.

78. Wash.—Sweazey v. Valley Transport, *supra*.

79. Tex.—Richardson v. Impey, Civ. App., 94 S.W.2d 490, error dismissed.

80. Cal.—Silvey v. Harm, 8 P.2d 570, 120 Cal.App. 561.

Conn.—Bryll v. Bryll, 159 A. 884, 114 Conn. 668.

N.Y.—Parker v. Helfert, 252 N.Y.S. 35, 140 Misc. 905.

Pa.—Smith v. Snowden Tp., 34 A.2d 515, 348 Pa. 187.

81. Wash.—Brotherton v. Day & Night Fuel Co., 78 P.2d 788, 192 Wash. 362.

82. Wis.—Abraham v. Clark, 232 N.W. 865, 202 Wis. 451.

42 C.J. p 1226 note 5.

Opinion evidence as to control of, or time or manner of stopping, vehicle see Evidence §§ 448, 533 b.

High wind

Evidence that high wind was blowing across highway, so as to render it difficult to retain control of automobile traveling at high rate of speed, was properly admitted.—Kellogg Sales Co. v. Holroyd, 73 P.2d 139, 181 Okl. 82.

83. Wis.—Georgeson v. Nielsen, 252 N.W. 576, 214 Wis. 191.

Evidence of distance in which defendant actually stopped his vehicle is admissible where the distance in-

properly excluded where it is not relevant or material to any question in the case.⁸⁴ Where the overcrowded condition of the front seat of an automobile necessarily restricts and hampers the driver's freedom of action to exercise the necessary control in the event of an emergency, the fact that up to the time of the collision he did not have any difficulty in operating the car is immaterial.⁸⁵

f. Custom or Common Practice

A custom or common practice at the place of the accident may be admissible on the question of contributory negligence, but it is not admissible to justify negligence, or where it is contrary to a statute or ordinance, or it would not be of sufficient aid to warrant its admission.

A custom or common practice at the place of the accident may be admissible on the question of contributory negligence;⁸⁶ but it is not admissible on the question of defendant motorist's negligence in the absence of a showing that he had knowledge,

or was chargeable with knowledge, thereof;⁸⁷ and, furthermore, it is not admissible to justify negligence,⁸⁸ or to convert negligent conduct into due care,⁸⁹ or where, under the circumstances, it is not evidence of either negligence or due care,⁹⁰ or where, in view of the collateral issue it would raise and the danger of its misuse, it would not be of sufficient aid to justify its admission.⁹¹ According to the weight of authority, evidence of a custom which is contrary to a statute or ordinance is not admissible;⁹² but it has been held admissible on the question of contributory negligence,⁹³ as where violation of the statute was only evidence of negligence, and not negligence per se, the custom was not unreasonable as a matter of law, and defendant's driver was familiar therewith.⁹⁴ In applying the foregoing rules, various customs or common practices have been held admissible,⁹⁵ while others have been held inadmissible.⁹⁶

which he was able to stop the vehicle is material in the light of the petition which, in addition to allegations of primary negligence, seeks recovery on the humanitarian doctrine.—*Cox v. Reynolds*, Mo.App., 18 S.W.2d 575.

84. Ala.—*Berry v. Dannelly*, 145 So. 663, 226 Ala. 151.

Mo.—*Taylor v. Silver King Oil & Gas Co.*, App., 203 S.W.2d 147.
Ohio.—*Hansen v. Goetz*, App., 46 N.E.2d 293.

Pa.—*Kummerlen v. Pustilnik*, 45 A.2d 27, 353 Pa. 327.

85. Pa.—*McIntyre v. Pope*, 191 A. 607, 326 Pa. 172.

86. Ark.—*Follock v. Hamm*, 6 S.W.2d 541, 177 Ark. 348.

Cal.—*Scott v. Gallot*, 138 P.2d 685, 59 Cal.App.2d 421.

Ga.—*Co-op. Cab Co. v. Preston*, 21 S.E.2d 251, 67 Ga.App. 580.

Iowa.—*Langer v. Caviness*, 38 N.W.2d 421, 238 Iowa 774.

Tex.—*City of Pampa v. Todd*, Civ. App., 39 S.W.2d 636, reversed on other grounds, Com.App., 59 S.W.2d 114.

42 C.J. p 1220 note 69.

87. Conn.—*Eamiello v. Piscitelli*, 51 A.2d 912, 133 Conn. 360.

Where defendant was bound to take notice that pedestrians might be expected to cross the street at the place where a pedestrian was struck, as where an avenue ends, it is proper to exclude evidence that defendant was unaware that people were accustomed to cross the street at that point.—*Johnston v. Cheyney*, 146 A. 551, 297 Pa. 189.

88. Neb.—*Koehn v. City of Hastings*, 206 N.W. 19, 114 Neb. 106.

89. Cal.—*Milton v. Los Angeles*

Motor Coach Co., 128 P.2d 178, 53 Cal App 2d 566.

90. Cal.—*Heath v. Keyser*, App., 169 P.2d 668, 74 Cal.App.2d 877.

Inapplicable custom

Va.—*Judy v. Doyle*, 108 S.E. 6, 130 Va. 392.

42 C.J. p 1220 note 65.

91. Conn.—*Eamiello v. Piscitelli*, 51 A.2d 912, 133 Conn. 360.

92. Cal.—*Hurtel v. Albert Cohn, Inc.*, 52 P.2d 922, 5 Cal.2d 145.

Or.—*Frame v. Arrow Towing Service*, 64 P.2d 1312, 155 Or. 522.

Pa.—*Allen v. Mack*, 28 A.2d 783, 345 Pa. 407.

Tex.—*Huey & Philp Hardware Co. v. McNeil*, Civ.App., 111 S.W.2d 1205, error dismissed.

W.Va.—*Elswick v. Charleston Transit Co.*, 36 S.E.2d 419, 128 W.Va. 241.

42 C.J. p 1220 note 66.

93. Iowa.—*Langner v. Caviness*, 38 N.W.2d 421, 238 Iowa 774.

94. Ark.—*Pollock v. Hamm*, 6 S.W.2d 541, 177 Ark. 348.

95. Evidence held admissible

(1) Bus passengers' custom of standing in aisle to reach for garments on upper rack.—*Co-op. Cab Co. v. Preston*, 21 S.E.2d 251, 67 Ga. App. 580.

(2) Custom of alighting passengers walking in front of street car.—*Pollock v. Hamm*, 6 S.W.2d 541, 177 Ark. 348.

(3) Custom of automobile drivers to extend left hand before turning corner to left.—*Elvidge v. Stronge*, etc., Co., 181 N.W. 346, 148 Minn. 185.

(4) Custom of giving warning before moving trucks.—*Scott v. Gallot*, 138 P.2d 685, 59 Cal.App.2d 421.

(5) Custom of people to cross the

street in question at the point where the accident occurred.

Ohio.—*Decker v. Mitchell*, 10 Ohio App. 438, 29 Ohio C. A. 558.

Wash.—*Wickman v. Lundy*, 206 P. 842, 120 Wash. 69.

(6) Custom to use left traffic lane of street when access to right side was blocked by railroad cars.—*Dugan v. Fry*, C.C.A.N.J., 34 F.2d 723.

(7) Evidence that automobiles traveling in the direction in which defendant's automobile was traveling did not ordinarily travel on the highway on which the accident occurred.—*Di Rienzo v. Goldfarb*, 153 N.E. 784, 257 Mass. 273—42 C.J. p 1220 note 69.

(8) Evidence that it was customary for four people to ride in coupé.—*City of Iampa v. Todd*, Tex.Civ. App., 39 S.W.2d 636, reversed on other grounds, Com.App., 59 S.W.2d 114.

(9) Evidence that street cars customarily stopped to take on passengers where pedestrian was struck by bus.—*Morgan v. Bingham State Lines Co.*, 283 P. 160, 75 Utah 87.

(10) Other customs or practices. Ala.—*Brown v. Bush*, 124 So. 300, 220 Ala. 130.

Cal.—*Burke v. John E. Marshall, Inc.*, 108 P.2d 738, 42 Cal.App.2d 195—*Mace v. Watanabe*, 87 P.2d 993, 31 Cal.App.2d 321.

Iowa.—*Scott v. McKelvey*, 290 N.W. 729, 228 Iowa 264.

Md.—*Holler v. Miller*, 9 A.2d 250, 177 Md. 204.

96. Evidence held inadmissible

(1) Customs as to parking.

Cal.—*Heath v. Keyser*, 169 P.2d 668, 74 Cal.App.2d 877.

Neb.—*Koehn v. City of Hastings*, 206 N.W. 19, 114 Neb. 106.

(2) Evidence that it was common

Habits or customs of individuals with respect to negligence are discussed *supra* § 515.

Yielding right of way to loaded truck. A custom for an unloaded truck to yield the right of way to a loaded truck on a narrow road or at a narrow or defective place in a highway may, under certain conditions, be admissible on the issue of contributory negligence;⁹⁷ but it is not material where the evidence shows that both loaded and unloaded trucks passed without difficulty at the place of the collision.⁹⁸

Children playing on street. Testimony as to the customary playing of children at or near the scene of the accident has been held relevant in an action for the death of, or injuries to, a child,⁹⁹ but has also been held immaterial where, on the occasion in question, only two children were on the street and they were in plain sight.¹

g. Death or Personal Injury

In an action for death or personal injuries, evidence as to the clothing worn by the decedent or plaintiff, as well as testimony of a physician who attended him, may be admissible.

In an action to recover damages for personal injuries occasioned by the operation of a motor vehicle, the evidence admissible to prove the existence, nature, and extent of plaintiff's injuries includes the clothing worn by him at the time of the accident and

showing cuts and blood stains,² the testimony of a physician or surgeon who examined, attended, treated, or operated on, plaintiff,³ and, within proper limitations, the testimony of a medical expert⁴ or the testimony or deposition of a nonexpert witness who observed plaintiff before and after the accident.⁵ Also, it is proper to ask plaintiff whether he told defendant's driver after the collision that he, plaintiff, had not been injured as a result of the collision.⁶ On the other hand, the fact that plaintiff has received workmen's compensation is incompetent to establish the fact of injury.⁷

In a death action, clothing worn by decedent at the time of the accident may be admissible,⁸ but is properly excluded where it would not furnish proof of the fact which it is claimed it would show.⁹ The admissibility of evidence of the appearance and condition of the body of deceased is discussed in Death § 85.

According to the weight of authority, evidence of the death of or injury to another person in the same accident or collision is admissible;¹⁰ but there is also authority tending to the contrary.¹¹

h. Identification

Competent evidence tending to identify a motor vehicle, involved in the accident or collision, or the operator thereof, or a person killed in the accident, is admissible.

practice for automobiles to make left turns at intersection where sign contained words "no left turn."—*Klas v. Yellow Cab Co.*, C.C.A.III., 106 F.2d 935.

(3) Local custom of pedestrians of starting across street intersection after ringing of first traffic signal bell and before ringing of second.—*Hurtel v. Albert Cohn, Inc.*, 52 P. 2d 922, 6 Cal.2d 145.

(4) Testimony of an experienced chauffeur as to what people do when suddenly confronted with an automobile.—*Holroyd v. Gray Taxi Co.*, 179 P. 709, 39 Cal.App. 693.

(5) Testimony that U-turns were generally made at place of automobile collision, in absence of allegation or proof of ordinance designating specified places where drivers may make U-turns.—*Basil v. Pope*, 5 P.2d 329, 165 Wash. 212.

(6) Custom among automobile dealers to permit the use of their cars by customers as a matter of courtesy is not relevant to, or admissible on, the question of what the automobile in question was being used for at the time of the accident.—*Wright v. Intermountain Motor Car Co.*, 177 P. 237, 53 Utah 176.

(7) Other customs or practices.

Cal.—*Milton v. Los Angeles Motor Coach Co.*, 128 P.2d 178, 53 Cal.App. 2d 566—*Falasco v. Hulien*, 44 P.2d 469, 6 Cal.App.2d 224.

Mass.—*Liberatore v. Town of Framingham*, 53 N.E.2d 561, 315 Mass. 538.

Pa.—*Allen v. Mack*, 28 A.2d 783, 345 Pa. 407.

97. Iowa.—*Langer v. Caviness*, 28 N. W.2d 421, 238 Iowa 774.

98. Wash.—*Marich v. Moe*, 103 P.2d 362, 4 Wash.2d 343.

99. Md.—*Stafford v. Zake*, 20 A.2d 144, 179 Md. 460.

1. Mass.—*Simon v. Berkshire Street Ry. Co.*, 11 N.E.2d 485, 298 Mass. 454.

2. Cal.—*Rannard v. Harris*, 297 P. 623, 113 Cal.App. 15.

Mass.—*Barrett v. Checker Taxi Co.*, 160 N.E. 792, 263 Mass. 252.

Mo.—*Carlson v. Kansas City, etc., Auto Transit Co.*, 282 S.W. 1037, 221 Mo.App. 537.

Tenn.—*Roddy Mfg. Co. v. Dixon*, 105 S.W.2d 513, 21 Tenn.App. 81.

3. Mo.—*Carlson v. Kansas City, etc., Auto Transit Co.*, 282 S.W. 1037, 221 Mo.App. 537.

42 C.J. p 1230 note 7.

4. Ala.—*Feore v. Trammel*, 102 So. 529, 212 Ala. 325.

42 C.J. p 1230 note 8.

5. Wash.—*Truva v. Goodyear Tire, etc., Co.*, 214 P. 818, 124 Wash. 445.

42 C.J. p 1230 note 9.

6. N.Y.—*Gulotta v. Fifth Avenue Coach Co.*, 300 N.Y.S. 648, 165 Misc. 101.

7. Iowa.—*Jarvis v. Stone*, 247 N.W. 393, 216 Iowa 27.

8. Ky.—*Glasgow Ice Cream Co. v. Fruits' Adm'r*, 105 S.W.2d 135, 268 Ky. 447.

9. Ill.—*Bouslough v. Schumacher*, 270 Ill.App. 79.

10. Ala.—*Townley v. Thornton*, 118 So. 230, 22 Ala.App. 598.

Cal.—*Miller v. Cranston*, 106 P.2d 963, 41 Cal.App.2d 470.

Mo.—*Day v. Banks, App.*, 143 S.W.2d 68.

Pa.—*Cunningham v. Spangler*, 186 A. 173, 123 Pa.Super. 151.

42 C.J. p 1231 note 11.

Effect of collision on occupants of vehicle as tending to show violence of collision and rate of speed see *infra* subdivision r of this section.

11. S.D.—*Kriens v. McMillan*, 178 N. W. 731, 42 S.D. 285.

42 C.J. p 1231 note 12.

Competent evidence tending to identify a motor vehicle involved in the accident or collision,¹² or the operator thereof,¹³ or a person killed in the accident,¹⁴ is admissible. Testimony offered to controvert other testimony of identification is properly excluded where it is too general and indefinite to have any probative force;¹⁵ and, where there is no suggestion that defendant's truck bore his name, it is proper to exclude a question to a witness, who was not present at the time and place of the accident, as to whether he has ever seen trucks bearing defendant's name.¹⁶

1. Insurance

Evidence that a party is protected by insurance is inadmissible unless it is relevant and material to an issue in the case; but evidence admissible for a legitimate purpose is not to be excluded because it discloses the fact that the defendant is carrying insurance.

Evidence that either plaintiff¹⁷ or defendant¹⁸ is protected by insurance is inadmissible except where it is relevant and material to an issue in the case;¹⁹ but evidence admissible for a legitimate purpose is not to be excluded because it discloses the fact that defendant is carrying insurance;²⁰ and evidence that plaintiff carries accident insurance may be received, in the discretion of the court, when offered

in connection with proof that he is feigning his injuries, and for the purpose of showing a motive for feigning and his interest in doing so.²¹ Defendant is not entitled to introduce evidence as to the amount of insurance carried by it by reason of the fact that plaintiff's counsel, on examination of jurors, has inquired into their connection with insurance companies.²²

j. Lack of License, Permit, or Registration

Ordinarily, evidence that a motor vehicle involved in an accident or collision was not registered, or that the operator thereof was not licensed, at the time of the accident or collision is not admissible.

Ordinarily, evidence that the motor vehicle in question was not registered or licensed in the state,²³ or that the operator thereof was not licensed,²⁴ at the time of the accident or collision is inadmissible, as is also evidence that the operator's license was suspended after the accident²⁵ and testimony of defendant that he has not lost his state license.²⁶ However, evidence of the lack of an operator's license has been held admissible as bearing on some issues or questions,²⁷ such as the question of the owner's negligence in permitting the operation of his motor vehicle by a driver known to be incompetent or inexperienced,²⁸ an issue as to

12. U.S.—Melville v. State of Md to Use of Morris, C.C.A.Md., 155 F.2d 440.

Ark.—Duckworth v. Stephens, 30 S. W.2d 840, 182 Ark. 161.

Cal.—Lundgren v. Converse, 93 P.2d 819, 34 Cal.App.2d 445.

Ill.—Shennan v. Chrispens Truck Lines, 44 N.E.2d 339, 316 Ill.App. 160—Walsh v. Murray, 43 N.E.2d 562, 315 Ill.App. 664.

Mich.—Zolton v. Rotter, 32 N.W.2d 30, 321 Mich. 1.

42 C.J. p 1221 note 77.

13. Ark.—Duckworth v. Stephens, 30 S.W.2d 840, 182 Ark. 161.

Iowa.—Harvey v. Borg, 257 N.W. 190, 218 Iowa 1228.

Md.—Epstein v. Ruppert, 99 A. 685, 129 Md. 432.

14. Cal.—House v. Pacific Greyhound Lines, 95 P.2d 465, 35 Cal. App.2d 336.

15. Tex.—Richardson v. Impey, Civ. App., 94 S.W.2d 490, error dismissed.

16. Mass.—Perrott v. Leahy, 19 N.E. 2d 10, 302 Mass. 318.

17. Ind.—Elliott v. Ticen, 134 N.E. 778, 78 Ind.App. 14.

42 C.J. p 1223 note 20.

18. N.H.—Hutchins v. John Hancock Mut. Life Ins. Co., 192 A. 498, 89 N.H. 79.

N.J.—Decker v. Everson, 187 A. 783, 14 N.J.Misc. 860.

42 C.J. p 1223 note 21.

Insurance is not evidence of negligence

Or.—Fletcher v. Saunders, 284 P. 276, 132 Or. 67

19. Ala.—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189.

20. Cal.—Handley v. Lombardi, 9 P. 2d 867, 122 Cal.App. 22.

42 C.J. p 1223 note 23.

Admissibility to show defendant's responsibility for operation of motor vehicle see infra subdivision q of this section.

21. Minn.—Wentworth v. Butler, 159 N.W. 828, 134 Minn. 382.

22. Mo.—Ternetz v. St. Louis Lime, etc., Co., 252 S.W. 65.

23. Ga.—Georgie Power Co. v. Jones, 188 S.E. 566, 54 Ga.App. 578.

Ky.—Prichard v. Collins, 15 S.W.2d 497, 228 Ky. 635.

42 C.J. p 1229 note 82.

24. Ky.—Prichard v. Collins, 15 S. W.2d 497, 228 Ky. 635.

Minn.—Mahowald v. Beckrich, 2 N.W. 2d 569, 212 Minn. 78.

42 C.J. p 1229 note 83.

In absence of evidence of proximate causal connection between defendant's violation of law, consisting of operating a motor vehicle without a proper driver's license, and the injuries complained of, it is not error to exclude evidence of such violation. —Wade v. Drinkard, 45 S.E.2d 231, 76 Ga.App. 159.

Employee other than driver

In action for injuries caused by negligence of minor who drove truck with consent of truck owner's employee, who was not present at time of accident, cross-examination on whether such employee was a licensed driver was properly excluded. —Kalinowski v. Odlewany, 287 N.W. 344, 289 Mich. 684.

25. Mass.—Peskin v. Buckley, 168 N. E. 791, 269 Mass. 177.

N.Y.—Tryon v. Willbank, 255 N.Y.S. 27, 234 App.Div. 335.

26. N.J.—Carey v. Deems, 129 A. 191, 101 N.J.Law 419.

27. Cal.—Shiffette v. Walkup Drayage & Warehouse Co., 169 P.2d 996, 74 Cal.App.2d 903—Moore v. Re, 22 P.2d 45, 131 Cal.App. 557.

Reason license not renewed

In action for damages arising out of automobile collision, where it was shown that driver of defendant's truck did not have license to operate motor vehicles as required by statute, permitting defendant to show reason that driver of his truck did not renew his license was error. —Watson v. Forbes, 30 N.E.2d 228, 307 Mass. 383.

28. Ohio.—Sours v. Sours, Com.Pl., 73 N.E.2d 226.

Tex.—Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587.

whether the vehicle was a family car,²⁹ and the question of a minor driver's negligence in operating a motor vehicle when he was inexperienced and without training;³⁰ and there is some authority for the view that it may properly be considered on the general question of negligence.³¹

Where, at the time of the accident, the operator had a license which had never been revoked, even though ground for revocation existed, it is proper to exclude evidence that, when he applied for the license, he falsely stated that his license or right to operate had never been suspended or revoked.³²

Evidence of the lack of a permit for the hauling of a load exceeding the weight permitted by statute has been held admissible in view of a defense that the loaded truck was too heavy for parking on a dirt shoulder.³³

k. Lights

Evidence respecting lights and flares at the time of, or immediately before or after, the accident or collision, or at a prior time not too remote, is admissible.

Evidence bearing on the question whether a motor vehicle involved in an accident or collision was lighted at the time of the accident or collision,³⁴

and, if so, to what extent,³⁵ is admissible; and, provided it is not too remote,³⁶ evidence as to whether the vehicle was lighted, and, if so, to what extent, before³⁷ or after,³⁸ the accident or collision is admissible. It has been held that evidence of inspection³⁹ or lack of inspection⁴⁰ of the regular lighting system of a truck is admissible; but it has also been held that evidence of whether or not defendant has had the lights of his automobile tested is inadmissible.⁴¹

On an issue as to whether the time of an accident was such that defendant should have had lights on his automobile, evidence that before the accident other automobiles had their lights burning,⁴² and that lights in a near-by village were lit shortly after the accident,⁴³ is admissible. Also, evidence of the lights burning on another motor vehicle which was at or near the scene of the collision at the time thereof is admissible to show the surrounding facts and circumstances⁴⁴ or, where plaintiff was blinded by such lights, on the question of his contributory negligence.⁴⁵ On the other hand, evidence that other trucks do not carry clearance lights as required by statute is inadmissible.⁴⁶

29. Conn.—Nichols v. Nichols, 13 A. 2d 591, 126 Conn. 614.

30. Ohio.—Sours v. Sours, Com.Pl., 73 N.E.2d 226.

31. Cal.—Moore v. Re, 22 P.2d 45, 131 Cal.App. 557.

32. Mass.—Simon v. Berkshire Street Ry. Co., 11 N.E.2d 485, 298 Mass. 454.

33. Cal.—Silvey v. Harm, 8 P.2d 570, 120 Cal.App. 561.

34. Ala.—White Swan Laundry Co. v. Wehrhan, 79 So. 479, 202 Ala. 87.

35. Mo.—Dennis v. Creek, App., 211 S.W.2d 59.

N.H.—Everett v. Littleton Const. Co., 46 A.2d 317, 94 N.H. 43, 42 C.J. p. 1229 note 67.

Evidence held inadmissible

(1) Evidence as to whether the lights on a truck and trailer were dim or bright when turned on is immaterial, where the controverted fact in the case is whether they were turned off entirely.—Silvey v. Harm, 8 P.2d 570, 120 Cal.App. 561.

(2) Testimony as to the distance the headlights of defendant's vehicle, struck in the rear by plaintiff's vehicle, would reveal objects at the point of collision is inadmissible in the absence of other testimony showing substantial similarity in the kind, character, or position on the respective vehicles of plaintiff and defendant, of the lights, or the condition of the weather, or the degree of dark-

ness when the witness made his observations.—Fenton v. Missouri Motor Distributing Corporation, Mo. App., 52 S.W.2d 213.

36. Ala.—Chambers v. Cox, 130 So. 416, 223 Ala. 1.
Wash.—Cleasby v. Taylor, 28 P.2d 795, 176 Wash. 251.

Remoteness of evidence of speed distinguished

Evidence as to speed and evidence as to lights are to be regarded differently in respect of remoteness, since the speed of a motor vehicle is peculiarly under the control of the driver and is intrinsically variable, while the lights of the vehicle are more constant and mechanical, the driver is not likely to extinguish the lights and continue in the dark, and, if one light is out because of some defect, it is not likely to go on again in a short space of time.—Kennedy Transfer Co. v. Greenfield's Adm'x, 59 S.W.2d 978, 248 Ky. 708.

37. U.S.—Melville v. State of Maryland to Use of Morris, C.C.A.Md., 155 F.2d 440.

Ill.—Howard v. Ind., 50 N.E.2d 769, 320 Ill.App. 338—Walters v. Ind., 48 N.E.2d 791, 319 Ill.App. 162.
Ky.—Kennedy Transfer Co. v. Greenfield's Adm'x, 59 S.W.2d 978, 248 Ky. 708, distinguishing Robinson Transfer Co. v. Turner, 50 S.W.2d 546, 244 Ky. 181.

Immediately before collision

Wyo.—Merback v. Blanchard, 109 P. 2d 49, 56 Wyo. 286.

Three hundred yards from scene of accident

U.S.—Melville v. State of Maryland, to Use of Morris, C.C.A.Md., 155 F. 2d 440.

Condition of lamps two days before collision

Testimony that intestate's automobile was in accident and its lamps stoved in two days before collision was admissible on question whether such automobile was being driven without lights on introduction of testimony that lamps had not been repaired.—Boyce v. Shtukas, 11 N.W. 2d 206, 306 Mich. 467.

38. Cal.—Williams v. Layne, 127 P. 2d 582, 53 Cal.App.2d 81.

D.C.—Spund v. Myers, 90 F.2d 380, 67 App.D.C. 135.

39. On morning of day of collision

Ill.—Piper v. Speroni, 47 N.E.2d 120, 317 Ill.App. 540.

40. U.S.—Clark v. Remington, C.C.A. N.H., 55 F.2d 48.

41. Cal.—Thompson v. Held, 183 P. 2d 711, 81 Cal.App.2d 275.

42. Mich.—Schock v. Cooling, 141 N. W. 675, 175 Mich. 313.

43. Mich.—Schock v. Cooling, supra.

44. Va.—Reid v. Boward, 26 S.E.2d 27, 181 Va. 718.

45. Mo.—Mitchell v. Dyer, 57 S.W.2d 1082.

46. U.S.—Sheehan v. Nims, C.C.A. Vt., 75 F.2d 293.

In an intersectional accident or collision case, evidence that the intersection was well lighted is admissible,⁴⁷ as is also evidence respecting a traffic light.⁴⁸

Where one of the vehicles was standing upon the highway at night, evidence that there was or was not in the vehicle a flashlight for use in case of trouble is admissible,⁴⁹ as is evidence of the setting out of warning flares after the collision⁵⁰ and evidence of the lack of flares required by statute under the circumstances;⁵¹ but it has also been held proper to exclude evidence of a failure to use flares where they are not required by statute.⁵² Evidence that certain kinds of fuses, required by statute to be set out when a truck is parked at night on the pavement, are impractical is not admissible.⁵³

Evidence showing that plaintiff, injured while riding his bicycle, was violating an ordinance requiring lights on bicycles at the time in question, is admissible as bearing on his contributory negligence;⁵⁴ but the absence of a headlight on a bicycle is immaterial where it did not proximately contribute to the accident, as where the bicycle was struck in the rear and there was a red reflector, visible for two hundred feet, on the rear of the bicycle.⁵⁵

Stop light. Where a moving motor vehicle col-

lided with the rear of another motor vehicle shortly after the latter had stopped, it is proper to receive evidence respecting the stop light of the latter vehicle.⁵⁶

I. Manner and Circumstances of Accident or Collision

Competent evidence of the manner in, and circumstances under, which the accident or collision occurred is admissible.

It is competent to prove all the circumstances under which the accident or collision occurred.⁵⁷ A witness who observed the accident or collision may testify as to how it happened or occurred;⁵⁸ and he is not confined to what he saw or heard,⁵⁹ but may also testify that he did not see or hear certain things.⁶⁰ However, an extrajudicial statement of plaintiff guest that he cannot accurately describe what occurred is without probative force, and is inadmissible, as original testimony tending to establish what occurred.⁶¹ A witness who did not see the collision, but who observed the conditions at the scene thereof shortly thereafter, should not be permitted to state his conclusions as to how it occurred⁶² or as to whether an animal was struck by a motor vehicle from behind or otherwise.⁶³ An eyewitness may detail the position of colliding vehicles with relation to each other⁶⁴ and to the street,⁶⁵ and may even be permitted to state whether there was room for one to pass the other on the

47. Tex.—Globe Laundry v. McLean, Civ.App., 19 S.W.2d 94.

48. Vt.—Stone v. Wood, 157 A. 829, 104 Vt. 105.

Evidence of position of "stop and go" lights at time of collision
Ill.—Schwartz v. Lindquist, 251 Ill. App. 320.

49. U.S.—Clark v. Remington, C.C.A. N.H., 55 F.2d 48.

N.H.—Adams v. Severance, 41 A.2d 233, 93 N.H. 289.

50. Wash.—Wheeler v. Portland-Tacoma Auto Freight Co., 9 P.2d 101, 167 Wash. 218.

51. N.H.—Everett v. Littleton Const. Co., 46 A.2d 317, 94 N.H. 43.

52. Va.—Yonker v. Williams, 192 S. E. 753, 169 Va. 294.

53. Minn.—Johnson v. Sunshine Creamery Co., 274 N.W. 404, 200 Minn. 428.

54. Mich.—Stinson v. Payne, 203 N. W. 831, 231 Mich. 158.

55. Cal.—Flynn v. Kumamoto, 72 P. 2d 448, 22 Cal.App.2d 607.

56. N.J.—Wilson v. G. R. Wood, Inc., 1 A.2d 416, 121 N.J.Law 41.

Working condition two or three days previously

Conn.—Hawley v. Rivolta, 41 A.2d 104, 131 Conn. 540.

57. Cal.—Purcel v. Goldberg, 93 P. 2d 578, 34 Cal.App.2d 344—Busch v. Oswald, 21 P.2d 1003, 131 Cal. App. 594.

Ohio.—Danner v. Avery, 168 N.E. 52, 32 Ohio App 301.

Malighting circumstances

Any evidence of conditions and circumstances surrounding accident which will throw light on conduct of parties and care or lack of care is admissible.—Reid v. Boward, 26 S.E. 2d 27, 181 Va. 718.

Jury is entitled to picture of situation as it existed at the time of the accident.—Judd v. Rudolph, 222 N.W. 416, 207 Iowa 113, 62 A.L.R. 1174.

Circumstantial evidence of negligence and impact is admissible where no direct proof, consisting of the testimony of eyewitnesses showing the actual manner in which the injury occurred, is available.—Pfendler v. Speer, 185 A. 618, 323 Pa. 443.

Skidding of vehicle

Ind.—Capitol Lumber Co. v. Van Hook, 168 N.E. 471, 90 Ind.App. 135.

58. Ariz.—Cox v. Enloe, 70 P.2d 331, 50 Ariz. 201.

42 C.J. p 1223 note 26.

59. Wash.—Webber v. Park Auto Transp. Co., 244 P. 718, 138 Wash 325, 47 A.L.R. 590.

60. Wash.—Webber v. Park Auto. Transp. Co., supra.

61. Mo.—Kaley v. Huntley, App., 88 S.W.2d 200.

62. Mo.—Clear v. Van Blaricum, App., 241 S.W. 81.

Opinion as to whether accident or collision could have been avoided see Evidence §§ 448, 533 b.

63. Mo.—Clear v. Van Blaricum, supra.

64. Or.—West v. Jaloff, 232 P. 642, 113 Or. 184, 36 A.L.R. 1391.

65. Iowa.—Harness v. Tehel, 263 N. W. 843, 221 Iowa 403.

Or.—West v. Jaloff, supra.

Bicycle

In action for injuries sustained by boy bicyclist struck by motor vehicle at intersection, jury could consider fact, if it was fact, that at moment of collision boy had passed out of one way street upon which he had been traveling in wrong direction.—Scranton v. Crosby, 9 N.E.2d 891, 298 Mass. 15.

right in the roadway,⁶⁶ but not whether an automobile had room to pass in safety.⁶⁷

In an action to recover damages for the death of, or injuries to, a pedestrian alleged to have been struck by a motor vehicle, evidence that the pedestrian was standing within a safety zone when struck is admissible,⁶⁸ as is also evidence of the direction in which he was thrown by impact with the vehicle;⁶⁹ and it is not improper to allow a witness to describe the pedestrian's position by illustration;⁷⁰ but evidence as to the part of a highway upon which a pedestrian was walking one thousand feet from the place of the accident is without probative value on the question of where he was at the time of the accident, and is properly excluded.⁷¹ It is proper to exclude evidence as to whether the vehicle could have passed the pedestrian without striking him where it does not appear material to any claim of either party;⁷² but, where there is some evidence that the accident would not have occurred if defendant driver had kept to the right of a safety zone, further evidence that there was nothing to prevent him from keeping to the right should not be excluded.⁷³

m. Other Judicial Proceedings

Ordinarily, and except in so far as it embraces an admission by defendant, evidence relating to civil suits be-

tween different parties, or to criminal proceedings against the driver of a motor vehicle involved in the accident or collision, is inadmissible.

Evidence relative to the arrest and conviction or acquittal of the driver of a motor vehicle on a criminal charge arising out of the accident or collision in question,⁷⁴ or on a charge of the commission of a crime on another occasion,⁷⁵ is ordinarily inadmissible; but sometimes evidence of this nature is held admissible on cross-examination of the driver,⁷⁶ or where it consists of evidence that defendant pleaded guilty to a charge of violating a criminal statute in connection with the accident⁷⁷ or that the driver, on the advice of counsel, dismissed his appeal from a conviction.⁷⁸ On the question whether the driver was an agent or employee of defendant, evidence that defendant or his representative put up bond for the driver's appearance in court⁷⁹ or paid the driver's fine⁸⁰ is admissible; but evidence that defendant paid the driver's fine should not, in the absence of other evidence, be received to show that the driver was acting within the course of his employment.⁸¹

Before coroner. The testimony of defendant before a coroner, as to what he was doing, where he had come from, and where he was going at the time of the collision is admissible against him as an admission on his part;⁸² and, furthermore, the

66. Wash.—Shelley v. Norman, 195 P. 243, 114 Wash. 381.

67. Mo.—Marshall v. Taylor, 153 S. W. 527, 168 Mo.App. 240.

68. N.J.—Rigg v. Lewis, 145 A. 223, 7 N.J.Misc. 290.

69. Idaho.—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.

Evidence bears on question whether the pedestrian ran into the side of the car or was struck by the front of the car.—Asumendi v. Ferguson, supra.

70. N.H.—Bullard v. McCarthy, 195 A. 355, 89 N.H. 158.

71. Mich.—Janse v. Haywood, 259 N.W. 347, 270 Mich. 632.

72. Conn.—Miller v. Stamford Transit Co., 32 A.2d 53, 130 Conn. 63.

73. N.Y.—Holder v. Abramson, 67 N. Y.S.2d 224, 271 App.Div. 649.

74. Cal.—Burbank v. McIntyre, 37 P.2d 400, 135 Cal.App. 482.

Ga.—Pollard v. Harbin, 192 S.E. 234, 56 Ga.App. 172.

N.H.—Kelly v. Simoutis, 4 A.2d 868, 90 N.H. 87.

N.Y.—Roach v. Yonkers R. Co., 271 N.Y.S. 289, 242 App.Div. 195.

42 C.J. p 1230 note 94.

Arrest, where arresting officer not eyewitness of collision

Vt.—Fitch v. Bemis, 177 A. 193, 107 Vt. 165.

Arrest and pending prosecution

Vt.—Paul v. Drown, 189 A. 144, 108 Vt. 458, 109 A.L.R. 1085.

Payment of fine by driver

Tex.—McElwrath v. Dixon, Civ.App., 49 S.W.2d 995.

75. Md.—Nelson v. Sellar, 139 A. 564, 154 Md. 63.

Or.—Dermody v. Fanning, 56 P.2d 1150, 153 Or. 392.

42 C.J. p 1230 note 95.

Charges of offenses unrelated to competency as driver

La.—Joynes v. Toye Bros. Auto & Taxicab Co., 119 So. 446, 11 La.App. 124.

Other evidence or lack thereof

Admitting a judgment record showing driver's conviction for reckless driving three years previously, in support of plaintiffs' theory that defendant employer had knowledge of driver's recklessness and incompetence, was error where it was not shown that employer had any knowledge thereof and the name appearing on record was not the same as name of driver, there being a difference in respect of initials.—R. J. Reynolds

Tobacco Co. v. Newby, C.C.A.Idaho, 145 F.2d 768.

76. Mass.—Monaghan v. Keith Oil Corporation, 183 N.E. 252, 281 Mass. 129.

42 C.J. p 1230 note 96.

77. Mass.—Dzura v. Phillips, 175 N. E. 629, 275 Mass. 283.

N.Y.—Barnum v. Morresey, 280 N.Y. S. 899, 245 App.Div. 798.

78. Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

79. S.C.—Lowie v. Dixie Stores, 174 S.E. 394, 172 S.C. 468.

80. Ariz.—Maynard v. Hall, 143 P.2d 884, 61 Ariz. 32, 150 A.L.R. 618.

81. Mass.—Stone v. Commonwealth Coal Co., 156 N.E. 737, 259 Mass. 360.

82. Conn.—Walsh v. Studwell, 135 A. 554, 105 Conn. 453.

Verdict

(1) Formerly, in Illinois, the verdict of a coroner's jury was admissible in evidence, provided the jury did not exceed their authority.—Devine v. Brunswick-Balke-Collender Co., 110 N.E. 780, 270 Ill. 504, Ann.Cas. 1917B 387—42 C.J. p 1230 notes 2, 3.

testimony of defendant's driver at the inquest has been held admissible.⁸³

Civil suits. Evidence that other similar suits have been brought⁸⁴ or are pending⁸⁵ against defendant is inadmissible, as is also the record of a suit by defendant against his driver for money owing in which defendant did not seek to recover damages for injury to his vehicle;⁸⁶ but the declaration filed by defendant in a previous case in which he sued plaintiff for damages from the same accident, defendant having sanctioned its allegations that his car was driven by his agent and servant by testifying in support of them, is properly received as an admission.⁸⁷

A statement made by the driver of a motor truck several months after the accident at the trial of an action in a municipal court and tending to show that he was working in the line of his duty for his employer at the time of the accident is not rendered admissible against the employer by the facts that the latter was present in court and remained silent.⁸⁸

n. Physical Conditions at Scene of Accident or Collision

- (1) In general
- (2) At subsequent time

(1) In General

Ordinarily, evidence of the condition of the road or street, the presence and location of directional or warning signs, signals, markings, or devices, and other physical conditions existing at the scene of the accident or collision is admissible.

Evidence of the physical conditions existing at the scene of the accident or collision is ordinarily admissible;⁸⁹ and this is true of evidence of such matters as the character⁹⁰ and condition⁹¹ of the road, the nature of an intersection,⁹² the presence of smoke over the highway,⁹³ and the presence and location of stop signs or other directional or warning signs, signals, markings, or devices.⁹⁴ Particular evidence of this nature may, however, be immaterial and inadmissible in certain cases,⁹⁵ as where it concerns the condition of,⁹⁶ or visibility on,⁹⁷ the street or highway at another point or place, turning markers at other intersections on the same street,⁹⁸ a sign directed to the drivers of

(2) Change of rule as to admissibility of coroners' verdicts in civil actions generally see Coroners § 27 b.

83. Ill.—Flickerle v. Herman Seekamp, Inc., 274 Ill.App. 310.

84. Tex.—Mumme v. Sutherland, Civ.App., 198 S.W. 395.

85. Tex.—Reid Auto Co. v. Gorsczya, Civ.App., 144 S.W. 688.

86. Ky.—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8.

87. Mich.—Cady v. Dostator, 159 N.W. 151, 193 Mich. 170.

88. Ind.—Buchanan v. Morris, 151 N.E. 385, 198 Ind. 79.

89. Ill.—Becherer v. Belleville-St. Louis Coach Co., 53 N.E.2d 731, 322 Ill.App. 37.

N.C.—Corpus Juris quoted in Goss v. Williams, 145 S.E. 169, 172, 196 N.C. 213.

Ohio.—Schaller v. Chapman, App., 66 N.E.2d 266.
42 C.J. p 1223 note 40.

Congestion of area immediately adjacent to point of collision
Va.—Nelson v. Dayton, 36 S.E.2d 535, 184 Va. 754.

90. Ky.—Lally v. Cochran, 21 S.W.2d 272, 281 Ky. 211.

Dip on one side of road two hundred feet from place of collision
Colo.—Leonard v. Bauer, 149 P.2d 376, 112 Colo. 247.

Character of street as state highway
Ind.—Wagoner v. Rose, 193 N.E. 108, 100 Ind.App. 192.

Public character of driveway in school grounds

Ill.—Teece v. Bieber, 56 N.E.2d 665, 323 Ill.App. 647.

Amount of traffic on road or street

Wash.—Reamer v. Walter H. C. Griffiths, Inc., 291 P. 714, 158 Wash. 665

Wis.—Georgeson v. Nielsen, 252 N.W. 576, 214 Wis. 191.

91. N.C.—Kepley v. Kirk, 132 S.E. 788, 191 N.C. 690.

Pa.—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437—Goldenberg v. Philadelphia Rural Transit Co., 170 A. 360, 112 Pa.Super. 163.

Wis.—Georgeson v. Nielsen, 252 N.W. 576, 214 Wis. 191.

Rough condition

Cal.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1.

Dusty condition

N.C.—Faves v. Cox, 165 S.E. 345, 203 N.C. 173.

Condition and width of shoulder of highway

Ill.—Becherer v. Belleville-St. Louis Coach Co., 53 N.E.2d 731, 322 Ill.App. 37.

92. Pa.—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437.

Width of intersecting highways

Md.—Paolini v. Western Mill & Lumber Corporation, 166 A. 609, 165 Md. 45.

Obstruction of view by building

Wash.—Rosenstrom v. North Bend Stage Line, 280 P. 932, 154 Wash. 57.

93. Neb.—Anderson v. Byrd, 275 N.W. 825, 133 Neb. 483.

94. Ala.—Harris v. Blythe, 130 So. 548, 222 Ala. 48.

Ill.—Hamann v. Lawrence, 188 N.E. 333, 354 Ill. 197.

Ind.—Wagoner v. Rose, 193 N.E. 108, 100 Ind.App. 192.

Iowa.—Rogers v. Jefferson, 272 N.W. 532, 223 Iowa 718.

Mass.—Burgess v. Giovannucci, 49 N.E.2d 907, 314 Mass. 252

Mo.—Pfeiffer v. Schee, App., 107 S.W.2d 170.

Ohio.—Willaman v. Graber, 11 N.E.2d 710, 57 Ohio App. 39.

Wash.—Nelson v. Bjelland, 95 P.2d 784, 1 Wash.2d 268, 125 A.L.R. 641—Reamer v. Walter H. C. Griffiths, Inc., 291 P. 714, 158 Wash. 665.

Lights see supra subdivision k of this section.

95. Pa.—Kellner v. Parker, 163 A. 353, 106 Pa.Super. 522—Henry v. Butler, 161 A. 556, 106 Pa.Super. 200.

96. Iowa.—Strand v. Grinnell Auto. Garage Co., 113 N.W. 488, 136 Iowa 68.

42 C.J. p 1223 note 42 [a], [b].

97. Mo.—Fenton v. Missouri Motor Distributing Corporation, App., 52 S.W.2d 213.

98. Cal.—Formosa v. Yellow Cab Co., 87 P.2d 716, 81 Cal.App.2d 77.

horses only,⁹⁹ or a sign warning of the presence of children, where the accident occurred on Saturday night several hundred feet from a schoolhouse.¹ Proof that similar cars had skidded at the same place is of no probative value on the question of the dangerous character of the roadway at the time of the accident or collision, unless the evidence also shows that the conditions and management were the same.²

Knowledge of conditions. It is held that evidence of defendant driver's knowledge of dangerous conditions at an intersection is admissible,³ but that evidence that he did not know that a street was an arterial one and did not see a stop sign because of an obstruction is inadmissible,⁴ and that a driver should not be questioned as to his knowledge of the proximity of a schoolhouse where neither the school building nor the school grounds abut upon the highway upon which he was driving.⁵

(2) At Subsequent Time

The testimony of a witness describing the position of the motor vehicles involved, gouges in the highway, the presence and location upon the highway of spots, tire tracks, skid marks, or other marks, or glass or other parts of a motor vehicle, or other conditions existing at the scene of the accident or collision after its occurrence is admissible where the witness observed such conditions before they were changed.

Witnesses may be permitted to describe the conditions at the scene of the accident or collision after its occurrence,⁶ such as the position of the motor vehicles involved,⁷ the existence and location of marks,⁸ spots,⁹ on, or scars, gashes, gouges, or indentations in,¹⁰ the highway, the presence of parts of a motor vehicle,¹¹ or the place where an article, which a pedestrian was wearing or carrying when struck, was found.¹² This is true where such conditions were observed by the witnesses soon after the accident or collision¹³ and before the conditions existing at the time of the accident or collision had changed.¹⁴ Indeed, some authorities have held

99. N.Y.—Falcone v. National Casket Co., 180 N.Y.S. 455, 190 App.Div. 651.

1. N.H.—Manor v. Gagnon, 32 A.2d 688, 92 N.H. 435.

2. Ky.—O'Neil & Hearne v. Bray's Adm'r, 90 S.W.2d 353, 262 Ky. 377. Mass.—Williams v. Holbrook, 103 N.E. 633, 216 Mass. 239.

3. Cal.—Bramble v. McEwan, 104 P. 2d 1054, 40 Cal.App.2d 400.

4. Wash.—Metzger v. Moran, 96 P. 2d 580, 1 Wash.2d 657.

5. Wash.—Rosenstrom v. North Bend Stage Line, 280 P. 932, 154 Wash. 57.

6. Ill.—Hann v. Brooks, 73 N.E.2d 624, 331 Ill.App. 535.

7. Ky.—Randle v. Mitchell, 142 S.W. 2d 124, 283 Ky. 501.

La.—Travelers Fire Ins. Co. v. Meadows, App., 13 So.2d 537. Minn.—Romann v. Bender, 252 N.W. 80, 190 Minn. 419.

N.Y.—Lazar v. Westchester Street Transp. Co., 51 N.Y.S.2d 533, 268 App.Div. 387.

Ohio.—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207.

Pa.—Nicholson v. Feagley, 14 A.2d 122, 239 Pa. 313—Goldenberg v. Philadelphia Rural Transit Co., 170 A. 360, 112 Pa.Super. 163.

R.I.—McAllister v. Chase, 13 A.2d 690, 65 R.I. 122.

Tex.—Lone Star Gas Co. v. Haire, Civ.App., 41 S.W.2d 424. 42 C.J. p 1223 note 45 [a].

Mute evidence

The position of colliding vehicles, after the accident, offers mute evidence which, on occasions, may be resorted to, in action for injuries sustained in the collision, in determining

the cause of the collision.—Nuss v. MacKenzie, La.App., 4 So.2d 845. Condition of motor vehicle see supra subdivision d of this section.

8. Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244. Conn.—Tomasko v. Raucci, 155 A. 64, 113 Conn. 274.

Marks shown to have been made by one of automobiles involved
Md.—Gloyd v. Wills, 23 A.2d 665, 180 Md. 161.

Scrape mark
Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.

Or.—Davis v. Lavenik, 165 P.2d 277, 178 Or. 90.

Marks in snow
Me.—Masse v. Wing, 149 A. 385, 129 Me. 33.

9. N.C.—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.

Grease spots
Miss.—Wallace v. Billups, 33 So.2d 819.

Wet spot, allegedly caused by water and oil from wrecked vehicle
Tex.—Dixie Motor Coach Corporation v. Ball, Civ.App., 69 S.W.2d 581, error dismissed.

Red spots, evidently blood
Mich.—Delfosse v. Breshnahan, 9 N.W.2d 866, 305 Mich. 621.

10. Cal.—Whitfield v. Debrincat, 123 P.2d 591, 50 Cal.App.2d 389.

Ill.—Sherman v. Chrispens Truck Lines, 44 N.E.2d 339, 316 Ill.App. 160.

Ky.—Southern Oxygen Co. v. Martin, 163 S.W.2d 459, 291 Ky. 238.

Or.—Peters v. Consolidated Freight Lines, 73 P.2d 713, 157 Or. 605.

11. Ky.—Crampton v. Dalme, 6 S.W. 2d 686, 224 Ky. 507.

Minn.—Nolan v. Newfert, 229 N.W. 97, 179 Minn. 293.

Glass

N.C.—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.

Wis.—Anderson v. Eggert, 291 N.W. 365, 234 Wis. 348.

Emblem attached to automobile

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

12. Iowa.—Hayes v. Stunkard, 10 N.W.2d 19, 233 Iowa 582.

Connecting evidence or lack thereof

Where, in an action to recover damages for the death of a person struck by an automobile, there is other evidence showing that the clothing of deceased caught on the automobile and that she was dragged, it is not error to admit the testimony of a witness that he saw a button, comb, piece of cloth, and some blood along skid marks, although there is no showing that the articles belonged to deceased, or at what time the witness arrived on the scene of the accident.—Remington v. Machamer, 186 N.W. 32, 192 Iowa 1098.

13. Ky.—Randle v. Mitchell, 142 S.W.2d 124, 283 Ky. 501.

N.H.—Bennett v. Bennett, 31 A.2d 374, 92 N.H. 379.

N.Y.—Lazar v. Westchester Street Transp. Co., 51 N.Y.S.2d 533, 268 App.Div. 387.

Or.—Davis v. Layenik, 165 P.2d 277, 178 Or. 90.

42 C.J. p 1223 note 44.

14. Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244.

N.J.—Girdwood v. Balder, 140 A. 894, 6 N.J.Misc. 302.

admissible testimony descriptive of the scene of the accident or collision, and conditions thereat, as viewed the day following the collision,¹⁵ or two¹⁶ or several¹⁷ days thereafter; and, in the case of conditions of some permanency, such as a stop sign,¹⁸ a hedge four feet high,¹⁹ or a gouge or indentation in a hard-surfaced pavement,²⁰ evidence of their existence a considerable time after the collision may be admissible.

On the other hand, it has been held that, in the absence of affirmative evidence that conditions remained the same as at the time of the accident, testimony concerning marks on the highway, or other temporary conditions at the scene, observed the day following the accident,²¹ or only four hours after the accident,²² is inadmissible, as is also evidence of what investigators found at the place of the accident at a later, but unknown, date,²³ and evidence of the reasons why the city, after the collision, placed a stop sign at the intersection in question.²⁴

Tire tracks and skid marks. Testimony concerning tire tracks and skid marks observed by the witness at the scene of the accident or collision after

its occurrence is admissible,²⁵ at least where the observation was made before any change had taken place,²⁶ and, it is held, even though the vehicles had been removed before he arrived at the scene.²⁷ It is proper to permit witnesses who visited and examined the scene of the accident or collision a comparatively short time after it occurred to describe the automobile tracks, skid marks, or other marks or imprints of a wheel or tire, which they observed,²⁸ and, where at the time of their visit they saw one or more of the automobiles involved in the accident or collision, they may be permitted to identify the tracks as those which were made by one or more of the automobiles.²⁹

According to some authorities, the testimony of a witness concerning tire tracks or skid marks which he observed at the scene of, and within a reasonable time after, the accident or collision is ordinarily admissible,³⁰ the length of time intervening between the accident and the observation,³¹ and the physical conditions surrounding the place of the accident which would affect the marks, such as the amount of travel on the highway and the wetness or dryness of the surface,³² are elements which ordi-

Before either automobile had been moved

Pa.—Nicholson v. Feagley, 14 A.2d 122, 339 Pa. 313.
42 C.J. p 1223 note 45.

15. Minn.—Quinn v. Zimmer, 239 N. W. 902, 184 Minn. 589.

Miss.—Wallace v. Billups, 33 So.2d 819.

16. W.Va.—Montgomery v. Chesapeake & Potomac Telephone Co. of West Virginia, 3 S.E.2d 58, 121 W. Va. 163.

17. Where testimony is merely in corroboration of other testimony

Tex.—Langham v. Talbott, Civ.App., 211 S.W.2d 987.

18. Ill.—Thomas v. Buchanan, 277 Ill.App. 393.

19. N.C.—Gaffney v. Phelps, 178 S.E. 231, 207 N.C. 553.

20. Ill.—Shennan v. Chrispens Truck Lines, 44 N.E.2d 339, 316 Ill. App. 160.

Ky.—Southern Oxygen Co. v. Martin, 163 S.W.2d 459, 291 Ky. 238.

Or.—Peters v. Consolidated Freight Lines, 73 P.2d 713, 157 Or. 605.

21. Ky.—Girtman's Adm'r v. Akins, 120 S.W.2d 660, 275 Ky. 2.

Mich.—Billingsley v. Gulick, 233 N. W. 225, 252 Mich. 235.

22. Ky.—Powell v. Commercial Standard Ins. Co., 170 S.W.2d 857, 294 Ky. 7.

23. Ohio.—In re Helle, 29 N.E.2d 175, 65 Ohio App. 45.

24. Tex.—Dallas Ry. & Terminal Co.

v. Orr, Civ.App., 210 S.W.2d 863, affirmed, Sup., 215 S.W.2d 862.

25. U.S.—Evansville Container Corporation v. McDonald, C.C.A.Tenn., 132 F.2d 80.

Cal.—Bowker v. Illinois Electric Co., 297 P. 615, 112 Cal.App. 740.

Ill.—Hann v. Brooks, 73 N.E.2d 624, 331 Ill.App. 575—Mondin v. Decatur Cartage Co., 60 N.E.2d 38, 325 Ill.App. 332—Johnson v. McKnight, 39 N.E.2d 700, 313 Ill.App. 260.

Minn.—Romann v. Bender, 252 N.W. 80, 190 Minn. 419.

N.C.—Lambert v. Caronna, 175 S.E. 303, 206 N.C. 616—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.

Ohio.—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207.

Admissibility of evidence of skid marks to show speed see infra subdivision r of this section.

26. Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244.

Ky.—Bohn v. Sams, 193 S.W.2d 459, 302 Ky. 63.

27. W.Va.—Bragg v. C. I. Whitten Transfer Co., 26 S.E.2d 217, 125 W. Va. 722.

28. Ala.—McWhorter Transfer Co. v. Peek, 167 So. 291, 232 Ala. 143.

Cal.—Hughes v. Hartman, 273 P. 560, 206 Cal. 199.

Kan.—Thomas v. Meyer, 95 P.2d 267, 150 Kan. 587.

Ky.—Bohn v. Sams, 193 S.W.2d 459, 302 Ky. 63—Bybee Bros. v. Imes, 155 S.W.2d 492, 288 Ky. 1—Whitehead v. Stith, 131 S.W.2d 455, 279 Ky. 556.

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Mass.—Mernagh v. Lillie, 45 N.E.2d 473, 312 Mass. 697.

Mo.—Corpus Juris cited in Clark v. Reising, 107 S.W.2d 33, 35, 341 Mo. 282.

N.Y.—Lazar v. Westchester Street Transp. Co., 51 N.Y.S.2d 533, 268 App Div. 387.

N.D.—Olson v. Wetzstein, 225 N.W. 459, 58 N.D. 283.

Wash.—Collins v. Barmon, 260 P. 245, 145 Wash. 383.

42 C.J. p 1224 note 46.

29. Ark.—Cahill v. Bradford, 287 S. W. 595, 172 Ark. 69.
42 C.J. p 1224 note 47.

General expressions of witness as to difficulty of identification do not impair the admissibility of the testimony.—Sheer v. Rathje, 197 A. 613, 174 Md. 79.

30. Mo.—Clark v. Reising, 107 S.W. 2d 33, 341 Mo. 282.

31. Cal.—Flach v. Fikes, 267 P. 1079, 204 Cal. 329.

Miss.—Wallace v. Billups, 33 So.2d 819.

Mo.—Clark v. Reising, 107 S.W.2d 33, 341 Mo. 282.

32. Miss.—Wallace v. Billups, 33 So. 2d 819.

narily affect the weight, rather than the admissibility, of the testimony; and testimony as to tire tracks or skid marks observed five³³ or twelve³⁴ hours, or the first morning,³⁵ or even the second morning,³⁶ after the accident or collision is admissible. According to other authorities, however, testimony concerning tire tracks or skid marks observed twelve hours,³⁷ or the next day,³⁸ or three days,³⁹ after the accident or collision is inadmissible in the absence of further evidence identifying the tracks or marks or showing that conditions had not changed.

Measurements. In connection with other evidence, and where it will aid the jury, evidence of measurements made at the scene, after the occurrence, of the accident may be received.⁴⁰ Where plaintiff testified that after the accident he made certain measurements, without stating whether defendant was then present or not, evidence by defendant that no measurements were made while he was present is admissible, not to contradict plaintiff's testimony⁴¹ but to show that defendant was not a party to the measurements.⁴² A witness who has testified that he saw evidence of a collision a certain number of feet from the end of a bridge may properly be interrogated as to whether he bases his testimony on an actual measurement or a mere guess or approximation.⁴³

A map, plat, or photograph of the scene of the accident or collision, made or taken after the ac-

cident or collision occurred, is admissible in evidence for the purpose of illustrating and explaining the testimony of witnesses,⁴⁴ where it is shown that the map, plat, or photograph is approximately correct and accurate⁴⁵ and that the conditions existing when it was made or taken were substantially the same as when the accident or collision occurred;⁴⁶ but a photograph should not be admitted in evidence where it is obscure and indefinite in some of its details⁴⁷ and it appears from the testimony that the conditions of the foliage, shrubbery, and lighting were different at the time of the accident than when the photograph was taken;⁴⁸ nor should several photographs offered collectively be admitted in evidence where they differ in details and thereby conclusively show on their face that it is impossible to prove that all the conditions disclosed by them existed at the time of the accident.⁴⁹

o. Relation between Plaintiff and Driver

Where plaintiff was injured while riding in a motor vehicle driven by another person, it is permissible to show the relation between plaintiff and the driver during the trip.

In an action to recover for injuries to a person riding in a motor vehicle driven by another person, evidence as to the relation between plaintiff and the driver during the trip,⁵⁰ such as whether they were engaged in a joint enterprise,⁵¹ whether the driver was an agent or employee of plaintiff,⁵² or whether

Mo.—Clark v. Reising, 107 S.W.2d 33, 341 Mo. 282.

33. Iowa.—Stutzman v. Younkerman, 216 N.W. 627, 204 Iowa 1162.

Four or five hours

Cal.—Flach v. Fikes, 267 P. 1079, 204 Cal. 329.

34. Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 197 Ark. 294.

Iowa.—Stutzman v. Younkerman, 216 N.W. 627, 204 Iowa 1162.

35. Cal.—Bowker v. Illinois Electric Co., 297 P. 615, 112 Cal.App. 740.

Ill.—Johnson v. McKnight, 39 N.E. 2d 700, 313 Ill.App. 260.

Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.

Minn.—Raths v. Sherwood, 262 N.W. 563, 195 Minn. 225.

Miss.—Wallace v. Billups, 33 So.2d 819.

Wash.—Still v. Swanson, 27 P.2d 704, 175 Wash. 553.

Admissibility in rebuttal of testimony as to movements

It has been held that the testimony of a witness who is familiar with automobiles and their operation, and who examined the scene of collision the morning after its occurrence, when conditions were the same, as

to what the wheel marks on the pavement indicated relative to the movement of defendant's automobile, is admissible in rebuttal to contradict the testimony of defendant's driver as to the movements of his car.—Carson v. Turrish, 168 N.W. 349, 140 Minn. 445, L.R.A.1918F 154.

36. Wash.—Still v. Swanson, 27 P. 2d 704, 175 Wash. 553.

37. Pa.—Hoover v. Reichard, 63 Pa. Super. 517.

38. Ky.—Appalachian Stave Co. v. Pickard, 86 S.W.2d 655, 260 Ky. 720.

39. Md.—Marine v. Stewart, 168 A. 891, 165 Md. 698.

40. U.S.—Gaillard v. Boynton, C.C. A.N.H., 70 F.2d 552.

Mich.—Delfosse v. Breshnahan, 9 N.W.2d 866, 305 Mich. 621.

In connection with evidence that condition of road was same at the time the measurements were taken as at the time of the accident, evidence of measurements of road made about eight months after accident is admissible.—Floyd v. Johnston, 100 S.W.2d 975, 193 Ark. 518.

41. Vt.—Duprat v. Chesmore, 110 A. 305, 94 Vt. 218.

42. Vt.—Duprat v. Chesmore, *supra*.

43. Cal.—Grover v. Morrison, 190 P. 1078, 47 Cal.App. 521.

44. Wash.—Ingersoll v. Olwell, 220 P. 775, 127 Wash. 276.

42 C.J. p 1224 note 58.

45. N.C.—Keepley v. Kirk, 132 S.E. 788, 191 N.C. 690.

42 C.J. p 1224 note 59

46. Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 197 Ark. 294.

42 C.J. p 1224 note 60.

47. Md.—Snibbe v. Robinson, 135 A. 838, 151 Md. 658.

48. Md.—Snibbe v. Robinson, *supra*.

49. U.S.—Porter v. Buckley, N.J., 147 F. 140, 78 C.C.A. 138.

42 C.J. p 1224 note 63.

50. Ill.—Schachtrup v. Hensel, 14 N.E.2d 897, 295 Ill.App. 303.

N.J.—Egan v. Levay, 7 A.2d 813, 123 N.J.Law 14, affirmed 11 A.2d 22, 124 N.J.Law 125.

51. Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247.

52. Ill.—Stoutz v. Nicoson, 270 Ill. App. 28.

42 C.J. p 1222 note 19.

plaintiff was a guest of the driver,⁵³ is admissible; and, in this connection, evidence of a conversation in which arrangements for the trip were made is admissible.⁵⁴

p. Report of, or Failure to Report, Accident

Unless it is provided otherwise by statute, a driver's statutory report of a motor vehicle accident may be admissible for some purposes.

According to some authorities, the fact that the driver of a motor vehicle did⁵⁵ or did not⁵⁶ make a report of the accident, as required by statute, is inadmissible otherwise than for the purpose of affecting the credibility of the driver as a witness; and, under the express terms of a particular statute, no accident report, or any part thereof, or statement contained therein, is admissible in evidence for any purpose in the trial of any case arising out of the accident.⁵⁷ According to other authorities, however, failure to make the report is admissible in evidence as a circumstance tending to show consciousness on the driver's part of his responsibility for the accident,⁵⁸ and an omission in the report of a material fact known to him is evidence against him.⁵⁹ The report is not admissible to prove the agency of the driver for defendant;⁶⁰ but, where agency otherwise appears, it may be admissible as a declaration made in the course of the agency.⁶¹

q. Responsibility of Defendant for Operation of Motor Vehicle

(1) In general

- (2) Ownership of vehicle
- (3) Agency and authority of operator

(1) In General

Evidence tending to show that at the time and place of the accident or collision defendant did or did not have such control over the motor vehicle in question as to render him responsible for its operation is admissible.

Evidence of matters tending to show that at the time and place of the accident or collision defendant did or did not have such control over the motor vehicle in question as to render him responsible for its operation is admissible.⁶² Evidence that defendant's son or nephew, who drove defendant's motor vehicle on the occasion in question, frequently drove it is held admissible⁶³ to establish defendant's general consent to such use;⁶⁴ and testimony as to the driving of the automobile by different members of defendant's family is held competent to indicate the use made of the car;⁶⁵ but evidence that defendant's son, who drove defendant's car on the occasion in question, had previously driven other cars owned by defendant is inadmissible to show that the car in question was a family car.⁶⁶

Although defendant owner was riding in the vehicle at the time and place of the accident, he may show the circumstances under which another person was driving it as tending to prove that he had loaned the vehicle to the driver;⁶⁷ but, where defendant joint owner of the vehicle was present therein, it is immaterial that it was agreed with another joint owner that the latter should drive.⁶⁸

Whether plaintiff had authority to control or direct driver

Ga.—Wilkinson v. Bray, 108 S.E. 133, 27 Ga.App. 277.

Pa.—Quaintance v. Evans, Com.Pl., 38 Berks Co. 101.

53. Cal.—Rapolla v. Goulart, 287 P. 562, 105 Cal.App. 417.

Invitation or lack of invitation

Ala.—Hodges v. Wells, 147 So. 672, 226 Ala. 558.

Ill.—Schachtrup v. Hensel, 14 N.E.2d 897, 295 Ill.App. 303.

N.J.—Doryk v. Perth Amboy Bottling Co., 139 A. 419, 104 N.J.Law 87.

54. Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247.

Cal.—Rapolla v. Goulart, 287 P. 562, 105 Cal.App. 417.

Wash.—Kelsel v. Bredick, 74 P.2d 473, 192 Wash. 465.

55. Md.—York Ice Machinery Corporation v. Sachs, 173 A. 240, 167 Md. 113.

56. Md.—York Ice Machinery Corporation v. Sachs, supra.

Va.—Diamond Cab Co. v. Jones, 174 S.E. 675, 162 Va. 412.

57. Or.—Henry v. Condit, 53 P.2d 723, 152 Or. 348, 103 A.L.R. 131.

58. Idaho.—Shaddy v. Daley, 76 P. 2d 279, 58 Idaho 536, distinguishing Quillin v. Colquhoun, 247 P. 740, 42 Idaho 522.

59. N.H.—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103.

60. Conn.—Voegeli v. Waterbury Yellow Cab Co., 150 A. 303, 111 Conn. 407, 69 A.L.R. 902.

61. Conn.—Ezzo v. Geremich, 142 A. 461, 107 Conn. 670.

62. Ohio.—Leonard v. Kreider, 1 N.E.2d 956, 51 Ohio App. 474.

Pa.—Middle Atlantic Transp. Co. v. Kelsner, Com.Pl., 57 Dauph.Co. 172, 42 C.J. p. 1221 note 79.

Defendant's carrying of insurance on vehicle

Ill.—Rhoden v. Peoria Creamery Co., 278 Ill.App. 452.

Mass.—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225.

Ohio.—Cushman Motor Delivery Co. v. Smith, 1 N.E.2d 628, 51 Ohio App. 421.

Exercise of control on different occasions

Disallowing defendant to answer question whether, when her husband was driving her motor vehicle on previous occasions, defendant instructed him what to do, and permitting defendant to say that she did not exercise control over her husband on evening when accident happened while he was driving automobile, was not error.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336.

63. Conn.—McCaughy v. Smiddy, 146 A. 822, 109 Conn. 417.

64. Wis.—Christiansen v. Schenkenberg, 236 N.W. 109, 204 Wis. 323.

65. Or.—McCallister v. Farra, 243 P. 785, 117 Or. 278.

Family purpose doctrine see supra § 433.

66. N.C.—Eaves v. Cox, 165 S.E. 345, 203 N.C. 173.

67. Cal.—Hathaway v. Mathews, 258 P. 713, 85 Cal.App. 31.

68. Utah.—Fox v. Lavender, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105.

Statutory liability. An application of a minor for an operator's license is admissible in an action to enforce the statutory liability of a parent who joined in the application by signing it.⁶⁹

(2) Ownership of Vehicle

Competent evidence tending to show that defendant did or did not own the motor vehicle in question at the time of the accident or collision is admissible.

In an action to recover damages for injuries caused by the operation of a motor vehicle, competent evidence tending to show that defendant did or did not own the motor vehicle in question at the time of the accident or collision is admissible.⁷⁰ Under some statutes, the only way to prove ownership is by the production of a certificate of title;⁷¹ but, in the absence of statute, the evidence admissible includes extrajudicial statements relative to ownership made by defendant⁷² prior to,⁷³ or at the time of,⁷⁴ the accident or collision, as well as statements made by him thereafter and constituting admissions on his part.⁷⁵ Evidence that defendant company, through an attorney, settled a former claim for injury inflicted by the truck in question is admissible on the question of the ownership and control of the truck;⁷⁶ but a letter from the president of defendant company guaranteeing the payment of hospital charges is not admissible as an acknowledgment of defendant's ownership of the vehicle in question.⁷⁷

Evidence of a transfer, or lack of transfer, of ownership after the accident is immaterial on the question of ownership at the time of the accident;⁷⁸ and it is proper to refuse introduction of evidence of the circumstances surrounding defendant's pur-

chase of automobiles other than the one in question.⁷⁹ Declarations as to ownership made by the driver of the automobile at such a time after the accident as not to constitute a part of the *res gestæ* are not admissible;⁸⁰ but, in connection with other evidence, declarations made by the driver at the place of the accident and immediately after its occurrence may be admissible.⁸¹

Statements of third persons. Where defendant claims that another person owned the automobile in question, evidence of statements made by such other person prior to the accident and at a time when he was not in possession of the automobile is not admissible,⁸² and, while statements made by such third person after the accident to the effect that defendant owned the car may be received in evidence for the purpose of contradicting the testimony of such person that he owned the car,⁸³ they are not admissible as assertions having substantive or independent evidentiary value.⁸⁴ Evidence that several days prior to the accident it was announced at a racing meet that defendant had entered the car in question in a race is inadmissible in the absence of other evidence showing that the announcement was made in the presence of defendant and that he acquiesced therein by remaining silent.⁸⁵

The opinion or conclusion of a witness as to the title or ownership of the motor vehicle is inadmissible.⁸⁶

Insurance. Evidence that defendant is carrying insurance covering the vehicle in question or liability for damages from its operation is admissible to show his ownership of, or interest in, the vehicle;⁸⁷ and evidence tending to show ownership of

69. Cal.—Bosse v. Marye, 250 P. 693, 80 Cal.App. 109.

70. Cal.—Ferroni v. Pacific Finance Corporation of California, 135 P. 2d 569, 21 Cal.2d 773, prior opinion 124 P.2d 615.

D.C.—Mason v. Automobile Finance Co., 121 P.2d 32, 73 App.D.C. 284.

Fla.—Farrelly v. Heuacker, 159 So. 24, 118 Fla. 340.

Idaho.—Franklin v. Wooters, 45 P. 2d 804, 55 Idaho 619.

Md.—Maryland Casualty Co. v. Sause, 57 A.2d 801.

Mass.—Roselli v. Riseman, 182 NE 567, 280 Mass. 338.

Minn.—Holmes v. Lilygren Motor Co., 275 N.W. 416, 201 Minn. 44.

Mo.—Paepke v. Stadelman, 300 S.W. 815, 222 Mo.App. 346.

N.J.—Yohannan v. Benisch, 135 A. 876, 103 N.J.Law 462.

N.Y.—Callahan v. Bergman, 258 N. Y.S. 296, 236 App.Div. 115, affirmed 185 N.E. 722, 261 N.Y. 523. 42 C.J. p 1221 note 82.

71. Ohio.—Fredericks v. Birkett L. Williams Co., 40 N.E.2d 162, 68 Ohio App. 217.

72. Tex.—Olds Motor Works v. Churchill, Civ.App., 175 S.W. 785.

73. Ala.—Feore v. Trammel, 104 So. 808, 213 Ala. 293.

N.Y.—Ferris v. Sterling, 108 N.E. 406, 214 N.Y. 249, Ann.Cas.1916D 1161.

74. Cal.—Hammond v. Hazard, 180 P. 46, 40 Cal.App. 45.

75. U.S.—Ross v. Salminen, Mass., 191 F. 504, 112 C.C.A. 148.

76. Mo.—Vaughn v. Davis, App. 221 S.W. 782, record quashed State ex rel. Dick & Bros. Quincy Brewery Co. v. Ellison, 229 S.W. 1059, 287 Mo. 139.

77. Pa.—Burns v. Joseph Flaherty Co., 123 A. 496, 278 Pa. 579.

78. Or.—Henry v. Condit, 53 P.2d 722, 152 Or. 348, 103 A.L.R. 131.

79. Cal.—Walker v. Nelson, 53 P. 2d 977, 11 Cal.App. 2d 297.

80. Ala.—Feore v. Trammel, 104 So. 808, 213 Ala. 293.

N.Y.—Page v. Hirsch, 202 N.Y.S. 787, 207 App.Div. 733.

81. Ala.—Levine v. Ferlisi, 68 So. 269, 192 Ala. 362.

82. Ala.—Barfield v. Evans, 65 So. 928, 187 Ala. 579.

83. Ala.—Barfield v. Evans, supra.

84. Ala.—Barfield v. Evans, supra.

85. Cal.—Henderson v. Northam, 168 P. 1044, 176 Cal. 493.

86. Mass.—Chase v. New York Cent., etc., R. Co., 94 N.E. 377, 208 Mass. 137.

N.J.—Reilly v. Lobdell, 134 A. 834, 103 N.J.Law 200.

87. Ark.—Pollock Stores Co. v. Chatwell, 90 S.W.2d 213, 192 Ark. 83.

Cal.—Perry v. A. Paladini, Inc., 264 P. 580, 89 Cal.App. 275.

the vehicle is not to be excluded because it also discloses the fact of insurance.⁸⁸

License or application therefor. In connection with other evidence, the fact that defendant has been granted a license or certificate of registration,⁸⁹ or has applied for one,⁹⁰ covering the vehicle, may be shown in evidence on the question of ownership; but evidence of a dealer's application for a license plate is not competent to prove his ownership of a particular car, where no particular car is described in the application, and the plates are attached indiscriminately to any car the dealer owns when he is demonstrating it for the purpose of sale;⁹¹ and a letter from the department of licenses, addressed to plaintiff's attorney, stating that defendant was the owner of the license corresponding to the number of the vehicle, is incompetent to show ownership,⁹² as is also a certificate of a state official that the license number is in the name of defendant, according to the records of the department, where the certificate does not purport to be

a transcript compared with the original record.⁹³

(3) Agency and Authority of Operator

In a case of death or injury resulting from the operation of a motor vehicle by a person other than the defendant, competent evidence bearing on the questions whether or not such person was the agent, servant, or employee of, the defendant, and was or was not acting within the scope of his authority, is admissible, and is not rendered inadmissible by the fact that it discloses that the defendant is protected by insurance.

In an action to recover damages for death or injuries occasioned by the operation of a motor vehicle by a person other than defendant, competent evidence bearing on the questions whether or not the driver or operator was an agent, servant, or employee of defendant,⁹⁴ and was or was not acting within the scope of his authority at the time,⁹⁵ is admissible. The evidence admissible on these questions includes, within proper limitations,⁹⁶ the testimony of the driver or operator.⁹⁷ Under the rules of evidence, however, particular evidence may be inadmissible on these questions,⁹⁸ or may be in-

Ill.—*Watson v. Trinz*, 274 Ill.App. 379.
Mass.—*Lekarczyk v. Dupre*, 163 N.E. 442, 265 Mass. 33.
Mo.—*Paepke v. Stadelman*, 300 S.W. 845, 222 Mo.App. 346.
Tex.—*Harper v. Highway Motor Freight Lines, Civ.App.*, 89 S.W. 2d 448, error dismissed
 42 C.J. p 1222 note 1.
Evidence of insurance generally see supra subdivision 1 of this section
88. **Ohio.**—*Goz v. Tenney*, 136 N.E. 215, 104 Ohio St. 500.
 42 C.J. p 1222 note 1.
89. **Mass.**—*Trombley v. Stevens-Duryea Co.*, 92 N.E. 764, 206 Mass. 516.
 42 C.J. p 1221 note 95.
90. **N.Y.**—*Bennett v. Nazzaro*, 258 N.Y.S. 828, 144 Misc. 450, affirmed *Bennett v. Nazzaro*, 261 N.Y.S. 1018, 237 App.Div. 866.
 42 C.J. p 1221 note 96.
91. **Or.**—*Ramp v. Osborne*, 239 P. 112, 115 Or. 672.
92. **N.Y.**—*Turteltaub v. Lauria*, 172 N.Y.S. 148.
93. **Mich.**—*McAvon v. Brightmoor Transit Co.*, 222 N.W. 126, 245 Mich. 44.
94. **U.S.**—*Eldridge v. McGeorge, C. C.A.*Ark., 99 F.2d 835.
Cal.—*Blank v. Coffin*, 126 P.2d 868, 30 Cal.2d 457—*Taylor v. Oakland Scavenger Co.*, 110 P.2d 1044, 17 Cal.2d 594.
Conn.—*Muraszki v. William L. Clifford, Inc.*, 28 A.2d 578, 129 Conn. 123.
D.C.—*Rhone v. Try Me Cab Co.*, 65 F.2d 834, 62 App.D.C. 201.

Ill.—*Harley v. Red Ball Transit Co.*, 176 N.E. 751, 344 Ill. 534.
Iowa.—*Sanford v. Goodridge*, 13 N.W. 2d 40, 234 Iowa 1036.
Ky.—*American Sav. Life Ins Co v. Riplinger*, 60 S.W.2d 115, 249 Ky. 8.
Md.—*Maryland Casualty Co. v. Sause*, 57 A.2d 801.
Mich.—*Ogland v. Detroit Edison Co.*, 246 N.W. 503, 281 Mich. 583.
Mo.—*McAbooy v. Hulett, App.*, 112 S.W.2d 86.
N.Y.—*Loensto v. Manning, Bowman & Co.*, 295 N.Y.S. 317, 251 App.Div. 21.
Tex.—*Wells v. Henderson, Civ.App.*, 78 S.W.2d 683, error refused—*Lightsey Black & White Cab Corporation v. Littlefield, Civ.App.*, 48 S.W.2d 766, error refused.
 42 C.J. p 1222 note 3.
95. **U.S.**—*Garford Trucking Corp v. Mann, C.C.A. Mass.*, 163 F.2d 71, certiorari denied 68 S.Ct. 112, 332 U.S. 810, 92 L.Ed. —.
Ark.—*Mullins v. Ritchie Grocer Co.*, 35 S.W.2d 1010, 183 Ark. 218.
Cal.—*Gardner v. Marshall*, 132 P.2d 833, 56 Cal.App.2d 62—*Tsirilis v. Standard Oil Co. of California*, 90 P.2d 128, 32 Cal.App.2d 469.
Conn.—*Smith v. Firestone Tire & Rubber Co.*, 177 A. 524, 119 Conn. 483.
Ga.—*American Fidelity & Casualty Co. v. McWilliams*, 191 S.E. 191, 55 Ga.App. 658.
Ill.—*Tarka v. Pratt*, 257 Ill.App. 403.
Ky.—*Wilson v. Deegan's Adm'r*, 139 S.W.2d 58, 282 Ky. 547—*Ashland Coca Cola Bottling Co. v. Ellison*, 66 S.W.2d 52, 252 Ky. 172—*Pack-*

ard-Louisville Motor Co. v. O'Neal, 58 S.W.2d 630, 248 Ky. 438.
La.—*Mancuso v. Hurwitz-Mintz Furniture Co., App.*, 183 So. 461.
Mo.—*Mattan v. Hoover Co.*, 166 S.W. 2d 557, 350 Mo. 506.
N.Y.—*Psota v. Long Island R. Co.*, 159 N.E. 180, 246 N.Y. 388, 62 A.L.R. 1163.
Ohio.—*Fredericks v. Birkett L. Williams Co.*, 40 N.E.2d 162, 68 Ohio App. 217.
Okl.—*Norton v. Harmon*, 133 P.2d 206, 192 Okl. 36.
S.C.—*Stevens v. Moore*, 46 S.E.2d 73, 211 S.C. 498.
Tex.—*Lightsey Black & White Cab Corporation v. Littlefield, Civ.App.*, 48 S.W.2d 766, error refused.
 42 C.J. p 1222 note 4.
Admissibility of:
Ordinance see subdivision 2 of this section.
Report of accident see supra subdivision p of this section.
96. **Mass.**—*Hartnett v. Gryzmish*, 105 N.E. 988, 218 Mass. 258.
Tex.—*Routledge v. Rambler Auto. Co., Civ.App.*, 95 S.W. 749.
97. **Cal.**—*Blank v. Coffin*, 126 P.2d 868, 30 Cal.2d 457—*Shields v. Oxnard Harbor Dist.*, 116 P.2d 121, 46 Cal.App.2d 477.
Ind.—*Zoludow v. Keeshin Motor Express*, 34 N.E.2d 980, 109 Ind.App. 575.
Mo.—*Smith v. Fine*, 175 S.W.2d 761, 351 Mo. 1179.
N.H.—*Ramsdell v. John B. Varick Co.*, 170 A. 12, 86 N.H. 457.
 42 C.J. p 1222 note 7.
98. **Del.**—*Cerchio v. Mullins*, 138 A. 277, 3 W.W.Harr. 245.
Ga.—*Brown v. Georgia Kaolin Co.*,

admissible in the absence of other evidence,⁹⁹ or inadmissible as positive, affirmative, and substantive evidence, as distinguished from evidence impeaching the credibility of a witness.¹ A statute providing that registration of the vehicle in defendant's name is evidence of his responsibility for the conduct of the driver is not applicable where the vehicle in question is not registered in the name of defendant as owner.²

Consent to, or instructions prohibiting or limiting, use. Ordinarily, evidence of instructions given to the driver by defendant or his supervisory representative is admissible on the question whether the driver was acting within the scope of his employment;³ but under some circumstances it is otherwise.⁴ So, also, evidence is held admissible in support of plaintiff's contention that defendant had no rule prohibiting the taking of an automobile by an employee;⁵ but evidence that the driver had not been expressly warned not to drive members of other employee's families to their homes is immaterial in the absence of evidence that defendant had knowledge that the driver had previously engaged in such practice.⁶

Under a statute making, in case of an accident,

a person operating another person's motor vehicle, with the express or implied consent of the owner, the owner's agent in the operation of the vehicle, it has been held, on the one hand, that defendant owner is not entitled to show the limited extent of his initial consent to his servant's operation of a motor vehicle,⁷ and, on the other hand, that, where defendant claims that he instructed his employee to limit the use of the vehicle to the employer's business, testimony concerning correspondence between defendant and the employee relating to the accident is admissible to show defendant's reaction on discovery of the employee's personal use of the car and as bearing on the question whether the employee was operating the vehicle with defendant's consent at the time of the accident.⁸

Insurance. Evidence which is otherwise competent to show the relationship existing between defendant and an alleged agent or servant is not inadmissible because it incidentally discloses that defendant possesses protective insurance;⁹ and in a number of cases the fact that defendant is protected by liability or other insurance in respect of the vehicle in question is held admissible as bearing on the issue of whether the driver of the vehicle is an

4 S.E.2d 100, 60 Ga.App. 347—Akridge v. Atlanta Journal Co., 194 S.E. 590, 56 Ga.App. 812, followed in Robinson v. Atlanta Journal Co., 194 S.E. 594, 56 Ga.App. 820.
Neb.—Myers v. McMaken, 276 N.W. 167, 133 Neb. 524.

N.J.—Van Genderen v. Paterson Wimsatt Thrift Co., 24 A.2d 223, 128 N.J.Law 41.

Tex.—Linden Lumber Co. v. Johnston, Civ.App., 128 S.W.2d 121, error dismissed—Ochoa v. Winerlich Motor Sales Co., 94 S.W.2d 416, 127 Tex. 542, on remand, Civ.App., 98 S.W.2d 235—Edgington v. Southern Old Line Life Ins. Co., Civ.App., 55 S.W.2d 579.

Conclusion of defendant as witness see Evidence § 471 n.

Extrajudicial declarations of alleged agent see Agency §§ 322 c (1), 324 c.

Immaterial evidence

U.S.—Dudley v. Preston Motor Co., C.C.A.Tenn., 51 F.2d 8.

Iowa.—Heintz v. Iowa Packing Co., 268 N.W. 607, 222 Iowa 517.

Pa.—Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 107 Pa.Super. 166.

99. N.C.—Carter v. Thurston Motor Lines, 41 S.E.2d 586, 227 N.C. 193.
Tex.—Wells v. Henderson, Civ.App., 78 S.W.2d 483, error refused.

Wash.—Sullivan v. Associated Dealers, 103 P.2d 489, 4 Wash.2d 352.

Wis.—Kowalsky v. Whipkey, 2 N.W. 2d 704, 240 Wis. 59.

1. Ariz.—Otero v. Soto, 267 P. 947, 34 Ariz. 87.

Ind.—Frick v. Bickel, 54 NE.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Wash.—Sullivan v. Associate Dealers, 103 P.2d 489, 4 Wash.2d 352.

2. Mass.—Ouellette v. Bethlehem-Hingham Shipyard, 73 N.E.2d 592, 321 Mass. 390.

3. Ky.—Model Laundry v. Collins, 43 S.W.2d 693, 241 Ky. 191—Saunders' Ex'rs v. Armour & Co., 295 S.W. 1014, 220 Ky. 719.

Minn.—Patterson-Stocking v. Dunn Bros. Storage Warehouses, 276 N.W. 737, 201 Minn. 308.

N.Y.—Conca v. Cushman's Sons, 55 N.Y.S.2d 481, 269 App.Div. 814.
42 C.J. p. 1222 note 4 [b].

Evidence that chauffeur acted contrary to owner's instructions

N.Y.—Psota v. Long Island R. Co., 159 N.E. 180, 246 N.Y. 388, 62 A.L.R. 1163.

4. Original negligence in intrusting vehicle to minors

In action against owner of motor vehicle who had intrusted it to minors who were too young to have driver's license, he was not entitled to introduce evidence as to where and by what minor the vehicle was to be driven, since owner could not be exonerated from his original neg-

ligence of intrusting the vehicle to minors because of alleged fact that his instructions to minors were not followed in operation of vehicle.—Atkins v. Churchill, Wash., 194 P.2d 364.

Lack of notice to plaintiff

In action against owner of used car lot for injuries to prospective customer when struck on lot by motor vehicle set in motion by another prospective customer, evidence that defendant had forbidden salesmen to allow customers to start any vehicle unless salesmen were present, and that no vehicle was to be driven on the lot, was properly excluded as not binding on plaintiff in the absence of notice thereof.—Siebel v. Shapiro, 137 P.2d 56, 58 Cal.App.2d 509.

5. Cal.—Hicks v. Reis, 134 P.2d 788, 21 Cal.2d 654.

6. Cal.—Gordoy v. Flaherty, 72 P.2d 538, 9 Cal.2d 716.

7. R.I.—Baker v. Rhode Island Ice Co., 50 A.2d 618, 72 R.I. 262.

8. Minn.—Schultz v. Swift & Co., 299 N.W. 7, 210 Minn. 533.

9. Cal.—Taylor v. Oakland Scavenger Co., 110 P.2d 1044, 17 Cal.2d 594.

Ohio.—Cushman Motor Delivery Co. v. Bernick, 8 N.E.2d 446, 55 Ohio App. 31.

Evidence of insurance generally see supra subdivision 1 of this section.

independent contractor or an employee of defendant or of some other person.¹⁰ On the other hand, a liability insurance policy or rider is inadmissible where it does not in any way show or afford proof that, at the time of the accident, the vehicle in question was being operated by an agent of insured.¹¹

A "nonownership" policy insuring against liability for death or injury resulting from the use of motor vehicles in the business of insured is admissible where the name of the driver in question appears in the schedule,¹² but it is not admissible where it does not name any particular employees and the agent or employee in question was, at the time of the accident, driving his own motor vehicle on his way to work,¹³ or the evidence shows that he at no time drove his vehicle under such circumstances as to give the right of control over its operation to insured.¹⁴

r. Speed

Competent evidence of the rate of speed at which a motor vehicle was travelling at the instant of, or immediately before or after, an accident or collision in

which it was involved is admissible. Physical facts, including the force of the impact or collision as shown by its effect on the vehicle and its occupants, may be considered in determining speed.

Ordinarily, in an action to recover damages for death, or for injury to person or property, caused by the operation of a motor vehicle, competent evidence of the rate of speed at which such motor vehicle, or another motor vehicle involved in the accident or collision, was traveling¹⁵ at the instant of,¹⁶ or immediately before¹⁷ or after,¹⁸ the accident or collision is admissible; and this is true, even though defendant admits liability and the case is tried on the question of damages only;¹⁹ but in some cases it is immaterial and properly excluded, as where a cause of action for the death of a pedestrian is rested on the last clear chance rule²⁰ or, in a collision case, the evidence relates to the speed of a vehicle on the wrong side of the road and a collision was inevitable if such vehicle was moving.²¹

While evidence of the speed of the motor vehicle at a remote time or place is not admissible,²² except

10. U.S.—McCoy v. Universal Car-loading & Distributing Co., C.C.A. Ohio, 82 F.2d 342.
- Ark.—Delamar & Allison v. Ward, 41 S.W.2d 760, 184 Ark. 82.
- Ind.—McDonald v. Swanson, 1 N.E. 2d 684, 103 Ind.App. 171.
- N.Y.—Rashall v. Morra, 294 N.Y.S. 680, 250 App.Div. 474.
- Ohio.—Leonard v. Kreider, 1 N.E.2d 956, 51 Ohio App. 474.
- S.D.—Biggins v. Wagner, 245 N.W. 385, 60 S.D. 581, 85 A.L.R. 776.
- Wash.—Carlson v. P. F. Collier & Son Corporation, 67 P.2d 842, 130 Wash. 301.
- Workmen's compensation, but not liability, insurance policy held admissible**
- Tex.—Gladewater Laundry & Dry Cleaners v. Newman, Civ.App., 141 S.W.2d 951, error dismissed, judgment correct.
11. Mo.—McAboy v. Hulett, App. 112 S.W.2d 86.
12. Ind.—Van Drake v. Thomas, 88 N.E.2d 878, 110 Ind.App. 586.
- Folioy limited to occasional operation**
- Conn.—Muraszki v. William L. Clifford, Inc., 26 A.2d 578, 129 Conn. 123.
13. Or.—Hantke v. Harris Ice Mach. Works, 54 P.2d 293, 152 Or. 564.
14. Mo.—Relling v. Missouri Ins. Co., 153 S.W.2d 79, 236 Mo.App. 164.
15. U.S.—Brinegar v. Green, C.C.A. Iowa, 117 F.2d 316.
- Cal.—Musante v. Guerrini, 13 P.2d 985, 125 Cal.App. 556.

- Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.
- Ky.—Hogle's Guardian v. Wolfzorn, 58 S.W.2d 577, 248 Ky. 396.
- Mass.—Simon v. Berkshire Street Ry. Co., 11 N.E.2d 485, 298 Mass. 454.
- Mich.—Marciniak v. Sundeen, 270 N. W. 729, 278 Mich. 407.
- Minn.—Hayden v. Lundgren, 221 N. W. 715, 175 Minn. 449.
- N.C.—Potter v. Dixie Transit Co., 146 S.E. 709, 196 N.C. 824.
- Pa.—Goldenberg v. Philadelphia Rural Transit Co., 170 A. 360, 112 Pa.Super. 163.
- Tenn.—Rice-Stix Dry Goods Co. v. Self, 101 S.W.2d 132, 20 Tenn.App. 498.
- Wash.—Stubbs v. Allen, 10 P.2d 983, 168 Wash. 156.
- Wis.—Georgeson v. Nielsen, 252 N. W. 576, 214 Wis. 191.
- 42 C.J. p 1224 note 65.
- High speed while approaching intersection**
- Cal.—Shelton v. Ackerman, 4 P.2d 598, 117 Cal.App. 679.
- Acceleration of speed**
- Ill.—Sullivan v. Heyer, 21 N.E.2d 776, 300 Ill.App. 699.
- Decrease of speed while crossing intersection**
- Tex.—Polasek v. Gaines Bros., Civ. App., 185 S.W.2d 609, error refused.
- Undiminished speed**
- Mass.—Payson v. Checker Taxi Co., 159 N.E. 449, 262 Mass. 22.
- Wis.—Abraham v. Clark, 282 N.E. 865, 202 Wis. 451.

16. Iowa.—Thomas v. Charter, 278 N.W. 920, 224 Iowa 1278.
- Wash.—Stubbs v. Allen, 10 P.2d 983, 168 Wash. 156.
17. Iowa.—Thomas v. Charter, 278 N.W. 920, 224 Iowa 1278.
- Mich.—Gibbons v. Delta Contracting Co., 4 N.W.2d 39, 301 Mich. 638.
- N.C.—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 218 N.C. 320.
- Tenn.—Corpus Juris quoted in Mason v. James, 89 S.W.2d 910, 912, 19 Tenn.App. 479.
- 42 C.J. p 1224 note 67.
18. D.C.—Standard Oil Co. of N. J. v. Sheppard, 148 F.2d 363, 80 U.S. App.D.C. 71.
- Tenn.—Corpus Juris quoted in Mason v. James, 89 S.W.2d 910, 912, 19 Tenn.App. 479.
- 42 C.J. p 1224 note 67.
19. Mass.—Wilder v. General Motorcycle Sales Co., 122 N.E. 319, 232 Mass. 305.
20. Ky.—Braden's Adm'x v. Liston, 79 S.W.2d 241, 258 Ky. 44.
21. Ky.—Thronton v. Phillips, 90 S. W.2d 347, 262 Ky. 346.
22. Ark.—Schwam v. Reece, 210 S. W.2d 903.
- Cal.—Blackford v. Beckwith, 265 P. 514, 90 Cal.App. 37.
- Conn.—Buonanno v. Cameron, 41 A. 2d 107, 131 Conn. 513.
- Ga.—Hollomon v. Hopson, 166 S.E. 45, 45 Ga.App. 762.
- Iowa.—Neyens v. Gehl, 15 N.W.2d 888, 235 Iowa 115.
- Mass.—Simon v. Berkshire Street Ry. Co., 11 N.E.2d 485, 298 Mass. 454.

for the limited purpose of affecting the credibility and accuracy of testimony as to speed at the time of the collision²³ or as to the limited speed of which the vehicle is capable,²⁴ or unless it is connected with other evidence showing that the same rate of

speed was maintained up to the time and place of the accident,²⁵ the question of remoteness is dependent on the facts of each case²⁶ and rests largely in the sound discretion of the trial court.²⁷ Evidence of the speed of a vehicle between the starting point

Tenn.—*Corpus Juris* quoted in *Mason v. James*, 89 S.W.2d 910, 912, 19 Tenn.App. 479—*Whitfield v. Loveless*, 1 Tenn.App. 377.

Vt.—*Loomis v. Abelson*, 144 A. 378, 101 Vt. 459.

Wash.—*Huttenball v. Montgomery*, 60 P.2d 679, 187 Wash. 516.

Wyo.—*Ries v. Cheyenne Cab & Transfer Co.*, 79 P.2d 468, 53 Wyo. 104.

42 C.J. p 1225 note 68.

Full stop, or possibility thereof before collision

(1) Admission of testimony concerning rate of speed of truck six miles from accident was error, where truck thereafter, and prior to collision, stopped for appreciable period of time and again resumed its course—*Denton v. Midwest Dairy Products Corporation*, 1 NE 2d 807, 284 Ill.App. 279.

(2) A question as to speed over a course intervening between the point of a motor vehicle collision and a point so remote that the speed might be reduced even to the extent of coming to a full stop is subject to objection for indefiniteness—*Thomas v. Charter*, 278 N.W. 920, 224 Iowa 1278.

Evidence held inadmissible or properly excluded

Ala.—*Hodges v. Wells*, 147 So. 672, 226 Ala. 558—*Whittaker v. Walker*, 135 So. 185, 223 Ala. 167.

Mass.—*Hagerty v. Tyler*, 4 N.E.2d 463, 295 Mass. 581.

Miss.—*Gough v. Harrington*, 141 So. 280, 163 Miss. 393.

Mo.—*Wood v. Claussen*, App., 207 S.W.2d 802.

Ohio.—*Booksbaum v. Cousins*, 1 N.E.2d 150, 51 Ohio App. 385, error dismissed 199 N.E. 217, 130 Ohio St. 336.

Pa.—*McCaull v. Griffith*, 168 A. 536, 110 Pa.Super. 522—*Mader v. Atkins*, Com.Pl., 49 Dauph. Co. 314.

23. Wash.—*Olson v. Rose*, 151 P.2d 454, 21 Wash.2d 464.

24. Ky.—*Paducah Coca-Cola Bottling Co. v. Reeves*, 88 S.W.2d 39, 261 Ky. 539.

25. U.S.—*Dromey v. Inter State Motor Freight Service*, C.C.A.Ill., 121 F.2d 361.

Ariz.—*Brooks v. Neer*, 47 P.2d 452, 46 Ariz. 144.

Ark.—*Missouri Pac. Transp. Co. v. Mitchell*, 137 S.W.2d 242, 199 Ark. 1045.

Cal.—*Ritchey v. Watson*, 263 P. 345, 204 Cal. 387.

Conn.—*Sosnowski v. Lenox*, 53 A.2d 388, 133 Conn. 624.

Ill.—*Carr v. Blackstock*, 49 N.E.2d 279, 319 Ill.App. 369.

Ky.—*Home Laundry Co. v. Cook*, 125 S.W.2d 763, 277 Ky. 8.

Mo.—*Long v. Mild*, 149 S.W.2d 853, 347 Mo. 1002.

Or.—*Martin v. Oregon Stages*, 277 P. 291, 129 Or. 435.

Tenn.—*Corpus Juris* quoted in *Mason v. James*, 89 S.W.2d 910, 912, 19 Tenn.App. 479.

Wyo.—*Ries v. Cheyenne Cab & Transfer Co.*, 79 P.2d 468, 53 Wyo. 104.

42 C.J. p 1225 note 69.

26. Ala.—*Utility Trailer Works v. Phillips*, 29 So.2d 289, 249 Ala. 61—*Townsend v. Adair*, 134 So. 637, 223 Ala. 150—*Davies v. Barnes*, 77 So. 612, 201 Ala. 120.

Tenn.—*Corpus Juris* quoted in *Mason v. James*, 89 S.W.2d 910, 912, 19 Tenn.App. 479.

Wyo.—*Ries v. Cheyenne Cab & Transfer Co.*, 79 P.2d 468, 53 Wyo. 104.

It is difficult to draw any exact line and say at what distance from the place of an accident the speed of an automobile becomes too remote to render proof thereof proper.—*Waldman v. Sanders Motor Co.*, 243 N.W. 555, 214 Iowa 1139.

Determinative matters

Competency of testimony of speed of motorist prior to collision is not determined by specific distance or time, but by causal connection or contact with the accident.—*Bryant v. Brown*, 271 N.W. 566, 278 Mich. 686.

Evidence held not too remote

Md.—*Acme Poultry Corp. v. Melville*, 53 A.2d 1.

Ohio.—*Van Agthoven v. Zumstein Taxicab Co.*, 18 Ohio App. 395.

Evidence held admissible

U.S.—*Melville v. State of Md. to Use of Morris*, C.C.A.Md., 155 F.2d 440.

Ark.—*Jelks v. Rogers*, 165 S.W.2d 258, 204 Ark. 877.

Ill.—*Walsh v. Murray*, 43 N.E.2d 562, 315 Ill.App. 664.

Iowa.—*Waldman v. Sanders Motor Co.*, 243 N.W. 555, 214 Iowa 1139.

Minn.—*Quinn v. Zimmer*, 239 N.W. 902, 184 Minn. 589.

Mont.—*Jones v. Northwestern Auto Supply Co.*, 18 P.2d 305, 93 Mont. 224.

N.Y.—*Clay v. Monington*, 40 N.Y.S.2d 108, 266 App.Div. 695.

Ohio.—*Solomon v. Mote*, App., 49 N.E.2d 703.

Pa.—*Rooney v. Maczko*, 172 A. 151,

315 Pa. 113—*Yourkavitch v. Dallessandro*, Com.Pl., 34 Berks Co. 285.

Tenn.—*Hamilton v. Moyers*, 140 S.W.2d 799, 24 Tenn.App. 86.

Wash.—*Husby v. Fiorata Bros.*, 297 P. 1075, 162 Wash. 135.

Wis.—*Fox v. Kaminsky*, 2 N.W.2d 199, 239 Wis. 559.

27. Ala.—*Utility Trailer Works v. Phillips*, 29 So.2d 289, 249 Ala. 61—*Corpus Juris* cited in *Townsend v. Adair*, 134 So. 637, 223 Ala. 150. Cal.—*Ritchey v. Watson*, 268 P. 345, 204 Cal. 387—*Lundgren v. Converse*, 93 P.2d 819, 34 Cal.App.2d 445—*Pruitt v. Krovitz*, 139 P.2d 992, 59 Cal.App.2d 666.

Iowa.—*Roushar v. Dixon*, 2 N.W.2d 660, 231 Iowa 993—*Thomas v. Charter*, 278 N.W. 920, 224 Iowa 1278—*Glass v. Hutchinson Ice Cream Co.*, 243 N.W. 352, 214 Iowa 825.

Minn.—*Johnson v. Farrell*, 298 N.W. 256, 210 Minn. 351—*Spencer v. Johnson*, 281 N.W. 879, 203 Minn. 402.

Neb.—*Prince v. Petersen*, 12 N.W.2d 704, 144 Neb. 134—*Showers v. A. H. Jones Co.*, 253 N.W. 902, 126 Neb. 604—*Schwartz v. Ogram*, 242 N.W. 273, 123 Neb. 76, 81 A.L.R. 769. N.H.—*Dimock v. Lussier*, 163 A. 500, 86 N.H. 54.

Or.—*Hanson v. Schrick*, 85 P.2d 355, 160 Or. 397.

Tenn.—*Corpus Juris* quoted in *Mason v. James*, 89 S.W.2d 910, 912, 19 Tenn.App. 479.

Va.—*Slate v. Saul*, 40 S.E.2d 171, 185 Va. 700—*Butler v. Greenwood*, 23 S.E.2d 217, 180 Va. 456.

Wyo.—*Ries v. Cheyenne Cab & Transfer Co.*, 79 P.2d 468, 53 Wyo. 104.

42 C.J. p 1225 note 71.

Evidence of racing

Court may properly say in its discretion that remote evidence of racing will not be first received, or received at all, unless evidence shows racing immediately preceding accident.—*Glass v. Hutchinson Ice Cream Co.*, 243 N.W. 352, 214 Iowa 825.

Limits of discretion

The discretion contemplated does not permit admission of evidence of speed at other points unless they are of such close proximity that reasonable inference could be drawn that it was continued to point of accident, or if more remote, there is evidence of fact or circumstance from which a reasonable inference could be drawn that speed was continued at approx-

of the trip and the place of the accident has been held admissible²⁸ as tending to show the time of the accident or collision.²⁹

In addition to the testimony of witnesses,³⁰ physical facts may be considered in determining the speed of a motor vehicle involved in an accident or collision.³¹ Particular matters of which evidence may be received and considered on the question of speed include the distance which the motor vehicle traveled after the brakes were applied,³² the skid marks which it made,³³ and the force or violence of the impact or collision,³⁴ as shown by its effect on the

vehicle,³⁵ its occupants,³⁶ and personal property being carried therein.³⁷ Also, evidence of the speed of a street car, alongside which the vehicle in question was being driven, is admissible,³⁸ as is also evidence of the rate of speed at which another vehicle was traveling where it was leading a procession of vehicles closely following each other and defendant's vehicle was a part of the procession.³⁹ While incompetent testimony relating to, or offered for the purpose of proving, speed is inadmissible,⁴⁰ the fact that a witness testifying to speed had only a brief time to observe it affects merely the weight, and not the competency, of his testimony.⁴¹

imately the same rate over intervening distance.—*Prince v. Petersen*, 12 N.W.2d 704, 144 Neb. 134.

Discretion held abused

(1) In admitting testimony as to speed at distance of two miles and five miles from place of accident where there was no evidence of any fact or circumstance from which a reasonable inference could be drawn that such speed was maintained over intervening distance.—*Prince v. Petersen*, supra.

(2) In excluding as too remote evidence of speed one-half mile from intersection where collision occurred, where evidence as to speed at which motorist approached intersection was conflicting and the record failed to show the speed at which motorist was traveling at distance of more than one hundred feet from the intersection.—*Hanson v. Schrick*, 85 P.2d 355, 160 Or. 397.

Discretion held not abused

(1) In admitting evidence. Cal.—*Fruitt v. Krovitz*, 139 P.2d 992, 59 Cal.App.2d 666—*Lundgren v. Converse*, 93 P.2d 819, 34 Cal.App.2d 445.

Iowa.—*Roushar v. Dixon*, 2 N.W.2d 660, 231 Iowa 993.

Minn.—*Spencer v. Johnson*, 281 N.W. 879, 203 Minn. 402.

Neb.—*Schwarting v. Ogram*, 242 N.W. 273, 123 Neb. 76, 81 A.L.R. 769.

Va.—*Slate v. Saul*, 40 S.E.2d 171, 185 Va. 700.

(2) In excluding evidence. Ala.—*Utility Trailer Works v. Phillips*, 29 So.2d 289, 249 Ala. 61.

Cal.—*Ackel v. American Creamery Co.*, 55 P.2d 1195, 12 Cal.App.2d 672.

Ill.—*Rzeszewski v. Barth*, 58 N.E.2d 269, 324 Ill.App. 345.

22. Ohio.—*Bailey v. Parker*, 170 N.E. 607, 34 Ohio App. 207.

29. Wash.—*Still v. Swanson*, 27 P.2d 704, 175 Wash. 553.

30. Ohio.—*Peltier v. Smith*, 66 N.E. 2d 117, 78 Ohio App. 171.

Wash.—*Hauswirth v. Pom-Arleau*, 119 P.2d 674, 11 Wash.2d 354.

Opinion or estimate:

Of observer see Evidence § 499.

Of person specially qualified by skill or experience see Evidence § 533 b.

Testimony of driver

(1) As to actual speed.—*Mid-Continent Pipe Line Co. v. Whitely*, C.C.A.Okla., 116 F.2d 871.

(2) As to the highest speed which that particular vehicle could attain.—*Goldblatt v. Brocklebank*, 166 Ill. App. 315.

31. Ohio.—*Peltier v. Smith*, 66 N.E. 2d 117, 78 Ohio App. 171.

Wash.—*Paddock v. Tone*, 172 P.2d 481, 25 Wash.2d 940.

Respective distances between the place of collision and the two points where the vehicles were shortly before the collision were held material on the question of relative speed.—*Page v. McGovern*, 3 A.2d 543, 110 Vt. 166.

32. Cal.—*Vedder v. Bireley*, 267 P. 724, 92 Cal.App. 52.
42 C.J. p 1225 note 72.

33. Wash.—*Stubbs v. Allen*, 10 P.2d 983, 168 Wash. 156.

Evidence of skid marks generally see supra subdivision n (2) of this section.

Length of skid marks

Cal.—*Vedder v. Bireley*, 267 P. 724, 92 Cal.App. 52.

Kan.—*Briley v. Nussbaum*, 252 P. 223, 122 Kan. 438, modified on other grounds 254 P. 351, 123 Kan. 58.

N.J.—*Tischler v. Steinholtz*, 122 A. 880, 99 N.J.Law 149.

34. Conn.—*Bruce v. Bitgood*, 156 A. 859, 113 Conn. 783.

Ky.—*Thronton v. Phillips*, 90 S.W.2d 347, 262 Ky. 346.

Tex.—*Universal Transport & Distributing Co. v. Cantu*, Civ.App., 84 S.W.2d 327, error refused.

Wash.—*Paddock v. Tone*, 172 P.2d 481, 25 Wash.2d 940—*Hauswirth v. Pom-Arleau*, 119 P.2d 674, 11 Wash.2d 354—*Johnson v. Ohman*, 117 P.2d 217, 10 Wash.2d 466—*Engel v. Interstate Transit Co.*, 115 P.2d 681, 9 Wash.2d 590—*Oyster v. Dye*,

110 P.2d 863, 7 Wash.2d 674, 133 A.L.R. 720—*Comstock v. Smith*, 48 P.2d 255, 183 Wash. 94—*Gaskill v. Amadon*, 38 P.2d 229, 179 Wash. 375—*Copeland v. North Coast Transp. Co.*, 13 P.2d 65, 169 Wash. 84.

35. Or.—*Goodale v. Hathaway*, 39 P.2d 678, 149 Or. 237—*Schairer v. Johnson*, 272 P. 1027, 128 Or. 409.

Tex.—*Universal Transport & Distributing Co. v. Cantu*, Civ.App., 84 S.W.2d 327, error refused.

Wash.—*Paddock v. Tone*, 172 P.2d 481, 25 Wash.2d 940.

Injury to vehicle generally see supra subdivision d of this section.

36. Cal.—*Lunde v. Emmick*, 61 P.2d 338, 16 Cal.App.2d 676.

N.C.—*Hobbs v. Queen City Coach Co.*, 34 S.E.2d 211, 225 N.C. 323.

Wash.—*Paddock v. Tone*, 172 P.2d 481, 25 Wash.2d 940.

Evidence of injury to, or death of, other persons in same accident or collision generally see supra subdivision g of this section.

Evidence of

(1) Throwing of occupant toward windshield, but not out of vehicle.—*Duprat v. Chesmore*, 110 A. 305, 94 Vt. 218.

(2) Driving of occupant's head and arm through window of vehicle.—*Paul v. Drown*, 189 A. 144, 108 Vt. 458, 109 A.L.R. 1085.

(3) Place where occupants, thrown from vehicle by collision, were found.—*Judd v. Rudolph*, 223 N.W. 416, 207 Iowa 113, 62 A.L.R. 1174.

37. Evidence that milk cans fell forward

Ky.—*Parris' Adm'x v. Molter*, 65 S.W.2d 52, 251 Ky. 432.

38. Ky.—*Park v. Schell*, 295 S.W. 161, 220 Ky. 317.

39. Mo.—*Tucker v. Carter*, App., 211 S.W. 138.

40. Or.—*Schairer v. Johnson*, 272 P. 1027, 128 Or. 409.

Pa.—*Fitzgerald v. Penn Transit Co.*, 44 A.2d 288, 353 Pa. 43.

41. N.H.—*Cedergren v. Hadaway*, 18 A.2d 380, 91 N.H. 270.

Evidence of speed derived from the fixed position of the hand or needle of a speedometer after the collision is admissible,⁴² except where the mechanism of the particular speedometer is such that it registered only the highest speed attained since the prior release of the hand to return to zero, and not necessarily the speed at or immediately preceding the collision.⁴³

Reasonable or improper speed. Evidence of conditions and circumstances is to be considered in determining whether the speed at which a vehicle was being driven at the time of the accident or collision was reasonable or dangerous;⁴⁴ and it is held that the testimony of a witness as to the speed of a particular vehicle is properly excluded where, under the physical facts, the speed of such vehicle immediately before, or at the time of, the accident could not have been excessive.⁴⁵ Evidence that a district ahead is thickly populated is properly excluded on the question of proper speed;⁴⁶ where there is no contention or evidence of excessive speed at the scene of the accident, evidence of speed in excess of the legal limit in another block is irrelevant and inadmissible;⁴⁷ and, where there is no evidence of speed in excess of the permissible rate before the collision, evidence of speed higher than the permissible rate while the vehicle, which was at first parked at the point of collision, was being driven away after the collision is inadmissible.⁴⁸

Customary or average speed. It is proper to exclude evidence of the average speed of motor vehicles at the place of the accident,⁴⁹ as well as evidence as to whether the bus driver in question was making the usual speed through traffic;⁵⁰ but,

where one party has been permitted to prove a customary rate of speed, the other party should be allowed to prove that it was exceeded on the occasion in question.⁵¹

Occupant's knowledge of, and protest against, speed. Evidence of a complaint or protest by an occupant of a vehicle to the driver about the speed at which the vehicle was being driven is admissible where the speed of that vehicle is involved;⁵² but evidence of the occupant's knowledge that the driver customarily drove at a high rate of speed is properly excluded in the absence of proof that the occupant had reason to suspect that the driver would drive at such speed under hazardous conditions;⁵³ and the knowledge of the occupants of one vehicle that another vehicle approaching an intersection was exceeding the statutory speed limit is immaterial on the question of whether the driver of the other vehicle was negligent.⁵⁴

s. Statutes, Ordinances, Rules, or Regulations

In order to be admissible, a municipal traffic ordinance, or a highway rule or safety regulation adopted and promulgated by a state or municipal commission or department, must be valid and relevant.

In view of the evidence before the court,⁵⁵ or concessions made by both parties,⁵⁶ it may be proper to exclude traffic regulations offered by one party.

Statutes. A statute of another state where the accident occurred is admissible where it is relevant;⁵⁷ but not otherwise.⁵⁸ A particular statute of the state where the accident occurred and the action is tried may be irrelevant;⁵⁹ but, where the case in-

42. Ohio.—Carl v. Shaffer, 50 N.E.2d 182, 71 Ohio App 339.

Or.—Albrecht v. Safeway Stores, 80 P.2d 62, 159 Or. 331.

43. Wis.—Geason v. Schaefer, 281 N. W. 681, 229 Wis. 8.

44. Iowa.—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 417.

Tex.—McClelland v. Mounger, Civ. App., 107 S.W.2d 901, error dismissed by agreement.

Odor of liquor

(1) Testimony that odor of liquor was on defendant at time of accident could be considered by jury in determining what was reasonable speed for him to be driving automobile under circumstances, although there was no evidence that he was under influence of intoxicating liquor.—Paddock v. Tone, 172 P.2d 481, 35 Wash.2d 940.

(2) Evidence of intoxication or use of intoxicants generally see supra subdivision b (2) of this section.

Evidence as to distance within which motor vehicle can be stopped is admissible to aid in determining whether speed of vehicle at time of accident in which it was involved was negligent.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151.

45. Iowa.—Klaaren v. Shadley, 247 N.W. 301, 215 Iowa 1043.

46. Mass.—Simon v. Berkshire Street Ry. Co., 11 N.E.2d 485, 298 Mass. 454.

47. S.C.—Wright v. South Carolina Power Co., 31 S.E.2d 904, 205 S.C. 327.

48. Ky.—Layne v. Cottle, 150 S.W.2d 684, 286 Ky. 221.

49. N.Y.—Sanford v. Moreau, 292 N. Y.S. 595, 249 App.Div. 915.

50. Ark.—Missouri Pac. Transp. Co. v. Brown, 99 S.W.2d 245, 193 Ark. 304.

51. Tex.—Hubb Diggs Co. v. Bell, Com.App., 1 S.W.2d 575.

52. Ill.—Harper v. Malandrone, 48 N.E.2d 789, 319 Ill. App 247.

Mass.—Hiller v. De Sautels, 169 N.E. 494, 269 Mass. 437.

53. Ill.—Burke v. Molloy, 14 N.E.2d 279, 294 Ill. App. 442.

54. Me.—Keller v. Banks, 156 A. 817, 130 Me. 397.

55. D.C.—Adams v. Capital Transit Co., 154 F.2d 859, 81 U.S. App. D.C. 78.

56. D.C.—Coleman v. Chudnow, Mun. App., 35 A.2d 925.

57. Mo.—Weisman v. Arrow Trucking Co., App., 176 S.W.2d 37.

58. Minn.—Brandsoy v. Bromeland, 225 N.W. 162, 177 Minn. 298.

59. R.I.—Cunningham v. Walsh, 163 A. 223, 53 R.I. 23.

volves a collision at an intersection, a statute pertaining to the right of way at an intersection should be considered.⁶⁰

Ordinances. A valid traffic ordinance, in effect at the time of the accident or collision, is admissible in evidence where it is applicable to the facts of the case as shown by other evidence,⁶¹ but not where it is inapplicable,⁶² or it is immaterial to any theory advanced in the case,⁶³ or the only question to which it could be material is eliminated from the case,⁶⁴ or where failure, or alleged failure, to comply with the ordinance does not appear to have been the proximate cause of the accident.⁶⁵ A traffic ordinance is inadmissible where it is void for unreasonableness,⁶⁶ or it is in conflict with,⁶⁷ or has been superseded by,⁶⁸ a statute, or it did not become effective until after the accident in question.⁶⁹

An ordinance prohibiting the operation of a mo-

tor vehicle by a person under a certain age is admissible where the driver of an automobile involved in the accident is under that age.⁷⁰ Ordinances requiring a license for the operation of a taxicab, and the filing of a public liability insurance policy, have been held admissible for the purpose of paving the way to the introduction of evidence of an employer and employee relationship between the owner and the driver of a taxicab involved in the collision.⁷¹

Rules or regulations of commission or department. Highway rules or safety regulations adopted and promulgated by a state department or commission under statutory authority are, when applicable, admissible;⁷² and the same is true of safety regulations promulgated by the Interstate Commerce Commission;⁷³ but it is otherwise as to a rule or regulation which is not applicable,⁷⁴ or, in

60. N.J.—Durgett v. Public Service Co.—ordinated Transport, 150 A. 557. 8 N.J.Misc. 457.

61. Cal.—Coursault v. Schwebel, 5 P.2d 77, 118 Cal.App. 259.

Fla.—Blue & Gray Cab Co. v. Lowe. 196 So. 425, 143 Fla. 129.

Ga.—Sweet v. Awrey, 28 S.E.2d 154. 70 Ga.App. 334.

Ill.—Patterson v. Aitken, 244 Ill.App. 264—Benison v. Dembinsky, 241 Ill.App. 530.

Mo.—Kenney v. J. A. Folger & Co., App., 192 S.W.2d 73—White v. Hasburgh, App., 124 S.W.2d 560.

Ohio.—Welch v. Canton City Lines. 50 N.E.2d 343, 142 Ohio St. 166.

Okl.—Burton v. Harn, 156 P.2d 618, 195 Okl. 232.

Tex.—Stedman Fruit Co. v. Smith, Civ.App., 28 S.W.2d 622, error dismissed.

42 C.J. p 1229 note 76.

Ordinance relating to right of way
U.S.—Long Transp. Co. v. Domurat. C.C.A.Ill., 93 F.2d 23.

Colo.—Bauserman v. White, 114 P.2d 557, 108 Colo. 101—Johnsen v. Baugher, 22 P.2d 855, 92 Colo. 588.

Ga.—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743.

Ill.—Tuttle v. Checker Taxi Co., 279 Ill.App. 455.

Mo.—White v. Hasburgh, App., 124 S.W.2d 560.

Ordinance limiting speed

Ga.—Hall v. Ponder, 179 S.E. 243, 50 Ga.App. 627.

Mont.—Marinkovich v. Tierney, 17 P.2d 93, 93 Mont. 72.

S.C.—Smith v. Carolina Milling Co., 167 S.E. 553, 168 S.C. 355.

Vt.—Purinton v. Newton, 49 A.2d 98, 114 Vt. 490.

42 C.J. p 1229 note 76 [a] (1).

Ordinance requiring signal before turning corner

Ill.—Pettit v. Well-McLain Co., 252 Ill.App. 423.

Ordinance requiring vehicle to be stopped at certain place

Mo.—Kenney v. J. A. Folger & Co., App., 192 S.W.2d 73—Hartley v. McKee, App., 86 S.W.2d 359

Ordinance regulating parking

Mass.—Mair v. Whittemore Co., 194 N.E. 92, 289 Mass. 261.

N.J.—Perry v. Public Service Coordinated Transport, 56 A.2d 617, 136 N.J.Law 398.

62. Ark.—Coca Cola Bottling Co. v. Shipp, 297 S.W. 856, 174 Ark. 130.

Cal.—Formosa v. Yellow Cab Co., 87 P.2d 716, 31 Cal.App.2d 77.

Ill.—Sheely v. Sall, 3 N.E.2d 943, 286 Ill.App. 466—Rutowicz v. United Motor Coach Co., 261 Ill.App. 377.

Mass.—Nickerson v. Boston Elevated Ry., 66 N.E.2d 193, 319 Mass. 220.

Ohio.—Mougey v. Becker, 197 N.E. 388, 49 Ohio App. 521—Dreihls v. Taxicabs of Cincinnati, 186 N.E. 832, 45 Ohio App. 129.

Vt.—Porter v. Fleming, 156 A. 903, 104 Vt. 76.

42 C.J. p 1229 note 77.

Ordinance not shown to be applicable
Ga.—Stewart v. Avery, 144 S.E. 218, 38 Ga.App. 431.

Mass.—Foschia v. First Nat. Stores, 194 N.E. 834, 290 Mass. 90.

Ordinances held irrelevant

Ohio.—Giglio v. Lasita, 55 N.E.2d 666, 73 Ohio App. 207.

Or.—Hanna v. Royce, 249 P. 173, 119 Or. 450.

S.C.—Wright v. South Carolina Power Co., 31 S.E.2d 904, 205 S.C. 327.

Whole ordinance containing many irrelevant sections is not admissible.

—Stewart v. Avery, 144 S.E. 218, 38 Ga.App. 431.

63. Mich.—Harnau v. Haight, 155 N. W. 563, 189 Mich. 600.

64. Cal.—Irwin v. Golden State Auto Tour Corp., 171 P. 1059, 178 Cal. 10.

Mo.—Gurwell v. Jefferson City Lines, App., 192 S.W.2d 683.

42 C.J. p 1229 note 80.

65. Kan.—Allen v. Pearce Dental Supply Co., 88 P.2d 1057, 149 Kan. 549

N.Y.—Curatolo v. Rochester Ice & Cold Storage Utilities, 8 N.Y.S.2d 803, 255 App.Div. 934.

66. Ill.—Hilderbrand v. Baldwin, 233 Ill.App. 278.

42 C.J. p 1229 note 78.

67. Ohio—Ottgen v. Garey, 181 N.E. 485, 41 Ohio App. 499.

Where one section of ordinance is consonant with statute, it may be admissible, although other sections are in conflict with the statute.—Ottgen v. Garey, supra.

68. Tex.—Magouirk v. Klas, Civ. App., 23 S.W.2d 488.

69. Ill.—Dina v. Passaglia, 23 N.E. 2d 773, 302 Ill.App. 159.

70. Miss.—Somerville v. Keeler, 145 So. 721, 165 Miss. 244.

Ohio.—Danner v. Avery, 168 N.E. 52, 32 Ohio App. 301.

71. Ind.—McDonald v. Swanson, 1 N. E.2d 684, 103 Ind.App. 171.

72. Neb.—Trussell v. Ferguson, 239 N.W. 461, 122 Neb. 82.

Ohio.—Matz v. J. L. Curtis Cartage Co., 7 N.E.2d 220, 132 Ohio St. 271.

73. U.S.—Interstate Motor Lines v. Great Western Ry. Co., C.C.A.Colo., 161 F.2d 968.

74. Okl.—Sheppard v. Scrivner-Stevens Co., 127 P.2d 159, 191 Okl. 112.

so far as applicable, has not been violated,⁷⁵ or which is not law, not having been promulgated by anyone authorized by law to make such a regulation.⁷⁶ A regulation adopted by a municipal department is not admissible where it is irrelevant⁷⁷ or it is offered for the purpose of showing the meaning of certain words as employed in a statute.⁷⁸

Private rules of employer. The private rules of a company governing the conduct of its employees are not admissible in an action between the company,⁷⁹ or its employee,⁸⁰ and a third person.

§ 517. Weight and Sufficiency

- a. In general
- b. Place where injury occurred
- c. Status of injured person
- d. Identity, ownership, and status of vehicle

- e. Identity of driver or person in control in general
- f. Agency
- g. Knowledge and permission of owner
- h. Family purpose doctrine
- i. Joint enterprise or joint adventure
- j. Damages

a. In General

In actions to recover damages sustained as the result of the operation of motor vehicles, every fact essential to the cause of action or defense must be established by a preponderance of the evidence.

In accord with the general rules relating to the weight and sufficiency of evidence in civil actions, particularly those applicable in actions based on negligence, each and every fact essential to the cause of action or defense in actions brought to recover damages for injuries sustained as the result of the operation of motor vehicles must be established by a preponderance of the evidence.⁸¹ Each

75. Conn.—Vaughn v Healy, 182 A 166, 120 Conn 589

76. Tenn.—Long v. Tomlin, 125 S. W.2d 171, 22 Tenn App. 607.

77. Del.—De Pace v. O'Neal, Super., 54 A.2d 855.

78. Wis.—Schumacher v. City of Milwaukee, 243 N.W. 756, 209 Wis. 43

79. S.C.—Eudy v. Atlantic Greyhound Lines, 191 S.E. 85, 183 S.C. 306

80. Ill.—Streeter v. Humrichouse, 191 N.E. 684, 357 Ill. 234.

81. La.—Wald v Board of Com'rs of Port of New Orleans, 124 So. 701, 14 La.App. 337—Ilick v. Tusa, 124 So. 678, 14 La.App. 330—Middleton v. Jordan, 120 So. 668, 10 La. App. 189.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Pa.—Rymer v. Devon, Com.Pl., 32 Del.Co 271.

42 C.J. p 1231 note 15

Proof beyond reasonable doubt not required

La.—James H. Demourelle & Sons v. Hortman Salmen Co., App., 123 So. 352, 11 La.App. 71.

Evidence held sufficient

(1) In general.

La.—Lyle v. Guillot, App., 143 So 511.

N.Y.—Meadows v. Lewis, 257 N.Y.S 137, 235 App.Div. 243.

Tex.—Sturdevant v. Hooper, Civ.App. 101 S.W.2d 379, error dismissed.

(2) To make prima facie case.

La.—Lawson v. Nossek, 130 So. 669, 15 La.App. 207.

N.Y.—Bara v. Ansh, 24 N.Y.S.2d 427, 260 App.Div. 1039.

(3) To authorize recovery by plaintiff.

U.S.—Cherry-Burrell Co. v Thatcher, C.C.A.Mont., 107 F.2d 65—Liberty Baking Co. v. Kellum, C.C.A.Pa., 79 F.2d 931.

Fla.—Sellers v. Flat, 21 So 2d 789, 155 Fla. 821—Postal Telegraph & Cable Co. v. Doyle, 167 So. 358, 123 Fla. 695, affirmed 175 So. 515, 128 Fla. 707—Smith v. Hickson, 157 So. 416, 117 Fla. 122.

Ga.—United Motor Freight Terminals v. Driver, 44 S.E.2d 156, 75 Ga. App. 571—Adams v. Evans, 23 S.E.2d 507, 68 Ga.App. 544.

Ill.—Lawson v. Beaudry, 9 N.E.2d 260, 290 Ill.App. 612—Straus Nat. Bank & Trust Co. v. Marcus, 274 Ill App. 597—Watson v. Trinz, 274 Ill App. 379.

Kan.—Bohannon v. Peoples Taxicab Co., 64 P.2d 1, 145 Kan. 86.

La.—Whipple v. Lirette, 124 So. 160, 11 La.App. 485.

Mass.—Liddell v. Middlesex Motor Co., 175 N.E. 737, 275 Mass. 346.

Neb.—Sutton v. Inland Const. Co., 14 N.W.2d 387, 144 Neb. 721.

N.J.—Iaconio v. D'Angelo, 146 A. 62, 7 N.J.Misc. 491.

N.Y.—Kramer v. Lantry, 41 N.Y.S.2d 118, 266 App.Div. 762, reargument denied 44 N.Y.S.2d 172, 266 App. Div. 925—Trifoglio v. M. & M. Transp. Co., 30 N.Y.S.2d 666, 263 App.Div. 723—Hartman v. S. & M. Forwarding Co., 9 N.Y.S.2d 174, 256 App.Div. 889—Snyder v. Jerge, 9 N.Y.S.2d 46, 256 App.Div. 888—Fencil v. Nelson Bros. Coal Co., 292 N.Y.S. 761, 249 App.Div. 857, motion denied 295 N.Y.S. 743, 250 App.Div. 765, affirmed 12 N.E.2d 455, 276 N.Y. 516.

Ohio.—Armour & Co. v. Yoter, 178 N.E. 596, 40 Ohio App. 225.

Okl.—Adair v. Moore, 83 P.2d 813, 183 Okl. 563.

Tenn.—Tennessee Coach Co. v. Heneley, 15 Tenn.App. 183.

W.Va.—Ercole v. Daniel, 141 S.E. 631, 105 W.Va. 118.

(4) To support verdict for defendant.

U.S.—Jackson v. Missouri, Kan. & Okl. Coach Lines, D.C.Mo., 63 F. Supp. 828

Cal.—Bovette v. Los Angeles Transit Lines, 179 P.2d 80, 78 Cal.App. 2d 860

Ga.—Hayden v. Lindsay & Morgan Co., 160 S.E. 688, 43 Ga.App. 855.

Ky.—Ortwein v. Droste, 228 S.W. 1028, 191 Ky. 17.

Mass.—Orlando v. City of Brockton, 3 N.E.2d 794, 295 Mass. 205.

Mich.—Mulvena v. Alexander, 270 N.W. 291, 278 Mich. 265

Minn.—Hamre v. Hamre-Hogenson Holding Co., 242 N.W. 377, 186 Minn. 77.

N.J.—Heuser v. Rothenberg, 1 A.2d 328, 121 N.J.Law 14, affirmed 8 A.2d 391, 123 N.J.Law 319.

N.Y.—Onorato v. P. Mouyios, Inc., 41 N.Y.S.2d 285, 266 App.Div. 750—Friedman v. Kyle, 40 N.Y.S.2d 422, 266 App.Div. 710, mot on denied 50 N.E.2d 307, 290 N.Y. 924, appeal denied 64 N.E. 658, 295 N.Y. 636, affirmed 65 N.E.2d 565, 295 N.Y. 740.

Wash.—Thornton v. Eneroth, 30 P.2d 951, 177 Wash. 1.

(5) To support verdict or judgment in favor of certain defendants and in favor of plaintiff against other defendants.

case must be decided on its own peculiar facts and the inferences that the trier of the fact is reasonably entitled to draw from the whole situation presented.⁸² Theories as to what actually happened cannot take the place of evidence.⁸³

b. Place Where Injury Occurred

General rules are applicable to determine weight and

sufficiency of evidence as to place where accident occurred or status thereof.

General rules of evidence have been applied in determining the weight and sufficiency of the evidence as to the place where the accident occurred,⁸⁴ or the status of the place as whether or not it is a public highway,⁸⁵ or the status of the place as

Fla.—Ford Motor Co. v. Floyd, 188 So. 601, 137 Fla. 301.

N.Y.—Burke v. Speziale, 25 N.Y.S. 2d 299, 261 App.Div. 912—Agnello v. Weissglass Gold Seal Dairies Corp., 23 N.Y.S.2d 122, 260 App.Div. 925, 1039—Genovese v. Buffalo Plate & Window Glass Corporation, 8 N.Y.S.2d 742, 255 App.Div. 1031.

(6) To sustain recovery from driver and from owner of motor vehicle.

U.S.—L. A. Wood & Co. v. Taylor, C. C.A.Ga., 154 F.2d 548.

Ind.—Marshall v. Temperley, 192 N. E. 106, 100 Ind.App. 131.

(7) To sustain verdict against parents for injuries by minor driver of motor vehicle.—Paschall v. Sharp, 110 So. 387, 215 Ala. 304.

(8) To justify verdict against husband for injuries by wife—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1—Nuttall v. Walton, Cal., 283 P. 66.

(9) To support findings.

U.S.—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65.

Cal.—Pontius v. McLain, 298 P. 541, 113 Cal.App. 452—Briggs v. Jess Mead, Inc., 270 P. 263, 93 Cal.App. 666.

Ga.—Eldson v. Felder, 25 S.E.2d 41, 69 Ga.App. 225.

La.—White v. Tinsley, App., 154 So. 752.

N.Y.—Jones v. Gray, 45 N.Y.S.2d 519, 267 App.Div. 242, stay granted 47 N.Y.S.2d 281, 267 App.Div. 853, appeal denied 47 N.Y.S.2d 606, 267 App.Div. 926.

Evidence held insufficient

(1) In general.

Ind.—Frymier v. Butler, 39 N.E.2d 809, 110 Ind.App. 531.

Pa.—Miller v. Guthrie, 191 A. 61, 325 Pa. 495.

(2) To support verdict for plaintiff.

Ala.—Watkins v. Reinhart, 9 So.2d 113, 243 Ala. 243.

Ariz.—Johnston v. Hare, 246 P. 546, 30 Ariz. 253.

Conn.—Koops v. Gregg, 32 A.2d 653, 130 Conn. 185.

Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256.

Ky.—Sanders v. Lakes, 109 S.W.2d 36, 270 Ky. 98.

La.—Nuss v. MacKenzie, App., 4 So. 2d 845—McCalmont v. Sterkx, 5 La.App. 730.

Me.—Copp v. Paradis, 157 A. 228, 130 Me. 464.

Mass.—Kindell v. Ayles, 160 N.E. 818, 263 Mass. 244.

N.J.—Bucossi v. Marrocco, 186 A. 456, 14 N.J. Misc. 562.

N.Y.—Passanante v. Rothenberg Cruller Bakery, 30 N.Y.S.2d 705, 263 App.Div. 727, reargument denied 32 N.Y.S.2d 143, 263 App. Div. 843, affirmed 43 N.E.2d 715, 289 N.Y. 570.

Wash.—Robinson v. Ebert, 39 P.2d 992, 180 Wash. 387.

(3) To support verdict for defendant.—Sorensen v. Hunter, 52 N.Y.S. 2d 872, 268 App.Div. 1078, reargument denied 56 N.Y.S.2d 404, 269 App.Div. 808—Lembach v. Lester, 28 N.Y.S.2d 108, 262 App.Div. 817—DeLaval Sales & Service v. Vaik, 16 N.Y.S.2d 889, 258 App.Div. 968—Donahue v. Meagley, 221 N.Y.S. 707, 220 App.Div. 469.

Weight of testimony

(1) The testimony of witness who witnessed actual impact between motor vehicle and truck or saw it a split second after collision, so as to obtain a mental picture thereof, must be given considerable weight.—Montifue v. American Mut. Liability Ins. Co., 1a App., 26 So.2d 407.

(2) Testimony that witness observed collision on dark and foggy night from point some fifty yards from the scene of the collision was properly disregarded, where testimony was contradictory and to believe witness' testimony court would have to disbelieve all of plaintiffs' and defendants' witnesses.—Middleton v. Scaife, La.App., 190 So. 829, followed in Midyett v. Scaife, 190 So. 832.

(3) Testimony of witness who made an examination at scene of collision on heavily traveled road more than thirty hours thereafter had no probative value.—Lee Way Motor Freight v. True, C.C.A.Okla., 165 F.2d 38.

(4) Fact that one witness in motor vehicle accident case is positive and opposing witness uncertain may be reason to give greater weight to testimony of one than the other.—Leiser v. Thomas, La.App., 150 So. 81, rehearing refused 150 So. 670.

Estimates of witnesses

Witness' testimony as to scene, location, and distance are estimates

which jury must consider with all other evidence and circumstances disclosed—Glover v. Vernon, 285 N. W. 652, 226 Iowa 1089.

Physical facts held not to prevent recovery by plaintiff

Pa.—Steinbacher v. Achey, Com.Pl., 45 Lanc.L.Rev. 471.

Tenn.—American Tobacco Co. v. Zoller, 6 Tenn App 390.

82. Wash.—Davis v. Browne, 147 P. 2d 263, 20 Wash.2d 219.

83. Pa.—Lithgow v. Lithgow, 5 A. 2d 573, 334 Pa. 262—Rymer v. Devon, Com.Pl., 32 Del.Co. 271.

84. Colo.—Campbell v. Trate, 149 P. 2d 380, 112 Colo. 265.

Conn.—Muse v. Page, 4 A.2d 329, 125 Conn. 219.

Mo.—Blackburn v. Ready-Mixed Concrete Co., App., 188 S.W.2d 526.

Evidence held sufficient

(1) To show that accident occurred in municipality.—Wilhelm v. Hersh, Mo.App., 50 S.W.2d 735.

(2) To sustain inference that collision occurred on south, rather than north, side of intersection—Poole v. Perretz, 127 So. 439, 13 La App 110.

Evidence held insufficient

(1) In general.—Finney v. Frevel, 37 A.2d 923, 183 Md 355—Gloyd v. Wills, 23 A.2d 665, 180 Md 161

(2) To prove place of collision. Ill.—Sturgeon v. Quarton, 44 N.E.2d 766, 316 Ill.App. 308.

Va.—Hagaman v. Vanacore, 28 S.E. 2d 633, 182 Va. 312.

(3) To show that accident happened in residential district.—Donaho v. Large, 158 S.W.2d 417, 25 Tenn. App. 433.

Circumstantial evidence held suggestive of point of collision

(1) Location of oil spots, proven to have been caused by drainage from one of the colliding vehicles.—Nuss v. MacKenzie, La.App., 4 So. 2d 845.

(2) Skid marks.—Evans v. Cru-sott, 97 S.W.2d 569, 265 Ky. 698.

85. Evidence held sufficient

(1) To establish that accident occurred on public highway.—Villegas v. Strohm, 297 P. 588, 112 Cal.App. 633—Laubscher v. Blake, 46 P.2d 836, 7 Cal.App.2d 376—42 C.J. p 1231 note 18.

(2) To warrant finding that street

whether or not it is a street intersection.⁸⁶

c. Status of Injured Person

Where the fact is in issue, the party having the burden of proof must establish by a preponderance of the evidence the status of the injured person; circumstantial evidence may be sufficient for the purpose.

was highway.—*Phillips v. Henson*, 30 S.W.2d 1065, 326 Mo. 282.

(3) To show that road on which collision occurred was not public street or highway, but private road.—*Sillis v. Forbes*, 91 P.2d 246, 33 Cal. App.2d 219.

Proof of how street became highway unnecessary

Ind.—*Wagoner v. Rose*, 193 N.E. 108, 100 Ind.App. 192.

86. Evidence sufficient to establish that accident occurred at street intersection

Wash.—*Yanase v. Seattle Taxicab, etc., Co.*, 157 P. 1076, 91 Wash. 415.

87. N.Y.—Bogart v. New York, 93 N.E. 937, 200 N.Y. 379, 21 Ann. Cas. 466.

Evidence held sufficient

(1) To establish that injured party was not a mere volunteer.

Ind.—*Daugherty v. Hunt*, 38 N.E. 2d 250, 110 Ind.App. 264

Mo.—*Nolan v. Joplin Transfer & Storage Co.*, Mo.App., 203 S.W.2d 740.

(2) To support finding that one riding in motor vehicle was not employee of driver or of company.—*Sumner v. Edmunds*, 21 P.2d 159, 130 Cal.App. 770

(3) To establish that relationship of master and servant existed between injured party and one of the defendants at the time of the accident.—*Malkowski v. Diasparra*, 65 N.Y.S.2d 449, 271 App.Div. 827, affirmed 74 N.E.2d 550, 297 N.Y. 568, reargument denied 75 N.E.2d 269, 297 N.Y. 598.

(4) To show that plaintiff was riding with driver's express consent.—*Buse v. Hollifield*, 164 S.E. 657, 158 Va. 498.

Evidence held insufficient

Mass.—*Balian v. Ogassian*, 179 N.E. 232, 277 Mass. 525, 78 A.L.R. 1021.
Pa.—*Stefan v. New Process Laundry Co.*, 185 A. 734, 323 Pa. 373.

83. N.Y.—Bogart v. New York, 93 N.E. 937, 200 N.Y. 379, 21 Ann.Cas. 466.

Evidence held sufficient

To establish that injured party was not a mere trespasser.

Mo.—*Nolan v. Joplin Transfer & Storage Co.*, App., 203 S.W.2d 740.
Tex.—*Morris v. Sanders*, Civ.App., 55 S.W.2d 594.

Va.—*Morris v. Peyton*, 139 S.E. 500, 148 Va. 812.

Evidence held insufficient

To establish any relation of plaintiff to defendant other than as trespasser.—*Clark v. Harnischfeger Sales Corporation*, 264 N.Y.S. 873, 238 App.Div. 493.

89. Evidence held sufficient

(1) To establish that injured party was invitee.

Ind.—*Daugherty v. Hunt*, 38 N.E.2d 250, 110 Ind.App. 264.

La.—*Johnson v. National Casualty Co.*, App. 176 So. 235.

Mass.—*Cook v. Cole*, 174 N.E. 271, 273 Mass. 557.

Mo.—*Nolan v. Joplin Transfer & Storage Co.*, App. 203 S.W.2d 740.

N.J.—*Wright v. Beith*, 157 A. 840, 9 N.J.Misc. 1183—*Ingley v. Toter*, 155 A. 133, 9 N.J.Misc. 567.

Va.—*Virginia Stage Lines v. Spencer*, 36 S.E. 522, 184 Va. 870.

(2) To sustain finding that defendant invited injured party to ride and permitted him to stand on fender of truck.—*Morris v. Peyton*, 139 S.E. 500, 148 Va. 812.

(3) To show that employee in charge of truck had apparent authority to invite injured employee to ride.—*Rice v. City of Portland*, 17 P.2d 562, 141 Or. 205.

(4) To sustain verdict against truck driver's employer for injuries sustained by boy, mounting truck while assisting in making deliveries.—*Dyer v. McCorkle*, 280 P. 965, 208 Cal. 216.

Evidence held insufficient

(1) To support finding of invitation of defendant.

Ky.—*Wigginton Studio v. Reuter's Adm'r*, 71 S.W.2d 14, 254 Ky. 128.

Mass.—*Welch v. O'Leary*, 191 N.E. 377, 287 Mass. 69.

N.J.—*Morlock v. Kohn*, 145 A. 627, 7 N.J.Misc. 381.

(2) To establish that truck driver had apparent authority to invite strangers to ride in truck with him.—*Lipscomb v. News Star World Pub. Corporation*, La.App., 5 So.2d 41.

(3) To support finding that plaintiff was not invited to ride with defendant.—*Leff v. Lafer*, 150 A. 59, 8 N.J.Misc. 319.

90. Evidence held sufficient

(1) To establish that injured person was licensee.—*Babcock & Wilcox Co. v. Nolton*, 71 P.2d 1051, 58 Nev. 133.

(2) To establish that injured party was not a mere licensee.—*Nolan*

Where such fact is in issue, the party having the burden of proof must establish by a preponderance of the evidence the status of the injured person,⁸⁷ whether he is a traveler, or a trespasser,⁸⁸ invitee,⁸⁹ licensee,⁹⁰ or guest;⁹¹ and circumstantial evidence

v. Joplin Transfer & Storage Co., Mo.App., 203 S.W.2d 740.

91. Ill.—Barnett v. Levy, 213 Ill. App. 129

Weight and sufficiency of evidence of negligence in action by guest against owner or operator of vehicle see *infra* § 518 q.

Clear proof required

Party relying on guest statute must clearly establish that plaintiff was guest within statute.—*Dobbs v. Suginka*, 185 P.2d 784, 117 Colo. 218.

Evidence held sufficient

(1) In general.

Mass.—*Nichols v. Rougeau*, 187 N.E. 710, 284 Mass. 371—*Haines v. Chereskie*, 16 N.E.2d 680, 301 Mass. 112.

N.Y.—*Lamica v. Vollmer*, 63 N.Y.S. 2d 31, 270 App.Div. 1063.

(2) To establish that injured party was guest.

Ark.—*Ward v. George*, 112 S.W.2d 30, 195 Ark. 216.

Ill.—*Bain v. Bain*, 12 N.E.2d 686, 293 Ill.App. 638.

Iowa.—*Clausen v. Johnson's Estate*, 278 N.W. 297, 224 Iowa 990.

La.—*Grantham v. Smith*, 132 So. 805, 18 La.App. 519, rehearing denied 134 So. 263, and reversed on other grounds *Lorance v. Smith*, 138 So. 871, 173 La. 883.

Mass.—*Jacobson v. Stone*, 178 N.E. 636, 277 Mass. 323.

Mo.—*Treadway v. United Rys. Co. of St. Louis*, 253 S.W. 1037, 300 Mo. 156.

N.H.—*Lee v. Chamberlain*, 148 A. 466, 84 N.H. 182

Or.—*Rauch v. Stecklein*, 20 P.2d 387, 142 Or. 286.

Vt.—*Huestis v. Lapham's Estate*, 32 A.2d 115, 113 Vt. 191.

Wash.—*Adair v. Newkirk*, 268 P. 153, 148 Wash. 165.

Wis.—*Renich v. Klein*, 283 N.W. 288, 230 Wis. 123.

(3) To show that injured person was not passenger for compensation.
Cal.—*Phillips v. Harper*, 140 P.2d 686, 60 Cal.App.2d 298—*Humphreys v. San Francisco Area Council, Boy Scouts of America*, 139 P.2d 941, 22 Cal.2d 436—*Christ v. O'Neil*, 83 P.2d 96, 28 Cal.App.2d 661—*McCann v. Hoffman*, 70 P.2d 909, 9 Cal.2d 279.

Nev.—*Mitrovich v. Pavlovich*, 114 P.2d 1084, 61 Nev. 62.

Or.—*Smith v. Williams*, 178 P.2d 710, 180 Or. 626, 173 A.L.R. 1220.

(4) To warrant conclusion that

may be sufficient for this purpose.⁹²

d. Identity, Ownership, and Status of Vehicle

In order to support a recovery for plaintiff, sufficient proof as to the identity and ownership of the vehicle

causing the injury must be adduced, but circumstantial evidence may suffice.

In order that plaintiff may recover against defendant, there must be sufficient proof as to the identity of the vehicle which injured plaintiff,⁹³ and

transaction between guest and host did not constitute a "payment for transportation" within guest statute.—*Strajer v. Schwartzman*, 188 P.2d 971, 164 Kan. 241—*Pilcher v. Erny*, 124 P.2d 461, 155 Kan. 257.

(5) To warrant finding or conclusion that injured party was not mere guest.

Cal.—*Weddle v. Loges*, 125 P.2d 914, 52 Cal.App.2d 115—*Sullivan v. Richardson*, 6 P.2d 567, 119 Cal. App. 367.

Ill.—*Foale v. Linsky*, 279 Ill.App. 58. Mass.—*Weida v. MacDougall*, 16 N. E.2d 60, 300 Mass. 521.

(6) To justify finding that occupant was riding for owner's benefit and protection.

Mass.—*Marshall v. Carter*, 17 N.E.2d 205, 301 Mass. 372—*Walker v. Lloyd*, 4 N.E.2d 306, 295 Mass. 507. Ohio.—*Edelstein v. Kidwell*, App. 38 N.E.2d 436, reversed on other grounds 41 N.E.2d 564, 139 Ohio St. 595.

Va.—*White v. Gregory*, 170 S.E. 739, 161 Va. 414.

(7) To show that plaintiff was passenger.

Cal.—*Sumner v. Edmunds*, 21 P.2d 159, 130 Cal.App. 770.

N.Y.—*Malkowski v. Diasparra*, 59 N. Y.S.2d 417, 270 App.Div. 768.

(8) To show that injured party was passenger for hire.

Cal.—*Whitechat v. Guyotte*, 122 P.2d 47, 19 Cal.2d 428—*Sullivan v. Richardson*, 6 P.2d 567, 119 Cal. App. 367.

Mass.—*Haines v. Chereskie*, 16 N.E. 2d 680, 301 Mass. 112—*Nichols v. Rougeau*, 187 N.E. 710, 284 Mass. 371.

(9) To warrant finding that guest relationship which earlier existed had terminated.—*Fone v. Elloian*, 7 N.E.2d 737, 297 Mass. 139.

(10) To support finding that violation of rule forbidding defendant's drivers from carrying passengers was so common and notorious as to have been abrogated.—*Manion v. Waybright*, 86 P.2d 181, 59 Idaho 643.

(11) To establish that employer gave no actual or implied consent that decedent might ride on employer's truck.—*Electric Bakeries v. Stacy's Adm'r*, 66 S.W.2d 70, 252 Ky. 20.

Evidence held insufficient

(1) In general.

Mass.—*Dineasoff v. Casey*, 29 N.E.2d 25, 308 Mass. 555—*Perkins v.*

Gardner, 191 N.E. 350, 287 Mass. 114.

N.D.—*Bentley v. Oldetyme Distillers*, 289 N.W. 92, 69 N.D. 587.

(2) To show that injured party was guest.—*Stefan v. New Process Laundry Co.*, 185 A. 734, 323 Pa. 373.

(3) To show that injured person was a paying passenger.

Ark.—*Froman v. J. R. Kelley Stave & Heading Co.*, 120 S.W.2d 164, 196 Ark. 808.

Cal.—*Whitechat v. Guyette*, 122 P.2d 47, 19 Cal.2d 428—*Jenkins v. National Paint & Varnish Co.*, 61 P. 2d 780, 17 Cal App 2d 161.

Fla.—*McDougald v. Couey*, 9 So.2d 187, 150 Fla. 748.

(4) To show that injured party was not guest.—*Sullivan v. Harris*, 276 N.W. 88, 224 Iowa 345.

(5) To establish that plaintiff was riding in the automobile without giving compensation within the guest statute.—*Kruzle v. Sanders*, 143 P.2d 704, 23 Cal.2d 237.

(6) To show an implied waiver by defendant company of its rule prohibiting any one other than its employee to ride upon its trucks, so as to authorize holding defendant company liable for death of guest riding at driver's invitation.—*Monroe Motor Exp. v. Jackson*, 45 S.E. 2d 445, 76 Ga App. 280—*Monroe Motor Exp. v. Jackson*, 38 S.E.2d 863, 74 Ga.App. 148.

92. Nev.—*Babcock & Wilcox Co. v. Nolton*, 71 P.2d 1051, 58 Nev. 133.

Employer's consent to truck driver's engaging boy to assist in deliveries could be implied from custom, usage, or conduct, without direct evidence, in boy's action for injuries.—*Dyer v. McCorkle*, 280 P. 965, 208 Cal. 216.

93. Ky.—*Race v. Chappell*, 202 S.W. 2d 626, 304 Ky. 788.

Evidence as to identity held sufficient

Cal.—*Hughes v. Hartman*, 273 P. 560, 206 Cal. 199—*Lake v. Churchill*, 67 P.2d 107, 20 Cal.App.2d 411.

Ga.—*Davies v. Hearn*, 164 S.E. 273, 45 Ga.App. 276.

La.—*Garbarino v. B. & R. Transfer Co., App.*, 20 So.2d 625—*Cooper v. Kennard, App.*, 192 So. 534—*Bullock v. Fidelity & Casualty Co. of New York, App.*, 187 So. 93—*Lovoi v. R. F. Mestayer Lumber Co., App.*, 185 So. 473, rehearing denied 186 So. 101—*Pegg v. Toye Bros.*

Yellow Cab Co., App., 167 So. 896—*Miley v. Marx, App.*, 147 So. 550—*James v. J. S. Williams & Son, App.*, 143 So. 84, reinstated 146 So. 335, affirmed 150 So. 9, 177 La. 1033—*Rossi v. Cust*, 136 So. 103, 17 La.App. 349—*Herrin v. Laundry & Dry Cleaning Service*, 128 So. 199, 14 La.App. 97.

Mich.—*Zolton v. Rotter*, 32 N.W.2d 30, 321 Mich. 1.

Mo.—*Vanausdall v. Schorr, App.*, 168 S.W.2d 110.

Pa.—*Reed v. Horn's Motor Express*, 187 A. 275, 123 Pa.Super. 411.

Va.—*Beasley v. Whitehurst*, 147 S.E. 194, 152 Va. 305.

Wash.—*Phelan v. Jones*, 4 P.2d 516, 164 Wash. 640.

Evidence as to identity held insufficient

Ark.—*Southwestern Transp. Co. v. Chambliss*, 125 S.W.2d 123, 197 Ark. 865.

Conn.—*Clark v. Connecticut Co.*, 44 A.2d 706, 132 Conn. 400.

La.—*Schepp v. Coca-Cola Bottling Co., App.*, 150 So. 413—*Davis v. Texas Lumber Co., App.*, 146 So. 788.

Md.—*Morris v. Twigg*, 58 A.2d 719.

Mass.—*Atlas v. Silsbury-Gamble Motors Co.*, 180 N.E. 127, 278 Mass. 279.

Mich.—*Davis v. Belmont Creamery Co.*, 274 N.W. 749, 281 Mich. 165.

Neb.—*Hahn v. Doyle*, 286 N.W. 389, 136 Neb. 469.

Pa.—*Epler v. Travis*, 19 A.2d 146, 341 Pa. 299.

Weight of evidence

Testimony of motorist, identifying a truck encountered after he was forced off road as the one responsible for his accident, based on momentary glimpse of the offending vehicle, had no evidential value apart from the observations on which the conclusion as to identity was based, and mere fact that defendant's truck was intercepted at a point twenty miles from scene of accident, proceeding in direction in which offending vehicle had been moving, was of slight probative value in establishing identity of vehicle responsible for the accident.—*Morris v. Twigg*, Md., 68 A.2d 719.

Failure to identify vehicle at scene

Pedestrian's failure at scene of accident to state that he was struck by defendant's vehicle was entitled to little, if any, consideration, where pedestrian was suffering from shock.—*Sanders v. Newsome*, 19 S.E.2d 882, 179 Va. 582.

general rules have been applied in determining the weight and sufficiency of evidence as to the status of a vehicle involved in an accident,⁹⁴ or the ownership of a damaged vehicle.⁹⁵ There must be evidence from which the jury can reasonably infer that the vehicle causing the injury is owned by de-

fendant,⁹⁶ or under his control,⁹⁷ and there can be no recovery when it is merely a matter of conjecture, surmise, speculation, or suspicion.⁹⁸ Plaintiff is required to prove defendant's ownership by a preponderance of the evidence,⁹⁹ but slight evidence of a substantial nature is sufficient to estab-

94. Evidence held sufficient

(1) On question whether nonregistered vehicle was trespasser, to warrant finding that owner had regular place of abode in state for more than thirty days.—*Avila v. Du Pont*, 180 N.E. 124, 278 Mass. 83

(2) To warrant finding that plaintiff's erroneous statement in registration application constituted heedless or reckless conduct in view of known facts, and hence was not a "mistake" within statute—*Munson v. Day State Dredging & Contracting Co.*, 50 N.E.2d 633, 314 Mass. 483.

(3) To show that status of vehicle was that of "business vehicle," kept by dealer for sale and for use in dealer's business—*Waters v. Hays*, Mo.App., 130 S.W.2d 220

Evidence held insufficient

Mass.—*Crean v. Boston Elevated Ry. Co.*, 198 N.E. 172, 292 Mass. 226

95. Mass.—*Dunn v. Merrill*, 34 N.E.2d 498, 309 Mass. 174

Evidence held sufficient

(1) To establish plaintiff's ownership

La.—*Adam v. English*, App., 21 So.2d 633

Mass.—*McTigue v. Ryan*, 190 N.E. 133, 286 Mass. 515

Pa.—*Draude & Donnelly v. Alfred Wolstenholme & Son*, 89 Pa. Super. 428.

(2) To establish that truck was registered in name of female plaintiff—*Burns v. Winchell*, 25 N.E.2d 752, 305 Mass. 276.

Evidence held insufficient

(1) To show ownership by plaintiff.—*Lively v. State*, La.App., 15 So.2d 617.

(2) To show that sole ownership of truck was not in female plaintiff—*Burns v. Winchell*, 25 N.E.2d 752, 305 Mass. 276.

96. Ky.—*Oldfield v. Owens*, 165 S.W.2d 952, 292 Ky. 183.

Evidence held sufficient

D.C.—*Mason v. Automobile Finance Co.*, 121 F.2d 82, 73 App.D.C. 284.

Tex.—*Globe Laundry v. McLean*, Civ.App., 19 S.W.2d 94.

Evidence held insufficient

U.S.—*Constitution Pub. Co. v. Dale*, C.C.A. Ala., 164 F.2d 210.

97. N.H.—*Hutchins v. John Hancock Mut. Life Ins. Co.*, 192 A. 498, 89 N.H. 79.

Evidence held insufficient

(1) In general.—*McKissick v. In-*

terstate Transit Lines, Mo.App., 201 S.W.2d 189.

(2) To support finding that bus company was not operating bus colliding with vehicle of plaintiff—*Ingle v. Bay Cities Transit Co.*, 164 P.2d 508, 72 Cal.App.2d 283.

92. Ky.—*Oldfield v. Owens*, 165 S.W.2d 952, 292 Ky. 183.

99. Pa.—*Bowling v. Roberts*, 83 A. 600, 235 Pa. 89.

S.C.—*Craig v. Clearwater Mfg. Co.*, 200 S.E. 765, 189 S.C. 176.

Evidence held sufficient

(1) In general.—*Association of Independent Taxi Operators v. Kern*, 13 A.2d 374, 178 Md. 252, 131 A.L.R. 792.

(2) To show ownership.

Ala.—*Shipp v. Davis*, 141 So. 366, 25 Ala.App. 101.

Ariz.—*Powell v. Langford*, 119 P.2d 230, 58 Ariz. 281

Ark.—*Arkansas Baking Co. v. Wyman*, 47 S.W.2d 45, 145 Ark. 310

Cal.—*Pearson v. Whitworth*, 171 P.2d 745, 75 Cal.App.2d 751—*Hill v. Fowble*, 149 P.2d 862, 65 Cal.App.2d 25—*Helmuth v. Frame*, 115 P.2d 846, 46 Cal.App.2d 372.

Conn.—*Denos v. Giovanelli*, 200 A. 573, 124 Conn. 464—*Larsen v. Thomas*, 176 A. 400, 119 Conn. 335

Ga.—*Lunsford v. Carden*, 13 S.E.2d 192, 64 Ga.App. 349—*Holland v. Bullock*, 190 S.E. 877, 55 Ga.App. 605—*Warren v. Brown*, 189 S.E. 67, 51 Ga.App. 769—*Davies v. Hearn*, 164 S.E. 273, 45 Ga.App. 276.

Ill.—*Watson v. Trinz*, 274 Ill.App. 379—*Whipkey v. Ashbaugh*, 267 Ill. App. 452

Iowa.—*Lange v. Bedell*, 212 N.W. 354, 203 Iowa 1194.

Ky.—*Union Transfer & Storage Co. v. Fryman's Adm'r*, 200 S.W.2d 953, 304 Ky. 422.

La.—*Baquet v. Meraux*, 123 So. 338, 11 La.App. 368—*Giangrosso v. Schweitzer*, 123 So. 127, 10 La.App. 777—*Atina Casualty & Surety Co. v. Crescent Forwarding & Transportation Co.*, 120 So. 798, 10 La.App. 31—*Vuillemot v. August J. Clavierie & Co.*, 125 So. 168, 12 La.App. 236

Mass.—*Kzcowski v. Johnowicz*, 192 N.E. 6, 287 Mass. 441—*Nash v. Lang*, 167 N.E. 762, 268 Mass. 407—*Lekarczyk v. Dupre*, 163 N.E. 642, 265 Mass. 33.

Mich.—*Sutser v. Allen*, 209 N.W. 918, 236 Mich. 1.

Minn.—*Krinke v. Timm*, 1 N.W.2d 866, 211 Minn. 510—*Flaugh v. Egan Chevrolet*, 279 N.W. 582, 202 Minn.

615—*Jasinuk v. Lombard*, 250 N.W. 568, 189 Minn. 594.

Miss.—*Atwood v. Garcia*, 147 So. 813, 167 Miss. 144.

Mo.—*Day v. Banks*, App., 143 S.W.2d 68—*Wells v. Wells*, App., 48 S.W.2d 109.

NH.—*Carroll v. Dane*, 196 A. 626, 89 N.H. 233.

N.J.—*Ceslak v. Krause*, 156 A. 461, 108 N.J.Law 350.

N.Y.—*Rathfelder v. Flag*, 12 N.Y.S.2d 136, 257 App.Div. 71, affirmed 24 N.E.2d 984, 282 N.Y. 563—*Mitchell v. Gilmour*, 9 N.Y.S.2d 45, 256 App.Div. 893, appeal denied—*Gerard v. Simpson*, 299 N.Y.S. 348, 252 App.Div. 340—*Hotop v. English & Greenfader*, 289 N.Y.S. 155, 248 App.Div. 774—*Callahan v. Bergman*, 258 N.Y.S. 296, 236 App.Div. 115, affirmed 185 N.E. 722, 261 N.Y. 523.

Ohio.—*Holmes v. Yellow Taxicab Co.*, 162 N.E. 710, 28 Ohio App. 382.

Pa.—*Reed v. Horn's Motor Express*, 187 A. 275, 123 Pa. Super. 411.

Tenn.—*Emert v. Wilkerson*, 7 Tenn. App. 269—*Kelley-Powell Co. v. Landen*, 7 Tenn.App. 92.

Tex.—*Reilly v. Buxter*, Civ.App., 52 S.W.2d 521, reversed on other grounds 82 S.W.2d 931, 125 Tex. 323—*Connor v. Crain*, Civ.App., 289 S.W. 712.

Va.—*Piccolo v. Woodford*, 35 S.E.2d 393, 184 Va. 432.

Wash.—*Forsberg v. Tevis*, 71 P.2d 358, 191 Wash. 355

Wis.—*Reynolds v. Wargus*, 2 N.W.2d 842, 240 Wis. 94.

42 C.J. p. 1231 note 20 [a].

(3) To establish prima facie case.

—*Voegeli v. Waterbury Yellow Cab Co.*, 150 A. 303, 111 Conn. 407, 69 A.L.R. 902.

Evidence held insufficient

(1) To show ownership.

U.S.—*Constitution Pub. Co. v. Dale*, C.C.A. Ala., 161 F.2d 210.

Ala.—*Mi-Lady Cleaners v. McDaniel*, 179 So. 908, 235 Ala. 469, 116 A.L.R. 639.

D.C.—*Page v. D. M. D. Taxi Corporation*, 92 F.2d 218, 67 App.D.C. 294.

Ga.—*Hayden v. Lindsey & Morgan Co.*, 160 S.E. 688, 43 Ga.App. 855.

Ky.—*Davis v. Bennett's Adm'r*, 132 S.W.2d 334, 279 Ky. 799—*Towles v. Perkins*, 98 S.W.2d 27, 266 Ky. 25.

La.—*Gondolfo v. O'Herry*, App., 12 So.2d 636—*Taylor v. Victoria Nav. Co.*, App., 176 So. 519—*Hardin v. Lyles Laundry*, App., 149 So. 151.

Mass.—*Petruzziello v. Borselli*, 72 N.

lish defendant's ownership,¹ and defendant's ownership may be shown by circumstantial evidence.²

Defendant's name on vehicle. Proof that defendant's name was printed on the vehicle is not conclusive evidence of his ownership of the vehicle,³ but it is at least a circumstance tending that way in the absence of any contravening proof,⁴ and such evidence has frequently been held sufficient to establish ownership.⁵ Where another whose name was also on the vehicle admitted ownership, however, proof that defendant's name was placed on the vehicle for advertising purposes will warrant denial of recovery against defendant.⁶

License or registration in defendant's name. Al-

though it has been said that the taking out of a license in one's own name does not of itself constitute proof of ownership,⁷ it is a circumstance tending to prove ownership,⁸ and evidence of license or registration in defendant's name, in connection with other evidence in the case, has frequently been held sufficient to establish ownership.⁹ The fact that a person who made application for the registration of a motor vehicle is found using a motor vehicle which bears the number issued therefor constitutes substantial evidence that the person who made the application is the owner thereof.¹⁰

Rebuttal. Positive, unequivocal testimony that defendant was not the owner will rebut a contrary presumption arising from the evidence,¹¹ but a pre-

E.2d 430, 321 Mass. 749—Atlas v. Silsbury-Gamble Motors Co., 180 N. E. 127, 278 Mass. 279.
Mich.—La Hay v. Nelson, 263 N.W. 419, 273 Mich. 435.
Okla.—Star v. Brumley, 263 P. 1086, 129 Okl. 134.
Pa.—Little v. Four Wheel Drive Sales Co., 179 A. 550, 319 Pa. 409.
S.C.—Craig v. Clearwater Mfg. Co., 200 S.E. 765, 189 S.C. 176.
Tex.—Linden Lumber Co. v. Johnston, Civ App., 128 S.W.2d 121. Error dismissed.
Wis.—Philip v. Schlager, 253 N.W. 394, 214 Wis. 370—De Forest Dairy Co. v. Friedrich, 232 N.W. 543, 202 Wis. 251—Bode v. Jensen, 222 N.W. 235, 197 Wis. 356
42 C.J. p 1231 note 20 [b]

(2) To show conclusively that defendant was not interested in keep and operation of vehicle.—Pollock Stores Co. v. Chatwell, 90 S.W.2d 213, 192 Ark. 83.

(3) To establish violation of statute requiring dealers to notify county clerk within prescribed period after sale.—Leonard v. Finney, 43 S.W.2d 213, 163 Tenn. 318.

(4) To make out prima facie case of ownership.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.

1. Ill.—Robeson v. Greyhound Lines, 257 Ill.App. 278.
2. Fla.—Sellers v. Flat, 21 So.2d 789, 155 Fla. 821.
3. Tex.—J. H. Robinson Truck Lines v. Jones, Civ.App., 139 S.W.2d 127—Freeman v. Texas Bread Co., Civ. App., 111 S.W.2d 307.
4. Tex.—J. H. Robinson Truck Lines v. Jones, Civ.App., 139 S.W.2d 127—Peveto v. Smith, Civ App., 113 S. W.2d 216 modified on other grounds 133 S.W.2d 572, 134 Tex. 308—Freeman v. Texas Bread Co., Civ.App., 111 S.W.2d 307.
5. Ark.—Lion Oil Refining Co. v. Smith, 133 S.W.2d 895, 199 Ark. 397—Plunkett-Jarrell Grocer Co. v.

Freeman, 92 S.W.2d 849, 192 Ark. 380.
Cal.—Tieiman v. Red Top Cab Co., 3 P.2d 381, 117 Cal App. 40.
Tenn.—Good v. Tennessee Coach Co., App., 209 S.W.2d 41—Bry-Block Mercantile Co. v. Byrd, 4 Tenn.App. 178.
Tex.—J. H. Robinson Truck Lines v. Jones, Civ.App., 139 S.W.2d 127.
Evidence held to establish prima facie case
Conn.—De Marey v. Brugas, 131 A. 392, 103 Conn. 667
Ill.—Robeson v. Greyhound Lines, 257 Ill App. 278.
Pa.—Wallin v. Katz, 86 Pa.Super 581.
Tex.—Austin Bros. v. Sill, Civ.App., 83 S.W.2d 716.
Wash.—Forsberg v. Tevis, 71 P.2d 358, 191 Wash. 355.

6. Ky.—Lyons v. Great Atlantic & Pacific Tea Co., 193 S.W.2d 450, 30 Ky. 827.
7. La.—Easley v. Roberts, App., 25 So.2d 245.
8. La.—Easley v. Roberts, supra.
9. Cal.—Johnson v. Griffith, 120 P.2d 6, 19 Cal.2d 176—Collard v. Love, 61 P.2d 458, 17 Cal.App.2d 72—Sayles v. Peters, 54 P.2d 94, 11 Cal. App.2d 401—Walker v. Nelson, 53 P.2d 977, 11 Cal.App.2d 297.
- Conn.—Lockwood v. Helfant, 13 A.2d 136, 126 Conn. 584—Jenkins v. Reichert, 5 A.2d 6, 125 Conn. 258—Dunn v. Santamauro, 175 A. 913, 119 Conn. 307.
- Fla.—Saunders v. Crawford, 164 So. 526, 122 Fla. 13.
- La.—Brunning v. Brock, App., 191 So. 551.
- Mass.—Fallon v. Darney, 15 N.E.2d 462, 300 Mass. 365.
- Mo.—Schmitt v. Shuplak, App., 42 S. W.2d 959.
- N.Y.—Allen v. Ennis, 300 N.Y.S. 1323, 253 App.Div. 769, affirmed 17 N.E. 2d 447, 279 N.Y. 578.

Prima facie case
Idaho.—Maier v. Minidoka County

Motor Co., 105 P.2d 1076, 61 Idaho 642.
Ky.—Wright v. Clausen, 92 S.W.2d 93, 263 Ky. 298.
N.Y.—Rathfelder v. Flag, 12 N.Y.S.2d 136, 257 App.Div. 71, affirmed 24 N. E.2d 984, 282 N.Y. 563—Staunton v. Robbins, 239 N.Y.S. 565, 136 Misc. 197.
Pa.—Morgan v. Heinel Motors, 197 A. 920, 329 Pa. 360.
R.I.—Staples v. Spelman, 165 A. 783, 53 R.I. 244.
Not conclusive
Minn.—Flaugh v. Egan Chevrolet, 279 N.W. 582, 202 Minn. 615.

Effect of statutory provisions
A statute making registration of motor vehicle prima facie evidence of ownership related entirely to matters of evidence.—Curtis v. Kyte, 106 S. W.2d 234, 21 Tenn.App. 115.

10. Utah.—Ferguson v. Reynolds, 176 P. 267, 52 Utah 583.
11. Mo.—Frohoff v. Adams, App., 108 S.W.2d 615.
N.Y.—Buono v. Stewart Motor Trucks, 33 N.Y.S.2d 209, 263 App. Div. 969, reversed on other grounds 55 N.E.2d 508, 292 N.Y. 637.
- Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520.

Evidence held sufficient

(1) To overcome prima facie evidence of defendant's ownership and control based on ownership of license plates.—Le Roy v. Tremper, 46 N.Y. S.2d 30, 267 App.Div. 387, motion denied 55 N.E.2d 514, 292 N.Y. 646—Rathfelder v. Flag, 12 N.Y.S.2d 136, 257 App.Div. 71, affirmed 24 N.E.2d 984, 282 N.Y. 563.

(2) To overcome inference of ownership in seller arising from fact that motor vehicle was registered at time of the collision in seller's name.
Iowa.—Craddock v. Bickelhaupt, 288 N.W. 109, 227 Iowa 202, 135 A.L.R. 474.
Tex.—Empire Gas & Fuel Co. v.

sumption of control and operation by defendant is not overcome by proof of gratuitous loan for a charitable purpose.¹²

e. Identity of Driver or Person in Control in General

General rules apply in determining the weight and sufficiency of the evidence as to the identity of the driver or person in control of the vehicle, or to overcome a presumption or inference of control or responsibility.

General rules have been applied in determining the weight and sufficiency of the evidence as to the identity of the driver or person in control of the motor vehicle causing the injury.¹³ In order to overcome a presumption or inference of control or responsibility of the owner, it has been held that the evidence must be clear, convincing, and uncon-

tradicted,¹⁴ although, according to some cases, such a presumption disappears where there is substantial evidence to the contrary.¹⁵ So it has been held that the presumption disappears where on all the evidence it appears that the owner gave no permission for the use of the vehicle,¹⁶ but the presumption is not as a matter of law overcome by a mere denial of authorized control by the owner, when all circumstances are as consistent with such control as with lack of it.¹⁷ Clear proof is required before an owner who has hired out his vehicle with a driver of his own choice will be presumed to have surrendered full control to the hirer.¹⁸

f. Agency

(1) In general

Muegge, 143 S.W.2d 763, 135 Tex. 520.

(3) To authorize inference that dealers' plates were duly furnished to owner by the registrar—*Legarry v. Finn Motor Sales*, 23 N.E.2d 1011, 304 Mass. 446.

Evidence held insufficient

(1) To disprove prima facie evidence of ownership of vehicle marked with defendant's name—*Robeson v. Greyhound Lines*, 257 Ill.App. 278.

(2) To destroy presumption of ownership of person in whose name vehicle is registered.—*Ramos v. Nadal*, 29 Puerto Rico 546—42 C.J. p 1209 note 53 [a].

12. Ill.—*Warput v. Reading Coal Co.*, 250 Ill.App. 450.

13. Evidence held sufficient

(1) To establish prima facie case of control and operation.—*Warput v. Reading Coal Co.*, 250 Ill.App. 450.

(2) To establish prima facie case of responsibility.—*Du Bois v. Owen*, 60 P.2d 1019, 16 Cal.App.2d 552.

(3) To support finding that defendant's driver was not in charge of vehicle at time it crashed into plaintiff's vehicle.—*Castay v. Katz & Besthoff*, La.App., 148 So. 76.

Evidence held insufficient

(1) In general.—*Johnson v. Hetrick*, 150 A. 477, 300 Pa. 225.

(2) To require jury to believe statement of defendant that guest was driving motor vehicle at time of accident.—*Collette v. Mosques*, 4 N.E.2d 336, 295 Mass. 576.

Identity shown

Ark.—*Kurry v. Frost*, 162 S.W.2d 48, 204 Ark. 386—*Arkansas Baking Co. v. Wyman*, 47 S.W.2d 45, 185 Ark. 810.

Cal.—*Card v. Boms*, 291 P. 190, 210 Cal. 200—*Owens v. Carmichael's U-Drive Autos*, 2 P.2d 580, 116 Cal. App. 348—*Hiner v. Olson*, 73 P.2d 945, 33 Cal.App.2d 227—*Chalmers*

v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Colo.—*Dwinelle v. Union Pac. R. Co.*, 92 P.2d 741, 104 Colo. 545.

Conn.—*Smith v. Firestone Tire & Rubber Co.*, 177 A. 524, 119 Conn. 483—*Shaughnessy v. Morrison*, 165 A. 553, 116 Conn. 661.

Ga.—*Davies v. Hearn*, 164 S.E. 273, 45 Ga.App. 276.

Iowa.—*Clausen v. Johnson's Estate*, 278 N.W. 297, 224 Iowa 990.

La.—*Vuillemot v. August J. Claverie & Co.*, 125 So. 168, 12 La.App. 236.

Mass.—*Ryan v. DiPaolo*, 47 N.E.2d 941, 313 Mass. 492—*Doonan v. Gravina*, 195 N.E. 895, 291 Mass. 103—*Wheeler v. Darmochwat*, 183 N.E. 55, 280 Mass. 553.

Minn.—*Leifson v. Henning*, 298 N.W. 41, 210 Minn. 311—*Nicol v. Gentler*, 247 N.W. 8, 188 Minn. 69—*Turner v. Gackle*, 209 N.W. 626, 168 Minn. 514.

Mo.—*Schmitt v. Shuplak*, App., 42 S.W.2d 959.

N.J.—*Sadofsky v. Frain*, 147 A. 729, 7 N.J.Misc. 1064.

N.Y.—*Allen v. Ennis*, 300 N.Y.S. 1323, 253 App.Div. 769, affirmed 17 N.E.2d 447, 279 N.Y. 578.

Ohio.—*Ottgen v. Garey*, 181 N.E. 485, 41 Ohio App. 493.

Pa.—*Morgan v. Peters*, 24 A.2d 644, 148 Pa.Super. 88.

R.I.—*Marsello v. Norton Taxi Motor Co.*, 133 A. 809.

Tex.—*Trice v. Bridgewater*, 81 S.W.2d 63, 125 Tex. 75, 100 A.L.R. 1014—*Reilly v. Buster*, Civ.App., 52 S.W.2d 521, reversed on other grounds 82 S.W.2d 931, 125 Tex. 323.

Vt.—*Huestis v. Lapham's Estate*, 32 A.2d 115, 113 Vt. 191.

42 C.J. p 1231 note 21 [a].

Identity not shown

Cal.—*Wilson v. Droege*, 294 P. 726, 110 Cal.App. 578.

Ind.—*Ward Bros. Co. v. Zimmerman*, 180 N.E. 25, 94 Ind.App. 130.

La.—*Dauenbauer v. Siren*, 127 So. 473, 13 La.App. 132.

Mass.—*Crowley v. Swanson*, 186 N.E. 46, 283 Mass. 82—*Atlas v. Silsbury-Gamble Motors Co.*, 180 N.E. 127, 278 Mass. 279.

Wash.—*Stidell v. Davidson*, 253 P. 458, 142 Wash. 348.

42 C.J. p 1231 note 21 [b].

14. La.—*Coon v. Monroe Scrap Material Co.*, App., 191 So. 607.

N.J.—*Conway v. Pickering*, 166 A. 76, 111 N.J.Law 15.

Evidence held to rebut presumption
N.J.—*Le Strange v. Krivit*, 158 A. 117, 10 N.J.Misc. 146.

Tex.—*Alfano v. International Harvester Co. of America*, Civ.App., 121 S.W.2d 466, error dismissed
Wash.—*Mitchell v. Nalley's, Inc.*, 300 P. 526, 163 Wash. 183, followed in *Cypert v. Nalley's, Inc.*, 300 P. 528, 163 Wash. 703, and *Parker v. Nalley's, Inc.*, 300 P. 529, 163 Wash. 703.

Evidence held insufficient to rebut presumption

Ga.—*Trawick v. Chambliss*, 156 S.E. 268, 42 Ga.App. 333.

N.Y.—*Hartstein v. U. S. Trucking Corporation*, 23 N.Y.S.2d 251, 260 App.Div. 643, reargument denied 25 N.Y.S.2d 398, 260 App.Div. 1006, and 25 N.Y.S.2d 400, 260 App.Div. 1006.

15. N.Y.—*Orlando v. Pioneer Barber Towel Supply Co.*, 146 N.E. 621, 239 N.Y. 342—*Deutsch v. Luther*, 172 N.Y.S. 404.

16. N.Y.—*St. Andrassy v. Mooney*, 186 N.E. 867, 262 N.Y. 368, reargument denied 262 N.Y.S. 907, 238 App.Div. 793.

17. N.Y.—*Orlando v. Pioneer Barber Towel Supply Co.*, 146 N.E. 621, 239 N.Y. 342.

18. Cal.—*Lowell v. Harris*, 74 P.2d 551, 24 Cal.App.2d 70.

- (2) Scope of employment and business or purpose of defendant
- (3) Servant driving own vehicle

(1) In General

- (a) Establishment of relation generally
- (b) Prima facie case
- (c) Rebuttal

(a) Establishment of Relation Generally

The existence of the relation of master and servant

or principal and agent between the driver of the vehicle and the party sought to be charged with his conduct must be established by a preponderance of the evidence. Agency may be established by circumstantial evidence.

The existence of the relation of master and servant or principal and agent between the driver of the vehicle and the party sought to be charged with his conduct must be established by a preponderance of the evidence;¹⁹ and this rule has been applied

19. Ill.—Stix, Baer & Fuller Co. v. Woesthaus Motor Co., 1 N.E.2d 796, 284 Ill.App. 301.
Ind.—Cates v. Long, 72 N.E.2d 233, 117 Ind.App. 444.
Iowa.—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325.
Neb.—Mackechnie v. Lyders, 279 N. W. 328, 134 Neb. 682.
Or.—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944.
Tenn.—Welch v. Young, 11 Tenn. App. 431.
Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 43 Wash.2d 28, 42 C.J. p 1231 note 22.

Testimony of agent

Agency of driver for defendant may be proved by testimony of such driver.—Barrilo v. Frank, 177 A. 58, 116 Pa.Super. 461.

Evidence held sufficient

(1) In general.
Ind.—Jones v. Cary, 37 N.E.2d 944, 219 Ind. 268—Great American Tea Co. v. Van Buren, 33 N.E.2d 580, 218 Ind. 462.
Tex.—Commercial Credit Co. v. Groseclose, Civ.App., 66 S.W.2d 709, error dismissed.

(2) To establish existence of relation.

U.S.—Young v. Wilky Carrier Corp., C.C.A.Pa., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477—Western Express Co. v. Smeltzer, C.C.A.Ohio, 88 F.2d 94, 112 A.L.R. 74, certiorari denied 58 S.Ct. 17, 302 U.S. 698, 82 L.Ed. 539—Western Express Co. v. Lechlightner, C.C.A.Ohio, 88 F.2d 94, certiorari denied 58 S.Ct. 17, 302 U.S. 698, 82 L.Ed. 539—Yelloway, Inc., v. Hawkins, C.C.A.Mo., 38 F.2d 731.
Ark.—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 192 Ark. 380—Monk v. Jones, 83 S.W.2d 526, 190 Ark. 1117—Waddington v. Marshall, 56 S.W.2d 416, 186 Ark. 870—Union Securities Co. v. Taylor, 48 S.W.2d 1100, 185 Ark. 737.
Cal.—Robinson v. George, 105 P.2d 914, 16 Cal.3d 288—Hiner v. Olson,

72 P.2d 890, 23 Cal.App.2d 227, rehearing denied 73 P.2d 945, 23 Cal App 2d 227—Fechtner v. Costa, 61 P.2d 473, 16 Cal App 2d 691—Malmstrom v. Bridges, 47 P.2d 336, 8 Cal App 2d 5—Fischer v. Have-lock, 25 P.2d 864, 134 Cal.App. 584—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal App. 40—Maberto v. Wolfe, 289 P. 218, 106 Cal App 202—Rapolla v. Goulart, 287 P. 562, 105 Cal App. 417—May v. Farrell, 271 P. 789, 94 Cal.App 703—Rosander v. Market St. Ry. Co., 265 P. 541, 89 Cal App. 721.
Conn.—Toletti v. Bidizckl, 173 A. 223, 118 Conn. 531—Perrelli v. Savas, 160 A 311, 115 Conn. 42—Hall v. Sera, 152 A 148, 112 Conn. 291.
Fla.—Ryder v. Plumley, 189 So. 422, 138 Fla 378—Orr v. Avon Florida Citrus Corporation, 177 So 612, 130 Fla. 306—Rice v. Phillips, 155 So. 723, 115 Fla 409.
Ga.—Davies v. Hearn, 164 S.E. 273, 45 Ga App 276
Idaho.—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792.
Ill.—Sollars v. Review Pub. Co., 264 Ill.App. 207—Van Meter v. Gurney, 240 Ill App 165.
Ind.—Cates v. Long, 72 N.E.2d 233, 117 Ind App. 444—Pennsylvania Ice & Coal Co v Elischer, 21 N.E. 2d 436, 106 Ind.App. 613—Jay v. Holman, 20 N.E.2d 656, 106 Ind. App 413—Coca Cola Bottling Co. v. Wheeler, 193 N.E. 385, 99 Ind. App. 502—Red Star Yeast Co. v. Shackleford, 171 N.E. 302, 91 Ind. App. 370.
Kan.—Wait v. Morrison, 281 P. 906, 129 Kan. 53.
Ky.—Square Deal Cartage Co. v. Smith's Adm'r, 210 S.W.2d 240, 307 Ky. 135.
La.—Mancuso v. Hurwitz-Mintz Furniture Co., App., 181 So. 814, rehearing denied 183 So. 461—Williams v. Brown, App., 181 So. 679—Taylor v. Victoria Nav. Co., App., 176 So. 519—McCain v. Pan-American Petroleum Corporation, App., 142 So. 376, reinstated on rehearing 146 So. 331—Bolinger v. Williams Bros., App., 134 So. 356—Norman v. Little, 129 So. 459, 14 La.App. 298—Johnson v. Jim Brownlee, Inc., 127 So. 127, 18 La.

App. 86—Giangrosso v. Schweitzer, 123 So. 127, 10 La.App. 777.
Me.—Anthony v. Arpin, 41 A.2d 4, 141 Me. 165.
Md.—Dorman v. Koontz, 165 A. 461, 164 Md 535.
Mich.—Laughlin v. Michigan Motor Freight Lines, 268 N.W. 887, 276 Mich. 545—Hazard v. Great Central Transport Corporation, 258 N. W. 210, 270 Mich. 60.
Minn.—Peterson v. Maloney, 232 N. W. 790, 181 Minn. 437.
Miss.—Merchants Co. v. Tracy, 166 So. 340, 175 Miss. 49—Life & Casualty Ins. Co. of Tennessee v. Curtis, 165 So. 435, 174 Miss. 768.
Mo.—Cotton v. Ship-By-Truck Co., 85 S.W.2d 80, 337 Mo. 270—Hanser v. Lerner, App., 153 S.W.2d 806.
Nev.—Wells, Inc., v. Shoemaker, 177 P.2d 451, 64 Nev. 57.
N.Y.—Sewilo v. Lazarus, 286 N.Y.S. 906, 247 App.Div. 855.
Ohio.—Mavromates v. Hutchinson, 183 N.E. 291, 43 Ohio App. 365—Alloy Cast Steel Co. v. Arthur, 179 N.E. 743, 40 Ohio App. 503.
Okla.—Deep Rock Oil Corporation v. Fox, 63 P.2d 24, 178 Okl. 516.
Pa.—Slidekum v. Animal Rescue League of Pittsburgh, 45 A.2d 59, 353 Pa. 408—Morgan v. Helml Motors, 197 A. 920, 329 Pa. 360—Barrilo v. Frank, 177 A. 58, 116 Pa Super. 461—Kent v. McFadden, Com Pl., 29 Del.Co 95.
R.I.—Massart v. Narragansett Electric Co., 171 A. 238, 54 R.I. 154.
S.C.—Brown v. Tweed Lumber Co., 166 S.E. 401, 167 S.C. 383.
S.D.—Pemberton v. Fritts, 228 N.W. 409, 56 S.D. 374.
Tenn.—Good v. Tennessee Coach Co., App., 209 S.W.2d 41—Bennett v. Duffie, App., 198 S.W.2d 287.
Tex.—Mullins v. McDowell, Civ.App., 142 S.W.2d 699—Younger Bros. v. Moore, Civ.App., 135 S.W.2d 780, error dismissed, judgment correct—Owl Taxi Service v. Saludis, Civ. App., 122 S.W.2d 226, error dismissed—Sturdevant v. Hooper, Civ. App., 101 S.W.2d 379, error dismissed—Wells v. Henderson, Civ. App., 78 S.W.2d 683, error refused—McElwraith v. Dixon, Civ.App., 49 S.W.2d 995.
Wash.—Malosevich v. Cichy, 193 P.

where the relation was claimed to exist between husband and wife,²⁰ and where relation was claimed

2d 342—Meacham v. Gjarde, 78 P. 2d 605, 194 Wash. 526—Wilson v. Washington Concrete Pipe Co., 35 P.2d 71, 178 Wash. 545.

Wis.—Sevey v. Jones, 292 N.W. 436, 235 Wis. 109—Czarnetzky v. Booth, 246 N.W. 574, 210 Wis. 536.

42 C.J. p 1231 note 22 [a].

(3) To authorize finding that railroad operating motor vehicle which had been leased from defendant railroad was defendant's subsidiary, thereby making defendant liable on theory of agency—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.

(4) To authorize inference that driver was defendant's agent.—House v. Stark Iron & Metal Co., Ohio App., 34 N.E.2d 592, rehearing denied 46 N.E.2d 419.

Evidence held insufficient

(1) In general

US—Constitution Pub. Co. v. Dale, C.C.A. Ala., 164 F.2d 210.

Ill.—Bartlett v. Sullivan, 241 Ill. App. 410.

Ind.—Indianapolis Bys v. Horwitz, 8 N.E.2d 1015, 103 Ind. App. 478.

Tex.—Commercial Credit Co. v. Grueszlose, Civ. App., 66 S.W.2d 709, error dismissed.

(2) To establish existence of relation

US—Constitution Pub. Co. v. Dale, C.C.A. Ala., 164 F.2d 210—De Bord v. Proctor & Gamble Distributing Co., C.C.A. Ga., 146 F.2d 54—Carroll v. Harrison, D.C. Va., 49 F. Supp. 283, affirmed, C.C.A., 139 F. 2d 427.

Ariz.—Johnston v. Hare, 246 P. 546, 30 Ariz. 253.

Ark.—Pollock Stores Co. v. Chatwell, 90 S.W.2d 213, 192 Ark. 83—Ricks v. Sanderson, 49 S.W.2d 604, 185 Ark. 828.

Cal.—Clarke v. Hernandez, 179 P.2d 831, 79 Cal. App.2d 414—Counihan v. Lufstufka Bros. & Co., 5 P.2d 694, 118 Cal. App. 602—Jones v. Bullard, 256 P. 555, 83 Cal. App. 179.

Conn.—Oleksinski v. Filip, 30 A.2d 912, 129 Conn. 701—Muraszki v. William L. Clifford, Inc., 26 A.2d 578, 129 Conn. 123.

Del.—Cercchio v. Mullins, 138 A. 277, 3 W. W. Harr. 245.

D.C.—Rosenberg v. Murray, 116 F. 2d 552, 73 App. D.C. 67.

Ga.—Grebbe v. Morgan, 26 S.E.2d 494, 69 Ga. App. 641—Townsend v. Brinson, 1 S.E.2d 612, 59 Ga. App. 518.

Ill.—Dean v. Ketter, 65 N.E.2d 572, 328 Ill. App. 206—Haynes v. Holman, 49 N.E.2d 824, 819 Ill. App. 398—Swain v. Hoberg, 46 N.E.2d 856, 317 Ill. App. 535—Union Bank of Chicago v. Kalkhurst, 265 Ill. App. 254.

Ind.—Glenn v. Johnson, 171 N.E. 18, 91 Ind. App. 263.

Iowa.—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325.

Kan.—Leathers v. Dillon, 131 P.2d 668, 156 Kan. 132.

Ky.—Davis v. Bennett's Adm'r, 159 S.W.2d 39, 289 Ky. 516—Dregan v. Wilson, 157 S.W.2d 68, 288 Ky. 801—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799—Towles v. Perkins, 98 S.W.2d 27, 266 Ky. 25—Bickel Coal Co. v. Louisville Tire Co., 14 S.W.2d 775, 228 Ky. 239.

La.—Call v. Cloverland Dairy Products Co., App., 21 So.2d 166—St. Paul v. Britain, App., 19 So.2d 596—Gondolfo v. O'Berry, App., 12 So.2d 636—Brewerton v. La Borde, App., 197 So. 172.

Me.—Berthiaume v. Usen, 160 A. 19, 131 Me. 195.

Md.—Phipps v. Milligan, 199 A. 498, 174 Md. 438.

Mass.—Tommasen v. Feeley, 55 N.E.2d 791, 316 Mass. 547—Haller v. American Tool & Machine Co., 192 N.E. 315, 288 Mass. 66—Kindell v. Ayles, 160 N.E. 818, 263 Mass. 244—Rosenberg v. Karas, 156 N.E. 711, 259 Mass. 568.

Mo.—Lechner v. Peters, 46 S.W.2d 527, 329 Mo. 891—De Vall v. Mrs. Stover's Bungalow Candies Co., App., 172 S.W.2d 956—Dorsett v. Pevely Dairy Co., App., 124 S.W.2d 624—Harpole v. Wunderlich, 93 S.W.2d 1104, 230 Mo. App. 578—Kurz v. Greenlease Motor Car Co., App., 52 S.W.2d 498, certiorari quashed State ex rel Kurz v. Bland, 64 S.W.2d 638, 333 Mo. 941.

Neb.—Werner v. Johnson, 239 N.W. 207, 122 Neb. 870.

N.J.—Marx v. Cornish, 167 A. 739, 11 N.J. Misc. 637—Vonella v. Shubert, 151 A. 548, 8 N.J. Misc. 777.

N.Y.—Brown v. Steamship Terminal Operating Corporation, 195 N.E. 692, 267 N.Y. 83, motion denied 196 N.E. 595, 267 N.Y. 591—Mills v. Gabriel, 18 N.Y.S.2d 78, 259 App. Div. 60, affirmed 31 N.E.2d 512, 284 N.Y. 755—Richter v. Merola Bros., 277 N.Y.S. 288, 243 App. Div. 392—Darrohn v. Russell, 277 N.Y.S. 783, 154 Misc. 753.

N.C.—Gibbs v. Russ, 26 S.E.2d 909, 223 N.C. 349—Walker v. Manson, 23 S.E.2d 839, 222 N.C. 527—Tribble v. Swinson, 196 S.E. 820, 213 N.C. 550—Liverman v. Cline, 192 S.E. 849, 212 N.C. 43—Dees v. Ballard, 188 S.E. 630, 210 N.C. 841—Shoemaker v. Sinclair Refining Co., 179 S.E. 334, 208 N.C. 124.

Ohio.—Reid v. Yaggs, App., 37 N.E.2d 645—Hillman v. Service Packing Co., 36 N.E.2d 433, 67 Ohio App. 254—Hudson v. Ohio Bus Line Co., 11 N.E.2d 113, 56 Ohio

App. 483—Alloy Cast Steel Co. v. Arthur, 179 N.E. 743, 40 Ohio App. 503.

Okl.—Randolph v. Schuth, 90 P.2d 880, 185 Okl. 204.

Or.—Allum v. Ball, 124 P.2d 533, 168 Or. 577.

Pa.—Axelrod v. Franklin, 167 A. 239, 109 Pa. Super. 300—Podejko v. Berrettini, Com. Pl., 37 Luz. Leg. Reg. 96, 11 Som. Leg. J. 336.

RI.—Hucci v. Butler, 53 A.2d 705—Gilmore v. Washington Park Wet Wash, 153 A. 796.

Tenn.—Southern Motors v. Morton, 154 S.W.2d 801, 25 Tenn. App. 204.

Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520—Seinsheimer v. Burkhardt, 122 S.W.2d 1063, 132 Tex. 336—Peyton Packing Co. v. Collis, Civ. App., 110 S.W.2d 625.

Va.—Moncier v. Green, 27 S.E.2d 921, 182 Va. 127—Barnes v. Hampton, 141 S.E. 836, 149 Va. 740.

Wis.—Borkenhagen v. Baertschi, 300 N.W. 742, 239 Wis. 21—Philip v. Schlager, 253 N.W. 394, 214 Wis. 370.

42 C.J. p 1231 note 22 [b].

(3) To show liability based on ostensible agency—Counihan v. Lufstufka Bros. & Co., 5 P.2d 694, 118 Cal. App. 602.

(4) To rebut defense established by owner's proof that driver had left his employ preceding accident and that use of truck was not known or authorized by owner but was on a personal mission of the driver.—Alfano v. International Harvester Co. of America, Tex. Civ. App., 121 S.W.2d 466.

(5) To support finding that member of owner's household was not in owner's employ while on errand for self and owner's wife.—Ruh v. Hyle, 138 A. 104, 5 N.J. Misc. 680.

20. Evidence held sufficient

(1) To establish existence of relationship of master and servant or principal and agent.

Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336.

Cal.—Ransford v. Ainsworth, 237 P. 747, 196 Cal. 279—McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417. Ind.—Willis v. Crays, 151 N.E. 13, 84 Ind. App. 253.

La.—Meibaum v. Campisi, App., 16 So.2d 257.

(2) To create prima facie case authorizing inference that wife was using motor vehicle as husband's agent.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1.

Evidence held insufficient

Cal.—Sanfilippo v. Lesser, 210 P. 44, 59 Cal. App. 86.

Ind.—Bryan v. Pommert, 87 N.E.2d 720, 110 Ind. App. 61.

to exist between parent and child,²¹ or other persons related by blood or marriage,²² or between the party sought to be charged and a servant claimed to be employed by or under control of a third person,²³ or as against the contention that the driver was an independent contractor or servant of an independent contractor.²⁴ In order to prevent recovery on the theory that the driver was the agent

Mo.—Drake v. Rowan, App., 272 S. W. 101.

21. Or.—Gossett v. Van Egmond, 155 P.2d 304, 176 Or. 134.
Family purpose doctrine see *infra* subdivision h of this section.

Evidence held sufficient

(1) To establish existence of relationship of master and servant or principal and agent.

Ark.—Richards v. McCall, 58 S.W.2d 432, 187 Ark. 61—Waddington v. Marshall, 56 S.W.2d 416, 186 Ark. 870.

Cal.—Van Horne v. Lim, 64 P.2d 448, 18 Cal.App.2d 624.

Conn.—Denos v. Giovannelli, 200 A. 573, 124 Conn. 464.

Fla.—Myrick v. Lloyd, 27 So.2d 615.

Ill.—Kovell v. North Roseland Motor Sales, 275 Ill.App. 566.

Ind.—Marshall v. Temperley, 192 N. E. 106, 100 Ind.App. 131.

Mass.—Bartley v. Almeida, 76 N.E.2d 22, 322 Mass. 104.

Ohio.—Pierce v. Bisesi, App., 38 N. E.2d 208—Riley v. Speraw, 181 N. E. 915, 42 Ohio App. 207.

Or.—Gossett v. Van Egmond, 155 P. 2d 304, 176 Or. 134.

Va.—Piccolo v. Woodford, 35 S.E.2d 393, 184 Va. 432—Crowell v. Duncan, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425.

Wash.—Hanford v. Goehry, 167 P. 2d 678, 24 Wash.2d 859.

(2) As respects statutory liability of father for damages occasioned by fault of unemancipated child living with him.—Whipple v. Lirette, 124 So. 160, 11 La.App. 485.

Evidence held insufficient

(1) In general.

U.S.—Carroll v. Harrison, D.C.Va., 49 F.Supp. 283, affirmed 139 F.2d 427.

Cal.—Medberry v. Olcovich, 59 P.2d 551, 15 Cal.App.2d 263, hearing denied 60 P.2d 281, 15 Cal.App.2d 263.

Idaho.—Colwell v. Bothwell, 89 P. 2d 193, 60 Idaho 107.

Ill.—DeMay v. Brew, 46 N.E.2d 138, 317 Ill.App. 183—Kinsman v. Peterson, 8 N.E.2d 957, 291 Ill.App. 1—Bentsen v. Panzer, 2 N.E.2d 677, 285 Ill.App. 582.

La.—Millet v. Rizzo, App., 2 So.2d 244.

Miss.—Murphy v. Willingham, 133 So. 213, 160 Miss. 94.

Mo.—Mulanix v. Reeves, 112 S.W.2d 100, 233 Mo.App. 143, certiorari quashed State ex rel. and to Use of Reeves v. Shain, 122 S.W.2d 885, 343 Mo. 550—Kibble v. Lamar, 54 S.W.2d 427, 227 Mo.App. 620.

Ohio.—Kemple v. Farina, 18 Ohio App. 160.

R.I.—Fosdick v. Brunelle, 170 A. 921.

(2) As respects implied permission of parents who had signed license of minor son.—Sommers v. Van Der Linden, 75 P.2d 83, 24 Cal. App.2d 375.

22. Miss.—Woods v. Franklin, 118 So. 450, 151 Miss. 635

Evidence held not to establish existence of relationship

(1) Between defendant and brother.—Smith v. Kirby, 168 A. 219, 11 N.J.Misc. 809.

(2) Between defendant and sister.—Woods v. Franklin, 118 So. 450, 151 Miss. 635.

(3) Between defendant and his wife's cousin, who was driving the car to take his wife to a party.—Swain v. Hoberg, 281 Ill.App. 203

(4) Between defendant and daughter-in-law.—Anderson v. Carrick, La App., 198 So. 385.

23. Evidence held to establish existence of relationship

(1) In general.

Cal.—Hilliard v. Fabricius, 51 P.2d 1134, 10 Cal.App.2d 348.

Ill.—McCarthy v. Morrison, 283 Ill App. 129—Warput v. Reading Coal Co., 250 Ill.App. 450.

Mo.—Gorman v. A. R. Jackson Kansas City Showcase Works Co., App., 19 S.W.2d 559.

Ohio.—Pasku v. Friedman Transfer & Const. Co., App., 78 N.E.2d 182

Pa.—Slidekum v. Animal Rescue League of Pittsburgh, 45 A.2d 59, 353 Pa. 408.

Tex.—Long v. Metcalf, Civ.App., 134 S.W.2d 485, error dismissed, judgment correct

Wis.—Laurent v. Plain, 281 N.W. 660, 229 Wis. 75.

(2) Between customer of garage and garage employee driving customer's car.

Ill.—Watson v. Trinz, 274 Ill.App. 379.

Pa.—Rosen v. Diesinger, 158 A. 561, 306 Pa. 13.

Evidence held not to establish existence of relationship

(1) In general.

Conn.—Tierney v. Correia, 193 A. 201, 123 Conn 146—Woolfenden v. Shea, 161 A. 846, 115 Conn. 504.

Kan.—Redfield v. Chelsea Coal Co., 16 P.2d 475, 136 Kan. 588.

Mo.—Lechner v. Peters, 46 S.W.2d 527, 329 Mo. 391.

Okl.—Gideon v. Jones, 70 P.2d 814, 180 Okl. 621—Crowe v. Peters, 43 P.2d 93, 171 Okl. 433.

Tex.—Peyton Packing Co. v. Collis, Civ.App., 110 S.W.2d 625.

(2) Between customer of garage and garage employee driving customer's car.

Kan.—Garner v. Martin, 122 P.2d 735, 155 Kan. 12.

Or.—Bunnell v. Parelus, 111 P.2d 88, 166 Or. 174.

24. Idaho.—Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 56 Idaho 242.
Mo.—Galentine v. Borglum, 150 S.W. 2d 1088, 235 Mo.App. 1141.

Evidence held without probative value

Proof that alleged employer reserved right to refuse to give truck man further work if truckman disobeyed traffic rules had no substantial evidentiary value in determining whether employer-employee relationship existed, as regards employer's liability for truckman's negligence.—Dave Lehr, Inc., v. Brown, 91 S.W.2d 693, 127 Tex. 236.

Evidence held sufficient

(1) To establish existence of relationship of master and servant or principal and agent.

Ark.—S. & C. Transport Co. v. Barnes, 85 S.W.2d 721, 191 Ark. 205—Delamar & Allison v. Ward, 41 S.W.2d 760, 184 Ark. 82.

Cal.—Graetich v. Dix, 156 P.2d 79, 68 Cal.App.2d 115—Maaskant v. Matsui, 123 P.2d 853, 50 Cal.App.2d 819

—Berkowitz v. Pelton, 48 P.2d 756, 9 Cal.App.2d 80—Cook v. Sanger, 293 P. 794, 110 Cal.App. 90—Willis v. San Bernardino Lumber & Box Co., 256 P. 224, 82 Cal.App. 751.

Ga.—Gulf Life Ins. Co. v. McDaniel, 43 S.E.2d 784, 75 Ga.App. 549, certiorari dismissed, Sup., 45 S.E.2d 64

—Hampton v. Macon News Printing Co., 12 S.E.2d 425, 64 Ga.App. 150, certiorari denied Macon News Printing Co. v. Hampton, 15 S.E.2d 793, 192 Ga. 623—Simmons v. Jones, 191 S.E. 490, 55 Ga.App. 831.

Idaho.—Baldwin v. Singer Sewing Mach. Co., 287 P. 944, 49 Idaho 231.

Ill.—Hartley v. Red Ball Transit Co., 176 N.E. 751, 344 Ill. 534.

Ky.—Vansant v. Holbrook's Adm'r, 146 S.W.2d 337, 285 Ky. 88—Irvin v. Madden, 134 S.W.2d 942, 281 Ky. 7—Wilhelmi v. Berns, 119 S.W.2d 625, 274 Ky. 618.

La.—Olano v. Leathers, App., 2 So.2d 486—Coon v. Monroe Scrap Material Co., App., 191 So. 607.

Mich.—Brinker v. Koenig Coal & Supply Co., 20 N.W.2d 301, 312 Mich. 534.

Miss.—Mississippi Public Service Co. v. Scott, 174 So. 573, 178 Miss. 559.

of the injured party as well as the agent of defendant, the evidence must show that such party had the right to participate, with authority, in the selection, control, and discharge of the driver.²⁵

The existence and scope of the agency of the driver need not be established by direct and positive evidence.²⁶ So, employment by defendant of the driver at the time of the accident may be established by circumstantial evidence,²⁷ and slight evidence of circumstances indicating employment has been held sufficient to show such relation in the absence of proof to the contrary.²⁸ The relationship cannot be made out by conjecture or speculation,²⁹ but must be proved by evidence³⁰ which need not, however, rise to that degree of certain-

ty which will exclude every other reasonable conclusion.³¹ The circumstances relied on to show agency must be such as to render the fact or conclusion of agency more probable than one or more other conclusions which would be inconsistent with liability.³²

(b) Prima Facie Case

General rules have been applied in determining the weight and sufficiency of the evidence to establish a prima facie case of agency, as where the evidence shows ownership by defendant, ownership and permissive use, or defendant's name on the vehicle.

General rules have been applied in determining the weight and sufficiency of the evidence to establish a prima facie case of agency.³³ Where the

Mo.—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo.App. 210. Neb.—Peterson v. Brinn & Jensen Co., 280 N.W. 171, 131 Neb. 909.

N.Y.—Cooke v. Drigant, 45 N.E.2d 815, 289 N.Y. 313, leave to appeal denied 34 N.Y.S.2d 401, 263 App. Div. 989—Johnson v. R. T. K. Petroleum Co., 44 N.E.2d 6, 289 N.Y. 101, reargument denied 44 N.E.2d 619, 289 N.Y. 646—Horowitz v. Daily Mirror, 258 N.Y.S. 39, 141 Misc. 99, affirmed 261 N.Y.S. 988, 237 App.Div. 876, reargument denied 262 N.Y.S. 919, 238 App.Div. 776.

Okl.—Modern Motors v. Elkins, 113 P.2d 969, 189 Okl. 134—Getman-MacDonell-Summers Drug Co. v. Acosta, 19 P.2d 149, 162 Okl. 77.

Pa.—Kimble v. Wilson, 42 A.2d 526, 352 Pa. 275.

Tex.—Le Sage v. Pryor, Civ.App., 154 S.W.2d 446, 137 Tex. 455, affirming Pryor v. Le Sage, 133 S.W.2d 308—Ochoa v. Winerich Motor Sales Co., 94 S.W.2d 416, 127 Tex. 542—Clowe & Cowan v. Morgan, Civ.App., 153 S.W.2d 863, error refused—Glazier v. Roberts, Civ.App., 108 S.W.2d 829—Scheuing v. Challiss, Civ. App., 104 S.W.2d 1113, error refused—Commercial Credit Co. v. Groseclose, Civ.App., 66 S.W.2d 709, error dismissed.

Wis.—Mann v. Reliable Transit Co., 259 N.W. 415, 217 Wis. 465.

(2) To sustain inference that automobile salesman was employee and not independent contractor.—Curran v. Earle C. Anthony, Inc., 247 P. 236, 77 Cal.App. 462.

Evidence held insufficient

Ark.—Moore v. Phillips, 120 S.W.2d 722, 197 Ark. 131.

Cal.—Lee v. Nanny, 100 P.2d 832, 38 Cal.App.2d 90—Chinnis v. Pomona Pump Co., 98 P.2d 560, 36 Cal.App. 2d 633—Rathbun v. Payne, 68 P.2d 291, 21 Cal.App.2d 49—Washko v. Stewart, 67 P.2d 144, 20 Cal.App.2d 347.

Idaho.—Joslin v. Idaho Times Pub.

Co., 53 P.2d 323, 56 Idaho 242—Magee v. Hargrove Motor Co., 296 P. 774, 50 Idaho 442.

Ill.—Dean v. Ketter, 65 N.E.2d 572, 328 Ill.App. 206—Johnson v. Squires, 256 Ill.App. 170—Mansfield v. Shapiro, 234 Ill.App. 596.

Ky.—Atlas Coal Co. v. Bryant, 93 S.W.2d 5, 263 Ky. 626—Hatfield Const. Co. v. City of Paintsville, 20 S.W.2d 713, 230 Ky. 750.

Mo.—Skidmore v. Haggard, 110 S.W.2d 726, 341 Mo. 837.

Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.

Okl.—Marion Machine, Foundry & Supply Co. v. Duncan, 101 P.2d 813, 187 Okl. 160.

Tex.—Hilgenberg v. Elam, Civ.App., 192 S.W.2d 799—Fowler v. Maytag Southwestern Co., Civ.App., 82 S.W.2d 699, error dismissed—Dave Lehr, Inc., v. Wackerbarth, Civ. App., 38 S.W.2d 879—Texas Electric Service Co. v. Kinkead, Civ. App., 36 S.W.2d 1052, error refused—Evans v. Bryant, Civ.App., 29 S.W.2d 481, error refused

Wis.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485.

25. Md.—Vacek v. State, 142 A. 491, 155 Md. 400.

26. U.S.—Hubbard v. Lock Joint Pipe Co., D.C. Mo., 70 F.Supp. 589.

27. Tex.—Weber v. Reagan, Civ. App., 91 S.W.2d 409, error dismissed.

Rule held not affected by statutes making proof of ownership of motor vehicle prima facie evidence that it was being operated with the owner's consent and making proof of its registration prima facie evidence that it was being operated by the owner or his servant in his business.—Good v. Tennessee Coach Co., Tenn.App., 209 S.W.2d 41.

28. Tex.—Weber v. Reagan, Civ. App., 91 S.W.2d 409, error dismissed.

Reason for rule

Real relationship between owner and driver of motor vehicle at time of accident is ordinarily peculiarly within knowledge of such parties.—Weber v. Reagan, supra.

Driver of passenger bus

Where circumstantial evidence is relied on to prove the master-servant relationship between owner and driver of vehicle, it would ordinarily require stronger evidence in the case of an automobile or truck to negative the relation of bailor and bailee and prove that of master and servant between owner and operator than would be required in the case of a large passenger bus—Good v. Tennessee Coach Co., Tenn.App., 209 S.W.2d 41.

29. Tenn.—Good v. Tennessee Coach Co., supra.

Wis.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485.

Evidence held insufficient

Okl.—Tulsa County Truck & Fruit Growers Ass'n v. McMurphey, 90 P.2d 927, 185 Okl. 132.

More suspicion is no proof of agency.—Gilmore v. Washington Park Wet Wash, R.I., 153 A. 796.

30. Tenn.—Good v. Tennessee Coach Co., App., 209 S.W.2d 41.

31. Tenn.—Good v. Tennessee Coach Co., supra.

32. Okl.—Tulsa County Truck & Fruit Growers Ass'n v. McMurphey, 90 P.2d 927, 185 Okl. 132.

Tenn.—Good v. Tennessee Coach Co., App., 209 S.W.2d 41.

Evidence held to establish prima facie case of agency

Cal.—Gammon v. Wales, 300 P. 988, 115 Cal.App. 133.

Conn.—Voegeli v. Waterbury Yellow Cab Co., 150 A. 303, 111 Conn. 407, 69 A.L.R. 902.

La.—Taylor v. Victoria Nav. Co., App., 176 So. 519—Gilbert v. Trotter, App., 160 So. 855.

Miss.—Mississippi Public Service Co.

facts pertaining to the agency of the driver lie peculiarly within the knowledge of defendant, full and clear disclosure of such facts by defendant should be required to establish an affirmative defense.³⁴

Ownership. According to one view, a prima facie case of agency is established by proof that defendant owned the vehicle³⁵ or that it bore his license plates,³⁶ and it is held that such prima facie case is based on an inference, not on a presumption;³⁷ but there is authority holding that proof of ownership is not sufficient to establish a prima facie case.³⁸

Ownership and permissive use. Under some statutes, a prima facie case of agency is made out from proof of ownership and permissive use,³⁹ but such a prima facie case is based on an inference, and not a presumption.⁴⁰

Name on vehicle. Fact that defendant's name was printed on the vehicle is not conclusive evidence of the driver's agency for defendant,⁴¹ but it is at least a circumstance tending that way in the absence of any contravening proof,⁴² and there is authority holding that proof of such fact shows prima facie that the vehicle was being operated by defendant's servants at the time of the accident.⁴³

v. Scott, 174 So. 573, 178 Miss. 859
—Atwood v. Garcia, 147 So. 813, 167 Miss. 144.

Mo.—Hedrick v. Hurst, App., 104 S. W.2d 392.

N.C.—Harper v. Harper, 34 S.E.2d 185, 225 N.C. 260.

Tenn.—Auburn Nashville Company v. Graham, 13 Tenn.App. 444—Racy Cream Co. v. Walden, 1 Tenn.App. 653.

Evidence held not to establish prima facie case of agency

Tex.—Morgan v. Olmsted-Kirk Co., Civ.App., 97 S.W.2d 260, error dismissed.

34. Ill.—Paulsen v. Cochfield, 278 Ill.App. 596.

35. Ala.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.

Ariz.—Silva v. Traver, 162 P.2d 615, 63 Ariz. 364—Consolidated Motors v. Ketcham, 66 P.2d 246, 49 Ariz. 295—Lutty v. Lockhart, 295 P. 975, 37 Ariz. 488.

Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Idaho.—Maler v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792.

Iowa.—Olinger v. Tiefenthaler, 285 N.W. 137, 226 Iowa 847—Hunter v. Irwin, 263 N.W. 34, 220 Iowa 693.

Mass.—Dineasoff v. Casey, 29 N.E.2d 25, 306 Mass. 555—Solomon v. Dabrowski, 3 N.E.2d 744, 295 Mass. 358, 106 A.L.R. 464.

Mo.—Mattocks v. Emerson Drug Co., App., 33 S.W.2d 142.

N.Y.—Bennrona Corporation v. Mulrone, 3 N.Y.S.2d 87, 254 App.Div. 630.

Or.—Summerville v. Gillespie, 179 P. 2d 719, 181 Or. 144—Jasper v. Wells, 144 P.2d 505, 173 Or. 114—Steele v. Hemmers, 40 P.2d 1022, 149 Or. 381—Purdin v. Richardson, 34 P.2d 926, 148 Or. 68—Millar v. Semler, 3 P.2d 987, 137 Or. 610—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944.

Wash.—McMullen v. Warren Motor Co., 25 P.2d 99, 174 Wash. 454.

Wis.—Sevey v. Jones, 292 N.W. 436, 235 Wis. 109—Philip v. Schlager, 253 N.W. 394, 214 Wis. 370—Schmidt v. Leary, 252 N.W. 151, 213 Wis. 587—Edwards v. Kohn, 241 N.W. 331, 207 Wis. 381—Gehloff v. DeMarce, 234 N.W. 717, 204 Wis. 464.

42 C.J. p 1231 note 22 [c].

Presumptions see supra § 511.

Owning and riding in vehicle

Evidence that defendant owned and was riding in vehicle but not driving authorized inference that driver was defendant's agent and that defendant was in control of automobile—Trawick v. Chambliss, 156 S.E. 268, 42 Ga.App. 333.

Evidence held sufficient

To support reasonable inference of the existence of employer-employee relationship.—Superior Meat Products v. Holloway, 48 N.E.2d 83, 113 Ind.App. 320—Midland Trail Bus Lines v. Martin, 194 N.E. 862, 100 Ind.App. 206.

36. Wis.—Verheyen v. Trettin, 227 N.W. 861, 200 Wis. 205.

Dealer's registration

Under some statutes evidence that vehicle bore dealer's registration plates at time of injuries was prima facie proof in action against dealer for damages that it was owned or in possession of defendant and operated by latter or its employee in its business or was being tested.—Morgan v. Heinel Motors, 197 A. 920, 329 Pa. 360.

37. Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944.

38. Fla.—Engleman v. Traeger, 136 So. 527, 102 Fla. 756.

La.—Griffin v. Motor Transit Co., 127 So. 438, 13 La.App. 151.

Miss.—Merchants Co. v. Tracy, 166 So. 340, 175 Miss. 49—Atwood v. Garcia, 147 So. 813, 167 Miss. 144—Woods v. Franklin, 118 So. 450, 151 Miss. 635.

Mo.—Conaghan v. Dean, App., 96 S. W.2d 924.

N.C.—Carter v. Thurston Motor Lines, 41 S.E.2d 586, 227 N.C. 193. Ohio.—House v. Stark Iron & Metal Co., App., 34 N.E.2d 592, rehearing denied 46 N.E.2d 419.

Tex.—Moreland v. Hawley Independent School Dist., Civ.App., 163 S. W.2d 892, supplemented on other grounds 169 S.W. 227.

Utah.—Saltas v. Affleck, 102 P.2d 493, 99 Utah 65.

42 C.J. p 1231 note 22 [d].

In California

(1) There is authority supporting the rule of the text.—Wilson v. Droege, 294 P. 726, 110 Cal.App. 578.

(2) But it has also been said that plaintiff makes out a prima facie case against defendant when he shows that the vehicle causing the injury by the negligent manner of its operation belonged to defendant.—Frierson v. Pacific Gas & Electric Co., 203 P. 788, 55 Cal.App. 397—Dierks v. Newsum, 194 P. 518, 49 Cal.App. 789.

39. Cal.—Ransford v. Ainsworth, 237 P. 747, 196 Cal. 279—Montanya v. Brown, 88 P.2d 745, 31 Cal.App.2d 642—Sanfilippo v. Lesser, 210 P. 44, 59 Cal App. 86—Brown v. Chevrolet Motor Co., 179 P. 697, 39 Cal. App. 738—McWhirter v. Fuller, 170 P. 417, 35 Cal.App. 288.

40. Cal.—Montanya v. Brown, 88 P. 2d 745, 31 Cal.App.2d 642—Pozzobon v. O'Donnell, 36 P.2d 236, 1 Cal.App.2d 151.

Evidence held sufficient

To give rise to inference that driver was owner's agent.—Squires v. Riffe, 295 P. 517, 211 Cal. 370.

41. Tex.—J. H. Robinson Truck Lines v. Jones, Civ.App., 139 S.W. 2d 127—Freeman v. Texas Bread Co., Civ.App., 111 S.W.2d 307.

42. Tex.—J. H. Robinson Truck Lines v. Jones, Civ.App., 139 S.W. 2d 127—Freeman v. Texas Bread Co., Civ.App., 111 S.W.2d 307.

43. Conn.—De Marey v. Brugas, 131 A. 392, 103 Conn. 667.

Ill.—Robeson v. Greyhound Lines, 257 Ill.App. 278.

(c) Rebuttal

Plaintiff's prima facie case falls, and the inference of agency at the time and place of the accident is dispelled, when it is rebutted by clear, positive, and uncontradicted evidence, or, according to some cases, by substantial evidence.

A prima facie case of the driver's agency for the owner will stand in the absence of substantial proof to the contrary.⁴⁴ In order to dispel the inference of employment at the time and place of the accident established by plaintiff's prima facie case, defendant's evidence must be clear, positive, uncontradicted, and not open to doubt, according to one view,⁴⁵ and the prima facie case falls, and the inference of agency is dispelled, when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt,⁴⁶ even though such evidence is produced by the opposite side,⁴⁷ and, according to some cases, where there is substantial evidence to the contrary.⁴⁸

Evidence held sufficient

(1) To support reasonable inference of existence of employer-employee relationship.

Ind.—Superior Meat Products v. Holloway, 48 N.E.2d 83, 113 Ind App. 320.

Tex.—Globe Laundry v. McLean, Civ. App., 19 S.W.2d 94.

(2) To raise inference that defendant's sign was fastened to truck.—De Vall v. Mrs. Stover's Bungalow Candies Co., Mo.App., 112 S.W.2d 956

44. N.Y.—Christie v. B. F. Vineburg, Inc., 19 N.Y.S.2d 252, 259 App.Div. 342.

Substantial proof within rule of text includes credible and trustworthy proof—Perry v. A. Paladini, Inc., 264 P. 580, 89 Cal.App. 275.

45. U.S.—Silent Automatic Sales Corporation v. Stayton, C.C.A.Mo., 45 F.2d 471.

Cal.—Huddy v. Chronicle Pub. Co., 103 P.2d 421, 15 Cal.2d 554.

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114.

Wash.—Carlson v. Wolski, 147 P.2d 291, 20 Wash.2d 323—Davis v. Browne, 147 P.2d 263, 20 Wash.2d 219—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.

Evidence held sufficient

(1) To destroy or overcome prima facie showing of agency.

Cal.—Montanya v. Brown, 88 P.2d 745, 31 Cal.App.2d 642.

Mo.—Harpole v. Wunderlich, 93 S.W.2d 1104, 230 Mo.App. 578.

Or.—Summerville v. Gillespie, 179 P.2d 719, 181 Or. 144.

(2) To overcome or destroy inference or presumption that driver was owner's agent.

Ala.—Jefferson County Burial Soc. v.

Cotton, 133 So. 256, 222 Ala. 578—Toranto v. Hattaway, 122 So. 816, 219 Ala. 520—Tullis v. Blue, 114 So. 185, 216 Ala. 577.

Cal.—Ceranski v. Muensch, 141 P.2d 750, 60 Cal.App.2d 751—Montanya v. Brown, 88 P.2d 745, 31 Cal.App.2d 642.

Conn.—Koops v. Gregg, 32 A.2d 653, 130 Conn. 185.

Ind.—Frick v. Rickel, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Ky.—Hickman v. Strunk, 197 S.W.2d 442, 303 Ky. 397.

Md.—State, for Use of Mitchell, v. Jones, 46 A.2d 623, 186 Md. 270, reargument denied 47 A.2d 71, 186 Md. 270.

N.J.—Paul v. Flannery, 26 A.2d 553, 128 N.J.Law 438—Onufer v. Strout, 183 A. 215, 116 N.J.Law 274—Hoffman v. Lasseff, 164 A. 293, 110 N.J.Law 122—Pugliese v. McCarthy, 160 A. 81, 10 N.J.Misc. 601

N.Y.—Wilson v. Harrington, 56 N.Y.S.2d 157, 269 App.Div. 891, affirmed 65 N.E.2d 101, 295 N.Y. 667.

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944.

S.C.—Watson v. Kennedy, 186 S.E. 549, 180 S.C. 543.

Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28—Sullivan v. Associated Dealers, 103 P.2d 489, 4 Wash.2d 352.

W.Va.—Lacowell v. Lampkin, 13 S.E.2d 583, 123 W.Va. 138.

Wis.—Hahn v. Smith, 254 N.W. 750, 215 Wis. 277.

Evidence held insufficient to overcome presumption

Mo.—Staley v. Lawler, 27 S.W.2d 1039, 224 Mo.App. 884.

Tenn.—Welch v. Young, 11 Tenn.App. 431.

(2) Scope of Employment and Business or Purpose of Defendant

(a) In general

(b) Prima facie case

(c) Rebuttal

(a) In General

The fact that the driver of a motor vehicle involved in an accident was at the time of the accident engaged in the performance of an act within the scope of his employment and while engaged in the defendant's business or for his purpose must be proved by a preponderance of the evidence, but circumstantial evidence may suffice.

There can be no recovery against a master or principal for injuries from the operation of a motor vehicle in the absence of proof that the agent was engaged in his master's business at the time of the accident,⁴⁹ and there must be direct proof or proof of facts from which that fact may reason-

Wis.—Edwards v. Kohn, 241 N.W. 331, 207 Wis. 381.
12 C.J. p 1211 note 15.

46. Cal.—Ceranski v. Muensch, 141 P.2d 750, 60 Cal.App.2d 751—Montanya v. Brown, 88 P.2d 745, 31 Cal.App.2d 642.

Md.—Hendler Creamery Co. v. Miller, 138 A. 1, 153 Md. 264.

Mich.—Wehling v. Linder, 226 N.W. 880, 248 Mich. 241.

Okl.—Gallagher v. Holcomb, 44 P.2d 44, 172 Okl. 1.

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114.

Tex.—Lewis v. J. P. Word Transfer Co., Civ.App., 119 S.W.2d 106, error refused.

Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.

Wis.—Kowalsky v. Whipkey, 2 N.W.2d 704, 240 Wis. 59—Zurn v. Whately, 251 N.W. 435, 213 Wis. 365.

12 C.J. p 1211 note 10.

47. Cal.—Ceranski v. Muensch, 141 P.2d 750, 60 Cal.App.2d 751—Montanya v. Brown, 88 P.2d 745, 31 Cal.App.2d 642.

48. D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.

Mo.—State ex rel. Steinbruegge v. Hostetter, 115 S.W.2d 802, 342 Mo. 341, conformed to, App. 118 S.W.2d 39, record quashed State ex rel. Waters v. Hostetter, 126 S.W.2d 1164, 344 Mo. 433, mandate conformed to Waters v. Hays, App. 130 S.W.2d 220.

12 C.J. p 1211 note 12.

49. Ohio.—Brazis v. National Telephone Supply Co., App., 48 N.E.2d 873.

Pa.—Henry v. Beck, 36 A.2d 734, 154 Pa.Super. 585—Grossman v. Knies, 193 A. 369, 127 Pa.Super.

ably be inferred.⁵⁰ The fact that the driver of the vehicle causing the injury was at the time of the accident engaged in the performance of an act within the scope of his employment by the person sought

to be charged and while using the vehicle in the latter's business or for his purpose must be proved by a preponderance of the evidence,⁵¹ and this rule has frequently been applied in cases where it was

310—Hoch v. Martin, 188 A. 602, 124 Pa.Super. 445.
Tenn.—Trimble v. Bridges, 180 S.W. 2d 590, 27 Tenn.App. 320—Welch v. Young, 11 Tenn.App. 431.
Tex.—Houston News Co. v. Shavers, Civ.App., 64 S.W.2d 384, error refused.

50. U.S.—Young v. Wilky Carrier Corporation, D.C.Pa., 54 F.Supp. 912, affirmed, C.C.A., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.
Ind.—Sears v. Moran, 59 N.E.2d 566, 223 Ind. 179.
N.M.—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.
Pa.—Hoch v. Martin, 188 A. 602, 124 Pa.Super. 445.

Evidence held sufficient

(1) To afford reasonable grounds for inference that at time of collision agent was on a mission for defendant.—National Life & Accident Ins. Co. v. Morrison, 162 S.W.2d 501, 179 Tenn. 29.

(2) To authorize inference that driver was acting within scope of his employment.

Cal.—Tairlis v. Standard Oil Co. of California, 90 P.2d 128, 32 Cal.App. 2d 469—Gammon v. Wales, 300 P. 988, 115 Cal.App. 103.

Iowa.—Orris v. Tolerton & Warfield Co., 207 N.W. 365, 201 Iowa 1344.
Mich.—Phillips v. Fotheringham, 269 N.W. 600, 277 Mich. 566.

Ohio.—House v. Stark Iron & Metal Co., App., 34 N.E.2d 592, rehearing denied 46 N.E.2d 419—Holmes v. Yellow Taxicab Co., 162 N.E. 710, 28 Ohio App. 382.

Tex.—Globe Laundry v. McLean, Civ.App., 19 S.W.2d 94.

(3) To give rise to presumption that salesman driving automobile was on employer's business at time he ran into pedestrian.—Staley v. Lawler, 27 S.W.2d 1039, 224 Mo.App. 884.

Evidence held insufficient

(1) To authorize inference that at time of accident employee was acting within the scope of employment as company's servant.—Railway Express Agency v. Bonnell, 34 N.E.2d 927, 218 Ind. 607.

(2) To support inference that a purpose of the agent's trip at time of the accident was collection, made two hours thereafter.—Snowwhite v. Metropolitan Life Ins. Co., 127 S.W. 2d 718, 344 Mo. 705.

51. Mo.—Snowwhite v. Metropolitan Life Ins. Co., 127 S.W.2d 718, 344 Mo. 705.

Neb.—Mackechnie v. Lyders, 279 N. W. 328, 134 Neb. 682.

Or.—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L. R. 944.

Tenn.—Welch v. Young, 11 Tenn.App. 431.

Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28

42 C.J. p 1233 note 23.

Presumptions held supra § 511.

Testimony held without probative value to establish that automobile, which belonged to employer, was being operated in business of employer—Kavanaugh v. Wheeling, 7 S.E.2d 125, 175 Va. 105.

Statement of driver not conclusive

In action for injuries to boy run over by defendant's truck, driven by one accompanied by another regular driver for defendant, jury was not bound by testimony of such other driver that he and person driving truck were not working for defendant at time of accident—Mays v. Welsh, 32 N.E.2d 701, 218 Ind. 356.

Evidence held sufficient

(1) To establish that driver was acting within the scope of his employment or while using vehicle in employer's business or for his purpose.

U.S.—R. J. Reynolds Tobacco Co. v. Newby, C.C.A. Idaho, 145 F.2d 768—Pillsbury Flour Mills Co. v. Miller, C.C.A. Mo., 121 F.2d 297—Crockett v. U. S., C.C.A. W. Va., 116 F.2d 646, certiorari denied 62 S.Ct. 57, 314 U.S. 619, 86 L.Ed. 498—Crockett v. McElroy, C.C.A. W. Va., 116 F.2d 646, certiorari denied 62 S.Ct. 57, 314 U.S. 619, 86 L.Ed. 498—Woody v. Utah Power & Light Co., C.C.A. Utah, 54 F.2d 220—Young v. Wilky Carrier Corporation, D.C.Pa., 54 F. Supp. 912, affirmed, C.C.A., 150 F. 2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Ala.—Koonce v. Craft, 3 So.2d 66, 241 Ala. 407—Bruner v. Eubanks, 33 So.2d 374, 33 Ala.App. 266, certiorari denied 33 So.2d 376, 250 Ala. 100.

Ariz.—Brooks v. Neer, 47 P.2d 452, 46 Ariz. 144.

Ark.—Lion Oil Refining Co. v. Smith, 133 S.W.2d 895, 199 Ark. 397—Vaughan Hardware Co. v. McAdoo, 118 S.W.2d 280, 196 Ark. 471—Marshall Ice & Electric Co. v. Fitzhugh, 112 S.W.2d 420, 195 Ark. 395—Southwestern Bell Telephone Co. v. Roberts, 31 S.W.2d 302, 182 Ark. 211.

Cal.—Loper v. Morrison, 145 P.2d 1, 23 Cal.2d 600—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870,

5 Cal.2d 480—Mirabito v. San Francisco Dairy Co., 35 P.2d 513, 1 Cal. 2d 400—Reed v. Parra, 264 P. 757, 203 Cal. 430—Nash v. Wright, 186 P.2d 686, 82 Cal.App.2d 467—Ingle v. Bay Cities Transit Co., 164 P. 2d 508, 72 Cal.App.2d 283—Graetch v. Dix, 156 P.2d 79, 68 Cal.App.2d 115—Sullivan v. Thompson, 87 P. 2d 62, 30 Cal.App.2d 675—Sullivan v. Barra, 70 P.2d 495, 22 Cal.App.2d 20—Hiner v. Olson, 72 P.2d 890, 23 Cal.App.2d 227, rehearing denied 73 P.2d 945, 23 Cal.App.2d 227—Christopher v. City of Los Angeles, 56 P.2d 539, 13 Cal.App.2d 118—Guberman v. Weiner, 51 P.2d 1141, 10 Cal.App.2d 401—Malmstrom v. Bridges, 47 P.2d 336, 8 Cal.App.2d 5—Meader v. Miller, 46 P.2d 229, 7 Cal.App.2d 511—Hill v. Fresno County, 35 P.2d 593, 140 Cal App. 272—Weinberg v. Clark, 8 P.2d 164, 120 Cal App 362—Cook v. Sanger, 293 P. 794, 110 Cal.App. 90—Barton v. McDermott, 291 P. 591, 108 Cal. App. 372—Wagnitz v. Scharetz, 265 P. 318, 89 Cal.App. 511—Curran v. Earle C. Anthony, Inc., 247 P. 236, 77 Cal App 462—Dillon v. Prudential Ins. Co. of America, 242 P. 736, 75 Cal App. 266

Conn.—Demos v. Giovannelli, 200 A. 573, 124 Conn 461—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483—Larsen v. Thomas, 176 A. 400, 119 Conn 335.

Fla.—Jacksonville Paper Co. v. Carlile, 15 So.2d 443, 153 Fla. 661.

Ga.—Lunsford v. Carden, 13 S.E.2d 192, 64 Ga.App. 349—Adair v. Carmichael, 191 S.E. 177, 55 Ga.App. 696—Holland v. Bullock, 190 S.E. 877, 55 Ga.App. 605—Mitchem v. Shearman Concrete Pipe Co., 165 S. E. 889, 45 Ga.App. 809, followed in Teichmiller v. Steele, 167 S.E. 911, 46 Ga.App. 468—Davies v. Hearn, 164 S.E. 273, 45 Ga.App. 276.

Ill.—Reilly v. Peterson Furniture Co., 40 N.E.2d 780, 314 Ill.App. 46—Susenlehl v. Red River Lumber Co., 28 N.E.2d 743, 306 Ill.App. 430—Raduens v. Kelley, 14 N.E.2d 509, 295 Ill.App. 622—Slaughter v. Exposition Gateway Parking Corporation, 4 N.E.2d 804, 287 Ill.App. 621—Tarka v. Pratt, 257 Ill.App. 403—Kavale v. Morton Salt Co., 243 Ill.App. 205, affirmed 180 N.E. 752, 329 Ill. 445.

Ind.—Albert McGann Securities Co. v. Coen, 48 N.E.2d 58, 114 Ind.App. 60, dissenting opinion 48 N.E.2d 1000, 114 Ind.App. 60—King v. Ransburg, 39 N.E.2d 822, 111 Ind. App. 523, rehearing denied 40 N.E. 2d 999, 111 Ind.App. 523—Kapp's

contended that the servant was acting in behalf of | himself or a third person at the time of the acci-

- Express & Van Co. v. Boyd**, 163 N. E. 515, 90 Ind.App. 351.
- Ky.—Union Transfer & Storage Co. v. Fryman's Adm'r**, 200 S.W.2d 953, 304 Ky. 422—**Vansant v. Holbrook's Adm'r**, 146 S.W.2d 337, 285 Ky. 83—**Home Laundry Co. v. Cook**, 128 S.W.2d 763, 277 Ky. 8.
- La.—Guillory v. Horecky**, 168 So. 481, 185 La. 21—**Automobile Ins. Co. of Hartford, Conn., v. Barnard**, App., 30 So.2d 142—**Gilbert v. Trotter**, App., 160 So. 855—**U-Drive-It-Car Co. v. Texas Pipe Line Co.**, 129 So. 565, 14 La.App. 524.
- Mass.—Arnold v. Brereton**, 158 N.E. 671, 261 Mass. 238—**Surette v. Hamel**, 149 N.E. 710, 254 Mass. 171.
- Mich.—Vitaloli v. Berklund**, 295 N. W. 557, 296 Mich. 56.
- Minn.—Wagstrom v. Joseph**, 255 N. W. 822, 192 Minn. 220—**Paulson v. Cave**, 241 N.W. 678, 185 Minn. 419—**Beckman v. Wilkins**, 232 N.W. 38, 181 Minn. 245.
- Mo.—Hein v. Peabody Coal Co.**, 85 S. W.2d 604, 337 Mo. 626—**Day v. Banks**, App., 143 S.W.2d 68—**Gillis v. Singer**, App., 86 S.W.2d 352—**Schmitt v. American Press**, App., 42 S.W.2d 969.
- Neb.—Sutton v. Inland Const. Co.**, 14 N.W.2d 387, 144 Neb. 721—**Kielley v. McCauley**, 296 N.W. 437, 139 Neb. 60—**Vanderlippe v. Midwest Studios**, 289 N.W. 341, 137 Neb. 289—**Keebler v. Harris**, 235 N.W. 328, 120 Neb. 739.
- N.J.—Spence v. Maier**, 59 A.2d 609, 137 N.J.Law 284, affirmed 61 A.2d 590—**Katzman v. Budden**, 16 A.2d 471, 125 N.J.Law 519—**Arnold v. Ollendorf**, 157 A. 127, 9 N.J.Misc. 1198—**Lohman v. Lindeman**, 153 A. 101, 9 N.J.Misc. 225—**Buncvich v. Public Service Ry. Co.**, 147 A. 375, 7 N.J.Misc. 823.
- N.Y.—Cooke v. Drigant**, 45 N.E.2d 815, 289 N.Y. 313—**Dunseath v. Starrett Bros. & Eken**, 42 N.E.2d 474, 288 N.Y. 174, reargument denied 43 N.E.2d 355, 288 N.Y. 734—**Zeiger v. Riley**, 59 N.Y.S.2d 421, 270 App.Div. 771, appeal denied 60 N.Y.S.2d 295, 270 App.Div. 819.
- N.D.—Bentley v. Oldetyme Distillers**, 298 N.W. 417, 71 N.D. 52—**Motley v. Standard Oil Co.**, 240 N.W. 206, 61 N.D. 660—**Conklin v. Sampson**, 213 N.W. 847, 55 N.D. 375.
- Okl.—Kelly v. Cann**, 136 P.2d 896, 192 Okl. 446—**Oklahoma City v. Head**, 90 P.2d 395, 185 Okl. 33.
- Or.—Knapp v. Standard Oil Co. of California**, 68 P.2d 1052, 156 Or. 564.
- Pa.—Davis v. Tredwell**, 32 A.2d 411, 347 Pa. 341—**Sefton v. Valley Dairy Co.**, 28 A.2d 313, 345 Pa. 324—**Kadlecik v. L. N. Renault & Sons**, 40 A.2d 866, 156 Pa.Super. 586.
- R.I.—Goff v. Craft's, Inc.**, 21 A.2d 70, 87 R.I. 11—**Landi v. Kirwin & Fletcher**, 157 A. 301, 52 R.I. 57.
- S.C.—Stevens v. Moore**, 46 S.E.2d 73, 211 S.C. 498.
- Tenn.—Wolfe v. Vaughn**, 152 S.W.2d 631, 177 Tenn. 678—**Good v. Tennessee Coach Co., App.**, 209 S.W.2d 41—**Pratt v. Duck**, 191 S.W.2d 562, 28 Tenn.App. 502—**Hall Grocery Co. v. Wall**, 13 Tenn.App. 203.
- Tex.—Texas Power & Light Co. v. Denson**, 81 S.W.2d 36, 125 Tex. 383—**Hranicky v. Trojanowsky**, Civ. App., 153 S.W.2d 649, error refused—**Wilhoit v. Iverson Tool Co., Civ. App.**, 119 S.W.2d 709, error dismissed by agreement—**Peveto v. Smith**, Civ.App., 113 S.W.2d 216, modified on other grounds 133 S.W.2d 572, 134 Tex. 308—**Beck v. Wahlgren**, Civ.App., 87 S.W.2d 890—**Kituri v. Lira**, Civ.App., 73 S.W.2d 891—**Colgate-Palmolive-Peet Co. v. Perkins**, Civ.App., 48 S.W.2d 1007, error refused—**Lightsey Black & White Cab Corporation v. Littlefield**, Civ.App., 48 S.W.2d 766, error refused—**Inceda Laundry v. Newton**, Civ.App., 33 S.W.2d 208, error dismissed—**American Indemnity Co. v. Venegas**, Civ.App., 17 S.W.2d 858, error dismissed.
- Va.—White v. Gregory**, 170 S.E. 739, 161 Va. 414—**Crowell v. Duncan**, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425.
- Wash.—Meloisevich v. Cichy**, 193 P.2d 342—**Rice v. Garl**, 98 P.2d 301, 2 Wash.2d 403—**Ennis v. Smith**, 18 P. 2d 1, 171 Wash. 126.
- 42 C.J. p 1232 note 23 [a].
- (2) To establish that driver was not acting within scope of his employment.—**McAllister v. Miami Daily News**, 17 So.2d 613, 154 Fla. 370.
- (3) To rebut presumption that truck driver was continuing on personal independent mission at the time of the accident.—**Mancuso v. Hurwitz-Mintz Furniture Co., La. App.**, 183 So. 461.
- (4) To warrant conclusion that president of company was acting within scope of employment in directing operation of its rented automobile when it struck pedestrian.—**U-Run-It Co. v. Merryman**, 153 S.E. 664, 154 Va. 467.
- Evidence held insufficient**
- (1) To establish that employee was acting within scope of his employment or while using vehicle in employer's business or for his purpose.
- U.S.—Metropolitan Life Ins. Co. v. Gosney**, C.C.A.Mo., 101 F.2d 167—**Dudley v. Preston Motor Co., C.C. A.Tenn.**, 51 F.2d 8.
- Ala.—Koonce v. Craft**, 174 So. 478, 234 Ala. 278—**Hill v. Decatur Ice & Coal Co.**, 122 So. 338, 219 Ala. 380
- Alabama Power Co. v. Watts**, 117 So. 425, 213 Ala. 78.
- Ark.—Brooks v. Bale Chevrolet Co.**, 127 S.W.2d 135, 198 Ark. 17.
- Cal.—Bourne v. Northern Counties Title Ins. Co.**, 40 P.2d 583, 4 Cal. App.2d 69.
- Colo.—Kirkpatrick v. McCarty**, 152 P. 2d 994, 112 Colo. 588.
- Conn.—Matulis v. Gans**, 141 A. 870, 107 Conn. 562.
- Ga.—Lamb v. Landers**, 21 S.E.2d 321, 67 Ga.App. 588—**Akridge v. Atlanta Journal Co.**, 194 S.E. 590, 56 Ga. App. 812, followed in **Robinson v. Atlanta Journal Co.**, 194 S.E. 594, 56 Ga.App. 820.
- Ind.—Railway Express Agency v. Bonnell**, 33 N.E.2d 980, r-hearing denied 34 N.E.2d 927, 218 Ind. 607.
- Kan.—Redfield v. Chelsea Coal Co.**, 54 P.2d 975, 143 Kan. 480.
- La.—Roy v. Houlihan**, App., 182 So. 333—**Banks v. Commercial Standard Ins. Co., App.**, 177 So. 488—**Bordelon v. T. L. James & Co., App.**, 148 So. 484—**Bennett v. Thompson**, App., 145 So. 783—**Jeter v. Archer**, 138 So. 890, 18 La.App. 527—**Schaumburg v. Nash-Mississippi Valley Motor Co.**, 129 So. 390, 14 La.App. 77.
- Mass.—Karpowicz v. Manasas**, 176 N. E. 497, 275 Mass. 413—**Kindell v. Ayres**, 160 N.E. 818, 263 Mass. 244—**Welch v. Checker Taxi Co.**, 159 N.E. 622, 262 Mass. 310—**Malley v. Hart**, 149 N.E. 664, 254 Mass. 168.
- Minn.—Messenbring v. Blackwood**, 213 N.W. 541, 171 Minn. 105—**Stauf-fer v. Schilpin**, 208 N.W. 1004, 167 Minn. 301.
- Mo.—Riggs v. Higgins**, 106 S.W.2d 1, 341 Mo. 1—**Rubinfeld v. Union Elec. Light & Power Co., App.**, 187 S.W. 2d 762.
- Neb.—Hildebrand v. McCauley**, 296 N.W. 434, 139 Neb. 55—**Riesland v. Dawson County Irr. Co.**, 279 N.W. 726, 134 Neb. 773.
- N.J.—Cinque v. Crown Oil Corp.**, 48 A.2d 777, 135 N.J.Law 38.
- N.Y.—Cullen v. Woodie**, 58 N.Y.S.2d 361, 269 App.Div. 992—**Cohen v. Neustadter**, 222 N.Y.S. 602, 221 App.Div. 102, reversed on other grounds 160 N.E. 12, 247 N.Y. 207.
- N.C.—Salmon v. Pearce**, 27 S.E.2d 647, 223 N.C. 537—**Russell v. Cutshall**, 26 S.E.2d 866, 223 N.C. 353—**Van Landingham v. Singer Sewing Mach. Co.**, 177 S.E. 126, 207 N.C. 355.
- N.D.—Parker Motor Co. v. Northern Packing Co.**, 227 N.W. 226, 58 N.D. 685.
- Ohio.—Harten-Brooks Co. v. Gayer**, 155 N.E. 252, 23 Ohio App. 458.
- Okl.—Russell Products Co. v. Bailey**, 19 P.2d 601, 162 Okl. 212.
- Pa.—Davis v. Pitt Pub. Co.**, 188 A. 291, 324 Pa. 449—**Warman v. Craig**, 184 A. 757, 321 Pa. 481—**Little v.**

dent.⁵³ While the fact that the driver is acting for the owner may be shown by the circumstances,⁵³ proof of the relationship of master and servant on other occasions when the employee drove the employer's vehicle does not establish agency in driving the vehicle at a time when the employee was acting for himself without the employer's permission.⁵⁴ The fact that defendant's name was printed on the vehicle is not conclusive evidence that the driver was acting at the time of the accident within the scope of his employment,⁵⁵ but it is at

least a circumstance tending that way in the absence of any contravening proof.⁵⁶

(b) Prima Facie Case

Circumstances which form a reasonable basis for finding that the vehicle at the time of the accident was being used in the defendant's business will suffice to make out a prima facie case.

Circumstances which form a reasonable basis for finding that the vehicle at the time of the accident was being used in defendant's business will suffice to make out a prima facie case.⁵⁷ Proof of owner-

Four Wheel Drive Sales Co., 179 A. 550, 319 Pa. 409—Martin v. Lipschitz, 149 A. 168, 299 Pa. 211—Orluske v. Nash Pittsburgh Motors Co., 133 A. 148, 286 Pa. 170—Koscelck v. Lucas, 43 A.2d 550, 157 Pa. Super. 548—Myers v. Strousse, 94 Pa. Super. 440.

Tenn.—Goff v. St. Bernard Coal Co., 129 S.W.2d 205, 174 Tenn. 558—English v. George Cole Motor Co., 111 S.W.2d 386, 21 Tenn. App. 408. Tex.—Pahl v. X. R. Gill, Inc., Civ. App., 97 S.W.2d 252—Houck v. McDonald, Civ. App., 59 S.W.2d 333. Wash.—Roletto v. Department Stores Garage Co., 191 P.2d 875. Wis.—Fawcett v. Gallery, 265 N.W. 687, 221 Wis. 195—Price v. Shorewood Motors, 251 N.W. 244, 214 Wis. 64.

42 C.J. p 1232 note 23 [b].

(2) To show that employee was not acting within the scope of his employment at the time of the accident.—Murphy v. Henderson, La. App., 23 So.2d 369—Lovel v. R. F. Mestayer Lumber Co., La. App., 185 So. 475, rehearing denied 186 So. 101.

(3) To show that defendants authorized their driver to employ assistants so as to be liable to one so employed for driver's ordinary negligence.—Murphy v. Barry, 163 N.E. 169, 264 Mass. 557.

(4) To justify finding that vehicle bearing number plates issued to partners was being operated in partnership business.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

52. Evidence held sufficient

(1) To establish that employee was acting within scope of his employment or while using vehicle in employer's business or for his purpose.

Cal.—Megowan v. City of Los Angeles, 59 P.2d 1012, 7 Cal.3d 80. La.—Culver v. Toye Bros. Yellow Cab Co., App., 28 So.2d 296. N.H.—Boston v. B. & M. Super Service, 20 A.2d 638, 91 N.H. 392.

(2) To establish that employee was acting within scope of his employment while taking vehicle to his home.—C. J. Horner Co. v. Holland, 180 S.W.2d 524, 207 Ark. 345—Helena

Wholesale Grocery Co. v. Bell, 112 S. W.2d 416, 195 Ark. 435.

(3) To support verdict that servant was not using master's truck solely for private purpose.—Rex Oil Corporation v. Crank, 38 S.W.2d 1093, 183 Ark. 819.

Evidence held insufficient

(1) To establish that employee was acting within scope of his employment or while using vehicle in employer's business or for his purpose. U.S.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—White v. Firestone Tire & Rubber Co., C. C.A.S.C., 90 F.2d 637.

Ala.—Bell v. Martin, 1 So.2d 906, 241 Ala. 182—Alabama Power Co. v. Watts, 117 So. 425, 218 Ala. 78.

Cal.—Cragun v. Krossoff, 114 P.2d 431, 45 Cal.App.2d 480—Vaden v. Holmes, 103 P.2d 1002, 39 Cal.App. 2d 580—Newman v. Sunde, 73 P.2d 260, 23 Cal.App.2d 332—Hanchett v. Wiseley, 290 P. 311, 107 Cal.App. 230—Adams v. Tuxedo Land Co., 267 P. 926, 92 Cal.App. 266.

Conn.—Leitzes v. F. L. Caulkins Auto Co., 196 A. 145, 123 Conn. 459—Slattery v. O'Meara, 181 A. 610, 120 Conn. 465—Hickson v. W. W. Walker Co., 149 A. 400, 110 Conn. 604, 68 A.L.R. 1044.

Idaho.—Baldwin v. Singer Sewing Mach Co., 287 P. 944, 49 Idaho 231. Iowa.—Alcock v. Kearney, 288 N.W. 785, 227 Iowa 650.

La.—Caldwell v. Unity Industrial Life Ins. Co., App., 17 So.2d 757—Williamson v. De Soto Wholesale Grocery Co., App., 16 So.2d 739—Lacobes v. De Soto Wholesale Grocery Co., 16 So.2d 743—Mancuso v. Hurwitz-Mintz Furniture Co., App., 181 So. 814, rehearing denied 183 So. 461—Great American Indemnity Co. v. Landry Stores, App., 177 So. 405—Vuillemot v. August J. Clavierie & Co., 125 So. 168, 12 La. App. 236.

Me.—Stevens v. Frost, 32 A.2d 164, 140 Me. 1. Minn.—Wenell v. Shapiro, 280 N.W. 503, 194 Minn. 368.

N.J.—Katz v. Newark Newsdealers

Supply Co., 197 A. 259, 119 N.J. Law 498.

N.C.—Miller v. Moore, 21 S.E.2d 876, 222 N.C. 749—Smith v. Moore, 16 S.E.2d 701, 220 N.C. 165—Crech v. National Linen Service Corporation, 14 S.E.2d 408, 219 N.C. 457.

Okl.—Wall v. Winn, 63 P.2d 28, 178 Okl. 472.

Pa.—Grossman v. Knless, 193 A. 369, 127 Pa. Super. 310.

Tex.—Mitchell v. Gibson, Civ. App., 160 S.W.2d 79, error refused—Alfano v. International Harvester Co. of America, Civ. App., 121 S.W.2d 466, error dismissed—McCoy v. Beach-Wittman Co., Civ. App., 22 S.W.2d 714, error dismissed—Woodward-Wanger Co. v. Nelson, Civ. App., 11 S.W.2d 371.

(2) To corroborate defendant's testimony on issue whether servant was engaged in scope of his employment or on mission of his own at time of accident.—Gammill v. Mullins, Tex. Civ. App., 188 S.W.2d 986, error dismissed.

53. Vt.—Luce v. Chandler, 195 A. 246, 109 Vt. 275—Ronan v. J. G. Turnbull Co., 131 A. 788, 99 Vt. 280.

Wash.—Smith v. Eldridge Motors, 90 P.2d 257, 199 Wash. 10, opinion adhered to 93 P.2d 1120, 199 Wash. 10.

Rule held not affected by statutes making proof of ownership of motor vehicle prima facie evidence that it was being operated with the owner's consent and making proof of its registration prima facie evidence that it was being operated by the owner or his servant in his business.—Good v. Tennessee Coach Co., Tenn. App., 209 S.W.2d 41.

54. Or.—Summerville v. Gillespie, 179 P.2d 719, 181 Or. 144.

55. Tex.—J. H. Robinson Truck Lines v. Jones, Civ. App., 139 S.W.2d 127—Freeman v. Texas Bread Co., Civ. App., 111 S.W.2d 307.

56. Tex.—J. H. Robinson Truck Lines v. Jones, Civ. App., 139 S.W.2d 127—Freeman v. Texas Bread Co., Civ. App., 111 S.W.2d 307.

57. Conn.—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn.

ship of the vehicle by defendant is held in some jurisdictions to make out a prima facie case on the issue of whether the driver was operating the vehicle at the time of the accident pursuant to the owner's business, and within the scope of his employment,⁵⁸ but there is also authority denying this view.⁵⁹ It has been held that proof of ownership by defendant, together with added proof that the negligent driver was in the general employment of

defendant, establishes a prima facie case,⁶⁰ although there is also authority to the contrary.⁶¹ A prima facie case of respondeat superior may be made by evidence that defendant was owner of the offending vehicle, that it was being operated by a person generally employed by the owner as his servant, and that at the time of the accident the vehicle was being operated under conditions resembling those which normally attended its operation in the mas-

483—*De Marey v. Brugas*, 131 A. 392, 103 Conn. 667.

Evidence held to establish prima facie case

U.S.—*National Battery Co. v. Levy*, C.C.A. Minn., 126 F.2d 33, certiorari denied *Levy v. National Battery Co.*, 62 S.Ct. 1294, 316 U.S. 697, 86 L.Ed 1767—*Hawthorne v. Eckerson Co.*, C.C.A.Vt., 77 F.2d 844.

Ala.—*Slaughter v. Murphy*, 194 So. 649, 239 Ala. 260

Ark.—*Arkansas Baking Co. v. Wyman*, 47 S.W.2d 45, 185 Ark. 310—*Boehmer v. Short*, 43 S.W.2d 511, 184 Ark. 672—*Mullins v. Ritchie Grocer Co.*, 35 S.W.2d 1010, 183 Ark. 218.

Cal.—*Huddy v. Chronicle Pub. Co.*, 103 P.2d 421, 15 Cal.2d 554—*Barton v. McDermott*, 291 P. 591, 108 Cal. App. 372

Conn.—*De Marey v. Brugas*, 131 A. 292, 103 Conn. 667.

Ky.—*It. L. Jeffries Truck Line v. Brown*, 197 S.W.2d 904, 303 Ky. 406—*Galloway Motor Co. v. Huffman's Adm'r*, 137 S.W.2d 379, 281 Ky. 841

La.—*Houlton v. Nichols Truck Line*, App., 23 So.2d 368—*Antoine v. Louisiana Highway Commission*, App., 188 So. 443—*Griffin v. Motor Transit Co.*, 127 So. 438, 13 La.App. 151—*Swedman v. Standard Oil Co. of Louisiana*, 125 So. 481, 12 La.App. 359.

Miss.—*Stovall v. Jepsen*, 13 So.2d 229, 195 Miss. 115.

N.Y.—*Hemmingway v. Town of Danemora*, Clinton County, 55 N.Y.S. 2d 828, 269 App.Div. 221.

N.C.—*Lazarus v. Blue Ridge Grocery Co.*, 161 S.E. 553, 201 N.C. 817.

Okl.—*Burt Corporation v. Crutchfield*, 6 P.2d 1055, 153 Okl. 2.

Tenn.—*Racy Cream Co. v. Walden*, 1 Tenn.App. 653.

Evidence held not to establish prima facie case

N.C.—*Cole v. Asheville Funeral Home*, 176 S.E. 553, 207 N.C. 271.

58. Ala.—*Walker v. Stephens*, 127 So. 668, 221 Ala. 18.

Ariz.—*Hatchimonji v. Homes*, 3 P.2d 271, 38 Ariz. 535—*Lutty v. Lockhart*, 295 P. 975, 37 Ariz. 488.

N.Y.—*Rathfelder v. Flag*, 12 N.Y.S. 2d 136, 257 App.Div. 71, affirmed 24 N.E.2d 984, 282 N.Y. 563.

Or.—*Summerville v. Gillespie*, 179 P.

2d 719, 181 Or. 144—*Jasper v. Wells*, 144 P.2d 505, 173 Or. 114.

Wis.—*Sevey v. Jones*, 292 N.W. 436, 235 Wis. 109—*Philip v. Schlager*, 253 N.W. 394, 214 Wis. 370—*Gehloff v. De Marce*, 234 N.W. 717, 204 Wis. 464.

42 C.J. p 1232 note 23 [c].

59. Cal.—*Wilson v. Droege*, 294 P. 726, 110 Cal.App. 578

Conn.—*Dunn v. Santamauro*, 175 A. 913, 119 Conn. 307—*Middletown Trust Co. v. Bregman*, 174 A. 67, 118 Conn. 651.

Ky.—*Ashland Coca Cola Bottling Co. v. Ellison*, 66 S.W.2d 52, 252 Ky. 172.

Miss.—*Merchants Co. v. Tracy*, 166 So. 340, 175 Miss. 49.

Ohio—*House v. Stark Iron & Metal Co.*, App., 34 N.E.2d 592, rehearing denied 46 N.E.2d 419.

Pa.—*Henry v. Beck*, 36 A.2d 734, 154 Pa.Super. 585—*Grossman v. Kniess*, 193 A. 369, 127 Pa.Super. 310—*Hoch v. Martin*, 188 A. 602, 124 Pa.Super. 445.

Tenn.—*Trimble v. Bridges*, 180 S.W. 2d 590, 27 Tenn.App. 320.

Tex.—*Moreland v. Hawley Independent School Dist.*, Civ.App., 163 S.W.2d 892, supplemented on other grounds 169 S.W.2d 227.

42 C.J. p 1232 note 23 [d].

Reason for rule

Such a rule ignores the principle that one presumption may not be supported by another presumption; for, if it should be granted that on such facts a presumption that the driver was a servant of the owner would arise, the further presumption that such servant was in the course of his employment would have nothing to support it except the first-mentioned presumption.—*Moreland v. Hawley Independent School Dist.*, supra.

In Missouri

(1) It has been held that mere admitted ownership of car is not sufficient to supply necessary proof of agency of driver or that alleged agent was engaged in work of his supposed master.—*Kurz v. Greenlease Motor Car Co.*, App., 52 S.W.2d 498, certiorari quashed State ex rel. Kurz v. Bland, 64 S.W.2d 688, 333 Mo. 941.

(2) However, proof of defendant's

ownership when considered with other circumstances in the evidence has been held sufficient to make a prima facie case for plaintiff.—*Rockwell v. Standard Stamping Co.*, 241 S.W. 979, 210 Mo.App. 168—42 C.J. p 1232 note 23 [c].

60. Cal.—*Bushnell v. Yoshika Tashiro*, 2 P.2d 550, 115 Cal.App. 563.

Ind.—*Frick v. Bickel*, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Ky.—*W. T. Litter Co. v. Graham*, 136 S.W.2d 1059, 281 Ky. 634.

La.—*Banks v. Commercial Standard Ins. Co. App.*, 177 So. 488—*Middletown v. Humble*, App., 172 So. 542.

Minn.—*Schultz v. Swift & Co.*, 299 N.W. 7, 210 Minn. 533.

Tex.—*Broadbudd v. Long*, 138 S.W.2d 1057, 135 Tex. 353—*Carle Oil Co. v. Owens*, Civ.App., 134 S.W.2d 411—*Weber v. Reagan*, Civ.App., 91 S.W.2d 409, error dismissed—*Texas News Co. v. Lake*, Civ.App., 58 S.W.2d 1044, error dismissed—*Homan v. Borman*, Civ.App., 19 S.W.2d 438—*Moreland v. Hawley Independent School Dist.*, Civ.App., 163 S.W.2d 892, supplemented on other grounds 169 S.W. 227—*Trachtenberg v. Castillo*, Civ.App., 257 S.W. 657—*Browne v. Hanagriff*, Civ.App., 270 S.W. 890—*Shrader v. Roberts*, Civ.App., 255 S.W. 469—*Lang Floral, etc.*, Co. v. Sheridan, Civ.App., 245 S.W. 467—*Gordon v. Texas, etc.*, Mercantile, etc., Co., Civ.App., 190 S.W. 748—*Christensen v. Christiansen*, Civ. App., 155 S.W. 995—*Studebaker Bros. Co. v. Kitts*, Civ.App., 152 S.W. 464.

Facts creating presumption that driver was acting within scope of employment generally see supra § 511 (6) d.

Use within general scope of employment

Fact that employee is intrusted with possession and operation of automobile, with discretion to use it in employer's business, imposes liability for negligent operation, on showing of use within general, not necessarily particular, employment.—*Vitelli v. Minutoli*, 4 P.2d 818, 118 Cal.App. 120.

61. Conn.—*Middletown Trust Co. v. Bregman*, 174 A. 67, 118 Conn. 651.

ter's business.⁶²

Registration. By virtue of some statutes the fact that the vehicle was at the time of the accident operated by the driver for the use and benefit of the owner and within the scope of his employment may be proved by showing registration in defendant's name.⁶³

(c) Rebuttal

A prima facie case established by the plaintiff, or an inference or presumption that the driver was acting within the scope of his employment or was engaged in the defendant's business at the time of the accident, may be rebutted by testimony sufficient in weight to overcome it.

A prima facie case established by plaintiff is rebuttable by testimony sufficient in weight to overcome it.⁶⁴ According to one view, defendant must

bring forth clear and convincing proof to overcome the inference or presumption that the driver was acting within the scope of his employment or was engaged in defendant's business at the time of the accident;⁶⁵ and the presumption is rebutted by clear, convincing, and uncontradicted evidence showing that the driver was not acting within the scope of his authority or employment⁶⁶ or was not engaged in the business, or for the use or on behalf, of defendant.⁶⁷ On the other hand, there is authority holding that clear, strong, convincing, and undisputed proof is not required to rebut a presumption that the driver was at the time and place of the accident operating the vehicle on the master's business, but it is necessary only to produce evidence that will reasonably satisfy the jury that the driver was not on the master's business;⁶⁸ and

62. Tenn.—Good v. Tennessee Coach Co., App., 209 S.W.2d 41.

63. Tenn.—Phillips-Ruttorff Mfg Co. v. McAlexander, 15 Tenn.App. 618—Elmore v. Thompson, 14 Tenn. App. 78—Welch v. Young, 11 Tenn. App. 431.

Statute as relating to evidence

A statute making registration of automobile prima facie proof that operation was for owner's benefit and within the course of the employment related entirely to matters of evidence.—Curtis v. Kyte, 106 S.W.2d 234, 21 Tenn.App. 115.

64. Cal.—Bourne v. Northern Counties Title Ins. Co., 40 P.2d 583, 4 Cal.App.2d 69.

La.—Banks v. Commercial Standard Ins. Co., App., 177 So. 488.

Minn.—Schultz v. Swift & Co., 299 N.W. 7, 210 Minn. 533.

Evidence held insufficient to overcome prima facie case

Ky.—Dennes v. Jefferson Meat Market, 14 S.W.2d 408, 228 Ky. 164.

N.Y.—Hemingway v. Town of Danemora, Clinton County, 55 N.Y.S. 2d 828, 269 App.Div. 221.

65. Cal.—Tsirlis v. Standard Oil Co. of California, 90 P.2d 128, 32 Cal. App.2d 469.

Ky.—Sharp v. Faulkner, 166 S.W.2d 62, 292 Ky. 179—Rawlings v. Clay Motor Co., 154 S.W.2d 711, 287 Ky. 604—W. T. Litter Co. v. Graham, 136 S.W.2d 1059, 281 Ky. 634.

Mo.—Staley v. Lawler, 27 S.W.2d 1039, 224 Mo.App. 884.

N.J.—Efsthathopoulos v. Federal Tea Co., 196 A. 470, 119 N.J.Law 408.

Tex.—Boydston v. Jones, Civ.App., 177 S.W.2d 303.

Wash.—Carlson v. Wolski, 147 P.2d 291, 20 Wash.2d 323—Davis v. Browne, 147 P.2d 263, 20 Wash.2d 219—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.

Evidence held sufficient to overcome presumption or inference

Cal.—McCammon v. Edmunds, 299 P. 551, 114 Cal.App. 36—Hanchett v. Wiseley, 290 P. 311, 107 Cal.App. 230.

Ky.—Rawlings v. Clay Motor Co., 154 S.W.2d 711, 287 Ky. 604—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8—Broadway Motors v. Bass, 67 S.W.2d 955, 252 Ky. 628.

La.—Hunt v. Chisholm, App., 183 So. 132—Kendricks v. Lewis, App., 175 So. 484.

Mont.—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165.

N.J.—Harris v. Kline, 151 A. 109, 8 N.J.Misc. 575.

N.Y.—Fisher v. New York Good Humor, 39 N.Y.S.2d 28, 265 App.Div. 967, appeal dismissed 50 N.E.2d 305, 290 N.Y. 921—Berry v. Employers' Liability Assur. Corporation, 5 N.Y.S.2d 887, 254 App.Div. 424.

Pa.—Grossman v. Knies, 193 A. 369, 127 Pa.Super. 310.

Tenn.—Southern Motors v. Morton, 154 S.W.2d 801, 25 Tenn.App. 204.

Tex.—Boydston v. Jones, Civ.App., 177 S.W.2d 303—Pyle v. Phillips, Civ.App., 164 S.W.2d 569.

Evidence held insufficient

(1) To defeat prima facie case against master for injuries by servant driving master's automobile.—Mullins v. Ritchie Grocer Co., 35 S.W. 2d 1010, 183 Ark. 218.

(2) To rebut presumption or inference.

U.S.—Young v. Wilky Carrier Corporation, D.C.Pa., 54 F.Supp. 912, affirmed, C.C.A., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Cal.—Lemka v. Nauman, 284 P. 1062, 103 Cal.App. 757.

Ky.—Dixie-Ohio Exp. Co. v. Webb, 184 S.W.2d 361, 299 Ky. 201.

La.—Antoine v. Louisiana Highway Commission, App., 188 So. 443.

Mich.—Rabaut v. Venable, 280 N.W. 129, 285 Mich. 111.

Mo.—Mauzy v. J. D. Carson Co., App., 189 S.W.2d 829.

N.J.—Wallace v. A. R. Perine Co., 172 A. 499, 113 N.J.Law 20.

Tenn.—Welch v. Young, 11 Tenn.App. 431.

Tex.—Eilar v. Theobald, Civ.App., 201 S.W.2d 237.

66. U.S.—Standard Coffee Co. v. Trippet, C.C.A. Tex., 108 F.2d 161.

Md.—Hendler Creamery Co. v. Miller, 138 A. 1, 153 Md. 264.

Mo.—Ross v. St. Louis Dairy Co., 98 S.W.2d 717, 339 Mo. 982.

Mont.—Monaghan v. Standard Motor Co., 29 P.2d 378, 96 Mont. 165.

Neb.—Ebers v. Whitmore, 241 N.W. 126, 122 Neb. 653.

Ohio.—Reichard v. Red Cab Co., 16 Ohio Supp. 3.

Tex.—Alfano v. International Harvester Co. of America, Civ.App., 121 S.W.2d 466, error dismissed.

Wash.—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28

42 C.J. p 1214 note 37.

67. N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368.

Or.—Bunnell v. Parellus, 111 P.2d 88, 166 Or. 174.

42 C.J. p 1214 note 38.

68. U.S.—Terminal Transport Co., Inc., v. Foster, C.C.A. Ala., 164 F.2d 248, 250.

"A requirement that the defendant's evidence in rebuttal of the presumption be undisputed is necessary to justify the giving of a directed verdict for a defendant, but is not necessary to rebut the presumption before the jury."—Terminal Transport Co., Inc. v. Foster, *supra*.

so it has been held that the presumption disappears where there is substantial evidence to the contrary⁶⁹ or where the surrounding circumstances are such that its recognition is unreasonable.⁷⁰ The presumption may be overcome by positive proof that the driver was not at the time on a mission of his master⁷¹ or by proof that the employee was engaged in his personal affairs;⁷² but according to some cases the fact that there is uncontradicted evidence that the driver was not driving the vehicle for the purposes of the owner does not of itself remove the presumption.⁷³ The jury cannot arbitrarily or capriciously disregard the testimony of credible witnesses introduced to obviate the effect of the presumption, arising from proof of ownership, that the driver of the vehicle was acting within the scope of his employment.⁷⁴

(3) Servant Driving Own Vehicle

Proof that the vehicle driven by the alleged employee or agent was owned by him is not necessarily controlling on the question of the employer's ultimate liability; and evidence of the master's right or power to control the servant and the vehicle at the time of the accident may be sufficient to establish the master's liability.

Proof that the vehicle driven by the alleged em-

ployee or agent was owned by him is not necessarily controlling on the question of the alleged employer's ultimate liability⁷⁵ and does not of itself establish that the relation of master and servant did not exist.⁷⁶ No inference of agency arises from proof of ownership of the vehicle by the employee;⁷⁷ but evidence of the master's right or power to control the servant and the vehicle at the time of the accident is sufficient to establish the master's liability for injury resulting from the servant's negligence while in performance of duties owed the master,⁷⁸ even though the latter did not have actual control of the servant and the vehicle.⁷⁹ The employer's right of control of his employee's vehicle should, however, be implied only from reasonably clear evidence showing it.⁸⁰

The fact that the vehicle was owned by the driver, and not the employer, has evidentiary value,⁸¹ but is not conclusive,⁸² as to whether the vehicle was used in the scope of the driver's employment, and the fact that the accident occurred, and the errand was being performed, outside usual business hours has slight weight in determining the question.⁸³

Evidence held to rebut presumption

Ala.—*Toranto v. Hattaway*, 122 So. 816, 219 Ala. 520.

69. Mo.—*Sowers v. Howard*, 139 S.W.2d 897, 346 Mo. 10—*Mauzy v. J. D. Carson Co.*, App., 189 S.W.2d 829.
42 C.J. p 1214 note 39.

70. N.Y.—*Flocco v. Carver*, 137 N.E. 309, 234 N.Y. 219—*Clark v. Harnischfeger Sales Corporation*, 264 N.Y.S. 873, 238 App.Div. 493.
42 C.J. p 1214 note 40.

71. La.—*Middleton v. Humble*, App., 172 So. 542.

Or.—*Summerville v. Gillespie*, 179 P. 2d 719, 181 Or. 144.

Use for own purposes

Presumption that driver's operation of automobile was in scope of employment may be rebutted by proof of use of car for his own purposes.—*Jackson v. De Bardelaben*, 118 So. 504, 22 Ala.App. 615.

72. Neb.—*Witthauer v. Paxton-Mitchell Co.*, 19 N.W.2d 865, 146 Neb. 436—*Philleo v. Hefnider*, 2 N.W.2d 31, 140 Neb. 808—*Harrell v. People's City Mission Home*, 267 N.W. 344, 131 Neb. 138.

73. Cal.—*Randolph v. Hunt*, 183 P. 358, 41 Cal.App. 739.

N.Y.—*Ferris v. Sterling*, 108 N.E. 406, 214 N.Y. 249, Ann.Cas.1916D 1161.
42 C.J. p 1214 note 41.

74. Ind.—*Frick v. Bickel*, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.

Tenn.—*Green v. Powell*, 124 S.W.2d 269, 22 Tenn.App. 481.

75. Or.—*Larkins v. Utah Copper Co.*, 127 P.2d 354, 169 Or. 499.

76. Or.—*Knapp v. Standard Oil Co. of California*, 68 P.2d 1052, 156 Or. 564.

Wash.—*Rice v. Garl*, 98 P.2d 301, 2 Wash.2d 403.

77. Or.—*Larkins v. Utah Copper Co.*, 127 P.2d 354, 169 Or. 499.

78. Or.—*Knapp v. Standard Oil Co. of California*, 68 P.2d 1052, 156 Or. 564.

Evidence held sufficient

(1) To justify imposing liability on employer—*Larkins v. Utah Copper Co.*, 127 P.2d 354, 169 Or. 499.

(2) To justify finding that one of two persons in charge of office had directed employee to use defendant's truck and the other had directed him to use his father's automobile and that employee chose automobile with knowledge of such persons, and not solely for his own convenience.—*Radocchia v. Goodrich Oil Co.*, 6 A.2d 746, 63 R.I. 58.

(3) To warrant inference that salesmen were expected to employ methods taught by employer in demonstrating merchandise to prospective customers as tending to establish that salesman was a servant.—*Mattan v. Hoover Co.*, 166 S.W.2d 557, 350 Mo. 506.

Evidence held insufficient

To warrant verdict or judgment for plaintiff.

U.S.—*Gosney v. Metropolitan Life Ins. Co.*, C.C.A.Mo., 114 F.2d 649.

Fla.—*McAllister v. Miami Daily News*, 17 So.2d 613, 154 Fla. 370.

Tenn.—*Tucker v. Home Stores*, 91 S.W.2d 296, 170 Tenn. 23.

Tex.—*Kennedy v. American Nat. Ins. Co.*, 107 S.W.2d 364, 130 Tex. 155, 112 A.L.R. 916—*American Nat. Ins. Co. v. Shepherd*, 95 S.W. 370, 128 Tex. 229, 107 A.L.R. 409.

79. Or.—*Knapp v. Standard Oil Co. of California*, 68 P.2d 1052, 156 Or. 564.

80. Wyo.—*Stockwell v. Morris*, 22 P.2d 189, 46 Wyo. 1.

81. Colo.—*United Brotherhood of Carpenters and Joiners of America, Local Union No. 55, v. Salter*, 167 P.2d 954, 114 Colo. 513.

82. Colo.—*United Brotherhood of Carpenters and Joiners of America, Local Union No. 55, v. Salter*, supra.

Evidence held sufficient

To establish that driver was operating his own automobile and was engaged in a mission of his own.—*McAllister v. Miami Daily News*, 17 So.2d 613, 154 Fla. 370.

83. Colo.—*United Brotherhood of Carpenters and Joiners of America, Local Union No. 55, v. Salter*, 167 P.2d 954, 114 Colo. 513.

g. Knowledge and Permission of Owner

Knowledge and permission of the owner must be affirmatively proved, and cannot be left to speculation or conjecture; but proof of ownership or of ownership and employment may be sufficient.

Where that fact is an issue in the case, whether the vehicle was being used at the time of the accident with the knowledge and permission of the owner must be affirmatively proved,⁸⁴ and the proof

84. Cal.—Casey v. Fortune, 179 P.2d 99, 78 Cal.App.2d 922—Howland v. Doyle, 44 P.2d 453, 6 Cal.App.2d 311.

Burden of proving that vehicle was or was not operated with knowledge and permission of owner see *supra* § 511 (6).

Previous use of automobile with express consent of owner cannot be construed as evidence of implied consent at a subsequent time.—Kayser v. Jungbauer, 14 N.W.2d 337, 217 Minn. 140—Krahmer v. Voss, 276 N.W. 218, 201 Minn. 272.

Difficulty of proving permission and legal use of another's automobile does not change law of evidence or liability.—Atwater v. Lober, 233 N.Y.S. 309, 133 Misc. 652.

Use by unlicensed operator

Fact that driver of automobile at time of accident was unlicensed operator was insufficient to establish absence of owner's consent to operation of automobile by such person under statute providing that owner shall be responsible for injuries resulting from negligence in operation of automobile in business of owner or otherwise by person legally using or operating automobile with permission of owner.—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560.

Evidence held sufficient

(1) In general.

Cal.—Hobbs v. Transport Motor Co., 141 P.2d 738, 22 Cal.2d 773.

La.—Serpas v. Collard Motors, App., 178 So. 261.

N.J.—Albrecht v. Raab, 22 A.2d 339, 127 N.J.Law 292.

N.Y.—Crawford v. Nilan, 35 N.Y.S.2d 33, 264 App.Div. 46, reversed on other grounds 46 N.E.2d 512, 239 N.Y. 444.

(2) To establish that vehicle was being used by driver with owner's permission at time of accident.

Ala.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.

Cal.—Hobbs v. Transport Motor Co., 141 P.2d 738, 22 Cal.2d 773—Blank v. Coffin, 126 P.2d 868, 20 Cal.2d 457—Brown v. Aldrich, 176 P.2d 89, 77 Cal.App.2d 693—Pearson v. Whitworth, 171 P.2d 745, 75 Cal.App.2d 751—Flemmer v. Monckton, 166 P.2d 380, 73 Cal.App.2d 271—Broadfoot v. Leather Supply Co., 160 P.2d 59, 69 Cal.App.2d 729—Davidson v. Ealey, 158 P.2d 1000, 69 Cal.App.2d 254—Hoffmann v. Lane, 54 P.2d 477, 11 Cal.App.2d 655—Prickett v. Whapples, 52 P.

2d 972, 10 Cal.App.2d 701—Badin v. Gaugh, 42 P.2d 394, 5 Cal.App.2d 185.

Fla.—Hastings v. Taylor, 177 So. 621, 130 Fla. 249—Boggs v. Butler, 176 So. 174, 129 Fla. 324—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Ill.—Kovell v. North Roseland Motor Sales, 275 Ill.App. 566.

Iowa.—Mooney v. Canier, 197 N.W. 625, 198 Iowa 251.

Mass.—Boyer v. Massachusetts Bonding & Insurance Co., 178 N.E. 523, 277 Mass. 359.

Minn.—Marty v. Nordby, 276 N.W. 739, 201 Minn. 469—Steinle v. Beckwith, 270 N.W. 139, 198 Minn. 424.

N.Y.—Munson v. Model Taxi Corp., 78 N.Y.S.2d 629, 273 App.Div. 1039—Hukey v. Pillsbury Mills, 60 N.Y.S.2d 307, 270 App.Div. 866—Devo v. Belotte, 27 N.Y.S.2d 1, 261 App.Div. 1119, reargument denied 29 N.Y.S.2d 910, 262 App.Div. 921, appeal denied 36 N.E.2d 917, 286 N.Y. 731—Mattera v. Green Bus Lines, 15 N.Y.S.2d 458, 258 App.Div. 800—Barber v. Jewel Tea Co., 300 N.Y.S. 302, 252 App.Div. 362, affirmed 16 N.E.2d 94, 278 N.Y. 540—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560.

Y.S.2d 910, 254 App.Div. 560—Darrohn v. Russell, 277 N.Y.S. 783, 154 Misc. 753—Brooks v. McNutt Auto Delivery Co., 214 N.Y.S. 562, 126 Misc. 730—Goschar v. Bauer, 13 N.Y.S.2d 328.

R.I.—Kernan v. Webb, 148 A. 186, 50 R.I. 394.

Tenn.—National Life & Accident Ins. Co. v. Morrison, 162 S.W.2d 501, 179 Tenn. 29.

(3) To establish that vehicle was not being used with owner's permission at time of accident.

Ala.—United Wholesale Grocery Co. v. Minge Floral Co., 142 So. 586, 25 Ala.App. 153, certiorari denied 142 So. 587, 225 Ala. 160.

Cal.—Henrietta v. Evans, 75 P.2d 1051, 10 Cal.2d 526.

Conn.—Sosnowski v. Lenox, 53 A.2d 388, 133 Conn. 624.

Iowa.—Heavilin v. Wendell, 241 N.W. 654, 214 Iowa 844, 83 A.L.R. 872.

Mo.—Rath v. Knight, 55 S.W.2d 682.

N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368—Ermann v. Kahn, 242 N.Y.S. 573, 229 App.Div. 693, affirmed, 175 N.E. 342, 255 N.Y. 627—Cammarata v. Nassau Appliance Co., 8 N.Y.S.2d 584, 255 App.Div. 1014, reversed on other grounds 27 N.E.2d 205, 282 N.Y. 795, reargument denied 28 N.E.2d 38, 283 N.Y. 640.

(4) To establish that child was driving with parent's consent.

Cal.—Casey v. Fortune, 179 P.2d 99, 78 Cal.App.2d 922—Donato v. Lopopolo, 66 P.2d 1256, 20 Cal.App.2d 409—Lufkin v. Patten—Blinn Lumber Co., 59 P.2d 414, 15 Cal.App.2d 259—Walker v. Nelson, 53 P.2d 977, 11 Cal.App.2d 297—Garrison v. Booth, 52 P.2d 535, 10 Cal.App.2d 738.

Ind.—Bolly v. Cisco, 171 N.E. 388, 92 Ind.App. 70.

Ky.—Wells v. Lockhart, 81 S.W.2d 5, 258 Ky. 698.

Or.—Steele v. Hemmers, 40 P.2d 1022, 149 Or. 381.

Tex.—Sturtevant v. Pagel, 130 S.W.2d 1017, 134 Tex. 46.

(5) To establish that child was driving without parent's consent.

Ill.—Halmel, for Use of Soukup, v. Motor Vehicle Casualty Co., 272 Ill. App. 336, affirmed Soukup v. Halmel, 192 N.E. 557, 357 Ill. 576.

Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn. App. 607.

Evidence held insufficient

(1) In general.

Ala.—McGowin v. Howard, 21 So.2d 683, 246 Ala. 553.

Cal.—Nash v. Wright, 186 P.2d 686, 82 Cal.App.2d 467—Helmut v. Frame, 115 P.2d 852, 46 Cal. App.2d 381—Hoffmann v. Lane, 54 P.2d 477, 11 Cal.App.2d 655—Di Rebaylo v. Herndon, 44 P.2d 581, 6 Cal.App.2d 567.

Conn.—Hickson v. W. W. Walker Co., 149 A. 400, 110 Conn. 604, 68 A.L.R. 1044.

Mass.—Tommassen v. Feeley, 55 N.E.2d 791, 316 Mass. 547.

Mich.—Merritt v. Huron Motor Sales, 276 N.W. 464, 282 Mich. 322.

Minn.—Kayser v. Jungbauer, 14 N.W.2d 337, 217 Minn. 140.

N.Y.—Fink v. Brzezinski, 37 N.Y.S.2d 347, 264 App.Div. 988—Smith v. American Steel & Wire Co., 18 N.Y.S.2d 5, 259 App.Div. 725—Fox v. City of Syracuse, 247 N.Y.S. 429, 231 App.Div. 273, affirmed 180 N.E. 328, 258 N.Y. 550—Owen v. Gruntz, 214 N.Y.S. 543, 216 App.Div. 19.

R.I.—Hartley v. Johnson, 175 A. 653, 54 R.I. 477—Ford v. Dorcus, 162 A. 898.

Tenn.—Life & Casualty Ins. Co. v. Bradley, 160 S.W.2d 410, 178 Tenn. 526.

Tex.—Worsham-Buick Co. v. Isaacs, 87 S.W.2d 252, 126 Tex. 546.

(2) To establish that driver did not have permission to drive vehicle.

—Blank v. Coffin, 126 P.2d 868, 20 Cal.2d 457.

must consist of facts and circumstances from which can follow the inference that the owner either expressly gave permission or that his acts and conduct were such that permission might be implied;⁸⁵ it cannot be left to speculation or conjecture.⁸⁶ There is authority to the effect that proof that the vehicle was owned by defendant and was negligently operated by an employee does not make a prima facie case of negligence against the owner unless it appears that the employee was driving with authority, express or implied, of the owner.⁸⁷ It has been held, however, that a prima facie case that the owner consented to the operation of the vehicle is made by proof of ownership⁸⁸ or by proof of defendant's ownership and that the operator is an employee of the owner.⁸⁹

A prima facie case must be opposed by what the evidence shows and not by what it fails to show.⁹⁰

(3) To establish that vehicle was operated with consent of driver's parent.

N.Y.—Atwater v. Lohr, 233 N.Y.S. 309, 133 Misc. 652.

Wis.—McGee v. Hahn, 212 N.W. 66, 192 Wis. 121.

85. Cal.—Howland v. Doyle, 44 P.2d 453, 6 Cal.App.2d 311.

Direct or circumstantial evidence

Consent of owner to use of automobile by third person, making owner liable for third person's negligence, may be proved by direct evidence, by inferences, and by facts and circumstances.—Greene v. Lagerquist, 252 N.W. 94, 217 Iowa 718—Wolfson v. Jewett Lumber Co., 227 N.W. 608, 230 N.W. 336, 210 Iowa 244.

Evidence held sufficient

(1) To authorize inference that authority granted to employee to use vehicle included permission to have employee's wife assist employee and to permit her to accompany him on trip.—Dierks Lumber & Coal Co. v. Mabry, C.C.A.Ark., 128 F.2d 1005.

(2) To authorize inference that bell boy had actual authority to drive guest's automobile.—Piedmont Operating Co. v. Cummings, 149 S.E. 814, 40 Ga.App. 397.

(3) To justify inference that employee was using automobile with defendant's permission.—Hicks v. Reis, 134 P.2d 788, 21 Cal.2d 654.

(4) To justify inference that owner had knowledge of repeated use of vehicle by son and tolerated such use, and that she took no positive steps to prevent such use.—Casey v. Fortune, 179 P.2d 99, 78 Cal.App.2d 922.

Evidence held insufficient

To authorize inference that owner of cab involved in accident had impliedly consented for regular driver

to employ any one else to operate cab.—Cowart v. Jordan, 44 S.E.2d 804, 75 Ga.App. 855.

86. Cal.—Casey v. Fortune, 179 P.2d 99, 78 Cal.App.2d 922.

87. Ohio.—House v. Stark Iron & Metal Co. App., 34 N.E.2d 592, rehearing denied 46 N.E.2d 419.

Permission or custom

Tex.—Thannisch Chevrolet Co. v. Kline, Civ.App., 134 SW 2d 433, error refused.

88. Fla.—Hastings v. Taylor, 177 So 621, 130 Fla. 249.

89. Minn.—Ballman v. Brinker, 1 N.W.2d 365, 211 Minn. 322—Schultz v. Swift & Co., 299 NW 7, 210 Minn. 533.

90. D.C.—Senator Cab Co. v. Rothberg, Mun.App., 42 A.2d 245.

91. Mich.—Transcontinental Ins. Co. v. Berens, 236 N.W. 887, 254 Mich. 613.

Evidence held sufficient

(1) To rebut inference of permissive use resulting from the ownership of vehicle.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64.

(2) To rebut inference of employer's permission of use of truck raised by driver's possession of truck at time of accident.—Truman v. United Products Corporation, 14 N.W.2d 120, 217 Minn. 155.

(3) To rebut statutory presumption that vehicle was being driven with defendant's consent.

Mich.—Christiansen v. Hilber, 276 N.W. 495, 283 Mich. 403.

N.Y.—Nickens v. City of New York, 71 N.Y.S.2d 877.

Evidence held insufficient

(1) To overcome prima facie case. Cal.—Herbert v. Cassinelli, 166 P.2d 377, 73 Cal.App.2d 277.

In order to overcome a statutory presumption that a motor vehicle was being driven with the owner's knowledge and consent, the evidence must be direct, positive, and credible.⁹¹ A prima facie case is not overcome by the uncontradicted but inconclusive testimony of interested witnesses,⁹² but a statutory presumption that the vehicle was driven with the owner's consent ceases when there is uncontradicted proof that the vehicle was not at the time being used with the owner's permission,⁹³ or where the inference is rebutted by clear, positive, and uncontradicted evidence not subject to doubt in reasonable men's minds,⁹⁴ or, according to one view, where there is substantial evidence to the contrary.⁹⁵

h. Family Purpose Doctrine

General rules are applicable in determining the weight and sufficiency of the evidence to bring the family pur-

Minn.—Schultz v. Swift & Co., 299 N.W. 7, 210 Minn. 533.

(2) To overcome statutory presumption of implied permission.—Winnowski v. Polito, 61 N.E.2d 425, 294 N.Y. 159.

(3) To rebut presumption that vehicle was being used with permission, or with knowledge and permission, of owner.

D.C.—Schwartzbach v. Thompson, Mun.App., 33 A.2d 624.

Mich.—Transcontinental Ins. Co. v. Berens, 236 N.W. 887, 254 Mich. 613.

N.Y.—Glasgow v. Weldt, 218 N.Y.S. 115, 218 App.Div. 749—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560.

92. Minn.—Schultz v. Swift & Co., 299 NW 7, 210 Minn. 533.

93. D.C.—Hiscox v. Jackson, 127 F.2d 160, 75 U.S.App.D.C. 293—Rosenberg v. Murray, 116 F.2d 552, 73 App.D.C. 67—Rice v. Simmons, Mun.App., 53 A.2d 587—Senator Cab Co. v. Rothberg, Mun.App. 42 A.2d 245—Schwartzbach v. Thompson, Mun.App., 33 A.2d 624.

94. Cal.—Hicks v. Reis, 134 P.2d 788, 21 Cal.2d 654.

Owner's positive and unequivocal testimony that driver had taken automobile without his knowledge, authority, or consent overcame statutory presumption that driver operated automobile with owner's consent and hence was owner's agent under statute.—Rosenberg v. Murray, 116 F.2d 552, 73 App.D.C. 67.

95. N.Y.—Crawford v. Nilan, 35 N.Y.S.2d 33, 264 App.Div. 46, reversed on other grounds 46 N.E.2d 512, 289 N.Y. 444.

pose doctrine into operation, and circumstantial evidence may be sufficient.

General rules have been applied in determining the weight and sufficiency of the evidence to show that the motor vehicle was kept for family purposes and was being used at the time of the accident by a member of the family with the owner's sanction.⁹⁶ Circumstantial evidence may be sufficient to bring the doctrine into operation,⁹⁷ and may be adequate to overcome direct testimony to the contrary.⁹⁸ A presumption that the husband, as head of the family, was acting for himself may be over-

thrown by evidence that the wife was the furnisher of the home and the substantial, if not the sole, supplier of household needs.⁹⁹

1. Joint Enterprise or Joint Adventure

In an action for injuries arising from the operation of a motor vehicle, a preponderance of the evidence is necessary to show a joint enterprise or joint adventure.

In an action for injuries arising from the operation of a motor vehicle, a preponderance of the evidence is necessary to show a joint enterprise¹ or joint adventure.²

96. Evidence held sufficient

(1) To show status of car and sanction.

Conn.—Maher v. Fahy, 151 A. 318, 112 Conn. 76—McCaughy v. Smiddy, 146 A. 822, 109 Conn. 417. Ill.—Beesley v. Goldstein, 239 Ill. App. 221.

Minn.—Nicol v. Gettler, 247 N.W. 8, 188 Minn. 69.

Neb.—Jennings v. Campbell, 6 N.W. 2d 376, 142 Neb. 354.

N.C.—McNabb v. Murphy, 175 S.E. 718, 207 N.C. 853.

Or.—Gossett v. Van Egmond, 155 P. 2d 304, 176 Or. 134—McDowell v. Hurner, 20 P.2d 395, 142 Or. 611, 88 A.L.R. 578.

Va.—Baptist v. Slate, 173 S.E. 512, 162 Va. 1—Litz v. Harman, 144 S.E. 477, 151 Va. 363.

Wash.—Hanford v. Goehry, 167 P.2d 678, 24 Wash.2d 859—Davis v. Browne, 147 P.2d 263, 20 Wash.2d 219—Forman v. Shields, 48 P.2d 599, 183 Wash. 333—Hart v. Hogan, 24 P.2d 99, 173 Wash. 598. 42 C.J. p 1233 note 24 [a].

(2) To show that vehicle was not being used at time of accident for family purpose.—Scott v. Greene, 242 Ill.App. 405.

(3) To warrant judgment for defendant.—Scott v. Greene, supra.

(4) To warrant recovery under statutory presumption.—O'Dea v. Amodeo, 170 A. 486, 118 Conn. 58.

Evidence held insufficient

(1) To show status of car and sanction.

Conn.—Haugh v. Kirsch, 135 A. 568, 105 Conn. 429.

Ga.—Durden v. Maddox, 37 S.E.2d 219, 73 Ga.App. 491—Grahil v. McMath, 200 S.E. 342, 59 Ga.App. 247.

N.C.—Hawes v. Haynes, 14 S.E.2d 503, 219 N.C. 535—Byers v. Brawley, 176 S.E. 255, 207 N.C. 151.

Va.—Green v. Smith, 151 S.E. 282, 153 Va. 675.

42 C.J. p 1233 note 24 [b].

(2) To furnish basis for inference that son was, at the time, using automobile for his own pleasure.—Gossett v. Van Egmond, 155 P.2d 304, 176 Or. 134.

(3) To sustain defendant's conten-

tion that he had denied son the use of defendant's automobile.—Gossett v. Van Egmond, supra.

Agency of family member

When it is first established, at least prima facie, that an automobile is a family purpose car, then the agency of the family member driving is prima facie established, but the major premise may not be shown by assuming that proof of ownership plus a family member's driving is a family purpose.—Durden v. Maddox, 37 S.E.2d 219, 73 Ga.App. 491.

Weight and sufficiency of evidence as to agency between persons related by blood or marriage generally see supra subdivision f (1) (a) of this section.

97. Conn.—Baker v. Paradiso, 169 A. 272, 117 Conn. 539—McCaughy v. Smiddy, 146 A. 822, 109 Conn. 417.

98. Conn.—Baker v. Paradiso, 169 A. 272, 117 Conn. 539.

99. Cal.—Ransford v. Ainsworth, 237 P. 747, 196 Cal. 279.

1. Evidence held sufficient

(1) To show joint enterprise between defendant and driver.

Ill.—Brooks v. Snyder, 24 N.E.2d 55, 302 Ill.App. 432.

Kan.—Cunningham v. Stucky, 58 P. 2d 42, 144 Kan. 118.

Neb.—Ahlestedt v. Smith, 264 N.W. 889, 130 Neb. 372.

Ohio.—Dietz v. Chandler, App., 56 N.E.2d 937.

42 C.J. p 1233 note 25 [a].

(2) To establish that plaintiff and defendant were engaged in a joint venture or joint enterprise.—Johnson v. Fischer, 290 N.W. 334, 292 Mich. 78.

(3) To sustain finding that guest or occupant and host or driver were not engaged in a joint enterprise.

Ill.—Bain v. Bain, 12 N.E.2d 686, 293 Ill.App. 638.

La.—Lorance v. Smith, 138 So. 871, 173 La. 883.

R.I.—Najjar v. Horovitz, 172 A. 255, 54 R.I. 224.

Tex.—Ford Motor Co. v. Maddin, 76 S.W.2d 474, 124 Tex. 131.

(4) To sustain finding that driver was lawfully in possession of ve-

hicle in a way mutually beneficial to himself and corporation at time of collision.—Jarvis-Tull & Co. v. Williams, Tex.Civ.App., 114 S.W.2d 1218.

Evidence held insufficient

(1) To show joint enterprise between owner and driver.

Cal.—Hathaway v. Mathews, 258 P. 712, 85 Cal.App. 31.

Or.—Brigham v. Munden, 19 P.2d 1096, 142 Or. 471.

Pa.—Baugh v. McCallum, 14 A.2d 364, 140 Pa.Super. 276.

Wis.—Kuhle v. Ladwig, 295 N.W. 41, 237 Wis. 147.

(2) To show joint enterprise between guest and host.—Schachtrup v. Hensel, 14 N.E.2d 897, 295 Ill.App. 303.

(3) To raise inference of joint enterprise between deceased and salesman demonstrating vehicle to prospective purchaser.—Curran v. Earle C. Anthony, Inc., 247 P. 236, 77 Cal.App. 462.

Ex parte statement as to whether motorist and his injured passenger were engaged in joint adventure should not be given weight and effect of sworn testimony, contrary thereto, in court of justice, particularly where such testimony is otherwise corroborated in whole or in part.—Prudhomme v. Continental Casualty Co., La.App., 169 So. 147.

Joint control

In determining whether persons wrongfully occupying automobile had joint control so as to be liable for driver's negligence, jury could consider occupants' testimony concerning directions and suggestions given to driver.—Jones v. Kasper, 33 N.E.2d 816, 109 Ind.App. 475.

2. Evidence held sufficient

(1) To support finding that there was not a joint venture which would make guest statute inapplicable.—Srajer v. Schwartzman, 188 P.2d 971, 164 Kan. 241.

(2) To support finding that salesman who was injured while riding with fellow salesman was not engaged in joint adventure with fellow

j. Damages

The fact of damage and the amount thereof must be established by a preponderance of the evidence.

The fact of damage, and the amount thereof must be established by a preponderance of the evidence.³

§ 518. — Negligence of Defendant

- a. In general
- b. Injuries to persons or property not on highway
- c. Injuries to persons on foot
- d. Injuries to children
- e. Injuries to persons working on or near highway
- f. Injuries to persons moving to or from streetcars
- g. Vehicles traveling in opposite directions
- h. Vehicles crossing
- i. Vehicles traveling in same direction
- j. Vehicles at rest or unattended
- k. Vehicles towing or being towed
- l. Vehicles used in saving life or property or enforcing the law
- m. Railroad cars or streetcars or occupants
- n. Bicycles or motorcycles

- o. Articles projecting, falling, or thrown from vehicles
- p. Injuring or frightening animals
- q. Operator injuring occupant of his vehicle

a. In General

- (1) General rules
- (2) Willful, wanton, or reckless acts
- (3) Acts in emergencies
- (4) Violation of statute or ordinance in general
- (5) Competency of operator
- (6) Equipment and lights
- (7) Signals and lookout
- (8) Speed and control

(1) General Rules

The defendant's negligence must be established by a preponderance of the evidence or by substantial or prima facie proof; but circumstantial evidence may be sufficient. Substantial and convincing evidence is required to overcome presumptions as to negligence.

In an action brought to recover damages for injuries sustained as the result of the operation of a motor vehicle, negligence of the person sought to be charged must be established by a preponderance of the evidence,⁴ or by substantial evidence⁵ or prima facie proof,⁶ and, in determining whether the evidence is sufficient to establish negligence, all the facts and circumstances surrounding the accident must be weighed and considered.⁷ Plaintiff

salesman.—*Prudhomme v. Continental Casualty Co.*, 169 So. 147.

Evidence held insufficient

To show joint adventure.—*Eubanks v. Kleismeyer*, 18 P.2d 48, 171 Wash. 484.

3. La.—*Phillips v. Cason*, 95 So. 400, 153 La. 56.

Evidence held sufficient

(1) In general.—*Talley v. Dalton*, 10 Tenn App. 597—42 C.J. p 1233 note 26 [a].

(2) To establish prima facie case for recovery of treble damages.—*Town of Waterford v. L. B. Brockett Lumber Co.*, 237 N.Y.S. 436, 227 App.Div. 422.

(3) To warrant both compensatory and punitive damages.—*Pratt v. Duck*, 191 S.W.2d 562, 28 Tenn.App. 502.

Evidence held insufficient

N.Y.—*Rango v. Fennell*, 168 N.Y.S. 646.

4. U.S.—*Van Wle v. U. S.*, D.C.Iowa, 77 F.Supp. 22.

Cal.—*Zulim v. Van Ness*, 38 P.2d 820, 3 Cal.App.2d 82.

Ill.—*Dowson v. Smith*, 40 N.E.2d 553, 313 Ill.App. 650.

Iowa.—*Smith v. Pine*, 12 N.W.2d 236, 234 Iowa 256—*Luther v. Jones*, 261 N.W. 817, 220 Iowa 95.

Mass.—*Ashapa v. Reed*, 182 N.E. 859, 280 Mass. 514.

Mo.—*Titworth v. Kuehn*, App., 18 S. W.2d 127.

Mont.—*Lesage v. Largey Lumber Co.*, 43 P.2d 896, 99 Mont. 372.

Pa.—*Xenos v. White Star Lines, Com. Pl.*, 19 Wash Co. 146.

42 C.J. p 1233 note 27.

In Louisiana

(1) There is authority supporting the rule of the text.—*Burns v. Evans Cooperage Co.*, 23 So.2d 165, 208 La. 406—*Dowell, Inc. v. Bayou State Oil Corp.*, App. 33 So.2d 709—*Connors v. Houma Packing Co.*, 125 So. 294, 12 La App. 167.

(2) But it has been said that plaintiffs had the burden of making out their case beyond a reasonable doubt.—*Jefferson v. Caddo Transfer & Warehouse Co.*, 4 La.App. 377.

5. Wash.—*Peterson v. Mayham*, 116 P.2d 259, 10 Wash 2d 111.

6. Me.—*Copp v. Paradis*, 157 A. 228, 130 Me. 464.

7. Idaho.—*Gorton v. Doty*, 69 P.2d 136, 57 Idaho 792.

Evidence held to establish negligence

(1) In general.

U.S.—*Ritch v. Warren*, C.C.A.Ky., 123 F.2d 198.

Cal.—*Johnson v. Griffith*, 120 P.2d 6, 19 Cal.2d 176—*Foster v. Pestana*, 177 P.2d 54, 77 Cal.App.2d 885—*Jolley v. Clemens*, 82 P.2d 51, 28 Cal App 2d 55—*Betzold v. Rossi Floral Co.*, 23 P.2d 839, 133 Cal. App. 236—*Manning v. O'Rourke*, 8 P.2d 181, 120 Cal.App. 433—*Crabbe v. Rhoades*, 282 P. 10, 101 Cal.App. 503.

Fla.—*White v. Hughes*, 190 So. 446, 139 Fla. 54.

Ga.—*Hornbrook v. Reed*, 133 S.E. 264, 35 Ga.App. 425.

Ill.—*Hann v. Brooks*, 73 N.E.2d 624, 331 Ill.App. 535.

La.—*Burgess v. Blackwell*, 120 So. 231, 9 La.App. 729.

Mass.—*Perriotti v. Andelman*, 11 N. E.2d 580, 298 Mass. 461—*Butler v. Graves*, 187 N.E. 115, 284 Mass. 84.

Minn.—*Cheadle v. James*, 231 N.W. 242, 181 Minn. 41—*Lee v. Wilson*, 208 N.W. 803, 167 Minn. 248.

must stand or fall on the case as made unless defendant establishes his own negligence.⁸

Negligence may be sufficiently proved notwith-

standing the absence of testimony of eyewitnesses to the accident.⁹ Thus it may be established by circumstantial evidence,¹⁰ as by proof of physical

Mo.—Williamson v. National Garage Co., App., 203 S.W.2d 126.

N.Y.—Hyman v. Lent & Lerner, 42 N.Y.S.2d 45, 266 App.Div. 263—Lurken v. Rothleder, 16 N.Y.S.2d 783, 258 App.Div. 1008—Thies v. Reich Bros., 286 N.Y.S. 943, 247 App.Div. 900, affirmed Thies v. Reich Bros. Long Island Motor Freight, 7 N.E.2d 688, 273 N.Y. 552—Holland v. Peterkin, 216 N.Y.S. 464, 217 App.Div. 57—Spence v. State, 288 N.Y.S. 1009, 159 Misc. 797.

Pa.—Parznik v. Central Abattoir Co., 131 A. 372, 284 Pa. 393.

Tenn.—Silver Fleet Motor Express v. Bilbrey, 120 S.W.2d 997, 22 Tenn. App. 244—Fly v. Swink, 69 S.W.2d 902, 17 Tenn. App. 627—Hot Blast Coal Co. v. Willhax, 10 Tenn. App. 226.

Va.—Birtcherds Dairy v. Randall, 23 S.E.2d 229, 180 Va. 311.

Wash.—Grapp v. Peterson, 168 P.2d 400, 25 Wash.2d 44.

42 C.J. p 1233 note 27 [a], p 1236 note 37 [a].

(2) As to passenger in vehicle struck by defendant's vehicle.

U.S.—Constitution Pub. Co. v. Dale, C.C.A. Ala., 164 F.2d 210.

Ala.—Ruffin Coal & Transfer Co. v. Rich, 108 So. 600, 214 Ala. 622.

Ga.—Goldstein v. Gee, 46 S.E.2d 763, 76 Ga. App. 637.

Mo.—Brooks v. McCray, App., 145 S.W.2d 985.

N.J.—Sharkey v. Kapusa, 135 A. 872, 5 N.J. Misc. 203.

N.Y.—Hemmingway v. Town of Danemora, 55 N.Y.S.2d 830, 269 App. Div. 798—Foster v. Fish, 33 N.Y.S.2d 761, 263 App. Div. 1044—Maloney v. Burlingame Motors Corporation, 4 N.Y.S.2d 242, 254 App. Div. 803, reargument denied 6 N.Y.S.2d 357, 254 App. Div. 917, appeal denied 17 N.E.2d 112, 278 N.Y. 737—Holland v. Newcomb, 295 N.Y.S. 435, 251 App. Div. 755.

(3) Collision of motor vehicles generally.

Ill.—Cipperly v. Carmack, 258 Ill. App. 593—Killilay v. Hawk, 250 Ill. App. 222.

La.—Terese v. Houma Mercantile Co., 4 La. App. 564.

Minn.—Eichhorn v. Lundin, 216 N.W. 637, 172 Minn. 591—Hackett v. Palon, 210 N.W. 996, 169 Minn. 218.

N.J.—Kline v. Camden Forge Co., 145 A. 472, 7 N.J. Misc. 328.

N.Y.—Mills v. Gabriel, 18 N.Y.S.2d 78, 259 App. Div. 60, affirmed 31 N.E.2d 512, 284 N.Y. 755.

Pa.—Sutton v. Quaker City Cab Co., 87 Pa. Super. 291.

Tenn.—Price-Bass Co. v. Owen, 146 S.W.2d 149, 24 Tenn. App. 474.

42 C.J. p 1233 note 27 [a] (7).

(4) Collision with wagon or buggy.—Dealer's Transport Co. v. Reese, C.C.A. Ala., 138 F.2d 638, certiorari denied 64 S.Ct. 939, 321 U.S. 798, 88 L.Ed. 1086—42 C.J. p 1233 note 27 [a] (8), (11).

(5) Driving out of driveway

La.—Willis v. Standard Oil Co. of Louisiana, 135 So. 777, 17 La. App. 217.

Minn.—Nelson v. Consumers' Store Co., 216 N.W. 803, 173 Minn. 163.

(6) Of defendant's servant.

Cal.—Manning v. O'Rourke, 8 P.2d 181, 120 Cal. App. 432

Fla.—Potts v. Mulligan, 193 So. 767, 141 Fla. 685.

N.J.—La Rosa v. Livezey, 155 A. 123, 9 N.J. Misc. 551, affirmed 160 A. 503, 109 N.J. Law 162

(7) Of both parties—Harkey v. Lucke, 65 P.2d 77, 19 Cal. App.2d 130

Evidence held not to establish negligence

(1) In general.

Colo.—Webster v. Nelson, 38 P.2d 908, 96 Colo. 6.

Ill.—Sturgeon v. Quarton, 44 N.E.2d 766, 316 Ill. App. 308.

Me.—Field v. Webber, 169 A. 732, 132 Me. 236—Lobley v. Penobscot Valley Motors, 149 A. 383, 129 Me. 21.

Mo.—Bauer v. Wood, 154 S.W.2d 356, 226 Mo. App. 266

N.Y.—Greenstein v. Kahan, 78 N.Y.S.2d 236, 273 App. Div. 974—Verni v. Johnson, 58 N.Y.S.2d 382, 269 App. Div. 997, appeal denied 59 N.Y.S.2d 281, 269 App. Div. 1050, reversed on other grounds 68 N.E.2d 431, 295 N.Y. 436—Hull v. Schake, 9 N.Y.S.2d 55, 256 App. Div. 888, followed in Skibinski v. Schake, 9 N.Y.S.2d 56, 256 App. Div. 888—Keber v. Central Brewing Co., 150 N.Y.S. 986.

Pa.—Galvin v. Kreider, 143 A. 110, 293 Pa. 395.

Wash.—Long v. Hicks, 21 P.2d 281, 173 Wash. 17.

42 C.J. p 1233 note 27 [b], p 1236 note 37 [b].

(2) Closing automobile door on plaintiff's finger.—Castano v. Leone, 180 N.E. 312, 278 Mass. 429.

(3) Collision between motor vehicles generally.

Cal.—Sharkey v. Sheets, 261 P. 1049, 87 Cal. App. 99.

Kan.—Harshaw v. Kansas City Public Service Co., 119 P.2d 459, 154 Kan. 481.

La.—Foti v. Myera, App., 8 So.2d 349—Gaubert v. Ed. E. Hebert Co., App., 174 So. 716.

N.J.—Calandro v. Mashey, 137 A. 425, 6 N.J. Misc. 609.

N.Y.—Kennison v. Dodge, 55 N.Y.S.2d 58, 269 App. Div. 795—Poeschel v. Gee, 288 N.Y.S. 869, 248 App. Div. 762.

Tex.—Sturtevant v. Pagel, Civ. App., 109 S.W.2d 556, affirmed 130 S.W.2d 1017, 134 Tex. 46.

42 C.J. p 1233 note 27 [b] (3).

(4) Entering highway and causing two automobiles proceeding on highway in opposite directions to collide, where defendant's vehicle did not come in contact with either automobile—General Exchange Ins. Corp. v. Kwaskein, 52 N.Y.S.2d 220, 268 App. Div. 1012.

Evidence held sufficient

(1) To show that defendant's car did not strike plaintiff's—Fisher v. Blam, La. App., 138 So. 201.

(2) To support finding that vehicle did not strike deceased—Wolfe v. Baumer Food Products Co., La. App., 171 So. 155.

8. Pa.—Young v. Gill, 157 A. 348, 103 Pa. Super. 467.

9. Cal.—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 Cal. App.2d 828

Kan.—Sawhill v. Casualty Reciprocal Exchange, 107 P.2d 770, 152 Kan. 735.

Pa.—Reardon v. Smith, 138 A. 860, 298 Pa. 554—Vunak v. Walters, 43 A.2d 536, 157 Pa. Super. 660.

10. Ala.—Peoples v. Seamon, 31 So. 2d 88, 249 Ala. 284.

Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140.

Iowa.—Luther v. Jones, 261 N.W. 817, 220 Iowa 95.

Mich.—Brown v. Arnold, 6 N.W.2d 914, 303 Mich. 616.

Neb.—Vanderlippe v. Midwest Studios, 289 N.W. 341, 137 Neb. 289.

N.Y.—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App. Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App. Div. 1007.

N.C.—Etheridge v. Etheridge, 24 S.E.2d 477, 222 N.C. 616.

Okl.—Star v. Brumley, 263 P. 1086, 129 Okl. 134.

Pa.—Neff v. Firth, 47 A.2d 193, 354 Pa. 308, 165 A.L.R. 1414—Grimes v. Yellow Cab Co., 25 A.2d 294, 344 Pa. 298—Reardon v. Smith, 148 A. 860, 298 Pa. 554—Frank v. Cohen, 135 A. 624, 288 Pa. 221—Vunak v. Walters, 43 A.2d 536, 157 Pa. Super. 660—Flowers v. Dolan, 38 A.2d 429, 155 Pa. Super. 378—Hoff-

facts.¹¹ There must, however, be positive proof of circumstances from which the inference of negligence may be drawn.¹² Furthermore, in order to warrant a verdict for plaintiff based on circumstantial evidence alone, the circumstances relied on must be of such a nature and so related to each other that the only conclusion that can be fairly or reasonably drawn therefrom is the conclusion indicated by the verdict;¹³ it is not sufficient that the circumstances be consistent merely with plaintiff's theory,¹⁴ but it must be established that there was such negligence as makes plaintiff's theory reasonable and more probable than any other theory.¹⁵ Negligence must be reasonably shown;¹⁶ proof of defendant's negligence cannot rest in mere speculation, conjecture, or surmise.¹⁷ In order to hold defendant liable for driving in a careless and imprudent manner, there must be some evidence tending

to show wherein the driving was careless and imprudent.¹⁸

A prima facie case is established by proof of facts showing that a collision resulted from defendant's act or omission and that defendant should have foreseen that the collision would result.¹⁹ In view of the rule stated supra § 511 (3) that negligence on the part of the operator cannot be inferred from the mere happening of an accident, mere proof that an accident happened is not sufficient to prove negligence on the part of the operator.²⁰ The fact that a motorist violates the rule of the road by driving on the wrong side of the street or highway is strong evidence of negligence.²¹

As against the owner who was not present when the accident occurred, the driver's negligence must be established by the usual rules which prevail in

man v. Herman, 163 A. 452, 107 Pa. Super. 92.

42 C.J. p 1237 note 39.

11. Ariz.—Seller v. Whiting, 84 P.2d 452, 52 Ariz. 542.

Kan.—Sawhill v. Casualty Reciprocal Exchange, 107 P.2d 770, 152 Kan. 735.

La.—Hebert v. Meibaum, 19 So.2d 629, affirmed 24 So.2d 297, 209 La. 156.

Mich.—Brown v. Arnold, 6 N.W.2d 914, 303 Mich. 616—Essmeister v. Roadway Transit Co., 266 N.W. 391, 275 Mich. 337—Faustman v. Hewitt, 264 N.W. 863, 274 Mich. 458.

12. Ala.—Peoples v. Seamon, 31 So. 2d 88, 249 Ala. 284.

Okl.—Star v. Brumley, 263 P. 1086, 129 Okl. 134.

Pa.—Vunak v. Walters, 43 A.2d 536, 157 Pa. Super. 660.

42 C.J. p 1237 note 40.

Evidence held sufficient

(1) To warrant inference that the accident arose from a want of due care.—Swalina v. Pisalski, 194 A. 749, 129 Pa. Super. 51.

(2) To warrant inference that driver reasonably believed he could safely make left turn.—Caines v. Wolfsey, 167 A. 733, 117 Conn. 671.

Evidence held insufficient

To require inference that windshield on driver's side was dirty.—West v. Wilson, 4 P.2d 469, 90 Mont. 522.

13. Iowa.—Luther v. Jones, 261 N. W. 817, 220 Iowa 95.

14. Iowa.—Luther v. Jones, supra.

15. Ariz.—Seller v. Whiting, 84 P. 2d 452, 52 Ariz. 542.

Iowa.—Welch v. Greenberg, 14 N. W.2d 266, 235 Iowa 159.

16. Ala.—Watkins v. Reinhart, 9 So. 2d 113, 243 Ala. 243.

Pa.—Reardon v. Smith, 138 A. 860, 298 Pa. 554—Flowers v. Dolan, 38 A.2d 429, 155 Pa. Super. 378—Lowder v. Bausman, Com.Pl., 55 Dauph Co. 119.

Description of what actually happened

In a negligence action involving an automobile, the evidence must so describe, picture, or visualize what actually happened as to enable one fixed with responsibility for ascertaining the facts to determine who was the culpable party.—Balducci v. Cutler, 47 A.2d 613, 354 Pa. 436—Skrutski v. Cochran, 19 A. 2d 106, 341 Pa. 289—Hartssock v. Winslow, 11 Pa. Dist. & Co. 243.

17. Ala.—Watkins v. Reinhart, 9 So.2d 113, 243 Ala. 243.

Ariz.—Seller v. Whiting, 84 P.2d 452, 52 Ariz. 542.

Mich.—Loucks v. Fox, 246 N.W. 141, 261 Mich. 338.

Mo.—Bauer v. Wood, 154 S.W.2d 356, 236 Mo. App. 266.

Pa.—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa. Super. 463—Hoffman v. Herman, 163 A. 452, 107 Pa. Super. 92.

42 C.J. p 1237 note 41.

Marks on road

(1) Reliance on testimony alone of marks on road, even though clearly shown to be made by defendant's automobile, to establish negligence, is not favored.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355.

(2) Evidence of negligence consisting entirely of testimony of marks on road after automobile accident would be legally sufficient or insufficient according as it might or might not arise above speculation and conjecture and afford rational basis for adjudication that negligence existed which produced accident.—Gloyd v. Wills, 23 A.2d 665,

180 Md. 161—Shafer v. State, for Use of—Sundergill, 189 A. 273, 171 Md. 506.

Position of vehicles after collision is not always indicative of the manner in which the collision occurred.—Pembor v. Marcus, 11 N.W.2d 889, 307 Mich. 279—Bates v. Franson, 267 N.W. 595, 276 Mich. 79—Harding v. Blankenship, 264 N.W. 312, 274 Mich. 118.

Physical damage to vehicles involved in collision was insufficient to show how the accident happened, where it was not shown whether the damage was caused at time of collision or by movement of the automobiles after collision.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355.

18. Iowa.—Crutchley v. Bruce, 240 N.W. 238, 214 Iowa 731.

19. Cal.—Deweese v. Kuntz, 20 P.2d 733, 130 Cal. App. 620.

Evidence held to make prima facie case

Cal.—Goss v. Pacific Motor Co., 259 P. 455, 85 Cal. App. 455.

N.Y.—Hoffert v. Tisdale Lumber Co., 39 N.Y.S.2d 516, 265 App. Div. 1012—Cortelyou v. Jacobson, 288 N.Y. S. 595, 248 App. Div. 735.

Pa.—Maltz v. Carter, 166 A. 852, 311 Pa. 550.

20. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F. Supp. 22.

Kan.—Sawhill v. Casualty Reciprocal Exchange, 107 P.2d 770, 152 Kan. 735.

Mass.—Mitchell v. Silverstein, 70 N. E.2d 306, 320 Mass. 524.

Pa.—McHale v. Casterlino, Com.Pl., 32 Luz. Leg. Reg. 218.

21. Md.—Crunkilton v. Hook, 42 A. 2d 517, 185 Md. 1—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223.

establishing the master's liability for the servant's negligence,²² and the negligence of the driver must be proved by evidence which is competent as against the owner.²³

Rebuttal. In order to overcome a presumption of negligence on the part of defendant, the evidence must be of a real and tangible nature.²⁴ It should not be vague or fanciful,²⁵ but must be substantial²⁶ and convincing.²⁷ In order to balance the presumption that his conduct was negligence per se, defendant is not required to establish his justification by a preponderance of the evidence.²⁸ Similar rules

apply with respect to the sufficiency of evidence to overcome a presumption that the driver of defendant's vehicle was exercising due care and was not negligent.²⁹

(2) Willful, Wanton, or Reckless Acts

The requirement of a preponderance of the evidence applies to proof of wanton or willful negligence, gross negligence, and reckless acts constituting negligence.

The requirement of a preponderance of the evidence applies to proof of wanton or willful negligence,³⁰ and to proof of gross negligence,³¹ as well

22. Iowa.—Hart v. Hinkley, 247 N. W. 258, 215 Iowa 915—Wilkinson v. Queal Lumber Co., 226 N.W. 43, 208 Iowa 933.

23. Iowa.—Broderick v. Barry, 237 N.W. 481, 212 Iowa 672, 75 A.L.R. 1530—Edge v. Born, 236 N.W. 75, 212 Iowa 1138—Cooley v. Killingsworth, 228 N.W. 880, 209 Iowa 646. N.Y.—Linde v. Bracken, 68 N.Y.S. 3d 871, 182 Misc. 476.

24. Del.—Diamond State Tel. Co. v. Hunter, 21 A.2d 286, 2 Terry 336.

25. Del.—Diamond State Tel. Co. v. Hunter, *supra*.

26. Del.—Diamond State Tel. Co. v. Hunter, *supra*.

Evidence held sufficient

(1) To meet defendant's burden of showing that accident did not arise from want of care.—National Union Fire Ins. Co. v. Wallace, Tex. Civ.App., 118 S.W.2d 609.

(2) To rebut presumptions as to driver's negligence.—Seller v. Whiting, 84 P.2d 452, 52 Ariz. 542.

Evidence held insufficient

(1) To overcome presumption of negligence by automobilist in making left turn to left of intersection.—Boulduc v. Garcelon, 144 A. 395, 127 Me. 482.

(2) To overcome prima facie case which guest passenger in vehicle made out against owners of both vehicles involved in collision.—Weddle v. Phelan, La.App., 177 So. 407.

27. Del.—Diamond State Tel. Co. v. Hunter, 21 A.2d 286, 2 Terry 336.

Reasonable explanation

To rebut presumption of negligence arising from fact that automobile went off road, explanation must be reasonable.—Shea v. Hern, 171 A. 248, 132 Me. 361.

28. Cal.—Roberts v. Salmon, 151 P. 2d 556, 66 Cal.App.2d 22—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App. 2d 55.

29. Mich.—Esameister v. Roadway Transit Co., 266 N.W. 391, 275 Mich. 387.

30. Ill.—Gavurnik v. Miller, 283 Ill. App. 472.

Weight and sufficiency of evidence of willful, wanton, or reckless act as affecting liability of owner or driver for injury to occupant of his car see *infra* subd. vision q (2) of this section.

Evidence held to establish wanton or willful negligence

(1) In general.

Ala.—Graham v. Werfel, 157 So. 201, 229 Ala. 385

Conn.—Ziman v. Whitley, 147 A. 370, 110 Conn. 108—Menzie v. Kalmonowitz, 139 A. 698, 107 Conn. 197.

Ill.—La Cerra v. Woodrich, 52 N.E. 2d 461, 321 Ill.App. 107—Flickerle v. Herman Seekamp, Inc., 274 Ill. App. 310—Wargo v. Buske, 273 Ill. App. 28—Ames v. Armour & Co., 257 Ill. App. 449.

Mass.—Bellenger v. Nelly, 185 N.E. 346, 282 Mass. 523.

42 C.J. p 1235 note 29 [a].

(2) Driving on wrong side of highway.—Hamilton v. Stocke, 32 N.E. 2d 985, 309 Ill.App. 439—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12.

(3) Speeding.

Ill.—Palmer v. De Filippis, 53 N.E. 2d 34, 321 Ill.App. 186—Heinichen v. Evans, 23 N.E.2d 400, 302 Ill. App. 70—Peterson v. Clark, 20 N.E. 2d 817, 300 Ill.App. 606—Palozola v. Fee, 9 N.E.2d 433, 291 Ill. App. 613.

Tenn.—Consolidated Coach Co. v. McCord, 102 S.W.2d 53, 171 Tenn. 253.

(4) Speeding on wrong side of highway.—Winson v. Fischer, 77 N.E. 2d 48, 333 Ill. 222.

Evidence held not to establish wanton or willful negligence

U.S.—M. & M. Transp. Co. v. Cochran, C.C.A.R.I., 100 F.2d 207.

Conn.—Brock v. Waldron, 14 A.2d 713, 127 Conn. 79.

Ill.—Maechtle v. Checker Taxi Co., 34 N.E.2d 883, 310 Ill.App. 539—Kelly v. Burtner, 33 N.E.2d 754, 310 Ill.App. 251—Zielinski v. Pleason, 20 N.E.2d 620, 299 Ill. App. 594.

—Greene v. Citro, 18 N.E.2d 237, 298 Ill.App. 25, reversed on other grounds Greene v. Noonan, 23 N.E. 2d 720, 372 Ill. 286—Brosselt v.

Nimtz, 15 N.E.2d 18, 295 Ill.App. 612—Cox v. Dreher, 12 N.E.2d 684, 293 Ill.App. 323—Crophe v. Central Illinois Produce Co., 12 N.E.2d 46, 293 Ill.App. 623—Graham v. Carlson, 10 N.E.2d 365, 291 Ill. App. 621—Becker v. Parks, 3 N.E.2d 93, 284 Ill. App. 658—Kunes v. Garcia, 1 N.E.2d 262, 284 Ill.App. 16—McGuire v. McGannon, 283 Ill.App. 293—Broadbent v. Kagey, 275 Ill. App. 623—Streeter v. Humrichouse, 261 Ill. App. 556—Nosko v. O'Donnell, 260 Ill. App. 544—Harris v. Piggly Wiggly Stores, 236 Ill. App. 392.

Kan.—Blosser v. Wagner, 59 P.2d 37, 144 Kan. 318.

Mass.—Malloy v. Newman, 37 N.E. 2d 1001, 310 Mass. 269—Query v. Howe, 172 N.E. 887, 273 Mass. 92. Mich.—Le Groh v. Bennett, 261 N.W. 81, 271 Mich. 526.

Miss.—Southern United Ice Co. v. Fowler, 187 So. 218, 185 Miss. 300. Ohio.—Slicker v. Seecombe, 182 N.E. 131, 43 Ohio App. 357.

Okl.—Clanton v. Chrisman, 51 P. 2d 748, 174 Okl. 425.

Or.—Monnet v. Ullman, 276 P. 244, 129 Or. 44.

S.D.—Endorf v. Johnson, 241 N.W. 519, 59 S.D. 549.

42 C.J. p 1235 note 29 [b].

31. Mass.—Marcienowski v. Sanders, 147 N.E. 275, 252 Mass. 65.

Evidence held sufficient to show gross negligence

(1) In general.

U.S.—M. & M. Transp. Co. v. Cochran, C.C.A.R.I., 100 F.2d 207.

Ill.—Jepsen v. Sprout & Davis, 71 N.E. 2d 542, 330 Ill.App. 448.

La.—Broughton v. T. S. C. Motor Freight Lines, 8 So.2d 76, 200 La. 421—Rester v. Davidson, App., 29 So.2d 527—Cox v. Louisiana Dept. of Highways, App., 25 So.2d 824.

—Thiaville v. Touns, App., 25 So. 2d 361—Bolton v. Glowaski, App., 15 So.2d 536—Dudley v. Surles, App., 11 So.2d 70—Scruggs v. V. Frank Lynn Co., App., 6 So.2d 86.

—Stevens v. Streun, App., 200 So. 182—Armour & Co. v. Hicks Co., 138 So. 676, 18 La.App. 504—Wa-

as to proof of reckless acts constituting negligence.³² A prima facie case of reckless driving may be overcome by competent evidence.³³

(3) Acts in Emergencies

General principles relating to the weight and sufficiency

of the evidence have been applied in cases involving the sudden emergency rule.

General principles relating to the weight and sufficiency of the evidence have been applied with respect to the issue that defendant's act was excused under the sudden emergency rule.³⁴

ters v. Meriwether Transfer Co., 137 So 578, 18 La.App. 18.
Mass.—Dean v. Bolduc, 4 N.E.2d 441, 296 Mass. 15.

Wis.—Wedel v. Klein, 282 N.W. 606, 229 Wis. 419—Tomasik v. Lanferman, 238 N.W. 857, 206 Wis. 94.

(2) Driving on wrong side of street.—Easley v. Roberts, La.App., 26 So.2d 245.

(3) Interfering with operation of automobile by driver.—Brainerd v. Stearns, 284 P. 348, 155 Wash 364.

(4) Not having vehicle under proper control.—Maggio v. M. F. Bradford Motor Express, App., 171 So. 859, rehearing refused and modified on other grounds 172 So. 438.

(5) Speeding.

Cal.—Azzaro v. O'Connell, 9 P.2d 345, 121 Cal.App. 617.

La.—Kasley v. Roberts, App., 25 So 2d 245—White v. Neff, App., 11 So 2d 289—Phillips v. New Amsterdam Casualty Co., App., 6 So 2d 96—Holland v. Gross, App., 195 So. 828—Anderson v. George A. Hormel & Co., 136 So. 906, 18 La.App. 398.

Evidence held insufficient to show gross negligence

US—Mayer v. Puryear, C.C.A.Va., 115 F.2d 675.

Mass.—Hebert v. Hicks, 13 N.E.2d 428, 299 Mass. 538.

42 C.J. p 1235 note 30 [a].

Drunkenness

Some act of negligence must be shown in addition to drunkenness to make out case of gross negligence of automobile driver.—Bertera v. Cuneo, 173 N.E. 427, 273 Mass. 181.

Violation of statute requiring truck to be equipped with a rear-view mirror was some evidence to be considered on the issue of gross negligence.—Dobson v. Henrietta Mills, 197 S.E. 313, 187 S.C. 281.

32. Evidence held to make prima facie case of reckless driving

U.S.—D'Allessandro v. Bechtol, C.C. A.Fla., 104 F.2d 845, certiorari denied 60 S.Ct. 295, 308 U.S. 619, 84 L.Ed. 517.

Evidence held sufficient to show reckless acts constituting negligence

Cal.—Yates v. Morotti, 8 P.2d 519, 120 Cal.App. 710.

Ill.—Johnson v. Sandberg, 283 Ill. App. 509.

Iowa.—Hartman v. Red Ball Transp. Co., 233 N.W. 23, 211 Iowa 64.

La.—Olano v. Leathers, App., 2 So. 2d 486—Leblanc v. O'Donovan, 125 So. 316, 12 La.App. 456.

Pa.—Cherry v. Nusbaum, 149 A. 110, 299 Pa. 91.

Evidence held insufficient to show reckless acts constituting negligence

Ill.—Kefly v. Burtner, 33 N.E.2d 754, 310 Ill.App. 251

Ind.—Lautif v. Blades, 180 N.E. 609, 94 Ind App. 266.

33. Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla 1105.

34. Neb.—Fanders v. Davison, 7 N. W 2d 652, 142 Neb. 745.

Sudden emergency doctrine generally see supra § 257.

Evidence held sufficient

(1) To establish defense of sudden emergency.

Ala.—Conner v. Foregger, 7 So 2d 856, 242 Ala. 275.

Ky.—Berry v. Jorris, 199 S.W.2d 616, 303 Ky 799.

Nev.—Botts v. Rushton, 172 P.2d 147, 63 Nev. 426.

N.M.—Sceele v. Purcell, 113 P.2d 320, 45 N.M. 176.

N.Y.—Beeston v. Maybury, 298 N.Y. S. 831, 252 App.Div. 812—Lichtenstein v. City of New York, 58 N. Y S 2d 243, affirmed 62 N.Y.S.2d 541, 270 App.Div. 925.

R.I.—Walsh v. Carroll, 175 A. 832, 54 R.I. 497, reargument denied 176 A. 927.

Va.—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320.

Wis.—Butts v. Ward, 279 N.W. 6, 227 Wis. 387, 116 A.L.R. 1441.

Wyo.—Corson v. Wilson, 108 P.2d 260, 256 Wyo. 218.

(2) To justify inference of negligence.—Llum v. Taylor, 155 A. 891, 9 N.J.Misc. 860.

(3) To show emergency of driver's own creation.

Iowa.—Luppes v. Harrison, 32 N.W. 2d 809.

La.—Butler v. Humphries, App., 34 So.2d 637.

Mass.—Isaacson v. Boston, W. & N. Y. St. Ry. Co., 180 N.E. 118, 278 Mass. 378.

N.Y.—Crippin v. Sunshine Transp. Corporation, 20 N.Y.S.2d 750, 260 App.Div. 52, reversed on other grounds 31 N.E.2d 509, 284 N.Y. 743.

Pa.—Volz v. Dresser, 28 A.2d 493, 150 Pa.Super. 371.

Tenn.—Nohsey & Schwab v. Slover, 14 Tenn.App. 42.

Vt.—Luce v. Chandler, 195 A. 246, 109 Vt. 275.

Va.—Stallard v. Atlantic Greyhound Lines, 192 S.E. 800, 169 Va. 223.

Wis.—Zeise v. Deprey, 31 N.W.2d 523, 252 Wis. 316.

(4) To show negligence when confronted with emergency.

Cal.—Miller v. Southern California Telephone Co., 14 P.2d 519, 216 Cal. 391.

Ill.—Harrison v. Bingheim, 182 N.E. 750, 350 Ill. 269—Goldberg v. Capitol Freight Lines, 41 N.E.2d 302, 314 Ill.App. 347, affirmed 47 N.E.2d 67, 382 Ill. 283.

N.J.—Plum v. Taylor, 155 A. 891, 9 N.J.Misc. 860.

(5) To show sudden emergency.

La.—Rosen v. Lloveras, App., 148 So. 734—Kennedy v. Opdenweyer, 121 So. 636, 11 La.App. 532, rehearing denied 123 So. 906, 11 La.App. 532.

Tenn.—Tavis v. Proctor & Gamble Distributing Co., 113 S.W.2d 64, 21 Tenn.App. 494.

(6) To show that emergency was not created by defendant.

Nev.—Botts v. Rushton, 172 P.2d 147, 63 Nev. 426

Va.—Jones v. Hanbury, 164 S.E. 545, 158 Va. 842.

(7) To warrant finding that defendant's act was not excused under emergency rule

Me.—Gravel v. Roberge, 134 A. 375, 125 Me. 399.

Mich.—Ulvund v. Sogge, 254 N.W. 202, 266 Mich. 518.

Evidence held insufficient

(1) To establish defense of sudden emergency

Conn.—Kalamian v. Kalamian, 139 A. 635, 107 Conn. 86.

La.—Pindola v. State, App., 4 So 2d 28, followed in Lococo v. State, 4 So.2d 32.

Va.—Gaines v. Campbell, 166 S.E. 701, 159 Va. 504.

Wash.—Rieger v. Kirkland, 111 P.2d 241, 7 Wash.2d 326.

(2) To show negligence when confronted with emergency.

Cal.—Staples v. L. W. Blinn Lumber Co., 275 P. 813, 97 Cal.App. 387.

Ill.—Rzeszewski v. Barth, 58 N.E.2d 269, 324 Ill.App. 345.

La.—Giglio v. Toupes, App., 192 So. 553.

Nev.—Botts v. Rushton, 172 P.2d 147, 63 Nev. 426.

Wash.—Wellons v. Wiley, 166 P.2d 852, 24 Wash.2d 543—Winston v. Bacon, 111 P.2d 764, 8 Wash.2d 216.

(4) Violation of Statute or Ordinance in General

Negligence in failing to comply with a statute or ordinance must be proved by a preponderance of the evidence; and prima facie proof of negligence therein may be overcome by sufficient evidence.

Negligence in failing to comply with a statute or ordinance must be proved by a preponderance of the evidence.³⁵ Prima facie proof of negligence in the violation of a traffic law may be overcome by proof of surrounding circumstances and conditions which will eliminate the character of negligence from the transaction.³⁶ Defendant's failure to furnish proof of legal excuse for not observing the

standard of care fixed by ordinance or statute establishes his negligence.³⁷

(5) Competency of Operator

General rules apply in determining the weight and sufficiency of evidence of the competency of a person to drive a motor vehicle, and of the owner's knowledge of the driver's incompetence.

General rules have been applied in determining the weight and sufficiency of the evidence on the issue of the competency of the driver of a motor vehicle,³⁸ as where it was contended that the driver was intoxicated,³⁹ that he fell asleep,⁴⁰ or that he suddenly became ill.⁴¹ A presumption that a child

W.Va.—Schade v. Smith, 188 S.E. 114, 117 W.Va. 703.

35. Cal.—City of Sacramento v. Hunger, 249 P. 223, 79 Cal.App. 234.

Violation of statute or ordinance as prima facie but not conclusive evidence of negligence see supra § 511 (4).

Evidence held sufficient

(1) To make prima facie case.—Wells v. Steinhilber, 176 S.E. 42, 49 Ga. App. 482.

(2) To support finding either way on question whether driver violated ordinance.—Schear v. Ludwig, 143 F. 2d 20, 79 U.S.App.D.C. 95, certiorari denied 65 S.Ct. 72, 323 U.S. 734, 89 L. Ed. 589.

(3) To support verdict for plaintiff.—Mantia v. Pearlman, 91 Pa. Super. 478.

Evidence held to establish violation of statute or ordinance

Cal.—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 132.

La.—Cohn v. Brown, 128 So. 54, 13 La.App. 604, amended 130 So. 50, 13 La.App. 604.

36. Fla.—Allen v. Hooper, 171 So. 513, 126 Fla. 458.

37. Iowa.—Kisling v. Thierman, 243 N.W. 552, 214 Iowa 911.

38. Probability of testimony

(1) Although negligence cannot be predicated on driver's inexperience or type of license in absence of causal connection between such facts and happening of accident, court was entitled to consider such facts in determining probability of testimony that driver traveling on through highway attempted to beat automobile approaching from the right through intersection.—Poe v. Lawrence, 140 P. 2d 136, 60 Cal.App.2d 125.

(2) Court was entitled to draw from proof of driver's inexperience and limited type of license such deductions as were warranted by a consideration of the usual propensities of people, as well as the course of nature and to ground thereon such

inferences as reason would direct.—Poe v. Lawrence, supra.

Evidence held sufficient

(1) To establish that driver was incapable of operating an automobile with safety.—Serpas v. Collard Motors, La.App., 178 So. 261.

(2) To sustain finding of negligence of licensed driver who failed to take control when unlicensed driver whom he accompanied turned across walk and struck pedestrian.—La Rosa v. Livezey, 160 A. 503, 109 N. J. Law 162.

Evidence held insufficient

(1) To show that defendant was negligent in attempting to drive when one of his legs had been amputated.—Madison v. Berry, La.App., 145 So. 694.

(2) To support inference of negligence, with respect to wearing or not wearing glasses at time of accident as required by driver's license.—Church v. Diffany, 11 A 2d 55, 124 N. J. Law 100.

39. Excitement of driver after accident is not evidence of intoxication but is consistent with sobriety.—Van Zandt v. Schell, Tex. Civ. App., 200 S. W.2d 725.

Evidence held sufficient

(1) To establish negligence in operating vehicle while under the influence of intoxicating liquor.—Roper v. Scott, Ga. App., 48 S.E.2d 118.

(2) To establish that driver was operating vehicle while under the influence of intoxicating liquor.—Orpheus v. Sutton, La.App., 8 So.2d 766, followed in Mitchell v. Sutton, 8 So.2d 769 and Andrus v. Sutton, 8 So.2d 770—Allen v. Metropolitan Casualty Ins. Co. of New York, La.App., 190 So. 168.

(3) To justify finding that driver was not intoxicated.—Tairlis v. Standard Oil Co. of California, 90 P. 2d 128, 32 Cal.App.2d 469—Johns v. Mecchi, 2 P.2d 452, 116 Cal.App. 31.

(4) To justify judgment on ground that intoxication of driver with consequent lack of control of automo-

bile and excessive speed was gross negligence on part of driver.—Allen v. Metropolitan Casualty Ins. Co. of New York, supra.

(5) To support finding that intoxicated defendant was negligent.

U.S.—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8, certiorari denied Milburn v. Heald, 62 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1754, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.Ed. 1754.

Mich.—Covert v. Randall, 298 N.W. 396, 298 Mich. 38.

(6) To warrant recovery.—Lavigne v. American Auto Ins. Co., La.App., 32 So.2d 38.

Evidence held insufficient

To establish that driver was under influence of intoxicating liquor.

Cal.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676—Tomlinson v. Karamidjian, 24 P.2d 559, 133 Cal. App. 418.

La.—Lee v. Perrin, App., 192 So. 387

—Foti v. Myers, App., 8 So.2d 349

—Woods v. Moffett, App., 162 So. 426.

40. Prima facie case

The mere fact of defendant's act in going to sleep while driving his automobile is a proper basis for an inference of negligence sufficient to make a prima facie case, and sufficient for recovery if not successfully rebutted to satisfaction of jury.—Diamond State Tel. Co. v. Hunter, 21 A.2d 286, 2 Terry, Del., 336.

41. Evidence held sufficient

(1) To support judgment for defendant.—Weldon Tool Co. v. Kelley, 76 N.E.2d 629, 81 Ohio App. 427.

(2) To sustain verdict rejecting defense that driver suffered a heart attack.—Barber v. Howard Sober, Inc., 58 N.Y.S.2d 465, 269 App.Div. 1008.

Evidence held insufficient

To establish lack of negligence on part of driver.—Waters v. Pacific Coast Dairy, Limited Mut. Compensation Ins. Co., Intervener, 131 P.2d 588, 55 Cal.App.2d 789.

is incompetent to operate a motor vehicle is rebutted by evidence showing competency.⁴²

In order to hold the owner of a motor vehicle liable on the theory of negligence in permitting an incompetent driver to drive, the latter's incompetence should be shown by specific acts of carelessness and recklessness committed by him.⁴³ Proof of the driver's negligence is necessary to hold the owner liable,⁴⁴ and so is evidence that the owner had knowledge of the driver's incompetence, inexperience, or reckless tendency as an operator or should have known thereof from the circumstances with which he was acquainted.⁴⁵ Evidence of the driv-

er's reputation of incompetency is not conclusive.⁴⁶

(6) Equipment and Lights

Failure to comply with legal requirements as to equipment and lights, when relied on to establish negligence, must be proved by a preponderance of the evidence, but evidence of the defective condition thereof is not conclusive and may be rebutted.

Where such facts are relied on to establish negligence on the part of the owner or operator of the vehicle, plaintiff must establish by a preponderance of the evidence that the owner or driver failed to comply with the requirements of the law with reference to equipment⁴⁷ and the requirements of the

42. Miss.—Murphy v. Willingham, 133 So. 213, 160 Miss. 94.

43. Or.—Guedon v. Rooney, 87 P.2d 209, 160 Or. 621, 120 A.L.R. 1298.

Insurance

Fact that owner carried liability insurance to protect against the consequences of negligence of son in driving automobile was not evidence of negligent propensities of the son.—Reid v. Owens, 93 P.2d 680, 98 Utah 50, 126 A.L.R. 55.

Evidence held sufficient

To establish fact that operator did not have driver's license.—Owens v. Carmichael's U-Drive Autos, 2 P.2d 580, 116 Cal.App. 348

Evidence held insufficient

To show that driver was incompetent driver.

Ill.—Union Bank of Chicago v. Kalkhurst, 265 Ill.App. 254.

Miss.—Vanner v. Dalton, 159 So. 558, 172 Miss. 183.

Tenn.—Gemmell Bros. Co. v. Durham, 11 Tenn.App. 97.

Tex.—Mayer v. Johnson, Civ.App., 148 S.W.2d 454, error dismissed, judgment correct.

44. Okl.—Anthony v. Covington, 100 P.2d 461, 187 Okl. 27.

45. Ohio.—Williamson v. Eclipse Motor Lines, 62 N.E.2d 339, 145 Ohio St. 467, 168 A.L.R. 1356.

Evidence held sufficient

(1) In general.

La.—Serpas v. Collard Motors, App., 178 So. 261.

N.H.—Greenie v. Nashua Buick Co., 158 A. 817, 85 N.H. 316.

Or.—Gossett v. Van Egmond, 155 P.2d 304, 176 Or. 134.

Va.—Crowell v. Duncan, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425.

(2) To establish prima facie case.—Owens v. Carmichael's U-Drive Autos, 2 P.2d 580, 116 Cal.App. 348.

(3) To show that dealer had no reasonable ground for believing that prospective purchaser was incompetent to drive.—Brown v. Fields, 83 P.2d 144, 160 Or. 23.

(4) To support verdict allowing recovery.

U.S.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A. Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

Ariz.—Powell v. Langford, 119 P.2d 230, 58 Ariz. 281.

42 C.J. p 1236 note 37 [a] (16).

Evidence held insufficient

(1) To permit recovery.

Ind.—North Side Chevrolet v. Clark, 25 N.E.2d 1011, 107 Ind.App. 592.

La.—Toole v. Morris-Webb Motor Co., App., 195 So. 863.

42 C.J. p 1236 note 37 [b] (4).

(2) To show that owner knew, or should have known, driver to be incompetent or reckless driver.

Ill.—Union Bank of Chicago v. Kalkhurst, 265 Ill.App. 254.

La.—Stough v. Young, App., 185 So. 476.

Miss.—Malcy v. Herman, 146 So. 309, 166 Miss. 811.

Mo.—Saunders v. Prue, 151 S.W.2d 478, 235 Mo.App. 1245.

Tenn.—Gemmell Bros. Co. v. Durham, 11 Tenn.App. 97.

46. Miss.—Vanner v. Dalton, 159 So. 558, 172 Miss. 183.

47. Evidence held sufficient

To warrant finding that condition of tires when examined by expert witness several months after the accident was the same as it was at the scene of the collision.—Curtin v. Benjamin, 26 N.E.2d 354, 305 Mass. 489, 129 A.L.R. 433.

Evidence held insufficient

To justify finding of driver's negligence in not anticipating injury to plaintiff from hot water from radiator.—Randazzo v. Wheaton, 180 N.E. 303, 278 Mass. 536.

Failure to comply with requirements shown

(1) Brakes.

U.S.—Uhl v. Dalton, D.C.Nev., 56 F. Supp. 656, appeal dismissed, C.C.A., 151 F.2d 502.

Cal.—Rocha v. Garcia, 263 P. 238, 203 Cal. 167.

Colo.—Stahl v. Cooper, 190 P.2d 891, 117 Colo. 468.

La.—Hassell v. Colletti, App., 12 So. 2d 31—Bertuccini v. Toye Bros.

Yellow Cab Co., App., 11 So.2d 247.

Minn.—Lee v. Zaske, 6 N.W.2d 793,

213 Minn. 244.

Miss.—Wheat v. Wheat, 139 So. 849, 162 Miss. 595.

Mo.—Steele v. Thomas, 101 S.W.2d 499, 231 Mo.App. 865.

N.J.—Hinach v. Amirkanian, 145 A. 232, 7 N.J.Misc. 274.

N.Y.—Passzahl v. Metropolitan Distributors, 21 N.Y.S.2d 386, 259 App. Div. 1050.

Ohio.—Schwab v. Keeler, 79 N.E.2d 176, 81 Ohio App. 291.

Pa.—Smith v. Snowden Tp., 34 A.2d 515, 348 Pa. 187.

Tex.—Sturtevant v. Pagel, 130 S.W.2d 1017, 134 Tex. 46—Ramirez v. Salinas, Civ.App., 90 S.W.2d 891,

error dismissed 117 S.W.2d 56, 131 Tex. 537.

Va.—Hatfield v. Thomas, 41 S.E.2d 460, 186 Va. 7.

Wash.—McCoy v. Courtney, 172 P.2d 596, 25 Wash.2d 956.

42 C.J. p 1236 note 35 [a] (2).

(2) Chains.

Cal.—Gross v. Burnside, 199 P. 780, 186 Cal. 467.

Conn.—C. A. Johnson, Inc., v. Bruce, 44 A.2d 917, 132 Conn. 429.

(3) Horn or other signal device.

Ohio.—Schwab v. Keeler, 79 N.E.2d 176, 81 Ohio App. 291.

Tex.—Staten v. Monroe, Civ.App., 150 S.W. 222.

(4) Steering gear.—Shrigley v. Pierson, 85 S.W.2d 727, 191 Ark. 224—

42 C.J. p 1236 note 37 [a] (10).

(5) Tire.

Kan.—Nelson v. Healey, 99 P.2d 795, 151 Kan. 512.

Pa.—Delair v. McAdoo, 188 A. 181, 324 Pa. 392.

(6) Wheel.—Levandowski v. Studey, 25 N.W.2d 59, 249 Wis. 421.

(7) Windshield wiper.

U.S.—Uhl v. Dalton, D.C.Nev., 56 F. Supp. 656, appeal dismissed, C.C.A., 151 F.2d 502.

law with reference to display of lights.⁴⁸ In order to show violation of a glaring headlamp statute, it must appear that the glare was more than that of a headlight properly equipped and adjusted.⁴⁹ Evidence of the defective condition of equipment does not conclusively establish violation of a statute in the absence of proof that the driver knew, or should have known, of the defective condition⁵⁰ and a prima facie case made by evidence of failure of equipment to operate may be rebutted by a showing of proper inspection and a sudden failure without warning.⁵¹ Where defendant relies on the defense of latent defects, the proof submitted must be such as to exclude any other rea-

sonable hypothesis in respect of the cause of the accident except that it resulted solely from the alleged defect.⁵²

(7) Signals and Lookout

A preponderance of the evidence is required to establish that the driver of a motor vehicle failed to keep a proper lookout or failed to give proper signals or warnings.

Where such facts are relied on to establish negligence on the part of the operator of the vehicle, plaintiff must establish by a preponderance of the evidence that the driver failed to keep a proper lookout⁵³ or failed to give proper signals or warn-

La.—Loret v. Armour & Co., App., 32 So.2d 55.

Failure to comply with requirements not shown

(1) Brakes.

Ariz.—Butane Corp. v. Kirby, 187 P. 2d 325, 66 Ariz. 272.

Ind.—Hoesel v. Cain, 53 N.E.2d 165, 222 Ind. 330, rehearing denied 53 N.E.2d 769, 222 Ind. 330.

La.—Holmes v. Lindsey, App., 15 So. 2d 89—Allen v. Allbritton, App., 172 So. 198.

Mo.—Williamson v. National Garage Co., App., 203 S.W.2d 126.

Neb.—Eaton v. Merritt, 281 N.W. 620, 135 Neb. 363.

S.C.—Greer v. State Highway Department, 159 S.E. 35, 160 S.C. 510.

42 C.J. p 1236 note 35 [h].

(2) Reflector.—Brickell v. Boston & M. Transp. Co., 36 A.2d 622, 93 N.H. 140.

Evidentiary fact

In action for injuries sustained by child when she was struck by automobile after she had alighted from schoolbus and walked around rear of bus, signs carried by bus which did not conform with statute were an evidentiary fact only.—Toomey v. Juracka, 297 N.Y.S. 665, 251 App.Div. 917.

Weight and sufficiency of evidence as to equipment and lights in actions for injuries resulting to or from:

Children see infra subdivision d of this section.

Occupant of defendant's vehicle see infra subdivision q (4) of this section.

Persons on foot see infra subdivision c (2) of this section.

Vehicles:

At rest or unattended see infra subdivision j (1) of this section.

Crossing see infra subdivision h (4) of this section.

Traveling in:

Opposite directions see infra subdivision g (2) of this section.

Same direction see infra subdivisions i (2), (3) of this section.

48. Evidence held sufficient

(1) To show negligent failure to display lights.

U.S.—Ubi v. Dalton, D.C.Nev. 56 F. Supp. 656, appeal dismissed, C.C. A., 151 F.2d 502.

Cal.—Bays v. Clugston, 161 P.2d 953, 71 Cal.App.2d 55—Chalmers v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Conn.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355.

Ill.—Spiers v. Anderson Motor Service Co., 271 Ill.App. 178—Herberger v. Anderson Motor Service Co., 268 Ill.App. 403.

Ind.—American Carloading Corporation v. Voight, 21 N.E.2d 453, 107 Ind.App. 267.

Me.—Perry v. Butler, 48 A.2d 631.

Mass.—McGaffee v. P. R. Mutrie Motor Transp., 42 N.E.2d 841, 311 Mass. 730.

Miss.—Walker v. Dickerson, 184 So. 438, 183 Miss. 642.

N.Y.—Myers v. Jensen, 9 N.Y.S.2d 83, 256 App.Div. 871.

Ohio.—Schwab v. Keeler, 79 N.E.2d 176, 81 Ohio App. 291.

Pa.—Murray v. Lavine, 92 Pa.Super. 272.

Tex.—Ramirez v. Salinas, Civ.App., 99 S.W.2d 891, error dismissed 117 S.W.2d 56, 131 Tex. 537.

42 C.J. p 1236 note 36 [a].

(2) To sustain finding that vehicle was equipped with requisite lights and that they were illuminated at time of accident.

Cal.—Donato v. Lopopolo, 66 P.2d 1256, 20 Cal.App.2d 409.

Neb.—Miller v. Abel Const. Co., 300 N.W. 405, 140 Neb. 482.

Wash.—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354.

Evidence held not to establish negligence

(1) Failure to display lights.

Ill.—Rhoden v. Peoria Creamery Co., 278 Ill.App. 452—Price v. Bailey, 265 Ill.App. 358.

Iowa.—Grover v. Neibauer, 247 N.W. 298, 216 Iowa 631.

La.—Portier v. Picou, 3 So.2d 295—Beard v. Morris, 101 So. 147, 156 La. 798.

Pa.—Shoffner v. Schmerin, 175 A. 516, 316 Pa. 323.

Wash.—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354.

(2) Failure to dim lights.—Refugio Refinery v. Speed, Tex.Civ.App. 139 S.W.2d 621, error dismissed, judgment correct.

49. Wis.—Carriveau v. Vatapek, 235 N.W. 445, 204 Wis. 139.

50. N.H.—MacDonald v. Appleyard, 53 A.2d 431.

51. Md.—Sothoron v. West, 26 A.2d 16, 180 Md. 539.

52. La.—Hassell v. Colletti, App., 12 So.2d 31.

53. Failure to keep proper lookout shown

Cal.—Truitner v. Knight, 257 P. 447, 83 Cal.App. 655—Truitner v. Knight, 257 P. 451 (first case), 83 Cal.App. 797.

Ill.—Stemkowski v. J. H. Patterson Co., 58 N.E.2d 463, 324 Ill.App. 318.

Ky.—Horton Transfer & Storage Co. v. Donaldson, 95 S.W.2d 1086, 265 Ky. 47.

La.—Laborde v. Schwartzenburg, App., 188 So. 668.

Mass.—Pinto v. Brennan, 150 N.E. 86, 254 Mass. 298.

Mo.—Bush v. Kansas City Public Service Co., 169 S.W.2d 331, 350 Mo. 876.

N.C.—Luther v. Mountain Transp. Co., 13 S.E.2d 416, 219 N.E. 862.

Ohio.—Kohnle v. Carey, 67 N.E.2d 98, 800 Ohio App. 23.

Pa.—Atkinson v. Coskey, 47 A.2d 156, 354 Pa. 297—Lane v. Samuels, 39 A.2d 626, 350 Pa. 446.

Tex.—Lookley v. Page, 180 S.W.2d 616, 142 Tex. 594—Barron v. James, Civ.App., 128 S.W.2d 245, reversed on other grounds 198 S.W.2d 256—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct.

ings.⁵⁴

(8) Speed and Control

- (a) In general
- (b) Skidding

(a) In General

Where speed is relied on to establish negligence, the plaintiff must establish by a preponderance of the evidence

that the driver operated the vehicle at an excessive or prohibited speed, but circumstantial evidence may be sufficient.

Where such facts are relied on to establish negligence on the part of the operator of the vehicle, plaintiff must establish by a preponderance of the evidence that the driver operated the vehicle at an excessive rate of speed⁵⁵ or that the driver op-

Va.—Highway Exp. Lines v. Fleming, 40 S.E.2d 294, 185 Va. 666.

W.Va.—Sigmon v. Mundy, 25 S.E.2d 636, 125 W.Va. 591.

Wis.—Haase v. Employers Mut. Liability Ins. Co., 27 N.W.2d 468, 250 Wis. 422—Kleiner v. Johnson, 23 N.W.2d 467, 249 Wis. 148—Derleder v. Piper, 1 N.W.2d 146, 239 Wis. 269—Gumm v. Koepke, 278 N.W. 447, 227 Wis. 635.

42 C.J. p 1236 note 33 [a].

Failure to keep proper lookout not shown

Conn.—Doolan v. Werner, 34 A.2d 731, 130 Conn. 394.

La.—Stringer v. Crawley, App., 16 So 2d 658.

Wis.—Maltby v. Thiel, 272 N.W. 848, 224 Wis. 648.

42 C.J. p 1236 note 33 [b].

Weight and sufficiency of evidence as to signals and lookout in actions for injuries resulting to or from Children see *infra* subdivision d of this section.

Persons on foot see *infra* subdivision c (2) of this section.

Vehicles:

At rest or unattended see *infra* subdivision k (1) of this section

Crossing see *infra* subdivision h (4) of this section.

Traveling in:

Opposite directions see *infra* subdivision g (2) of this section.

Same direction see *infra* subdivisions i (2), (3) of this section.

54. Evidence held sufficient

(1) To establish that it was the rule and custom that a signal of some kind be given the driver before he was warranted in driving forward after vehicle was loaded.—Richey v. Swink, La.App., 4 So.2d 749.

(2) To establish that no signal to start vehicle was given the driver and that he gave no signal of his intention to start.—Richey v. Swink, *supra*.

(3) To sustain finding that driver of defendant's automobile failed to give arm signal.—Gialdini v. Russell, 25 P.2d 845, 134 Cal.App. 524.

Evidence held to show negligent failure to give signal or warning

(1) In general.

Mass.—Huffman v. Paquin, 156 N.E. 6, 259 Mass. 191.

Tex.—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256.

42 C.J. p 1236 note 34 [a].

(2) At intersection.—Lane v. Samuels, 39 A.2d 626, 350 Pa. 446—42 C. J. p 1236 note 34 [a] (4).

(3) Backing up without giving warning signal.

Ill.—Hart v. City of Chicago, 42 N.E. 2d 887, 315 Ill.App. 214.

Wis.—Patterson v. Edgerton Sand & Gravel Co., 277 N.W. 636, 227 Wis. 11.

42 C.J. p 1236 note 34 [a] (5).

(4) To indicate or warn of turn from course.—Barthelman v. Braun, 278 Ill App. 384—42 C.J. p 1236 note 34 [a] (8).

Evidence held not to show negligent failure to give signal or warning

Conn.—Seney v. Trowbridge, 16 A.2d 573, 127 Conn. 284.

Ill.—Rhoden v. Peoria Creamery Co., 278 Ill App. 452.

N.Y.—Becker v. Fargo, 144 N.Y.S. 297, 158 App.Div. 810.

42 C.J. p 1236 note 34 [b].

Evidence held to make it impossible for jury to decide that left-turn signal was not given.—Heimer v. Salisbury, 142 A. 749, 108 Conn. 180.

55. N.C.—Fleeman v. Citizens Transfer & Coal Co., 198 S.E. 596, 214 N.C. 117—Woods v. Freeman, 195 S.E. 812, 213 N.C. 314.

Care required as to speed and control generally see *supra* §§ 290–299.

Weight and sufficiency of evidence as to:

Speed and control in actions for injuries resulting to or from:

Children see *infra* subdivision d of this section.

Collision with bicycle or motorcycle see *infra* subdivision n of this section.

Occupant of speeding vehicle see *infra* subdivision q (6) of this section.

Persons on foot see *infra* subdivision c (3) of this section.

Vehicles:

Crossing see *infra* subdivision h (5) of this section.

Traveling in opposite directions see *infra* subdivision g (3) of this section.

Willful, wanton, or reckless acts generally see *supra* subdivision a (2) of this section.

Matters affecting credibility

Where witness testified as to speed of an automobile, matter of the witness' distance from automobile, the angle of its approach, intervening obstructions and limited time and space for observation of its speed went only to the credibility of the witness and weight of his testimony.—Ramseur v. Hudson, Tex.Civ.App., 190 S.W.2d 576.

Evidence as to governor

Where defendant's vehicle was equipped with a governor which limited the speed to a stated rate, and his driver testified that he was not driving in excess thereof and that it could not be done, and there was no evidence that the governor failed in its function, the driver's testimony must be accepted as final, notwithstanding testimony of other witnesses that the vehicle was driven at a higher speed.—Collins v. Zimmerman, Ohio App., 57 N.E.2d 245.

Evidence held sufficient

(1) In general.

Iowa.—Schroeder v. Kindschuh, 294 N.W. 784, 229 Iowa 590.

La.—Roper v. Brooks, 9 So.2d 485, 201 La. 135, vacating 9 So.2d 497

—Fontenot v. La Fleur, App., 2 So. 2d 479.

Mo.—Egan v. Palmer, 293 S.W. 460, 221 Mo App. 823

(2) To establish negligence in driving at excessive rate of speed.

U.S.—National Mut. Casualty Co. of Tulsa, Okl., v. Eisenhower, C.C.A. Kan., 116 F.2d 891—Bickley v. U. S., D.C.S.C., 77 F.Supp. 454—Peach v. U. S., D.C.Pa., 75 F.Supp. 218.

Ala.—International Harvester Co. v. Williams, 133 So. 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595.

Ark.—Missouri Pac. Transp. Co. v. Mitchell, 137 S.W.2d 242, 199 Ark. 1045—Union Securities Co. v. Taylor, 48 S.W.2d 1100, 185 Ark. 737.

Cal.—Turnipseed v. Hoffman, 144 P. 2d 797, 23 Cal.2d 532—Kapitan v. Smith, 161 P.2d 270, 70 Cal.App.2d 454—Harkey v. Lucke, 65 P.2d 77, 19 Cal.App.2d 130—Adrian v. Guyette, 58 P.2d 988, 14 Cal.App.2d 493—Armstrong v. Studer, 37 P.2d 475, 2 Cal.App.2d 166—Mecham v. Crump, 30 P.2d 568, 137 Cal.App. 200—Yates v. Morotti, 8 P.2d 519, 120 Cal.App. 710—Williams v. Pickwick Stages System, 297 P. 98, 112

Cal.App. 597—MacCorkell v. Williams, 295 P. 879, 111 Cal.App. 572—Brooks v. City and County of San Francisco, 295 P. 344, 111 Cal.App. 254.

Colo.—Jaackel v. Funk, 138 P.2d 939, 111 Colo. 179.

Conn.—Goodsell v. Brighenti, 24 A.2d 834, 128 Conn. 581.

Ill.—Phillpott v. Parham, 44 N.E.2d 934, 316 Ill.App. 278—Grossmann v. Diesel, 42 N.E.2d 957, 315 Ill.App. 306—Koch v. Barker, 41 N.E.2d 329, 314 Ill.App. 378—Gruntle v. Valha, 37 N.E.2d 931, 312 Ill.App. 181—Mulligan v. Andel, 245 Ill.App. 133.

Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.

La.—Roper v. Brooks, 9 So.2d 485, 201 La. 135, vacating 9 So.2d 497—Pacific Fire Ins. Co. v. Employers' Liability Assur. Co., App., 34 So.2d 796—Rachal v. Baithazar, App., 32 So.2d 483—Ford v. Leonard Truck Lines, App., 26 So.2d 309—James v. White, App., 19 So.2d 383—Redden v. Blythe, App., 12 So.2d 728—Camden Fire Ins. Ass'n v. Fontenot, App., 11 So.2d 99—Stevens v. Streun, App., 200 So. 182—Bourgeois v. Longman, App., 199 So. 142—Goynes v. St. Charles Dairy, App., 197 So. 819—McDanell v. Hargrove, App., 197 So. 292—Bates v. Hayden National Casualty Co., Intervenor, App., 188 So. 751—Schmidt & Zeigler, Limited, v. Carroll, App., 161 So. 785—General Exchange Ins. Corporation v. Caraccio, App., 144 So. 630—Blevins v. Drake-Lindsay Co., App., 144 So. 257—Griffen v. Teche Transfer Co., 140 So. 113, 19 La.App. 157—Genovese v. Krebs, 138 So. 470, 18 La.App. 639—Quatray v. Wicker, 134 So. 313, 16 La.App. 515—Mutti v. McCall, 130 So. 229, 14 La.App. 504—Mutti v. McCall, 130 So. 233, 14 La.App. 511—Chenevert v. Kimball, 129 So. 233, 14 La.App. 83—Usannaz v. Brugier, 129 So. 227, 14 La.App. 577—Richey v. Brasher, 7 La.App. 506.

Me.—Campbell v. Langdo, 28 A.2d 311, 139 Me. 188.

Mass.—Fayard v. Morrissey, 183 N.E. 154, 281 Mass. 166.

Mich.—Boyce v. Shtukas, 11 N.W.2d 206, 306 Mich. 467—Haszczyn v. Detroit Creamery Co., 275 N.W. 211, 281 Mich. 467.

Minn.—Johnston v. Selfe, 251 N.W. 525, 190 Minn. 269.

N.H.—McCourt v. Travers, 175 A. 865, 87 N.H. 185.

N.Y.—Tryon v. Willbank, 255 N.Y.S. 27, 234 App.Div. 335—Becker v. Fargo, 144 N.Y.S. 297, 158 App.Div. 810.

N.C.—Hobbs v. Queen City Coach Co., 84 S.E.2d 211, 225 N.C. 823—Yokeley v. Kearns, 25 S.E.2d 602, 223 N.C. 196.

N.D.—Logan v. Schjeldahl, 262 N.W. 463, 66 N.D. 152.

Ohio.—Carle v. Courtright, 40 N.E.2d 431, 69 Ohio App. 69, rehearing de-

nied 43 N.E.2d 296, 69 Ohio App. 69.

Pa.—Commonwealth v. Pennzoil Co., 56 A.2d 93—Rocco v. Tallia, 162 A. 495, 108 Pa.Super. 597.

R.I.—Little v. Rubin, 6 A.2d 683, 62 R.I. 438.

Tenn.—Hoover Lines v. Whitaker, 120 S.W.2d 983, 22 Tenn.App. 223.

Tex.—Dunigan Tool & Supply Co. v. Whipple, Civ.App., 136 S.W.2d 947, error dismissed, judgment correct—Stroud v. Smith, Civ.App., 119 S.W.2d 894—Thurman v. Chandler, Civ.App., 52 S.W.2d 315, reversed 81 S.W.2d 489, 125 Tex. 34.

Wash.—Hardman v. Younkens, 131 P.2d 177, 15 Wash.2d 483, 151 A.L.R. 868—Barnes v. Cole, 244 P. 728, 138 Wash. 481.

W.Va.—Sigmon v. Mundy, 25 S.E.2d 636, 125 W.Va. 591.

Wis.—Kasper v. Kocher, 4 N.W.2d 158, 240 Wis. 629—Derleder v. Piper, 1 N.W.2d 146, 239 Wis. 269—Liebenstein v. Eisele, 284 N.W. 525, 230 Wis. 521.

Wyo.—Oviatt v. Hohnholtz, 299 P. 1037, 43 Wyo. 174.

42 C.J. p 1235 note 31 [a].

(3) To establish that speed was not excessive.

La.—Kemp v. Donnes, App., 32 So.2d 383.

Tex.—Safeway Stores of Texas v. Webb, Civ.App., 164 S.W.2d 868, error refused.

(4) To show negligence in failing to have vehicle under control.

Fla.—Union Bus Co. v. Bowen, 184 So. 17, 134 Fla. 254.

Ohio.—Misrach v. Epperson, 168 N.E. 230, 32 Ohio App. 451.

Tex.—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256—Houston Electric Co. v. McLeroy, Civ.App., 153 S.W.2d 617, reversed on other grounds 163 S.W.2d 1062, 139 Tex. 170—Western States Grocery Co. v. Smith, Civ.App., 114 S.W.2d 419, error dismissed.

Wis.—Derleder v. Piper, 1 N.W.2d 146, 239 Wis. 269.

42 C.J. p 1236 note 37 [a] (4).

(5) To sustain determination that driver was not negligent—Stringer v. Crawley, La.App., 16 So.2d 658—Hudgins v. Gage, La.App., 194 So. 105, followed in Dance v. Gage, 194 So. 108—Walker v. Louisiana Stores, La.App., 151 So. 656.

(6) To sustain finding that driver failed to reduce speed of vehicle.—Barron v. James, Tex.Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256, 145 Tex. 283—42 C.J. p 1236 note 37 [a] (6).

(7) To sustain verdict or judgment for plaintiff.

Cal.—McDougall v. Morrison, 130 P.2d 149, 55 Cal.App.2d 92—Temple v. De Mirjian, 125 P.2d 544, 51 Cal.

App.2d 559—Armer v. Dorton, 138 P.2d 94, 50 Cal.App.2d 413—McBride v. Southern California Telephone Co., 28 P.2d 931, 136 Cal.App. 382—Smith v. Fall River Joint Union High School Dist., 5 P.2d 930, 118 Cal.App. 673.

Ga.—American Fidelity & Cas. Co. v. Farmer, App., 48 S.E.2d 122—Adams v. Evans, 23 S.E.2d 507, 68 Ga.App. 544.

Ky.—Clark's Ex'x v. Weir, 67 S.W.2d 962, 252 Ky. 560.

La.—Allen v. Metropolitan Casualty Ins. Co. of New York, App., 190 So. 163—Maddox v. Pattison, App., 136 So. 894—Masaracchia v. Inter-City Express Lines, App., 162 So. 221.

N.C.—Luther v. Mountain Transp. Co., 13 S.E.2d 416, 219 N.C. 862.

Okl.—Miller v. Dobbs, 71 P.2d 737, 180 Okl. 576.

S.D.—Schumacher v. Storberg, 7 N.W.2d 141, 69 S.D. 103.

Tenn.—McFadden v. Gray, 8 Tenn. App. 514.

Tex.—Molter v. Madden, Civ.App., 207 S.W.2d 984—American Indemnity Co. v. Venegas, Civ.App., 17 S.W.2d 858, error dismissed.

Va.—Neal v. Spencer, 26 S.E.2d 70, 181 Va. 668—Walton v. Light, 26 S.E.2d 29, 181 Va. 609.

(8) To warrant finding as to rate of speed.

Cal.—Kastel v. Stieber, 8 P.2d 474, 215 Cal. 37—Packer v. Wagner, 292 P. 523, 109 Cal.App. 26.

Kan.—Mullich v. Graham Ship By Truck Co., 174 P.2d 98, 162 Kan. 61—Claggett v. Phillips Petroleum Co., 92 P.2d 52, 150 Kan. 191.

La.—Ferris v. Cooley, App., 171 So. 142—Jordan v. Ortlieb, App., 148 So. 95.

Mo.—Proffitt v. Farmers' Produce Exchange Co-op. Ass'n, No. 277, App., 64 S.W.2d 746.

S.D.—Pooley v. Leith, 255 N.W. 153, 62 S.D. 554.

Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

(9) To warrant verdict or judgment denying recovery.

Ill.—McGoorty v. Benhart, 27 N.E.2d 289, 305 Ill.App. 458.

La.—Gibbs v. Whittlessey, App., 31 So.2d 241—Geter v. DeSoto Lumber Co., Commercial Standard Ins. Co., Intervenor, App., 26 So.2d 314—Mesmer v. Wagner, App., 168 So. 378.

R.I.—Antocicchio v. Stanley, 191 A. 498, 58 R.I. 118.

Evidence held insufficient

(1) In general.

Mo.—Clark v. Prue, App., 151 S.W.2d 487—La Pierre v. Kinney, 19 S.W.2d 306, 225 Mo.App. 199.

Nev.—Rose v. Rushton, 172 P.2d 157.

Tex.—Renner v. National Biscuit Co., Civ.App., 173 S.W.2d 332, error refused.

(2) To authorize recovery by plain-

erated the vehicle at a rate of speed prohibited by statute or ordinance.⁵⁶ In order to make out a prima facie case of negligence based on violation of a statute regulating speed, it is necessary to show a speed in excess of the maximum lawful speed fixed by the statute as applicable at the time, the place, and under the circumstances of the accident.⁵⁷ Proof of speed in excess of statutory limits is not, however, conclusive proof of the driver's negligence.⁵⁸ When it is sought to fasten negligence on one because of improper or unreasonable driving on a steep grade, neither the witnesses nor

the jury should be left to conjecture; there should be proof that the grade in question was within the statutory definition thereof.⁵⁹ Evidence of speed is of little or no probative value where it does not relate to the speed at the time of the accident.⁶⁰

A description of the speed which in its very nature is largely conjectural and which lacks the certainty and precision necessary to impart a knowledge of any definite rate of speed is of little or no probative value,⁶¹ as where the witness testifies that the speed was "like lightning,"⁶² "fast,"⁶³

tiff.—Holmes v. Lindsey, 15 App., 15 So.2d 89.

(3) To establish negligence in driving at excessive rate of speed. U.S.—Texas Co. v. Hood, C.C.A.Tex., 161 F.2d 618, certiorari denied 68 S.Ct. 206

Cal.—Hosking v. Danforth, 36 P.2d 427, 1 Cal App.2d 178—Staples v. L. W. Blinn Lumber Co., 275 P. 813, 97 Cal App. 387.

Ill.—Schuster v. Jefferson Ice Co., 65 N.E.2d 239, 328 Ill App 124—Little v. Gogotz, 58 N.E.2d 336, 324 Ill. App 516.

Ky.—Tate v. Collins, 98 S.W.2d 938, 266 Ky. 322.

La.—Portier v. Picou, 3 So.2d 295—Campbell v. F. Hollier & Sons, App., 4 So.2d 576—Stocum v. Hawn, App., 155 So. 24.

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355.

Mass.—Reynolds v. Jacobucci, 58 N. E.2d 838, 317 Mass. 500.

Mo.—Schaff v. Nelson, App., 285 S.W. 1036.

N.Y.—Smith v. Levison, 226 N.Y.S. 311, 222 App.Div. 310—Mayo v. Sherwood, 13 N.Y.S.2d 899.

Or.—Cameron v. Goree, 189 P.2d 596 —Whiting v. Andrus, 144 P.2d 501, 173 Or. 133.

Pa.—Matys v. Consumers Ice & Coal Co., 36 A.2d 821, 154 Pa.Super. 568 —Hoffman v. Herman, 163 A. 452, 107 Pa.Super. 92.

Va.—Shoemaker v. Andrews, 152 S.E. 370, 154 Va. 170.

Wash.—Murray v. Banning, 134 P.2d 715, 17 Wash.2d 1—Jamieson v. Taylor, 95 P.2d 791, 1 Wash.2d 217—Haydon v. Bay City Fuel Co., 9 P.2d 98, 167 Wash. 212.

Wis.—Uren v. Purity Dairy Co., 32 N.W.2d 615, 252 Wis. 446, rehearing denied 83 N.W.2d 213, 252 Wis. 446—Dekeyser v. Milwaukee Automobile Ins. Co., 295 N.W. 755, 236 Wis. 419—Ray v. Milwaukee Automobile Ins. Co., Limited, Mutual, 283 N.W. 799, 230 Wis. 233.

42 C.J. p 1235 note 31 [b].

(4) To support verdict for defendant.

Ill.—Werlik v. Murray, 46 N.E.2d 138,

317 Ill.App. 378—Leonil v. McMillan, 5 N.E.2d 742, 287 Ill.App. 579. Pa.—Biehl v. Rafferty, 37 A.2d 729, 349 Pa. 493.

(5) To sustain finding that driver was negligent with respect to control and management of vehicle—Martin v. Barry Transfer & Storage Co., 27 N.W.2d 719, 250 Wis. 574 —42 C.J. p 1236 note 37 [b] (1), (2).

58. W.Va.—Boyce v. Black, 15 S.E. 2d 588, 123 W.Va. 234.

Evidence held sufficient

To show negligence in exceeding speed limit.

Cal.—Soda v. Marriott, 5 P.2d 675, 118 Cal.App. 635—Traylen v. Citro, 297 P. 649, 112 Cal App. 172, followed in 297 P. 652, 112 Cal. App. 763—Truittner v. Knight, 257 P. 447, 83 Cal App. 655—Truittner v. Knight, 257 P. 451 (first case), 83 Cal App. 797—Truittner v. Knight, 257 P. 447, 451, second case, 83 Cal.App. 664.

Ga.—Roper v. Scott, App., 48 S.E.2d 118.

Iowa.—Richards v. Begenstos, 21 N. W.2d 23, 237 Iowa 398—Harvey v. Knowles Storage & Moving Co., 244 N.W. 660, 215 Iowa 35

La.—Ford v. Brewer, App., 186 So. 905—Stelly v. Prather, App., 182 So. 171.

Mass.—Hall v. Shain, 197 N.E. 437, 291 Mass. 506—Isaacson v. Boston, W. & N. Y. St. Ry. Co., 180 N.E. 118, 278 Mass. 378.

Mich.—Haley v. Grosse De Rapid Transit Co., 287 N.W. 536, 290 Mich. 373.

Mo.—Hopkins v. Highland Dairy Farms Co., 159 S.W.2d 254, 348 Mo. 1158.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

Tex.—Sherwin-Williams Co. of Texas v. Delahoussaye, Civ.App., 124 S.W.2d 870, error dismissed—Stroud v. Smith, Civ.App., 119 S.W. 2d 894—L. E. Whitam & Co. v. Allen, Civ.App., 64 S.W.2d 1024, error dismissed—Wright v. Maddox, Civ.App., 288 S.W. 560.

Va.—Yellow Cab Corporation of

Abingdon v. Henderson, 16 S.E.2d 389, 178 Va. 207.

Wash.—Pyle v. Wilbert, 98 P.2d 664, 2 Wash.2d 429.

42 C.J. p 1235 note 32 [a].

Evidence held insufficient

To show negligence in exceeding speed limit.

La.—Folse v. Hannagriff & Edmondson, 127 So. 663, 14 La.App. 249.

42 C.J. p 1235 note 32 [b].

Expert testimony held not required

Mo.—Renson v. Smith, App., 38 S.W. 2d 743

N.H.—Wiggin v. Kingston, 20 A.2d 625, 91 N.H. 397.

57. Minn.—Cooper v. Hoeglund, 22 N.W.2d 450, 221 Minn. 446.

Evidence held to make prima facie case

Ala.—Brown Hauling Co. v. Newsome, 2 So.2d 782, 241 Ala. 300. Ind.—D. Graff & Sons v. Williams, 61 N.E.2d 72, 115 Ind.App. 597.

58. Me.—Sturtevant v. Ouellette, 140 A. 368, 126 Me 558.

59. Ky.—National Linen Supply Co. v. Snowden, 156 S.W.2d 186, 288 Ky. 374.

60. U.S.—Winn v. Consolidated Coach Corporation, C.C.A.Tenn., 65 F.2d 256, certiorari denied 54 S. Ct. 453, 291 U.S. 668, 78 L.Ed. 1059, rehearing denied 54 S.Ct. 557, 291 U.S. 651, 78 L.Ed. 1059.

Ky.—Atlantic Greyhound Corp. v. Franklin, 192 S.W.2d 753, 301 Ky. 867.

Md.—Acme Poultry Corp. v. Melville, 53 A.2d 1.

Ohio.—Solomon v. Mote, App., 49 N.E. 2d 703.

61. Wash.—Jamieson v. Taylor, 95 P.2d 791, 1 Wash.2d 217.

62. Conn.—Sarver v. Morrow, 183 A. 739, 121 Conn. 697.

63. Conn.—Brock v. Waldron, 14 A. 2d 713, 127 Conn. 79—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614. Mass.—Burke v. Cook, 141 N.E. 585, 246 Mass. 518.

W.Va.—Fleming v. McMillan, 26 S.E. 2d 8, 125 W.Va. 354.

"pretty fast,"⁶⁴ "very fast,"⁶⁵ or "terrific,"⁶⁶ or that the vehicle was moving "at a good rate of speed"⁶⁷ or at a "pretty rapid gait,"⁶⁸ or that it came "of a sudden."⁶⁹ However, it has been held that a finding of negligence may be warranted on the basis of testimony that the vehicle traveled "quite fast," "quickly," and "rapidly."⁷⁰

Evidence as to speed is to be considered with other evidence in the case in determining whether rea-

sonable care was exercised by the driver;⁷¹ and this rule has been applied where there was evidence of fog⁷² or other obstructions of view,⁷³ rain, snow, and ice,⁷⁴ or where there was evidence that defendant's vehicle was swerving or zigzagging.⁷⁵

Circumstantial evidence may be sufficient to establish the speed at which a vehicle is being operated,⁷⁶ or to establish that the vehicle was negligently operated at an excessive speed,⁷⁷ and such evidence

64. Pa.—Steinbrecker v. Monaghan, 100 Pa.Super. 195.

65. Conn.—Nichols v. Nichols, 13 A. 2d 591, 126 Conn. 614.

Pa.—Wertz v. Shade, 182 A. 789, 121 Pa.Super. 4.

66. Wash.—Jamieson v. Taylor, 95 P.2d 791, 1 Wash.2d 217.

67. Pa.—Otis v. Kolsky, 94 Pa. Super. 548.

68. Tex.—Aycock v. Green, Civ.App. 94 S.W.2d 894, error dismissed.

69. Pa.—Pittsburgh Corrugated Paper Box Co. v. Luterman, 156 A. 631, 102 Pa.Super. 297.

70. N.H.—Labreque v. Childs, 55 A. 2d 473.

71. Ky.—Utilities Appliance Co. v. Toon's Adm'r, 45 S.W.2d 478, 241 Ky. 823.

72. U.S.—Nash v. Raun, C.C.A.Pa. 149 F.2d 885, certiorari denied 66 S.Ct. 99, 326 U.S. 758, 90 L.Ed. 455. Ind.—Gumz v. Campbell, 73 N.E.2d 345, 117 Ind.App. 494.

Mass.—Texeira v. Sundquist, 192 N. E. 611, 288 Mass. 93.

Minn.—Salera v. Schroeder, 237 N.W. 180, 183 Minn. 478.

73. Evidence held to establish negligence

Cal.—Continental Ins Co of New York v. Pacific Greyhound Lines, 111 P.2d 37, 43 Cal.App.2d Supp. 877.

Wis.—Leonard v. Bottomley, 245 N. W. 849, 210 Wis. 411, followed in 245 N.W. 852, 210 Wis 420, and 245 N.W. 853, 210 Wis. 421.

Evidence held to warrant finding of obstructed view

U.S.—Clark v. Remington, C.C.A.N. H., 55 F.2d 48.

74. Evidence held to establish negligence

U.S.—Parmiter v. U. S., D.C.Mass., 75 F.Supp. 823.

Ill.—Baker v. Dowling, 33 N.E.2d 508, 309 Ill.App. 572.

Iowa.—Richards v. Begenstos, 21 N. W.2d 23, 237 Iowa 398—Schalk v. Smith, 277 N.W. 303, 224 Iowa 904.

Va.—Hagaman v. Vanacore, 28 S.E.2d 638, 182 Va. 312.

Evidence held not to establish negligence

Conn.—Baum v. Atkinson, 3 A.2d 305, 125 Conn. 72.

Mass.—Reynolds v. Jacobucci, 58 N. E.2d 838, 317 Mass. 500—Sadak v. Tucker, 37 N.E.2d 495, 310 Mass. 153.

75. Evidence held to establish negligence

Cal.—Bushey v. Rigby, 92 P.2d 1032, 34 Cal.App.2d 41.

Fla.—Florida Motor Lines v. Casad, 124 So. 180, 98 Fla. 720, followed in 124 So. 181, 98 Fla. 726.

Ill.—Philpott v. Parham, 44 N.E.2d 934, 316 Ill.App. 278.

Kan.—Harshaw v. Kansas City Public Service Co., 139 P.2d 141, 157 Kan 95.

Ky.—Humphries v. Gray, 203 S.W.2d 8, 305 Ky. 205.

La.—Redden v. Hlythe, App., 12 So.2d 728.

Mass.—Wolfe v. Checker Taxi Co., 12 N.E.2d 849, 299 Mass. 225, 42 C.J. p 1236 note 37 [a] (18).

76. Ga.—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, opinion conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288. Iowa.—Davidson v. Vast, 10 N.W.2d 12, 233 Iowa 534.

77. Iowa.—Hawkins v. Burton, 281 N.W. 342, 225 Iowa 707.

Or.—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133—Greenslitt v. Three Bros. Baking Co., 133 P.2d 597, 170 Or. 345.

Pa.—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437—Green v. Gantz, Com.Pl., 31 Del.Co. 476.

Wash.—Gaskill v. Amadon, 38 P.2d 229, 179 Wash. 375

Circumstances held significant

(1) In general.

Ohio.—Solomon v. Mote, App., 49 N. E.2d 703.

Wash.—Vercruysse v. Cascade Laundry Co., 74 P.2d 920, 193 Wash. 184.

(2) Character of injuries sustained by occupants of vehicles involved in collision.

Or.—McVay v. Byars, 138 P.2d 210, 171 Or. 449.

Pa.—Kins v. Deere, 58 A.2d 335, 359 Pa. 106.

(3) Damage to plaintiff's vehicle and its contents.—Vercruysse v. Cascade Laundry Co., 74 P.2d 920, 193 Wash. 184.

(4) Distance which automobile causing an injury overshot point of accident before being brought to standstill

Iowa.—Hawkins v. Burton, 281 N.W. 342, 225 Iowa 707.

Pa.—Kins v. Deere, 58 A.2d 335, 359 Pa. 106.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618—Elmore v. Thompson, 14 Tenn.App. 78.

(5) Distance which object struck was moved by collision

Pa.—Kins v. Deere, 58 A.2d 335, 359 Pa. 106

Wash.—Vercruysse v. Cascade Laundry Co., 74 P.2d 920, 193 Wash. 184.

(6) Force of impact.

Iowa.—Hawkins v. Burton, 281 N.W. 342, 225 Iowa 707.

Pa.—Kins v. Deere, 58 A.2d 335, 359 Pa. 106—Jenkins v. Policy, 50 A.2d 32, 160 Pa.Super. 6.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618—Elmore v. Thompson, 14 Tenn.App. 78.

Evidence held sufficient

(1) To warrant inference of excessive speed.

Md.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151.

Wash.—Hunter v. Lincoln Stages, 297 P. 179, 161 Wash. 634.

(2) To warrant inference of excessive speed and lack of control.

Pa.—Lonasco v. Veill, 45 A.2d 417, 158 Pa.Super. 456.

Wis.—McGill v. Baumgart, 288 N.W. 799, 233 Wis. 86.

(3) To warrant inference that driver was negligent in failing to stop, or in driving too fast or too near to vehicles ahead of him.—Brenahan v. Manchester Coal & Ice Co., 188 A. 10, 88 N.H. 273.

(4) To warrant inference that defendant was proceeding in excess of speed limit.—Swartz v. Dahlquist, 30 N.W.2d 809, 320 Mich. 135.

Evidence held insufficient

La.—Lee v. Ferrin, App., 192 So. 387.

may be sufficient to overcome direct evidence as to speed.⁷⁸ Circumstances may be so persuasive of excessive speed as to require strong proof to establish the contrary.⁷⁹

(b) Skidding

The mere skidding of a motor vehicle is not in itself conclusive proof of negligence, although skidding may be considered with other circumstances in determining the question.

The mere skidding of a motor vehicle is not in

itself conclusive evidence of negligence,⁸⁰ but skidding may be considered with other circumstances in determining the question.⁸¹ A prima facie showing of negligence from proof that the vehicle skidded is overcome by evidence balancing, although not preponderating against, it.⁸²

b. Injuries to Persons or Property Not on Highway

Negligence resulting in injury to persons or property

78. Iowa.—Davidson v. Vast, 10 N. W.2d 12, 233 Iowa 534—Hawkins v. Burton, 281 N.W. 342, 225 Iowa 707.

Mo.—Bear v. Devore, App., 176 S.W. 2d 862.

79. La.—Bethancourt v. Bayhi, App., 141 So. 111—Giardina v. Massaro & Paterno, 3 La.App. 221.

80. Conn.—Nirenstein v. Sachs, 167 A. 822, 117 Conn. 343—James v. Von Schuckman, 162 A. 3, 115 Conn 490.

La.—Dupuy v. Godchaux Sugars, App., 184 So 730—Deichmann v. Gerard, App., 145 So. 30.

Me.—Marr v. Hicks, 1 A 2d 271, 136 Me. 33—Morin v. Carney, 165 A. 166, 132 Me. 25.

Md.—Stafford v. Zake, 20 A.2d 144, 179 Md. 460.

N.Y.—Gillman v. Grimm, 278 N.Y.S. 569, 154 Misc. 575.

Pa.—Miller v. Measmer, 44 A 2d 284, 353 Pa. 18—Eisenhower v. Hall's Motor Transit Co., 40 A.2d 458, 351 Pa. 200—Master v. Goldstein's Fruit & Produce, 23 A.2d 443, 344 Pa. 1—Lithgow v. Lithgow, 5 A 2d 573, 334 Pa. 262—Cirquitella v. C. C. Callaghan, Inc., 200 A. 588, 331 Pa. 465—Dahman v. Petrovich, 161 A. 550, 307 Pa. 298—Knoble v. Ritter, 20 A.2d 848, 145 Pa.Super. 149—Wertz v. Shade, 182 A. 789, 121 Pa Super. 4—Goldenberg v. Philadelphia Rural Transit Co., 170 A. 360, 112 Pa.Super. 163—Healey v. Robertson, 101 Pa.Super. 342—Hatch v. Robinson, 99 Pa.Super. 111—Commonwealth v. Shriver, 35 Pa.Dist & Co. 1—Krammes v. Tryon, Com.Pl., 48 Lanc.L.Rev. 493—Miller v. Rishel, Com.Pl., 5 Sch. Reg. 84.

Skidding as:

Negligence generally see supra § 298.

Not raising presumption or inference of negligence see supra § 511 (3) c.

81. Ind.—Acton v. Lowery, 34 N.E. 2d 972, 109 Ind.App. 581.

La.—Leitz v. Rosenthal, App., 166 So. 651.

Mass.—Goyette v. Amor, 2 N.E.2d 219, 294 Mass. 355.

Mo.—Bear v. Devore, App., 177 S.W. 2d 674—Bear v. Devore, App., 176 S.W.2d 862.

Pa.—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437—Glover v. Stoeltzlen, Com.Pl., 26 Erie Co. 178—Weaver v. Scranton Bus Co., Com.Pl., 44 Lack Jur. 233.

R.I.—Luiz v. Ingram, 190 A. 439, 57 R.I. 428—Peters v. United Electric Rys. Co., 189 A. 901, 57 R.I. 311.

Tenn.—Stanford v. Holloway, 157 S. W.2d 864, 25 Tenn App 379

Tex.—Akers v. Epperson, Civ.App., 172 S.W.2d 512, certified question answered 171 S.W.2d 483, 141 Tex. 189, 156 A.L.R. 1028.

Wash.—Hughes v. Wallace, 107 P.2d 910, 6 Wash 2d 396—Cook v. Rafferty, 93 P 2d 376, 200 Wash. 234—Eggert v. Schumacher, 22 P.2d 52, 173 Wash. 119.

W.Va.—Sigmon v. Mundy, 25 S.E.2d 636, 125 W.Va. 591.

Conduct prior to skidding

The inquiry in determining whether motorist was negligent in case of skidding of his automobile should be directed to motorist's conduct immediately preceding such skidding, including the speed of the automobile prior to the skidding and care in handling the automobile

Ohio—Haman v. Goodman, 17 Ohio Supp 30.

S.D.—Zeigler v. Ryan, 271 N.W. 767, 65 S.D. 110.

Evidence held to establish negligence

(1) In general.

U.S.—Andruss v. Nieto, C.C.A.Cal., 112 F.2d 250.

Tex.—Texas Steel Co. v. Rockholt, Civ.App., 142 S.W.2d 842, error refused.

(2) In operating vehicle that skidded into another held supported by evidence.

Cal.—Musante v. Guerrini, 13 P.2d 965, 125 Cal App. 556.

Conn.—C. A. Johnson, Inc., v. Bruce, 44 A.2d 917, 132 Conn. 429—Fogarty v. E. J. Kelley Co., 7 A.2d 851, 125 Conn. 605—De Antonio v. New Haven Dairy Co., 136 A. 567, 105 Conn. 663.

Ind.—Acton v. Lowery, 34 N.E.2d 972, 109 Ind.App. 587.

Iowa.—Luppes v. Harrison, 32 N.W. 2d 809.

Mass.—Arnold v. Brereton, 158 N.E. 671, 261 Mass. 238.

N.H.—Carroll v. Dane, 196 A. 626, 89 N.H. 233.

N.J.—First Nat. Acceptance Corporation v. Annett, 2 A.2d 650, 121 N.J.Law 356, affirmed 11 A.2d 106, 124 N.J.Law 78.

Ohio.—Bauman v. Sincovich, 27 N.E. 2d 772, 137 Ohio St. 21.

Okl.—Purity Ice Cream Co. v. Morgan, 71 P 2d 727, 180 Okl. 484.

Pa.—Kotlikoff v. Master, 27 A.2d 35, 345 Pa. 258—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437.

Tenn.—Stanford v. Holloway, 157 S. W.2d 864, 25 Tenn.App. 379.

Vt.—Nicholson v. Twin State Fruit Corporation, 29 A.2d 819, 113 Vt. 59.

Wash.—Tutewiler v. Shannon, 111 P. 2d 215, 8 Wash 2d 23—Cook v. Rafferty, 93 P 2d 376, 200 Wash. 234.

Wis.—Zenemann v. Gasser, 29 N.W. 2d 49, 251 Wis. 238.

Evidence held not to establish negligence

Ill.—Fisher v. Allen, App., 79 N.E.2d 529.

Pa.—Master v. Goldstein's Fruit & Produce, 23 A 2d 443, 344 Pa. 1.

Evidence held sufficient

(1) To authorize finding that skidding of defendant's automobile resulted from her own negligence in descending hill at excessive speed so as to lose control of automobile on icy pavement—Knoble v. Ritter, 20 A.2d 848, 145 Pa.Super. 149.

(2) To support finding that skidding was occasioned by the careless operation of the vehicle, either through excessive speed, inattention to the road, or improper use of brakes—Sigmon v. Mundy, 25 S.E. 2d 636, 125 W.Va. 591.

Evidence held insufficient

(1) To justify finding that driver of skidding automobile, which struck one putting chains on another automobile, was negligent in applying brakes—Byron v. O'Connor, 153 A. 809, 130 Me. 90.

(2) To warrant recovery.—Wertz v. Shade, 182 A. 789, 121 Pa.Super. 4—Cantakalli v. King, Pa.Com.Pl., 27 Del.Co. 304.

82. Cal.—Smith v. Hollander, 259 P. 958, 85 Cal.App. 535.

not on the highway must be established by a preponderance of the evidence, but it is not necessary to show the precise manner in which the accident occurred.

Negligence of defendant resulting in injury to persons or property not on the highway must be established by a preponderance of the evidence,⁸³ and, while a finding of negligence cannot be based on speculation and conjecture,⁸⁴ it is not necessary to show the precise manner in which the accident occurred.⁸⁵ Where defendant has the burden of establishing freedom from fault, a preponderance of

the evidence is required to meet the burden.⁸⁶

c. Injuries to Persons on Foot

- (1) In general
- (2) Lights, signals, and lookout
- (3) Speed and control; right of way

(1) In General

General principles relating to the weight and sufficiency of evidence have been applied with respect to proof of negligence in actions against the owner or operator of motor vehicles for injuries to persons on foot.

83. Cal.—*Morales v. L. W. Blinn Lumber Co.*, 49 P.2d 621, 9 Cal. App.2d 292.

Iowa.—*Hatfield v. White Line Motor Freight Co.*, 272 N.W. 99, 223 Iowa 7.

Pa.—*Bickel v. Horst*, 38 Berks Co. 243.

Evidence held to establish negligence
(1) In general.

Cal.—*Turnipseed v. Hoffman*, 144 P. 2d 797, 23 Cal.2d 532—*Taylor v. Oakland Scavenger Co.*, 110 P.2d 1044, 17 Cal.2d 594—*Beck v. Sirota*, 109 P.2d 419, 42 Cal.App.2d 551—*Martin, Continental Casualty Co., Intervener, v. Clinton Const. Co.*, 105 P.2d 1029, 41 Cal.App.2d 35, rehearing denied 106 P.2d 629, 41 Cal. App.2d 35.

La.—*Blackburn v. Ainsworth*, App. 23 So.2d 696—*Carroll v. Louisiana Iron & Supply Co.*, App., 17 So.2d 650—*Roos v. Metropolitan Casualty Ins. Co. of Newark, N. J.*, App. 195 So. 657—*Dunn v. Baker-Lawhon & Ford, App.*, 188 So. 415.

Me.—*Wood v. Balzano*, 15 A.2d 188, 137 Me. 87.

Md.—*State, to Use of State Accident Fund v. Carroll-Howard Supply Co.*, 37 A.2d 330, 183 Md. 293.

Minn.—*Murphy v. Dyson*, 25 N.W.2d 291, 223 Minn. 19.

Miss.—*Thomas v. Feibelman*, 145 So. 607, 164 Miss. 699.

N.Y.—*Donnelly v. Kilby Bros.*, 36 N. Y.S.2d 38, 264 App.Div. 931, appeal denied 37 N.Y.S.2d 284, 264 App. Div. 960—*Weeks v. Byrnes*, 33 N.Y. S.2d 65.

Pa.—*Itzkovich v. Royal Electrotape Co.*, 100 Pa.Super. 310—*Obenauer v. Hunter*, 89 Pa.Super. 204.

Tenn.—*Lee A. Gridley Const. Co. v. Maryland Casualty Co.*, 15 Tenn. App. 229.

Va.—*P. L. Farmer, Inc. v. Cimino*, 41 S.E.2d 1, 185 Va. 965—*Virginia Stage Lines v. Spencer*, 36 S.E. 522, 184 Va. 870.

(2) At gasoline service station.
Conn.—*Rosa v. American Oil Co.*, 30 A.2d 385, 129 Conn. 585.

N.Y.—*Stockham v. Teska*, 40 N.Y.S. 2d 460.

Or.—*McMillan v. Kik*, 181 P.2d 128.
Tex.—*Gillette Motor Transport v. Lucas, Civ.App.*, 138 S.W.2d 887, error dismissed, judgment correct.

(3) Collision with building adjoining highway

Conn.—*Block v. Pascucci*, 149 A. 210, 111 Conn. 58.

Ill.—*Keogh v. Millspaugh*, 2 N.E.2d 584, 285 Ill.App. 588.

La.—*Barret v. Caddo Transfer & Warehouse Co.*, 116 So. 563, 165 La. 1075, 58 A.L.R. 261—*Saenger-Ehrlich Enterprises v. Stephens*, 120 So. 778, 10 La.App. 188.

N.C.—*Carter v. Thurston Motor Lines*, 41 S.E.2d 586, 227 N.C. 193.
Ohio.—*Scovanner v. Toelke*, 163 N.E. 493, 119 Ohio St. 256.

Pa.—*Mitchell v. Marinelli*, 52 A.2d 203.

(4) Damage to building resulting from collision of motor vehicles.

Cal.—*Cooper v. San Diego Elec. Ry. Co.*, 194 P.2d 559—*Wood v. Moore*, 148 P.2d 91, 64 Cal.App.2d 144.

Kan.—*Theno v. Cuthbertson*, 36 P. 2d 79, 140 Kan. 233.

La.—*Security Ins. Co. v. Couvillion*, App., 16 So.2d 262.

Minn.—*Waldron v. Page*, 253 N.W. 894, 191 Minn. 302.

Pa.—*Kissell v. Motor Age Transit Lines*, 53 A.2d 593, 357 Pa. 204.

Wash.—*Newkirk v. Workman*, 270 P. 125, 149 Wash. 84.

(5) Damage to building resulting from negligence of defendant in failing to keep proper lookout and yield right of way to vehicle colliding with building in avoiding collision with defendant.—*Gumm v. Koepke*, 278 N.W. 447, 227 Wis. 635.

(6) On private way.

Cal.—*Yoshiko Yamauchi v. O'Neill*, 102 P.2d 365, 38 Cal.App.2d 703—*Gay v. Cadwallader-Gibson Co.*, 93 P.2d 1051, 34 Cal.App.2d 566—*Cambou v. Marty*, 277 P. 365, 98 Cal. App. 598.

Conn.—*Kosinski v. Kosinski*, 172 A. 924, 118 Conn. 701.

Ill.—*Johnson v. Balmes*, 27 N.E.2d 570, 305 Ill.App. 623.

La.—*Jackson v. State Farm Mut. Auto. Ins. Co.*, App., 32 So.2d 52—*Blackburn v. Ainsworth*, App., 23 So.2d 696.

Mass.—*D'Ambrosia v. Brest*, 19 N.E. 2d 53, 302 Mass. 318.

Mich.—*Reedy v. Goodin*, 381 N.W. 377, 285 Mich. 614.

N.Y.—*Brown v. Babcock*, 40 N.Y.S. 2d 428, 265 App.Div. 596.

(7) Striking stone with sufficient force to hurl it through window.—*Burruano v. Public Service Transp. Co.*, 144 A. 585, 7 N.J.Misc. 169.

(8) Unloading truck.—*Foster v. Pestana*, 177 P.2d 54, 77 Cal.App.2d 885.

Evidence held not to establish negligence

La.—*Deimel v. Etheridge*, App., 198 So. 537—*Rogers v. F. Strauss & Son*, App., 194 So. 136—*Lemoine v. Thomas*, App., 157 So. 170

Mass.—*Theatres Co. of Boston v. American Ry. Express Co.*, 166 N. E. 557, 267 Mass. 178.

Mich.—*Wortman v. R. L. Coolsack Const. Co.*, 9 N.W.2d 50, 305 Mich. 176.

Minn.—*Norton v. Connolly*, 16 N.W. 2d 170, 218 Minn. 366.

Mo.—*Thompson v. A. Morgan Hauling & Express Co.*, App., 26 S.W. 2d 807.

Neb.—*Eaton v. Merritt*, 281 N.W. 620, 135 Neb. 363.

N.Y.—*Gloshinsky v. Bergen Milk Transp. Co.*, 17 N.E.2d 766, 279 N. Y. 54—*Mandallos v. Sheffield Farms Co.*, 291 N.Y.S. 201, 249 App. Div. 647—*Bush v. Goodno*, 251 N. Y.S. 271, 233 App.Div. 152, affirmed 182 N.E. 171, 259 N.Y. 538.

S.D.—*Larson v. Loucks*, 6 N.W.2d 436, 69 S.D. 60.

Evidence held to show plaintiff did not assume risk

Cal.—*Martin, Continental Casualty Co., Intervener, v. Clinton Const. Co.*, 105 P.2d 1029, 41 Cal.App.2d 35, rehearing denied 106 P.2d 629, 41 Cal.App.2d 35.

Or.—*Motejl v. Greenwood*, 138 P.2d 216, 171 Or. 469.

84. S.D.—*Larson v. Loucks*, 6 N.W. 2d 436, 69 S.D. 60.

85. Mass.—*D'Ambrosia v. Brest*, 19 N.E.2d 53, 302 Mass. 318.

86. La.—*Tymon v. Toye Bros. Yellow Cab Co.*, App., 180 So. 839.

Evidence held insufficient
To overcome prima facie case of negligence.—*B & B Cut Stone Co. v. Uhler, La.App.*, 1 So.2d 149.

The general rule requiring proof by a preponderance of the evidence applies with respect to proof of negligence in actions for injuries to persons on foot,³⁷ and, in accordance with this rule, it has been

37. Ill.—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1. N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Va.—Darden v. Murphy, 11 S.E.2d 579, 176 Va. 511.

Evidence held sufficient

(1) In general.

Cal.—Mitrovitch v. Graves, 78 P.2d 227, 25 Cal.App.2d 649.

Mass.—Hall v. Shaln, 197 N.E. 437, 291 Mass. 506.

N.Y.—Wood v. Woodlawn Improvement Ass'n Transp. Corporation, 214 N.Y.S. 398, 215 App.Div. 628, affirmed 161 N.E. 197, 247 N.Y. 598.

Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.

(2) To establish prima facie case of negligence.—Emert v. Wilkerson, 7 Tenn App. 269.

(3) To justify finding that operator of motor vehicle was free from negligence.

Cal.—Thompson v. Held, 183 P.2d 711, 81 Cal App 2d 275—Fletcher v. Lloyd, 242 P. 746, 75 Cal App. 205.

Ill.—Kos v. Linden, 45 N.E.2d 105, 316 Ill App. 450—Bezouskas v. Kruger, 19 N.E.2d 116, 298 Ill App 462—Coleman v. Geo. Wienhoeber, Inc., 9 N.E.2d 265, 291 Ill App 603.

Ky.—Eads' Adm'r v. Pureful, 158 S.W.2d 645, 289 Ky. 350—Smith v. Dunning, 122 S.W.2d 781, 275 Ky. 733.

La.—Matassa v. Economy Cab Co., App., 158 So. 239—Owens v. Tisdale, App., 153 So 564—Johnson v. Zeringue, App., 151 So. 105.

(4) To support finding or verdict that driver was negligent

Cal.—Nuttall v. Walton, 283 P. 66—Carrisosa v. Southern Service Co., 16 P.2d 1032, 128 Cal.App. 160—Stealey v. Chessum, 11 P.2d 428, 123 Cal.App. 446—Corcoran v. Pacific Auto Stages, 2 P.2d 225, 116 Cal.App. 35—Gibbons v. Naritoka, 283 P. 845, 102 Cal App. 669—Peters v. United Studios, 277 P. 156, 98 Cal.App. 378—Lang v. McKimney Blueprint Paper Co., 266 P. 616, 81 Cal.App. 84—Davis v. Tanner, 262 P. 1106, 88 Cal.App 67—Wright v. Foreman, 261 P. 481, 86 Cal.App. 595—Phillips v. Pickwick Stages, Northern Division, 259 P. 968, 85 Cal.App. 571—Fletcher v. Lloyd, 242 P. 746, 75 Cal.App. 205—Whitmore v. Smith, 241 P. 919, 76 Cal.App. 125.

Idaho.—Wyland v. Twin Falls Canal Co., 285 P. 676, 48 Idaho 789.

Kan.—Moore v. Wichita Yellow Cab Co., 12 P.2d 736, 136 Kan. 99—Briley v. Nussbaum, 252 P. 228,

122 Kan. 438, modified on other grounds 254 P. 351, 123 Kan. 58.

Ky.—Norfolk & W. Ry. Co. v. Hensley's Adm'r, 67 S.W.2d 510, 252 Ky. 347.

La.—Neyrey v. Maillet, App., 21 So. 2d 158—Vuillemot v. August J. Claverie & Co., 125 So. 168, 12 La. App. 236—Stone v. Balon Rouge Yellow Cab Co., 124 So. 778, 12 La. App 520—Hanson v. Texas Co., 3 La.App. 46.

Me.—Cole v. Wilson, 143 A. 178, 127 Me. 316.

Mass.—Tagerman v. Railway Express Agency, 33 N.E.2d 569, 308 Mass. 517—Tookmanian v. Fanning, 31 N.E.2d 536, 308 Mass 162—Hennessey v. Moynihan, 172 N.E. 93, 272 Mass 165

Minn.—Flanagan v. Twin City Motor Bus Co., 238 N.W. 326, 184 Minn. 219.

N.J.—Ceslak v. Krause, 156 A. 461, 108 N.J Law 350—Redell v. Mandel, 155 A. 383, 108 N.J Law 22—Ryerson v. Leisel, 157 A 132, 9 N.J Misc. 1151—Redfield v. Hurff, 152 A. 451, 9 N.J Misc 15.

N.Y.—McCabe v. Smith, 59 N.Y.S.2d 574, 270 App Div. 773, affirmed 68 N.E.2d 48, 295 N.Y. 959.

Okl.—Gideon v. Jones, 70 P.2d 814, 180 Okl. 621.

Pa.—Neidlinger v. Haines, Com.Pl., 5 Sch.Reg. 51.

R.I.—Clifford v. Rose, 158 A. 876.

Tenn.—Cochran v. Gaither, 9 Tenn. App. 247—Taylor v. Arnold, 2 Tenn.App. 246

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Va.—Samples v. Trimble, 182 S.E. 247, 165 Va. 306—Virginia Electric & Power Co. v. Evich, 146 S.E. 265, 152 Va 236

Wis.—Feller v. Leonard, 239 N.W. 498, 207 Wis 43—Knutson v. Stangl, 220 N.W. 375, 196 Wis. 334—Benedict v. Berg, 281 N.W. 650, 229 Wis. 1—Felix v. Soderberg, 240 N.W. 836, 207 Wis. 76. 42 C.J. p 1233 note 27 [a] (2).

(5) To support verdict against both owners of colliding automobiles.—McDonald v. Robinson, 224 N.W. 820, 207 Iowa 1293, 62 A.L.R. 1119, followed in McDonald v. Padzensky, 224 N.W. 824.

(6) To support verdict either for or against automobile driver.—Wilkins v. Hopkins, 128 S.W.2d 772, 278 Ky. 280.

(7) To support verdict or judgment for defendant.

Ky.—Cline v. Cook, 287 S.W. 927, 216 Ky. 366—Finnegan v. Floyd Garage & Auto Livery Co., 283 S. W. 402, 214 Ky. 416.

La.—Pierre v. Templeman Bros., App., 164 So. 259.

Ohio.—Woodward v. Gray, 188 N.E. 304, 46 Ohio App. 177.

(8) To support verdict or judgment for plaintiff.

Cal.—Umemoto v. McDonald, 58 P. 2d 1274, 6 Cal.2d 587—Bowles v. Stanley, 278 P. 441, 207 Cal. 362—Rinker v. Carl, 283 P. 317, 102 Cal. App. 436.

Conn.—Smart v. Bissonette, 138 A. 365, 106 Conn. 447.

Kan.—O'Connell v. Lusk, 250 P. 1059 122 Kan. 186.

La.—Vicaro v. New Amsterdam Casualty Co., App., 160 So. 177—Caloway v. Service Cab Co., App., 158 So. 848—Vuillemot v. August J. Claverie & Co., 125 So. 168, 12 La. App. 236.

Mich.—Greenwood v. Faber, 207 N. W. 911, 234 Mich. 217.

Minn.—Yorek v. Potter, 207 N.W. 188, 166 Minn. 131.

N.J.—Hargrave v. Stockloss, 21 A. 2d 820, 127 N.J.Law 262—Sigrist v. Noon, 147 A. 640, 7 N.J.Misc. 1004—Morberg v. Morris & Co., 147 A. 469, 7 N.J.Misc. 861.

N.Y.—Beare v. Everett, 280 N.Y.S. 962, 245 App.Div. 783, affirmed 199 N.E. 697, 269 N.Y. 612.

N.C.—Mangum v. Rogers, 24 S.E.2d 256, 222 N.C. 761.

Okl.—Emerson v. Pasker, 267 P. 480, 131 Okl. 13.

Pa.—Partridge v. Scott Bros., 158 A. 790, 306 Pa. 60.

R.I.—Smith v. Di Maio, 163 A. 230.

Tex.—Peden Iron & Steel Co. v. Claflin, Civ.App., 146 S.W.2d 1062.

Error dismissed, judgment correct Va.—Yellow Cab Corporation of Abingdon v. Henderson, 16 S.E.2d 389, 178 Va 207—Paytes v Davis, 157 S.E. 557, 156 Va. 229.

Wash.—Settles v. Johnson, 298 P. 690, 162 Wash. 466.

Evidence held insufficient

(1) In general.

Iowa.—Ward v. Zerzanek, 289 N.W. 443, 227 Iowa 918.

La.—Matassa v. Economy Cab Co., App., 158 So. 239—Caston v. Connell, App., 144 So. 633, rehearing denied 146 So 483—Neville v. Postal Telegraph Cable Co., 126 So. 720, 13 La App. 76.

Mass.—Engel v. Checker Taxi Co., 176 N.E. 179, 275 Mass. 471.

Vt.—McKilryher v. Yager, 24 A.2d 331, 112 Vt. 336.

(2) To show negligence.

Mass.—Sylvester v. Shea, 182 N.E. 916, 250 Mass. 508—Engel v. Checker Taxi Co., 176 N.E. 179, 275 Mass. 471.

Mich.—Gordon v. Sears, Roebuck & Co., 270 N.W. 769, 278 Mich. 513.

held that proof beyond a reasonable doubt is not required.⁸⁸ Vague testimony which is at variance with any opportunity for observation by the witness is entitled to no weight with the jury against positive testimony to the contrary.⁸⁹ Negligence may be established by circumstantial evidence,⁹⁰ but the circumstances must be proved, and not themselves presumed,⁹¹ and the circumstantial evidence relied on must be so strong as to preclude the possibility of injury in any other way.⁹² The jury may not

resort to surmise or conjecture on the question of whose fault caused the collision;⁹³ there must be some proof as to how the accident occurred.⁹⁴ The mere fact that the driver did not know he had struck a pedestrian is not sufficient to prove negligence.⁹⁵

The rule requiring that negligence must be proved by a preponderance of the evidence has been applied where injury occurred while the pedestrian was attempting to cross a street or way⁹⁶ and the rule has frequently been applied where the injury

Neb.—Neal v Union Transfer Co., 255 N.W. 544, 127 Neb. 443

N.Y.—Skoller v. Short, 35 N.Y.S.2d 68.

Pa.—Sajatovich v. Traction Bus Co., 172 A. 148, 314 Pa. 569—Watson v. Lit Bros., 135 A. 631, 288 Pa. 175—Todd v. Simpers, Com Pl., 29 Del.Co. 503.

Wis.—Besser v. Hill, 271 N.W. 921, 224 Wis. 211.

(3) To support verdict for plaintiff.

Ill.—Duckett v. Chicago & W. T. Rys., 30 N.E.2d 937, 307 Ill.App. 671.

Kan.—Hendren v. Snyder, 53 P.2d 472, 143 Kan. 34.

La.—Ellis v. Edwards, App., 183 So. 116—Lacara v. West Monroe Gin Co., App., 181 So. 686—Tartt v. Spizer, App., 174 So. 677.

N.Y.—Waters v. Brooklyn Bus Corporation, 15 N.Y.S.2d 299, 258 App. Div. 755—Tanner v. Schoenbeck, 246 N.Y.S. 617, 231 App.Div. 452.

Pa.—Skrutski v. Cochran, 19 A.2d 106, 341 Pa. 289—Sajatovich v. Traction Bus Co., 172 A. 148, 314 Pa. 569.

88. Ill.—Wargo v. Buske, 273 Ill. App. 28.

N.Y.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

89. U.S.—Proel v. Nugent, C.C.A.N. H., 97 F.2d 353.

90. Ala.—Harbin v. Moore, 175 So. 264, 234 Ala. 266.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Pa.—Miller v. Siebert, 145 A. 909, 296 Pa. 400—Hoffman v. Herman, 163 A. 452, 107 Pa.Super. 92.

Evidence held sufficient

Cal.—Tucker v. City and County of San Francisco, 296 P. 101, 111 Cal. App. 720.

Mass.—Hall v. Shain, 197 N.E. 437, 291 Mass. 506.

N.Y.—Ockerman v. Johnson, 70 N.Y. S.2d 98, 272 App.Div. 846.

Pa.—Ludwig v. Troutman, Com.Pl., 60 Montg Co. 65.

91. Ala.—Harbin v. Moore, 175 So. 264, 234 Ala. 266.

92. Pa.—Skrutski v. Cochran, 19 A. 2d 106, 341 Pa. 289—Pfendler v. Speer, 195 A. 618, 323 Pa. 443.

Circumstantial evidence held insufficient

To show that driver of automobile failed to use ordinary care—Vaughn v. Huff, 41 S.E.2d 482, 186 Va. 144.

93. Mass.—Clark v. C. E. Fav Co., 183 N.E. 423, 281 Mass. 210.

94. Pa.—Whalen v. Yellow Cab Co., 169 A. 97, 313 Pa. 97.

95. Pa.—Whalen v. Yellow Cab Co. supra.

96. Ill.—Wargo v. Buske, 273 Ill. App. 28.

Tex.—Owl Taxi Service v. Saludis, Civ.App., 122 S.W.2d 225, error dismissed.

Reasonable certainty

Pedestrian struck by motor vehicle while crossing street must make out case with reasonable certainty—Thomas v. Natural Gas Producing Co. of Louisiana, 121 So. 649, 9 La.App. 680.

Place of impact

(1) There is no rule establishing place of impact between automobile and pedestrian from position of pedestrians body and location of blood stains when circumstances show that pedestrian was struck with tremendous force—Delfosse v. Bresnahan, 9 N.W.2d 866, 305 Mich. 621.

(2) Evidence was held to establish that pedestrian was in street when struck by automobile, not between curb and sidewalk—Thomas v. Natural Gas Producing Co. of Louisiana, 121 So. 649, 9 La.App. 680.

Evidence held sufficient

(1) To support finding or verdict that operator of motor vehicle was negligent.

Cal.—Filson v. Balkins, 273 P. 578, 206 Cal. 209—Sartori v. Granucci, 266 P. 280, 204 Cal. 28—Lang v. Barry, 161 P.2d 949, 71 Cal.App.2d 121—Guillot v. Hagman, 86 P.2d 865, 30 Cal.App.2d 582—Grant v. Ryon, 53 P.2d 170, 11 Cal.App.2d 101—Jones v. Barion, 283 P. 885, 103 Cal.App. 59.

Conn.—Chase v. Fitzgerald, 45 A.2d 789, 132 Conn. 461, 163 A.L.R. 247—Squires v. Reynolds, 5 A.2d 877, 125 Conn. 366—Alston v. Consolidated Motor Lines, 173 A. 899, 118

Conn. 707—Spagnola v. New Methodist Laundry Co., 152 A. 403, 112 Conn. 399.

Ky.—Davidson v. Ratliffe, 126 S.W. 2d 827, 277 Ky. 371.

La.—Law v. Osterland, 3 So.2d 680, 198 La. 421—Davidson v. American Drug Stores, App. 175 So. 157—Wall v. Aetna Casualty & Surety Co., App. 167 So. 903—Taylor v. Shreveport Yellow Cabs, App., 163 So. 737—Landry v. Checker Cab Co., 122 So. 912, 10 La.App. 723.

Mich.—Eagan v. Edwards, 293 N.W. 641, 294 Mich. 260—Pospeck v. Ellingson, 241 N.W. 261, 257 Mich. 212.

Minn.—Saunders v. Yellow Cab Corporation of Minnesota, 233 N.W. 539, 182 Minn. 62.

N.J.—Coari v. Lolli, 158 A. 820, 10 N.J.Misc. 285.

N.Y.—Bernegger v. Brooklyn Bus Corporation, 300 N.Y.S. 149, 252 App.Div. 880.

Ohio—Meier v. Joseph R. Peebles Sons Co., 11 N.E.2d 707, 57 Ohio App. 80.

Pa.—Adams v. Armour & Co., 16 A. 2d 142, 142 Pa.Super. 280—Lowers v. Zuker, 157 A. 339, 102 Pa.Super. 581.

Wash.—Shea v. Yellow Cab Co. of Spokane, 49 P.2d 925, 184 Wash. 109.

Wis.—Langworthy v. Reisinger, 23 N.W.2d 482, 249 Wis. 24, followed in 23 N.W.2d 485, 249 Wis. 29—Risch v. Lawhead, 248 N.W. 127, 211 Wis. 270.

42 C.J. p. 1233 note 27 [a] (17).

(2) To support finding that operator of motor vehicle was not negligent.

Cal.—Garcia v. Conrad, 104 P.2d 627, 40 Cal.App.2d 167—Shedd v. Downie, 87 P.2d 895, 31 Cal.App.2d 104—Bottl v. Savill, 275 P. 1029, 97 Cal.App. 524.

Ill.—Schmidt v. Anderson, 21 N.E. 2d 825, 301 Ill.App. 28—Young v. United Cab & Drivurself, 6 N.E. 2d 283, 288 Ill.App. 634.

La.—Hebert v. Meibaum, 24 So.2d 297, 209 La. 156.

Mass.—Keefe v. McCarthy, 3 N.E. 2d 1013, 294 Mass. 567.

Va.—Yellow Cab Corporation of Ab-

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ing to cross the street or highway at a place between intersections.⁹⁸ Furthermore, the rule has been applied in actions involving injuries to persons who were injured while pushing or cranking a

vehicle,⁹⁹ or while entering or leaving a vehicle,¹ or while leading or driving animals,² or while standing or lying on or near a street or way,³ or while the injured person was standing or lying on a side-

Cola Bottling Co. v. Wheeler, 193 N.E. 385, 99 Ind.App. 502.

Minn.—Plante v. Pulaski, 248 N.W. 64, 186 Minn. 280.

Ohio.—Schwab v. Keeler, 79 N.E.2d 176, 81 Ohio App. 291—Reed v. Hensel, 159 N.E. 843, 26 Ohio App. 79.

Okl.—Lamerton v. McGill, 17 P.2d 374, 161 Okl. 97—Newell v. Musgrove, 264 P. 156, 129 Okl. 207.

Pa.—Clark v. Horowitz, 143 A. 131, 293 Pa. 441—Catarious v. Benjamin, 100 Pa.Super. 184.

Va.—Lucas v. Craft, 170 S.E. 836, 161 Va. 228.

Wash.—Young v. Smith, 7 P.2d 1, 166 Wash. 411.

Evidence held insufficient

(1) In general.

Cal.—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63.

Kan.—Coffman v. Shearer, 34 P.2d 97, 140 Kan. 176.

N.Y.—Carp v. Wilson, 9 N.Y.S.2d 90, 256 App.Div. 165, affirmed 24 N.E.2d 992, 282 N.Y. 579.

Pa.—Balducci v. Cutler, 47 A.2d 643, 354 Pa. 436.

Va.—Bailey v. Fore, 177 S.E. 100, 163 Va. 611.

(2) To establish negligence.

La.—Webb v. Baton Rouge Bus Co., App., 15 So.2d 646—Roberts v. Duracher, App., 196 So. 576—Harrison v. Carlisle, 121 So. 216, 9 La.App. 517.

Md.—Nicholson v. Kreczmer, 13 A.2d 596, 178 Md. 680.

Mass.—Kneizys v. Stone, 7 N.E.2d 425, 297 Mass. 31.

Pa.—Stanalonis v. Branch Motor Exp. Co., 57 A.2d 866, 358 Pa. 426.

98. Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

Ky.—Whitehead's Adm'r v. Peter Knopf's Sons, 90 S.W.2d 709, 262 Ky. 493.

La.—Jones v. American Mut. Liability Ins. Co., App., 189 So. 169—Jordan v. Ortlieb, App., 148 So. 95.

Me.—Page v. Moulton, 141 A. 183, 127 Me. 80.

Evidence held to establish negligence

Cal.—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

Minn.—Hollander v. Dietrich, 232 N. W. 630, 181 Minn. 376—Brazney v. Barnard, 211 N.W. 949, 169 Minn. 501.

Tex.—Seinsheimer v. Burkhart, Civ. App., 93 S.W.2d 1231, modified on other grounds 122 S.W.2d 1063, 132 Tex. 336.

Wis.—Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519.

Evidence held not to establish negligence

Cal.—Fox v. Sherwood, 45 P.2d 1026, 7 Cal.App.2d 265—Carlson v. Stan-

bitz, 45 P.2d 820, 7 Cal.App.2d 455

—Underhill v. Peterson, 293 P. 861, 110 Cal.App. 221.

Colo.—Fabling v. Jones, 114 P.2d 1100, 108 Colo. 144.

Ill.—Koll v. Mitchell, 69 N.E.2d 703, 330 Ill.App. 132.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

La.—Thompson v. Dyer, App., 1 So. 2d 433—Walker v. Mire, App., 197

So. 798—Miorlana v. Star Checker Cab Co., 135 So. 724, 18 La.App. 333.

Md.—Barker v. Whitter, 170 A. 578, 166 Md. 33.

Pa.—Maguire v. Brogin, 171 A. 578, 314 Pa. 306—Cuneo v. Fayette County, Com.Pl., 5 Fay L.J. 138.

Wis.—Weber v. Barrett, 298 N.W. 53, 238 Wis. 50.

99. Ill.—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1.

Evidence held sufficient

(1) To support verdict for plaintiff—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1.

(2) To sustain finding of negligence.—Bell v. Weiner, 129 A. 339, 46 R.I. 478—42 C.J. p 1233 note 27 [a] (18), (19).

(3) To warrant verdict denying recovery.—McGoorty v. Benhart, 27 N. E.2d 289, 305 Ill.App. 458.

1. Ky.—Clifton v. McMakin, 157 S. W.2d 85, 288 Ky. 806.

N.Y.—Hamm v. Queens-Nassau Transit Lines, 20 N.Y.S.2d 849, 260 App.Div. 106.

Evidence held sufficient

(1) To establish negligence.

U.S.—Valanda v. Baum & Reissman, D.C.Pa., 31 F.Supp. 71, reversed on other grounds, C.C.A., 113 F.2d 188.

Ill.—McNally v. Chauncy Body Corporation, 42 N.E.2d 853, 315 Ill.App. 190—A. L. Strachan & Son v. Illinois Brick Teaming Co., 263 Ill. App. 481.

Me.—Blanchette v. Miles, 27 A.2d 396, 139 Me. 70.

Mass.—Smithell v. Murphy, 41 N.E.2d 283, 311 Mass. 745—Campbell v. Cairns, 20 N.E.2d 427, 302 Mass. 584.

N.J.—Heinsmann v. Kumpf, 153 A. 370, 9 N.J.Misc. 265.

Ohio.—Meier v. Joseph R. Peebles Sons Co., 11 N.E.2d 707, 57 Ohio App. 80.

Wis.—Bump v. Voights, 249 N.W. 508, 212 Wis. 256.

(2) To establish gross negligence.

—Racy Cream Co. v. Walden, 1 Tenn. App. 653.

Evidence held insufficient

Ill.—Kutrzeba v. Solewski, 37 N.E.2d 370, 311 Ill.App. 603.

Mass.—Abrahams v. Rice, 27 N.E.2d 193, 306 Mass. 24.

2. N.M.—Lopez v. Townsend, 82 P. 2d 921, 42 N.M. 601.

Evidence held to establish negligence

Mass.—Powers v. Loring, 121 N.E. 425, 231 Mass. 458.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Va.—Clay v. Bishop, 30 S.E.2d 585, 182 Va. 746.

3. Ill.—Loeb v. Corrie, 65 N.E.2d 28, 327 Ill.App. 660.

Circumstances considered

Driver's speed and fact that he was driving close behind automobile along rough, narrow road, at time of striking pedestrian standing beside road at night, were circumstances to be considered by jury on question of driver's care in action for injuries to pedestrian.—Dorrien v. Sirois, 175 A. 236, 87 N.H. 144.

Evidence held sufficient

(1) In general.

La.—Laguens v. Masera, 3 La.App. 762.

Tenn.—Stone v. O'Neal, 90 S.W.2d 548, 19 Tenn.App. 512.

(2) To support verdict or finding that defendant was not negligent. Conn.—Buonanno v. Cameron, 41 A. 2d 107, 131 Conn. 513.

Ill.—Taylor v. City of Berwyn, 17 N. E.2d 1007, 297 Ill.App. 417, affirmed 22 N.E.2d 930, 372 Ill. 124.

(3) To sustain finding that defendant driver was negligent.

Cal.—Bright v. Zabler, 111 P.2d 387, 43 Cal.App.2d 706.

Conn.—Atkins v. Varrone, 14 A.2d 731, 127 Conn. 156.

Ill.—Kornacke v. Blomseth, 4 N.E.2d 792, 287 Ill.App. 615.

Kan.—Waltmire v. Ford, 78 P.2d 893, 147 Kan. 732.

Md.—Fotterall v. Hilleary, 13 A.2d 358, 178 Md. 335.

Neb.—Tullis v. Blixt, 285 N.W. 307, 136 Neb. 142.

N.J.—Schoenfelder v. Pope, 158 A. 828, 10 N.J.Misc. 247—McCormack v. Haines, 154 A. 738, 9 N.J.Misc. 547—Hall v. Panciera, 136 A. 332, 5 N.J.Misc. 281.

Okl.—Martin v. McLain, 87 P.2d 1075, 184 Okl. 418.

Pa.—McNeal v. Spencer, 25 A.2d 147, 344 Pa. 417.

Tenn.—Henry v. Sharp, 9 Tenn.App. 850.

walk⁴ or while he was walking along a street or way.⁵

(2) Lights, Signals, and Lookout

In actions against the owner or operator of a motor

Va.—Thornton v. Downes, 14 S.E.2d 345, 177 Va. 451.

W.Va.—Utt v. Herold, 34 S.E.2d 357, 127 W.Va. 719.

Wis.—Liebenstein v. Eisele, 284 N.W. 525, 230 Wis. 521.

42 C.J. p 1233 note 27 [a] (20).

(4) To sustain judgment for death or injury of pedestrian.

Cal.—Christopher v. City of Los Angeles, 56 P.2d 539, 13 Cal.App.2d 118—Straftotis v. Daniels, 265 P. 558, 90 Cal.App. 144.

Pa.—Derricotte v. Ulitsky, 45 A.2d 5, 353 Pa. 309.

(5) To warrant finding that greater care is required of driver proceeding in wrong direction in one-way street than when he is proceeding in same direction as others go.—Blanco v. Scott Bros., 175 A. 721, 115 Pa. Super. 482.

Evidence held insufficient

(1) In general.—Ruh v. Hyle, 138 A. 104, 5 N.J. Misc. 580

(2) To show negligence. Cal.—Lake v. Churchill, 67 P.2d 107, 20 Cal. App. 2d 411.

Ill.—Swanson v. Progress Elec. Co., 67 N.E.2d 426, 329 Ill. App. 184.

La.—Buttitta v. Varino, App., 197 So. 331.

Pa.—McNeal v. Spencer, 25 A.2d 147, 314 Pa. 417—Fox v. Shoemaker, 193 A. 353, 127 Pa. Super. 264

Tex.—Comet Motor Freight Lines v. Holmes, Civ. App., 175 S.W.2d 464, error refused.

Va.—Willard Stores v. Cornnell, 23 S.E.2d 761, 181 Va. 113.

Wis.—Weddeck v. Grimes, 282 N.W. 593, 229 Wis. 448.

(3) To exonerate driver from negligence.—Whipple v. Lirette, 124 So. 160, 11 La. App. 485.

4. Ill.—Zister v. Pollack, 13 N.E.2d 517, 294 Ill. App. 602.

Va.—Virginia Electric & Power Co. v. Mercer, 171 S.E. 495, 161 Va. 666.

Precise manner of injury

In action for death of pedestrian who was struck by bus which was being backed over sidewalk on which pedestrian was walking, it was not necessary for plaintiff to show precise manner in which bus came into contact with pedestrian.—Thomas v. Spinney, 39 N.E.2d 753, 310 Mass. 749.

Evidence held to establish negligence

(1) In failing to keep vehicle which struck pedestrian in safe condition.—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal. App. 221.

(2) In operation of motor vehicle. Cal.—Linberg v. Stango, 297 P. 9, 211 Cal. 771, 75 A.L.R. 555—Lewin v.

Margolis, 59 P.2d 153, 14 Cal. App. 2d 746—Cook v. Sanger, 293 P. 794, 110 Cal. App. 90—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal. App. 221.

La.—Navarrette v. Joseph Laughlin, Inc., App., 20 So.2d 313, reversed on other grounds 24 So.2d 672, 209 La. 417—Franklin v. Cotton Baking Co., App., 16 So.2d 70—Thomas v. Shippers' Compress & Warehouse Co., App., 158 So. 859—Scott v. Checker Cab Co., 126 So. 241, 12 La. App. 598.

Minn.—Mullin v. Minkel, 224 N.W. 255, 177 Minn. 42

N.J.—Domzalski v. Cohen, 144 A. 307, 7 N.J. Misc. 127.

N.Y.—Stone v. Great Eastern Stages, 8 N.Y.S.2d 673, 256 App. Div. 822, affirmed 21 N.E.2d 524, 280 N.Y. 762.

Pa.—Griffith v. V. A. Smrell & Son Co., 155 A. 299, 304 Pa. 165—Miller v. Siebert, 145 A. 909, 296 Pa. 400 42 C.J. p 1233 note 27 [a] (21).

Evidence held not to establish negligence

La.—Franklin v. Cotton Baking Co., App., 16 So.2d 70—Pittman v. Hunter, App., 6 So.2d 786, amended on other grounds 8 So.2d 554

Mass.—Randazzo v. Wheaton, 180 N.E. 303, 278 Mass. 536

N.Y.—Demjanik v. Kultau, 274 N.Y. S. 387, 242 App. Div. 255

Pa.—Lyntkowski v. Gallo, 164 A. 792, 310 Pa. 32.

Tex.—Tarbutton v. Ambriz, Civ. App., 259 S.W. 259.

Evidence held sufficient

(1) To sustain verdict or judgment for pedestrian.

La.—Simon v. Toye Bros. Yellow Cab Co., App., 152 So. 606.

Mass.—Thomas v. Spinney, 39 N.E.2d 753, 310 Mass. 749.

N.J.—Riebel v. Liddle, 159 A. 407, 10 N.J. Misc. 437—Eggens v. Yellow Cab, 155 A. 745, 9 N.J. Misc. 720.

N.Y.—Demjanik v. Kultau, 274 N.Y. S. 387, 242 App. Div. 255.

Pa.—Portner v. Wible Bros., 91 Pa. Super. 522.

R.I.—Peters v. United Electric Rys. Co., 189 A. 901, 57 R.I. 311.

(2) To sustain verdict or judgment for defendant.—Tymon v. Toye Bros. Yellow Cab Co., La. App., 10 So. 2d 599.

(3) To show that defendant's automobile struck deceased when his automobile plunged upon sidewalk.—Reardon v. Smith, 148 A. 860, 298 Pa. 554.

5. Conn.—Kapilionuz v. Sundman, 193 A. 749, 123 Conn. 214.

La.—Butler v. Oswald, App., 4 So.2d 241.

Evidence held sufficient

(1) To authorize finding for defendant.

Conn.—Kapilionuz v. Sundman, 193 A. 749, 123 Conn. 214.

Ohio—Jones v. Butler, 52 N.E.2d 347, 73 Ohio App. 335

(2) To authorize finding that operator of motor vehicle was not negligent.

U.S.—Napier v. Bossard, C.C.A.N.Y., 102 F.2d 467.

Conn.—Friday v. Bacon, 5 A.2d 709, 125 Conn. 354.

Ill.—Graham v. Carlson, 10 N.E.2d 365, 291 Ill. App. 621.

Ky.—Giriman's Adm'r v. Akins, 120 S.W.2d 660, 275 Ky. 2.

(3) To authorize finding that pedestrian was walking on shoulder of road when struck by automobile.—Miller v. Adkisson, 153 A. 774, 112 Conn. 658.

(4) To support finding or verdict that operator of motor vehicle was negligent.

Cal.—Buchignoni v. De Haven, 72 P. 2d 159, 23 Cal. App. 2d 76.

Conn.—Kupchunos v. Connecticut Co., 26 A.2d 775, 129 Conn. 180—Peterson v. Meehan, 163 A. 757, 116 Conn. 150.

Ga.—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga. App. 383.

Idaho—Hooker v. Schuler, 260 P. 1027, 45 Idaho 83.

Ill.—Roussin v. Kirkbride, 31 N.E.2d 833, 308 Ill. App. 366—Del Boccio v. Maringer, 3 N.E.2d 176, 286 Ill. App. 603.

La.—Antoine v. Louisiana Highway Commission, App., 188 So. 443.

Mass.—Lucier v. Norcross, 37 N.E.2d 498, 310 Mass. 213, 137 A.L.R. 749—Smith v. Hogan, 185 N.E. 23, 282 Mass. 573.

Mich.—Fors v. La Freniere, 278 N.W. 743, 284 Mich. 5.

N.J.—Cordts v. Vanderbilt, 147 A. 464, 7 N.J. Misc. 856.

N.Y.—Mullin v. Riddell, 1 N.Y.S.2d 435, 253 App. Div. 777, affirmed 21 N.E.2d 521, 280 N.Y. 753.

Tenn.—Knight v. Hawkins, 173 S.W. 2d 163, 26 Tenn. App. 448.

Va.—Stuart v. Coates, 42 S.E.2d 311, 186 Va. 315.

42 C.J. p 1233 note 27 [a] (22).

Evidence held insufficient

(1) To establish negligence.

N.H.—Monroe v. Sterling, 26 A.2d 21, 92 N.H. 11.

Pa.—Justice v. Weymann, 158 A. 873, 306 Pa. 88.

S.D.—Haines v. Waite, 248 N.W. 207, 61 S.D. 250.

(2) To sustain judgment for plaintiff.—Ross v. Crank, 24 N.E.2d 403, 303 Ill. App. 25.

vehicle for injuries to a person on foot, general rules apply in determining the weight and sufficiency of evidence of negligence as to lights, signals, and lookout.

In actions against the owner or operator of a motor vehicle for injuries to a person on foot, general rules apply in determining the weight and sufficiency of evidence of defendant's alleged negligence with respect to lights,⁶ signals,⁷ and lookout.⁸

6. Pa.—Sajatovich v. Traction Bus Co., 127 A. 148, 314 Pa. 569.

Weight and sufficiency of evidence of negligence as to equipment and lights generally see supra subdivision a (6) of this section.

Evidence held sufficient

(1) In general.

Iowa.—Sparks v. Long, 11 N.W.2d 716, 234 Iowa 21.

Ky.—Marsee v. Hunt's Adm'r, 55 S.W.2d 376, 246 Ky. 503.

(2) To establish negligence.

Cal.—Katz v. T. I. Butler Co., 254 P. 679, 81 Cal.App. 747.

Kan.—Claggett v. Phillips Petroleum Co., 92 P.2d 52, 150 Kan. 191.

(3) To show that vehicle was improperly lighted in violation of statute.—Nilson v. Oppenheimer, 23 N.Y.S.2d 621, 260 App.Div. 670, appeal granted 25 N.Y.S.2d 997, 261 App.Div. 828, affirmed 35 N.E.2d 498, 285 N.Y. 824.

(4) To show that vehicle was operated on left side of street without lights.—Hernandez v. Lyons, 126 So. 538, 12 La.App. 547.

Evidence held insufficient

(1) To prove that defendant driver was driving without lights prior to, and at time of, accident.—Thompson v. Dyer, La.App., 1 So.2d 433

(2) To establish negligence.—Sajatovich v. Traction Bus Co., 172 A. 148, 314 Pa. 569.

7. N.J.—Graff v. Louis Stern Sons, 135 A. 335, 103 N.J.Law 13.

Weight and sufficiency of evidence of negligence as to signals and lookouts generally see supra subdivision a (7) of this section.

Evidence held sufficient

(1) To warrant finding that operator of motor vehicle failed to give warning.

Iowa.—Robertson v. Carlgren, 234 N.W. 824, 211 Iowa 963.

Mo.—Hicks v. De Luxe Cab Co., App., 189 S.W.2d 152—Loughlin v. Marr-Bridger Grocer Co., App., 10 S.W.2d 75.

N.H.—Gosselin v. Lemay, 153 A. 716, 85 N.H. 13.

Tex.—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct.

Va.—Stuart v. Coates, 42 S.E.2d 311, 186 Va. 227—Crawford v. Hite, 10 S.E.2d 561, 176 Va. 69.

(2) To establish that driver was negligent.

La.—Dougon v. Volunteers of America, App., 151 So. 797.

Ohio.—Meier v. Joseph R. Peebles Sons Co., 11 N.E.2d 707, 57 Ohio App. 80.

Evidence held insufficient

To establish that truck driver failed to sound his horn.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

8. N.H.—Green v. Bond, 36 A.2d 633, 93 N.H. 144.

Evidence held sufficient

(1) To establish negligence.

Cal.—Bedell v. Duniven, 174 P.2d 666, 77 Cal.App.2d 145—Tomey v. Dyson, 172 P.2d 739, 76 Cal.App.2d 212—Gustafson v. Blunk, 41 P.2d 953, 4 Cal.App.2d 630—Nichols v. Nelson, 252 P. 739, 80 Cal.App. 590

Conn.—Chase v. Fitzgerald, 45 A.2d 789, 132 Conn. 461, 163 A.L.R. 247

—Kupchunos v. Connecticut Co., 26 A.2d 775, 129 Conn. 160—Domochel v. Becce, 175 A. 569, 119 Conn. 175

Ill.—Szalacha v. Landsman, 60 N.E.2d 643, 325 Ill.App. 691

Ind.—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

Ky.—Gilbert's Adm'r v. Allen, 94 S.W.2d 341, 264 Ky. 202.

La.—Neyrey v. Maillet, App., 21 So.2d 158—Le Blanc v. Jordy, App., 10 So.2d 64—Law v. Osterland, App., 3 So.2d 674, affirmed 3 So.2d 680, 198 La. 421—Tassin v. Downs, App., 190 So. 232—Wall v. Aetna Casualty & Surety Co., App., 167 So. 903—Pegg v. Toyce Bros Yellow Cab Co., App., 167 So. 896

—Schaumburg v. Nash-Mississippi Valley Motor Co., 129 So. 390, 14 La.App. 77—Hayne v. Jaffa, 125 So. 773, 12 La.App. 642.

Mass.—Lucier v. Norcross, 37 N.E.2d 498, 310 Mass. 213, 137 A.L.R. 749—McGuigan v. Atkinson, 179 N.E. 627, 278 Mass. 264.

Mich.—Orme v. Farmer, 256 N.W. 470, 268 Mich. 425—Watrous v. Conor, 254 N.W. 143, 266 Mich. 397.

Mo.—Hicks v. De Luxe Cab Co., App., 189 S.W.2d 152.

N.H.—Monroe v. Sterling, 36 A.2d

(3) Speed and Control; Right of Way

The speed and control, or absence of control, of a motor vehicle must be proved by a preponderance of the evidence in an action for injuries sustained by a person on foot.

The speed and control, or absence of control, of a motor vehicle must be proved by a preponderance of the evidence in an action for injuries sustained

21, 92 N.H. 11—Gosselin v. Lemay, 153 A. 716, 85 N.H. 13.

N.J.—Melia v. Malicke Bus Co., 147 A. 467, 7 N.J.Misc. 859—Klein v. Offen, 136 A. 419, 5 N.J.Misc. 357.

Ohio.—Misrach v. Epperson, 168 N.E. 230, 32 Ohio App. 451.

Tenn.—Hunter v. Stacey, 141 S.W.2d 921, 24 Tenn.App. 158.

Va.—Stuart v. Coates, 42 S.E.2d 311, 186 Va. 227—Nelson v. Dayton, 36 S.W.2d 535, 184 Va. 754—Yellow Cab Corporation of Abingdon v. Henderson, 16 S.E.2d 389, 178 Va. 207.

Wis.—Langworthy v. Reisinger, 23 N.W.2d 482, 249 Wis. 24, followed in 23 N.W.2d 485, 249 Wis. 29—

Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519—Liebenstein v. Esche, 284 N.W. 525, 230 Wis. 521—Benedict v. Berg, 281 N.W. 650, 229 Wis. 1—Doepke v. Reimer, 258 N.W. 345, 217 Wis. 49.

Wyo.—Chapman v. Ewing, 24 P.2d 687, 46 Wyo. 130, rehearing denied 25 P.2d 1019, 46 Wyo. 130.

(2) To warrant finding that motorist failed to keep proper lookout.

Iowa.—Robertson v. Carlgren, 234 N.W. 824, 211 Iowa 963

Tex.—Comet Motor Freight Lines v. Homes, Civ.App., 203 S.W.2d 233.

(3) To sustain finding that driver did not negligently fail to keep lookout.—Thompson v. Dyer, La.App., 1 So.2d 433—Walker v. Louisiana Stores, La.App., 151 So. 656.

(4) To warrant finding that there were no diverting circumstances, causing motorist to refrain from making observations straight forward and seeing pedestrian—Robertson v. Carlgren, supra.

(5) To warrant verdict denying recovery for pedestrian's injury.—Grimes v. Thompson, 289 S.W. 290, 217 Ky. 389.

Evidence held insufficient

(1) To warrant finding that driver could have seen person in time to avoid striking him—Hayes v. Gunter Bros. Lumber Co., 129 So. 401, 14 La.App. 402

(2) To show that driver was not keeping proper lookout.

Va.—Bailey v. Fore, 177 S.E. 100, 163 Va. 611.

Wis.—Weber v. Barrett, 298 N.W. 53, 238 Wis. 50—Weddecky v. Grimes, 282 N.W. 593, 229 Wis. 448.

by a person on foot.⁹ Circumstantial evidence may | be sufficient to establish the speed at which the ve-

9. Evidence held sufficient

(1) In general.
Ill.—Fickerle v. Herman Seekamp, Inc., 274 Ill.App. 310.

Iowa.—Minks v. Stenberg, 250 N.W. 883, 217 Iowa 119.

Kan.—Claggett v. Phillips Petroleum Co., 92 P.2d 52, 150 Kan. 191.

La.—Simpson v. Hyde, App., 144 So. 793, annulled 147 So. 759.

Mass.—Tookmanian v. Fanning, 31 N.E.2d 536, 308 Mass. 162.

(2) To warrant verdict or judgment for plaintiff.

U.S.—Cromley v. Speich, D.C.Pa., 19 F.Supp. 857, affirmed, C.C.A., Speich v. Cromley, 94 F.2d 543.

Cal.—Jacoby v. Johnson, 190 P.2d 243, 84 Cal.App.2d 271—Broadfoot v. Leather Supply Co., 160 P.2d 59, 69 Cal.App.2d 729—Welch v. Sink, 74 P.2d 832, 24 Cal.App.2d 231—Richmond v. Moore, 284 P. 681, 103 Cal.App. 173

Ind.—King v. Ransburg, 39 N.E.2d 822, 111 Ind.App. 523, rehearing denied 40 N.E.2d 999, 111 Ind.App. 523.

La.—Sergas v. Collard Motors, App., 178 So. 261.

Pa.—Herchelroth v. Jaffe, 35 A.2d 594, 154 Pa.Super. 54

R.I.—Walling v. Jenks, 194 A. 600, 59 R.I. 129.

S.D.—Bock v. Sellers, 285 N.W. 437, 66 S.D. 450

(3) To authorize denial of recovery

Ill.—Smith v. Raup, 15 N.E.2d 936, 296 Ill.App. 171.

Ky.—Eads' Adm'r v. Purcifull, 158 S.W.2d 645, 289 Ky. 350

W.Va.—Willhide v. Biggs, 188 S.E. 876, 118 W.Va. 160

(4) To show that car was negligently driven at excessive speed

Cal.—Flach v. Fikes, 267 P. 1079, 204 Cal. 329—Cannon v. Kemper, 73 P.2d 268, 23 Cal.App.2d 239—Buchignoni v. De Haven, 72 P.2d 159, 33 Cal.App.2d 76—Skulte v. Ahern, 71 P.2d 340, 22 Cal.App.2d 460—Grant v. Ryon, 53 P.2d 170, 11 Cal.App.2d 101—Chase v. Thomas, 46 P.2d 200, 7 Cal.App.2d 440—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal.App. 221.

Colo.—Stahl v. Cooper, 190 P.2d 891, 117 Colo. 468.

Conn.—Chase v. Fitzgerald, 45 A.2d 789, 132 Conn. 461, 163 A.L.R. 247—Kupchunas v. Connecticut Co., 26 A.2d 775, 129 Conn. 160—Leonard v. Gambardella, 181 A. 542, 120 Conn. 445.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga.App. 383.

Ind.—Conner v. Jones, 59 N.E.2d 577, 115 Ind.App. 660, rehearing denied 60 N.E.2d 534, 115 Ind.App. 660

—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94—Vogel v. Ridens, 44 N.E.2d 238, 112 Ind.App. 493.

La.—Lervick v. White Top Cabs, App., 10 So.2d 67—Bonner v. Boudreaux, App. 8 So.2d 309—Law v. Osterland, App. 3 So.2d 674, affirmed 3 So.2d 680, 198 La. 421—Tassin v. Downs, App. 190 So. 232—McNeil v. Boagni, App., 153 So. 352—Bougon v. Volunteers of America, App. 151 So. 797—Johnson v. Zermague, App. 151 So. 105—Madison v. Berry, App. 145 So. 694—Harrison v. Shreveport Yellow Cab Co., App., 142 So. 724—Delcourt v. Bernard, 136 So. 909, 18 La.App. 616—Tarleton-Gaspard v. Malochce, 133 So. 409, 16 La.App. 527—Schaumburg v. Nash-Mississippi Valley Motor Co., 129 So. 390, 14 La.App. 77

Md.—McClenny v. Przyborowski, 32 A.2d 365, 182 Md. 95—Fotterall v. Hilleary, 13 A.2d 358, 178 Md. 335.

Mass.—Sadak v. Tucker, 37 N.E.2d 495, 310 Mass. 153—Campbell v. Cairns, 20 N.E.2d 427, 302 Mass. 584—Hall v. Shain, 197 N.E. 437, 291 Mass. 506.

Mich.—Covert v. Randall, 298 N.W. 396, 298 Mich. 38—Haley v. Grosse Ile Rapid Transit Co., 287 N.W. 536, 290 Mich. 373—Sahms v. Marcus, 214 N.W. 969, 239 Mich. 682.

N.H.—Monroe v. Sterling, 26 A.2d 21, 92 N.H. 11—Bourque v. Strussa, 25 A.2d 127, 92 N.H. 94—Feuerstein v. Grady, 169 A. 622, 86 N.H. 406—Gosselin v. Lemay, 153 A. 716, 85 N.H. 13.

N.J.—Gunnion v. Fern, 139 A. 893, 6 N.J.Misc. 26.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

N.Y.—Di Salvo v. City of New York, 5 N.Y.S.2d 264, 254 App.Div. 886—Becker v. Underwood, 65 N.Y.S.2d 916.

Ohio.—Meier v. Joseph R. Peebles Sons Co., 11 N.E.2d 707, 57 Ohio App. 80.

Pa.—Atkinson v. Coskey, 47 A.2d 156, 354 Pa. 297—DeSantis v. Maddaloni, 35 A.2d 72, 348 Pa. 296—Altzman v. Kelly, 9 A.2d 423, 336 Pa. 481—Smith v. Shatz, 200 A. 620, 331 Pa. 453—Smith v. Wistar, 194 A. 486, 327 Pa. 419

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731—Hunter v. Stacey, 141 S.W.2d 921, 24 Tenn.App. 158.

Va.—Yellow Cab Corporation of Abington v. Henderson, 16 S.E.2d 389, 178 Va. 207—Locker v. Carter, 15 S.E.2d 39, 177 Va. 610.

Wash.—Wappler v. Pacific Door & Manufacturing Co., 53 P.2d 738, 185 Wash. 241.

Wis.—Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519.

(5) To warrant finding that defendant was negligent as to management and control of vehicle.—Grohusky v. Ferry, 30 N.W.2d 205, 251 Wis. 569—Kleiner v. Johnson, 23 N.W.2d 467, 249 Wis. 148—Doepke v. Reimer, 258 N.W. 345, 217 Wis. 49.

(6) To show that motorist was grossly negligent in driving at excessive rate of speed.—Law v. Osterland, 3 So.2d 680, 198 La. 421.

(7) To sustain finding that motorist was not negligent

Conn.—Doolan v. Werner, 34 A.2d 731, 130 Conn. 394—Friday v. Bacon, 5 A.2d 709, 125 Conn. 354.

N.Y.—Brew v. Behrenhoff, 41 N.Y. S.2d 84, 266 App.Div. 744, affirmed 53 N.E.2d 243, 291 N.Y. 778.

Wis.—Weber v. Barrett, 298 N.W. 53, 238 Wis. 50—Benedict v. Berg, 281 N.W. 650, 229 Wis. 1.

(8) To show that vehicle was not operated at an excessive rate of speed

Ky.—Malcolm v. Nunn, 10 S.W.2d 817, 226 Ky. 275.

La.—Thompson v. Dyer, App., 1 So. 2d 433—Caston v. Connell, App., 146 So. 483, denying rehearing 144 So. 633

Tex.—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct.

Evidence held insufficient

(1) In general.

Colo.—Fahling v. Jones, 114 P.2d 1100, 108 Colo. 144

Kan.—Coffman v. Shearer, 34 P.2d 97, 140 Kan. 176.

La.—Rogers v. F. Strauss & Son, App., 191 So. 136.

Md.—Nicholson v. Kreczmer, 13 A. 2d 596, 178 Md. 680.

N.Y.—Freire v. Kaupman, 272 N.Y.S. 316, 241 App.Div. 541.

Tex.—Globe Laundry v. McLean, Civ. App., 19 S.W.2d 94

(2) To show that driver was traveling at excessive speed

Iowa.—Lawlor v. Gaylord, 10 N.W. 2d 531, 233 Iowa 834.

La.—Bonner v. Boudreaux, App., 8 So.2d 309—Harper v. Shreveport Ice Cream Factory, App., 162 So. 471—Hernandez v. Lyons, 126 So. 538, 12 La.App. 547.

Md.—Barker v. Whitter, 170 A. 578, 166 Md. 33.

Mass.—Abrahams v. Rice, 27 N.E. 2d 193, 306 Mass. 24.

N.C.—Ray v. Post, 32 S.E.2d 168, 224 N.C. 665.

(3) To establish that speed was negligent.

Cal.—Gaston v. Hisashi Tsuruda, 43 P.2d 355, 5 Cal.App.2d 639.

Ind.—Indianapolis Rys. v. Horwitz, 8 N.E.2d 1015, 103 Ind.App. 478.

hicle injuring the pedestrian was being operated.¹⁰ The rule as to the weight and sufficiency of the evidence has also been applied with respect to evidence relating to the right of way and duty to stop.¹¹ The fact that a statute grants the operator of a motor vehicle the right of way over a pedestrian at the time and place of the accident is an element which the jury are bound to consider in determining the question of liability.¹²

Mass.—*Tamagno v. Conley*, 76 N.E. 2d 637, 322 Mass. 218—*Stafford v. Jones*, 198 N.E. 745, 292 Mass. 489.

(4) To sustain finding that driver was negligent with respect to control.—*Langworthy v. Reisinger*, 23 N.W.2d 482, 249 Wis. 24, followed in 23 N.W.2d 485, 249 Wis. 29—*Weddecky v. Grimes*, 282 N.W. 593, 229 Wis. 448.

10. Pa.—*Jenkins v. Poley*, 50 A.2d 32, 160 Pa.Super. 6.

Weight and sufficiency of evidence of negligence as to speed and control generally see *supra* subdivision a (8) of this section.

Evidence held sufficient

(1) To authorize inference of excessive speed of vehicle.

U.S.—*Sprinkle v. Davis*, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101.

N.Y.—*Carolan v. Vencchanos*, 260 N.Y.S. 165, 236 App.Div. 812, rearr-gument denied 260 N.Y.S. 967, 236 App.Div. 852.

Pa.—*Di Gregorio v. Skinner*, 41 A.2d 649, 351 Pa. 441.

(2) To justify impression that driver applied brakes as hard and as soon as could reasonably be expected under circumstances—*Caplan v. Arndt*, 196 A. 631, 123 Conn. 585, 119 A.L.R. 1037.

Evidence held insufficient

To warrant inference that vehicle was driven at an unreasonable rate of speed—*Hamilton v. Finch*, 109 P.2d 852, 166 Or. 156, rehearing denied 111 P.2d 81, 166 Or. 156

11. Testimony that "light showed green" and pedestrian went on was held testimony that light was in pedestrian's favor.—*Ferguson v. Charis*, 170 A. 131, 314 Pa. 164.

Evidence held sufficient

(1) In general.

Iowa.—*Robertson v. Carlgren*, 234 N.W. 824, 211 Iowa 963

La.—*Wall v. Aetna Casualty & Surety Co.*, App., 167 So. 903.

Va.—*Nelson v. Dayton*, 86 S.E.2d 535, 184 Va. 754.

(2) To establish that pedestrian had right of way at intersection.

Conn.—*Hoffberg v. Epstein*, 36 A.2d 388, 130 Conn. 613—*Footo v. E. P. Broderick Haulage Co.*, 195 A. 191, 123 Conn. 296.

D.C.—*Gutshall v. Wood*, 123 F.2d 174, 74 App.D.C. 379.

Fla.—*Baston v. Shelton*, 13 So.2d 453, 152 Fla. 879.

La.—*Mahne v. Steele*, App., 32 So.2d 761.

Va.—*Nelson v. Dayton*, 36 S.E.2d 535, 184 Va. 754—*Sawyer v. Blankenship*, 169 S.E. 551, 160 Va. 651.

(3) To warrant denial of recovery. Ill.—*Warner v. Burke*, 23 N.E.2d 393, 302 Ill.App. 85.

Ohio.—*Scott v. Cismadi*, 74 N.E.2d 563, 80 Ohio App. 39—*Moody v. Vickers*, 72 N.E.2d 280, 79 Ohio App. 212.

Wis.—*Weber v. Barrett*, 298 N.W. 53, 238 Wis. 50.

(4) To sustain finding that pedestrian had started across street with green light in pedestrian's favor so that motorist approaching on intersecting street was negligent in failing to give pedestrian the right of way notwithstanding light had turned green in motorist's favor before he reached the intersection.—*Kerr v. Floyd*, 169 P.2d 349, 25 Wash.2d 135.

(5) To support finding that driver was negligent in failing to give right of way to pedestrian—*Wappler v. Pacific Door & Manufacturing Co.*, 53 P.2d 738, 185 Wash. 241.

Evidence held insufficient

To show that place of accident was within business or residence district within statute requiring driver to yield right of way to pedestrian at regular pedestrian crossing.—*Nichols v. Smith*, 111 S.W.2d 911, 21 Tenn.App. 478.

12. Or.—*Keys v. Griffith*, 55 P.2d 15, 153 Or. 190.

13. Ind.—*Elliott v. Kraus*, 172 N.E. 783, 92 Ind.App. 494.

Ability to avoid accident

In order to sustain verdict for minor, plaintiff must point out evidence justifying men of ordinary reason and fairness in saying that driver could have avoided accident in exercise of ordinary care.—*Oland v. Kohler*, 169 A. 411, 111 Pa.Super. 185—*Gavin v. Bell Telephone Co.*, 87 Pa.Super. 276.

Evidence held sufficient

(1) In general.

Iowa.—*Schlotterbeck v. Anderson*, 26 N.W.2d 340, 238 Iowa 208.

La.—*Tabary v. New Orleans Public Service, App.*, 142 So. 800, followed in *Boudreaux v. New Orleans Pub-*

d. Injuries to Children

Negligence in the operation of a motor vehicle resulting in injury to, or death of, a child must be proved by a preponderance of the evidence, but circumstantial evidence may be sufficient.

In an action for injury to or death of, a child, as in other cases of negligent injury by motor vehicles, defendant's negligence must be proved by a preponderance of the evidence,¹³ and the ques-

tion of liability, 142 So. 802—*Sarpy v. Mesman*, 135 So. 915, 17 La.App. 346.

Minn.—*Peterson v. Miller*, 235 N.W. 15, 182 Minn. 532.

Mo.—*Murphy v. Quick Tire Service, App.*, 47 S.W.2d 202

Mont.—*Burns v. Eminger*, 261 P. 613, 81 Mont. 79.

N.H.—*Marcoux v. Collins*, 53 A.2d 322.

(2) To support verdict for plaintiff.

Conn.—*Sherman v. William M. Ryan & Sons*, 21 A.2d 378, 128 Conn. 182—*Genishevsky v. Fishbone*, 145 A. 64, 109 Conn. 58.

Hawaii.—*Tsuruoka v. Lukens*, 32 Hawaii 263.

Ky.—*Goin v. Slusher*, 140 S.W.2d 363, 282 Ky. 710.

Mich.—*Guscinski v. Kenzie*, 275 N.W. 820, 282 Mich. 204.

N.J.—*Hinsch v. Amirkanian*, 145 A. 232, 7 N.J.Misc. 274.

N.Y.—*Hall v. Socony-Vacuum Oil Co.*, 77 N.Y.S.2d 670, 273 App.Div. 926—*Cross v. Stibbs Transp. Lines*, 56 N.Y.S.2d 253, 269 App.Div. 893, affirmed 67 N.E.2d 262, 295 N.Y. 863—*Toomey v. Juracka*, 297 N.Y. S. 665, 251 App.Div. 917.

Pa.—*Crane v. Sadler*, 96 Pa.Super. 217.

S.D.—*Alendal v. Madsen*, 275 N.W. 352, 65 S.D. 502.

(3) To establish negligence.

U.S.—*Lewis v. McGill Interstate Exp. C.C.A.N.Y.*, 156 F.2d 230.

Cal.—*Graf v. Harvey*, 179 P.2d 348, 79 Cal.App.2d 64—*Ross v. Story*, 53 P.2d 760, 11 Cal.App.2d 307—

McManus v. Arnold Taxi Corporation, 255 P. 755, 82 Cal.App. 215.

La.—*Guillory v. Horecky*, 168 So. 481, 185 La. 21—*Smith v. City of Alexandria, App.*, 178 So. 737—*Giangrosso v. Schweitzer*, 123 So. 127, 10 La.App. 777.

Mass.—*Jette v. Longpre*, 8 N.E.2d 601, 297 Mass. 264—*Lyttle v. Monto*, 142 N.E. 795, 248 Mass. 340.

Mich.—*Colvaruso v. Stroh Brewery Co.*, 3 N.W.2d 265, 301 Mich. 255.

Minn.—*Rye v. King*, 246 N.W. 266, 187 Minn. 587.

N.J.—*Dwyer v. New York Telephone Co.*, 135 A. 76, 4 N.J.Misc. 986—*Balog v. F. M. Mitchell Motor Co.*, 130 A. 441, 3 N.J.Misc. 1000.

N.Y.—*Tonry v. De Paolo*, 46 N.Y.S.

tion cannot be left to surmise, conjecture, or imagination.¹⁴ Circumstantial evidence may be sufficient;¹⁵ and, where there are no eyewitnesses, the law requires only the highest proof of which the case is susceptible or that can reasonably be made.¹⁶

The rule requiring that negligence be proved by a preponderance of the evidence has been applied where the injury occurred while the child was crossing a street or way,¹⁷ or where the injury occurred when the child suddenly ran into the path-

2d 457, 267 App.Div. 877, appeal denied 47 N.Y.S.2d 485, 267 App. Div. 906.

Pa.—Vogel v. Stupl, 53 A.2d 542, 357 Pa. 253—Spring v. Herriman, 191 A. 224, 126 Pa.Super. 241.

R.I.—Bucci v. Butler, 53 A.2d 705. Va.—Virginia Stage Lines v. Spencer, 36 S.E.2d 522, 184 Va. 870—Thress v. Hackler, 154 S.E. 502, 155 Va. 389.

Wis.—Madison Trust Co. v. Helleckson, 257 N.W. 691, 216 Wis. 443, 96 A.L.R. 992.

42 C.J. p 1233 note 27 [a] (5), (6)

(4) To establish prima facie case of negligence—Burnett v. Kansas City Public Service Co., 72 P.2d 72, 146 Kan. 474.

(5) To warrant inference of negligence.

Mo.—Sawyer v. Winterholder, 195 S.W.2d 659.

N.Y.—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App. Div. 1007—Fury v. De Robertis, 40 N.Y.S.2d 197.

(6) To support verdict for defendant.

Ky.—Arthur v. Rose, 158 S.W.2d 652, 289 Ky. 402.

N.J.—De Lucia v. Bleha, 137 A. 428, 5 N.J. Misc. 501.

N.Y.—Aubrey v. Knight, 289 N.Y.S. 28, 248 App. Div. 801.

Pa.—Meagher v. Nolte, Com Pl., 29 Del. Co. 497.

R.I.—Bourre v. Texas Co., 154 A. 82, 51 R.I. 254.

(7) To sustain finding that driver was not negligent.

Conn.—Sachonchik v. Bartlett, 158 A. 895, 114 Conn. 727—Cantalini v. Felder, 153 A. 779, 112 Conn. 692. D.C.—Harris v. Roberson, 139 F.2d 529, 78 U.S.App.D.C. 246.

La.—Helo v. Lyons, App., 142 So. 805—Carter v. Carraway, 138 So. 143, 18 La.App. 249.

Evidence held insufficient

(1) In general.

Mass.—Christiansen v. John Hancock Mut. Life Ins. Co., 59 N.E.2d 89, 317 Mass. 771.

Pa.—Rapczynski v. W. T. Cowan, Inc., 10 A.2d 810, 138 Pa.Super. 392.

(2) To warrant recovery.

Cal.—Moss v. Stubbs, 295 P. 572, 111 Cal.App. 359, rehearing denied 296 P. 86, 111 Cal.App. 359.

La.—Payne v. Siebert, 4 La.App. 691.

Mass.—Franca v. Rubin, 168 N.E. 99, 268 Mass. 590.

N.Y.—Jones v. Good Roads Engineering & Construction Co., 24 N.Y.S. 2d 388, 260 App.Div. 1044—Martucci v. Eskay Coal & Fuel Corporation, 13 N.Y.S.2d 723, 257 App.Div. 998, affirmed 25 N.E.2d 984, 282 N.Y. 642—Smith v. New York Dugan Bros., 3 N.Y.S.2d 978, 254 App. Div. 743.

Ohio.—City Ice & Fuel Co. v. Center, 6 N.E.2d 580, 54 Ohio App. 116.

Pa.—Stauffer v. Railway Exp. Agency, 47 A.2d 817, 355 Pa. 24—Purdy v. Hazeltine, 184 A. 660, 321 Pa. 459—De Francisco v. La Face, 194 A. 511, 128 Pa.Super. 538—Gavin v. Bell Telephone Co. of Pa., 87 Pa.Super. 276.

R.I.—Willett v. Slocum, 131 A. 545, 47 R.I. 136—Smith v. Hopkins, 131 A. 542.

(3) To establish negligence.

Ill.—Wall v. Greene, 52 N.E.2d 303, 321 Ill. App. 161.

Ind.—Elliott v. Kraus, 172 N.E. 783, 92 Ind. App. 494.

Ky.—Coomer's Adm'r v. Kentucky Transport Corp., 201 S.W.2d 901, 304 Ky. 650.

Md.—Maas v. Sevicke, 20 A.2d 159, 179 Md. 491.

(4) To sustain finding of driver's negligence

Iowa.—Williams v. Cohn, 206 N.W. 823, 201 Iowa 1121.

N.H.—Praded v. Magown, 190 A. 287, 88 N.H. 405.

Or.—Simpson v. Hillman, 97 P.2d 527, 163 Or. 357.

Pa.—Hulmes v. Keel, 6 A.2d 64, 335 Pa. 117—Kaschenbach v. Ferguson, Com Pl., 37 Luz. Leg. Reg. 29.

Wis.—Schmidt v. Helm, 229 N.W. 33, 200 Wis. 608.

42 C.J. p 1233 note 27 [b] (2).

(5) To support verdict or judgment for defendant.—Faucett v. Hensley, 171 N.E. 352, 35 Ohio App. 16—Flightmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.

14. Mass.—Rocha v. Alber, 18 N.E. 2d 1018, 302 Mass. 155.

Pa.—Martin v. Rotunno, 167 A. 33, 311 Pa. 487.

15. N.H.—Summerfield v. Wetherell, 135 A. 147, 82 N.H. 513.

N.Y.—Fury v. De Robertis, 40 N.Y. S.2d 197.

16. Ill.—Schwanz v. Sangamo Electric Co., 13 N.E.2d 1007, 294 Ill. App. 395.

17. Evidence held sufficient

(1) In general.—Bullard v. McCarthy, 195 A. 355, 89 N.H. 158.

(2) To sustain judgment for plaintiff

Cal.—Hoy v. Tornich, 250 P. 565, 199 Cal. 545—McCutcheon v. Thompson, 133 P.2d 422, 56 Cal.App.2d 689.

Ill.—Ogden v. Keck, 253 Ill.App. 444. N.J.—Rizio v. Public Service Electric & Gas Co., 23 A.2d 585, 128 N.J. Law 60.

N.Y.—Fury v. De Robertis, 40 N.Y. S.2d 197.

W. Va.—Rogers v. Goforth, 2 S.E.2d 903, 121 W. Va. 239.

(3) To sustain finding of negligence.

Ark.—Patterson v. Bell, 164 S.W.2d 902, 204 Ark. 777.

Cal.—Harrison v. Gamatero, 125 P. 2d 904, 52 Cal.App.2d 178—Portier v. Hogan, 1 P.2d 23, 115 Cal.App. 50—Wilson v. Mardakis, 280 P. 989, 100 Cal.App. 678—Wong Kit v. Crescent Creamery Co., 262 P. 481, 87 Cal.App. 563.

Ill.—Crisler v. Zahari, 47 N.E.2d 542, 318 Ill.App. 220—McMannus v. Supreme Beverage Co., 5 N.E.2d 590, 287 Ill.App. 633—Ehrenheim v. Yellow Cab Co., 239 Ill.App. 403. Ind.—Gerking v. Johnson, 44 N.E. 2d 90, 220 Ind. 501.

La.—Seither v. Pater, App., 194 So. 467—Bodin v. Texas Co., App., 186 So. 390—Iglesias v. Campbell, App., 170 So. 265, reinstated 175 So. 145. Md.—Henkelmann v. Metropolitan Life Ins. Co., 26 A.2d 418, 180 Md. 591.

Mass.—Fayard v. Morrissey, 183 N. E. 154, 281 Mass. 166.

Mich.—Onkes v. Van Zomeren, 238 N.W. 177, 255 Mich. 372.

Minn.—Peterson v. Miller, 235 N.W. 15, 182 Minn. 532.

N.J.—Alisauskas v. Itro, 156 A. 336, 9 N.J. Misc. 1057.

N.Y.—Conrow v. Snyder, 214 N.Y.S. 410, 215 App.Div. 603—Ramos v. Dixie Cab Corporation, 39 N.Y.S.2d 591, 179 Misc. 287.

Okl.—O. C. Cab Service Co. v. Askew, 79 P.2d 811, 183 Okl. 6.

Pa.—Reader v. May-Stern & Co., 7 A.2d 379, 136 Pa.Super. 359—Arndt v. Brockhausen, 191 A. 362, 126 Pa.Super. 269—Michael v. Kirchner, 11 Pa. Dist. & Co. 771, 41 Lanc. L. Rev. 265.

Tex.—Ramirez v. Salinas, Civ. App., 90 S.W.2d 891, error dismissed 117 S.W.2d 56, 131 Tex. 537.

way of the vehicle,¹⁸ as where the child ran into the street from in front of or from behind a parked or standing vehicle.¹⁹ The rule has also been ap-

plied with respect to injuries to children playing, skating, or coasting in or near the street or way,²⁰

Utah.—Van Cleave v. Lynch, 166 P. 2d 244, 109 Utah 149.

Va.—Sheckler v. Anderson, 29 S.E. 2d 867, 182 Va. 701—American Tobacco Co. v. Harrison, 27 S.E.2d 181, 181 Va. 800—R. F. Trant, Inc. v. Upton, 165 S.E. 404, 159 Va. 355.

Wash.—Barlow v. Dereiko, 63 P.2d 371, 188 Wash. 495.

(4) To support verdict for defendant.

Ala.—Conner v. Foregger, 7 So 2d 856, 242 Ala. 275.

Cal.—Benson v. Burk, 97 P.2d 858, 36 Cal App 2d 448—Walsh v. Van Tuyle, 69 P.2d 189, 21 Cal.App 2d 302.

D.C.—Steger v. Cameron, 109 F.2d 347, 71 App.D.C. 302.

Ill.—Edmiston v. Hampton, 42 N.E. 2d 963, 315 Ill.App 305.

La.—Jamison v. State, App., 7 So.2d 373.

(5) To support conclusion that driver was not negligent

Cal.—De Nardi v. Palanca, 8 P.2d 220, 120 Cal.App 371.

La.—Sanders v. Cascio, App., 24 So 2d 884.

N.C.—Redwine v. Bass, 2 S.E.2d 362, 215 N.C. 467.

Evidence held insufficient

(1) To sustain verdict for plaintiff.

N.Y.—Constantinides v. Manhattan Transit Co., 34 N.Y.S.2d 600, 264 App.Div. 147.

N.C.—Threatt v. Railway Express Agency, 19 S.E.2d 873, 221 N.C. 211.

(2) To establish negligence of driver.

La.—Fourmeaux v. Clark-Roscher Hardware & Supply Co., App., 17 So.2d 731—Guillory v. United Gas Public Service Co., App., 148 So. 274.

N.Y.—Scanlon v. Temple, 74 N.E.2d 463, 297 N.Y. 516.

Wis.—Wachsmuth v. Wachsmuth, 247 N.W. 327, 210 Wis. 683.

18. Evidence held sufficient

(1) To support verdict for plaintiff.—Cimo v. Karstendiek, La.App., 173 So. 548.

(2) To establish negligence.

La.—Edmiston v. Terrill Bros. Grocery Co., 125 So. 495, 12 La.App. 373.

Mass.—Bartley v. Almeida, 76 N.E. 2d 22, 322 Mass. 104—Faircloth v. Framingham Waste Material Co., 190 N.E. 609, 286 Mass. 320.

(3) To support verdict for defendant.

Fla.—Turner v. Seegar, 10 So.2d 320, 151 Fla. 643.

La.—Brooks v. Labruyere, App., 173 So. 466.

(4) To sustain finding that driver was not negligent.

Cal.—Bennett v. Stein, 108 P.2d 694, 42 Cal App 2d 237.

Ill.—Roberts v. City of Rockford, 16 N.E.2d 668, 296 Ill App 467—Zink v. Breese Grain Co., 260 Ill App. 281.

La.—Vallery v. Teche Lines, App., 166 So. 646.

Mich.—Braxton v. Gazdecki, 238 N.W. 194, 255 Mich. 518.

Evidence held insufficient

(1) To establish negligence.

Ky.—Hall's Adm'r v. City of Greensburg, 43 S.W.2d 680, 241 Ky 279

Md.—Stafford v. Zake, 20 A.2d 141, 179 Md. 460.

Mass.—Lynch v. Krancer, 21 N.E.2d 376, 302 Mass. 593—Baker v. Davis, 12 N.E.2d 816, 299 Mass. 345

Mich.—Colvaruso v. Stroh Brewery Co., 3 N.W.2d 261, 301 Mich 245

Pa.—Papa v. Helvenston, 25 A.2d 702, 344 Pa. 453—Buffington v. Snyder, Com Pl., 48 Dauph Co. 30.

Wash.—Haydon v. Ray City Fuel Co., 9 P.2d 98, 167 Wash. 212

(2) To justify conclusion that driver should have anticipated that child would suddenly run out in front of vehicle.—Woods v. De Mont, 77 N.E.2d 220, 322 Mass. 233

19. Evidence held sufficient

(1) To establish negligence.

La.—Davies v. Consolidated Underwriters, App., 14 So 2d 494

N.Y.—Day v. Johnson, 39 N.Y.S.2d 203, 265 App Div 383.

Pa.—Haas v. Wesley, 14 A.2d 179, 140 Pa.Super. 453.

Va.—Carlton v. Martin, 168 S.E. 348, 160 Va. 149.

(2) To support verdict for defendant.

Ky.—Burton v. Spurlock's Adm'r, 171 S.W.2d 1012, 294 Ky. 336

Ohio.—Hattie v. Shaheen, 174 N.E. 20, 37 Ohio App. 50.

(3) To sustain finding that driver was not negligent.

Cal.—McKay v. Hedger, 34 P.2d 221, 139 Cal.App. 266.

La.—Jamison v. State, App., 7 So.2d 373—Rodriguez v. Abadie, App., 168 So. 515.

Mo.—La Brie v. Lord, 45 A.2d 441.

Wash.—Rettig v. Coca-Cola Bottling Co., 156 P.2d 914, 22 Wash.2d 572.

(4) To sustain finding that defendant's vehicle was not on wrong side of highway.—Jacobs v. Williams, La.App., 160 So. 861.

Evidence held not to establish negligence

La.—Lopreore v. New Orleans Pub-

lic Service, App., 27 So.2d 737—Gauthier v. Foote, App., 12 So 2d 9.

Mass.—Rose v. Silveira, 63 N.E.2d 895, 318 Mass. 709—Foley v. Osgood, 199 N.E. 742, 293 Mass. 280 N.Y.—Wallach v. R. Gray's Sons, 280 N.Y.S. 79, 244 App.Div. 873.

Va.—Clark v. Hodges, 39 S.E.2d 252, 185 Va. 431—Messick v. Mason, 157 S.E. 575, 156 Va. 193.

20. Ind.—Elliott v. Kraus, 172 N.E. 783, 92 Ind App. 494.

Evidence held sufficient

(1) To sustain verdict for plaintiff.

Ky.—Bryson v. Raum's Adm'r, 47 S.W.2d 927, 243 Ky. 121

Pa.—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149.

Va.—Fagg v. Carney, 165 S.E. 419, 159 Va. 118.

(2) To establish negligence.

Ill.—Stemkowski v. J. H. Patterson Co., 58 N.E.2d 463, 324 Ill App 318

Iowa.—Kallansrud v. Libbey, 13 N.W.2d 684, 234 Iowa 700

La.—Guillory v. Horecky, 168 So 481, 185 La 21.

Mass.—Towle v. Morin, 4 N.E.2d 348, 295 Mass. 583.

Mont.—Lesage v. Largey Lumber Co., 43 P.2d 896, 99 Mont 372.

N.J.—Scott-Huntington v. Pearson, 168 A. 259, 11 N.J Misc 642

N.Y.—Scott v. New York Dugan Bros., 66 N.Y.S.2d 387, 271 App. Div. 1015.

Va.—Harris v. Wright, 200 S.E. 597, 172 Va. 67.

42 C.J. p 1233 note 27 [a] (3).

(3) To sustain findings that driver was not negligent

Cal.—Burton v. Los Angeles Ry Corp., 180 P.2d 367, 79 Cal.App 2d 605

La.—McMorris, for Use of McMorris, v. Graham, App., 176 So. 630

Mass.—Rocha v. Alber, 18 N.E.2d 1018, 302 Mass. 155

(4) To show that alley in which boy was coasting was not place where drivers of vehicles along street might reasonably anticipate presence of children on sleds.—Kovalchik v. Demo, 94 Pa.Super. 167.

Evidence held insufficient

(1) To establish negligence.

Iowa.—McBride v. Stewart, 290 N.W. 700, 227 Iowa 1273.

Mass.—Luvera v. De Caro, 57 N.E. 2d 548, 317 Mass. 222.

Mich.—Door v. Valley Lumber Co., 236 N.W. 910, 254 Mich. 694.

N.H.—Praded v. Magown, 190 A. 287, 88 N.H. 405.

Pa.—Oland v. Kohler, 169 A. 411, 111 Pa.Super. 185—Stickler v.

Catanzaro, 86 Pa.Super. 63—Sal-

or walking along the street or way.²¹ Furthermore, the rule has been applied in the case of injuries to children on the sidewalk,²² and to bicyclists and tricyclists.²³

The rule has also been frequently applied where the operator of the motor vehicle was allegedly negligent in parking or starting up,²⁴ or with respect to lights,²⁵ with respect to signals,²⁶ or with respect

inger v. Peshina, Com.Pl., 46 Dauph.Co. 183.

42 C.J. p 1233 note 37 [b] (2).

(2) To require consideration of applicability of coasting statute in coaster's action for injuries sustained in collision with automobile, evidence being insufficient to establish motorist's negligence.—Praded v. Magown, supra.

21. Mo.—Gardner v. Turk, 123 S.W. 2d 158, 343 Mo. 899.

Evidence held sufficient

(1) To support recovery.

Cal.—Metcalf v. Romano, 257 P. 114, 83 Cal.App. 508.

Ohio—Wilkeson v. Erskine & Sons, App., 70 N.E.2d 787.

Va.—Myers v. Bush, 17 S.E.2d 382, 178 Va. 375.

(2) To support finding or verdict that operator of motor vehicle was negligent.—Sadak v. Tucker, 37 N.E.2d 495, 310 Mass. 153.

(3) To warrant finding that injury resulted from coincident acts of drivers of two vehicles.—Housley v. Noblett, 234 Ill.App. 59.

22. Evidence held sufficient

(1) To support finding of negligence.

Ill.—Schwanz v. Sangamo Electric Co., 13 N.E.2d 1007, 294 Ill.App. 395—Onyschuk v. A. Vincent Sons Co., 277 Ill.App. 414.

Mo.—Rosenkottier v. Fleer, 155 S.W. 2d 157

N.J.—Bothyl v. Ott, 143 A. 546, 6 N.J.Misc. 1011.

Pa.—Mansfield v. City of Philadelphia, 42 A.2d 549, 352 Pa. 199.

Va.—Edgerton v. Norfolk Southern Bus Corp., 47 S.E.2d 409, 187 Va. 642.

Wis.—De Groot v. Van Akkeren, 273 N.W. 725, 225 Wis. 105.

42 C.J. p 1233 note 27 [a] (4).

(2) To support finding that defendant was not negligent.—Wilcox v. Epstein, 151 P.2d 156, 65 Cal.App. 2d 581.

(3) To warrant inference of negligence.—Biddle v. Haldas Bros., 190 A. 588, 8 W.W.Harr., Del., 210.

23. Neb.—Bixby v. Ayers, 298 N.W. 533, 139 Neb. 652.

Weight and sufficiency of evidence of negligence in collision with bicycle or motorcycle generally see infra subdivision n of this section.

Evidence held sufficient

(1) To establish negligence.

Cal.—Wright v. Sniffin, 181 P.2d 675, 80 Cal.App.2d 358—Drake v. Rusconi, 122 P.2d 605, 50 Cal.App.2d

89—Long v. Bevers, 58 P.2d 1295, 15 Cal.App.2d 47.

Conn.—Johnson v. Shattuck, 3 A.2d 229, 125 Conn. 60.

Ga.—Asphalt Products Co. v. Wright, 2 S.E.2d 818, 60 Ga.App. 110.

Ill.—Johnson v. McKnight, 39 N.E.2d 700, 313 Ill.App. 260—Kavanaugh v. Farret, 34 N.E.2d 868, 310 Ill.App. 429, reversed on other grounds 40 N.E.2d 500, 379 Ill. 273.

La.—Walsdorf v. Perrett, App., 23 So.2d 782.

Mass.—Minsk v. Pitaro, 187 N.E. 224, 284 Mass. 109.

N.J.—Simmier v. Woolman, 155 A. 768, 9 N.J.Misc. 718.

N.Y.—Romeyn v. Penfield Petroleum Products, 38 N.Y.S.2d 661, 265 App. Div. 982.

N.C.—Hood v. Orange Crush Bottling Co., 135 S.E. 609, 192 N.C. 827.

Ohio—Sherburn v. Armstrong, App., 42 N.E.2d 716

Va.—Dickens v. Goode, 42 S.E.2d 863, 186 Va. 388—Piccolo v. Woodford, 35 S.E.2d 393, 184 Va. 432.

Wash.—Everest v. Riecken, 174 P.2d 762, 26 Wash.2d 542—Rieger v. Kirkland, 111 P.2d 241, 7 Wash. 2d 326.

Wis.—De Groot v. Van Akkeren, 273 N.W. 725, 225 Wis. 105

(2) To warrant denial of recovery.

Ill.—Sullivan v. Union Transfer Co. of Omaha, 69 N.E.2d 738, 330 Ill. App. 133.

Ky.—Lyons v. Great Atlantic & Pacific Tea Co., 193 S.W.2d 450, 301 Ky. 827—Deegan v. Wilson, 157 S.W.2d 68, 288 Ky. 801.

La.—Williams v. Werner, App., 189 So. 300

N.C.—Toney v. Henderson, 45 S.E.2d 41, 228 N.C. 253.

Utah.—Redd v. Airway Motor Coach Lines, 137 P.2d 374, 104 Utah 9.

(3) To warrant conclusion that front of truck had passed children, and, as back wheel was passing, bicycle fell against truck.—Cantrell v. H. G. Hill Stores, La.App., 193 So. 389.

Evidence held insufficient

(1) To show actionable negligence.

Fla.—McClain v. Swearingen, 10 So. 2d 564, 152 Fla. 11.

Pa.—Davis v. Moylan, 47 A.2d 641, 354 Pa. 508—Klein v. Philadelphia Rural Transit Co., 188 A. 43, 320 Pa. 548.

Wis.—Batura v. Schwertsinske, 295 N.W. 698, 237 Wis. 208.

(2) To establish that driver was not negligent.—Oran v. Kraft-Phe-

nix Cheese Corp., 58 N.E.2d 781, 324 Ill.App. 463.

24. Evidence held to establish negligence

Ill.—Stine v. Union Electric Co. of Illinois, 26 N.E.2d 433, 305 Ill.App. 37.

Mass.—Fone v. Elliotan, 7 N.E.2d 737, 297 Mass. 139.

Minn.—McCarthy v. City of St. Paul, 276 N.W. 1, 201 Minn. 276.

N.H.—Marcoux v. Collins, 53 A.2d 322.

Evidence held not to establish negligence

U.S.—Demers v. Railway Express Agency, C.C.A.Mass., 108 F.2d 107.

Ill.—Conn v. Cooperative Trading Co., 22 N.E.2d 404, 301 Ill.App. 621.

Mass.—O'Reilly v. Sherman, 11 N.E. 2d 446, 298 Mass. 571.

25. Evidence held sufficient

To justify finding of negligence in operating automobile without proper lights.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

Weight and sufficiency of evidence of negligence as to equipment and lights generally see supra subdivision a (6) of this section.

26. Evidence held sufficient

(1) To establish negligence.

Ala.—International Harvester Co. v. Williams, 133 So. 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595—Watson v. Ingalls, 119 So. 667, 218 Ala. 537.

Conn.—Johnson v. Shattuck, 3 A.2d 229, 125 Conn. 60.

Ga.—City Ice Delivery Co. v. Turley, 160 S.E. 517, 44 Ga.App. 32.

Ill.—Stemkowski v. J. H. Patterson Co., 58 N.E.2d 463, 324 Ill.App. 318.

Mich.—Kinsler v. Simpson, 240 N.W. 98, 257 Mich. 7.

N.J.—Hinsch v. Amirkhanian, 145 A. 232, 7 N.J.Misc. 274.

N.Y.—Toomey v. Juracka, 297 N.Y. S. 665, 251 App.Div. 917—Hammer v. Bloomingdale Bros., 213 N.Y.S. 743, 215 App.Div. 308.

Pa.—Haas v. Wesley, 14 A.2d 179, 140 Pa.Super. 453.

Tenn.—East End Tire & Oil Co. v. Mallory, 2 Tenn.App. 101.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

Va.—Edgerton v. Norfolk Southern Bus Corp., 47 S.E.2d 409, 187 Va. 642.

42 C.J. p 1236 note 34 [a] (2).

(2) To show that driver did not give signal.—Embry v. Reserve Natural Gas Co. of Louisiana, 124 So. 572, 12 La.App. 97.

to maintaining lookout,⁸⁷ or where the alleged negligence of the operator of the motor vehicle was in relation to speed and control.²⁸

(3) To support finding that defendant was not negligent in failing to give signal.

Cal.—Wilcox v. Epstein, 151 P.2d 156, 65 Cal.App.2d 581.

Wis.—Hanes v. Hermesen, 236 N.W. 646, 205 Wis. 16.

Evidence held insufficient

(1) In general.

Cal.—Keller v. Markley, 122 P.2d 614, 50 Cal.App.2d 155.

Tex.—Short v. Nehl Bottling Co., Civ.App., 145 S.W.2d 684.

(2) To establish negligence.

Ill.—Wall v. Greene, 52 N.E.2d 303, 321 Ill.App. 161.

Iowa.—McBride v. Stewart, 290 N.W. 700, 227 Iowa 1273.

La.—Fourmeaux v. Clark-Roscher Hardware & Supply Co., App. 17 So.2d 731.

⁸⁷ Ind.—Elliott v. Kraus, 172 N.E. 783, 92 Ind.App. 494.

Weight and sufficiency of evidence of negligence as to signals and lookout generally see supra subdivision a (7) of this section.

Evidence held to establish negligence

(1) In failing to maintain proper lookout.

Ark.—Patterson v. Bell, 164 S.W.2d 902, 204 Ark. 777.

Cal.—Gates v. McKinnon, 114 P.2d 576, 18 Cal.2d 179—Rocha v. Garcia, 263 P. 238, 203 Cal 167—Drake v. Rusconi, 122 P.2d 605, 50 Cal App.2d 89—Benson v. Burk, 97 P. 2d 858, 36 Cal.App.2d 448.

Iowa.—Hampton v. Burrell, 17 N.W. 2d 110, 236 Iowa 79.

Ky.—Kentucky-Virginia Stages v. Tackett, 182 S.W.2d 226, 298 Ky 78—Nickell v. Stewart, 163 S.W. 2d 39, 291 Ky. 4.

La.—Seither v. Pater, App., 194 So. 467—Ford v. Brewer, App., 186 So. 905—Bodin v. Texas Co., App., 186 So. 390—Iglesias v. Campbell, App., 170 So. 265, reinstated 175 So. 145—Wyble v. Putfork, App., 141 So. 776—Embry v. Reserve Natural Gas Co. of Louisiana, 124 So. 572, 12 La.App. 97.

Mich.—Kinsler v. Simpson, 240 N.W. 98, 267 Mich. 7.

Minn.—Peterson v. Miller, 235 N.W. 15, 182 Minn. 532.

Mont.—Burns v. Eminger, 276 P. 437, 84 Mont. 397.

N.H.—Robbins v. Green, 42 A.2d 690, 93 N.H. 384—Summerfield v. Wetherell, 135 A. 147, 82 N.H. 513.

N.Y.—Ramos v. Dixie Cab Corporation, 39 N.Y.S.2d 591, 179 Misc. 287.

Ohio.—Sears v. Lairson, 13 Ohio Supp. 82.

Okl.—O. C. Cab Service Co. v. Askew, 79 P.2d 811, 183 Okl. 6.

Pa.—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149.

Tex.—Temple Lumber Co. v. Living, Civ.App., 289 S.W. 746.

Va.—Edgerton v. Norfolk Southern Bus Corp., 47 S.E.2d 409, 187 Va 642—American Tobacco Co. v. Harrison, 27 S.E.2d 181, 181 Va. 800.

Wash.—Cleveland v. Grays Harbor Dairy Products, 74 P.2d 909, 193 Wash. 122—Barlow v. Dereiko, 63 P.2d 371, 188 Wash. 495.

Wis.—De Groot v. Van Akkeren, 273 N.W. 725, 225 Wis. 105.

(2) Failing to see plaintiff.

Cal.—Harrison v. Gamatero, 125 P.2d 904, 52 Cal.App.2d 178.

Fla.—Vining v. American Bakeries Co., 159 So. 670, 118 Fla. 572.

Ill.—Stemkowski v. J. H. Patterson Co., 58 N.E.2d 463, 324 Ill.App. 318.

—Schwanz v. Sangamo Electric Co., 13 N.E.2d 1007, 294 Ill.App. 395.

Me.—Farrell v. Hildish, 165 A. 903, 132 Me. 57.

N.Y.—Day v. Johnson, 39 N.Y.S.2d 203, 265 App.Div. 383.

Pa.—Derr v. Rich, 200 A. 599, 321 Pa 502—Reader v. May-Stern & Co., 7 A.2d 379, 136 Pa.Super. 359.

Tenn.—East End Tire & Oil Co. v. Mallory, 2 Tenn.App. 101.

Va.—Piccolo v. Woodford, 35 S.E.2d 393, 184 Va. 432.

Evidence held not to establish negligence

Iowa.—McBride v. Stewart, 290 N.W. 700, 227 Iowa 1273.

Mass.—Rose v. Silveira, 63 N.E.2d 895, 318 Mass. 709.

Wis.—Batura v. Schwertsinske, 295 N.W. 698, 237 Wis. 208.

Evidence held sufficient

(1) In general.

Mo.—Murphy v. Quick Tire Service, App., 47 S.W.2d 202.

N.H.—Robbins v. Green, 42 A.2d 690, 93 N.H. 381.

N.Y.—Conti v. Luchs, 73 N.Y.S.2d 763, 272 App.Div. 1025.

Pa.—Glover v. Struble, 48 A.2d 50, 159 Pa.Super. 305.

(2) To show that motorist was keeping proper lookout.

La.—Carter v. Carraway, 138 So. 143, 18 La.App. 249.

Wis.—Hanes v. Hermesen, 236 N.W. 646, 205 Wis. 16.

(3) To support inference that defendant failed to maintain proper lookout for bicyclist.—Sawyer v. Winterholder, Mo., 195 S.W.2d 659.

Evidence held insufficient

(1) In general.—Coulson v. Discerns, 66 N.E.2d 728, 329 Ill.App. 28.

(2) To show that driver kept negligent lookout.

Tex.—Short v. Nehl Bottling Co., Civ.App., 145 S.W.2d 684.

Wash.—Haydon v. Bay City Fuel Co., 9 P.2d 98, 167 Wash. 212.

Wis.—Wachsmuth v. Wachsmuth, 247 N.W. 327, 210 Wis. 683.

²⁸ N.Y.—Allen v. Stokes, 23 N.Y. S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App.Div. 1007.

Weight and sufficiency of evidence as to speed and control generally see supra subdivision a (8) of this section.

Evidence held sufficient

(1) In general.

Wis.—Stoffe v. Hilker, 207 N.W. 685, 189 Wis. 414, followed in 207 N.W. 687, 189 Wis. 419.

(2) To warrant verdict or judgment for plaintiff.

Ga.—Jackson v. Ely, 194 S.E. 40, 56 Ga.App. 763.

La.—Cimo v. Karstendiek, App., 173 So. 548.

N.J.—Hinsch v. Amirkanian, 145 A. 232, 7 N.J.Misc. 274.

N.Y.—Toomey v. Juracka, 297 N.Y.S. 665, 251 App.Div. 917.

Pa.—Small v. Morgan, 195 A. 153, 129 Pa.Super. 41.

(3) To support verdict for defendant.

Ala.—Conner v. Foregger, 7 So.2d 856, 242 Ala. 275.

Fla.—Turner v. Seegar, 10 So.2d 320, 151 Fla. 643.

Ill.—Edmiston v. Hampton, 42 N.E. 2d 963, 315 Ill.App. 305.

La.—McMorris, for Use of McMorris, v. Graham, App., 176 So 630.

(4) To sustain finding that defendant was negligent in driving at dangerous speed.

Ark.—Patterson v. Bell, 164 S.W.2d 902, 204 Ark. 777.

Ga.—City Ice Delivery Co. v. Turley, 160 S.E. 517, 44 Ga.App. 32.

Ill.—Crisler v. Zahart, 47 N.E.2d 542, 318 Ill.App. 220—McManus v. Supreme Beverage Co., 5 N.E.2d 590, 287 Ill.App. 633.

Iowa.—Schlotterbeck v. Anderson, 26 N.W.2d 340, 238 Iowa 208.

La.—Seither v. Pater, App., 194 So. 467—Ford v. Brewer, App., 186 So. 905—Smith v. City of Alexandria, App., 178 So. 737—O'Pry v. Berdon, App., 149 So. 287—Wyble v. Putfork, App., 141 So. 776.

Mass.—Boni v. Goldstein, 177 N.E. 581, 276 Mass. 372.

Neb.—Campbell v. Slater, 254 N.W. 897, 127 Neb. 231.

N.Y.—Day v. Johnson, 39 N.Y.S.2d 203, 265 App.Div. 383.

Ohio.—Sears v. Lairson, 13 Ohio Supp. 82.

Okl.—O. C. Cab Service Co. v. Askew, 79 P.2d 811, 183 Okl. 6.

e. Injuries to Persons Working on or near Highway

General rules as to the weight and sufficiency of evidence of negligence have been applied in actions for injuries by motor vehicles to persons working on or near the highway.

The general rule requiring that defendant's negligence in the operation of a motor vehicle be proved by a preponderance of the evidence has been applied in actions for injuries by motor vehicles to persons working on or near the highway.²⁹ It is not essential that there be direct proof of defendant's negligence before recovery may be had; proof may be furnished by the circumstances themselves.³⁰

f. Injuries to Persons Moving to or from Streetcars

General rules as to weight and sufficiency of evidence of negligence have been applied in actions against the owner or operator of a motor vehicle for injuring persons moving to or from streetcars.

General rules as to the weight and sufficiency of evidence to establish negligence have been applied in actions against the owner or operator of a motor vehicle for injuring persons moving to or from streetcars.³¹

g. Vehicles Traveling in Opposite Directions

(1) In general

Pa.—Fabel v. Hazlett, 43 A.2d 373, 157 Pa.Super. 416.

Va.—Sheckler v. Anderson, 29 S.E.2d 867, 182 Va. 701.

Wash.—Barlow v. Derelko, 63 P.2d 371, 188 Wash. 495.

(5) To sustain finding that defendant was not negligent.

Cal.—Bennett v. Stein, 108 P.2d 694, 42 Cal.App.2d 237.

La.—Sanders v. Casco, App. 24 So.2d 884—Jamison v. State, App. 7 So. 2d 373

Pa.—Davidonis v. Philadelphia Gas Works Co., 32 A.2d 301, 347 Pa. 314

Wis.—Hanes v. Hermesen, 236 N.W. 646, 205 Wis. 16

(6) To warrant finding that driver did not have vehicle under control.

Pa.—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149

Wash.—Barlow v. Derelko, 63 P.2d 371, 188 Wash. 495.

Wis.—Zeise v. Deprey, 31 N.W.2d 523, 252 Wis. 316

Evidence held insufficient

(1) In general.

Ill.—Coulson v. Discerns, 66 N.E.2d 728, 329 Ill.App. 28.

Iowa.—McBride v. Stewart, 290 N.W. 700, 227 Iowa 1273.

Md.—Maas v. Seveck, 20 A.2d 159, 179 Md. 491—Stafford v. Zake, 20 A.2d 144, 179 Md. 460.

(2) To establish negligence in driving at an excessive speed.

U.S.—Madden v. U. S., D.C.Fla., 76 F.Supp. 41.

Mass.—Rose v. Silveira, 63 N.E.2d 895, 318 Mass. 709—Franca v. Rubin, 168 N.E. 99, 268 Mass. 590.

Neb.—De Griselles v. Gans, 219 N.W. 235, 116 Neb. 835.

29. Ill.—Johnson v. Englehardt, 256 Ill.App. 557.

Evidence held to establish negligence

Cal.—Amore v. Di Resta, 13 P.2d 986, 125 Cal.App. 410—White v. Davis, 284 P. 1086, 103 Cal.App. 531.

Conn.—Farrell v. L. G. De Felice & Son, 42 A.2d 697, 132 Conn. 81—

Goodsell v. Brighenti, 24 A.2d 834, 128 Conn. 581.

Ill.—Serio v. Bowman Dairy Co., 73 N.E.2d 160, 331 Ill.App. 372—Koch v. Barker, 41 N.E.2d 329, 314 Ill. App. 378—Dinwiddie v. Siefkin, 20 N.E.2d 130, 299 Ill.App. 316—Leoni v. McMillan, 5 N.E.2d 742, 287 Ill. App. 579.

Iowa.—Rebmann v. Heesch, 288 N.W. 695, 227 Iowa 566.

Ky.—Tate v. Hall, 57 S.W.2d 986, 247 Ky. 843.

La.—Hare v. New Amsterdam Casualty Co., App. 1 So.2d 439—Ellis v. Whitmeyer, App. 183 So. 77.

Me.—Tibbotts v. Dunton, 174 A. 453, 133 Me. 128.

Mass.—Nicholas v. Lewis Furniture Co., 193 N.E. 753, 292 Mass. 500.

Neb.—Sutton v. Inland Const. Co., 14 N.W.2d 357, 144 Neb. 721

N.J.—Hughes v. English, 152 A. 473, 9 N.J.Misc. 28—De Witt v. Brown, 145 A. 321, 7 N.J.Misc. 316.

N.Y.—Tedla v. Ellman, 300 N.Y.S. 1051, 253 App.Div. 764, affirmed 19 N.E.2d 987, 280 N.Y. 24.

Or.—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 375.

R.I.—Segee v. Cowan, 20 A.2d 270, 66 R.I. 445.

Wis.—Walker v. Pomush, 238 N.W. 859, 206 Wis. 45.

42 C.J. p 1233 note 27 [a] (24), (25).

Evidence held not to establish negligence

Ill.—Huebner v. Goldblatt Bros., 5 N.E.2d 614, 287 Ill.App. 630.

La.—Bailey v. Reggie, App. 22 So.2d 698—Jackson v. Crassons, App. 165 So. 332.

Pa.—Dahman v. Petrovich, 156 A. 897, 102 Pa.Super. 454, affirmed 161 A. 550, 307 Pa. 298.

30. Pa.—Vunak v. Walters, 43 A.2d 536, 157 Pa.Super. 660.

Test of whether circumstances of collision constitute the necessary affirmative proof of motorist's negligence, is whether circumstances are such as to satisfy reasonable and well-balanced minds that accident resulted from motorist's negligence.—

Vunak v. Walters, 43 A.2d 536, 157 Pa.Super. 660.

31. Ga.—Hexter v. Burgess, 184 S. E. 769, 52 Ga.App. 819.

Weight and sufficiency of evidence of negligence as to street car passengers see infra subdivision m of this section.

Evidence held to establish negligence

Cal.—Broadfoot v. Leather Supply Co., 160 P.2d 59, 69 Cal.App.2d 729

—Kingston v. Hardt, 62 P.2d 1376, 18 Cal.App.2d 61—Richmond v. Moore, 284 P. 681, 103 Cal.App. 173

—Wagnitz v. Scharretg, 265 P. 318, 89 Cal.App. 511.

Ky.—Shatz v. Raiser, 158 S.W.2d 627, 289 Ky. 297.

La.—Murphy v. Gladney's Inc., 124 So. 780, 12 La.App. 442.

Me.—House v. Ryder, 150 A. 487, 129 Me. 135—Day v. Cunningham, 133 A. 855, 125 Me. 328, 47 A.L.R. 1229.

Mass.—Spain v. Olkemus, 180 N.E. 314, 278 Mass. 544.

Minn.—Russell v. Winters, 241 N.W. 589, 185 Minn. 472.

N.J.—Ryrie v. Lowe, 157 A. 245, 9 N. J. Misc. 1059.

N.Y.—Cohen v. City of New York, 213 N.Y.S. 710, 215 App.Div. 382, affirmed 154 N.E. 605, 243 N.Y. 561

Pa.—Smith v. Shatz, 200 A. 620, 331 Pa. 453—Maguire v. Doughty, 191 A. 348, 326 Pa. 122.

R.I.—Gannin v. Otis, 165 A. 440.

Wash.—Atkeson v. Puget Transp. Co., 247 P. 956, 139 Wagh. 552.

42 C.J. p 1233 note 27 [a] (15), (16).

Evidence held not to establish negligence

Cal.—Balasco v. Chick, 192 P.2d 76, 84 Cal.App.2d 802—Alexander v. Willis, 37 P.2d 520, 2 Cal.App.2d 73.

Fla.—Rubio v. Armour & Co., 116 So. 40, 94 Fla. 761.

Ill.—Fray v. Hale, 10 N.E.2d 870, 292 Ill.App. 633.

La.—Kemp v. Donnes, App. 32 So. 2d 383.

Pa.—Brooks v. Morgan, 200 A. 81 331 Pa. 235.

- (2) Lights, signals, and lookout
- (3) Speed and control

(1) In General

In actions for injuries resulting from the collision of motor vehicles traveling in opposite directions, the defendant's negligence must be proved by a preponderance

of the evidence, but circumstantial evidence may be sufficient.

As in other actions based on negligence, in an action for injuries resulting from the collision of motor vehicles traveling in opposite directions, defendant's negligence must be proved by a preponderance of the evidence.³² While circumstantial

32. Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140.

Ill.—Gordon v. Current, 263 Ill.App. 435.

Iowa.—Rich v. Herry, 269 N.W. 489, 222 Iowa 465—Reimer v. Musel, 251 N.W. 863, 217 Iowa 377.

La.—Baden v. Globe Indemnity Co., App., 146 So. 784.

Tex.—Markusfeld v. Zahn, Civ.App., 99 S.W.2d 438, error dismissed.

Substantial evidence

Plaintiff suing for injuries in collision must show by substantial evidence that driver was negligent—Dunsmoor v. North Coast Transp. Co., 281 P. 995, 154 Wash. 229, followed in 281 P. 996, 154 Wash. 700.

Evidence held to establish negligence

U.S.—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8, certiorari denied Milburn v. Heald, 62 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1754, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.Ed. 1754—Carroll v. Harrison, D.C.Va., 49 F. Supp. 283, affirmed, C.C.A., 139 F.2d 427.

Cal.—Jackson v. Lactein Co., 288 P. 781, 209 Cal. 520—Gardini v. Arakelian, 64 P.2d 181, 18 Cal.App.2d 424—Bixby v. Pickwick Stage Co., 21 P.2d 972, 131 Cal.App. 739—MacPherson v. West Coast Transit Co., 271 P. 509, 94 Cal.App. 463—Marston v. Pickwick Stages, 248 P. 930, 78 Cal.App. 526.

Ill.—Philpott v. Parhan, 44 N.E.2d 934, 316 Ill.App. 278—Butler v. Illinois Highway Transp. Co., 266 Ill.App. 486.

La.—Griessen v. Cook, App., 164 So. 260—Elliot v. Corell, App., 158 So. 698—Porter v. Melancon, App., 146 So. 513—Selby v. Manning, App., 145 So. 555—Marquez v. Le Blanc, App., 143 So. 108—Allen v. Campbell, App., 141 So. 827—Viator v. Talbot, 137 So. 84, 18 La.App. 124—Krousel v. Thieme, 128 So. 670, 13 La.App. 680—Irwin v. Sibley, 120 So. 65, 10 La.App. 210—Robinson v. Landry, 1 La.App. 517.

Me.—Atherton v. Cramblemire, 33 A. 2d 803, 140 Me. 28.

Mass.—Fitzgerald v. Packard, 58 N.E. 2d 765, 317 Mass. 431—Nash v. Heald, 29 N.E.2d 7, 306 Mass. 518—Wall v. King, 182 N.E. 855, 280 Mass. 577.

Mich.—Ulvund v. Sogge, 254 N.W. 202, 266 Mich. 548.

Minn.—Oxborough v. Murphy Transfer & Storage Co., 260 N.W. 305,

194 Minn. 335—Honkomp v. Martin, 234 N.W. 638, 182 Minn. 404—Seitz v. Claybourne, 231 N.W. 714, 181 Minn. 4.

N.J.—Sharkey v. Kapusa, 135 A. 872, 5 N.J. Misc. 203.

N.Y.—Low v. Reilig, 5 N.Y.S.2d 548, 254 App.Div. 920, reargument denied 7 N.Y.S.2d 224, 255 App.Div. 748, appeal denied—Tykewinski v. Buff & Buff, 258 N.Y.S. 823, 144 Misc. 438, affirmed 261 N.Y.S. 970, 237 App.Div. 865.

Pa.—Lookatch v. Robinson, 179 A. 66, 318 Pa. 546—Cherry v. Nussbaum, 149 A. 110, 299 Pa. 91.

Tex.—Kimbriel Produce Co. v. Mayo, Civ.App., 180 S.W.2d 504, error refused—Chance v. Warlick, Civ.App., 145 S.W.2d 283, error dismissed, judgment correct—Dunigan Tool & Supply Co. v. Whipple, Civ.App., 136 S.W.2d 947, error dismissed, judgment correct.

Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43—Chick Transit Corporation v. Edenton, 196 S.E. 648, 170 Va. 361.

Wis.—Reardon v. Terrien, 252 N.W. 691, 214 Wis. 267—Mader v. Boehm, 250 N.W. 854, 213 Wis. 55, followed in 250 N.W. 856, 213 Wis. 62—Coittrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310.

Evidence held not to establish negligence

U.S.—Price v. U. S., D.C.Ky., 50 F. Supp. 676.

Cal.—Sinclair v. Harp, 63 P.2d 876, 18 Cal.App.2d 167—Sanford v. Grady, 36 P.2d 652, 1 Cal.App.2d 365, modified on other grounds and rehearing denied 37 P.2d 475, 1 Cal.App.2d 365.

La.—Stout v. Nehl Bottling Co., App., 146 So. 720.

N.H.—Boulduc v. Stein, 47 A.2d 107, 94 N.H. 89.

Wis.—Royer v. Saecker, 234 N.W. 742, 204 Wis. 265.

Evidence held sufficient

(1) In general

Ky.—Wolfenbarger v. Stanton, 295 S.W. 467, 220 Ky. 451.

Md.—State, to Use of Balderston, v. Hopkins, 196 A. 91, 173 Md. 321.

Mich.—Bielawski v. Nicks, 287 N.W. 560, 290 Mich. 401—Osmalowski v. Deyman, 229 N.W. 499, 249 Mich. 586.

(2) To support verdict or judgment for plaintiffs.

U.S.—Elzig v. Gudwangen, C.C.A. Minn., 91 F.2d 434.

Ark.—Bryant Truck Lines v. Silver Fleet of Memphis, Tenn., 91 S.W.2d 287, 192 Ark. 286.

Cal.—Poe v. Lawrence, 140 P.2d 136, 60 Cal.App.2d 125—Smith v. Brown, 283 P. 132, 102 Cal.App. 477.

Colo.—Knaus v. Yoder, 52 P.2d 1152, 98 Colo. 1.

Idaho.—Mintun v. Moorman, 259 P. 1, 44 Idaho 658.

Ill.—Gunn v. Meyer, 267 Ill.App. 592.

Ind.—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585.

Iowa.—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23.

Kan.—Cox v. Kellogg's Sales Co., 95 P.2d 531, 150 Kan. 561.

Ky.—Humphries v. Gray, 203 S.W.2d 8, 305 Ky. 205—E. L. Martin & Co. v. Hurt's Admr., 62 S.W.2d 465, 250 Ky. 235—Fremd v. Gividen, 24 S.W.2d 915, 233 Ky. 38.

La.—Lavigne v. American Auto Ins. Co., App., 32 So.2d 88—Meaux v. Gulf Ins. Co., App., 182 So. 158, followed in 182 So. 164, two cases—Smith v. Ricks, App., 150 So. 674—Hoggatt v. Lampton, 123 So. 399, 11 La.App. 47.

Mich.—Pembor v. Marcus, 11 N.W.2d 889, 307 Mich. 279—McDuffie v. Root, 1 N.W.2d 544, 300 Mich. 286—Barkman v. Montague, 298 N.W. 273, 297 Mich. 538—Miller v. Beasley, 237 N.W. 47, 255 Mich. 15—Prove v. Interstate Stages, 231 N.W. 41, 250 Mich. 478.

Neb.—Major v. Harrison, 272 N.W. 201, 132 Neb. 363.

N.J.—Hebert v. Public Service Coordinated Transport, 156 A. 921, 9 N.J.Misc. 1138—Le Vay v. Bingham Motor Express Co., 154 A. 418, 9 N.J.Misc. 418—Appar v. Campbell, 151 A. 77, 8 N.J.Misc. 517—McClave v. Barnaba, 144 A. 190, 7 N.J.Misc. 112.

N.Y.—Englberger v. Hulse, 25 N.Y.S.2d 510, 261 App.Div. 921, affirmed 36 N.E.2d 693, 286 N.Y. 653—Braniss v. Bassage, 300 N.Y.S. 755, 253 App.Div. 739.

Ohio.—Neal v. Schmidt, App., 39 N.E.2d 859.

S.D.—Schumacher v. Storberg, 7 N.W.2d 141, 69 S.D. 103.

Tex.—Chance v. Warlick, Civ.App., 145 S.W.2d 283, error dismissed judgment correct.

Vt.—Loomis v. Abelson, 144 A. 378, 101 Vt. 459.

Wash.—Shanahan v. International Stage Co., 3 P.2d 1092, 164 Wash. 609—Archer v. Beverly, 272 P. 513, 150 Wash. 174.

evidence which is as consistent with the theory that defendant was not negligent as with the theory that he was negligent will not support a verdict for plaintiff,³³ negligence may ordinarily be proved by circumstantial evidence.³⁴ The mere use of a public road for the purpose of its dedication is not evidence of negligence on the part of either driver of

two colliding motor vehicles.³⁵

The rule requiring that negligence be proved by a preponderance of the evidence has been applied where the collision occurred as a result of the alleged negligence of defendant in failing to keep to the right.³⁶ So, general rules as to the weight and sufficiency of the evidence have been applied where

Wis.—Hansberry v. Dunn, 284 N.W. 556, 230 Wis. 626—Loehr v. Crocker, 211 N.W. 299, 191 Wis. 422, followed in 211 N.W. 302, 191 Wis. 429.

Wyo.—Kinney v. Barnhisel, 77 P.2d 807, 53 Wyo. 58.

(3) To sustain verdict or judgment for defendant.

Cal.—Bowers v. Putman, 284 P. 470, 103 Cal App. 289.

Ill.—Bentkowski v. Bryan, 19 N.E.2d 841, 299 Ill.App. 217.

Ky.—Hall's Adm'r v. Burton Produce Co., 88 S.W.2d 938, 262 Ky. 36.

La.—St. Paul Fire & Marine Ins. Co. v. Lagatutta, App., 17 So.2d 741—Daniels v. Louisiana Power & Light Co., App., 171 So. 612.

Mich.—Zeitiz v. Mara, 287 N.W. 418, 290 Mich. 161.

Ohio.—Bachman v. Ambros, 79 N.E.2d 177, 83 Ohio App. 141.

(4) To support finding that defendant was not guilty of negligence. Ark.—Fields v. Freeman, 8 S.W.2d 436, 177 Ark. 807.

Cal.—Heslop v. Kinyoun, 136 P.2d 621, 58 Cal App.2d 247.

La.—Bolin v. Cuyler, 136 So. 779, 18 La.App. 138, followed in 136 So. 781, 18 La.App. 129.

Evidence held insufficient

(1) To support verdict or judgment for plaintiff.

Cal.—Hamm v. San Joaquin & Kings River Canal Co., 111 P.2d 940, 44 Cal.App.2d 47.

Fla.—Stanley v. Powers, 169 So. 861, 125 Fla. 322.

Ill.—Yelmland v. Kaiser, 19 N.E.2d 395, 298 Ill.App. 627.

La.—Lanoix v. Home Indemnity Co. of New York, App., 13 So.2d 501.

Neb.—Bowers v. Kugler, 1 N.W.2d 299, 140 Neb. 684.

N.J.—Chandler v. New York & Philadelphia Bus Line, 146 A. 684, 7 N.J.Misc. 601—Boreth v. Kisselman, 146 A. 683, 7 N.J.Misc. 922.

(2) To support verdict or judgment for defendant.

Cal.—Hamm v. San Joaquin & Kings River Canal Co., 111 P.2d 940, 44 Cal.App.2d 47.

Ill.—Kaiser v. Kielsaas, 19 N.E.2d 396, 298 Ill.App. 627.

(3) To support finding that driver of approaching vehicle was negligent. Conn.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614.

La.—Lorance v. Smith, 188 So. 871, 173 La. 883.

(4) To warrant inference of negligence—Borin v. Pevely Dairy Co., Mo.App., 183 S.W.2d 839.

(5) To overcome presumption of defendant's negligence.—Betts v. Queens Farms Dairy Co., 295 N.Y.S. 78, 162 Misc. 583.

33. Pa.—Burger v. Fischer Baking Co., 12 A.2d 14, 338 Pa. 110.

34. Ark.—Phillips Motor Co. v. Price, 165 S.W.2d 251, 204 Ark. 827.

Position that vehicles occupy after a collision is not conclusive as to the manner in which the collision occurred.—Lanoix v. Home Indemnity Co. of New York, La.App., 13 So.2d 501.

35. Tex.—Phoenix Refining Co. v. Walker, Civ.App., 108 S.W.2d 323, error dismissed.

36. Ark.—Phillips Motor Co. v. Price, 165 S.W.2d 251, 204 Ark. 827.

Iowa.—Rich v. Herny, 269 N.W. 489, 222 Iowa 465.

La.—Scriber v. Chaffin, App., 191 So. 566—Anderson v. Struve, App., 152 So. 814.

Pa.—Burger v. Fischer Baking Co., 12 A.2d 14, 338 Pa. 110.

Wash.—Schalow v. Oakley, 139 P.2d 296, 18 Wash.2d 347.

Evidence held to establish negligence

U.S.—Keal Driveway Co. v. Car & General Ins. Corp., C.C.A.Fla., 145 F.2d 345—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8, certiorari denied.

Milburn v. Heald, 62 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1754, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.Ed. 1754—Trucking, Inc., v. Krotzer, C.C.A. Ohio, 106 F.2d 447—Parmiter v. U. S., D.C. Mass., 75 F.Supp. 823—Peach v. U. S., D.C. Pa., 75 F.Supp. 218—Sitton v. Lindley, D.C. Mo., 39 F.Supp. 853.

Ark.—Missouri Pac. Transp. Co. v. Mitchell, 137 S.W.2d 242, 199 Ark. 1045.

Cal.—Temple v. De Mirjian, 125 P.2d 544, 51 Cal.App.2d 559—Jansen v. Sugiyama, 85 P.2d 476, 29 Cal.App.2d 717—Moniz v. Bettencourt, 76 P.2d 535, 24 Cal.App.2d 718—White v. Kretz Bros., 10 P.2d 198, 122 Cal.App. 197—Robinson v. Thorne-will, 297 P. 28, 112 Cal.App. 498—Monroe v. Switzer, 267 P. 125, 91 Cal.App. 364.

Conn.—Malon v. Adley Express Co., 173 A. 159, 118 Conn. 565—Bolin-

sky v. Shobrinsky, 172 A. 922, 118 Conn. 703—Flynn v. Peracchio, 170 A. 926, 118 Conn. 124.

Fla.—Union Bus Co. v. Bowen, 184 So. 17, 134 Fla. 254.

Ga.—Spalding Lumber Co. v. Hemp-hill, App., 47 S.E.2d 514.

Ill.—Philpott v. Parham, 44 N.E.2d 934, 316 Ill.App. 278—Sussemehl v. Red River Lumber Co., 28 N.E.2d 743, 306 Ill.App. 430.

Kan.—Meneley by Myers v. Mont-gomery, 64 P.2d 550, 145 Kan. 109—Caldwell v. Schlatter, 37 P.2d 13, 140 Kan. 396—Baxter v. Caw-ker Tp., Mitchell County, 257 P. 229, 123 Kan. 672.

Ky.—Hollis v. Bourne, 167 S.W.2d 50, 292 Ky. 578—Rabold v. Gon-yer, 148 S.W.2d 728, 285 Ky. 618.

La.—Roper v. Brooks, 9 So.2d 486, 201 La. 135—Bituminous Fire & Marine Ins. Co. v. Travelers In-

dem Co., App., 33 So.2d 104—Au-tomobile Ins. Co. of Hartford,

Conn., v. Barnard, App., 30 So.2d 142—Clemens v. Southern Advance

Bag & Paper Co., App., 20 So.2d 749—Aguillard v. State, App., 7

So.2d 645—Prevost v. Smith, App., 197 So. 905—Watson v. Hightow-

er, App., 181 So. 612—Crysel v. Gifford-Hill & Co., App., 158 So.

264—Miller v. Horton-Salmen

Co., App., 145 So. 786—McCullough

v. Billeaud, 140 So. 63, 19 La.App.

193—Culpepper v. Jordan, 124 So.

531, 11 La.App. 626—Edwards v.

Cappel Motor Co., 8 La.App. 344

—Ellis v. Colleta, 1 La.App. 369

Mc—Chenery v. Russell, 167 A. 857,

132 Me. 130.

Mass.—Kerr v. Deveau, 40 N.E.2d

872, 311 Mass. 210

Mich.—In re Olney's Estate, 14 N.

W.2d 574, 309 Mich. 65.

Minn.—Ranum v. Swenson, 19 N.W.

2d 327, 320 Minn. 170.

N.J.—Rafferty v. Public Service In-terstate Transp. Co., 186 A. 575,

14 N.J.Misc. 643.

Okl.—Chambers v. Cunningham, 5 P.

2d 378, 153 Okl. 129, 78 A.L.R. 905.

Pa.—Butler v. Del Favero, 176 A.

the action is based on the alleged negligence of defendant in the operation of his motor vehicle on

ment correct—*Western States Grocery Co. v. Smith*, Civ.App., 114 S. W.2d 418, error dismissed.

Wash.—*Bernard v. Portland Seattle Auto Freight*, 118 P.2d 167, 11 Wash.2d 17—*Tutewiler v. Shannon*, 111 P.2d 215, 8 Wash.2d 23.

Wis.—*Quinnell v. Bowen*, 16 N.W.2d 415, 246 Wis. 6—*Plesik v. Deuster*, 11 N.W.2d 358, 248 Wis. 598—*Booth v. Frankenstein*, 245 N.W. 191, 209 Wis. 362—*Zastrow v. Schaumburger*, 245 N.W. 202, 210 Wis. 116—*Zillmer v. Deismann*, 212 N.W. 268, 192 Wis. 147.

42 C.J. p 1236 note 37 [a] (3).

Evidence held not to establish negligence

(1) In general.

Ill.—*Beery v. Breed*, 36 N.E.2d 591, 311 Ill.App. 469.

Ky.—*Hollis v. Bourne*, 167 S.W.2d 50, 292 Ky. 578.

La.—*Barton v. Phelan Co.*, App., 200 So. 508, certiorari denied 62 S.Ct. 109, 314 U.S. 613, 86 L.Ed. 493—*Thibodaux v. Pittman Bros Const. Co.*, App., 199 So. 159—*Middleton v. Scaife*, App., 190 So. 829, followed in *Midyett v. Scaife*, 190 So. 832.

N.Y.—*Farrell v. Kory*, 282 N.Y.S. 355, 245 App.Div. 901.

N.C.—*Brown v. L. H. Bottoms Truck Lines*, 47 S.E.2d 711, 229 N.C. 122.

Ohio.—*Collins v. Zimmerman*, App., 57 N.E.2d 245.

Tenn.—*Webster v. Trice*, 133 S.W.2d 621, 23 Tenn.App. 365.

(2) In failing to stop when discovering that automobile was approaching on wrong side of highway—*O'Mally v. Eagan*, 2 P.2d 1063, 43 Wyo. 233, 77 A.L.R. 582, rehearing denied 5 P.2d 276, 43 Wyo. 350.

(3) In not discovering sooner that approaching automobile on wrong side of highway would not turn to right.—*O'Mally v. Eagan*, *supra*.

(4) In turning to left to avoid approaching automobile on wrong side of highway.—*O'Mally v. Eagan*, *supra*—42 C.J. p 1236 note 37 [b] (6).

Evidence held sufficient

(1) In general.

Cal.—*Hetherington v. Crossley Transp. Co.*, 191 P.2d 463, 84 Cal. App.2d 722.

La.—*Travelers Fire Ins. Co. v. Meadows*, App., 13 So.2d 537—*Naremore v. Beene Motor Co.*, App., 159 So. 426.

Md.—*Wolfe v. State*, for Use of *Brown*, 194 A. 832, 173 Md. 103.

Wis.—*Hamilton v. Reinemann*, 290 N.W. 194, 233 Wis. 572—*Hansberry v. Dunn*, 284 N.W. 556, 230 Wis. 626.

(2) To establish a *prima facie* case for plaintiff.

Mich.—*Anderson v. Kearly*, 20 N.W. 2d 728, 312 Mich. 566.

Pa.—*Davin v. Levin*, 55 A.2d 364, 357 Pa. 554.

Wis.—*Zeinemann v. Gasser*, 29 N.W. 2d 49, 251 Wis. 238—*Hamilton v. Reinemann*, 290 N.W. 194, 233 Wis. 572.

(3) To support verdict or judgment for plaintiff.

Conn.—*Warren v. City of Bridgeport*, 28 A.2d 1, 129 Conn. 355—*Willows v. Snyder*, 164 A. 385, 116 Conn. 213.

Ill.—*Ambuehl v. Steiner*, 32 NE.2d 994, 309 Ill.App. 437—*Rutowicz v. United Motor Coach Co.*, 261 Ill. App. 377.

Ind.—*Lee Bros. v. Jones*, 54 NE.2d 108, 114 Ind.App. 688—*Smith v. Keyes*, 9 NE.2d 119, 103 Ind.App. 487.

Iowa.—*Pazen v. Des Moines Transp. Co.*, 272 N.W. 126, 223 Iowa 23.

Kan.—*Thomas v. Meyer*, 95 P.2d 267, 150 Kan. 587.

Ky.—*Bohn v. Sams*, 193 S.W.2d 459, 302 Ky. 63—*Jones v. Sharp's Adm'r.*, 139 S.W.2d 731, 262 Ky. 638, followed in *Jones v. Vance*, 139 S.W.2d 735, 282 Ky. 646.

La.—*Brown v. Dickson*, App., 3 So. 2d 562—*Berard v. Bullard*, App., 199 So. 674—*American Employers' Ins. Co. v. Giardina*, App., 189 So. 145—*Travis v. Lavigne*, App., 161 So. 912.

Mass.—*Mazmanian v. Kuken*, 189 N.E. 815, 285 Mass. 516.

Mich.—*Anderson v. Kearly*, 20 N.W. 2d 728, 312 Mich. 566.

Mont.—*Coolidge v. Mcagher*, 46 P. 2d 684, 100 Mont. 172.

Neb.—*Jones v. McCully*, 285 N.W. 551, 136 Neb. 206—*Federman v. Summers*, 282 N.W. 261, 135 Neb. 453—*Echternach v. Widick*, 276 N.W. 162, 133 Neb. 543.

N.Y.—*Clifford v. Sadlowski*, 50 N.Y. S.2d 642, 268 App.Div. 941—*Heath v. Adirondack Transit Lines*, 32 N.Y.S.2d 409, 263 App.Div. 920—*Hess v. Magee-Ross Motor Corporation*, 298 N.Y.S. 834, 252 App. Div. 807—*Fitzgerald v. Middlebrook*, 291 N.Y.S. 193, 249 App.Div. 701.

N.D.—*Pearce v. Hanlon*, 233 N.W. 840, 60 N.D. 231.

S.D.—*Kerr v. Basham*, 264 N.W. 187, 64 S.D. 27.

Wis.—*Hamilton v. Reinemann*, 290 N.W. 194, 233 Wis. 572—*Phillips v. Saecker*, 234 N.W. 745, 204 Wis. 273.

(4) To support verdict for defendant.

Ill.—*Mondin v. Decatur Cartage Co.*, 60 N.E.2d 38, 325 Ill.App. 332.

Kan.—*Nichols v. Derry*, 118 P.2d 537, 154 Kan. 305.

La.—*Henderson v. Marmande*, App., 177 So. 827.

Neb.—*Harrell v. People's City Mission Home*, 267 N.W. 344, 131 Neb. 138.

Okl.—*Walker v. Oklahoma Natural Gas Co.*, 107 P.2d 997, 188 Okl. 241.

R.I.—*Antocicchio v. Stanley*, 191 A. 498, 58 R.I. 118.

Wash.—*Schalow v. Oakley*, 139 P. 2d 296, 18 Wash.2d 347—*Bates v. Olsen*, 292 P. 1106, 159 Wash. 315.

Wis.—*Martin v. Barry Transfer & Storage Co.*, 27 N.W.2d 719, 250 Wis. 574.

(5) To sustain finding that defendant's vehicle was being driven on left side of road at or immediately before time of accident.

U.S.—*Blaszzyk v. Eastern Auto Forwarding Co.*, C.C.A.N.Y., 134 F.2d 600.

Cal.—*Scaletta v. Silva*, 126 P.2d 898, 52 Cal.App.2d 730—*Jones v. O'Neal*, 122 P.2d 589, 60 Cal.App.2d 76.

Colo.—*Campbell v. Trate*, 149 P.2d 380, 112 Colo. 265.

Conn.—*Friedrich v. Marino*, 172 A. 782, 118 Conn. 385.

Ill.—*Chicago-Rockford Motor Exp. v. Cagnoni*, 79 N.E.2d 839, 334 Ill. App. 623—*Shennan v. Chrispens Truck Lines*, 44 N.E.2d 339, 316 Ill.App. 160.

Ky.—*Combs v. Stewart*, 190 S.W.2d 861, 301 Ky. 50.

La.—*Masaracchia v. Inter-City Express Lines*, App., 162 So. 221—*Dunnington v. Sable*, App., 148 So. 724—*Lacy v. Lucky*, 140 So. 857, 19 La.App. 743—*Glover v. Southern Transp. Co.*, 133 So. 474, 16 La. App. 63.

Mich.—*Bachand v. Rosemurgy*, 246 N.W. 212, 261 Mich. 519.

Minn.—*Leifson v. Henning*, 298 N.W. 41, 210 Minn. 311—*Harrsch v. Breillen*, 232 N.W. 710, 181 Minn. 400.

Neb.—*Moore v. Krejcl*, 297 N.W. 913, 139 Neb. 582—*Hill v. Interstate Transit Lines*, 288 N.W. 508, 137 Neb. 110.

Tex.—*Newlin v. Smith*, Civ.App., 142 S.W.2d 610, reversed on other grounds 150 S.W.2d 233, 136 Tex. 260—*Miller v. Wyrick*, Civ.App., 96 S.W.2d 253, error dismissed.

Wis.—*Hansberry v. Dunn*, 284 N.W. 556, 230 Wis. 626.

Evidence held insufficient

(1) In general.

Cal.—*Sills v. Forbes*, 91 P.2d 246, 33 Cal.App.2d 219—*Held v. Jiridon*, 42 P.2d 1046, 5 Cal.App.2d 531.

La.—*Lee v. Perrin*, App., 192 So. 387.

Me.—*Morin v. Carney*, 165 A. 166, 132 Me. 25.

Mich.—*Loucks v. Fox*, 246 N.W. 141, 261 Mich. 338.

Wis.—*Uren v. Purity Dairy Co.*, 32

three-lane³⁷ or four-lane³⁸ highways, around corners or curves,³⁹ or where it is based on negligence in the operation of the motor vehicle over bridges and culverts.⁴⁰

N.W.2d 615, 252 Wis. 446, rehearing denied 33 N.W.2d 213, 252 Wis. 446.

(2) To sustain verdict or judgment for plaintiff.

Ky.—Union Underwear Co. v. Barnett, 148 S.W.2d 339, 285 Ky. 488.
Md.—Shafer v. State, for Use of Sundergill, 189 A. 273, 171 Md. 506.
Mich.—Patterson v. Thatcher, 263 N.W. 882, 273 Mich. 597.

N.Y.—Klep v. McMackin, 238 N.Y.S. 619, 248 App.Div. 741.

Tex.—Wells v. Texas Pac. Coal & Oil Co., 164 S.W.2d 660, 140 Tex. 2.

(3) To sustain verdict or judgment for defendant—Salera v. Schroeder, 237 N.W. 180, 183 Minn. 478.

(4) To establish that vehicle was traveling on wrong side of highway.

U.S.—Wolkin v. Cadegan, D.C.Me., 39 F.Supp. 610—O'Hara v. Dodge Bros., D.C.Nev., 35 F.Supp. 792.
Tex.—Markusfeld v. Zahn, Civ.App., 99 S.W.2d 438, error dismissed.
Wis.—Ernst v. Karlman, 8 N.W.2d 280, 242 Wis. 516.

Conclusiveness of proof

(1) Proof of violation of statute requiring driver to keep on right side of highway when meeting another vehicle does not conclusively establish negligence.

U.S.—Brinegar v. Green, C.C.A.Iowa, 117 F.2d 316.

Ind.—Jones v. Cary, 37 N.E.2d 944, 219 Ind. 268.

Iowa.—Christenson v. Northwestern Bell Telephone Co., 270 N.W. 394, 222 Iowa 808—Wilson v. Long, 266 N.W. 482, 221 Iowa 668—Hoover v. Haggard, 260 N.W. 540, 219 Iowa 1232—Ryan v. Perry Rendering Works, 245 N.W. 301, 215 Iowa 363—Cooley v. Killingsworth, 228 N.W. 880, 209 Iowa 646.

Mass.—Coates v. Bates, 164 N.E. 448, 265 Mass. 444.

(2) But unexplained fact that motorist is on wrong side of road at time of collision has been held conclusive evidence of carelessness.—Brown v. Sanborn, 158 A. 855, 131 Me. 53.

(3) Prima facie evidence of negligence see supra § 511 (4).

37. U.S.—Peach v. U. S., D.C.Pa., 75 F.Supp. 218.

Evidence held to establish negligence

(1) In driving in middle traffic lane where lane to right was free of traffic.—Robbiano v. Bovet, 24 P.2d 466, 218 Cal. 589.

(2) In failing to return from center to proper lane after passing an-

other vehicle.—Salgado v. Matsui, 119 P.2d 777, 48 Cal.App.2d 230.

(3) Of drivers of both vehicles when one vehicle turned into center strip to pass another and collided with automobile which had first occupied the center strip—Lozier v. Preston, 12 N.Y.S.2d 388, 257 App. Div. 900.

Evidence held not to establish negligence

Cal.—Warwick v. Maneely, 104 P.2d 831, 40 Cal.App.2d 235, followed in 104 P.2d 838, two cases, 40 Cal. App.2d 812 and 104 P.2d 838, 40 Cal.App.2d 813.

Evidence held sufficient

(1) In general.

Cal.—Salgado v. Matsui, 119 P.2d 777, 48 Cal.App.2d 230.

Ohio.—Hubbard v. Cleveland, Columbus & Cincinnati Highway, 76 N.E. 2d 721, 81 Ohio App. 445.

(2) To warrant verdict for plaintiff.

Ind.—Wahl Co. v. Compton, 36 N.E. 2d 942, 109 Ind.App. 631.

Pa.—Clark v. Rumsey, Com.Pl., 28 Del.Co. 181.

(3) To support verdict denying recovery.—Williams v. Greene, 26 S.E. 2d 89, 181 Va. 707.

Evidence held insufficient

To prove conclusively that collision occurred in center lane rather than outside lane—Keck v. Hinkley, 6 A.2d 165, 90 N.H. 181.

38. Evidence held sufficient

(1) To authorize recovery for injuries and damages arising from collision in four-lane highway on ground that defendant's vehicle left its side of highway and crossed center line.

Ark.—Schwam v. Reece, 210 S.W.2d 903.

La.—Stelly v. Prather, App., 182 So. 171.

Utah.—Thomas v. Sadleir, 162 P.2d 112, 108 Utah 552.

(2) To authorize verdict for defendant.—Cochran v. Koller, 33 N.E.2d 910, 310 Ill.App. 91.

39. Evidence held to establish negligence

(1) In general.

Cal.—Corcoran v. Ward, 1 P.2d 455, 115 Cal.App. 180—Ivie v. Enterprise Poultry Farm, 275 P. 514, 97 Cal.App. 242.

La.—Smythe v. Great Am. Indem. Co., App., 35 So.2d 267—Waller v. Hutchinson, 126 So. 565, 12 La.App. 537.

Mo.—Stone v. Garrett Const. Co., App., 92 S.W.2d 951.

(2) In failing to remain on own side of the road.

U.S.—Parmlter v. U. S., D.C.Mass., 75 F.Supp. 823.

La.—Miller v. Hayes, App., 29 So. 2d 396—Cutrer v. Jones, App., 9 So.2d 859—Keowen v. Amite Sand & Gravel Co., App., 4 So.2d 79.

Wash.—Taylor v. Lubetich, 97 P.2d 142, 2 Wash.2d 6.

Wyo.—Oviatt v. Hohnholtz, 299 P. 1037, 43 Wyo. 174.

(3) In driving around curve at excessive speed.

La.—Tillman v. Centineo, App., 158 So. 603, amended 159 So. 137.

Wis.—Hansberry v. Dunn, 284 N.W. 556, 230 Wis. 626.

Evidence held sufficient

(1) In general.

Conn.—Wilson v. Bliss, 54 A.2d 493.

Ill.—Schuster v. Jefferson Ice Co., 65 N.E.2d 239, 328 Ill.App. 124.

(2) To sustain verdict for plaintiff.

Mich.—Bates v. Franson, 267 N.W. 595, 276 Mich. 79.

N.Y.—Lee v. Terns, 11 N.Y.S.2d 885, 257 App.Div. 872.

Tex.—Schroeder v. Whisenant, Civ. App., 93 S.W.2d 571, error granted.

Va.—Texas Co. v. Zeigler, 14 S.E.2d 704, 177 Va. 557.

(3) To sustain verdict for defendant.—Ramage v. Trepanier, 283 N.W. 471, 69 N.D. 19.

(4) To sustain judgment against defendant whose vehicle rounded curve on wrong side of highway.

Ga.—La. Hatte v. Walton, 184 S.E. 742, 53 Ga.App. 6.

Ill.—Castle v. Searles, 28 N.E.2d 619, 306 Ill.App. 304.

Ky.—Gayheart v. Caudill, 111 S.W.2d 394, 271 Kv. 1.

La.—Thibodaux v. Culotta, App., 192 So. 712.

Neb.—Ross v. Carroll, 291 N.W. 726, 138 Neb. 1.

Evidence held insufficient

(1) In general.

Ky.—Silver Fleet Motor Express v. Turnmire, 178 S.W.2d 597, 296 Ky. 768.

La.—Holden v. Fred Brenner Lumber Co., 134 So. 301, 17 La.App. 84.

(2) To sustain judgment for defendant.

Ill.—Werlik v. Murray, 46 N.E.2d 138, 317 Ill.App. 378.

N.Y.—Amann v. Thurston, 231 N.Y.S. 657, 133 Misc. 293, affirmed 230 N.Y.S. 794, 224 App.Div. 782.

40. La.—Kruta v. Gibbon, App., 21 So.2d 744.

Evidence held sufficient

(1) In general.

La.—Kruta v. Gibbon, App., 21 So.2d 744—Pitcher v. Erwin, 120 So. 229, 10 La.App. 534.

(2) Lights, Signals, and Lookout

General rules are applicable in determining the weight and sufficiency of the evidence of negligence as to lights, signals, and lookout.

In actions for injuries resulting from the collision of motor vehicles traveling in opposite directions, general rules have been applied in determining the weight and sufficiency of evidence of negligence with respect to lights,⁴¹ signals,⁴² and lookout.⁴³

Tenn.—Texas Co. v. Ingram, 64 S.W. 2d 208, 16 Tenn.App. 267.

(2) To sustain verdict or judgment for plaintiff for injuries sustained as result of collision on or near bridge.

Ky.—Kennedy Transfer Co. v. Greenfield's Adm'x, 59 S.W.2d 978, 248 Ky. 708.

La.—Maddox v. Pattison, App., 186 So. 894—Briley v. Natchitoches Motor Co., App., 174 So. 394—Baudine v. Teche Transfer Co., 130 So. 60, 15 La.App. 90.

Miss.—Universal Truck Loading Co. v. Taylor, 172 So. 756, 178 Miss 143.

Okl.—Wray v. Ferris, 103 P.2d 912, 187 Okl. 428, 128 A.L.R. 1079

Tenn.—Mason v. James, 89 S.W.2d 910, 19 Tenn.App. 479

Va.—Wilkins v. Davis, 164 S.E. 649, 158 Va. 763.

Evidence held insufficient

La.—Theriot v. Fontenot, App., 147 So. 725.

Miss.—Universal Truck Loading Co. v. Taylor, 164 So. 3, 174 Miss 353.

Tex.—Wright v. McCoy, Civ.App., 131 S.W.2d 52.

Circumstantial evidence held sufficient

Ga.—Wray v. Garrett, 113 P.2d 367, 189 Ga. 28.

41. N.H.—Lavigne v. Nelson, 18 A. 2d 832, 91 N.H. 304.

Tex.—Markusfeld v. Zahn, Civ.App., 99 S.W.2d 438, error dismissed.

Weight and sufficiency of evidence of negligence as to equipment and lights generally see supra subdivision a (6) of this section.

Evidence held sufficient

(1) In general.

Ala.—Clift v. Donegan, 186 So. 476, 237 Ala. 304.

Conn.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355.

Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

(2) To establish negligence in driving without lights.

Cal.—Robbiano v. Bovet, 24 P.2d 466, 213 Cal. 589.

La.—Keith v. Borron, App., 152 So. 343—Baden v. Globe Indemnity

Co., 145 So. 53, reheard 146 So. 784.

(3) To establish negligence in failing to dim lights—Bell v. Lewis, 38 S.E.2d 686, 74 Ga.App. 26—Whatley v. Henry, 16 S.E.2d 214, 65 Ga.App. 668.

42. Evidence held sufficient

(1) To establish negligence in failing to sound horn—Whatley v. Henry, 16 S.E.2d 214, 65 Ga.App. 668

(2) To sustain finding that signal complied with statute—Salmon v. Maloney, 16 P.2d 1050, 128 Cal.App. 183.

Weight and sufficiency of evidence of negligence as to signals and lookout generally see supra subdivision a (7) of this section.

43. Evidence held sufficient

(1) In general

Mo.—La Pierre v. Kinney, 19 S.W.2d 306, 225 Mo.App. 199

Wis.—Hohensee v. Acheson, 251 N.W. 234, 213 Wis. 316.

(2) To authorize finding that driver was not negligent as to lookout—Butts v. Ward, 279 N.W. 6, 227 Wis 387, 116 A.L.R. 1441.

(3) To establish negligence in failing to keep proper lookout.

Cal.—Connor v. Owen, 82 P.2d 1114, 28 Cal.App.2d 591

Ill.—Philpott v. Parham, 44 N.E.2d 934, 316 Ill.App. 278.

Iowa.—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23.

Tex.—Newlin v. Smith, Civ.App., 142 S.W.2d 610, reversed on other grounds 150 S.W.2d 233, 136 Tex. 260—Dunigan Tool & Supply Co. v. Whipple, Civ.App., 136 S.W.2d 947, error dismissed, judgment correct.

Wash.—Tutewiler v. Shannon, 111 P.2d 215, 8 Wash.2d 23.

Wis.—Quinnell v. Bowen, 16 N.W.2d 415, 246 Wis. 6—Cottrill v. Pinkerton, 248 N.W. 124, 211 Wis. 310—Stewart v. Rudis, 246 N.W. 552, 210 Wis. 523.

Evidence held insufficient

(1) To destroy testimony tending to show that driver was keeping a proper lookout.—Stotts v. Love, Tex. Civ.App., 184 S.W.2d 308, error refused.

(3) Speed and Control

General rules apply, in actions for injuries resulting from the collision of vehicles traveling in opposite directions, in determining the weight and sufficiency of evidence of negligence as to speed and control.

The general rules as to the weight and sufficiency of evidence as to speed and control, discussed supra subdivision a (8) of this section, have been applied in actions for injuries resulting from the collision of motor vehicles traveling in opposite directions,⁴⁴ as where the alleged negligence consist-

(2) To support finding that defendant was negligent in failing to keep proper lookout—Uren v. Purity Dairy Co., 32 N.W.2d 615, 252 Wis. 446, rehearing denied 33 N.W.2d 213, 252 Wis. 446—Dekeyser v. Milwaukee Automobile Ins. Co., 295 N.W. 755, 236 Wis. 419.

44. Evidence held sufficient

(1) In general.

U.S.—Day v. Newton, C.C.A.Kan., 142 F.2d 582—Dromey v. Inter State Motor Freight Service, C.C.A. Ill., 121 F.2d 361—Cope v. Heath, C.C.A. Ark., 108 F.2d 854.

Cal.—Boyle v. Loyd, 114 P.2d 398, 45 Cal.App.2d 493

Mich.—Bielewski v. Nicks, 287 N.W. 560, 290 Mich. 401.

Neb.—Ross v. Carroll, 291 N.W. 726, 138 Neb. 1.

(2) To show negligence in management and control of vehicle.

U.S.—Peach v. U.S., D.C.Pa., 75 F. Supp. 218.

Wis.—Hansberry v. Dunn, 284 N.W. 556, 230 Wis. 626

(3) To show operation of defendant's vehicle at excessive speed.

U.S.—Blaszkyk v. Eastern Auto Forwarding Co., C.C.A.N.Y., 134 F.2d 600

Cal.—Rodriguez v. Savage Transp. Co., 175 P.2d 37, 77 Cal.App.2d 162

Connor v. Owen, 82 P.2d 1114, 28 Cal.App.2d 591—Petersen v. Petersen, 67 P.2d 759, 20 Cal.App.2d 680.

Iowa.—Richards v. Begenstos, 21 N.W.2d 23, 237 Iowa 398—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23—Rogers v. Lago-

marcino-Grupe Co., 248 N.W. 1, 215 Iowa 1270.

Ky.—Mullen v. Coleman, 179 S.W.2d 600, 297 Ky. 351.

La.—Muse v. Chambley, App., 16 So. 2d 276.

Me.—Atherton v. Crandlemire, 33 A. 2d 303, 140 Me. 28.

Mass.—Wall v. King, 182 N.E. 855, 280 Mass. 577.

Mich.—Derby v. Culver, 258 N.W. 244, 270 Mich. 197.

Minn.—Turnmire v. Jefferson Transp. Co., 278 N.W. 159, 202 Minn. 307.

Neb.—Moore v. Krejci, 297 N.W. 913, 139 Neb. 562.

Tenn.—American Trust & Banking

ed in failure to exercise due care in view of the nature and condition of the highway⁴⁵ and weather conditions.⁴⁶ An estimate of speed based on a momentary glimpse of a car approaching head on is of obviously little value.⁴⁷

h. Vehicles Crossing

- (1) In general
- (2) Right of way and duty to stop
- (3) Left or U-turns

Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

Tex.—Newlin v. Smith, Civ.App., 142 S.W.2d 610, reversed on other grounds 150 S.W.2d 233, 136 Tex. 260—Bantuelle v. Evans, Civ.App., 139 S.W.2d 283.

Va.—Baptist v. Slate, 173 S.E. 512, 162 Va. 1.

Wis.—Dinger v. McCoy Transp. Co., 29 N.W.2d 60, 251 Wis. 265—Hansberry v. Dunn, 284 N.W. 556, 230 Wis. 626.

(4) To warrant verdict for plaintiff.

Mich.—Milliman v. Spratt, 209 N.W. 667, 235 Mich. 521.

Neb.—Echternach v. Widick, 276 N.W. 162, 133 Neb. 543.

R.I.—Urquhart v. Marty, 200 A. 456, 61 R.I. 102.

Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

Evidence held insufficient

Cal.—Bingham v. Grenamyre, 77 P.2d 867, 25 Cal.App.2d 467.

Ind.—Lee Bros. v. Jones, 54 N.E.2d 108, 114 Ind.App. 688.

N.H.—Boiduc v. Stein, 47 A.2d 107, 94 N.H. 89.

Pa.—Anderson v. Perta, 10 A.2d 898, 138 Pa.Super. 321.

Wis.—Stoll v. Andro, 26 N.W.2d 162, 250 Wis. 26.

45. Vt.—Brooks v. Holmes, 35 A.2d 374, 113 Vt. 456.

Wis.—Uren v. Purity Dairy Co., 32 N.W.2d 615, 252 Wis. 446, rehearing denied 33 N.W.2d 213, 252 Wis. 446.

Evidence held to establish negligence

(1) In general.—Wade v. U. S., D. C. Mass., 75 F.Supp. 729, affirmed, C.C. A., 170 F.2d 298.

(2) In skidding into plaintiff's vehicle.

Ill.—Gordon v. Current, 263 Ill.App. 435.

N.H.—Carroll v. Dane, 196 A. 626, 89 N.H. 233.

Ohio.—Bauman v. Sincovich, 27 N.E.2d 772, 137 Ohio St. 21.

Wash.—Tutewiller v. Shannon, 111 P.2d 215, 8 Wash.2d 23.

Wis.—Chevinkas v. Wilcox, 250 N.W. 381, 212 Wis. 554.

(3) In traveling at too high a

speed in view of slippery condition of road.

U.S.—Parmiter v. U. S., D.C. Mass., 75 F.Supp. 823.

Mass.—Tutewiller v. Shannon, 111 P.2d 215, 8 Wash.2d 23.

46. Evidence held to establish negligence

U.S.—Parmiter v. U. S., D.C. Mass., 75 F.Supp. 823.

Wash.—Tutewiller v. Shannon, 111 P.2d 215, 8 Wash.2d 23.

47. Pa.—Mulheirn v. Brown, 185 A. 304, 322 Pa. 171—Commonwealth v. Hatch, 27 A.2d 742, 149 Pa.Super. 289—Anderson v. Perta, 10 A.2d 898, 138 Pa.Super. 321—Parsons v. Motor Freight Express, Com.Pl., 35 Berks Co. 245.

48. Ill.—Louis v. Checker Taxi Co., 47 N.E.2d 351, 318 Ill.App. 71.

La.—Perret v. Toye Bros. Yellow Cab Co., App., 20 So.2d 377—Herr v. Thames, App., 165 So. 530.

Ohio.—Hopkins v. Kissinger, 166 N.E. 916, 31 Ohio App. 229.

Description of what occurred

Plaintiff must so describe facts showing defendant's liability for automobile collision at intersection as to enable jury to visualize occurrence and form independent judgment thereon—Koshgerian v. Yellow Cab Co., 100 Pa.Super. 376.

Evidence held sufficient

(1) In general.

Ala.—Johnston v. Weissinger, 143 So. 464, 225 Ala. 425.

Cal.—Malone v. Red Top Cab Co. of Los Angeles, 60 P.2d 543, 16 Cal.App.2d 268.

Kan.—Tilden v. Ash, 67 P.2d 614, 145 Kan. 909.

La.—Sibille v. Highway Ins. Underwriters, App., 12 So.2d 625, followed in 12 So.2d 631—Ashbury v. Allan, App., 12 So.2d 615—Atina Casualty & Surety Co. v. Lee, 123 So. 137, 10 La.App. 763.

Minn.—Free Press Co. v. Bellig, 236 N.W. 306, 183 Minn. 286.

Mo.—Myers v. Nissenbaum, App., 6 S.W.2d 993.

N.J.—Schaack v. J. A. Holmes Const. Co., 158 A. 494, 10 N.J.Misc. 226, affirmed 163 A. 663, 110 N.J.Law 16.

Pa.—Pittsburgh Corrugated Paper

(4) Lights, signals, and lookout

(5) Speed and control

(1) In General

In an action for damages sustained in a collision between crossing motor vehicles, the defendant's negligence must be proved by a preponderance of the evidence.

In an action for damages sustained in a collision between crossing motor vehicles, defendant's negligence must be proved by a preponderance of the evidence⁴⁸ and general rules as to the weight

Box Co. v. Luterman, 156 A. 631, 102 Pa.Super. 297.

(2) To authorize recovery.

U.S.—Gaughan v. Michigan Interstate Motor Freight, C.C.A.Ill., 94 F.2d 266.

Cal.—Kirschbaum v. McCarthy, 54 P.2d 8, 5 Cal.2d 191—Bennett v. Chanslor & Lyon Co., 266 P. 803, 204 Cal. 101—Nagamatsu v. Rohrer, 53 P.2d 174, 10 Cal.App.2d 752—Ashbury v. Goldberg, 47 P.2d 311, 8 Cal.App.2d 70—Walter v. Ayvazian, 25 P.2d 526, 134 Cal.App. 360—Sawyer v. Nelson, 1 P.2d 1068, 115 Cal.App. 490—Mella v. Hooper, 254 P. 256, 200 Cal. 628.

Conn.—Aldrich v. Duggan, 139 A. 270, 107 Conn. 17.

Fla.—Rose v. Pickard, 11 So.2d 474, 152 Fla. 293—Porter v. Smith, 164 So. 280, 121 Fla. 511.

Ga.—A. G. Boone Co. v. Owens, 187 S.E. 899, 54 Ga.App. 379—Simpson Grocery Co. v. Holley, 180 S.E. 501, 51 Ga.App. 355.

Idaho.—Hamilton v. Carpenter, 290 P. 724, 49 Idaho 629.

Ill.—Schneiderman v. Interstate Transit Lines, 69 N.E.2d 293, 394 Ill. 569—Stitzel v. Johnson, 73 N.E.2d 653, 331 Ill.App. 609—Wheeler v. Rudek, 65 N.E.2d 611, 328 Ill. App. 283, reversed on other grounds 74 N.E.2d 601, 397 Ill. 438—Walters v. Ind., 48 N.E.2d 791, 319 Ill.App. 162—Cimaroli v. City of Chicago, 20 N.E.2d 175, 299 Ill. App. 620—McCarthy v. O. H. Yates & Co., 14 N.E.2d 254, 294 Ill.App. 474—Johnson v. Duke, 247 Ill.App. 372.

Ind.—Superior Meat Products v. Holmoway, 48 N.E.2d 83, 113 Ind.App. 320.

Iowa.—Connelly v. Nolte, 21 N.W.2d 311, 237 Iowa 114—Schenk v. Moore, 286 N.W. 445, 226 Iowa 1313.

Kan.—Leinbach v. Pickwick Greyhound Lines, 23 P.2d 449, 138 Kan. 50, 92 A.L.R. 1.

Ky.—Randle v. Mitchell, 142 S.W.2d 124, 283 Ky. 501—Hinternisch v. Brewsaugh, 87 S.W.2d 934, 261 Ky. 432.

La.—Isaac v. Frederick, App., 5 So.2d 176—Wagner v. Susslin, App., 4 So.2d 624—Althans v. Toye Bros.

and sufficiency of the evidence have been applied where the injury allegedly occurred as the result

- Yellow Cab Co., App., 191 So. 717—Battalora v. Carnahan Creamery, App., 157 So. 612—Dartez v. Castle, App., 145 So. 408—Soniat v. Russell, App., 142 So. 854—Flake v. Le Blanc, App., 141 So. 800—Wolfe v. Toye Bros. Auto & Taxicab Co., 138 So. 453, 18 La.App. 321—Monticello v. Spano, 137 So. 357, 17 La. App. 697—Rumpf v. Callo, 132 So. 763, 16 La.App. 12—Pope v. Locascio, 126 So. 727, 13 La. App. 304, followed in 126 So. 729, 13 La.App. 304.
- Me.—Libby v. Heikkinen, 32 A.2d 604, 140 Me. 23—Hill v. Janson, 31 A.2d 236, 139 Me. 344.
- Mass.—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584.
- Mich.—Michaels v. Smith, 216 N.W. 413, 240 Mich. 671.
- Minn.—Meyer v. Agren, 287 N.W. 680, 206 Minn. 72—Boyle v. Boileau, 219 N.W. 866, 174 Minn. 545—Meeker v. Fineberg, 209 N.W. 895, 168 Minn. 111.
- N.J.—Rich v. Central Electrotpe Foundry Corporation, 3 A.2d 584, 121 N.J.Law 481—Hommell v. Brington, 157 A. 673, 10 N.J.Misc. 93—Loccisano v. Feltus, 156 A. 332, 9 N.J.Misc. 1045—Carraher v. Brown & White Cab, 154 A. 736, 9 N.J.Misc. 549—Comar v. Kelly & McAllinden Co., 152 A. 471, 9 N.J. Misc. 8—Brouzell v. Reeves, 152 A. 387, 8 N.J.Misc. 856—MacDonald v. Weart, 150 A. 578, 8 N.J.Misc. 445—Rubel v. Weiss, 149 A. 756, 8 N.J.Misc. 269.
- N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.
- N.Y.—Carozza v. Carpenter, 56 N.Y.S. 2d 156, 269 App.Div. 893—Eaton v. Paige, 24 N.Y.S.2d 522, 261 App. Div. 850—Walrath v. Jennings, 1 N.Y.S.2d 549, 253 App.Div. 865.
- N.C.—Winstead v. Thorp, 165 S.E. 331, 203 N.C. 843—De Laney v. Henderson-Gilmer Co., 135 S.E. 791, 192 N.C. 647.
- Ohio.—Watt v. Feuerlicht, App., 41 N.E.2d 719—Interstate Motor Freight Corporation v. Girard, 163 N.E. 206, 29 Ohio App. 101.
- Okl.—Meier v. Edsall, 137 P.2d 926, 192 Okl. 529—Walker v. Lahman, 14 P.2d 416, 159 Okl. 97—Walker v. Sanders, 14 P.2d 417, 159 Okl. 97—Oklahoma Natural Gas Corporation v. Schwartz, 293 P. 1087, 146 Okl. 250—De Camp v. Comerford, 272 P. 475, 134 Okl. 145.
- Pa.—Fitzgerald v. Penn Transit Co., 44 A.2d 288, 353 Pa. 43—McNulty v. Joseph Horne Co., 148 A. 105, 298 Pa. 244—Graham v. E. F. Houghton & Co., 175 A. 178, 115 Pa. Super. 155—Scull v. Moross, 170 A. 366, 111 Pa. Super. 581—Plauschnat v. Snellenburg, 100 Pa. Super. 417—Meyer v. American Stores Co., 100 Pa. Super. 303—Born v. Bulletin Co., 100 Pa. Super. 300—Liberman v. Northern Trust Co., 100 Pa. Super. 223—Steinbrecker v. Monaghan, 100 Pa. Super. 195—Fry v. Derrito, 97 Pa. Super. 131—Smith v. Blafkin, 95 Pa. Super. 520—Concanon v. Little, 95 Pa. Super. 230—Barrett v. Bass, 95 Pa. Super. 123—Williamson v. De Frain Sand Co., 94 Pa. Super. 437—Keystone Lead Co. v. Frechie, 94 Pa. Super. 395—Hood v. Urban, 93 Pa. Super. 4—Fox v. Cohen, 89 Pa. Super. 186—Wiebe v. Powers, 86 Pa. Super. 389.
- Tenn.—Central Produce Co. v. General Cab Co. of Nashville, 129 S.W. 2d 1117, 23 Tenn. App. 209—Atchley v. Sims, 128 S.W.2d 975, 23 Tenn. App. 187.
- Utah.—Moss v. Taylor, 273 P. 515, 73 Utah 277.
- Va.—Hatfield v. Thomas, 41 S.E.2d 460, 186 Va. 7—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320—Hamrick v. Fahrney, 161 S.E. 43, 157 Va. 396.
- Wash.—Colvin v. Simonson, 16 P.2d 839, 170 Wash. 341—Nelson v. Owens, 8 P.2d 301, 166 Wash. 647.
- Wis.—Schemm v. Bruch, 29 N.W.2d 66, 251 Wis. 229—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Cranston v. Railway Express Agency, 297 N.W. 418, 237 Wis. 479.
- Wyo.—Wallis v. Nauman, 157 P.2d 285, 61 Wyo. 231.
- (3) To establish negligence.
- U.S.—Kansas City Public Service Co. v. McMullin, C.C.A.Kan., 142 F.2d 116.
- Ark.—Baker v. Boone, 177 S.W.2d 756, 206 Ark. 823.
- Cal.—Rechtoild v. Bishop & Co., 105 P.2d 984, 16 Cal.2d 285—Root v. Pacific Greyhound Lines, 190 P.2d 48, 84 Cal.App.2d 135—Ades v. Brush, 152 P.2d 519, 66 Cal.App.2d 436—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal.App.2d 349—De Arman v. Connelly, 25 P.2d 24, 134 Cal. App. 173—Harlow v. Motor Coach Co., 16 P.2d 779, 127 Cal.App. 728, followed in Miller v. Motor Coach Co., 16 P.2d 781, 127 Cal.App. 781, and 16 P.2d 781, 127 Cal.App. 782—De Martini v. Wheatley, 14 P.2d 869, 126 Cal.App. 230—Brower v. Arnstein, 14 P.2d 863, 126 Cal.App. 291—Van Derhoof v. Chambon, 8 P.2d 925, 121 Cal.App. 118—Kroijer v. Jenkins, 6 P.2d 96, 119 Cal.App. 175—Hepner v. Libby, McNeill & Libby, 300 P. 830, 114 Cal.App. 747—Enz v. Johns, 296 P. 115, 112 Cal. App. 1—Olds & Stoller v. Seifert, 254 P. 289, 81 Cal.App. 423—Dillon v. Prudential Ins. Co. of America, 242 P. 736, 75 Cal.App. 266.
- Colo.—Lorenzini v. Rucker, 35 P.2d 865, 95 Colo. 246.
- Conn.—Hazen v. Vogel, 150 A. 507, 111 Conn. 728—Camarotta v. Kling, 143 A. 881, 108 Conn. 602.
- D.C.—Shu v. Basinger, Mun.App., 57 A.2d 295.
- Ill.—Bentley v. Olson, 58 N.E.2d 316, 324 Ill.App. 281—Barber v. Northcutt, 39 N.E.2d 411, 313 Ill.App. 147—Partridge v. Enterprise Transfer Co., 30 N.E.2d 947, 307 Ill.App. 386—Partridge v. Enterprise Transfer Co., 25 N.E.2d 839, 303 Ill.App. 650—Leahy v. Morris, 6 N.E.2d 914, 289 Ill.App. 99—Skala v. Lehon, 258 Ill.App. 252, affirmed 175 N.E. 832, 343 Ill. 602—Darling & Co. v. Yellow Cab Co., 238 Ill.App. 326.
- Ind.—Helton v. Mann, 40 N.E.2d 395, 111 Ind. App. 487.
- Kan.—Sawhill v. Casualty Reciprocal Exchange, 107 P.2d 770, 152 Kan. 735—Kersting v. Reese, 255 P. 74, 123 Kan. 277—Beeson v. Perry, 253 P. 1097, 123 Kan. 164.
- La.—Sheehan v. Hanson-Flotte Co., App., 34 So.2d 657—Prescott v. Rowland, App., 32 So.2d 72—Abrigo v. Tri-State Transit Co., App., 22 So.2d 681—Perret v. Toye Bros. Yellow Cab Co., App., 20 So.2d 377—Meyer v. Rein, App., 18 So.2d 69—World Fire & Marine Ins. Co. v. Henderson, App., 10 So.2d 535—Folse v. Flynn, App., 200 So. 160—Stock v. Davis, App., 187 So. 678—Vincent v. Simon, App., 186 So. 362—Di Chiara v. Hackett, App., 186 So. 113—Rohleder v. Toye Bros. Yellow Cab Co., App., 185 So. 540—Vassar v. Levy, App., 184 So. 255—Anderson v. Louisiana Power & Light Co., App., 180 So. 243—Coleman v. New Orleans Public Service, App., 177 So. 103—Alcantara v. Haik, App., 153 So. 357—Cuchiarra v. Siple, App., 153 So. 338—Page v. It. P. Hyams Coal Co., App., 144 So. 515—Di Marco v. Viking Packing Co., 140 So. 881, 19 La. App. 573—McClary v. Endom's Transfer & Storage Garage, 139 So. 702, 19 La. App. 515—Fuller v. Moore, 139 So. 679, 19 La. App. 98—Bordlee v. Di Carlo, 135 So. 725, 17 La. App. 200—Springer v. Carter, 134 So. 764, 17 La. App. 165—Jordan v. Katz & Besthoff, 132 So. 380, 15 La. App. 500—Reeves v. Heymann, 128 So. 47, 13 La. App. 876—Brunson v. Barnwell, 124 So. 564, 11 La. App. 663—Brevard v. New Orleans Transfer Co., 123 So. 187, 10 La. App. 772—Maryland Casualty Co. v. Muller, 119 So. 764, 9 La. App. 700.
- Me.—Atherton v. Crandlemire, 33 A. 2d 303, 140 Me. 28—Campbell v. Langdo, 28 A.2d 311, 139 Me. 188—Keller v. Banks, 156 A. 817, 130 Me. 397.
- Md.—Jones v. Dickerson, 41 A.2d 492, 184 Md. 499.
- Mass.—Gaines v. Ratnowsky, 41 N.E. 2d 25, 311 Mass. 254—Gibbs v.

of defendant's negligence in entering a highway | when another vehicle was approaching so closely as

Swiman, 38 N.E.2d 930, 310 Mass. 830—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394—Scott v. Lieberman, 187 N.E. 629, 284 Mass. 325.
 Mich.—Wright v. Barron, 28 N.W.2d 278, 318 Mich. 409—Nicewander v. Diamond, 4 N.W.2d 533, 302 Mich. 239.
 Minn.—Behr v. Schmidt, 288 N.W. 722, 206 Minn. 378—Duncanson v. Jeffries, 263 N.W. 92, 195 Minn. 347—Lund v. Olson, 234 N.W. 310, 182 Minn. 204, 75 A.L.R. 371—Chandler v. Buchanan, 216 N.W. 254, 173 Minn. 31.
 Miss.—McCollum v. Thrift, 125 So. 544, 156 Miss. 236.
 N.H.—Leavitt v. Bacon, 200 A. 399, 89 N.H. 383.
 N.J.—Bowen v. Healy's Inc., 197 A. 655, 16 N.J.Misc. 113, appeal dismissed Fisher v. Healy's Special Tours, 1 A.2d 848, 121 N.J.Law 198—Henderson v. Abbotts Alderney Dairies, 156 A. 20, 9 N.J.Misc. 802—Napolitano v. Moore, 152 A. 705, 9 N.J.Misc. 49.
 N.Y.—Faron v. Herman Elpert, Inc., 8 N.Y.S.2d 741, 255 App.Div. 933—Swarthout v. Van Auken, 235 N.Y.S. 732, 227 App.Div. 644—Devuono v. Muller, 214 N.Y.S. 557, 126 Misc. 669, reversed in part on other grounds 219 N.Y.S. 83, 128 Misc. 501—Areson v. Malek, 65 N.Y.S.2d 474—Goschar v. Bauer, 13 N.Y.S.2d 328—Healy v. Warwick, 174 N.Y.S. 632.
 N.D.—Wilson v. Oscar H. Klorie Co., 12 N.W.2d 526, 73 N.D. 134.
 Okl.—Oklahoma City v. Head, 90 P.2d 395, 185 Okl. 33.
 Pa.—Luckenbaugh v. Houghawout, 46 A.2d 163, 353 Pa. 528—Malo v. Fahs, 14 A.2d 105, 339 Pa. 180—Jones v. Bell Tel. Co. of Pa., 49 A.2d 272, 159 Pa.Super. 556—Carroll v. Kirk, 19 A.2d 584, 144 Pa.Super. 211—Gaskill v. Melilla, 18 A.2d 455, 144 Pa.Super. 78—Cunningham v. Spangler, 186 A. 173, 123 Pa.Super. 151—Myers v. Funk, 169 A. 400, 111 Pa.Super. 17.
 R.I.—National Sugar Refining Co. v. Knight, 11 A.2d 918, 64 R.I. 279.
 S.D.—Loffer v. Witte, 28 N.W.2d 698.
 Tex.—O. K. Theater Corporation v. Rehmeier, Civ.App., 115 S.W.2d 985, error dismissed—South Texas Coaches v. Eastland, Civ.App., 101 S.W.2d 878, error dismissed—Tinker v. Yellow Cab Co., Civ.App., 74 S.W.2d 521, error dismissed—Sustaita v. Valle, Civ.App., 38 S.W.2d 638—Sanchez v. McKittrick, Civ.App., 25 S.W.2d 935, error dismissed.
 Vt.—Gregoire v. Willett, 8 A.2d 660, 110 Vt. 459.
 Va.—Hatfield v. Thomas, 41 S.E.2d 460, 186 Va. 7—Brown v. Parker, 189 S.E. 339, 167 Va. 286.
 Wash.—Koboski v. Cobb, 297 P. 771,

161 Wash. 574—Rowell v. Johnson, 266 P. 733, 147 Wash. 607—Keller v. Waddington, 253 P. 646, 142 Wash. 474.
 Wis.—Dinger v. McCoy Transp. Co., 29 N.W.2d 60, 251 Wis. 265—Hanse v. Employers Mut. Liability Ins. Co., 27 N.W.2d 468, 250 Wis. 422—Zigler v. Kinney, 27 N.W.2d 433, 250 Wis. 338—Tietz v. Blaier, 26 N.W.2d 551, 250 Wis. 214—Klas v. Fenske, 22 N.W.2d 596, 248 Wis. 534—Jacobson v. Bryan, 12 N.W.2d 789, 244 Wis. 359—Kasoev v. Kocher, 4 N.W.2d 158, 240 Wis. 629—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341—Asmus v. Gams, 244 N.W. 581, 209 Wis. 201—Tofte v. Crolus, 220 N.W. 225, 196 Wis. 608.
 (4) To support finding as to defendant's lack of negligence.
 Cal.—Sinabough v. Clark, 294 P. 462, 110 Cal.App. 340—Lapp v. Moon, 280 P. 710, 100 Cal.App. 618.
 Conn.—Graveline v. Livingston, 34 A.2d 732, 130 Conn. 397—Kildav v. Voltz, 166 A. 754, 117 Conn. 170.
 Ky.—Thomas v. Smith, 195 S.W.2d 274, 302 Ky. 636—Hilsenrad v. Bowling, 166 S.W.2d 847, 292 Ky. 368.
 La.—Montfue v. American Mut. Liability Ins. Co. App., 26 So.2d 407—Firemen's Ins. Co. v. Boggs, App., 23 So.2d 630—Daly v. Employers Liability Assur. Corporation, Limited, of London, England, App., 15 So.2d 396—World Fire & Marine Ins. Co. v. Henderson, App., 10 So.2d 535—Hochenadel v. Heard, App., 188 So. 413—Herr v. Thames, App., 165 So. 530—Stewart v. Barker Delivery Service, App., 158 So. 258—Downey v. Dittmer, App., 151 So. 653—Smith's Tutorship v. Perrin, App., 145 So. 685—Perry v. Carter, 129 So. 388, 14 La.App. 102.
 Me.—Richard v. Neault, 135 A. 524, 126 Me. 17.
 Tenn.—Walton v. Duke, App., 207 S.W.2d 595.
 Tex.—Tinker v. Yellow Cab Co., Civ.App., 74 S.W.2d 521, error dismissed.
 Wash.—Winston v. Bacon, 111 P.2d 764, 8 Wash.2d 216—Stidell v. Davidson, 253 P. 458, 142 Wash. 348.
 (5) To sustain verdict or judgment denying recovery.
 U.S.—Kuper v. Betzer, C.C.A.S.D., 127 F.2d 84.
 Cal.—Thompson v. Pioneer Laundry Co., 128 P.2d 915, 54 Cal.App.2d 360—Shannon v. Mt. Eden Nursery Co., 25 P.2d 849, 134 Cal.App. 591—Mosesian v. Crown Cleaners & Dyers, 10 P.2d 193, 122 Cal.App. 248.
 Conn.—Sutton v. Hauk, 142 A. 385, 108 Conn. 9.

Ga.—Eddleman v. Askew, 179 S.E. 247, 50 Ga.App. 540.
 Ill.—Benestad v. Vander Molen, 76 N.E.2d 351, 332 Ill.App. 660—Drummond v. Gleim, 33 N.E.2d 751, 309 Ill.App. 649.
 Ind.—Baker v. Pritchard, 194 N.E. 781, 100 Ind.App. 509.
 Kan.—Miller v. Hartman, 36 P.2d 965, 140 Kan. 298.
 Ky.—Buschmeyer v. Kentucky Carriers, 43 S.W.2d 999, 241 Ky. 373.
 La.—Frans v. Shushan, 131 So. 591, 14 La.App. 465—Fabregas v. Hausmann, 125 So. 882, 13 La.App. 231.
 Mich.—Rhoades v. Finn, 284 N.W. 720, 288 Mich. 262.
 Minn.—Kane v. Locke, 12 N.W.2d 495, 216 Minn. 170.
 Miss.—McLean v. Mississippi Power Co., 186 So. 314.
 Mo.—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104.
 Neb.—Torres v. Bollman, 32 N.W.2d 642, 149 Neb. 762—Carter v. Parsons, 286 N.W. 696, 136 Neb. 515—Storm v. Christenson, 263 N.W. 896, 130 Neb. 86.
 N.Y.—Jensen v. Livernois, 23 N.Y.S.2d 322, 260 App.Div. 977, reargument denied 25 N.Y.S.2d 1009, 261 App.Div. 848—Shepard v. Peck, 5 N.Y.S.2d 865, 254 App.Div. 421.
 Okl.—Pate v. Specht, 53 P.2d 239, 175 Okl. 318.
 Wash.—Cecchi v. Bosa, 57 P.2d 1064, 186 Wash. 205.
Evidence held insufficient
 (1) In general
 Ariz.—Hall v. Wallace, 130 P.2d 36, 59 Ariz. 503, followed in 130 P.2d 39, two cases, 59 Ariz. 510, 511, and Hall v. Schuyler, 130 P.2d 40, 59 Ariz. 512.
 La.—Rocheffort v. Teche Lines, App., 186 So. 751—Burthe v. Lee, App., 152 So. 100, rehearing refused 152 So. 589.
 Mass.—Shockett v. Akesson, 37 N.E.2d 1015, 310 Mass. 289.
 Miss.—Coca Cola Bottling Works of Greenwood v. Hand, 191 So. 674, 186 Miss. 893—Flowers v. Stringer, 120 So. 198, 152 Miss. 897.
 R.I.—Little v. Rubin, 6 A.2d 683, 62 R.I. 438.
 (2) To show that defendant was negligent.
 Cal.—Walzman v. Black, 281 P. 1087, 101 Cal.App. 610.
 La.—Kihneman v. Nejim, App., 29 So. 2d 618—Phares v. Courtney, App., 27 So.2d 925—Solomon v. Davis Bus Line, App., 1 So.2d 816—Laborde v. Schwartzburg, App., 188 So. 668—Gardescu v. Taylor, App., 187 So. 135—Raggio v. Natchitoches Motor Co., App., 174 So. 397.
 N.H.—Peterson v. Pappacostantis, 26 A.2d 677, 92 N.H. 146.
 N.J.—Dolci v. Public Service Co-ordi-

to constitute a hazard.⁴⁹ Evidence of the positions of the vehicles and their skid marks after a collision between them has been held to have little probative value on the issue of defendant's negligence,⁵⁰ although it has also been said that such evidence may be important.⁵¹

(2) Right of Way and Duty to Stop

General rules have been applied with respect to the

weight and sufficiency of evidence of the defendant's alleged negligence in failing to yield the right of way or in failing to stop before entering a through or favored street or highway, or with respect to his alleged negligent operation of his vehicle on a through or favored street or highway.

General rules of evidence have been applied with respect to the weight and sufficiency of the evidence of defendant's alleged negligence in failing to yield the right of way,⁵² for example, in failing

nated Transport, 155 A. 781, 9 N.J. Misc. 822.

N.M.—Crockner v. Johnston, 95 P.2d 214, 43 N.M. 469.

N.Y.—Winegar v. Chalupelt, 10 N.Y.S. 2d 887, 256 App.Div. 1054.

Pa.—Koshgerian v. Yellow Cab Co., 100 Pa.Super. 376—Bochinsky v. Lenzuk, Com.Pl., 32 Luz.Leg.Reg. 173.

(3) To support verdict or judgment for defendant.

Ill.—Whittaker v. Chicago Motor Coach Co., 80 N.E.2d 81, 334 Ill. App. 629.

N.J.—Grossberg v. Shapiro, 147 A. 729, 7 N.J.Misc. 1062.

N.Y.—Martin v. Ingram, 5 N.Y.S.2d 277, 254 App.Div. 890, reargument denied 7 N.Y.S.2d 491, 255 App.Div. 789 and Gilchrist v. Ingram, 7 N.Y.S.2d 492, 255 App.Div. 788, appeal dismissed Martin v. Ingram, 20 N.E.2d 1022, 280 N.Y. 671—Wilson v. Griffin, 278 N.Y.S. 469, 243 App.Div. 831, appeal dismissed 196 N.E. 595, 267 N.Y. 591.

(4) To support verdict or judgment for plaintiff.

Ala.—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala.App. 179, certiorari denied 156 So. 865, 229 Ala. 276.

Cal.—Johnson v. City of Santa Monica, 66 P.2d 433, 8 Cal.2d 473.

La.—Passera v. U. S. Guarantee Co., App., 187 So. 345—Poole v. Perretz, 127 So. 439, 13 La.App. 110.

Miss.—Jones v. Carter, 7 So.2d 519, 192 Miss. 603.

Neb.—Klaus v. Solomon Valley Stage Lines Co., 264 N.W. 747, 130 Neb. 325.

Ohio.—Stuchel v. Cleveland Ry. Co., App., 58 N.E.2d 430—McCombs v. Landes, 171 N.E. 862, 35 Ohio App. 164.

49. Evidence held to establish negligence

(1) In general.

U.S.—Van Wie v. U. S., D.C.Iowa, 77 F.Supp. 22.

Cal.—Malinson v. Black, 188 P.2d 788, 83 Cal.App.2d 375.

La.—Tatar v. Munson, App., 161 So. 361.

Ohio.—Connors v. Dobbs, 66 N.E.2d 546, 77 Ohio App. 247.

Tex.—Kimbriel Produce Co. v. Webster, Civ.App., 185 S.W.2d 198, error refused.

(2) Backing onto highway in front of oncoming vehicle.

La.—Anderson v. Brock Bros. & Collins, 124 So. 716, 11 La.App. 700.

Neb.—Burry v. Interstate Transit Lines, 287 N.W. 66, 136 Neb. 695—Vandervert v. Robey, 225 N.W. 36, 118 Neb. 395.

(3) Entering highway from driveway.

Ark.—Jamison v. Spivey, 125 S.W.2d 453, 197 Ark. 698.

Ill.—Miller v. Odell, 28 N.E.2d 581, 306 Ill.App. 295.

La.—Richie v. Natchitoches Oil Mill, App., 178 So. 752.

Ohio.—Boyd v. Hadley, App., 59 N.E.2d 676—Wallace v. Bartlett, App., 58 N.E.2d 495.

Pa.—Shoemaker v. Williams, 200 A. 255, 131 Pa.Super. 546.

Va.—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320.

Evidence held not to establish negligence

Cal.—Conley v. Marvin, 291 P. 830, 210 Cal. 330.

50. U.S.—Nash v. Raun, CCA Pa., 149 F.2d 885, certiorari denied 66 S.Ct. 99, 326 U.S. 758, 90 L.Ed. 455.

Cal.—Roselle v. Beach, 125 P.2d 77, 51 Cal.App.2d 579.

Pa.—McNulty v. Joseph Horne Co., 148 A. 105, 298 Pa. 244.

Evidence held insufficient

To authorize inferences as to how damage was done.—Ranck v. Sauder, 193 A. 269, 327 Pa. 177.

51. La.—Trowbridge v. Rackle & Schmid, 3 La.App. 368.

52. Pa.—Homsher v. Lynn, Com.Pl., 34 Del.Co. 84.

Evidence held sufficient

(1) In general.

La.—Holmes v. Hanna, App., 25 So.2d 106—Lindsey v. Schlieder, App., 21 So.2d 98—Arline v. Alexander, App., 2 So.2d 710.

Minn.—Krueger v. Sanford, 227 N.W. 50, 178 Minn. 619.

Ohio.—Peltier v. Smith, 66 N.E.2d 117, 78 Ohio App. 171.

Wash.—Mercillott v. Hart, 22 P.2d 658, 173 Wash. 224.

Wis.—Anderson v. Potts, 27 N.W.2d 495, 250 Wis. 510.

(2) To show negligence generally.

La.—Perkins v. Ruscliana, App., 29

So.2d 532—Pender v. Bonfanti, App., 13 So.2d 105—Poulan v. Gallagher, App., 147 So. 723, rehearing denied 148 So. 511.

N.Y.—Camden Fire Ins. Ass'n of Camden, N. J., v. Bleem, 227 N.Y.S. 746, 132 Misc. 22.

Vt.—Senecal v. Bleau, 189 A. 139, 108 Vt. 486.

Wash.—Rhodes v. Johnson, 299 P. 976, 163 Wash. 54, followed in 299 P. 978, 163 Wash. 701.

(3) To show negligence in failing to yield right of way in general.

Wash.—Boyle v. Lewis, 193 P.2d 332—Mahoney v. Canafax, 162 P.2d 903, 23 Wash.2d 869—O'Neil v. Wilshire, 57 P.2d 1254, 186 Wash. 276.

Wis.—Schemm v. Bruch, 29 N.W.2d 66, 251 Wis. 229—Landskron v. Hartford Accident & Indemnity Co., 6 N.W.2d 178, 241 Wis. 445.

42 C.J. p. 1236 note 37 [a] (8).

(4) To show that defendant had right of way.—Brandao v. Bisso, La. App., 142 So. 916.

(5) To show that vehicle in which plaintiff was riding had right of way.

Cal.—Kirschbaum v. McCarthy, 54 P. 2d 8, 5 Cal.2d 191.

Conn.—Decker v. Roberts, 32 A.2d 651, 130 Conn. 174—De Marey v. Brugas, 131 A. 392, 103 Conn. 667.

La.—Hinton v. Tri-State Transit Co. of Louisiana, App., 151 So. 116.

(6) To support judgment for plaintiff

Colo.—Brothers v. Chatfield, 154 P.2d 46, 113 Colo. 7.

Ill.—Roadruck v. Schultz, 77 N.E.2d 874, 333 Ill.App. 476—Goad v. Phipps, 57 N.E.2d 528, 324 Ill.App. 160.

La.—H. Well Baking Co. v. Barton, App., 5 So.2d 591—Hartford Fire Ins. Co. v. Romero, App., 5 So.2d 208—Marsiglia v. Toye, App., 158 So. 589.

Mich.—Haynes v. Clark, 233 N.W. 321, 252 Mich. 295.

Minn.—Olson v. Thake, 300 N.W. 602, 211 Minn. 231.

N.Y.—Russell v. Stieglitz, 3 N.Y.S.2d 234, 254 App.Div. 681.

Pa.—Shives v. White-Lyons Motor Co., 9 Pa.Dist. & Co. 709.

(7) To justify finding that, although driver failed to yield right of way, such act was not negligence.—Dedear v. James, Tex.Civ.App., 184 S.W.2d 319, error refused.

to yield the right of way to a vehicle approaching from his right⁵³ or to the vehicle first to enter the intersection,⁵⁴ or in failing to stop before entering a through or favored street or highway,⁵⁵ or

Evidence held insufficient

- (1) In general.—Weismantle v. Petros, 19 S.E.2d 594, 124 W.Va. 180.
 (2) To entitle plaintiff to recover.
 Ill.—Spangler v. Blackburn, 22 N.E. 2d 405, 301 Ill.App. 625.
 La.—Terrebonne v. Toye Bros. Yellow Cab Co., App., 3 So.2d 224—Brown v. Sardinga, App., 176 So. 662, followed in Drivon v. Sardinga, 176 So. 663 and Perrin v. Sardinga, 176 So. 664.
 (3) To make out prima facie case of negligence.—Hill v. Lopez, 45 S. E.2d 539, 228 N.C. 433.
 (4) To show negligence.—Meyer v. Hartford Bros. Gravel Co., 14 N.W. 2d 660, 144 Neb. 808.

53. Evidence held sufficient

- (1) In general.
 Ill.—Gantar v. Nastruz, 72 N.E.2d 565, 331 Ill.App. 113—Walker v. Brandon, 19 N.E.2d 219, 298 Ill.App. 630—Govekar v. Kweder, 16 N.E.2d 249, 296 Ill.App. 402
 La.—Gulf Ins. Co. v. Robins, App., 15 So.2d 552.
 N.Y.—Southcombe v. Coyle, 8 N.Y.S. 2d 557.
 Pa.—Close v. Philadelphia Electric Co., 90 Pa.Super. 260.
 Wis.—La Chance v. Stuart, 288 N.W. 262, 233 Wis. 246—Kilcoyne v. Trausch, 269 N.W. 276, 222 Wis. 528.
 (2) To support verdict in favor of plaintiff who approached intersection from defendant's right
 N.Y.—Colgan v. Battista, 18 N.Y.S. 2d 254, 259 App.Div. 776.
 Ohio.—Neal v. Schmidt, App., 39 N.E. 2d 859.
 Pa.—American Ry. Express Co. v. Crane, 90 Pa.Super. 422.
 Wash.—Horsfall v. Naher, 257 P. 1118, 144 Wash. 205.
 (3) To support verdict or judgment in favor of party approaching from left.
 Colo.—Bauserman v. White, 114 P.2d 557, 108 Colo. 101.
 Me.—Fitts v. Marquis, 140 A. 909, 127 Me. 75.
 Mass.—Fallovalita v. Johnsyn, 57 N.E.2d 532, 317 Mass. 153.
 Neb.—Showers v. A. H. Jones Co., 253 N.W. 902, 126 Neb. 604.
 Nev.—Hilton v. Hymers, 65 P.2d 679, 57 Nev. 391.
 N.J.—Moran v. Booghor, 148 A. 181, 8 N.J.Misc. 50.
 Pa.—Redmond v. Koons, 97 Pa.Super. 229.
 Tenn.—Atchley v. Sims, 128 S.W.2d 975, 23 Tenn.App. 167.
 (4) To support finding of negligence in respect of collision at intersection with vehicle approaching from right.
 Cal.—Shamlian v. Minardi, 11 P.2d

- 402, 123 Cal.App. 495—Klemko v. Ryer, 4 P.2d 998, 118 Cal.App. 238.
 Colo.—Markley v. Hilkey Bros., 160 P.2d 394, 113 Colo. 562.
 Conn.—Hansen v. Costello, 5 A.2d 880, 125 Conn. 386.
 La.—Wagner v. Susslin, App., 4 So. 2d 624—Simon v. Harrison, App., 200 So. 476, followed in 200 So. 481.
 N.J.—Becker v. Waring, 53 A.2d 311, 135 N.J.Law 535—Taylor v. Adkins, 158 A. 924, 10 N.J.Misc. 289—Brunt v. Schenck, 155 A. 618, 9 N. J Misc. 805.
 N.Y.—Reynolds v. State, 28 N.Y.S.2d 851, 262 App.Div. 927, appeal dismissed 40 N.E.2d 34, 287 N.Y. 745
 Pa.—Gasperoni v. Datt, 19 A.2d 376, 341 Pa. 448—Christensen v. Jules Junker, Inc., 181 A. 326, 119 Pa.Super. 335—Dougherty v. Glose, Com. Pl., 22 Leh Co.L.J. 395

Evidence held insufficient

- (1) To support judgment for defendant, who approached intersection from plaintiff's left —Coshun v. Mauseau, 23 N.E.2d 656, 62 Ohio App. 249
 (2) To support judgment for plaintiff against defendant coming from plaintiff's right—Brayman v. De Wolf, 97 Pa.Super. 225.

54. Evidence held sufficient

- (1) In general.
 La.—Butler v. O'Neal, App., 26 So.2d 753—Frank De Latour, Inc. v. Toye Bros. Yellow Cab Co., App., 145 So. 310.
 S.D.—Smith v. Aspaas, 21 N.W.2d 878.
 Wash.—Anderson v. Kurrell, 182 P. 2d 1, 28 Wash.2d 227
 Wis.—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341.
 (2) To establish that both vehicles entered the intersection approximately at the same time.
 La.—Chaney v. Hutches, App., 192 So. 556—Universal Automobile Ins. Co. v. Manisulco, App., 148 So. 731.
 Mo.—Banks v. Empire Dist. Electric Co., App., 4 S.W.2d 875.
 (3) To show that defendant's vehicle entered intersection first.—Thoman v. Deliberto, 136 So. 904, 17 La. App. 574.
 (4) To support conclusion that plaintiff's automobile was first to enter intersection.
 Cal.—Ebert v. Tide Water Associated Oil Co., 129 P.2d 135, 54 Cal.App.2d 497—Lundgren v. Converse, 93 P. 2d 819, 34 Cal.App.2d 445—Demers v. Sutherland, 4 P.2d 187, 117 Cal. App. 489.
 Iowa.—Stein v. Sharpe, 295 N.W. 155, 229 Iowa 812.
 La.—Glazner v. Wilson, App., 23 So. 2d 330—Meredith v. Arkansas Lou-

- isiana Gas Co., App., 185 So. 498—Smith v. Silvio, App., 157 So. 757—Wittenberg v. Massey, 131 So. 708, 14 La.App. 488—Laughlin v. Sullivan, 131 So. 687, 14 La.App. 491.
 Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.

Evidence held insufficient

- La.—Hartford Fire Ins. Co. v. Romero, App., 5 So.2d 208.

55. Evidence held unworthy of belief

- A motorist will not be permitted to say that he stopped at a through street but did not see another vehicle with which he collided as he proceeded into intersection, when it is obvious that if he had stopped and looked he could have seen the vehicle—Ritter v. Nieman, 67 N.E.2d 417, 329 Ill.App. 163—Smith v. A. Salavitch & Son, 27 N.E.2d 851, 305 Ill. App. 495.

Evidence held sufficient

- (1) In general.
 La.—Butler v. O'Neal, App., 26 So.2d 753—Dow v. Brown, App., 193 So. 239.
 Mich.—Valenti v. Mayer, 4 N.W.2d 5, 301 Mich. 551.
 N.Y.—Eggleton v. Thompson, 78 N.Y.S.2d 7, 273 App.Div. 987.
 Ohio.—Neal v. Schmidt, App., 39 N.E.2d 859.
 Or.—Ervast v. Sterling, 68 P.2d 137, 156 Or. 432.
 Tenn.—Whitehurst v. Howell, 98 S.W.2d 1071, 20 Tenn.App. 314.
 Wash.—Bennett v. Karnowsky, 166 P. 2d 192, 24 Wash.2d 487.
 (2) To establish negligence.
 U.S.—U. S. v. Goldman, D.C.Pa., 61 F. Supp. 315.
 Cal.—Cox v. Tyrone Power Enterprises, 121 P.2d 829, 49 Cal.App.2d 383—Hodges v. McCullom, 117 P.2d 44, 47 Cal.App.2d 41—Huffnes v. Standard Brands of California, 90 P.2d 599, 32 Cal.App.2d 631—Hiatt v. Brockman, 45 P.2d 411, 7 Cal. App.2d 88.
 Ill.—Goad v. Phipps, 57 N.E.2d 528, 324 Ill.App. 160—Roberts v. Cipri, 40 N.E.2d 629, 313 Ill.App. 373—Smith v. A. Salavitch & Son, 27 N.E.2d 851, 305 Ill.App. 495—Graham v. Drossen, 10 N.E.2d 843, 292 Ill. App. 15.
 La.—Waller v. Rapides Grocery Co., App., 22 So.2d 407—Authement v. Hays, App., 18 So.2d 182—Cole v. Sherrill, App., 7 So.2d 205—Smith v. Jackson, App., 198 So. 174—Anderson v. Louisiana Power & Light Co., App., 180 So. 243—Bertucci v. Arjonilla, App., 172 So. 445—United Theatres v. Rochefort, App., 171 So. 205—Joseph Chalona Co. v. Smith,

with respect to defendant's alleged negligent operation of his vehicle on a through or favored street or highway,⁵⁶ or at an intersection controlled by traffic signals or lights.⁵⁷ On the question of who entered the intersection first, circumstantial evidence may be considered,⁵⁸ although it does not establish conclusively who was at fault.⁵⁹

(3) Left or U-Turns

General rules have been applied in determining the weight and sufficiency of evidence of negligence in making a left turn, or in striking a vehicle making a left turn, or with respect to a vehicle making a U-turn.

General rules have been applied in determining the weight and sufficiency of evidence of negligent operation of a motor vehicle while making a left turn⁶⁰ or negligent operation based on striking

App., 158 So. 237—Wirth v. Pokert, 140 So. 234, 19 La.App. 690.

Mich.—Pulford v. Mouw, 272 N.W. 713, 279 Mich. 376—Leader v. Straver, 270 N.W. 280, 278 Mich. 234—Tobin v. Smiley, 248 N.W. 603, 268 Mich. 226—Hoban v. Ryder, 241 N.W. 241, 257 Mich. 188.

N.M.—Bunton v. Hull, 177 P.2d 168, 51 N.M. 5—Mayfield v. Crowdus, 35 P.2d 291, 38 N.M. 471.

N.Y.—Faron v. Herman Elpert, Inc., 8 N.Y.S.2d 741, 255 App.Div. 933.

Pa.—Fitzgerald v. Penn Transit Co., 44 A.2d 288, 353 Pa. 43.

R.I.—Fournier v. Goulet, 26 A.2d 480, 68 R.I. 63.

Tenn.—Central Produce Co. v. General Cab Co. of Nashville, 129 S.W.2d 1117, 23 Tenn.App. 209—Atchley v. Sims, 128 S.W.2d 975, 23 Tenn.App. 167.

Wis.—Klas v. Fenske, 22 N.W.2d 596, 248 Wis. 534.

56. Evidence held sufficient

(1) In general.—Angelo v. Esau, 93 P.2d 205, 34 Cal.App.2d 130.

(2) To support finding of negligence.

Mich.—Lindzy v. Swaab, 248 N.W. 617, 263 Mich. 264.

Neb.—Clausen v. Johnson, 246 N.W. 458, 124 Neb. 280.

R.I.—De Arruda v. Newport Creamery, 197 A. 474, 60 R.I. 153.

(3) To sustain finding that defendant was not guilty of negligence.

Cal.—Ambra v. Woolsey, 130 P.2d 152, 55 Cal.App.2d 104.

La.—Ernst v. General Baking Co., App., 16 So.2d 259.

N.M.—Bunton v. Hull, 177 P.2d 168, 51 N.M. 5.

57. Evidence held sufficient

(1) In general.

Ill.—Janitch v. Coca Cola Bottling Co. of Chicago, 53 N.E.2d 286, 321 Ill.App. 629.

La.—Seiner v. Toye Bros. Yellow Cab Co., App., 18 So.2d 189—Lopez v. Bertel, App., 198 So. 185—Chandler v. F. Strauss & Son, App., 194 So. 133—Bruscatto v. Stewart, App., 177 So. 121—Manuel v. Bradford, App., 166 So. 657.

Pa.—McCartney v. Bareford, 159 A. 85, 104 Pa.Super. 594.

(2) To support finding of negligence.

Md.—Allen v. State, for Use of Tattle, 197 A. 144, 173 Md. 649.

Va.—Hatfield v. Thomas, 41 S.E.2d 460, 186 Va. 7—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570.

Wash.—Church v. Shaffer, 297 P. 1097, 162 Wash. 126.

Evidence held insufficient

Ill.—Rosten v. Western United Gas & Electric Co., 20 N.E.2d 365, 299 Ill.App. 615.

58. Cal.—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272—Goyette v. Hellman, 8 P.2d 911, 121 Cal. App. 144.

59. Cal.—Goyette v. Hellman, supra. La.—Frank Delatour, Inc. v. Marullo, 135 So. 63, 17 La.App. 181.

Effect of proof that one vehicle struck the other

(1) Fact that one automobile struck the other and not vice versa is not conclusive on whether motorist whose automobile was struck had preempted the crossing.—Di Chiara v. Hackett, La.App., 186 So. 113.

(2) The fact that it was defendant's automobile which ran into the automobile in which plaintiffs were riding was not in itself a controlling consideration on the question whether defendant, who was the favored driver in approaching obstructed intersection, was negligent.—Winston v. Bacon, 111 P.2d 764, 8 Wash.2d 216.

Probative value

Although some of the details of intersectional automobile collision given by defendant motorist in his testimony were not in accord with the trial court's ultimate findings, it did not follow that defendant's testimony was entirely unreliable and that injured plaintiffs' version of the accident was entirely correct.—Winston v. Bacon, supra.

60. Evidence held sufficient

(1) In general.

Cal.—McDevitt v. Rogers, 136 P.2d 323, 58 Cal.App.2d 307—Doyle v. Loyd, 114 P.2d 398, 45 Cal.App.2d 493.

La.—Hero v. Toye Bros. Yellow Cab Co., App., 19 So.2d 887—Gumbel v. Jackson Brewing Co., App., 15 So. 2d 391—Scaife v. Clifton, App., 160 So. 142.

Ohio.—Eversole v. Seelbach, App., 73 N.E.2d 223.

Wash.—Grimes v. Fraser, 35 P.2d 88, 178 Wash. 511.

(2) To sustain verdict for defendant making left-hand turn.

Cal.—Cosby v. Rimmel, 186 P.2d 215, 82 Cal.App.2d 415.

Ky.—Hilsenrad v. Bowling, 166 S.W. 2d 847, 292 Ky. 368.

La.—Buras v. Letellier Transfer Co., App., 165 So. 328—Thorgrimson v. Shreveport Yellow Cabs, App., 161 So. 49.

Mich.—Barnum v. Berk, 239 N.W. 329, 256 Mich. 363.

Okl.—Equeis v. Tulsa City Lines, 147 P.2d 460, 194 Okl. 79.

R.I.—McAllister v. Chase, 13 A.2d 690, 65 R.I. 122.

(3) To warrant recovery.

Ind.—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624.

La.—Dunigan v. Haynes, App., 26 So. 2d 710—McGee v. Interstate Motor Express, 135 So. 713, 17 La.App. 214.

Mo.—Bennett v. Cauble, App., 167 S.W.2d 959.

N.J.—Wilson v. Brown, 145 A. 614, 7 N.J. Misc. 389.

R.I.—Haas v. Simeone, 21 A.2d 13, 67 R.I. 108.

Evidence held insufficient

Ill.—Jordan v. Railway Express Agency, 27 N.E.2d 309, 305 Ill.App. 491—Robbins v. Illinois Power & Light Corporation, 255 Ill.App. 106.

La.—Fulmer v. U. S. Fidelity & Guaranty Co., Great American Indemnity Co., Intervener, App., 5 So.2d 923, followed in Bacon v. U. S. Fidelity & Guaranty Co., 5 So.2d 927 and Hartford Fire Ins. Co. v. U. S. Fidelity & Guaranty Co., 5 So.2d 927.

Wis.—Manchuk v. Milwaukee Electric Ry. & Light Co., 294 N.W. 42, 235 Wis. 579.

Evidence held to establish negligence

(1) In making left turn generally.

Ark.—Lewis v. Prescott, 99 S.W.2d 590, 193 Ark. 379.

Cal.—Mason v. San Diego Electric Ry. Co., 133 P.2d 841, 57 Cal.App. 2d 17.

Ill.—Gragg v. Pasqualini, 17 N.E.2d 75, 297 Ill.App. 631.

La.—Gomez v. Broussard, App., 34 So.2d 643, rehearing denied 35 So. 2d 477—Loret v. Armour & Co., App., 32 So.2d 55—Seale v. Stephens, Employers Cas. Co., Interveners, App., 24 So.2d 651, affirmed 29 So.2d 65, 210 La. 1068.

a vehicle making a left turn,⁶¹ or in determining the weight and sufficiency of evidence of alleged negligence with respect to a vehicle making a U-turn.⁶²

(4) Lights, Signals, and Lookout

In an action for damages sustained in a collision

between crossing vehicles, there must be a preponderance of the evidence to prove negligence with respect to lights, signals, and lookout.

In an action for damages sustained in a collision between crossing vehicles, there must be a preponderance of the evidence to prove negligence with respect to lights,⁶³ signals,⁶⁴ and lookout.⁶⁵

Tex.—Dillingham v. Currie, Civ.App., 92 S.W.2d 1122, error dismissed.

(2) In making left turn directly in front of plaintiff's vehicle.

La.—Home Ins. Co. v. Warren, App., 29 So.2d 551—Grasser v. Cunningham, App., 200 So. 658.

N.J.—Oliver v. Leonardo, 51 A.2d 129, 135 N.J. Law 210—Jaffe v. Spata, 157 A. 135, 9 N.J. Misc. 1067.

R.I.—Dietz v. United Electric Rys. Co., 21 A.2d 277, 67 R.I. 161.

Wis.—Zigler v. Kinney, 27 N.W.2d 433, 250 Wis. 338—Zutter v. O'Connell, 229 N.W. 74, 200 Wis. 601.

(3) In turning to left without signal.

Ala.—Griffith Freight Lines v. Benson, 176 So. 370, 234 Ala. 613.

Cal.—Hall v. Williams, 11 P.2d 19, 123 Cal.App. 148.

Ind.—Drewrys Limited, U. S. A., v. Crippen, 44 N.E.2d 1006, 113 Ind. App. 120.

Ky.—Louisville Taxicab & Transfer Co. v. Boughter, 36 S.W.2d 12, 237 Ky. 611.

Tenn.—Atchley v. Sims, 128 S.W.2d 975, 23 Tenn. App. 167.

(4) In turning left and striking approaching vehicle

La.—Wise v. Villere Coal Co., App., 11 So.2d 419, rehearing refused 11 So.2d 657.

Pa.—Sillies v. American Stores Co., 53 A.2d 610, 357 Pa. 176.

(5) In cutting corner in making left turn at intersection.

Cal.—Buckus v. Sessions, 110 P.2d 51, 17 Cal.2d 380—Anderson v. San Francisco Examiner, 112 P.2d 297, 44 Cal.App.2d 349—McGlothlin v. City and County of San Francisco, 10 P.2d 116, 122 Cal.App. 324—Hoffman v. McNamara, 282 P. 990, 102 Cal.App. 280.

Conn.—Mignone v. Murphy, 33 A.2d 130, 130 Conn. 196.

La.—Dietrich & Wiltz v. H. T. Cottam & Co., 120 So. 262, 9 La.App. 740.

S.D.—Federal Land Bank of Omaha v. Kinsman, 30 N.W.2d 8.

Tex.—Adams v. Siefferman, Civ.App., 197 S.W.2d 506.

Va.—Hannabass v. Ryan, 180 S.E. 416, 164 Va. 519.

42 C.J. p 1236 note 37 [a] (1).

61. Evidence held sufficient

(1) In general.

Cal.—Atchley v. Finley, 133 P.2d 823, 57 Cal.App.2d 21.

Conn.—Estabrook v. Main, 147 A. 822, 110 Conn. 271.

Kan.—Bergman v. Kansas City Public Service Co., 58 P.2d 110, 144 Kan. 27.

Me.—Reid v. Walton, 168 A. 876, 132 Me. 209.

Wis.—Dinger v. McCoy Transp. Co., 29 N.W.2d 60, 250 Wis. 265—Jacobson v. Bryan, 12 N.W.2d 789, 244 Wis. 359—Stylow v. Milwaukee Electric Railway & Transport Co., 5 N.W.2d 750, 241 Wis. 211—McGill v. Baumgart, 288 N.W. 799, 233 Wis. 86.

(2) To establish negligence.

Cal.—Kennedy v. Berg, 62 P.2d 1374, 18 Cal.App.2d 53—Hollenbough v. Wickersheim, 299 P. 90, 114 Cal. App. 1.

Conn.—Caines v. Wolfsey, 167 A. 733, 117 Conn. 671.

La.—Messina v. Bomicino, App., 27 So.2d 397—Charing v. Cunningham, App., 187 So. 809—Bayer v. Whitley, 138 So. 702, 18 La.App. 443.

Me.—Tibbetts v. Harbach, 198 A. 610, 135 Me. 397.

N.J.—Samuel v. Christiansen, 158 A. 479, 10 N.J. Misc. 223.

N.Y.—Bustard v. Lunt, 284 N.Y.S. 56, 246 App.Div. 431.

Okl.—Stroud v. Tompkins, 145 P.2d 396, 193 Okl. 483.

R.I.—Dietz v. United Electric Rys. Co., 21 A.2d 277, 67 R.I. 161.

(3) To sustain verdict for defendant.

Stalnaker v. Baird, 189 S.E. 86, 54 Ga.App. 734.

Evidence held insufficient

(1) To make prima facie case.—Rutger v. Walken, 143 P.2d 866, 19 Wash.2d 681.

(2) To warrant recovery.

N.Y.—Raufeisen v. Rochester Transit Corporation, 15 N.Y.S.2d 670, 258 App.Div. 846.

R.I.—Joseph v. Craig, 13 A.2d 515, 65 R.I. 74.

Va.—Garrison v. Burns, 16 S.E.2d 306, 178 Va. 1.

62. Cal.—De La Motte v. Rucker, 130 P.2d 444, 55 Cal.App.2d 226.

Minn.—Smith v. Twin City Motor Bus Co., 233 N.W. 316, 181 Minn. 554.

63. Evidence held sufficient

Ill.—Howard v. Ind., 50 N.E.2d 769, 320 Ill.App. 338.

La.—Brodtman v. Lawrence, 132 So. 256, 15 La.App. 407.

Mich.—Boyce v. Shukas, 11 N.W.2d 206, 806 Mich. 467.

Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.

Wis.—Tietz v. Blaier, 26 N.W.2d 551, 250 Wis. 214.

Weight and sufficiency of evidence of negligence as to equipment and lights generally see supra subdivision a (6) of this section.

64. Evidence held to establish negligence

Conn.—Rosenberg v. Matulis, 166 A. 397, 116 Conn. 675.

N.Y.—Areson v. Majek, 65 N.Y.S.2d 474

Weight and sufficiency of evidence of negligence as to signals and lookout generally see supra subdivision a (7) of this section.

65. Evidence held sufficient

(1) In general.

Ariz.—Casey v. Marshall, 168 P.2d 240, 64 Ariz. 232, rehearing denied 169 P.2d 84, 64 Ariz. 260.

Cal.—Angelo v. Esau, 93 P.2d 205, 34 Cal.App.2d 130.

Del.—Odgers v. Clark, 19 A.2d 724, 2 Terry 232.

Ill.—Crowe Name Plate & Mfg. Co. v. Dammerich, 279 Ill.App. 103.

La.—Bruscatto v. Stewart, App., 177 So. 121—Blevins v. Drake-Lindsay Co., 144 So. 257—Hamilton v. Lee, App., 144 So. 249—Thibodeaux v. Star Checker Cab Co., App., 143 So. 101.

Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394.

Tex.—Dedear v. James, Civ.App., 184 S.W.2d 319, error refused—Houston Electric Co. v. Potter, Civ.App., 51 S.W.2d 754, error dismissed.

Wis.—Ray v. Milwaukee Automobile Ins. Co., Limited, Mutual, 283 N.W. 799, 230 Wis. 323—Kilcoyne v. Trausch, 269 N.W. 276, 222 Wis. 528—Hotz v. Ingels, 253 N.W. 177, 214 Wis. 356.

(2) To establish negligence in failing to keep proper lookout.

U.S.—Van Wie v. U. S., D.C.Iowa, 77 F.Supp. 22.

Cal.—McNitt v. Volf, 269 P. 932, 205 Cal. 89.

Conn.—Hansen v. Costello, 5 A.2d 880, 125 Conn. 386.

Kan.—McGinley v. City of Cherryvale, 40 P.2d 377, 141 Kan. 155.

La.—Prescott v. Rowland, App., 32 So.2d 72—Nezat v. General Outdoor Advertising Co., App., 24 So. 2d 482—Saucier v. Kellett, App., 23 So.2d 772—McBride v. Gill, App., 15 So.2d 643—Wise v. Villere Coal Co., App., 11 So.2d 419, rehearing refused 11 So.2d 657—Cole v. Sherrill, App., 7 So.2d 205—Isaac v.

(5) Speed and Control

In crossing collision cases, general rules apply with respect to weight and sufficiency of evidence relating to speed and control; and negligence may be sufficiently established by circumstantial evidence.

General rules are applicable in determining the weight and sufficiency of the evidence of defendant's alleged negligence with respect to speed and control in an action for damages sustained in a collision between crossing vehicles,⁶⁶ and, in accord-

Frederick, App. 5 So.2d 176—Althans v. Toye Bros. Yellow Cab Co., App., 191 So. 717—Finkelstein v. U. S. Fidelity & Guaranty Co., App., 184 So. 219—Becker v. U. S. Rubber Products, App., 183 So. 596, amended and reinstated 186 So. 99—Antoine v. Werner, App., 172 So. 800—Schmidt & Zeigler, Limited, v. Carroll, App., 161 So. 785—Long v. White, App., 146 So. 368, opinion adhered to 149 So. 133.

Me.—Tibbitts v. Harbach, 198 A. 610, 135 Me. 397—Davis v. Tobin, 163 A. 780, 131 Me. 426.

N.H.—Leavitt v. Bacon, 200 A. 399, 89 N.H. 383.

Pa.—Fitzgerald v. Penn Transit Co., 44 A.2d 288, 353 Pa. 43—Carroll v. Kirk, 19 A.2d 584, 144 Pa Super 211.

Tex.—Kimbriel Produce Co. v. Webster, Civ App., 185 S.W.2d 198, error refused—Sherwin-Williams Co. of Texas v. Delahoussaye, Civ App., 124 S.W.2d 870, error dismissed.

Vt.—Gregoire v. Willett, 8 A.2d 660, 110 Vt. 459—Senecal v. Bleau, 189 A. 139, 108 Vt. 486.

Wis.—Haase v. Employers Mut. Liability Ins. Co., 27 N.W.2d 468, 250 Wis. 422—Zigler v. Kinney, 27 N.W.2d 433, 250 Wis. 338—Klas v. Fenske, 22 N.W.2d 596, 248 Wis. 534—Jacobson v. Bryan, 12 N.W.2d 789, 244 Wis. 359—Landskron v. Hartford Accident & Indemnity Co., 6 N.W.2d 178, 241 Wis. 445—Stylow v. Milwaukee Electric Railway & Transport Co., 5 N.W.2d 750, 241 Wis. 231—Kasper v. Kocher, 4 N.W.2d 158, 240 Wis. 629—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—McGill v. Baumgart, 288 N.W. 799, 233 Wis. 86.

(3) To establish negligence in failing to observe oncoming traffic as driver entered intersection.

Cal.—Huffines v. Standard Brands of California, 90 P.2d 599, 32 Cal.App. 2d 634.

Conn.—Leete v. Griswold Post No. 79, American Legion, 158 A. 919, 114 Conn. 400—Rosenberg v. Matulis, 166 A. 397, 116 Conn. 675.

Fla.—De Salvo v. Curry, 33 So.2d 215. La.—Bertucci v. Arjonilla, App., 172 So. 445.

N.J.—Becker v. Waring, 53 A.2d 311, 135 N.J. Law 535.

S.D.—Loffer v. Witte, 28 N.W.2d 698. Va.—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570.

(4) To establish negligence in failing to see approaching vehicle.

Cal.—Stevenson v. Fleming, 117 P. 2d 717, 47 Cal.App.2d 225.

La.—Wagner v. Susslin, App., 4 So. 2d 624.

Mich.—Heckler v. Laing, 1 N.W.2d 484, 300 Mich. 139.

N.Y.—Areson v. Majek, 65 N.Y.S.2d 474.

Wash.—Bleiler v. Wolff, 161 P.2d 145, 23 Wash.2d 368—Justice v. Lavagetto, 113 P.2d 1025, 9 Wash.2d 77.

Evidence held insufficient

To show that defendant was guilty of negligence in failing to keep proper lookout

Neb.—Bergendahl v. Rabeler, 276 N.W. 673, 133 Neb. 699

Wash.—Winston v. Bacon, 111 P.2d 764, 8 Wash.2d 216.

Wis.—Wilson v. Koch, 6 N.W.2d 659, 241 Wis. 594—Manchuk v. Milwaukee Electric Ry. & Light Co., 294 N.W. 42, 235 Wis. 579—La Chance v. Stuart, 288 N.W. 262, 233 Wis. 246—Ray v. Milwaukee Automobile Ins. Co., Limited, Mutual, 283 N.W. 799, 230 Wis. 323—Ziemke v. Faber, 266 N.W. 217, 221 Wis. 512.

66. Evidence held sufficient

(1) In general.

La.—Bruscatto v. Stewart, App., 177 So. 121—Martin v. Cazades, 130 So. 129, 15 La.App. 100.

N.Y.—Shea v. Judson, 28 N.E.2d 885, 283 N.Y. 393.

Pa.—Michener v. Lewis, 170 A. 272, 314 Pa. 156.

R.I.—Little v. Rubin, 6 A.2d 683, 62 R.I. 438

Wash.—Ellestad v. Leonard, 138 P.2d 200, 18 Wash.2d 118—Rhodes v. Johnson, 299 P. 976, 163 Wash. 54, followed in 299 P. 978, 163 Wash. 701.

(2) To establish negligence.

U.S.—Atlantic Greyhound Corporation v. Loudermilk, C.C.A. Ga., 110 F.2d 596

Cal.—Backus v. Sessions, 110 P.2d 51, 17 Cal.2d 380—Poe v. Lawrence, 140 P.2d 136, 60 Cal.App.2d 125—Pruitt v. Krovitz, 139 P.2d 992, 59 Cal.App.2d 666—Breland v. Traylor Engineering & Manufacturing Co., 126 P.2d 455, 52 Cal.App.2d 415—Finley v. Steiner, 104 P.2d 819, 40 Cal.App.2d 331—Cope v. Goble, 103 P.2d 598, 39 Cal.App.2d 448—Smith v. Schwartz, 57 P.2d 1386, 14 Cal. App.2d 160—Farrett v. Carothers, 53 P.2d 1023, 11 Cal.App.2d 222—Florman v. Patzer, 24 P.2d 228, 133 Cal.App. 358—Demers v. Sutherland, 4 P.2d 187, 117 Cal.App. 489—Shurtleff v. Wynns, 300 P. 890, 114 Cal.App. 653, followed in 300 P. 892, 114 Cal.App. 768—Qua-

tacker v. Hutton, 292 P. 140, 108 Cal.App. 606.

Conn.—Hansen v. Costello, 5 A.2d 880, 125 Conn. 386—Carlin v. Haas, 199 A. 430, 124 Conn. 259.

D.C.—Smith v. Doyle, 98 F.2d 341, 69 App.D.C. 60.

Ill.—Leahy v. Morris, 6 N.E.2d 914, 289 Ill.App. 99—Wallace v. Yellow Cab Co., 238 Ill.App. 283.

Ind.—H. E. McGonigal, Inc. v. Etherington, App., 79 N.E.2d 777—Helton v. Mann, 40 N.E.2d 395, 111 Ind. App. 487—Earle v. Porter, 40 N.E. 2d 381, 112 Ind.App. 71—Lautif v. Blades, 180 N.E. 609, 94 Ind.App. 266.

Iowa.—Falt v. Krug, 32 N.W.2d 781—Simanek v. Behel, 7 N.W.2d 792, 232 Iowa 1150

Kan.—Taggart v. Yellow Cab Co. of Wichita, 131 P.2d 924, 156 Kan. 88.

La.—Capps v. American Auto Ins. Co., App., 35 So.2d 263—Prescott v. Rowland, App., 32 So.2d 72—Culver v. Toye Bros Yellow Cab Co., App., 26 So.2d 296—Acosta v. Smith, App., 23 So.2d 712, followed in 23 So.2d 745 and Butler v. Smith, 23 So.2d 745—Birocato v. T. S. C. Motor Freight Lines, App., 22 So.2d 480—Davilla v. New Orleans Public Service, App., 18 So.2d 357—Kelly v. Neff, App., 14 So.2d 657—Pender v. Bonfanti, App., 13 So.2d 105—Bertuccini v. Toye Bros Yellow Cab Co., App., 11 So.2d 247—H. Weil Baking Co. v. Barton, App., 5 So.2d 591—Isaac v. Frederick, App., 5 So.2d 176—Collins v. United Electric Service, App., 1 So.2d 820—Schexnauldre v. Bledsoe, App., 194 So. 45—Chaney v. Hutches, App., 192 So. 556—Althans v. Toye Bros. Yellow Cab Co., App., 191 So. 717—Itocheffort v. Teche Lines, App., 186 So. 751—Becker v. U. S. Rubber Products, App., 183 So. 596, amended and reinstated 186 So. 99—Mesc v. Summers, App., 170 So. 510—Pannell v. Consolidated Parcels, App., 164 So. 167—Tatar v. Munson, App., 161 So. 361—Farace v. United Creamery, App., 159 So. 627—Webb v. Key, App., 144 So. 650—Watson v. Munding, App., 144 So. 620—Hamilton v. Lee, App., 144 So. 249—Brown v. Dalton, App., 143 So. 672—Arceneaux v. Teche Lines, App., 143 So. 533—Bailey v. Demourelle, 135 So. 623, 17 La. App. 116, followed in Eastman v. Demourelle, 135 So. 625, 17 La.App. 119—Brodman v. Lawrence, 132 So. 256, 15 La.App. 407—Russell v. Louisiana Oil Refining Corporation, 127 So. 27, 13 La.App. 74—

ance with the general rule discussed supra subdivision a (8) (a) of this section, circumstantial evidence of such negligence may be sufficient.⁶⁷

1. Vehicles Traveling in Same Direction

- (1) In general
- (2) Duties of forward vehicle
- (3) Duties of following vehicle
- (4) Collision with, or endangering, approaching vehicle

Middleton v. Jordan, 120 So. 668, 10 La.App. 189.
 Mass.—Gaines v. Ratnowsky, 41 N.E. 2d 25, 311 Mass. 254.
 Mich.—Nicewander v. Diamond, 4 N.W.2d 533, 302 Mich. 239—Huber v. Paquette, 292 N.W. 334, 293 Mich. 370—Leader v. Straver, 270 N.W. 280, 278 Mich. 234.
 Mo.—Murphy v. Quick Tire Service, App. 47 S.W.2d 202—Agree v. Herring, 298 S.W. 250, 221 Mo.App. 1022
 N.H.—Leavitt v. Bacon, 200 A. 399, 89 NH 383.
 N.J.—Bowen v. Healy's Inc., 197 A. 655, 16 N.J.Misc. 113, appeal dismissed Fisher v. Healy's Special Tours, 1 A 2d 848, 121 N.J.Law 198
 N.Y.—Cross v. Cohen, 9 N.Y.S.2d 43, 256 App.Div. 891, reargument denied 11 N.Y.S.2d 549, 256 App.Div. 1056, appeal denied 23 N.E.2d 219, 280 N.Y. 849—Faron v. Herman Elpert, Inc., 8 N.Y.S.2d 741, 255 App. Div. 933—Merrill v. Hinckley, 56 N.Y.S.2d 63
 N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 616.
 N.D.—Wilson v. Oscar H. Kjolrie Co., 12 N.W.2d 526, 73 ND 134
 Okl.—Wilson & Co. v. Campbell, 157 P.2d 465, 195 Okl. 323—Boston v. Alexander, 132 P.2d 343, 191 Okl. 653.
 Pa.—Nathan v. McGinley, 19 A.2d 917, 342 Pa. 12—Maio v. Fahs, 14 A.2d 105, 339 Pa. 180.
 R.I.—Perry v. New England Transp. Co., 45 A.2d 481, 71 R.I. 352.
 S.C.—Lynch v. Pee Dee Express, 30 S.E.2d 449, 204 S.C. 537.
 S.D.—Ioffer v. Witte, 28 N.W.2d 698.
 Vt.—Senecal v. Bleau, 189 A. 139, 108 Vt. 486.
 Va.—Moore v. Vick, 24 S.E.2d 429, 181 Va. 157.
 Wash.—Thorstenon v. Degler, 129 P. 2d 996, 15 Wash.2d 211—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354—Pyle v. Wilbert, 98 P.2d 664, 2 Wash.2d 429—O'Neill v. Wilshire, 57 P.2d 1254, 186 Wash. 276.
 Wis.—Haase v. Employers Mut. Liability Ins. Co., 27 N.W.2d 468, 250 Wis. 422—Klas v. Fenske, 22 N.W.2d 596, 248 Wis. 534—Jacobson v. Bryan, 12 N.W.2d 789, 244 Wis. 359—Stylow v. Milwaukee Electric Railway & Transport Co., 5 N.W.2d

750, 241 Wis. 211—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Lurie v. Nickel, 289 N.W. 686, 233 Wis. 420—McGill v. Baumgart, 288 N.W. 799, 233 Wis. 86—Mader v. Boehm, 250 N.W. 854, 213 Wis. 55, followed in 250 N.W. 856, 213 Wis. 62.

(3) To establish gross negligence.—White v. Neff, La App. 11 So.2d 289—Boykin v. Plauche, La App., 168 So. 741, rehearing denied and amended 169 So. 131.

(4) To support finding that driver entered intersection at speed exceeding statutory rate

Cal.—Merrill v. Finigan, 24 P.2d 188, 133 Cal App 101.
 La.—Finkelstein v. U. S. Fidelity & Guaranty Co., App., 184 So. 219—Laughlin v. Sullivan, 131 So. 687, 14 La.App. 491.

(5) To support finding that defendant was not negligent.

Conn.—Graveline v. Livingston, 34 A. 2d 732, 130 Conn. 397.
 Mich.—Wilson v. Corwin, 300 N.W. 857, 299 Mich. 494.
 N.Y.—Beeston v. Maybury, 298 N.Y.S. 831, 252 App.Div. 812.
 Wash.—Winston v. Bacon, 111 P.2d 764, 8 Wash.2d 216.
 Wis.—La Chance v. Stuart, 288 N.W. 262, 233 Wis. 246.

(6) To sustain verdict or judgment for plaintiff.

Cal.—Hiatt v. Brockman, 45 P.2d 411, 7 Cal.App.2d 88.
 La.—Terrehonne v. Toye Bros. Yellow Cab Co., App., 3 So.2d 224.
 Me.—Libby v. Heikkinen, 32 A.2d 604, 140 Me. 23.
 N.J.—Tinnirello v. Lodwick, 156 A. 784, 9 N.J.Misc. 1031—Rubei v. Weiss, 149 A. 756, 8 N.J.Misc. 269.
 N.Y.—Eaton v. Paige, 24 N.Y.S.2d 522, 261 App.Div. 850.
 Tenn.—Central Produce Co. v. General Cab Co. of Nashville, 129 S. W.2d 1117, 23 Tenn.App. 209—Atchley v. Sims, 128 S.W.2d 975, 23 Tenn.App. 167.
 Va.—Hatfield v. Thomas, 41 S.E.2d 460, 186 Va. 7.
 Wis.—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Olk v. Marquardt, 234 N.W. 723, 203 Wis. 479.

(1) In General

In an action for damages resulting from alleged negligence of the driver of one of several vehicles traveling in the same direction, such negligence must be established by a preponderance of the evidence.

In an action for damages resulting from the alleged negligence of the driver of one of several vehicles traveling in the same direction, such negligence must be established by a preponderance of the evidence.⁶⁸

Evidence held insufficient

(1) In general.

La.—Bridwell v. Butler, 139 So. 51, 18 La App. 675—Guinn v. Kemp, 136 So. 764, 18 La.App. 3.
 Wis.—Ziemke v. Faber, 266 N.W. 217, 221 Wis. 512.

(2) To warrant recovery.—Brown v. Sardinga, La.App., 176 So. 662, followed in Drivon v. Sardinga, 176 So. 663 and Perrin v. Sardinga, 176 So. 664.

(3) To warrant judgment for defendant.

N.Y.—Wilson v. Griffin, 278 N.Y.S. 469, 243 App.Div. 831, appeal dismissed 196 N.E. 595, 267 N.Y. 591.
 Ohio—Coshun v. Mauscau, 23 N.E. 2d 656, 62 Ohio App 249.

(4) To show excessive speed of either vehicle—Droddy v. Southern Bus Lines, La.App., 26 So.2d 761—Butler v. O'Neal, La.App., 26 So.2d 753.

(5) To show that vehicle was approaching intersection at excessive speed

La.—Lyons v. Magee Truck Lines, App. 200 So. 841.
 Miss.—Coco Cola Bottling Works of Greenwood v. Hand, 191 So. 674, 186 Miss. 893.
 Neb.—Bergendahl v. Rabaler, 276 N. W. 673, 133 Neb. 699.
 Or.—Hedding v. Heints, 72 P.2d 44, 157 Or. 542.
 Wis.—Geyer v. Milwaukee Electric Railway & Light Co., 284 N.W. 1, 230 Wis. 347.

Evidence held too inconclusive, contradictory, and uncertain to be accepted as basis of a legal conclusion.—Askin v. Long, 6 A.2d 246, 176 Md. 545.

67. Wis.—Haase v. Employers Mut. Liability Ins. Co., 27 N.W.2d 468, 250 Wis. 422—Klas v. Fenske, 22 N.W.2d 596, 248 Wis. 534.

Evidence held sufficient

Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394.

Evidence held insufficient

Ill.—Little v. Gogotz, 58 N.E.2d 336, 324 Ill.App. 516.
 Ohio.—Willard v. Fast, 61 N.E.2d 807, 75 Ohio App. 225.

68. La.—Lasseigne v. Calvaruso, App., 15 So.2d 540.

(2) Duties of Forward Vehicle

Negligence on the part of the driver of the forward vehicle, for example, in stopping, backing, or turning, or with respect to lights, signals, and lookout, must be established by a preponderance of the evidence.

In an action for damages resulting from an al-

leged breach of duty on the part of the driver of the forward vehicle, his negligence must be established by a preponderance of the evidence;⁶⁹ and general rules have been applied in determining the weight and sufficiency of evidence of such driver's negligence in stopping,⁷⁰ backing,⁷¹ or turning,⁷² as

Evidence held sufficient

(1) In general.

Cal.—Wohlenberg v. Malcewicz, 133 P.2d 12, 56 Cal.App.2d 508.

Conn.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.

Wis.—Reichert v. Rex Accessories Co., 279 N.W. 645, 228 Wis. 425.

(2) To support finding that driver was negligent.—Continental Ins. Co. of New York v. Pacific Greyhound Lines, 111 P.2d 37, 43 Cal.App.2d Supp. 877.

(3) To support finding that fire truck did not have its siren sounding.—Calhoun v. Grant, Tex.Civ.App., 129 S.W.2d 752.

Evidence held insufficient

N.C.—Guthrie v. Gocking, 8 S.E.2d 607, 217 N.C. 476.

60. La.—Lasseigne v. Calvaruso, App., 15 So.2d 540.

Evidence held sufficient

(1) In general.

Cal.—Burch v. Valley Motor Lines, 179 P.2d 47, 78 Cal.App.2d 834

Ind.—Lee Bros v. Jones, 54 N.E.2d 108, 114 Ind.App. 688

La.—Dupuy v. Godchaux Sugars, App., 184 So. 730.

(2) To sustain verdict for driver of passing vehicle.

U.S.—Warlich v. Miller, D.C.Pa., 73 F.Supp. 593.

Minn.—Dickinson v. Lee, 246 N.W. 669, 188 Minn. 130.

(3) To sustain verdict for defendant.

Ky.—Siler v. Renfro Supply Co., 26 S.W.2d 12, 233 Ky. 487.

Mich.—Bryant v. Brown, 271 N.W. 566, 278 Mich. 686—Felsenfeld v. Chattaway, 253 N.W. 280, 266 Mich. 234.

(4) To sustain finding that driver of forward vehicle was negligent.

U.S.—Stafford v. Roadway Transit Co., C.C.A.Pa., 165 F.2d 920.

Cal.—Ohlson v. Frazier, 39 P.2d 429, 2 Cal.App.2d 708.

Colo.—Jaekel v. Funk, 138 P.2d 939, 111 Colo. 179.

Conn.—Rivkin v. Gouveia, 34 A.2d 634, 130 Conn. 378.

N.Y.—Dicicco v. State, 273 N.Y.S. 937, 152 Misc. 541.

(5) To sustain finding that driver of forward vehicle was not negligent.

Cal.—Raddant v. Watson, 264 P. 588, 89 Cal.App. 101.

Conn.—Plucherino v. Shey, 143 A. 886, 108 Conn. 544.

La.—Burns v. Evans Cooperage Co., 28 So.2d 165, 208 La. 406.

Mich.—Fugere v. Aronson, 281 N.W.

396, 285 Mich. 661.

Neb.—Miller v. Abel Const. Co., 300 N.W. 405, 140 Neb. 482.

Evidence held insufficient

Or.—Kiddle v. Schnitzer, 117 P.2d 983, 167 Or. 316.

Pa.—Hutchinson v. Follmer Trucking Co., 5 A.2d 182, 333 Pa. 424

Wash.—Brotherton v. Day & Night Fuel Co., 73 P.2d 788, 192 Wash. 362.

70. Wash.—Caylor v. B. C. Motor Transp., 71 P.2d 162, 191 Wash. 365

Weight and sufficiency of evidence as to speed and control generally see supra subdivision a (8) of this section.

Evidence held sufficient

(1) In general.—Cannon v. Bassett, 162 N.E. 772, 264 Mass. 383.

(2) To warrant recovery.

U.S.—Skinner v. Pennsylvania Greyhound Lines, C.C.A.Ind., 123 F.2d 497.

N.Y.—Muth v. Fitzgerald Bros. Brewing Co., 12 N.Y.S.2d 489, 257 App.Div. 897.

(3) To sustain finding that driver was negligent in stopping in middle of highway.

Colo.—Jaekel v. Funk, 138 P.2d 939, 111 Colo. 179

Ill.—Wedig v. Kroger Grocery & Baking Co., 282 Ill.App. 370.

Minn.—Fryklind v. Jackson, 252 N.W. 232, 190 Minn. 356.

N.J.—Barnes v. Browell Bus Co., 32 A.2d 286, 130 N.J.Law 193.

Wis.—Georgeson v. Nielsen, 252 N.W. 576, 214 Wis. 191.

(4) To show that driver was not negligent in stopping.

La.—Hudson v. Brown, App., 190 So. 860—Fuld v. Maryland Casualty Co., App., 178 So. 201, followed in

178 So. 205 and 178 So. 206.

Tenn.—Russell v. Furniture Renewal, 151 S.W.2d 1066, 177 Tenn. 525.

Evidence held insufficient

(1) To establish negligence.

Ky.—Short Way Lines v. Wallace, 175 S.W.2d 123, 295 Ky. 658.

La.—Lasseigne v. Calvaruso, App., 15 So.2d 540.

(2) To sustain finding that defendant negligently brought his vehicle to sudden stop, so as to endanger plaintiffs, in violation of statute.—Cole v. Phephes, 5 N.W.2d 755, 241 Wis. 155.

71. Evidence held sufficient

(1) To support judgment for plaintiff.

La.—Billich v. Templeman Bros., App. 164 So. 261.

Pa.—McDade v. Lohrey Co., Com.Pl., 27 Wash.Co. 235.

(2) To authorize verdict for defendant.—Vale v. Illinois Pipe Line Co., 134 S.W.2d 940, 281 Ky. 1.

72. Evidence held sufficient

(1) In general.

U.S.—Zentz v. Buchman, C.C.A.Pa., 103 F.2d 850.

N.Y.—Massar v. Bell, 16 N.Y.S.2d 727, 258 App.Div. 924, reargument denied 17 N.Y.S.2d 1000, 258 App. Div. 966.

(2) To support finding of negligence.

Cal.—Williams v. Kawanami, 127 P.2d 58, 53 Cal.App.2d 14, rehearing denied 127 P.2d 996, 53 Cal.App.2d

14—Farmer v. Matsutani, 119 P.2d 740, 48 Cal.App.2d 332.

Tex.—Wells v. Ford, Civ.App., 118 S.W.2d 420, error refused.

Va.—Dey v. Virginia Transit Co., 47 S.E.2d 552, 187 Va. 635.

(3) To support verdict finding negligence in swinging to left as vehicle attempted to pass from rear.

Ark.—Southwestern Bell Telephone Co. v. Balesh, 76 S.W.2d 291, 189 Ark. 1085—Greenlee v. Rolfe, 60 S.W.2d 568, 187 Ark. 1162.

Cal.—Cadwell v. Anschutz, 52 P.2d 916, 4 Cal.2d 709—Webster v. Harris, 6 P.2d 88, 119 Cal.App. 46.

(4) To establish negligence in making left turn into path of overtaking vehicle.

Ill.—Dunn v. Bertram, 78 N.E.2d 126, 333 Ill.App. 656—Gantz v. Young, 78 N.E.2d 110, 333 Ill.App. 655—

Bobalek v. Atlasz, 43 N.E.2d 584, 315 Ill.App. 514—Beard v. Zindars, 25 N.E.2d 136, 303 Ill.App. 337—

Barthelman v. Braun, 278 Ill.App. 384.

La.—Tornabene v. Rau, App., 34 So. 2d 655—Harris v. B. gby, App., 29 So.2d 805—Coffey v. Baham, App.,

29 So.2d 494—Employers Fire Ins. Co. v. Langley, App., 197 So. 178—

White v. Halliburton Oil Well Cementing Co., App., 183 So. 537, rehearing denied 185 So. 68—Martin

v. Breaux, App., 165 So. 743—Van Baast v. Thibaut Feed Mills, App.,

151 So. 226—Sandoz v. Beridon, App., 150 So. 25, costs taxed 154

So. 677—McCain v. Pan-American Petroleum Corporation, App., 143

So. 376, reinstated on rehearing

well as in determining the weight and sufficiency of negligence with respect to lights,⁷³ signals,⁷⁴ and lookout.⁷⁵

(3) Duties of Following Vehicle

Negligence of the operator of a vehicle approaching, passing, or attempting to pass another vehicle from

the rear must be established by a preponderance of the evidence.

In an action for injuries or damages sustained by the owner or occupant of a vehicle as a result of the negligence of the operator of a vehicle approaching from the rear, such negligence must be proved by a preponderance of the evidence.⁷⁶ This

146 So. 331—Salaun v. Ducasse, App., 141 So. 473, followed in Ducasse v. Salaun, 146 So. 172. Md.—Wallace v. Fowler, 36 A.2d 691, 183 Md. 97.

Mass.—Beach v. Minkley, 19 N.E.2d 20, 302 Mass. 228—Wood v. Sabins, 194 N.E. 94, 289 Mass. 299.

N.Y.—Mangan v. Terminal Transp. System, 284 N.Y.S. 183, 157 Misc. 627, affirmed 286 N.Y.S. 666, 247 App.Div. 853.

N.C.—Exum v. Poole, 176 S.E. 556, 207 N.C. 244.

Ohio—Schenck v. Co-Op. Cab Co., App., 60 N.E.2d 796

Okl.—Y. & Y. Operating Co. v. Pugh, 65 P.2d 186, 179 Okl. 198.

Pa.—Church v. American Stores Co., 157 A. 633, 103 Pa.Super 427.

R.I.—Tillinghast v. Rhode Island Motor Sales Co., 150 A. 753

Tex.—Holland v. De Leon, Civ.App., 118 S.W.2d 489, error refused—Wells v. Ford, Civ.App., 118 S.W.2d 420, error refused

Wis.—Stenson v. Schumacher, 290 N.W. 285, 234 Wis. 19.

(5) To support conclusion that driver was negligent in turning without giving proper signal, and in failing to keep reasonable lookout for vehicles approaching from rear.—England v. Watkins Bros., 186 A. 484, 122 Conn. 1.

(6) To warrant verdict or judgment for defendant.

Ill.—Stevens v. Moore, 47 N.E.2d 498, 318 Ill.App. 228—Dowson v. Smith, 40 N.E.2d 553, 313 Ill.App. 650.

La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406—Thomas v. Kelly, App., 6 So.2d 760.

Minn.—Arvidson v. Slater, 237 N.W. 12, 183 Minn. 446.

(7) To sustain finding that defendant was not negligent in failing properly to signal for turn.—Anderson v. Lum Show, 12 P.2d 1045, 124 Cal.App. 490.

(8) To support finding that driver of forward vehicle was not negligent in making left turn.

Cal.—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554.

La.—Union Indemnity Co. v. Crow, 129 So. 409, 14 La.App. 197.

Wis.—Trastek v. Dahlem, 262 N.W. 609, 219 Wis. 249.

Evidence held insufficient

(1) In general.

Wash.—Byrne v. Stanford, 292 P. 1014, 159 Wash. 271.

Wis.—Ramsay v. Blemert, 258 N.W. 355, 216 Wis. 631.

(2) To justify recovery for plaintiff.

La.—Item Co. v. Angelo Centineo, Inc., App., 199 So. 157.

Mich.—Baumgartner v. St. Armour, 268 N.W. 768, 276 Mich. 650.

Tex.—Airline Motor Coaches v. Cleveland, Civ.App., 199 S.W.2d 847, refused no reversible error.

(3) To show that defendant swerved to left directly in front of path of plaintiff's vehicle—Boudra v. Williams, La.App., 17 So.2d 502.

73. Ill.—Sugru v. Highland Park Yellow Cab Co., 251 Ill.App. 99.

Weight and sufficiency of evidence of negligence as to equipment and lights generally see supra subdivision a (6) of this section.

Evidence held sufficient

(1) In general—Mortvedt v. Western Austin Co., 50 N.E.2d 764, 320 Ill.App. 337.

(2) To sustain verdict for occupant of vehicle driven into unlighted rear end of defendant's vehicle. Cal.—Ellison v. Lang Transp. Co., 84 P.2d 510, 12 Cal.2d 355

Ill.—Mortvedt v. Western Austin Co., 50 N.E.2d 764, 320 Ill.App. 337.

N.Y.—Weyrauch v. Lankletter, 6 N.Y.S.2d 874, 255 App.Div. 746

Ohio—Smith v. Cushman Motor Delivery Co., 6 N.E.2d 594, 54 Ohio App. 89.

(3) To authorize finding that defendants were negligent in operating their vehicle at night without rear lights

N.C.—McKinnon v. Howard Motor Lines, 44 S.E.2d 735, 228 N.C. 132.

Okl.—Fairmont Creamery Co. v. Rogers, 116 P.2d 983, 189 Okl. 320.

Evidence held insufficient

Wash.—Brotherton v. Day & Night Fuel Co., 73 P.2d 788, 192 Wash. 362.

74. Cal.—Wohlenberg v. Malcewicz, 133 P.2d 12, 56 Cal.App.2d 508.

Weight and sufficiency of evidence of negligence as to signals and lookout generally see supra subdivision a (7) of this section.

Evidence held sufficient

(1) In general.

Cal.—Pewitt v. Riley, 163 P.2d 873, 27 Cal.2d 310—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554.

La.—Slocum v. Hawn, App., 155 So. 24.

Wis.—Stenson v. Schumacher, 290 N.W. 285, 234 Wis. 19.

(2) To support finding that driver was negligent in failing to signal that he was going to stop.

U.S.—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718.

Colo.—Alden v. Watson, 102 P.2d 479, 106 Colo. 103.

N.Y.—Sills v. Meyers, 11 N.Y.S.2d 106, 171 Misc. 63

Okl.—Smith v. Rohl, 126 P.2d 61, 190 Okl. 603—Union Transp. Co. v. Lamb, 123 P.2d 660, 190 Okl. 327.

Tex.—Le Master v. Fort Worth Transit Co., 160 S.W.2d 224, 138 Tex. 512.

75. Evidence held sufficient

La.—Sandoz v. Beridon, App., 150 So. 25, costs taxed 154 So. 677.

Tex.—Wells v. Ford, Civ.App., 118 S.W.2d 420, error refused.

Evidence held insufficient

Wis.—Cole v. Phephles, 5 N.W.2d 755, 241 Wis. 155—Young v. Nunn, Bush & Weldon Shoe Co., 249 N.W. 278, 212 Wis. 403

76. Mo.—Sisk v. Industrial Track Const. Co., 295 S.W. 751, 316 Mo. 1143.

Evidence held sufficient

(1) In general.

U.S.—Kleibor v. Colonial Stores, C. C.A.N.C., 159 F.2d 894—Bennett v. Gillette Motor Transport Co., D. C.Mo., 59 F.Supp. 475.

Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116

La.—J. J. Clarke Co. v. Toye Bros. Yellow Cab Co., App., 22 So.2d 298

—Giles v. Post, 135 So. 775, 17 La. App. 225

Tex.—Southland-Greyhound Lines v. Cotten, Civ.App., 55 S.W.2d 1066, reversed on other grounds, Com. App., 91 S.W.2d 326.

Va.—Richmond Coca-Cola Bottling Works v. Andrews, 3 S.E.2d 419, 173 Va. 240.

Wash.—Rust v. Schlaitzer, 27 P.2d 571, 175 Wash. 331.

(2) To sustain verdict or judgment for plaintiff whose vehicle was struck from behind.

Cal.—Rogers v. Interstate Trans't Co., 297 P. 884, 212 Cal. 36, certiorari denied Interstate Transit Co. v. Rogers, 52 S.Ct. 22, 234 U.S. 640, 76 L.Ed. 545.

Ga.—American Fidelity & Cas. Co. v. Farmer, App., 48 S.E.2d 137—

rule has been frequently applied with respect to alleged negligence in passing or attempting to pass a vehicle traveling in the same direction;⁷⁷ and such negligence may be established without proof that

American Fidelity & Cas. Co. v. Farmer, App., 48 S.E.2d 122—Yellow Cab Co. v. Adams, 31 S.E.2d 195, 71 Ga.App. 404.
Ky.—Consolidated Coach Corporation v. Saunders, 17 S.W.2d 233, 229 Ky. 284.
La.—Houlton v. Nichols Truck Line, App., 23 So.2d 368—Muhleisen v. Eberhardt, App., 21 So.2d 235.
Mich.—Noonan v. Volek, 224 N.W. 657, 246 Mich. 377.
Neb.—Daly v. Publix Cars, 259 N.W. 163, 128 Neb. 403.
N.Y.—Neary v. Middlesex Transp. Co., 61 N.Y.S.2d 565, 270 App.Div. 912, reversed on other grounds 72 N.E.2d 12, 296 N.Y. 818.
Ohio.—Carle v. Courtright, 40 N.E.2d 431, 69 Ohio App. 69, rehearing denied 43 N.E.2d 296, 69 Ohio App. 69.
Okla.—Greenback v. Wood, 280 P. 464, 138 Okl. 53.
Pa.—Meek v. Allen, 58 A.2d 370, 162 Pa.Super. 495—Farmer v. Nevin Bus Lines, 163 A. 41, 107 Pa.Super. 153—Kaplan v. Greenberg, 95 Pa.Super. 537—Pelosi v. Hoffman, 94 Pa.Super. 398—Rosengarten v. Budd, 44 Pa.Dist. & Co. 139.
S.D.—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.
Tenn.—Lasater Lumber Co. v. Harding, 189 S.W.2d 583, 28 Tenn.App. 296.
Tex.—Molter v. Madden, Civ.App., 207 S.W.2d 984.
Va.—Neal v. Spencer, 26 S.E.2d 70, 181 Va. 668.
(3) To authorize verdict for defendant.—Vitale v. Burton, 192 A. 264, 122 Conn. 667.
(4) To support verdict or judgment for defendant
Ill.—Dowson v. Smith, 40 N.E.2d 553, 313 Ill.App. 650.
N.J.—Wagner v. Sossner, 143 A. 555, 6 N.J.Misc. 1013.
R.I.—Larsh v. Manian, 9 A.2d 5, 63 R.I. 358.
(5) To sustain finding that driver of overtaking vehicle was negligent
Ark.—Layes v. Harris, 63 S.W.2d 971, 187 Ark. 1107.
Cal.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676—Leonard v. Hume, 41 P.2d 965, 5 Cal.App.2d 41—Chapman v. Pickwick Stages System, 4 P.2d 283, 117 Cal.App. 560—Inouye v. Gilboy Co., 300 P. 835, 115 Cal.App. 25—Hanson v. Cordoza, 290 P. 62, 106 Cal.App. 500.
Conn.—Hedberg v. Cooley, 161 A. 665, 115 Conn. 352.
Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116—McCoy v. Fleming, 113 P.2d 1074, 153 Kan. 780—

Weaver v. Snyder, 29 P.2d 1096, 139 Kan. 144.
La.—Call v. Cloverland Dairy Products Co., App., 21 So.2d 166—Barber v. El Dorado Lumber Co., App., 139 So. 29, affirmed 142 So. 718—McGehee v. Hines, 124 So. 846, 12 La.App. 13.
Mass.—Leach v. Escobar, 63 N.E.2d 891, 318 Mass. 711.
Minn.—Fryklind v. Jackson, 252 N.W. 232, 190 Minn. 356.
Mo.—Hanser v. Lerner, App., 153 S.W.2d 806.
Mont.—McDonough v. Smith, 284 P. 542, 86 Mont. 545.
N.J.—Smith v. Montclair Brown & White Cab Co., 139 A. 904, 6 N.J.Misc. 57.
N.Y.—Sills v. Meyers, 11 N.Y.S.2d 106, 171 Misc. 63.
Or.—Hornby v. Wiper, 63 P.2d 204, 155 Or. 203.
Wash.—Clausen v. Jones, 71 P.2d 362, 191 Wash. 334.
Wis.—Schneider v. Nedry, 228 N.W. 509, 201 Wis. 111.
(6) To warrant inference that driver was negligent.
NH.—Bresnahan v. Manchester Coal & Ice Co., 188 A. 10, 88 N.H. 273.
S.C.—Eickhoff v. Beard-Laney, Inc., 20 S.E.2d 153, 199 S.C. 500, 141 A.L.R. 1010.
(7) To show that defendant was not negligent
Ala.—Byars v. Hollimon, 153 So. 748, 228 Ala. 494.
La.—Hudgins v. Gage, App., 194 So. 105, followed in Dance v. Gage, 194 So. 108—McCain v. Pan-American Petroleum Corporation, App., 142 So. 376, reinstated on rehearing 146 So. 331—Hoppe v. Stewart Stage Lines, 132 So. 664, 15 La.App. 613.
(8) To make out prima facie case of negligence.
Iowa.—Harvey v. Borg, 257 N.W. 190, 218 Iowa 1228.
Tex.—Rankin v. Nash-Texas Co., Civ.App., 73 S.W.2d 680, error granted.
Evidence held insufficient
(1) In general.—Jensen v. Atwill, Iowa, 241 N.W. 787.
(2) To authorize recovery.—Long v. Shreveport Yellow Cabs, La.App., 180 So. 651.
(3) To support verdict or judgment against defendants.
Ill.—Schampon v. Speis, 1 N.E.2d 499, 285 Ill.App. 23.
N.J.—Super v. Garfield-Passaic Transit Co., 155 A. 619, 9 N.J. Misc. 812.
77. Mo.—Sisk v. Industrial Track Const. Co., 295 S.W. 751, 316 Mo. 1143.
Negligence in passing, resulting in

collision with or endangering approaching vehicle see *infra* subdivision 1 (4) of this section.
Evidence held sufficient
(1) In general.
Ark.—Hodges v. Smith, 298 S.W. 1023, 175 Ark. 101.
Cal.—Toriyama v. Putnam, 25 P.2d 34, 134 Cal.App. 201.
Conn.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.
Kan.—Stilwell v. Faith, 52 P.2d 635, 142 Kan. 730—Wheeler v. Jackson, 297 P. 427, 132 Kan. 742.
Tex.—Abbott v. Andrews, Civ.App., 29 S.W.2d 885, reversed on other grounds, Com.App., 45 S.W.2d 568.
Wash.—Joski v. Short, 96 P.2d 483, 1 Wash.2d 454.
Wis.—Byerly v. Thorpe, 265 N.W. 76, 221 Wis. 28.
(2) To support verdict or judgment for plaintiff.
La.—Wilkerson v. Faggard, 127 So. 5, 13 La.App. 439.
N.H.—Martin v. Sinnett, 12 A.2d 513, 91 N.H. 525.
ND.—Engen v. Skeels, 236 N.W. 240, 60 N.D. 652.
(3) To sustain judgment denying recovery.
La.—Gibbs v. Whittlessey, App., 31 So.2d 241—Waters v. Clinton, App., 187 So. 100.
Mo.—Williams v. Davis, App., 168 S.W.2d 483.
(4) To warrant finding that driver was negligent in passing or attempting to pass.
Cal.—Williams v. Pickwick Stages System, 297 P. 98, 112 Cal.App. 597.
Idaho.—Garrett Freightlines v. Sell, 125 P.2d 1020, 63 Idaho 738.
Ky.—Wells v. Lockhart, 81 S.W.2d 5, 258 Ky. 698.
La.—Fogleman v. Interurban Transp. Co., 187 So. 73, 192 La. 115—Jones v. Miscal, App., 34 So.2d 810—Ford v. Leonard Truck Lines, App., 26 So.2d 309—Weltkam v. Johnston, App., 5 So.2d 582, rehearing denied 6 So.2d 54—Goynes v. St. Charles Dairy, App., 197 So. 819—Breaux v. Roussell, App., 151 So. 267—Martinez v. Rein, App., 146 So. 787—Donaldson v. Riddling's Succession, App., 145 So. 804—Goins v. Moore, App., 143 So. 522—Griffen v. Teche Transfer Co., 140 So. 113, 19 La.App. 167—Herrin v. Laundry & Dry Cleaning Service, 128 So. 199, 14 La.App. 97.
N.Y.—Dicicco v. State, 273 N.Y.S. 937, 152 Misc. 541.
Or.—Hornby v. Wiper, 63 P.2d 204, 155 Or. 203.
Tenn.—C. D. Kenny Co. v. Williams, 1 Tenn.App. 184.

the vehicles had physical contact with one another.⁷⁸ So general rules have been applied in determining the weight and sufficiency of defendant's alleged negligence with respect to lights, signals, and lookout.⁷⁹ Slight evidence of the circumstances may place the fault in an action for injuries resulting from a rear-end collision.⁸⁰ Where the burden is on defendant, he must show his freedom from fault by a clear preponderance of the evidence.⁸¹

(4) Collision with, or Endangering, Approaching Vehicle

General rules have been applied in determining the

weight and sufficiency of evidence of the defendant's negligence when vehicles traveling in the same direction and a vehicle approaching from the opposite direction were so operated as to cause damage or injury to the plaintiff.

General rules have been applied in determining the weight and sufficiency of the evidence of negligence when motor vehicles traveling in the same direction and a vehicle approaching from the opposite direction were operated in such a manner as to cause damage or injury.⁸²

Tex.—Rhone v. Fox, Civ.App., 142 S. W.2d 542, error dismissed—Mueller v. Bobbitt, Civ App., 41 S.W.2d 466—Donham v. Rugel, Civ App., 39 S.W.2d 627—Yturria v. Lankford, Civ App., 4 S.W.2d 210, error dismissed—Yturria v. Everton, Civ App., 4 S.W.2d 211, error dismissed.

Va.—Jones v. Hanbury, 164 S.E. 645, 158 Va. 842.

(5) To establish driver's freedom from negligence

Fla.—Florida Motor Lines v. Ward, 137 So 163, 102 Fla. 1105.

La.—McCain v. Pan-American Petroleum Corporation, App., 142 So. 376, reinstated on rehearing 146 So. 331—Probst v. Smith Hardware Co., App., 141 So 508, followed in Maitre v. Smith Hardware Co., 141 So. 512, and Probst v. Smith Hardware Co., 141 So 512.

Mich.—Fugere v. Aronson, 281 N.W. 396, 285 Mich. 461.

Evidence held insufficient

(1) In general

Ill.—Adkins v. Strathmore Co., 278 Ill App 183.

La.—Sallinger v. Scontrino, App., 170 So 54.

N.J.—Weisman v. Burns, 145 A. 227, 7 N.J Misc. 268.

N.Y.—Malcolm v. Vedder, 46 N.Y.S. 2d 239, 267 App Div. 804, motion denied 61 N.E.2d 458, 294 N.Y. 735, affirmed 62 N.E.2d 487, 294 N.Y. 856.

(2) To show negligence.

La.—Hamburger v. Katz, 120 So. 391, 10 La.App 215.

Md.—Wallace v. Fowler, 36 A.2d 691, 183 Md. 97.

N.Y.—Mayo v. Sherwood, 13 N.Y.S.2d 899.

Ohio.—Wardwell v. Cincinnati St. Ry. Co., 67 N.E.2d 630, 77 Ohio App. 397.

78. Wash.—Zurfluh v. Lewis County, 91 P.2d 1002, 199 Wash. 378.

79. Kan.—Lechleitner v. Cummings, 163 P.2d 423, 160 Kan. 453.

Weight and sufficiency of evidence of negligence as to:

Equipment and lights generally see supra subdivision a (6) of this section.

Signals and lookout generally see supra subdivision a (7) of this section

Evidence held sufficient

(1) In general.

U.S.—Bennett v. Gillette Motor Transport Co., D.C.Mo., 59 F.Supp 475.

Va.—Kinsey v. Brugh, 161 S.E. 41, 157 Va 407—Lawson v. Darter, 160 S.E. 74, 157 Va 284

Wash.—Joski v. Short, 96 P.2d 483, 1 Wash 2d 454

(2) To sustain finding that following driver was negligent in respect to lookout

Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116—Weaver v. Snyder, 29 P.2d 1096, 139 Kan. 144

La.—Hudson v. Brown, App., 190 So 860—Barber v. 121 Dorado Lumber Co., App., 139 So. 29, affirmed 142 So. 718.

Tex.—Molter v. Madden, Civ.App., 207 S.W.2d 984.

Evidence held insufficient

Ky.—Roederer's Adm'x v. Gray, 69 S.W.2d 998, 253 Ky. 669.

80. Mass.—Jennings v. Bragdon, 194 N.E. 697, 289 Mass 595—Hendler v. Coffey, 179 N.E. 801, 278 Mass. 339—Washburn v. R. F. Owens Co., 147 N.E. 564, 252 Mass. 47.

81. La.—Adam v. English, App., 21 So.2d 633.

Burden of proof as to negligence generally see supra § 511 (2).

Evidence held insufficient

(1) To disprove prima facie case of negligence.—Harvey v. Borg, 257 N.W. 190, 218 Iowa 1228.

(2) To sustain defendant's burden of establishing that his driver was free from fault.—Adam v. English, La.App., 21 So.2d 633.

82. Evidence held to establish negligence

(1) On part of driver of passing vehicle.

U.S.—Peach v. U. S., D.C.Pa., 75 F. Supp 218.

Conn.—White v. Herler, 159 A. 654, 114 Conn. 734.

Ill.—Griffin v. Chicago-Rockford Motor Exp., 76 N.E.2d 528, 332 Ill. App. 663—Kellenberger v. Mitchell, 44 N.E.2d 73, 316 Ill App 112.

Ind.—Heinrich v. Ellis, 48 N.E.2d 96, 113 Ind.App. 478.

Ia.—Drewes v. Miller, App., 25 So. 2d 820—Crow v. State Farm Mut. Automobile Ins. Co., App., 10 So. 2d 105—Muse v. Gulf Refining Co., App., 8 So.2d 330—Williams v. Geo. A. Hormel & Co., App., 195 So. 634—Relf v. Tufts, 141 So. 90, 19 La App. 600.

Minn.—Cooper v. Hoeglund, 22 N. W.2d 450, 221 Minn. 446

N.Y.—Pierce v. Grayline Motor Tours, 37 N.Y.S.2d 852, 265 App. Div. 894, affirmed 49 N.E.2d 1003, 290 N.Y. 728.

Ohio—Chency v. Garrett, App., 76 N.E.2d 96

Pa.—Houlihan v. Turkheimer, 23 A. 2d 352, 146 Pa Super. 496

Tex.—Rhone v. Fox, Civ.App., 142 S. W.2d 542, error dismissed.

Vt.—Cote v. Boise, 16 A.2d 175, 111 Vt. 343.

Wash.—Miller v. Stevens, 128 P.2d 494, 14 Wash 2d 489—American Products Co v. Villwock, 109 P.2d 570, 7 Wash 2d 246, 132 A.L.R. 1010

—Kardong v. Allen, 264 P. 716, 147 Wash 50.

(2) On part of driver of overtaken vehicle

Minn.—Cooper v. Hoeglund, 22 N.W. 2d 450, 221 Minn. 446.

Mo.—Heltz v. Voss Truck Lines, 175 S.W.2d 583.

N.Y.—Muth v. Fitzgerald Bros. Brewing Co., 12 N.Y.S.2d 489, 257 App.Div 897.

(3) On part of driver of approaching vehicle.

Cal.—Trowbridge v. Briggs, 85 P.2d 426, 140 Cal.App. 554.

Colo.—Alden v. Watson, 102 P.2d 479, 106 Colo. 103.

Me.—Kimball v. Bauckman, 158 A. 694, 131 Me. 14.

j. Vehicles at Rest or Unattended

- (1) In general
- (2) Colliding with parked or standing vehicle

(1) In General

There must be a preponderance of evidence to prove

negligence of the owner or operator of a motor vehicle at rest or unattended, and the facts may be established by circumstantial evidence.

There must be a preponderance of evidence to prove negligence of the owner or operator of a motor vehicle at rest or unattended,⁸³ as where the vehicle was parked on the main traveled portion of a street or highway,⁸⁴ or where the damage alleged-

N.J.—Takacs v. Woodcock, 154 A. 189, 9 N.J.Misc. 395.

Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

Evidence held sufficient**(1) In general.**

Colo.—Small v. Clark, 263 P. 933, 83 Colo. 211.

Ill.—Gregory v. Merriam, 14 N.E.2d 268, 294 Ill.App. 483.

Ky.—Berry v. Jorris, 199 S.W.2d 616, 303 Ky. 799—Pedigo v. Osborne, 129 S.W.2d 996, 279 Ky. 85.

Minn.—Dux v. Ringdahl, 235 N.W. 383, 182 Minn. 611.

Wash.—Kardong v. Allen, 264 P. 716, 147 Wash. 50.

(2) To show that operator did not violate traffic laws by attempting to pass another vehicle from rear when too near crest of hill—Smith v. Tri-State Transit Co. of Louisiana, La.App., 171 So. 119, affirmed 175 So. 83.

(3) To justify inference that drivers were guilty of negligence—Rodriguez v. Savage Transp. Co., 175 P. 2d 37, 77 Cal. App. 2d 162.

(4) To support verdict allowing recovery from oncoming motorist.—McCulloch's Adm'r v. Abell's Adm'r, 115 S.W.2d 386, 272 Ky. 756.

(5) To sustain finding that collision between oncoming vehicle and vehicle following defendant's was due to defendant's driver's negligence in running to left of center of highway.—Nelson v. California Const. Co., 22 P.2d 282, 131 Cal. App. 757, followed in 22 P.2d 283, 131 Cal.App. 787, 22 P.2d 284, two cases, 131 Cal.App. 788.

Evidence held insufficient**(1) In general.**

Conn.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614.

La.—Hardy v. National Mut. Casualty Co., App., 9 So.2d 346.

(2) To support verdict for defendant who in passing collided with oncoming vehicle.—Kelly v. Collins, 299 N.Y.S. 152, 252 App.Div. 794.

(3) To establish that defendant's negligence, when attempting to pass automobile and then driving on extreme left side of road, caused collision with plaintiffs' oncoming automobile.—Anderson v. Struve, La. App., 152 So. 814.

83. Evidence to be considered by jury

In passing on negligence of owner of vehicle stopped on highway, jury could consider testimony as to condition and width of shoulder of highway, whether there was a sufficient hill near scene of collisions to have affected visibility, and as to weather conditions—Becherer v. Belleville-St. Louis Coach Co., 53 N.E.2d 731, 322 Ill.App. 37.

Evidence held sufficient**(1) To show negligence.**

Cal.—Stoltz v. Converse, 172 P.2d 78, 75 Cal.App.2d 909—Skaggs v. Willhour, 292 P. 649, 210 Cal. 524

Conn.—Keheley v. Uhl, 26 A.2d 357, 129 Conn. 30

D.C.—Bullock v. Dahlstrom, Mun. App., 46 A.2d 370.

La.—St. Pierre v. National Casualty Co., App., 2 So.2d 93

N.M.—Lucero v. Harshey, 165 P.2d 567, 50 N.M. 1.

Pa.—Lute v. Ross, 190 A. 391, 125 Pa.Super. 584.

Wis.—Knauf v. Diamond Cartage Co., 275 N.W. 903, 226 Wis. 111—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.

42 C.J. p 1236 note 37 [a] (7).

(2) To show that driver was not negligent—Fuld v. Maryland Casualty Co., La.App., 178 So. 201, followed in 178 So. 205 and 178 So. 206.

(3) To warrant finding that driver stopped truck on highway—Jones v. Missouri Freight Transit Corporation, 40 S.W.2d 465, 225 Mo.App. 1076.

(4) To warrant finding that tractor and trailer were stopped at time of collision.—Kline v. Barkett, 158 P.2d 51, 68 Cal. App.2d 765.

(5) To establish that at time of accident vehicle had come to stop and blocked its traffic lane.—Falgout v. Younger, La.App., 192 So. 706.

(6) To justify jury in disbelieving driver's uncontradicted explanation of stopping.—Jewell v. Bell, 8 P.2d 223, 120 Cal.App. 682.

(7) To establish that plaintiff's automobile collided with rear of unlighted parked truck, not merely with poles extending from back of truck—Sexton v. Stiles, 130 So. 821, 15 La.App. 148.

(8) To support findings that de-

fendant's driver was present at scene of accident.—Rath v. Bankston, 281 P. 1081, 101 Cal.App. 274.

(9) To sustain verdict or judgment for plaintiff.

Colo.—Grunsfeld v. Yenter, 69 P.2d 309, 100 Colo. 570.

Ill.—Johnson v. Sandberg, 283 Ill. App. 509—Du Comb v. Schwartzman, 243 Ill.App. 518.

Kan.—Cooper v. Kansas City Public Service Co., 73 P.2d 1092, 146 Kan. 961.

Okl.—Hunch v. Perkins, 180 P.2d 664, 198 Okl. 517.

Evidence held not to establish negligence

R.I.—Brey v. Rosenfeld, 48 A.2d 177, 72 R.I. 28, adhered to 50 A.2d 911, 72 R.I. 316.

42 C.J. p 1236 note 37 [b] (3).

84. Evidence held sufficient**(1) In general.**

Cal.—Barone v. Jones, 176 P.2d 392, 177 Cal.App.2d 656, rehearing denied and opinion modified on other grounds 177 P.2d 30, 77 Cal.App.2d 656—Kline v. Barkett, 158 P.2d 51, 68 Cal. App.2d 765—Callison v. Dondoro, 124 P.2d 852, 51 Cal.App. 2d 403.

La.—Finger v. M. Romano & Son, App., 4 So.2d 588.

Minn.—Gelsen v. Luce, 242 N.W. 8, 185 Minn. 479.

Tex.—Ford Motor Co. v. Madden, Civ.App., 42 S.W.2d 165, affirmed Ford Motor Co. v. Madden, 76 S.W.2d 474, 124 Tex. 131.

(2) To support verdict or judgment for plaintiff

U.S.—Jaggers v. Southeastern Greyhound Lines, C.C.A.Tenn., 126 F. 2d 762—Clark v. Remington, C.C. A.N.H., 55 F.2d 48.

Ariz.—Salt River Valley Water Users' Ass'n v. Green, 104 P.2d 162, 56 Ariz. 22.

Ill.—Mapes v. Hulcher, 2 N.E.2d 63, 363 Ill. 227.

Ky.—Bradley v. Clarke, 293 S.W. 1082, 219 Ky. 438.

Va.—Twyman v. Adkins, 191 S.E. 615, 168 Va. 456.

Wash.—Brauns v. Housden, 56 P. 2d 1313, 186 Wash. 149.

(3) To sustain verdict or judgment for defendant.

Me.—Dube v. Sherman, 190 A. 809, 135 Me. 144.

Minn.—Ward v. Bandel, 231 N.W. 244, 181 Minn. 82.

ly resulted when an unattended vehicle started down a hill or incline,⁸⁵ or when the driver of a standing vehicle started it in motion.⁸⁶ Such rules have also been applied where the alleged negligence was with respect to lights,⁸⁷ and where the alleged neg-

Okl.—Madden v. Tilly, 54 P.2d 161, 175 Okl. 589.

Vt.—Macaulay v. Hyde, 42 A.2d 482, 114 Vt. 198.

(4) To warrant conclusion that defendants were negligent.

Colo.—Calnon v. Sorel, 119 P.2d 615, 108 Colo. 467.

Ill.—Belcher v. Citizens Coach Co., 64 N.E.2d 747, 327 Ill.App. 618

La.—Millet v. Rizzo, App. 2 So.2d 244.

Md.—Marshall v. Sellers, 53 A.2d 5. Minn.—Bartley v. Fritz, 285 N.W. 484, 205 Minn. 192—Hall v. Gessner, 240 N.W. 100, 185 Minn. 105—Forster v. Consumers' Wholesale Supply Co., 218 N.W. 249, 174 Minn. 105.

Tex.—Safeway Stores of Texas v. Webb, Civ.App., 164 S.W.2d 868, error refused.

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

Va.—Armstrong v. Rose, 196 S.E. 613, 170 Va. 190.

W.Va.—Divita v. Atlantic Trucking Co., 40 S.E.2d 324.

Wis.—Butts v. Ward, 279 N.W. 6, 227 Wis. 387, 116 A.L.R. 1441.

(5) To warrant conclusion that no negligence was attributable to defendant.

La.—Duet v. Tramontana, App., 26 So.2d 324—Jeter v. Archer, 138 So. 590, 18 La.App. 527.

Va.—Webb v. Smith, 10 S.E.2d 503, 176 Va. 235, 131 A.L.R. 558.

Wis.—Serkowski v. Wolf, 30 N.W.2d 223, 251 Wis. 595—Beck v. Fond Du Lac Highway Committee, 286 N.W. 64, 231 Wis. 593.

(6) To warrant finding that vehicle was unlawfully parked.

Cal.—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765.

Wis.—Schultz v. Brogan, 29 N.W.2d 719, 251 Wis. 390.

Evidence held insufficient

(1) In general.

Cal.—Thomson v. Bayless, 150 P.2d 413, 24 Cal.2d 543.

Ill.—Wilson v. Nichols, 35 N.E.2d 396, 311 Ill.App. 73.

La.—Hutchinson v. T. L. James & Co., App., 160 So. 447.

Ohio.—Wills v. Anchor Cartage & Storage Co., 159 N.E. 124, 26 Ohio App. 66.

(2) To authorize verdict or judgment for plaintiff.

Mont.—Boepple v. Mohalt, 54 P.2d 857, 101 Mont. 417—Morton v. Mooney, 33 P.2d 262, 97 Mont. 1.

Neb.—McGaffey v. Blosser, 261 N.W. 565, 129 Neb. 371.

N.Y.—Slusans v. Marshall, 26 N.E.2d 817, 282 N.Y. 694.

Tex.—Universal Transport & Distrib-

uting Co. v. Cantu, Civ.App., 84 S.W.2d 327, error refused.

(3) To sustain finding of negligence.

Ill.—Lamesch v. Schmidt, 24 N.E.2d 579, 303 Ill.App. 58.

Mass.—Carney v. Casey, 18 N.E.2d 338, 302 Mass. 73.

Mont.—Boepple v. Mohalt, 54 P.2d 857, 101 Mont. 417.

Neb.—Johnson v. Mallory, 243 N.W. 872, 123 Neb. 706.

85. Evidence held sufficient

(1) In general.

Cal.—Peavey v. Mutual Realty Corporation, 255 P. 858, 82 Cal.App. 542.

Mass.—McFarlane v. McCourt, 2 N.E.2d 1017, 295 Mass. 85

N.J.—Barbanes v. Brown, 163 A. 148, 110 N.J.Law 6

Pa.—Don v. J. S. Ivins Sons, 90 Pa. Super. 105.

(2) To justify finding that driver was negligent in parking vehicle.—Miller v. Universal News Delivery Corporation, 188 A. 880, 122 Conn. 662—42 C.J. p. 1236 note 37 [a] (7)

(3) To support finding that defendant was not negligent—Gorfain v. Gorfain, 172 A. 924, 118 Conn. 484.

Evidence held insufficient

Cal.—Price v. McDonald, 45 P.2d 425, 7 Cal.App.2d 77.

N.Y.—Rintel v. Dairymen's League Co-op. Ass'n, 34 N.Y.S.2d 318, 178 Misc. 348.

86. Evidence held sufficient

(1) To sustain verdict or judgment for plaintiff.

Ill.—Strawn v. Perbix, 40 N.E.2d 93, 313 Ill.App. 351.

Pa.—Rudnitzky v. American Stores Co., 96 Pa.Super. 21.

(2) To sustain verdict against plaintiff—Gibson v. Johnson, 14 N.E.2d 337, 106 Ind.App. 103.

87. Cal.—Pattee v. King, 24 P.2d 564, 133 Cal.App. 601.

Weight and sufficiency of evidence of negligence as to equipment and lights generally see supra subdivision a (6) of this section.

Evidence held sufficient

(1) In general.

Ark.—Rose v. Greb, 112 S.W.2d 961, 195 Ark. 532.

Tex.—Hulsey v. Patterson, Civ.App., 121 S.W.2d 509.

Vt.—Johnson v. Cone, 28 A.2d 384, 112 Vt. 459.

(2) To support verdict for damages resulting from collision with unlighted parked vehicle.

Ark.—Liberty Cash Grocers v. Clements, 102 S.W.2d 836, 193 Ark. 808.

Ill.—Luhren v. Marcus, 7 N.E.2d 508, 289 Ill.App. 620.

N.J.—Meisterman v. Lozowick, 157 A. 123, 9 N.J.Misc. 1224—Trefts v. Kirby, 146 A. 688, 7 N.J.Misc. 555—Ellis v. Robinson, 145 A. 870, 7 N.J.Misc. 470.

N.Y.—Goebler v. Selma Mercantile Corporation, 33 N.Y.S.2d 965, 263 App.Div. 1012, appeal denied 35 N.Y.S.2d 166, 264 App.Div. 729.

Ohio.—Kronenberg v. Whale, 153 N.E. 302, 21 Ohio App. 322.

Pa.—Kline v. Moyer, Com.Pl., 32 Berks Co.L.J. 100.

Tex.—Leyendecker v. Harlow, Civ. App., 189 S.W.2d 706, refused for want of merit.

W.Va.—Divita v. Atlantic Trucking Co., 40 S.E.2d 324.

(3) To authorize denial of recovery—Kelly v. Locke, 194 S.E. 595, 57 Ga.App. 78, reversed on other grounds 198 S.E. 754, 186 Ga. 620, mandate conformed to 199 S.E. 544, 58 Ga.App. 558, vacated on other grounds 199 S.E. 544, 58 Ga.App. 558.

(4) To warrant conclusion that there were no lights on rear of vehicle at time of collision.

U.S.—Miller v. Advance Transp. Co., CCA Ill. 126 P.2d 442, certiorari denied Advance Transp. Co. v. Miller, 63 S.Ct. 32, 317 U.S. 641, 87 L. Ed 516.

La.—Barber v. El Dorado Lumber Co., App., 139 So. 29, affirmed 142 So. 718—Hanno v. Motor Freight Lines, 134 So. 317, 17 La.App. 62.

Minn.—Martin v. Tracy, 216 N.W. 6, 187 Minn. 529.

Mo.—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299.

Tex.—Herrin v. Falcon, Civ.App., 198 S.W.2d 117.

(5) To sustain finding that parked vehicle was equipped with a taillight, which was burning at time of accident.

Cal.—Ruth v. Bankston, 281 P. 1081, 101 Cal.App. 271.

Ill.—James v. Motor Transit Management Co., 260 Ill.App. 246.

La.—Finger v. M. Romano & Son, App., 4 So.2d 588.

N.J.—Byer v. Cladd & Sons, 159 A. 817, 10 N.J.Misc. 381.

N.D.—Gausvik v. Larsen Richter Co., 212 N.W. 846, 55 N.D. 218.

(6) To support finding of negligence in parking vehicle without lights.

Ark.—Coca Cola Bottling Co. v. Shipp, 297 S.W. 856, 174 Ark. 130.

Cal.—Woods v. Walker, 124 P.2d 844, 51 Cal.App.2d 307.

Conn.—Anderson v. R. E. Cunniff & Co., 164 A. 500, 116 Conn. 712—Falleo v. Byrolly Transp. Co., 147 A. 16, 109 Conn. 500.

ligence was with respect to signals,⁸⁸ or warnings.⁸⁹ The facts are not required to be proved by direct evidence of persons who saw the occurrence,⁹⁰ but may be established by proof of circumstances giving rise to a reasonable inference of the truth of the facts alleged.⁹¹

(2) Colliding with Parked or Standing Vehicle

General rules apply in determining the weight and

sufficiency of evidence as to negligence of the owner or operator of a motor vehicle which collided with a parked or standing vehicle.

General rules have been applied in determining the weight and sufficiency of evidence as to negligence of the owner or operator of a motor vehicle which collided with a parked or standing vehicle.⁹²

Ga.—Eveready Cab Co. v. Wilhite, 19 S.E.2d 343, 66 Ga App. 815

Ind.—Cushman Motor Delivery Co. v. McCabe, 36 N.E.2d 769, 219 Ind. 156
—Fossmeyer v. Self, 60 N.E.2d 610, 115 Ind.App. 553.

Iowa.—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 377.

Kan.—Watson v. Travelers Mut Casualty Co., 73 P.2d 64, 146 Kan 623

Mass.—Renaud v. New England Transp. Co., 189 N.E. 789, 286 Mass 39.

Mich.—Meyer v. Weimaster, 270 N.W. 715, 278 Mich. 370

Minn.—Jacobs v. Belland, 214 N.W. 55, 171 Minn 338.

N.J.—Sussex Print Works v. Nochen-son, 142 A. 437, 6 N.J. Misc 625.

Pa.—Cormican v. Menke, 159 A. 36, 306 Pa 156—Farley v. Ventresco, 157 A. 1, 103 Pa Super. 98, reversed on other grounds 161 A. 534, 307 Pa. 441.

Va.—Armstrong v. Rose, 196 S.E. 613, 170 Va. 190.

Wis.—Butts v. Ward, 279 N.W. 6, 227 Wis. 387, 116 A.L.R. 1441.

Evidence held insufficient

(1) In general.

Conn.—Cheskus v. Christiano, 182 A. 131, 120 Conn. 596.

Iowa.—Harvey v. Knowles Storage & Moving Co., 244 N.W. 660, 215 Iowa 35.

(2) To support verdict for plaintiff.

N.Y.—Melly v. Kauffman, 296 N.Y.S. 971, 251 App Div. 792.

Wis.—Beck v. Fond Du Lac Highway Committee, 286 N.W. 64, 231 Wis 593.

(3) To establish that rear light was not burning.—Jeter v. Archer, 138 So. 890, 18 La App. 527.

(4) To show negligence.

Cal.—Lockie v. Pence, 42 P.2d 340, 5 Cal.App.2d 172.

Ga.—Sumner v. Thomas, 33 S.E.2d 825, 72 Ga App. 351.

N.J.—Bacharde v. Homusiok, 155 A. 477, 9 N.J. Misc. 747.

Vt.—Macauley v. Hyde, 42 A.2d 482, 114 Vt. 198.

(5) To sustain finding that lights on defendant's parked vehicle had dangerous glare.—Carriveau v. Vatapek, 235 N.W. 445, 204 Wis. 139.

Me.—Nickerson v. Barber, 191 A. 901, 135 Me. 508.

Weight and sufficiency of evidence of negligence as to signals and look-out generally see supra subdivision a (7) of this section.

89. Evidence held sufficient

(1) In general.

Ill.—Wise v. Kuehne Mfg Co., 53 N.E.2d 711, 322 Ill.App. 28.

Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind 894

Iowa.—Weede v. Briar, 5 N.W.2d 157, 232 Iowa 972.

La.—Beach v. Union Brewing Corporation, App., 187 So 332

N.H.—MacDonald v. Appleyard, 53 A.2d 434.

N.Y.—Sommers v. Bergen Milk Transp. Co., 14 N.Y.S.2d 772, 258 App.Div. 759, reargument denied 15 N.Y.S.2d 815, 258 App Div 820, appeal denied.

Tex.—Leyendecker v. Harlow, Civ. App., 189 S.W.2d 706, refused for want of merit.

(2) To support finding that driver had ample time and opportunity to put out flares before the collision—Bailey v. Walker, Tex.Civ.App., 163 S.W.2d 864, error refused.

(3) To establish that there was not sufficient time to warn plaintiff of danger—Held v. Jiridon, 42 P.2d 1046, 5 Cal.App.2d 531.

Evidence held to establish negligence

(1) In general—Goodman v. Keeswin Motor Express Co., 278 Ill.App. 227.

(2) In failing to exercise reasonable care to warn approaching travelers of vehicle's presence by setting out flares, lanterns, etc.

Ark.—H. L. Wilson Lumber Co. v. Koen, 151 S.W.2d 681, 202 Ark. 576.

Cal.—Anderson v. Pacific Tank Lines, 126 P.2d 153, 52 Cal.App.2d 244.

Ill.—Cushman Motor Delivery Co. v. Monark Motor Freight System, 48 N.E.2d 540, 318 Ill.App. 638—Nystrom v. Chicago-St. Louis Transfer Co., 17 N.E.2d 364, 297 Ill.App. 649.

Ind.—Northwestern Transit v. Wagner, 61 N.E.2d 591, 223 Ind. 447.

La.—Coffey v. Lalanne, App., 20 So. 2d 614, opinion adhered to 24 So.2d 658—Millet v. Rizzo, App., 2 So.2d 244.

Md.—Marshall v. Sellers, 53 A.2d 5.

Mass.—Prout v. Mystic Motor

Transp. Co., 58 N.E.2d 121, 317 Mass 349.

Minn.—Duff v. Bemidji Motor Service Co., 299 N.W. 196, 210 Minn 456.

Va.—Armstrong v. Rose, 196 S.E. 613, 170 Va. 190.

W.Va.—Divita v. Atlantic Trucking Co., 40 S.E.2d 324.

Wis.—Butts v. Ward, 279 N.W. 6, 227 Wis. 387, 116 A.L.R. 1441.

(3) In failing to place flares at place where warning would have been effective

Cal.—Callison v. Dondero, 124 P.2d 852, 51 Cal.App.2d 403.

S.C.—Montgomery v. National Convey & Trucking Co., 195 S.E. 247, 186 S.C. 167.

Evidence held insufficient

Cal.—Held v. Jiridon, 42 P.2d 1046, 5 Cal.App.2d 531.

Ga.—Sumner v. Thomas, 33 S.E.2d 825, 72 Ga App. 351

Vt.—Macauley v. Hyde, 42 A.2d 482, 114 Vt. 198.

Wyo.—Merback v. Blanchard, 105 P.2d 272, 56 Wyo. 153, rehearing denied 109 P.2d 49, 56 Wyo. 286.

90. Ky.—Owen Motor Freight Lines v. Russell's Adm'r, 86 S.W.2d 708, 260 Ky. 795.

91. Ky.—Owen Motor Freight Lines v. Russell's Adm'r, supra.

92. Evidence held sufficient

(1) In general.

N.J.—Sadofsky v. Frain, 147 A. 729, 7 N.J. Misc. 1064.

Tex.—Peveto v. Smith, 133 S.W.2d 572, 134 Tex. 308—Peveto v. Smith, Civ.App., 113 S.W.2d 216, modified on other grounds 133 S.W.2d 572, 134 Tex. 308.

Wash.—Chapin v. Stickel, 22 P.2d 290, 173 Wash. 174.

(2) To authorize recovery by owner, driver, or occupant of parked or standing vehicle

Ark.—Schwam v. Reece, 210 S.W.2d 903.

Ga.—Sherrill v. Pace, 30 S.E.2d 793, 71 Ga.App. 300.

Ill.—Meng v. Lucash, 69 N.E.2d 367, 329 Ill.App. 512.

La.—Ropollo v. State, App., 23 So.2d 374.

Ohio.—Gates v. Wise, App., 77 N.E.2d 716.

Pa.—Thomas F. Leonard Co. v. Scranton Coca-Cola Bottling Co., 90 Pa.Super. 360.

k. Vehicles Towing or Being Towed

General rules apply in determining the weight and sufficiency of evidence of negligence on the part of the driver of a motor vehicle towing a trailer or other vehicle, or of the operator of the towed vehicle, or of one colliding with a towed vehicle.

General rules have been applied in determining

the weight and sufficiency of the evidence to show negligence of the driver of a motor vehicle towing a trailer⁹³ or other vehicle,⁹⁴ or of the operator of the towed vehicle,⁹⁵ or negligence of defendant running into, or colliding with, a towed vehicle.⁹⁶ Failure of the operator of a tow car working at the

(3) To justify recovery for damages to parked automobile against one motorist and a denial of recovery by him against owner of automobile approaching from the left—*Baba v. Russell*, 60 N.E.2d 652, 325 Ill.App. 696.

(4) To support verdict for personal injuries sustained by plaintiff when defendant's bus backed into parked automobile which plaintiff was attempting to enter—*Missouri Pac Transp. Co. v. Allen*, 184 S.W.2d 961, 208 Ark. 122.

(5) To support findings and judgment for defendants.—*Jessen v. Angelus Furniture & Mfg. Co.*, 42 P.2d 1063, 5 Cal.App.2d 477.

(6) To sustain judgment denying recovery for damages
Ill.—*Vanderwall v. Beard*, 25 N.E.2d 98, 303 Ill.App. 339
Mass.—*Zarrillo v. Stone*, 58 N.E.2d 848, 317 Mass. 510.

N.Y.—*Bonded Freightways v. Codington*, 22 N.Y.S.2d 365, 260 App.Div. 832—*Remillard v. Homer Bros.*, 279 N.Y.S. 843, 244 App.Div. 868—*Pearlman v. Misner*, 36 N.Y.S.2d 646.

Ohio—*Kessler v. Brown*, App., 32 N.E.2d 68.

Tenn.—*Whitehurst v. Howell*, 98 S.W.2d 1071, 20 Tenn.App. 314.

(7) To show that defendant was negligent.

Ark.—*East Arkansas Lumber Co. v. Moss*, 52 S.W.2d 49, 186 Ark. 30.

Cal.—*Sanford v. McCook*, 44 P.2d 631, 6 Cal.App.2d 482—*Pate v. Pickwick Stages System*, 14 P.2d 174, 125 Cal.App. 670—*Sawdey v. R. W. Rasmussen Co.*, 290 P. 684, 107 Cal.App. 467—*Giorgetti v. Wollaston*, 257 P. 109, 83 Cal.App. 358.

Conn.—*Fogarty v. E. J. Kelley Co.*, 7 A.2d 851, 125 Conn. 605.

Ill.—*Granlie v. Valha*, 37 N.E.2d 931, 312 Ill.App. 181.

Ind.—*Gumz v. Campbell*, 73 N.E.2d 345, 117 Ind.App. 494.

Iowa.—*Luppes v. Harrison*, 32 N.W.2d 809.

Ky.—*Alford v. Bealrd*, 192 S.W.2d 180, 301 Ky. 512.

La.—*Brocato v. T. S. C. Motor Freight Lines*, App., 22 So.2d 480—*Rector v. Allied Van Lines*, App., 198 So. 516—*Cloverland Dairy Products Co. v. Leach*, 134 So. 433, 16 La.App. 659—*Globe Indemnity Co. v. Tove Bros. Auto & Taxicab Co.*, 129 So. 234, 14 La.App. 142—*Borg v. Jahneke Service*, 124 So. 680, 11 La.App. 694.

Mass.—*Hendler v. Coffey*, 179 N.E. 801, 278 Mass. 339.

Mich.—*Cothran v. Benjamin Cleenerck & Son*, 209 N.W. 132, 235 Mich. 351.

Minn.—*Lund v. Springsteel*, 246 N.W. 116, 187 Minn. 577.

N.J.—*Rubin v. Senna*, 165 A. 282, 11 N.J.Misc. 256.

Pa.—*Gerdes v. Booth & Flinn*, 150 A. 483, 300 Pa. 586—*Weinberg v. Broomall*, 169 A. 393, 111 Pa.Super. 115.

S.D.—*Griebel v. Ruden*, 249 N.W. 810, 61 S.D. 507, affirmed 253 N.W. 447, 62 S.D. 469.

Tex.—*Peveto v. Smith*, 133 S.W.2d 572, 134 Tex. 308—*Houston Electric Co. v. McLeroy*, Civ.App., 153 S.W.2d 617, reversed on other grounds 163 S.W.2d 1062, 139 Tex. 170—*Wright v. Maddox*, Civ.App., 288 S.W. 560.

(8) To show that defendant was not negligent.—*Siren v. Montague*, La.App., 142 So. 196—*Browning v. Maestri*, 125 So. 74, 12 La.App. 6.

(9) To make prima facie case of negligence against defendant
Mo.—*Howlett v. Randol*, App., 39 S.W.2d 463—*Waite v. Boutross*, 39 S.W.2d 454, 225 Mo.App. 724—*Christie v. Randol*, 38 S.W.2d 538, 225 Mo.App. 744.

Pa.—*Petrovsky v. Danovitz*, 86 Pa.Super. 22.

Evidence held insufficient

(1) In general.

Cal.—*Staples v. L. W. Blinn Lumber Co.*, 275 P. 813, 97 Cal.App. 387.

Ky.—*Higgins v. Forkner*, 277 S.W. 983, 211 Ky. 588.

Mont.—*West v. Wilson*, 4 P.2d 469, 90 Mont. 522.

N.Y.—*Kiev v. S. & E. Motor Hire Corporation*, 30 N.Y.S.2d 651, 263 App.Div. 720.

(2) To establish negligence of defendant.

La.—*Romano v. Davidson*, 123 So. 411, 11 La.App. 286.

Mass.—*Zarrillo v. Stone*, 58 N.E.2d 848, 317 Mass. 510.

93. Evidence held sufficient

(1) In general.

U.S.—*Kroger Grocery & Baking Co. v. Reddin*, C.C.A.Mo., 128 F.2d 787.

La.—*Caston v. Connell*, App., 146 So. 483—*Butler v. Baker*, App., 141 So. 780.

N.Y.—*Kosnick v. Keeshin Motor Exp. Co.*, 77 N.Y.S.2d 402.

Tex.—*Pool v. Gilbert*, Civ.App., 199 S.W.2d 798, error refused, no reversible error—*National Union*

Fire Ins. Co. v. Wallace, Civ.App., 118 S.W.2d 609.

(2) To show negligence.

US—*Jayne v. Mason & Dixon Lines*, C.C.A.N.Y., 124 F.2d 317.

Ark.—*Coca-Cola Bottling Co. of Southwest Arkansas v. Carter*, 154 S.W.2d 824, 202 Ark. 1026

La.—*Gillespie v. Louisiana Long Leaf Lumber Co.*, App., 185 So. 116

—*Hamilton v. F. Strauss & Son*, App., 154 So. 489.

Wis.—*Baird v. Edmonds*, 276 N.W. 306, 226 Wis. 209

42 C.J. p. 1236 note 37 [a] (15).

Evidence held insufficient

Wash.—*Bissell v. Seattle Vancouver Motor Freight*, 168 P.2d 390, 25 Wash.2d 68.

94. Evidence held sufficient

(1) In general.

Ala.—*Wilson & Co. v. King*, 33 So.2d 351, 250 Ala. 90.

La.—*Broussard v. Teche Transfer Co.*, 132 So. 136, 15 La.App. 439.

Wis.—*Baird v. Edmonds*, 276 N.W. 306, 226 Wis. 209

(2) To sustain verdict or judgment for plaintiff.

Ill.—*Washington v. Peterson*, 49 N.E.2d 883, 320 Ill.App. 140.

N.Y.—*Meredith v. Wallace*, 37 N.Y.S.2d 198, 264 App.Div. 975, appeal denied 38 N.Y.S.2d 375, 265 App.Div. 888.

Tex.—*South Texas Coaches v. Woodward*, Civ.App., 123 S.W.2d 395.

(3) To establish prima facie case of negligence.—*Staples v. Spelman*, 165 A. 783, 53 R.I. 244.

Evidence held insufficient

Minn.—*Middaugh v. Waseca Canning Co.*, 281 N.W. 818, 203 Minn. 456.

95. Evidence held sufficient

Cal.—*Weddle v. Loges*, 125 P.2d 914, 52 Cal.App.2d 115.

Wis.—*Johnson v. Hasslinger*, 270 N.W. 52, 223 Wis. 239.

96. Evidence held sufficient

(1) In general.

Me.—*Illingworth v. Madden*, 192 A. 273, 135 Me. 159, 110 A.L.R. 1090

Tenn.—*Chattanooga Ice Delivery Co. v. George F. Burnett Co.*, 147 S.W.2d 750, 124 Tenn.App. 535.

(2) To sustain verdict for defendant.—*Morris v. Cantlay & Tanzola*, 39 P.2d 471, 3 Cal.App.2d 224.

Evidence held insufficient

N.Y.—*Young v. Rochester Gas & Electric Corporation*, 17 N.Y.S.2d 35, 258 App.Div. 418.

scene of a wrecked motor vehicle to place signs on the roadway warning oncoming traffic of the obstruction of the highway has been held to establish a prima facie case of negligence against such operator.⁹⁷

l. Vehicles Used in Saving Life or Property or Enforcing the Law

There must be a preponderance of the evidence to prove negligence in actions by or against the owner, operator, or occupant of vehicles used in saving life or property or enforcing the law.

There must be a preponderance of the evidence to prove negligence in actions by or against the owner, operator, or occupant of vehicles used in saving life or property or enforcing the law,⁹⁸ as in actions brought by the owner or occupant of an

ambulance,⁹⁹ a fire truck,¹ or a police car² or motorcycle,³ or in actions against the owner or operator of an ambulance,⁴ a police car,⁵ a fire truck,⁶ a public service corporation's emergency repair truck,⁷ or of city and county vehicles generally.⁸

m. Railroad Cars or Streetcars or Occupants

General rules apply in determining the weight and sufficiency of the defendant's negligence resulting in damage or injury to railroad cars or streetcars or the occupants thereof.

The weight and sufficiency of evidence of defendant's negligence allegedly resulting in damage or injury to railroad cars or streetcars or the occupants thereof are determined in accordance with general rules.⁹

97. Or.—*Frame v. Arrow Towing Service*, 64 P.2d 1312, 155 Or. 522.

98. Cal.—*Isaacs v. City and County of San Francisco*, 167 P.2d 221, 73 Cal.App.2d 621.

99. Evidence held sufficient

La.—*Rose-Neath Funeral Home v. Cudahy Packing Co. of Louisiana*, App., 12 So.2d 717.

1. Evidence held sufficient

(1) In general.

La.—*Steger v. Bayes*, App., 155 So. 27.

Wash.—*Benefiel v. Eagle Brass Foundry*, 282 P. 213, 154 Wash. 330.

(2) To support verdict for plaintiff.

N.J.—*Morris Tp., in Morris County, v. Joseph Harris & Sons*, 143 A. 817, 7 N.J.Misc. 17.

N.Y.—*McCusker v. Jamaica Buses*, 8 N.Y.S.2d 418, 255 App.Div. 996, reargument denied 10 N.Y.S.2d 213, 256 App.Div. 830, appeal denied 20 N.E.2d 23, 280 N.Y. 575, affirmed 21 N.E.2d 213, 280 N.Y. 718.

(3) To authorize verdict denying recovery.—*Bischell v. State*, 157 P.2d 41, 68 Cal.App.2d 557.

(4) To show that defendant was not negligent.—*Crowley v. Fifth Ave. Coach Co.*, 292 N.Y.S. 473, 249 App. Div. 408, affirmed 12 N.E.2d 175, 276 N.Y. 496.

2. Evidence held sufficient

U.S.—*Town of Amherst v. U. S., D. C.N.Y.*, 77 F.Supp. 80.

Cal.—*Stucker v. McMains*, 161 P.2d 997, 71 Cal.App.2d 35.

3. Evidence held sufficient

To authorize verdict for defendant.—*Wilkinson v. Marcellus*, 125 P.2d 584, 51 Cal.App.2d 630.

4. Evidence held sufficient

U.S.—*New Amsterdam Cas. Co. v. Ledoux*, C.C.A.La., 159 F.2d 905.

Conn.—*Leete v. Griswold Post No. 79, American Legion*, 158 A. 919, 114 Conn. 400.

Evidence of skidding of ambulance was held circumstance to be considered on allegation of negligence in operation of ambulance at unreasonable speed—*O'Neil & Hearne v. Bray's Adm'x*, 90 S.W.2d 353, 262 Ky. 377.

5. Evidence held sufficient

(1) In general.

Cal.—*Lufkin v. City of Bakersfield*, 20 P.2d 788, 131 Cal.App. 21.

N.H.—*American Motorists Ins. Co. v. Rush*, 190 A. 432, 88 N.H. 383.

(2) To support verdict for plaintiff.—*Guthrie v. Thomas*, 24 N.Y.S.2d 934, affirmed 24 N.Y.S.2d 936, 260 App.Div. 1011, appeal denied 25 N.Y.S.2d 1001, 261 App.Div. 836.

(3) To sustain verdict for police officer and municipality.—*Smith v. Town of Orangetown, D.C.N.Y.*, 57 F. Supp. 52, affirmed, C.C.A., 150 F.2d 782, certiorari denied 68 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462.

(4) To sustain finding that officers operating vehicles were responding to an emergency call.—*Coltman v. City of Beverly Hills*, 105 P.2d 153, 40 Cal.App.2d 570.

Evidence held insufficient

Cal.—*Osgood v. City of San Diego*, 62 P.2d 195, 17 Cal.App.2d 345.

6. Evidence held sufficient

(1) In general.—*McCarthy v. Mason*, 171 A. 256, 132 Me. 347.

(2) To authorize verdict denying recovery.—*Bischell v. State*, 157 P.2d 41, 68 Cal.App.2d 557.

Proof required to make prima facie case

Cal.—*Isaacs v. City and County of San Francisco*, 167 P.2d 221, 73 Cal.App.2d 621.

7. Evidence held insufficient

Md.—*Baltimore Transit Co. v. Young*, 56 A.2d 140.

8. Cal.—*Isaacs v. City and County of San Francisco*, 167 P.2d 221, 73 Cal.App.2d 621.

9. Mo.—*Nyberg v. Wells*, App., 14 S.W.2d 529.

Weight and sufficiency of evidence of negligence as to persons moving to or from streetcars see supra subdivision f of this section.

Evidence held sufficient

(1) In general.

Conn.—*Podziowski v. Gaumond*, 198 A. 569, 124 Conn. 157—*Clarleglio v. Jonas*, 167 A. 828, 117 Conn. 665.

Ohio—*New York Cent. R. Co. v. Suttle*, 8 N.E.2d 149, 54 Ohio App. 488.

Pa.—*Parker v. Philadelphia Rapid Transit Co.*, 162 A. 664, 308 Pa. 209.

R.I.—*Muscente v. R. S. Brine Transp. Co.*, 196 A. 259, 59 R.I. 482.

Wash.—*Allen v. Ingersoll-Rand Co.*, 78 P.2d 1086, 194 Wash. 708.

(2) To establish that driver of motor vehicle was negligent.

Colo.—*Interstate Motor Lines v. Neal*, 179 P.2d 665, 116 Colo. 42.

Ill.—*McManaman v. Johns-Manville Products Corp.*, 72 N.E.2d 741, 331 Ill.App. 178, affirmed 81 N.E.2d 137, 400 Ill. 423—*Ames v. Armour & Co.*, 257 Ill.App. 449.

Kan.—*Waugh v. Kansas City Public Service Co.*, 143 P.2d 788, 157 Kan. 690.

Md.—*Charlton Bros. Transp. Co. v. Garrettson*, 51 A.2d 642.

Mich.—*Grand Trunk Western R. Co. v. Lovejoy*, 7 N.W.2d 212, 304 Mich. 35.

Minn.—*Fox v. Minneapolis St. Ry. Co.*, 251 N.W. 916, 190 Minn. 343.

Mo.—*Nyberg v. Wells*, App., 14 S.W.2d 529.

Pa.—*Doyle v. Philadelphia Transp. Co.*, 55 A.2d 583, 161 Pa.Super. 556.

Tex.—*Missouri-Kansas-Texas R. Co. v. McKinney*, Civ.App., 126 S.W.2d 789, affirmed *Missouri, K. & T. R. Co. of Texas v. McKinney*, 145 S.W.2d 1081, 136 Tex. 75.

Wis.—*Duane v. Feltus*, 283 N.W. 299, 229 Wis. 655.

(3) To authorize verdict or judgment

n. Bicycles or Motorcycles

In an action against the operator or owner of a motor vehicle for injuries sustained by a bicyclist or motorcyclist, the fact that the injury was produced by some negligence or wrongful act must be shown by a preponderance of the evidence; but circumstantial evidence may be sufficient.

The fact that the injury was produced by some negligence or wrongful act of the driver must be shown by evidence reasonably supporting such conclusion in an action against the owner or operator of a motor vehicle in an action for injuries sustained by a bicyclist,¹⁰ or motorcyclist,¹¹ and it is

ment in favor of streetcar passenger. Cal.—Reilly v. California St. Cable R. Co., 173 P.2d 872, 76 Cal.App.2d 620.

Minn.—Useman v. Minneapolis St. Ry. Co., 268 N.W. 866, 198 Minn. 79.

N.Y.—Notter v. Union Ry. Co. of New York, 286 N.Y.S. 745, 247 App Div. 140.

Pa.—Parker v. Philadelphia Rapid Transit Co., 162 A. 664, 308 Pa. 209 —Hall v. Belmont Auto Trucking Co., 90 Pa Super. 176.

(4) To sustain verdict or judgment for trainman.

Cal.—Dunham v. Cantlay & Tanzola, 49 P.2d 332, 9 Cal App.2d 274.

Fla.—Penn v. Pearce, 163 So. 288, 121 Fla. 3.

Prima facie case

In wrongful death action arising out of collision between streetcar and truck driven by defendant owner's employee, plaintiffs were confined, as to issues, to facts of their prima facie case based on testimony of employee and truck foreman, or inferences reasonably deducible therefrom.—Crabb v. Zanes Freight Agency, Tex Civ.App., 123 S.W.2d 752, error dismissed, judgment correct.

10. Pa.—Hebron v. Merchants' Delivery, Com.Pl., 13 Northumb Leg J 242.

Weight and sufficiency of evidence of negligence in collision with child on bicycle or tricycle see *supra* subdivision d of this section.

Evidence held sufficient

(1) In general.—L. A. Wood & Co. v. Taylor, C.C.A.Ga., 154 F.2d 548.

(2) To sustain finding that driver was guilty of negligence.

Cal.—Hart v. Farris, 21 P.2d 432, 218 Cal. 69—North v. Vinton, 61 P.2d 950, 17 Cal.App.2d 214—Cuadrado v. Tarver, 15 P.2d 898, 127 Cal.App. 434—Hauksins v. Buck Co., 298 P. 137, 113 Cal.App. 176.

La.—Commercial Casualty Ins. Co. v. Landry, App., 153 So. 61.

Minn.—Ludwig v. Haugen Motor Co., 245 N.W. 371, 187 Minn. 315—Weasler v. Murphy Transfer & Storage Co., 208 N.W. 657, 187 Minn. 211.

N.J.—Mulligan v. Losi, 139 A. 387, 5 N.J.Misc. 1019.

Tex.—Stamper v. Scholtz, Civ.App., 29 S.W.2d 883, error refused.

Wash.—Saulness v. Reynolds, 60 P. 2d 93, 187 Wash. 357.

Wis.—Prange v. Rognstad, 286 N.W. 650, 205 Wis. 62.

42 C.J. p 1233 note 27 [a] (9).

(3) To sustain finding that motorist was not negligent.—Cesaneck v. G. Fox & Co., 29 A.2d 581, 129 Conn. 492.

(4) To show that boy on bicycle entered intersection before vehicle, and was almost across when he was struck thereby.—Lepinay v. Vitrano, 125 So. 301, 12 La.App. 475.

(5) To sustain verdict or judgment for plaintiff.

Iowa.—Coble v. McChane, 8 N.W.2d 755, 233 Iowa 54—Peterson v. Bonnes, 299 N.W. 825, 230 Iowa 986.

Mich.—Saums v. Parfet, 258 N.W. 235, 270 Mich. 165.

N.Y.—O'Master v. New York City Omnibus Corporation, 15 N.Y.S.2d 486, 258 App Div. 785, affirmed 27 N.E.2d 47, 282 N.Y. 769—Laundry v. Trombley, 4 N.Y.S.2d 146, 254 App.Div. 715.

Ohio.—Meggison v. Billan, 178 N.E. 281, 40 Ohio App. 210.

R.I.—Kopinos v. Sommer's Transfer Co., 170 A. 490, 54 R.I. 132—McGowan v. Dadekhan, 163 A. 883.

Wash.—Beaulier v. Mahoney, 283 P. 707, 155 Wash. 141.

(6) To support verdict or judgment for defendant.

Iowa.—Reardon v. Hermansen, 275 N.W. 6, 223 Iowa 1207.

La.—Hall v. Vincent, App., 14 So.2d 337—Harris v. Brock, App., 191 So. 762.

N.J.—Sadlon v. Cusick, 156 A. 24, 9 N.J.Misc. 853—Szpanowski v. Duff, 140 A. 396, 6 N.J.Misc. 157.

R.I.—Lavallee v. Electric Maintenance & Engineering Works, 150 A. 749.

Evidence held insufficient

(1) To establish actionable negligence of defendant.

Mo.—McCoy v. Home Oil & Gas Co., App., 60 S.W.2d 715.

N.C.—Miller v. Holland, 147 S.E. 8, 196 N.C. 739.

42 C.J. p 1233 note 27 [b] (4).

(2) To support finding that defendant was negligent.—General Contract Purchase Corporation v. Armour, C. C.A.Miss., 125 F.2d 147.

11. Md.—U. S. Fidelity & Guaranty Co. v. Continental Baking Co., 190 A. 768, 172 Md. 24.

Tenn.—Hansard v. Ferguson, 132 S.W.2d 221, 23 Tenn.App. 306.

Evidence held sufficient

(1) In general.

La.—Varnado v. Rex Petroleum Corporation, App., 147 So. 513.

N.M.—Greenfield v. Bruskas, 68 P.2d 921, 41 N.M. 346.

(2) To establish negligence.

U.S.—Sanders v. Leech, C.C.A.Fla., 158 F.2d 486.

Ariz.—Kauffroath v. Wilbur, 185 P. 2d 522, 66 Ariz. 152.

Cal.—Backus v. Sessions, 110 P.2d 51, 17 Cal.2d 380, prior opinion 104 P.2d 719—Neilson v. Houle, 254 P. 891, 200 Cal. 726—Gunter v. Claggett, 151 P.2d 271, 65 Cal.App.2d 636.

Fla.—Crosby v. Donaldson, 116 So. 231, 95 Fla. 365.

Ga.—Idle Hour Club v. Robinson, 157 S.E. 125, 42 Ga.App. 650.

Kan.—Koger v. Keller, 243 P. 294, 120 Kan. 196.

La.—Adams v. Golsen, 174 So. 876, 187 La. 363—Gaines v. Standard Acc Ins Co., App., 32 So.2d 633—Lane v. Bourgeois, App., 28 So.2d 91—Lindsay v. Gulf Ins. Co., App., 7 So.2d 757—Letoff v. People's Ice & Fuel Co., App., 149 So. 232.

Me.—Bonefant v. Chapdelaine, 158 A. 857, 131 Me. 45—Esponette v. Wiseman, 155 A. 650, 130 Me. 297—Gustin v. Asskov, 151 A. 443, 129 Me. 491.

Mich.—Sorensen v. Katon, 299 N.W. 798, 299 Mich. 38.

Minn.—Merritt v. Stuve, 9 N.W.2d 329, 215 Minn. 44.

N.H.—Boyle v. Telegraph Pub. Co., 35 A.2d 394, 93 N.H. 61.

N.J.—Stork v. Barbour Flax Spinning Co., 138 A. 509, 5 N.J.Misc. 837.

N.M.—Greenfield v. Bruskas, 68 P.2d 921, 41 N.M. 346.

Va.—Stratton v. Bergman, 192 S.E. 813, 169 Va. 249.

(3) To establish that defendant exercised ordinary care in circumstances, and was not negligent.

Cal.—Glynn v. Vaccari, 149 P.2d 409, 64 Cal.App.2d 718.

La.—Murphy v. City of Alexandria, App., 2 So.2d 103—Smith v. Crow, 1 La App. 659.

Minn.—Wetterlind v. Hintz Feed Co., 263 N.W. 462, 195 Minn. 426.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195.

(4) To support verdict or judgment for plaintiff.

Cal.—Hammer v. Crehan, 190 P.2d 270, 84 Cal.App.2d 123—Duggan v. Forderer, 249 P. 533, 79 Cal.App. 339.

Ga.—Hinesley v. Anderson, 43 S.E.2d 736, 75 Ga.App. 394—Cochran v. Kendrick, 158 S.E. 57, 43 Ga.App. 135.

incumbent on plaintiff to establish the averments of his declaration or complaint by a preponderance of the evidence.¹² The alleged negligence need not necessarily be shown by direct and positive testimony;¹³ but may be shown by facts and circumstances which fairly suggest that defendant's negligence operated to produce the injuries and which afford a reasonable inference to that effect;¹⁴ but speculation as to how or from what cause the accident occurred cannot be allowed to stand for proof or be made the basis of a verdict in favor of plaintiff.¹⁵ The fact that the collision may not have occurred in the exact spot where plaintiff testified it happened would not necessarily cause plaintiff's case to fall.¹⁶

Speed and control. The general rules for deter-

mining the weight and sufficiency of evidence of defendant's negligence in relation to speed and control, which are considered *supra* subdivision a (8) of this section, have been applied in actions for injuries sustained by bicyclists¹⁷ or motorcyclists.¹⁸

o. Articles Projecting, Falling, or Thrown from Vehicles

The weight and sufficiency of evidence of defendant's negligence with respect to articles projecting, falling, or thrown from vehicles are determined according to general rules.

General rules have been applied in determining the weight and sufficiency of the evidence to establish negligence with respect to articles projecting,¹⁹ or falling²⁰ from vehicles, or with respect

Ill.—Manzeske v. Yellow Cab Co., 54 N.E.2d 239, 322 Ill.App. 280

Ind.—Pumphrey v. Tannehill, 8 N.E. 2d 414, 102 Ind.App. 468.

Ky.—Saxton v. Tucker, 134 S.W.2d 590, 280 Ky. 777.

La.—Di Fulco v. Sharfstein, App. 199 So. 595.

N.J.—Harris v. Kaplan, 156 A. 18, 9 N.J.Misc. 800—Nevis v. Perth Ambboy Auto Wrecking Co., 145 A. 325, 7 N.J.Misc. 295.

N.Y.—Loucks v. Ford, 283 N.Y.S. 282, 246 App.Div. 658.

Pa.—Young v. Quaker City Cab Co., 87 Pa.Super. 294.

(5) To warrant verdict or judgment for defendant.—Habben v. Robertson, 28 N.E.2d 353, 306 Ill.App. 283.

Evidence held insufficient

(1) To establish negligence. Cal.—Giovannoni v. Union Ice Co., 291 P. 461, 108 Cal.App. 190.

La.—Thrash v. Continental Casualty Co., App., 6 So.2d 75—Hennessey v. Daigle, 123 So. 900, 11 La.App. 474.

(2) To sustain verdict or judgment for plaintiff.

La.—Stevens v. Hamann, 126 So. 94, 12 La.App. 318.

N.Y.—Melly v. Kauffman, 296 N.Y.S. 971, 251 App.Div. 792.

(3) To support verdict for defendant.—Sheridan v. Florito, 32 N.E.2d 172, 308 Ill.App. 442.

12. Tenn.—Hansard v. Ferguson, 132 S.W.2d 221, 23 Tenn.App. 306.

13. Mo.—Vanausdall v. Schorr, App., 168 S.W.2d 110.

14. Mo.—Vanausdall v. Schorer, *supra*.

Evidence held to warrant inference of negligence

Cal.—Green v. Pedigo, 170 P.2d 999, 75 Cal.App.2d 300.

Tex.—Edwards v. Hawkins, Civ.App., 77 S.W.2d 1098.

15. Md.—U. S. Fidelity & Guaranty Co. v. Continental Baking Co., 190 A 768, 172 Md. 24.

Pa.—Hebron v. Merchants' Delivery, Com.Pl., 13 Northumb Leg J. 242.

16. Ill.—Manzeske v. Yellow Cab Co., 54 N.E.2d 239, 322 Ill.App. 280.

17. Evidence held sufficient

(1) In general.—Green v. Pedigo, 170 P.2d 999, 75 Cal.App.2d 300

(2) To show or sustain finding that driver was negligent in driving too fast.

Cal.—Drake v. Ruseoni, 122 P.2d 605, 50 Cal.App.2d 89

Ill.—Kavanaugh v. Parret, 34 N.E.2d 868, 310 Ill.App. 420, reversed on other grounds 40 N.E.2d 500, 379 Ill. 273

La.—Bosarge v. Spliss & Co., App., 145 So. 21—Ziegler v. Lamantia, 126 So. 262, 13 La.App. 70.

Wash.—Saulness v. Reynolds, 60 P. 2d 93, 187 Wash. 357.

(3) To sustain finding that motorist was not negligent.—Cesaneck v. G. Fox & Co., 29 A.2d 581, 129 Conn. 492.

Evidence held insufficient

(1) To sustain finding that defendant was negligent.

U.S.—General Contract Purchase Corporation v. Armour, C.C.A. Miss., 125 F.2d 147.

Fla.—McClain v. Swearingen, 10 So. 2d 564, 152 Fla. 11.

Wis.—Batura v. Schwertsinske, 295 N.W. 698, 237 Wis. 208—Driessen v. Moder, 289 N.W. 689, 233 Wis. 416.

(2) To sustain charge that defendant's vehicle was being driven at speed claimed.—Cantrell v. H. G. Hill Stores, La.App., 193 So. 389.

18. Evidence held to establish negligence

Cal.—Backus v. Sessions, 110 P.2d 51, 17 Cal.2d 380.

Evidence held not to establish negligence

La.—Thrash v. Continental Casualty Co., App., 6 So.2d 75.

19. Evidence held sufficient

(1) In general.—Dube v. Bickford, 31 A.2d 64, 92 N.H. 362.

(2) To support finding that defendants were negligent.

Cal.—Miller v. Lyons, 252 P. 330, 200 Cal. 232—Brooks v. Bailey, 104 P. 2d 854, 40 Cal.App.2d 310.

Kan.—Barzen v. Kepler, 266 P. 69, 125 Kan. 648.

Me.—Howley v. Smith, 163 A. 539, 131 Me. 402.

Pa.—Dorris v. Bridgman & Co., 145 A. 827, 296 Pa. 198.

42 C.J. § 1236 note 37 [a] (17).

(3) To sustain verdict for plaintiff.

Cal.—O'Neal v. Kelly Pipe Co., 173 P. 2d 685, 76 Cal.App.2d 577

Ill.—Moore v. Jansen & Schaefer, 265 Ill.App. 459.

(4) To justify finding of negligence in failing to give warning of danger by sufficient, properly located lights.

Neb.—Moore v. Nisley, 275 N.W. 827, 133 Neb. 474.

N.J.—Sokiera v. H. A. Jaeger, Inc., 169 A. 347, 12 N.J.Misc. 17, affirmed 171 A. 786, 112 N.J.Law 500.

Evidence held insufficient

Ohio.—Central Transfer & Storage Co. v. Frost, App., 36 N.E.2d 494.

20. Evidence held sufficient

(1) In general.—Champlin Refining Co. v. Crisp, 86 P.2d 784, 184 Okl. 248.

(2) To support finding that defendants were negligent.

Cal.—Dunn v. Shamoon, 99 P.2d 1113, 37 Cal.App.2d 486.

La.—Wilcox v. B. Olinde & Sons Co., App., 182 So. 149—Pizzitola v. Letailier Transfer Co., App., 167 So. 158.

to articles thrown from vehicles.²¹

p. Injuring or Frightening Animals

In an action for injuring or frightening animals, the weight and sufficiency of the evidence of the defendant's negligence are determined in accordance with general rules.

The weight and sufficiency of the evidence of defendant's negligence in an action for injuring or frightening animals are determined in accordance with the general rules of evidence.²²

q. Operator Injuring Occupant of His Vehicle

(1) In general

(2) Gross negligence or willful, wanton, and reckless acts in general

- (3) Assumption of risk
- (4) Defects in vehicle
- (5) Intoxication and falling asleep
- (6) Speed and control

(1) In General

Negligence of the owner or operator of a motor vehicle resulting in injury of an occupant thereof must be proved by a preponderance of the evidence, although circumstantial evidence may be sufficient.

In an action by the occupant of a motor vehicle for injuries sustained as a result of the negligence of the owner or driver thereof, such negligence must be proved by a preponderance of the evidence.²³ While circumstantial evidence may justify the inference that defendant was wanting in respect

Or.—Motejl v. Greenwood, 138 P.2d 216, 171 Or. 469.

Pa.—Goodpasture v. Simpson, 199 A 222, 330 Pa 225.

Wash.—Porter v. Smart's Auto Freight Co., 25 P.2d 576, 174 Wash. 566.

(3) To sustain verdict for plaintiff

Ga.—Parker v. Ford, 32 S.E.2d 916, 72 Ga.App. 71

Pa.—Bannon v. Simpson, Com.Pl., 44 Dauph Co. 402.

Evidence held not to establish negligence

La.—Franklin v. Gordon's Transports, App., 26 So.2d 387.

21. Evidence held insufficient

W.Va.—Agsten v. Lemma, 193 S.E. 545, 119 W.Va. 330.

22. Evidence held sufficient

(1) To warrant conclusion that defendant was negligent.

Conn.—Griffin v. Fancher, 20 A.2d 95, 127 Conn. 686, 134 A.L.R. 701.

Ill.—Grossmann v. Diesel, 42 N.E.2d 957, 315 Ill.App. 306.

La.—Garbarino v. B & R. Transfer Co., App., 20 So.2d 625—Smith v.

Louisiana Power & Light Co., App., 158 So. 844—Jeter v. Caddo Transfer & Warehouse Co., 1 La.App. 35.

Tex.—Gillette Motor Transport v. Kelly, Civ.App., 141 S.W.2d 959.

42 C.J. p 1233 note 27 [a] (1), (10).

(2) To support conclusion that defendant was not negligent.

La.—Stringer v. Crawley, App., 16 So.2d 658—Fontenot v. La Fleur,

App., 2 So.2d 479—Turner v. Oden, 133 So. 501, 16 La.App. 163.

Mich.—Rosen v. Beh, 262 N.W. 291, 272 Mich. 487.

Tenn.—Stacy v. Keller, 1 Tenn.App. 80.

(3) To sustain verdict or judgment for plaintiff.

Ala.—Barber v. Upton, 187 So. 497, 237 Ala. 415.

Ark.—Davis v. Draper, 148 S.W.2d 862, 201 Ark. 1172.

Iowa.—Lawson v. Fordyce, 21 N.W. 2d 69, 237 Iowa 28.

La.—Palmer v. Muse, App., 29 So. 2d 389.

N.M.—Bell v. Carter Tobacco Co., 71 P.2d 683, 41 N.M. 513

Okl.—Tibbels & Pleasant v. Cook, 287 P. 1014, 143 Okl. 101.

Evidence held insufficient

(1) To show that driver was negligent.

La.—Campbell v. F. Hollier & Sons. App., 4 So.2d 576

Tenn.—Harris v. Miller, 144 S.W.2d 7, 24 Tenn.App. 332.

Va.—Shoemaker v. Andrews, 152 S.E. 370, 154 Va. 170.

Wash.—Frowd v. Marchbank, 283 P. 467, 154 Wash. 634.

3 C.J. p 162 note 16 [a]—42 C.J. p 1233 note 27 [b] (1), (5).

(2) To sustain verdict or judgment for plaintiff.

La.—Dunkelman v. Shockley, App., 183 So. 52.

Pa.—Hartssock v. Winslow, 11 Pa. Dist. & Co. 243.

23. Cal.—Morris v. Morris, 258 P. 616, 84 Cal.App. 599.

Conn.—Vanderkrul v. Mitchell, 173 A. 900, 118 Conn. 625.

La.—Dunaway v. Maroun, App., 178 So. 710—Bennett v. Pugh, App., 177 So. 112.

Me.—Chaisson v. Williams, 156 A. 154, 130 Me. 341.

Greater weight of credible evidence to reasonable satisfaction of jury

Mo.—Boyce v. Donnellan, 168 S.W. 2d 120, 237 Mo.App. 63.

Testimony held not inherently incredible or improbable

Mont.—Batchoff v. Craney, 172 P.2d 308.

Testimony held not conclusive on question of negligence

Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201.

Failure to introduce testimony of sole survivor of collision

Where evidence in automobile col-

lision case did not show construction of truck struck by overtaking automobile, load or speed of truck, whether it was traveling or parked, whether there were other traffic hazards, or what truck driver did, testimony of truck driver, who was sole survivor of collision, should have been introduced or a showing made as to why it was not available.—Babington v. Burris, La.App., 7 So. 2d 650

Probative value of testimony of interested witnesses

In action to recover for injuries sustained by plaintiff when she fell from side door of ambulance, interest in favorable outcome for plaintiff in litigation precluded testimony of plaintiff, her son, and her son-in-law from having any greater probative value than unsupported testimony of ambulance driver—Morales v. Employers' Liability Assur. Corporation, 12 So.2d 804, 202 La. 755.

Testimony of little weight

Testimony of plaintiff's witness that the sun glare on the windshield while about one hundred feet from the accident affected his vision was entitled to little weight, where it did not appear that it interfered with the driver's management.—Ferrell v. Soliski, 123 A. 493, 278 Pa. 665.

Evidence held sufficient

(1) In general.

Cal.—Mahood v. Mutual Motors, 299 P. 117, 113 Cal.App. 719—Sheean v. Foster, 251 P. 235, 80 Cal.App. 56.

Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201—Tracy v. Welch,

145 A. 662, 109 Conn. 144—Argazzi v. Reynolds, 137 A. 857, 106 Conn.

281—White v. Ciriaco, 136 A. 70, 105 Conn. 553.

Kan.—Isle v. Kaw Transport Co., 152 P.2d 827, 159 Kan. 110.

La.—Deichmann v. Gerard, App., 145 So. 30—Driefus v. Levy, App., 140

So. 259.

- Mass.—Haines v. Chereskie, 16 N.E. 2d 680, 301 Mass. 112—Donovan v. Johnson, 16 N.E.2d 62, 301 Mass. 12—Moat v. Magrath, 199 N.E. 307, 293 Mass. 19.
- Nev.—Thorne v. Lampros, 288 P. 601, 52 Nev. 417.
- N.H.—Lagasse v. Laporte, 58 A.2d 812—Himmel v. Finkelstein, 4 A.2d 657, 90 N.H. 78.
- S.C.—Nettles v. Your Ice Co., 4 S.E. 2d 797, 191 S.C. 429.
- Tex.—Morris v. Sanders, Civ.App., 55 S.W.2d 594.
- Wis.—Struck v. Vetter, 290 N.W. 181, 233 Wis. 540.
- (2) To establish negligence.
- U.S.—Boyle v. Ward, D.C.Pa., 39 F. Supp. 545, affirmed, C.C.A., 125 F.2d 672.
- Cal.—Prager v. Isreal, 98 P.2d 729, 15 Cal.2d 89—Cate v. Fresno Traction Co., 2 P.2d, 364, 213 Cal. 190—Lamar v. John & Wade, 161 P.2d 970, 70 Cal.App.2d 806—Hernandez v. Murphy, 115 P.2d 565, 46 Cal.App. 2d 201—Parrett v. Carothers, 53 P. 2d 1023, 11 Cal.App.2d 222—Day v. Pickwick Stages System, 25 P.2d 16, 134 Cal.App. 92—Friedman v. Barbe, 23 P.2d 529, 132 Cal.App. 672—Deweese v. Kuntz, 20 P.2d 733, 130 Cal.App. 620—Sullivan v. Richardson, 6 P.2d 567, 119 Cal.App. 367—Miller v. Geary, 298 P. 843, 118 Cal.App. 573—Traylen v. Citraro, 297 P. 649, 112 Cal.App. 172, followed in 297 P. 652, 112 Cal.App. 763—Mesnickow v. Fawcett, 278 P. 500, 99 Cal.App. 357.
- Colo.—Dobbs v. Sugloka, 185 P.2d 784, 117 Colo. 218—Dwinnelle v. Union Pac. R. Co., 92 P.2d 741, 104 Colo. 545.
- Conn.—Argazzi v. Reynolds, 137 A. 857, 106 Conn. 281.
- Ill.—O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 571.
- Ind.—Hoesel v. Cain, 53 N.E.2d 165, 222 Ind. 330, rehearing denied 53 N.E.2d 769, 222 Ind. 330.
- Kan.—Elliott v. Behner, 73 P.2d 1116, 146 Kan. 827.
- Ky.—Hollis v. Bourne, 167 S.W.2d 50, 292 Ky. 578.
- La.—Scarborough v. St. Paul Mercury Indemnity Co., App., 11 So.2d 52—Harrelson v. McCook, App., 198 So. 532—Moore v. Davis, App., 196 So. 566, reinstated 199 So. 205—Barr v. Fidelity & Casualty Co. of New York, App., 188 So. 521—Hadrick v. Burbank Cooperage Co., App., 177 So. 831—Johnson v. National Casualty Co., App., 176 So. 235—Duncan v. Pedare, App., 161 So. 221—Rhodes v. Jordan, App., 157 So. 811—Ponder v. Ponder, App., 157 So. 627—Theriot v. Tassin, App., 146 So. 729—Christos v. Manos, 134 So. 713, 16 La.App. 512, followed in Montz v. Manos, 134 So. 715, 16 La.App. 511—Denham v. Taylor, 131 So. 614, 15 La.App. 545, rehearing denied 132 So. 372, 19 La.App. 814.
- Me.—Levesque v. Pelletier, 161 A. 198, 131 Me. 266—Trumpfeller v. Crandall, 155 A. 646, 130 Me. 279—Avery v. Thompson, 103 A. 4, 117 Me. 120, L.R.A.1918D 205, Ann.Cas. 1916E 1122.
- Md.—Dashiell v. Moore, 11 A.2d 640, 177 Md. 657.
- Mass.—Orlando v. City of Brockton, 3 N.E.2d 794, 295 Mass. 205.
- Minn.—Hinman v. Gould, 286 N.W. 364, 205 Minn. 377—Cullen v. Pearson, 253 N.W. 117, 191 Minn. 136, reargument denied 254 N.W. 631, 191 Minn. 136—Fryklind v. Jackson, 252 N.W. 232, 190 Minn. 356—Wildes v. Wildes, 247 N.W. 508, 188 Minn. 441—Gelsen v. Luce, 242 N.W. 8, 185 Minn. 479—Berlin v. Koblas, 236 N.W. 307, 183 Minn. 278—Lund v. Olson, 234 N.W. 310, 182 Minn. 204, 75 A.L.R. 371—Plitzen v. Plitzen, 232 N.W. 344, 181 Minn. 338—Cohen v. Silverman, 190 N.W. 795, 153 Minn. 391.
- Mo.—Tabler v. Perry, 85 S.W.2d 471, 337 Mo. 154.
- Neb.—Zarkovsky v. Muller, 231 N.W. 809, 120 Neb. 255.
- Nev.—Nicora v. Cerveri, 244 P. 897, 49 Nev. 261.
- N.H.—Lagasse v. Laporte, 58 A.2d 312—Rix v. Rix, 161 A. 38, 85 N.H. 529.
- N.J.—Wright v. Beith, 157 A. 840, 9 N.J. Misc. 1183—McKeown v. Muss, 157 A. 121, 9 N.J. Misc. 1223—Pugley v. Toler, 155 A. 133, 9 N.J. Misc. 567—Murray v. Cohen, 132 A. 221, 4 N.J. Misc. 139.
- N.Y.—Waite v. Mosconi, 78 N.Y.S.2d 615, 273 App.Div. 1040—Belrose v. Whipple, 34 N.Y.S.2d 945, 264 App. Div. 809—Lozier v. Preston, 12 N.Y.S.2d 388, 257 App.Div. 900—Delmonte v. La Fountain, 298 N.Y.S. 902, 252 App.Div. 806—Holland v. Peterkin, 216 N.Y.S. 464, 217 App. Div. 57.
- Ohio—Rector v. Iyer, App., 41 N.E. 2d 886.
- Okl.—Kelly v. Cann, 136 P.2d 896, 192 Okl. 446.
- Pa.—Kirr v. Suwak, 9 A.2d 735, 336 Pa. 561—Reilly v. City of Philadelphia, 195 A. 897, 328 Pa. 563—Cormican v. Menke, 159 A. 36, 306 Pa. 156—Klein v. Weissberg, 174 A. 636, 114 Pa.Super. 569—Earll v. Wisner, 45 Pa.Dist. & Co. 93, reversed on other grounds 30 A.2d 803, 346 Pa. 357.
- Tenn.—Harrison v. Graham, 107 S.W.2d 517, 21 Tenn.App. 189—Chumley v. Anderton, 103 S.W.2d 331, 20 Tenn.App. 621.
- Tex.—Cannan v. Dupree, Civ.App., 294 S.W. 298.
- Va.—Universal Tractor & Equipment Co. v. Bolling, 170 S.E. 585, 161 Va. 408—Balse v. Warren, 164 S.E. 655, 158 Va. 505.
- Wash.—Engel v. Interstate Transit Co., 115 P.2d 681, 9 Wash.2d 590.
- Wis.—Uren v. Purity Dairy Co., 32 N.W.2d 615, 252 Wis. 446, rehearing denied 33 N.W.2d 213, 252 Wis. 446—Brown v. Travelers Indemnity Co., 28 N.W.2d 306, 251 Wis. 188—Hatch v. Small, 23 N.W.2d 460, 249 Wis. 183—Barrus v. Duxstad, 20 N.W.2d 548, 247 Wis. 647—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400—Elkey v. Elkey, 290 N.W. 627, 234 Wis. 149, motion denied 292 N.W. 800, 234 Wis. 149—Stenson v. Schumacher, 290 N.W. 285, 234 Wis. 19—Hoffman v. Labutzke, 289 N.W. 652, 233 Wis. 365—Schwartz v. Schwartz, 267 N.W. 276, 222 Wis. 401—Mauermann v. Dixon, 258 N.W. 352, 217 Wis. 29—Teas v. Eisenlord, 253 N.W. 795, 215 Wis. 455—Krantz v. Krantz, 248 N.W. 155, 211 Wis. 249—Williams v. Williams, 246 N.W. 322, 210 Wis. 304—Sweet v. Underwriters' Casualty Co., 240 N.W. 199, 206 Wis. 447.
- 42 C.J. p 1233 note 27 [a] (6), (14).
- (3) To establish that defendant was not negligent.
- Cal.—Norland v. Gould, 254 P. 560, 200 Cal. 706.
- Conn.—Shinville v. Hanscom, 166 A. 398, 116 Conn. 672—Ghent v. Stevens, 159 A. 94, 114 Conn. 415.
- Fla.—Babcock v. Flowers, 198 So. 326, 144 Fla. 479.
- La.—Morales v. Employers' Liability Assur. Corporation, App., 7 So.2d 660, affirmed 12 So. 804, 203 La. 755—Keowen v. Amite Sand & Gravel Co., App., 4 So.2d 79—Duncan v. Pedarre, App., 164 So. 498—Monroe v. D'Aunoy, App., 143 So. 716—Marquez v. Le Blanc, App., 143 So. 108—Levy v. Leopold, App., 142 So. 191—Thompson v. Hauptman, 137 So. 362, 18 La App 119.
- Md.—Finney v. Frevel, 37 A.2d 923, 183 Md 355.
- Minn.—Ritter v. Porter, 13 N.W.2d 372, 216 Minn. 479—White v. Cochran, 249 N.W. 328, 189 Minn 300—Mahan v. McCool, 239 N.W. 914, 185 Minn. 94.
- Mo.—Vanausdall v. Schorr, App., 168 S.W.2d 110.
- N.J.—Sharkey v. Kapusa, 135 A. 872, 5 N.J. Misc. 203.
- N.Y.—Kraus v. Do All Eastern Co., 70 N.Y.S.2d 165, 272 App.Div. 820.
- N.C.—Luttrell v. Hardin, 136 S.E. 726, 193 N.C. 266.
- Ohio.—Casper v. Higgins, 6 N.E.2d 3, 54 Ohio App 21.
- Va.—Tarrall v. Tarrall, 171 S.E. 500, 161 Va. 663—Osborn v. Berglund, 165 S.E. 410, 159 Va. 258.
- Wash.—Broxson v. Robinson, 254 P. 252, 143 Wash. 1.
- (4) To support verdict or judgment for defendant.
- Ark.—Gurdin v. Fisher, 18 S.W.2d 345, 179 Ark. 742.
- Cal.—Federal Mut. Liability Ins. Co.

v. Dally, 45 P.2d 209, 7 Cal.App.2d 118—Crooks v. White, 290 P. 497, 107 Cal.App. 304.

Fla.—Juhasz v. Barton, 1 So.2d 476, 146 Fla. 484.

Ga.—Whitfield v. Wheeler, 47 S.E.2d 658, 76 Ga.App. 857—Edwards v. Ford, 26 S.E.2d 306, 69 Ga.App. 578. Idaho.—Dillon v. Brooks, 6 P.2d 851, 51 Idaho 510.

Iowa.—Martin v. Momyer, 300 N.W. 310, 230 Iowa 1158.

Ky.—Schreiber v. Roser, 80 S.W.2d 1, 258 Ky. 340.

La.—Smith v. Roueche, App., 153 So. 487, followed in 153 So. 490 (two cases).

Minn.—Fenske v. Unterman, 232 N.W. 326, 181 Minn. 275.

N.J.—Kraus v. Fisher, 156 A. 315, 9 N.J.Misc. 1053—Woodruff v. Lawler, 140 A. 430, 6 N.J.Misc. 219.

N.Y.—Burke v. Speciale, 25 N.Y.S.2d 299, 261 App.Div. 912.

Pa.—Peterson v. McCauslan, 170 A. 276, 314 Pa. 176.

Wis.—Schemm v. Bruch, 29 N.W.2d 66, 251 Wis. 229.

(5) To sustain verdict or judgment for plaintiff

U.S.—Rumberger v. Welsh, C.C.A.N.Y., 131 F.2d 384, certiorari denied 63 S.Ct. 1316, 319 U.S. 759, 87 L.Ed. 1711, rehearing denied 64 S.Ct. 28, 320 U.S. 810, 88 L.Ed. 489.

Ala.—Bruner v. Rubanks, 33 So.2d 374, 33 Ala.App. 266, certiorari denied 33 So.2d 376, 250 Ala. 100.

Cal.—Agnew v. Wenstrand, 90 P.2d 813, 33 Cal.App.2d 21—Sullivan v. Richardson, 6 P.2d 567, 119 Cal.App. 367.

Conn.—O'Brien v. Seaboard Freight Lines, 16 A.2d 826, 127 Conn. 374. Fla.—Ryder v. Plumley, 189 So. 422, 138 Fla. 378—City of Hollywood v. Blair, 186 So. 818, 136 Fla. 100.

Ga.—Eldson v. Felder, 25 S.E.2d 41, 69 Ga.App. 225—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, opinion conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288.

Ill.—Hanlon v. Lindberg, 48 N.E.2d 735, 319 Ill.App. 1—Seiffe v. Sciffe, 267 Ill.App. 23—Warput v. Reading Coal Co., 250 Ill.App. 450.

La.—Farnet v. DeCuers, App., 195 So. 797, rehearing denied 196 So. 538—Reil v. McNaspy, App., 177 So. 393—Gayden v. Diaz, App., 158 So. 246—Holderith v. Zilbermann, App., 151 So. 670—Duvic v. Friedrichs & Dupas, 120 So. 494, 9 La.App. 394.

Me.—Banks v. Adams, 195 A. 206, 135 Me. 270—Parrott v. Homer, 190 A. 624, 135 Me. 507.

Mass.—Schusterman v. Rosen, 183 N.E. 414, 280 Mass. 582.

Mich.—Anderson v. Conterio, 5 N.W.2d 572, 303 Mich. 75—Herbert v.

Durgis, 287 N.W. 809, 276 Mich. 158.

Minn.—Delyea v. Goossen, 32 N.W.2d 179, 226 Minn. 91—Barndt v. Searle, 277 N.W. 363, 202 Minn. 82—Martin v. Schiska, 236 N.W. 312, 183 Minn. 256.

Mo.—Palmer v. Brooks, 169 S.W.2d 906, 350 Mo. 1055.

N.J.—Hommell v. Errington, 157 A. 673, 10 N.J.Misc. 93—Skelding v. Poppenga, 149 A. 119, 8 N.J.Misc. 145—Hennig v. Booth, 132 A. 294, 4 N.J.Misc. 150—Buchman v. Reynolds, 127 A. 330, 3 N.J.Misc. 130.

N.Y.—Foster v. Fish, 33 N.Y.S.2d 761, 263 App.Div. 1044—Hawley v. Corroon, 25 N.Y.S.2d 175, 261 App.Div. 904, affirmed 35 N.E.2d 929, 286 N.Y. 581—Agnello v. Weissglass Gold Seal Dairies Corp., 23 N.Y.S.2d 122, 260 App.Div. 925, 1039—Dibble v. Whipple, 4 N.Y.S.2d 243, 254 App.Div. 805, reargument denied in re Allen's Estate, 7 N.Y.S.2d 97, 255 App.Div. 737, reversed on other grounds Dibble v. Whipple, 22 N.E.2d 358, 281 N.Y. 247—Tyler v. Conway, 1 N.Y.S.2d 563, 253 App.Div. 865—Moses v. Bliss, 299 N.Y.S. 836, 252 App.Div. 909—Moon v. Hoy, 299 N.Y.S. 342, 252 App.Div. 830, affirmed 14 N.E.2d 389, 277 N.Y. 684—Fitzgerald v. Middlebrook, 291 N.Y.S. 193, 249 App.Div. 701—Galotti v. Deansboro Supply Co., 289 N.Y.S. 535, 248 App.Div. 20—Tweedie v. Ballard, 287 N.Y.S. 923, 248 App.Div. 644—Porter v. Wagner, 284 N.Y.S. 889, 246 App.Div. 797—Wittenberg v. Wittenberg, 278 N.Y.S. 207, 243 App.Div. 820—Kinary v. Taylor, 276 N.Y.S. 688, 243 App.Div. 651—Tykwinski v. Buff & Buff, 258 N.Y.S. 823, 144 Misc. 438, affirmed 261 N.Y.S. 970, 237 App.Div. 865.

Ohio.—Sprenger v. Braker, 49 N.E.2d 958, 71 Ohio App. 349—Zwick v. Zwick, 163 N.E. 917, 29 Ohio App. 522, petition dismissed 166 N.E.2d 202, 119 Ohio St. 644.

Okl.—Barall Food Stores v. Bennett, 153 P.2d 106, 194 Okl. 508.

Pa.—Arhile v. Murray, 58 A.2d 143, 359 Pa. 12—Fitzgerald v. Penn Transit Co., 44 A.2d 288, 353 Pa. 43—Brewer v. Brodhead, 19 A.2d 117, 341 Pa. 384—Reilly v. City of Philadelphia, 195 A. 897, 328 Pa. 563—O'Hagan v. Byron, 33 A.2d 779, 153 Pa.Super. 372—Morgan v. Peters, 24 A.2d 644, 148 Pa.Super. 88—Davallo v. Sworcheck, Com.Pl., 18 Wash. Co. 56.

R.I.—Woodward v. Wilbur, 169 A. 486, 54 R.I. 60.

S.D.—Russell v. Crow, 245 N.W. 249, 60 S.D. 230.

Wash.—Engel v. Interstate Transit Co., 115 P.2d 681, 9 Wash.2d 590—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 369.

W.Va.—Stone v. Rudolph, 32 S.E.2d 742, 127 W.Va. 335—Darling v.

Browning, 200 S.E. 737, 120 W.Va. 666—Thomas v. Jones, 141 S.E. 424, 105 W.Va. 46.

Wis.—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Baker v. Pusey, 223 N.W. 414, 198 Wis. 82, mandate amended 224 N.W. 488, 198 Wis. 82.

Evidence held insufficient

(1) In general.

Conn.—Tracy v. Welch, 145 A. 662, 109 Conn. 144—Kalamian v. Kalamian, 139 A. 635, 107 Conn. 86.

La.—Monroe v. D'Aunoy, App., 143 So. 716—Lawson v. Nossek, 130 So. 669, 15 La.App. 207.

Mont.—Cowden v. Crippen, 53 P.2d 98, 101 Mont. 187.

N.J.—Mende v. Purity Bakeries Corporation, 180 A. 856, 115 N.J.Law 471.

W.Va.—Clise v. Prunty, 152 S.E. 201, 108 W.Va. 635.

Wis.—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Tracy v. Malmstadt, 296 N.W. 87, 236 Wis. 642—Mauermann v. Dixon, 258 N.W. 352, 217 Wis. 29.

(2) To establish negligence.

Ala.—Crider v. Yolande Coal & Coke Co., 89 So. 285, 206 Ala. 71.

Cal.—Lombara v. Union Paving Co., 88 P.2d 871, 3 Cal.App.2d 268.

Colo.—Clune v. Mercereau, 1 P.2d 101, 89 Colo. 227.

Conn.—Grillo v. Bonaiuto, 193 A. 730, 123 Conn. 226.

Kan.—Cornwell v. O'Connor, 5 P.2d 861, 134 Kan. 269.

La.—Morales v. Employers' Liability Assur. Corporation, 12 So.2d 804, 202 La. 755—Brown v. Waller, App. 8 So.2d 301—Bennett v. Pugh, App. 177 So. 112—Acanis v. Morgan, App. 173 So. 540, rehearing denied 174 So. 157—Liberty Mut. Ins. Co. v. Benton, App. 153 So. 479—Barabin v. Teche Transfer Co., 1 La.App. 197.

Mass.—Broderick v. Lyons, 165 N.E. 11, 266 Mass. 184.

Nev.—Austin v. Dilday, 34 P.2d 1073, 55 Nev. 357, rehearing denied 36 P.2d 359, 55 Nev. 357.

N.J.—Nicolosi v. Knight, 52 A.2d 850, 135 N.J.Law 515—Hammond v. Wacker, 154 A. 735, 107 N.J.Law 438.

N.Y.—Naffky v. Yosovitz, 196 N.E. 764, 268 N.Y. 118—Higgins v. Mason, 243 N.Y.S. 630, 230 App.Div. 149, affirmed 174 N.E. 77, 255 N.Y. 104.

Pa.—Riley v. Wooden, 165 A. 738, 310 Pa. 449—Simpson v. Jones, 131 A. 541, 284 Pa. 596—Ferrell v. Solaski, 123 A. 493, 278 Pa. 565.

Va.—Millard v. Cohen, 46 S.E.2d 2, 187 Va. 44.

Wash.—Heiman v. Kloizner, 247 P. 1034, 139 Wash. 655.

Wis.—Schneider v. American Indemnity Co., 6 N.W.2d 644, 241 Wis. 568—Baird v. Edmonds, 276 N.W.

to the exercise of the care owing to his guest,²⁴ affirmative proof is required,²⁵ and plaintiff may not rely on speculation or unjustifiable inferences to make out his case,²⁶ although slight evidence may be sufficient to fasten responsibility on defendant.²⁷

General rules have been applied in determining the weight and sufficiency of the evidence to establish a prima facie case,²⁸ or to overcome a prima facie case²⁹ or a presumption or inference of negligence.³⁰

In order to recover against defendant for injuries received while riding on a motor vehicle with defendant's servant contrary to defendant's instructions, plaintiff must establish by clear and convincing evidence that defendant knew of the violation

of its rules and acquiesced therein to the extent of allowing the practice to continue without objection or serious protest.³¹

(2) Gross Negligence or Willful, Wanton, and Reckless Acts in General

Where the measure of proof is fixed by statutes requiring proof of gross negligence, willful or wanton misconduct, recklessness, or the like, recovery should not be allowed unless the evidence brings the case clearly within the terms and intent of the statute.

The measure of proof necessary for recovery under motor vehicle guest statutes may be fixed by the statutes,³² and recovery should not be allowed unless the evidence brings the case clearly within the terms and intent thereof,³³ as where under the

306, 226 Wis. 209—Grover v. Sherman, 252 N.W. 680, 214 Wis. 152, 42 C.J. p 1233 note 27 [b] (7).

(3) To support finding of defendant's freedom from negligence.—Smith v. Stanton, 279 N.Y.S. 386, 244 App.Div. 804—Howard v. Reid, 233 N.Y.S. 381, 225 App.Div. 399.

(4) To support verdict or judgment for defendant.

N.J.—Grossberg v. Shapiro, 147 A. 729, 7 N.J.Misc. 1062—Hoffman v. Smith, 143 A. 923, 6 N.J.Misc. 1090—Keller v. McNulty, 130 A. 535, 3 N.J.Misc. 1075.

N.Y.—Tesiero v. Kiskla, 32 N.Y.S. 2d 38, 283 App.Div. 171, affirmed 42 N.E.2d 729, 288 N.Y. 639—Thibodeau v. Geross Haulage & Warehouse Corporation, 300 N.Y.S. 686, 252 App.Div. 615, affirmed 16 N.E.2d 98, 278 N.Y. 551—Levine v. Kopelowitz, 292 N.Y.S. 764, 249 App.Div. 860—Zamenick v. Eisman & Co., 290 N.Y.S. 766, 248 App.Div. 920

(5) To warrant recovery.

Fla.—Carver v. Chase, 174 So. 408, 128 Fla. 287.

Ill.—Baumeister v. Bowers, 271 Ill. App. 332.

Kan.—Srajer v. Schwartzman, 188 P. 2d 971, 164 Kan. 241

La.—Coffey v. Ouachita River Lumber Co., App., 191 So. 561—Saks v. Elchel, App., 173 So. 558—Ferry v. Holmes & Barnes, 124 So. 848, 12 La.App. 3.

Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

Mich.—Oxenger v. Ward, 240 N.W. 65, 256 Mich. 499.

Neb.—Oakes v. Gregory, 275 N.W. 607, 133 Neb. 407—Heesacker v. Bosted, 267 N.W. 177, 131 Neb. 42.

N.Y.—Ullmann v. Sangster, 59 N.Y.S. 2d 192, 269 App.Div. 1064, affirmed Fortuna v. Sangster, 73 N.E.2d 40, 296 N.Y. 923—Fortuna v. Sangster, 59 N.Y.S.2d 190, 269 App.Div. 1060, affirmed 73 N.E.2d 40, 296

N.Y. 923—Shulman v. Wolkenberg, 262 N.Y.S. 287, 237 App.Div. 614

Wash.—Shea v. Olson, 53 P.2d 615, 185 Wash. 143, 111 A.L.R. 998, opinion adhered to 59 P.2d 1183, 186 Wash. 700, 111 A.L.R. 998—Dawson v. Foster, 14 P.2d 458, 169 Wash. 516—Heiman v. Klotzner, 247 P. 1034, 139 Wash. 655.

Wis.—Storlie v. Hartford Accident & Indemnity Co., 28 N.W.2d 920, 251 Wis. 340.

24. Me.—Chaisson v. Williams, 156 A. 154, 130 Me. 341.

25. N.C.—Clodfelter v. Wells, 195 S. E. 11, 212 N.C. 823

Tex.—Aycock v. Green, Civ. App., 94 S.W.2d 894, error dismissed

26. Ky.—Newton v. Wetherby's Adm'x, 153 S.W.2d 947, 287 Ky. 400

N.Y.—Lahr v. Tirrill, 8 N.E.2d 298, 274 N.Y. 112, reargument denied 10 N.E.2d 575, 274 N.Y. 611.

Evidence held sufficient

(1) To justify inference of negligence of driver.

Cal.—Tracy v. Gulbhini, 66 P.2d 675, 20 Cal.App.2d 216—Morris v. Morris, 258 P. 616, 84 Cal.App. 599.

Ky.—Robinson v. Higgins, 174 S.W. 2d 687, 295 Ky. 448.

(2) To support inference that automobile rolled down incline injuring companion, because motorist failed either totally or partially to apply brakes.—Prager v. Isreal, 98 P. 2d 729, 15 Cal.2d 89.

(3) To support inference of defendant's liability.—Sheehan v. Goriatsky, 56 N.E.2d 883, 317 Mass. 10.

27. Pa.—Ebey v. Schwartz, 158 A. 291, 104 Pa.Super. 181.

28. Under the common law a gratuitous automobile passenger may recover on proof of his own due care and of ordinary negligence on defendant's part.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

Evidence held sufficient

La.—Lawson v. Nossck, 130 So. 669, 15 La.App. 207.

N.Y.—Gadd v. Universal Road Machinery Co., 33 N.Y.S.2d 527, 263 App.Div. 456.

Tex.—Roper v. Lunsford, Civ. App., 211 S.W.2d 638.

Evidence held insufficient

N.Y.—Galbraith v. Busch, 196 N.E. 36, 267 N.Y. 230

29. Evidence held sufficient

La.—Aden v. Allen, App., 3 So.2d 905

Evidence held insufficient

Cal.—Ireland v. Marsden, 291 P. 912, 108 Cal.App. 632

La.—Gomer v. Anding, App., 146 So. 704, rehearing denied 147 So. 545.

30. Evidence held insufficient

Cal.—Godfrey v. Brown, 29 P.2d 165, 220 Cal. 57, 93 A.L.R. 1092

La.—Monkhouse v. Johns, App., 142 So. 347.

N.Y.—Russo v. State, 2 N.Y.S.2d 350, 166 Misc. 316.

31. La.—Kimbell v. K. C. S. Drug Co., App., 166 So. 895.

Evidence held sufficient

U.S.—R. J. Reynolds Tobacco Co. v. Newby, C.C.A. Idaho, 145 F.2d 768.

La.—Elbert v. Creswell Street Pharmacy, App., 161 So. 42.

Evidence held insufficient

La.—Kimbell v. K. C. S. Drug Co., App., 166 So. 895.

32. Idaho.—Hughes v. Hudelson, 169 P.2d 712, 67 Idaho 10.

Weight and sufficiency of evidence as to status of injured person see supra § 517 c.

33. Conn.—Schepp v. Trotter, 160 A. 869, 115 Conn. 183.

Evidence held sufficient

Ark.—Tilghman v. Rightor, 199 S.W. 2d 943, 211 Ark. 229.

Evidence held insufficient

(1) In general.—Lassiter v. Shell Oil Co., 62 P.2d 1096, 188 Wash. 371.

circumstances of the particular case the statute requires proof of gross negligence,³⁴ or where the

(2) To support recovery by guest. Conn.—Palmer v. R. & H. Pant Co., 167 A. 94, 117 Conn. 124. Fla.—Orme v. Burr, 25 So.2d 870, 157 Fla. 378.

Ill.—Madison v. Essington, 29 N.E. 2d 288, 306 Ill.App. 607—Celner v. Prather, 22 N.E.2d 397, 301 Ill. App. 224.

Iowa.—Brown v. Martin, 248 N.W. 368, 216 Iowa 1272.

(3) To show that motorist operated automobile with such utter disregard of prudence as to amount to complete neglect of safety of guest. —Hill v. Bradley, 43 S.E.2d 29, 186 Va. 394—Keen v. Harman, 33 S.E.2d 197, 183 Va. 670.

34. Mass.—Picarello v. Rodakis, 11 N.E.2d 470, 299 Mass. 33—Stetson v. Howard, 187 N.E. 609, 284 Mass. 208—Crowley v. Fisher, 187 N.E. 608, 284 Mass. 205.

Weight and sufficiency of evidence of willful, wanton, or reckless acts generally see *supra* subdivision a (2) of this section.

Determined by circumstances of case Neb.—In re O'Byrne's Estate, 277 N.W. 74, 133 Neb. 750—Belik v. Warsocki, 253 N.W. 489, 126 Neb. 560.

Headless disregard of passenger's rights or safety

Under a statute denying recovery to a guest unless the injury results from gross negligence, in order to entitle plaintiff to recover there must be satisfactory evidence showing that the injury was caused by the driver's headless disregard of the rights or safety of the passenger.—McCoy v. Moore, 140 F.2d 699, 78 U.S.App.D.C. 346.

Evidence held sufficient

(1) To sustain finding of gross negligence.

U.S.—Powers v. Wilson, C.C.A.Vt., 110 F.2d 960—Pepper v. Morrill, C. C.A.Mass., 24 F.2d 320, 57 A.L.R. 750.

Cal.—Stotts v. Bickle, 30 P.2d 392, 220 Cal. 225—Bettencourt v. Oliveria, 39 P.2d 243, 3 Cal.App.2d 325 —Fenstermacher v. Johnson, 32 P. 2d 1106, 138 Cal.App. 691—Johnson v. Johnson, 31 P.2d 237, 137 Cal. App. 701—Walters v. Du Four, 22 P.2d 259, 132 Cal.App. 72, hearing denied 23 P.2d 1020, 132 Cal.App. 72—Sumner v. Edmunds, 21 P.2d 159, 130 Cal.App. 770—Hagen v. Metzger, 20 P.2d 117, 130 Cal.App. 497—Nelson v. Westergaard, 19 P. 2d 867, 130 Cal.App. 79—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298—Dahl v. Spotts, 16 P.2d 774, 128 Cal.App. 133—O'Neill v. Haynes, 9 P.2d 853, 122 Cal.App. 329.

Fla.—Ake v. Birnbaum, 25 So.2d 213,

156 Fla. 735, followed in 25 So.2d 225, 156 Fla. 760—Shams v. Saporitas, 10 So.2d 715, 152 Fla. 48—Nelson v. McMillan, 10 So.2d 565, 151 Fla. 847—Cormier v. Williams, 4 So.2d 525, 148 Fla. 201.

Ga.—Atlantic Ice & Coal Corporation v. Newlin, 192 S.E. 915, 56 Ga. App. 428—Britt v. Davis, 187 S.E. 125, 53 Ga.App. 783—Petway v. McLeod, 171 S.E. 225, 47 Ga.App. 647.

La.—Morgan v. Lanz, App., 195 So. 128, followed in Schindler v. Lanz, 195 So. 133 and Yeatman v. Lanz, 195 So. 133.

Mass.—Belletete v. Morin, 76 N.E.2d 660, 322 Mass. 214—Connell v. Harrington, 45 N.E.2d 278, 312 Mass. 436—O'Neill v. McDonald, 16 N.E.2d 866, 301 Mass. 256—Szemkus v. Petrella, 13 N.E.2d 108, 299 Mass. 551—Dombrowski v. Gedman, 12 N.E.2d 80, 299 Mass. 87—Smith v. Axelman, 6 N.E.2d 809, 296 Mass. 512—Cycz v. Dugal, 3 N.E.2d 1011, 295 Mass. 417—Le-feave v. Ascher, 198 N.E. 251, 292 Mass. 336—Channon v. Lynch, 198 N.E. 145, 292 Mass. 316—Copeland v. Russell, 195 N.E. 541, 290 Mass. 542—Stowe v. Mason, 194 N.E. 671, 289 Mass. 577—Cushing v. Stieler, 194 N.E. 96, 289 Mass. 346—Horne-man v. Brown, 190 N.E. 735, 286 Mass. 65—Crowley v. Fisher, 187 N.E. 608, 284 Mass. 205—Dow v. Lipsitz, 185 N.E. 921, 283 Mass. 132—Smiddy v. O'Neill, 177 N.E. 809, 277 Mass. 36—Meaney v. Doyle, 177 N.E. 6, 276 Mass. 218—Green v. Hoffarth, 178 N.E. 828, 277 Mass. 508—Parker v. Moody, 174 N.E. 189, 274 Mass. 100—McCarron v. Bolduc, 169 N.E. 559, 270 Mass. 39—Rog v. Eltis, 169 N.E. 413, 269 Mass. 466.

N.H.—Desrosiers v. Cloutier, 25 A. 2d 123, 92 N.H. 100—Richards v. Richards, 166 A. 823, 86 N.H. 273. Vt.—Peck v. Gluck, 29 A.2d 814, 113 Vt. 53—Barrows v. Powell, 29 A.2d 708, 113 Vt. 109, followed in 29 A.2d 712, 113 Vt. 117—Ellison v. Colby, 8 A.2d 637, 110 Vt. 431—Dessereau v. Walker, 163 A. 632, 105 Vt. 99.

Va.—Waller v. Waller, 46 S.E.2d 42, 187 Va. 25—Wright v. Osborne, 9 S.E.2d 452, 175 Va. 442—Hackley v. Robey, 195 S.E. 689, 170 Va. 55—Yonker v. Williams, 192 S.E. 753, 169 Va. 294—Wright v. Swain, 191 S.E. 611, 168 Va. 315—Kent v. Miller, 189 S.E. 832, 167 Va. 422.

Wash.—Lewis v. Sussman, 23 P.2d 883, 178 Wash. 480—Trotter v. Bullock, 269 P. 825, 148 Wash. 516.

(2) To show that host was not guilty of gross negligence.—Shaw v. Moore, 162 A. 373, 104 Vt. 529, 86 A. L.R. 1139.

(3) To establish defendant's ordinary negligence, and not gross negligence, within guest statute.—Cobb v. Lawrence, 129 P.2d 462, 54 Cal. App.2d 630.

Evidence held insufficient

Cal.—Cooper v. Kellogg, 42 P.2d 59, 2 Cal.2d 504—Waterman v. Llederman, 60 P.2d 881, 16 Cal.App. 2d 483, hearing denied 62 P.2d 142, 16 Cal.App.2d 483—Taylor v. Cockrell, 3 P.2d 16, 116 Cal.App. 596. D.C.—Krueger v. Taylor, 132 F.2d 736, 77 U.S.App.D.C. 112.

Mass.—Reeves v. Margey, 76 N.E.2d 314, 321 Mass. 752—Thomas v. Fritz, 63 N.E.2d 357, 318 Mass. 622—Polcarl v. Cardello, 55 N.E.2d 681, 316 Mass. 421—Adams v. Doucet, 55 N.E.2d 4, 316 Mass. 1—Romer v. Kaplan, 54 N.E.2d 673, 315 Mass. 736—Driscoll v. Pagano, 48 N.E.2d 11, 313 Mass. 464—McGrath v. Parsons, 45 N.E.2d 384, 312 Mass. 476—De Simone v. Pedonti, 32 N.E.2d 612, 308 Mass. 373—Harvey v. Murphy, 30 N.E.2d 854, 308 Mass. 16—Loughran v. Nolan, 29 N.E.2d 737, 307 Mass. 195—Bruno v. Donahue, 24 N.E. 2d 761, 305 Mass. 30—Souza v. Mello, 24 N.E.2d 516, 304 Mass. 552—Beaton v. Dawson, 21 N.E.2d 965, 303 Mass. 429—Peace v. Gahourel, 19 N.E.2d 49, 302 Mass. 313—Castelli v. Padani, 18 N.E.2d 338, 301 Mass. 603—Pittsley v. David, 11 N.E.2d 461, 298 Mass. 552—Lynch v. Springfield Safe Deposit & Trust Co., 200 N.E. 914, 294 Mass. 170—Folan v. Price, 199 N. E. 320, 293 Mass. 76—Adamian v. Messerlian, 198 N.E. 166, 292 Mass. 275—Byrne v. Daley, 192 N.E. 201, 288 Mass. 51—Desroches v. Holland, 189 N.E. 619, 285 Mass. 495—Richards v. Donohue, 188 N.E. 389, 285 Mass. 19—Stetson v. Howard, 187 N.E. 609, 284 Mass. 208—McKenna v. Smith, 175 N.E. 474, 275 Mass. 149—Cook v. Cole, 174 N.E. 271, 273 Mass. 557—Mason v. Thomas, 174 N.E. 217, 274 Mass. 59.

Mich.—Olszewski v. Dibrizio, 275 N. W. 194, 281 Mich. 423.

Minn.—Dakins v. Black, 261 N.W. 870, 195 Minn. 91.

Neb.—Gummere v. Mudd, 297 N.W. 622, 139 Neb. 370—Holberg v. McDonald, 289 N.W. 542, 137 Neb. 405—Gosnell v. Montgomery, 277 N.W. 429, 133 Neb. 871—Thurston v. Carrigan, 256 N.W. 39, 127 Neb. 625.

Nev.—Hart v. Kline, 116 P.2d 672, 61 Nev. 96.

N.Y.—Kerfoot v. Kelley, 62 N.E.2d 74, 294 N.Y. 288, certiorari denied 66 S.Ct. 146, 326 U.S. 764, 90 L.Ed. 460—Smith v. Clute, 297 N.Y.S. 866, 251 App.Div. 625, reversed on

statute requires proof of willful misconduct,³⁵ wanton misconduct,³⁶ or willful and wanton misconduct.³⁷ Also recovery should not be allowed un-

less the evidence brings the case within a statute requiring wanton or willful negligence,³⁸ gross neg-

other grounds 14 N.E.2d 455, 277 N.Y. 407, reargument denied 16 N.E.2d 118, 278 N.Y. 598.
N.D.—Stockfeld v. Sayre, 283 N.W. 788, 69 N.D. 42—Schwager v. Anderson, 249 N.W. 305, 63 N.D. 579.
Or.—Lawry v. McKennie, 164 P.2d 444, 177 Or. 604—La Vigne v. La Vigne, 158 P.2d 557, 176 Or. 634—Ross v. Hayes, 157 P.2d 517, 176 Or. 225, 158 A.L.R. 452—Rauch v. Stecklein, 20 P.2d 387, 142 Or. 286.
Tenn.—Kaset v. Freedman, 120 S.W. 2d 977, 22 Tenn.App. 213.
Tex.—Magnolia Petroleum Co. v. Winkler, Civ.App., 40 S.W.2d 831.
Vt.—Hastings v. Murray, 20 A.2d 107, 112 Vt. 37—Kelley v. Anthony, 8 A.2d 641, 110 Vt. 490—L'Ecuyer v. Farnsworth, 170 A. 677, 106 Vt. 180.
Va.—Austin v. Austin, 43 S.E.2d 31, 186 Va. 382—Keen v. Harman, 33 S.E.2d 197, 183 Va. 670—Richter v. Seawell, 32 S.E.2d 62, 183 Va. 379—Grinstead v. Mayhew, 187 S.E. 615, 167 Va. 19—Jones v. Massie, 163 S.E. 63, 158 Va. 121.
Wash.—Pitschman v. Oman, 30 P.2d 945, 177 Wash. 55—Warren v. Bowditch, 6 P.2d 593, 166 Wash. 217—Dailey v. Phoenix Inv. Co., 285 P. 657, 155 Wash. 597.

35. Evidence held sufficient

(1) To show willful misconduct authorizing recovery.—Hastings v. Serieto, 143 P.2d 956, 61 Cal.App.2d 672—Rawlins v. Lory, 111 P.2d 973, 44 Cal.App.2d 20—Hagglund v. Nelson, 73 P.2d 265, 23 Cal.App.2d 348—Jones v. Hathway, 70 P.2d 681, 22 Cal.App.2d 316—Petersen v. Petersen, 67 P.2d 759, 20 Cal.App.2d 680—Candini v. Hatt, 50 P.2d 843, 9 Cal.App.2d 679—Sanford v. Grady, 36 P.2d 652, 1 Cal.App.2d 365, modified on other grounds and rehearing denied 37 P.2d 475, 1 Cal.App.2d 365—Gibson v. Easley, 32 P.2d 983, 138 Cal.App. 303—Norton v. Puter, 32 P.2d 172, 138 Cal.App. 253—Olson v. Gay, 27 P.2d 922, 135 Cal.App. 726.

(2) To support judgment denying recovery on ground that driver was not guilty of willful misconduct.—Medberry v. Olcovich, 69 P.2d 551, 15 Cal.App.2d 263, hearing denied, Sup., 60 P.2d 281, 15 Cal.App.2d 263.

(3) To sustain finding that driver was not guilty of willful misconduct within guest statute.—Woodson v. Everson, 142 P.2d 338, 61 Cal.App.2d 304—Huddleston v. Pound, 68 P.2d 376, 21 Cal.App.2d 128—Volat v. Tucker, 49 P.2d 337, 9 Cal.App.2d 295—Illingsworth v. Boyd, 36 P.2d 659, 1 Cal.App.2d 438.

Evidence held insufficient

To establish willful misconduct.

Cal.—Sparrar v. Kersgard, 85 P.2d 449—Meek v. Fowler, 45 P.2d 194, 3 Cal.2d 420—Stewart v. Kelly, 155 P.2d 850, 68 Cal.App.2d 122—Mia'e v. Wilkie, 154 P.2d 725, 67 Cal.App.2d 440—Katz v. Kuppman, 112 P.2d 681, 44 Cal.App.2d 406—Spencer v. Scott, 102 P.2d 551, 39 Cal.App.2d 109—Robertson v. Brown, 99 P.2d 288, 37 Cal.App.2d 189—Rhoads v. Studley, 59 P.2d 1082, 15 Cal.App.2d 726—Hall v. Mazzei, 57 P.2d 948, 14 Cal.App.2d 48—Bartlett v. Jackson, 56 P.2d 1298, 13 Cal.App.2d 435—Weir v. Lukes, 56 P.2d 987, 13 Cal.App.2d 312—Rode v. Roberts, 54 P.2d 498, 11 Cal.App.2d 638—Parrett v. Carothers, 53 P.2d 1023, 11 Cal.App.2d 222—Halter v. Malone, 53 P.2d 374, 11 Cal.App.2d 79—Newman v. Solt, 47 P.2d 289, 8 Cal.App.2d 50—Crawford v. Herzog, 40 P.2d 954, 3 Cal.App.2d 705—Lennon v. Woodbury, 40 P.2d 292, 3 Cal.App.2d 595—Turner v. Standard Oil Co. of California, 25 P.2d 988, 134 Cal.App. 622—Howard v. Howard, 22 P.2d 279, 132 Cal.App. 124.
Nev.—Hart v. Kline, 116 P.2d 672, 61 Nev. 96.

36. Evidence held sufficient

Del.—Law v. Gallegher, 107 A. 479, 9 W.W. Harr. 189.
Ohio.—Gill v. Arthur, 43 N.E.2d 894, 69 Ohio App. 386.

Evidence held insufficient

(1) To establish wanton misconduct.
Ohio.—Rector v. Hyer, App., 41 NE 2d 886.
Pa.—Mackey v. Robertson, 135 A. 870, 328 Pa. 504.
(2) To show wantonness.—Griffin Lumber Co. v. Harper, 25 So.2d 505, 247 Ala. 616.

(3) To show such conduct as amounted to wantonness or to gross and wanton negligence within guest statute.—Donelnn v. Wright, 81 P.2d 50, 148 Kan. 287.

37. Evidence held sufficient

(1) To show that defendant was guilty of willful and wanton misconduct.

Ill.—Winson v. Fischer, 77 N.E.2d 48, 333 Ill.App. 222—Barnum v. Schmauss, 52 N.E.2d 293, 321 Ill. App. 162—Ogilby v. Schmauss, 52 N.E.2d 293, 321 Ill.App. 161—O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 574—Schachtrup v. Hensel, 14 N.E.2d 897, 295 Ill.App. 303—Cohen v. Fineman, 13 N.E.2d 848, 294 Ill.App. 606—Bain v. Bain, 12 N.E.2d 686, 293 Ill.App. 638—Barmann v. McConachie, 6 N.E.2d 918, 289 Ill.App. 196—Reiff v. Mir-

ring, 3 N.E.2d 165, 284 Ill.App. 657—Foale v. Linsky, 279 Ill.App. 58—Reed v. Zellers, 273 Ill.App. 18—Seiffe v. Seiffe, 267 Ill.App. 23.

Ind.—Ridgway v. Yenny, 57 N.E.2d 581, 233 Ind. 16—Kahan v. Weck-sler, 12 N.E.2d 998, 104 Ind.App. 673.

Mich.—Thomas v. Parsons, 270 N.W. 296, 278 Mich. 276—Wyma v. Van Anrooy, 244 N.W. 478, 260 Mich. 295.

Minn.—Ressmeyer v. Jones, 298 N.W. 709, 210 Minn. 423.

Mo.—Taylor v. Laderman, 161 S.W. 2d 253, 349 Mo. 415.

(2) To show that driver was not guilty of willful and wanton misconduct.—Mondin v. Decatur Cart-ago Co., 60 N.E.2d 38, 335 Ill.App. 332—Gardner v. Kelly, 31 N.E.2d 278, 308 Ill.App. 6.

Evidence held insufficient

(1) To establish that driver was guilty of willful and wanton mis-conduct.

Ark.—Edwards v. Jeffers, 162 S.W.2d 472, 204 Ark. 400.

Ill.—Clarke v. Storchak, 52 N.E.2d 229, 384 Ill. 564, appeal dismissed 64 S.Ct. 1270, 322 U.S. 713, 88 L. Ed. 1555—Clark v. Hasselquist, 25 N.E.2d 900, 304 Ill.App. 41—Adolphson v. Russell, 25 N.E.2d 120, 303 Ill.App. 225—Bezemek v. Panico, 23 N.E.2d 216, 301 Ill.App. 408.

Ind.—Hoesel v. Cain, 53 N.E.2d 165, 222 Ind. 330, rehearing denied 53 N.E.2d 769, 222 Ind. 330.

La.—Lipscomb v. News Star World Pub. Corporation, App., 5 So.2d 41.

Mich.—Sherman v. Yarger, 262 N.W. 318, 272 Mich. 644—Bobich v. Rogers, 241 N.W. 854, 258 Mich. 343.

W.Va.—Stone v. Rudolph, 32 S.E.2d 742, 127 W.Va. 335.

(2) To show willful or wanton injury.—Morris v. Dame's Ex'r, 171 S. E. 662, 161 Va. 545.

38. Ark.—Southern Kansas Stage Lines Co. v. Ruff, 101 S.W.2d 968, 193 Ark. 684.

Care required as to persons on vehicle generally see supra §§ 397-404.

Evidence held sufficient

Colo.—United Brotherhood of Car-penters and Joiners of America, Local Union No. 55, v. Salter, 187 P.2d 954, 114 Colo. 513—Jaackel v. Funk, 138 P.2d 939, 111 Colo. 179.

Vt.—Sorrell v. White, 153 A. 369, 103 Vt. 277.

ligence, or wanton and willful misconduct,³⁹ or reckless disregard of the guest's rights.⁴⁰

As to the quantum of proof required, the statements in the cases vary. Thus it has been said that a preponderance of the evidence is required to prove gross negligence,⁴¹ recklessness,⁴² wanton misconduct,⁴³ or gross negligence, or willful and wanton misconduct.⁴⁴ On the other hand, it has

been said that substantial evidence is required to prove wanton or willful negligence,⁴⁵ or that the driver was grossly negligent or that the vehicle was being operated in a manner indicating a reckless disregard of plaintiff's rights, at least in the absence of a showing that the accident was caused intentionally or that any of the parties in the vehicle was intoxicated.⁴⁶ Furthermore, it has been said

Evidence held insufficient

Ill.—Willgeroth v. Maddox, 3 N.E.2d 888, 286 Ill.App. 622.

39. Evidence held sufficient

(1) To authorize finding that driver was guilty of gross negligence or willful and wanton misconduct.—Martins v. Kueter, 274 N.W. 497, 65 S.D. 384.

(2) To sustain finding that driver was guilty of gross and wanton negligence.—McCown v. Schram, 298 N.W. 681, 139 Neb. 738.

(3) To sustain verdict that defendant was not guilty of gross negligence or wanton and willful misconduct.

Fla.—Kozak v. Ake, 3 So.2d 120, 147 Fla. 508, followed in Mazur v. Ake, 3 So.2d 121, 147 Fla. 512.

Wyo.—Mitchell v. Walters, 100 P.2d 102, 55 Wyo. 317.

Evidence held insufficient

(1) To establish gross negligence or willful or wanton misconduct.

U.S.—Huffman v. Buckingham Transp. Co. of Colorado, C.C.A. Wyo., 98 F.2d 916.

Fla.—O'Reilly v. Sattler, 193 So. 817, 141 Fla. 770.

Mich.—La Drig v. Renike, 20 N.W.2d 189, 312 Mich. 277—Thompson v. Ross, 290 N.W. 864, 292 Mich. 450. Ohio.—De Shetler v. Kordt, 183 N.E. 85, 43 Ohio App. 236.

(2) To sustain verdict that host was guilty of gross and wanton negligence

Kan.—Ewing v. Edwards, 36 P.2d 1021, 140 Kan. 325.

Mich.—Crowley v. Upleger, 263 N.W. 737, 273 Mich. 541.

40. Evidence held sufficient

(1) In general.

U.S.—Ehrlich v. Merritt, C.C.A.N.J., 96 F.2d 251.

Cal.—De Martini v. Wheatley, 14 P.2d 869, 126 Cal.App. 230.

Conn.—O'Connor v. Dale, 167 A. 85, 117 Conn. 660—Shinville v. Hanscom, 166 A. 398, 116 Conn. 672.

Iowa.—Claussen v. Johnson's Estate, 278 N.W. 297, 224 Iowa 990.

Mass.—Sheehan v. Goriansky, 56 N.E.2d 882, 317 Mass. 10—Learned v. Hawthorne, 169 N.E. 557, 269 Mass. 654.

Nev.—Mitrovich v. Pavlovich, 114 P.2d 1084, 61 Nev. 62.

Wash.—Adair v. Newkirk, 268 P. 153, 148 Wash. 165.

(2) To show that driver's conduct was in reckless disregard of guest's rights.

U.S.—R. J. Reynolds Tobacco Co. v. Newby, C.C.A.Idaho, 145 F.2d 768. Conn.—Szetela v. Abramowicz, 172 A. 852, 118 Conn. 697—Peterson v. Connecticut Co., 164 A. 637, 116 Conn. 237—Coner v. Chittenden, 163 A. 472, 116 Conn. 78—Schepp v. Trotter, 160 A. 869, 115 Conn. 183—Bryll v. Bryll, 159 A. 884, 114 Conn. 668.

Ind.—Jay v. Holman, 20 N.E.2d 656, 106 Ind.App. 413—Blair v. May, 19 N.E.2d 490, 106 Ind.App. 599—Kraning v. Taggart, 1 N.E.2d 689, 103 Ind.App. 62.

N.M.—Stalcup v. Ruzic, 185 P. 298, 51 N.M. 377.

Tex.—Kirkpatrick v. Neal, Civ.App., 153 S.W.2d 519, error refused

(3) To sustain finding that driver was guilty of reckless and wanton misconduct.—Kakluskas v. Somers Motor Lines, 54 A.2d 592, 134 Conn. 35.

(4) To sustain finding that host was not reckless in operation of vehicle.—Martin v. Momyer, 300 N.W. 310, 230 Iowa 1158.

(5) To warrant finding that there was no reckless and heedless disregard of guest's rights under statute.—Rindge v. Holbrook, 149 A. 231, 111 Conn. 72—Berman v. Berman, 147 A. 568, 110 Conn. 169.

Evidence held insufficient

(1) In general.

Conn.—Cook v. Cook, 166 A. 672, 117 Conn. 655.

N.Y.—Mastruzzi v. Aloï, 200 N.E. 35, 269 N.Y. 637, reargument denied 1 N.E.2d 355, 270 N.Y. 612.

Tex.—Rowan v. Allen, 134 S.W.2d 1022, 134 Tex. 215—Johnson v. Long, Civ.App., 179 S.W.2d 788, error refused—Kirkpatrick v. Neal, Civ.App., 153 S.W.2d 519, error refused—Mayer v. Johnson, Civ.App., 148 S.W.2d 454, error dismissed, judgment correct.

(2) To establish reckless disregard of rights of others.

Conn.—Ferris v. Van Mannagetta, 198 A. 167, 124 Conn. 88—Bowen v. Hartford Accident & Indemnity Co., 191 A. 530, 122 Conn. 621—Grillo v. Bonaiuto, 193 A. 730, 123 Conn. 226—Anderson v. Colucci, 168 A. 610, 116 Conn. 67.

Ind.—Albert McGann Securities Co. v. Coen, 48 N.E.2d 58, 114 Ind.App. 60, dissenting opinion 48 N.E.2d 1000, 114 Ind.App. 60.

Tex.—Hamilton v. Perry, Civ.App., 109 S.W.2d 1142—Pfeiffer v. Green, Civ.App., 102 S.W.2d 1077—Crosby v. Strain, Civ.App., 99 S.W.2d 659, error dismissed.

(3) To show recklessness.—Vandell v. Roewe, 6 N.W.2d 295, 232 Iowa 896—Crabb v. Shanks, 284 N.W. 446, 226 Iowa 589—Popham v. Case, 271 N.W. 226, 223 Iowa 52—Duncan v. Lowe, 268 N.W. 10, 221 Iowa 1278—Brown v. Mart n, 248 N.W. 368, 216 Iowa 1272—Stanbery v. Johnson, 254 N.W. 303, 218 Iowa 160.

(4) To show wanton or reckless misconduct—Neary v. Middlesex Transp. Co., 72 N.E.2d 12, 296 N.Y. 818.

41. Neb.—James v. Krebek, 7 N.W.2d 637, 142 Neb. 757.

Va.—Keen v. Harman, 33 S.E.2d 197, 183 Va. 670.

42. Iowa—Tomasek v. Lynch, 10 N.W.2d 3, 233 Iowa 662.

43. Del.—Law v. Gallagher, 197 A. 479, 9 W.W.Harr. 189.

44. Mich.—Pawlicki v. Faulkerson, 280 N.W. 141, 285 Mich. 141.

45. Ark.—Splawn v. Wright, 128 S.W.2d 248, 198 Ark. 197.

Mental state

(1) On the question whether the driver was guilty of willful or wanton misconduct, there must be substantial evidence supporting the conclusion that his mental state constituted a disposition to perversity.—Schulz v. Fible, 48 N.E.2d 899, 71 Ohio App. 353.

(2) Before a jury may infer that a motorist was conscious that his conduct would result in injury, there must be evidence from which the jury can deduce what caused resulting accident, and only then are jury justified in considering whether motorist was guilty of wanton misconduct within meaning of statute.—Randall v. Stager, 49 A.2d 689, 355 Pa. 352.

46. Or.—Storm v. Thompson, 64 P.2d 1309, 155 Or. 686.

that proof of willful negligence should be unusually strong and convincing,⁴⁷ and that there must be conclusive proof of gross negligence.⁴⁸

Wanton and willful misconduct may be sufficiently proved by proof of wanton misconduct alone,⁴⁹ but proof of ordinary negligence is not sufficient to establish gross negligence,⁵⁰ or willful and wanton misconduct,⁵¹ and a showing of simple, or even gross, negligence is insufficient to establish wanton or willful negligence.⁵² Proof that the guest expressed dissatisfaction with the manner of the operation of the vehicle does not ipso facto establish willful misconduct of the host.⁵³ Evidence of reckless driving prior to the time of the accident will not establish liability where the evidence shows that at the time of the accident the driver was not guilty of gross negligence.⁵⁴ Plaintiff need not negative every possibility which might relieve defendant from liability.⁵⁵ Plaintiff may prove his case directly or by legitimate inference,⁵⁶

and witnesses of the occurrence are not essential.⁵⁷ The proof must rest on facts and proper inferences, however, before there can be a recovery of damages;⁵⁸ suspicion and presumption are not sufficient,⁵⁹ and neither is proof of a mere possibility.⁶⁰

(3) Assumption of Risk

General rules apply in determining the weight and sufficiency of the evidence on the issue of assumption of risk.

In an action for injuries resulting to the occupant of a motor vehicle from the alleged negligence of the owner or operator, general rules have been applied in determining the weight and sufficiency of the evidence on the issue of assumption of risk.⁶¹

(4) Defects in Vehicle

General rules apply in determining the weight and

47. La.—Surgan v. Parker, App., 181 So. 86.

48. Fla.—O'Reilly v. Sattler, 193 So. 817, 141 Fla. 770.

49. U.S.—Swain v. American Mut. Liability Ins. Co., C.C.A.La., 134 F.2d 886.

50. Ga.—Minkovitz v. Fine, 19 S.E. 2d 561, 67 Ga.App. 176.

Neb.—James v. Krebek, 7 N.W.2d 637, 142 Neb. 757—Johnk v. Scanlon, 285 N.W. 488, 136 Neb. 187.

N.H.—Lee v. Chamberlain, 148 A. 466, 84 N.H. 182

N.C.—Hale v. Hale, 13 S.E.2d 221, 219 N.C. 191.

Ohio.—Witdock v. Gyselbracht, 36 N.E.2d 40, 67 Ohio App. 120.

Va.—Wright v. Swain, 191 S.E. 611, 168 Va. 315.

51. Ohio.—Witdock v. Gyselbracht, 36 N.E.2d 40, 67 Ohio App. 120

52. Ark.—Splawn v. Wright, 128 S.W.2d 248, 198 Ark. 197

53. Cal.—Katz v. Kuppin, 112 P.2d 681, 44 Cal.App.2d 406.

54. Wash.—Warren v. Bowdish, 6 P.2d 593, 166 Wash. 217.

55. Iowa.—White v. Center, 254 N.W. 90, 218 Iowa 1027.

56. Cal.—Rawlins v. Lory, 111 P.2d 973, 44 Cal.App.2d 20.

Intent to injure

To establish willful misconduct of host, within automobile guest statute it is not necessary that an actual, executed intent to injure the guests be proved by parol evidence.—Wright v. Sellers, 78 P.2d 209, 25 Cal.App.2d 603.

57. Ala.—Griffin Lumber Co. v. Harper, 25 So.2d 505, 247 Ala. 616.

58. Va.—Grinstead v. Mayhew, 187 S.E. 515, 167 Va. 19.

Knowledge of peril and probable consequences

(1) In order to sustain a charge of wantonness, there must be evidence to show or create a reasonable inference that the driver had knowledge of the occupant's peril and of the probable consequences of his conduct, and with reckless disregard of such consequences he pursued that conduct which caused the injury.—Griffin Lumber Co. v. Harper, 25 So.2d 505, 247 Ala. 616

(2) Testimony that defendant became angry when requested by plaintiffs to decelerate speed did not justify inference that she acted with knowledge that such speed would probably lead to injuries to plaintiffs and herself under circumstances—Katz v. Kuppin, 112 P.2d 681, 44 Cal.App.2d 406.

59. Va.—Grinstead v. Mayhew, 187 S.E. 515, 167 Va. 19.

60. Ill.—Celnor v. Prather, 22 N.E. 2d 397, 301 Ill.App. 224.

Conjectural statement

Driver's testimony that she imagined that at time of accident she continued to suffer from nervousness engendered when motorcycle struck automobile earlier in day was held too conjectural to be weighed on question of driver's recklessness—Duncan v. Lowe, 268 N.W. 10, 221 Iowa 1278.

Evidence held sufficient

(1) In general.—Pecor v. Home Indemnity Co. of New York, 291 N.W. 313, 234 Wis. 407.

(2) To support finding that plaintiff assumed risk.

Mass.—Laffey v. Mullen, 176 N.E. 736, 275 Mass. 277.

Wis.—Kimball v. Mathew, 31 N.W. 2d 184, 252 Wis. 194—Kauth v. Landsverk, 271 N.W. 841, 224 Wis. 554.

(3) To support finding that plaintiff did not assume risk.

Cal.—Lamar v. John & Wade, 161 P. 2d 970, 70 Cal.App.2d 806

Conn.—Kakluskas v. Somers Motor Lines, 54 A.2d 592, 134 Conn. 35.

Me.—Michaud v. Taylor, 27 A.2d 820, 139 Me. 124.

Wis.—Haight v. Luedtke, 1 N.W.2d 882, 239 Wis. 389—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400.

(4) To sustain finding that, if host was under influence of liquor, guest assumed risk.

Iowa.—Martin v. Momyer, 300 N.W. 310, 230 Iowa 1158.

W.Va.—Young v. Wheby, 30 S.E.2d 6, 126 W.Va. 741, 154 A.L.R. 919.

Evidence held insufficient

(1) In general.—Brown v. Waller, La.App., 8 So.2d 304.

(2) To establish that guest assumed risk of driver's negligence.

Ind.—Albert McGann Securities Co. v. Coen, 48 N.E.2d 58, 114 Ind. App. 60, dissenting opinion, 48 N.E.2d 1000, 114 Ind.App. 60.

Wis.—Forecki v. Kohlberg, 295 N.W. 7, 237 Wis. 67, rehearing denied 296 N.W. 619, 237 Wis. 67—Elkey v. Elkey, 290 N.W. 627, 234 Wis. 149, motion denied 292 N.W. 800, 234 Wis. 149—Cummings v. Nelson, 250 N.W. 759, 218 Wis. 121—Royer v. Saecker, 234 N.W. 742, 204 Wis. 265.

sufficiency of evidence on the issue of negligence in the operation of a defective vehicle.

Where the owner or operator of a motor vehicle was allegedly negligent in operating it while in a defective condition whereby an occupant thereof was injured, general rules have been applied in determining the weight and sufficiency of the evidence.⁶²

(5) Intoxication and Falling Asleep

Proof of the defendant's intoxication may be considered on the issue of the degree of his negligence; and general rules apply in determining the weight and sufficiency of the evidence with respect to intoxication of the driver or his falling asleep.

62. Evidence held sufficient

(1) In general.

Ark.—Shaver v. Nash, 79 S.W.2d 53, 190 Ark. 410.

Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201.

Ohio—May v. Szwed, 39 N.E.2d 630, 68 Ohio App. 459.

Wis.—Sweet v. Underwriters' Casualty Co., 240 N.W. 199, 206 Wis. 447.

(2) To support finding of negligence.

Cal.—Whitechat v. Guyette, 122 P.2d 47, 19 Cal.2d 428.

Colo.—Henry v. Strobel, 31 P.2d 319, 94 Colo. 492.

La.—Driefus v. Levy, App., 140 So. 259.

Evidence held insufficient

(1) In general

Ala.—Armistead v. Lenkeit, 160 So. 257, 230 Ala. 155.

Cal.—Turner v. Standard Oil Co. of California, 25 P.2d 988, 134 Cal. App. 622.

Iowa.—Glanopoulos v. Saunders System, Cedar Rapids Co., 242 N.W. 53.

La.—Bahington v. Burris, App., 7 So.2d 650.

Miss.—Monsour v. Farris, 181 So. 326, 181 Miss. 803.

(2) To establish knowledge of defect.

Ga.—Mathis v. Mathis, 155 S.E. 88, 42 Ga.App. 1.

La.—Banta v. Moresi, 119 So. 900, 9 La.App. 636.

N.Y.—Higgins v. Mason, 174 N.E. 77, 255 N.Y. 104.

(3) To show any breach of duty.—Olson v. Buskey, 19 N.W.2d 57, 220 Minn. 155.

Weight and sufficiency of evidence of negligence as to equipment generally see *supra* subdivision a (6) of this section.

63. Mass.—Caldbeck v. Flint, 183 N.E. 739, 281 Mass. 360.

64. Capability of heedless and reckless disregard

Evidence that the owner or opera-

tor of an automobile was intoxicated, but not unconscious, at the time of the accident does not prove, or certainly does not conclusively prove, that he was incapable of heedless and reckless disregard, or of conscious indifference, within the meaning of the guest statute—Scott v. Gardner, 156 S.W.2d 513, 137 Tex. 628, 141 A.L.R. 50.

Number of drinks and subsequent actions

Trial court or jury may consider number of drinks of intoxicating liquor which one has imbibed and his subsequent actions, in determining whether at time of accident such person was intoxicated within statute allowing recovery by guest when accident in which guest is injured results from intoxication of driver.—Knickrihm v. Hazel, 40 P.2d 305, 3 Cal.App.2d 721.

Evidence held sufficient

(1) To support finding of defendant's intoxication—Kroplin v. Huston, 179 P.2d 575, 79 Cal.App.2d 332—Smith v. Maloney, 78 P.2d 1034, 26 Cal.App.2d 97—Smith v. Baker, 57 P.2d 960, 14 Cal.App.2d 10—Noble v. Key System, 51 P.2d 887, 10 Cal.App.2d 132—Knickrihm v. Hazel, 40 P.2d 305, 3 Cal.App.2d 721—Tracy v. Brecht, 39 P.2d 498, 3 Cal.App.2d 105.

(2) To support finding that host was not under influence of liquor.—Martin v. Mommyer, 300 N.W. 810, 230 Iowa 1158.

Evidence held insufficient

Mass.—Adams v. Doucet, 55 N.E.2d 4, 316 Mass. 1.

Ohio.—Rector v. Hyer, App., 41 N.E.2d 886.

65. Evidence held sufficient

(1) In general.

Cal.—Cooper v. Kellogg, 42 P.2d 59, 2 Cal.2d 504.

Conn.—Kakluskas v. Somers Motor Lines, 54 A.2d 592, 134 Conn. 35—Pots v. Williams, 155 A. 211, 113 Conn. 278.

Ill.—Secret v. Raffenon, 62 N.E.2d 36, 326 Ill.App. 489—Barmann v.

Proof that defendant was intoxicated may be considered on the issue of the degree of his negligence,⁶³ and general rules have been applied in determining the weight and sufficiency of the evidence with respect to intoxication of the driver⁶⁴ or his falling asleep.⁶⁵ It has been held that proof that the driver fell asleep establishes a *prima facie* case.⁶⁶

(6) Speed and Control

The weight and sufficiency of the evidence of negligence with relation to speed and control are determined according to general rules in an action against the owner or operator of a motor vehicle for injuries to an occupant thereof.

McConachie, 6 N.E.2d 918, 289 Ill. App. 196.

Tex.—McMillan v. Sims, Civ.App., 112 S.W.2d 793, error granted.

Va.—Lee v. Moore, 191 S.E. 589, 168 Va. 278.

(2) To justify finding that driver fell asleep.

Cal.—Cooper v. Kellogg, 42 P.2d 59, 2 Cal.2d 504.

Conn.—Ryan v. Scanlon, 168 A. 17, 117 Conn. 428.

Tex.—McMillan v. Sims, Civ.App., 112 S.W.2d 793, error granted.

(3) To support finding of gross negligence.

Conn.—Ryan v. Scanlon, 168 A. 17, 117 Conn. 428.

Mass.—Belletete v. Morin, 76 N.E.2d 660, 322 Mass. 214—Moore v. Partrone, 10 N.E.2d 69, 298 Mass. 198.

(4) To warrant inference of negligence in continuing driving while in drowsy condition.

Miss.—Gower v. Strain, 145 So. 244, 169 Miss. 344.

Wis.—Krantz v. Krantz, 248 N.W. 155, 211 Wis. 249.

Evidence held insufficient

Conn.—Gilmartin v. D. & N. Transp. Co., 193 A. 726, 123 Conn. 127, 113 A.L.R. 1322.

Mass.—Loughran v. Nolan, 29 N.E.2d 737, 307 Mass. 195.

Mich.—Nasser v. Kalush, 298 N.W. 480, 298 Mich. 133.

Minn.—Sohm v. Sohm, 3 N.W.2d 496, 212 Minn. 316.

N.Y.—Mochnal v. Pegos, 12 N.Y.S.2d 414, 257 App.Div. 890, reargument denied 14 N.Y.S.2d 411, 257 App. Div. 1063.

66. Ariz.—Brownell v. Freedman, 6 P.2d 1115, 39 Ariz. 385.

Conn.—Pots v. Williams, 155 A. 211, 113 Conn. 278—Bushnell v. Bushnell, 131 A. 432, 103 Conn. 583, 44 A.L.R. 785.

N.C.—Baird v. Baird, 28 S.E.2d 225, 223 N.C. 730.

Ohio.—Collins v. McClure, 56 N.E.2d 171, 143 Ohio St. 569.

Tex.—McMillan v. Sims, Civ.App., 112 S.W.2d 793, error granted.

Va.—Jones v. Pasco, 18 S.E.2d 258, 179 Va. 7, 138 A.L.R. 1285.

In an action against the owner or operator of a motor vehicle for injuries to an occupant thereof, general rules have been applied in determining the weight and sufficiency of the evidence on the issue of negligence with relation to speed and control.⁶⁷ Where the host traveling at an alleged excessive speed on an arterial highway relies on the presence of a stop sign, his knowledge of the presence thereof must affirmatively appear in the evidence.⁶⁸

§ 519. — Proximate Cause

In actions brought to recover for injuries sustained

as the result of the negligent operation of motor vehicles, the causal relation between the negligence or other misconduct of the party sought to be charged and the injuries complained of must be shown by a preponderance of the evidence.

In actions brought to recover for injuries sustained as the result of the negligent operation of motor vehicles, it must appear by a preponderance of the evidence that the negligence or other misconduct of the party sought to be charged was the proximate cause, or at least a contributing proximate cause, of the injuries.⁶⁹ It is not necessary, in order to sustain this burden, to exclude other

67. Evidence held sufficient

(1) In general.

Cal.—Druzanich v. Criley, 122 P.2d 53, 19 Cal.2d 439.

Conn.—Kakluskas v. Somers Motor Lines, 54 A.2d 592, 134 Conn. 35—Kudla v. Pignone, 175 A. 469, 119 Conn. 204.

Ga.—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, opinion conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288.

Ill.—Farley v. Mitchell, 282 Ill.App. 555—Seiffe v. Seiffe, 267 Ill.App. 23.

La.—Lake v. Employers' Liability Assur. Corporation, App., 152 So. 600.

N.Y.—Allen v. Ennis, 300 N.Y.S. 1323, 253 App.Div. 769, affirmed 17 N.E.2d 447, 279 N.Y. 578.

Tenn.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356.

Tex.—Bowman v. Puckett, 188 S.W. 2d 571, 144 Tex. 125—Kirkpatrick v. Neal, Civ.App., 153 S.W.2d 519, error refused.

Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

Va.—Stubbs v. Parker, 192 S.E. 820, 169 Va. 696, opinion adhered to 195 S.E. 688, 927, 169 Va. 676, dissenting opinion 198 S.E. 363, 169 Va. 676.

Wis.—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Olson v. Hermansen, 220 N.W. 203, 196 Wis. 614, 61 A.L.R. 1243.

(2) To show negligence.

Me.—Michaud v. Taylor, 27 A.2d 820, 139 Me. 124.

Mo.—Goggin v. Schoening, App., 199 S.W.2d 87.

Pa.—German v. Riddell, 27 A.2d 680, 149 Pa.Super. 647.

Tex.—Glannukes v. Sfris, 81 S.W.2d 999, 125 Tex. 354.

Va.—Millard v. Cohen, 46 S.E.2d 2, 187 Va. 44.

Wis.—Prasch v. Prasch, 228 N.W. 745, 200 Wis. 353.

(3) To support verdict for guest.

Ala.—Harris v. Snider, 134 So. 807, 223 Ala. 94.

N.J.—Graber v. Cormack, 148 A. 156, 7 N.J.Misc. 1117.

Va.—Watson v. Coles, 195 S.E. 506, 170 Va. 141.

Evidence held insufficient

(1) In general.

Ill.—Sullivan v. Weldon, 2 N.E.2d 588, 284 Ill.App. 644.

Iowa.—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325.

La.—Brooks v. Norris, App., 153 So. 574.

Miss.—Furr v. Brookhaven Creamery, 192 So. 838, 188 Miss. 1.

N.H.—Hersey v. Fritz, 22 A.2d 770, 91 N.H. 484.

N.Y.—Kemp v. Stephenson, 247 N.Y.S. 650, 139 Misc. 38.

Tenn.—Hatch v. Brinkley, 80 S.W.2d 838, 169 Tenn. 17.

(2) To authorize finding that driver was guilty of wantonness.

Ala.—Griffin Lumber Co. v. Harper, 25 So.2d 505, 247 Ala. 616.

Del.—Law v. Gallagher, 197 A. 479, 9 W.W.Harr. 189.

(3) To show excessive speed.

Ala.—Griffin Lumber Co. v. Harper, 25 So.2d 505, 247 Ala. 616.

La.—Smith v. Roueche, App., 153 So. 487, followed in 153 So. 490, two cases.

Mont.—Cowden v. Crippen, 53 P.2d 98, 101 Mont. 187.

(4) To show such a highly dangerous rate of speed as to indicate gross negligence on part of driver.

Mass.—McGrath v. Parsons, 45 N.E. 2d 384, 312 Mass. 476—Burke v. Cook, 141 N.E. 585, 246 Mass. 618.

Va.—Reel v. Spencer, 47 S.E.2d 359, 187 Va. 530.

Wash.—Dailey v. Phoenix Inv. Co., 285 P. 657, 155 Wash. 597.

68. N.C.—Groome v. Davis, 2 S.E.2d 771, 215 N.C. 610.

Weight and sufficiency of evidence as to speed and control generally see supra subdivision a (8) of this section.

69. U.S.—Warren v. Haines, C.C.A. N.J., 126 F.2d 160, certiorari denied 62 S.Ct. 1279, 316 U.S. 688, 86 L.Ed. 1760—Railway Express Agency v. Finn, C.C.A.Mass., 124 F. 2d 892—Van Wie v. U. S., D.C.Iowa, 77 F.Supp. 22—Wolkin v. Cadegan, D.C.Mo., 39 F.Supp. 610.

Ala.—Griffin Lumber Co. v. Harper, 25 So.2d 505, 247 Ala. 616—Watkins v. Reinhart, 9 So.2d 113, 243 Ala. 243.

Ark.—Arkmo Lumber Co. v. Lockett, 143 S.W.2d 1107, 201 Ark. 140.

Cal.—Cummings v. Kendall, 93 P.2d 633, 34 Cal.App.2d 379.

Del.—Law v. Gallagher, 197 A. 479, 9 W.W.Harr. 189—Biddle v. Haldas Bros., 190 A. 588, 8 W.W.Harr. 210.

Ind.—Elliott v. Kraus, 172 N.E. 783, 92 Ind.App. 494.

Iowa.—Maland v. Tesdall, 5 N.W.2d 327, 232 Iowa 959—Luse v. Nickoley, 3 N.W.2d 503—Crutchley v. Bruce, 240 N.W. 238, 214 Iowa 731.

Ky.—Gilreath v. Blue & Gray Transp. Co., 108 S.W.2d 1002, 269 Ky. 787, followed in 108 S.W.2d 1004, 269 Ky. 791—Consolidated Coach Corporation v. Bryant, 86 S.W.2d 88, 260 Ky. 452.

La.—Perret v. Toye Bros. Yellow Cab Co., App., 20 So.2d 377—Holmes v. Lindsey, App., 15 So.2d 89—Coffey v. Ouachita River Lumber Co., App., 191 So. 561—Smith v. Kennedy, App., 181 So. 678—Kent v. Lefaux, App., 169 So. 793, followed in 169 So. 798, two cases—Keith v. Borron, App., 152 So. 343.

Mass.—Connell v. Maynard, 76 N.E.2d 642, 322 Mass. 245—Marshall v. Carter, 17 N.E.2d 205, 301 Mass. 372.

Neb.—Bixby v. Ayers, 298 N.W. 533, 139 Neb. 652—Meyers v. Neeld, 289 N.W. 797, 137 Neb. 428—Peterson v. Omaha & Council Bluffs St. Ry. Co., 269 N.W. 510, 131 Neb. 676.

N.H.—Green v. Bond, 36 A.2d 633, 93 N.H. 144.

N.Y.—Tryon v. Willbank, 255 N.Y.S. 27, 234 App.Div. 335.

Ohio.—Scott v. Hibberd, Com.Pl., 75 N.E.2d 92.

Tex.—Mitchell v. Gooch, Civ.App., 210 S.W.2d 834—Pritchard v. Henry, Civ.App., 200 S.W.2d 651.

Wash.—Peterson v. Mayham, 116 P. 2d 259, 10 Wash.2d 111—Wilson v. Congdon, 37 P.2d 892, 179 Wash. 400.

42 C.J. p 1287 note 43.

possible causes;⁷⁰ but defendant, if he attempts to prove that the injuries were caused by some intervening sole proximate cause, other than his own negligence, must show that the injuries were not the natural or probable consequence of his original negligence.⁷¹ The fact that defendant's negligence proximately caused the accident need not be proved by direct testimony,⁷² and circumstantial evidence is sufficient if it furnishes a reasonable basis for inference that some negligent act of the operator was the cause, or a contributing cause, of the injury.⁷³ Where the evidence is insufficient to

show the cause of the injury, there is a failure of proof,⁷⁴ and the same is true where it is merely a matter of speculation, conjecture, or surmise whether the injury was or was not due to the negligence of defendant.⁷⁵

Evidence held sufficient. Applying the foregoing principles and the rules governing weight and sufficiency of evidence generally, evidence in particular cases has been held sufficient to show that negligence or other misconduct in the operation of a motor vehicle was the proximate cause of the injuries,⁷⁶ or that such negligence or misconduct

All relevant facts in evidence should be considered.

Ill.—Carroll v. Krause, 15 N.E.2d 323, 295 Ill.App. 552.

N.C.—Groome v. Davis, 2 S.E.2d 771, 215 N.C. 510.

Pleading guilty to criminal charge

Evidence that motorist, after accident, pleaded guilty to charge of reckless driving did not support judgment for injuries allegedly caused by such negligence, since such plea admitted only negligence, and did not admit that negligence caused injuries.—Adrian v. Guyette, 69 P.2d 197, 21 Cal.App.2d 306.

Violation of statute or rule of road does not warrant recovery unless it is shown by a preponderance of the evidence to have been a proximate cause of the injury

Md.—Gloyd v. Wills, 23 A.2d 665, 180 Md. 161

Mass.—Levellie v. Wright, 15 N.E.2d 247, 300 Mass. 382

N.M.—Bell v. Carter Tobacco Co., 71 P.2d 683, 41 N.M. 513.

More proof of excessive speed is not enough; such speed must be shown by a preponderance of the evidence proximately to have caused the injuries.—Fleeman v. Citizens Transfer & Coal Co., 198 S.E. 596, 214 N.C. 117—Woods v. Freeman, 195 S.E. 812, 213 N.C. 314.

70. Mass.—Hendler v. Coffey, 179 N.E. 801, 278 Mass. 339.

71. Cal.—Springer v. Pacific Fruit Exchange, 268 P. 951, 92 Cal.App. 732.

72. Ala.—Harbin v. Moore, 175 So. 264, 234 Ala. 266.

Kan.—Sawhill v. Casualty Reciprocal Exchange, 107 P.2d 770, 152 Kan. 735

Mo.—Vanausdall v. Schorr, App., 168 S.W.2d 110—Gillis v. Singer, App., 86 S.W.2d 352.

42 C.J. p 1237 note 44.

73. Ala.—People v. Seamon, 31 So. 2d 88, 249 Ala. 284—Harbin v. Moore, 175 So. 264, 234 Ala. 266.

Cal.—Parra v. Cleaver, 294 P. 6, 110 Cal.App. 168.

Ill.—Howard v. Ind., 50 N.E.2d 769, 320 Ill.App. 338.

Md.—Acme Poultry Corp. v. Melville, 53 A.2d 1.

Mass.—Fone v. Ellolian, 7 N.E.2d 737, 297 Mass. 139.

Mo.—Vanausdall v. Schorr, App., 168 S.W.2d 110—Kuba v. Nagel, App., 124 S.W.2d 597—Gillis v. Singer, App., 86 S.W.2d 352.

N.H.—Mooney v. Chapdelaine, 10 A.2d 220, 90 N.H. 415, reheard 11 A.2d 713.

N.Y.—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App.Div. 1007.

Pa.—Rowles v. Evanuk, 38 A.2d 255, 350 Pa. 64.

Tex.—J. S. Abercrombie Co. v. Delcomyn, Civ.App., 116 S.W.2d 1105, reversed on other grounds 135 S.W.2d 978, 134 Tex. 490.

W.Va.—Horchler v. Van Zandt, 199 S.E. 65, 120 W.Va. 452.

42 C.J. p 1237 note 45.

Probability of plaintiff's theory

Where evidence relied on to establish that proximate cause of injury was negligence of defendants' driver was circumstantial, it must be established that there was such negligence as made plaintiff's theory reasonable, probable, and not a mere possibility, and more probable than any other theory.—Welch v. Greenberg, 14 N.W.2d 266, 235 Iowa 159.

74. U.S.—Railway Express Agency v. Finn, C.C.A. Mass., 124 F.2d 892—Wright v. Wilson, D.C.Pa., 64 F. Supp. 694, affirmed, C.C.A., 154 F.2d 616, 170 A.L.R. 1237, certiorari denied Wright v. Lohr, 67 S.Ct. 50, 329 U.S. 743, 91 L.Ed. 640.

Ill.—Sturgeon v. Quanton, 44 N.E.2d 766, 316 Ill.App. 308.

Kan.—Harshaw v. Kansas City Public Service Co., 119 P.2d 459, 154 Kan. 481.

Neb.—Oakes v. Gregory, 275 N.W. 607, 133 Neb. 407.

Tex.—Comet Motor Freight Lines v. Holmes, Civ.App., 203 S.W.2d 233.

Wis.—Storlie v. Hartford Accident & Indemnity Co., 28 N.W.2d 920, 251 Wis. 340.

42 C.J. p 1238 note 46.

75. U.S.—Railway Express Agency v. Finn, C.C.A. Mass., 124 F.2d 892.

Ill.—McInerney v. Boysen Baking Co., 27 N.E.2d 482, 305 Ill.App. 489.

La.—Wilcox v. B. Olinde & Sons Co., App., 182 So. 149—Kent v. Lefaux, App., 169 So. 793, followed in 169 So. 798, two cases.

N.Y.—Tryon v. Willbank, 255 N.Y.S. 27, 234 App.Div. 335.

Pa.—Pfendler v. Speer, 185 A. 618, 323 Pa. 443.

Wis.—Storlie v. Hartford Accident & Indemnity Co., 28 N.W.2d 920, 251 Wis. 340.

42 C.J. p 1238 note 47.

76. U.S.—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8, certiorari denied Milburn v. Heald, 62 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1754, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.Ed. 1754—Price v. U. S., D.C.Ky., 50 F.Supp. 676—Carroll v. Harrison, D.C.Va., 49 F.Supp. 283, affirmed, C.C.A., 139 F.2d 427.

Ala.—Bruner v. Eubanks, 33 So.2d 374, 33 Ala.App. 266, certiorari denied 33 So.2d 376, 250 Ala. 100—Burns v. Bythwood, 184 So. 346, 28 Ala.App. 335, certiorari denied 184 So. 349, 236 Ala. 639.

Ariz.—Kauffronth v. Willbur, 185 P.2d 522, 66 Ariz. 152.

Ark.—Coca-Cola Bottling Co. of Southwest Arkansas v. Carter, 154 S.W.2d 824, 202 Ark. 1026—Allen v. Ross, 138 S.W.2d 409, 200 Ark. 104—Dermott Grocery & Commission Co. of Eudora v. Meyer, 101 S.W.2d 443, 193 Ark. 591.

Cal.—Wood v. Moore, 148 P.2d 91, 64 Cal.App.2d 144—Porter v. Signal Trucking Service, 138 P.2d 753, 59 Cal.App.2d 289—Bright v. Zabler, 111 P.2d 387, 43 Cal.App.2d 706—Brooks v. Bailey, 104 P.2d 854, 40 Cal.App.2d 310—Guillot v. Hagman, 86 P.2d 865, 30 Cal.App.2d 582—Weis v. Davis, 82 P.2d 487, 28 Cal.App.2d 240—Mitrovitch v. Graves, 78 P.2d 227, 25 Cal.App.2d 649—Sullivan v. Barra, 70 P.2d 495, 22 Cal.App.2d 20—Gardini v. Arakelian, 64 P.2d 181, 18 Cal.App.2d 424—Long v. Bevers, 58 P.2d 1295, 15 Cal.App.2d 47—Wantz v. Ammons, 46 P.2d 210, 7 Cal.App.2d 643—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256—

Smith v. Rothschild, 39 P.2d 484, 3 Cal.App.2d 273—Coppock v. Pacific Gas & Electric Co., 30 P.2d 549, 137 Cal.App. 80—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 132—Anderson v. Walters, 27 P.2d 100, 135 Cal.App. 380—Bennis v. Young, 20 P.2d 111, 130 Cal.App. 580—Harlow v. Motor Coach Co., 16 P.2d 779, 127 Cal.App. 728, followed in Miller v. Motor Coach Co., 16 P.2d 781, 127 Cal.App. 781, and 16 P.2d 781, 127 Cal.App. 782—Pate v. Pickwick Stages System, 14 P.2d 174, 125 Cal.App. 670—Brunette v. Speddiaci, 12 P.2d 151, 124 Cal.App. 252—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742—Krolier v. Jenkins, 6 P.2d 96, 119 Cal.App. 175—Harju v. Market St. Ry. Co., 299 P. 788, 114 Cal.App. 138—Marshall v. Golden State Milk Products Co., 297 P. 109, 113 Cal.App. 43—Williams v. Pickwick Stages System, 297 P. 98, 112 Cal.App. 597—MacCorkell v. Williams, 295 P. 879, 111 Cal.App. 572—Sinsbaugh v. Clark, 294 P. 462, 110 Cal.App. 340—Crabbe v. Rhoades, 282 P. 10, 101 Cal.App. 503—Daniel v. Ashill, 276 P. 149, 97 Cal.App. 731—Rignell v. Font, 266 P. 588, 90 Cal.App. 730.

Colo.—Lorenzini v. Rucker, 35 P.2d 865, 95 Colo. 246.

Conn.—Figlar v. Gordon, 53 A.2d 645, 133 Conn. 577—Anderson v. C. E. Hall & Sons, 38 A.2d 787, 131 Conn. 232—Basilie v. De Bella, 33 A.2d 123, 130 Conn. 234—Seney v. Trowbridge, 16 A.2d 573, 127 Conn. 284—Hedberg v. Cooley, 161 A. 665, 115 Conn. 352—Doerr v. Woodland Transp. Co., 136 A. 693, 105 Conn. 689.

Fla.—Ryder v. Plumley, 189 So. 422, 138 Fla. 378.

Ga.—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga.App. 383—Adair v. Carmichael, 191 S.E. 177, 55 Ga.App. 696—Hodges v. Peek, 179 S.E. 129, 50 Ga.App. 631—Boswell v. Boswell, 143 S.E. 436, 38 Ga.App. 174.

Ill.—Harber v. Northcutt, 39 N.E.2d 411, 313 Ill.App. 147—Rhoden v. Peoria Creamery Co., 278 Ill.App. 452—Meyer v. Correct Motor Fuels Co., 254 Ill.App. 261—Waitrovich v. Black, 254 Ill.App. 49.

Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind. 394.

Iowa.—Buchanan v. Hurd Creamery Co., 246 N.W. 41, 215 Iowa 415.

Kan.—Waugh v. Kansas City Public Service Co., 143 P.2d 788, 157 Kan. 690—Cunningham v. Stucky, 58 P. 2d 42, 144 Kan. 118—Godsey v. Cox, 10 P.2d 871, 135 Kan. 843.

Ky.—Bell & Bell v. Rascoe, 63 S.W. 2d 932, 250 Ky. 756—Consolidated Coach Corporation v. Saunders, 17 S.W.2d 233, 229 Ky. 284.

La.—Ferris v. Quinn, App., 21 So.2d 106—Perret v. Toye Bros. Yellow Cab Co., App., 20 So.2d 377—Davies v. Consolidated Underwriters, App.,

14 So.2d 494—Ollphant v. Town of Lake Providence, App., 193 So. 516—Cooper v. Kennard, App., 192 So. 534—Hochenadel v. Heard, App., 188 So. 413—Ardoin v. Robinson, App., 176 So. 228—Reneau v. Seybert, App., 170 So. 375—Wall v. Aetna Casualty & Surety Co., App., 167 So. 903—Tatar v. Munson, App., 161 So. 361—Stamm v. Eagle Rice & Feed Mill, App., 151 So. 257—Varnado v. Rex Petroleum Corporation, App., 147 So. 513—Antoine v. Interurban Transp. Co., 140 So. 151, 19 La.App. 203—Antoine v. Interurban Transp. Co., 140 So. 158, 19 La.App. 216, two cases—Griffen v. Teche Transfer Co., 140 So. 113, 19 La.App. 157—Reggie v. Karre, 139 So. 532, 19 La.App. 477, followed in 139 So. 536, 19 La.App. 476, Karre v. Karre, 139 So. 536, 19 La.App. 476, and Zwan v. Karre, 139 So. 536, 19 La.App. 475—Nelms v. Boswell, 136 So. 146, 17 La.App. 480—Stevenson v. Campbell, 134 So. 718, 17 La.App. 142—Brothers v. Metzger Dairies, 133 So. 454, 16 La.App. 72—Fontaine v. Dorsey, 131 So. 506, 15 La.App. 282—Martin v. Cazadesaus, 130 So. 129, 15 La.App. 100—Hanley v. Checker Cab Co., 126 So. 274, 12 La.App. 562.

Me.—Plante v. Canadian Nat. Rys., 23 A.2d 814, 138 Me. 215—Hutchins v. Emery, 183 A. 754, 134 Me. 205—Trumpfeller v. Crandall, 155 A. 616, 130 Me. 279.

Md.—Dashiell v. Moore, 11 A.2d 640, 177 Md. 657—Allen v. State, for Use of Taetle, 197 A. 144, 173 Md. 649—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.

Mass.—Campbell v. Cairns, 20 N.E. 2d 427, 302 Mass. 584—Marshall v. Carter, 17 N.E.2d 205, 301 Mass. 372—Abdow v. Silverbrand, 17 N.E.2d 163, 301 Mass. 337—Marlow v. Dike, 168 N.E. 151, 269 Mass. 38.

Mich.—Grand Trunk Western R. Co. v. Lovejoy, 7 N.W.2d 212, 304 Mich. 35—Egan v. Edwards, 293 N.W. 641, 294 Mich. 260—Reedy v. Goodin, 281 N.W. 377, 285 Mich. 614.

Minn.—Winans v. Sinanovski, 2 N.W.2d 127, 211 Minn. 606—Erickson v. Morrow, 287 N.W. 628, 208 Minn. 58—Bartley v. Fritz, 285 N.W. 484, 205 Minn. 192—Kulla v. E. B. Crabtree Co., 280 N.W. 16, 203 Minn. 105—Pitzen v. Pitzen, 232 N.W. 344, 181 Minn. 338—Tuttle v. Wicklund, 227 N.W. 203, 178 Minn. 353.

Miss.—Trewolla v. Garrett, 27 So.2d 887—Randall v. Skinner, 192 So. 341, 187 Miss. 602.

Neb.—Fahrenbruch v. Peter Klewit Sons' Co., 27 N.W.2d 680, 148 Neb. 460—Ross v. Carroll, 299 N.W. 477, 140 Neb. 350—Gorman v. Bratka, 296 N.W. 456, 139 Neb. 84—Moran v. Moran, 246 N.W. 711, 124 Neb. 378—Stieffer v. Miller, 232 N.W. 620, 120 Neb. 6.

N.H.—Monroe v. Sterling, 26 A.2d 21, 92 N.H. 11—American Motorists Ins. Co. v. Rush, 190 A. 432, 88 N.H. 383.

N.J.—Barbanes v. Brown, 163 A. 148, 110 N.J.Law 6—Ceslak v. Krause, 156 A. 461, 108 N.J.Law 350—Gray v. Elmo, 156 A. 825, 9 N.J.Misc. 1093—Bethanis v. Siegel, 152 A. 459, 9 N.J.Misc. 21—Junge v. King, 149 A. 43, 8 N.J.Misc. 115—Julich v. T. A. Gillespie Co., 146 A. 785, 7 N.J.Misc. 630—Rogozo v. Mahoney, 136 A. 196, 5 N.J.Misc. 247.

N.M.—Lucero v. Harshey, 165 P.2d 587, 50 N.M. 1.

N.Y.—Lembach v. Lester, 28 N.Y.S.2d 108, 262 App.Div. 817—Sewilo v. Lazarus, 286 N.Y.S. 906, 247 App. Div. 855—Gregory v. New York Railways Corporation, 282 N.Y.S. 499, 246 App.Div. 538—Kelly v. Eagle Motor Haulage Co., 277 N.Y.S. 447, 243 App.Div. 739.

N.C.—Pridden v. Holeman Produce Co., 155 S.E. 247, 199 N.C. 560.

N.D.—Ziegler v. Ford Motor Co., 272 N.W. 743.

Ohio.—Brinkley v. Rhea, 4 N.E.2d 270, 53 Ohio App. 128, petition dismissed Rhea v. Brinkley, 198 N.E. 40, 130 Ohio St. 172—Kress v. Roush, 198 N.E. 491, 50 Ohio App. 376.

Or.—Motejl v. Greenwood, 138 P.2d 216, 171 Or. 469.

Pa.—Derricotte v. Ulitsky, 45 A.2d 5, 353 Pa. 309—Grebe v. Kliggerman, 164 A. 796, 310 Pa. 60.

Tex.—Kimbriel Produce Co. v. Mayo, Civ.App., 180 S.W.2d 504, error refused—Newlin v. Smith, Civ.App., 112 S.W.2d 610, reversed on other grounds 150 S.W.2d 233, 136 Tex. 260—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct—Porter v. Liberty Film Lines, Civ.App., 127 S.W.2d 480, reversed on other grounds Liberty Film Lines v. Porter, 146 S.W.2d 982, 136 Tex. 49—Schneider v. Delavan, Civ. App., 118 S.W.2d 823, error dismissed—Mueller v. Bobbitt, Civ. App., 41 S.W.2d 466—Texas Co. v. Blackstock, Civ.App., 21 S.W.2d 13, error dismissed.

Utah.—Van Cleave v. Lynch, 166 P.2d 244, 109 Utah 149—Anderson v. Salt Lake City, 10 P.2d 927, 79 Utah 324.

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Va.—Chick Transit Corporation v. Edenton, 196 S.E. 648, 170 Va. 361—Kinsey v. Brugh, 161 S.E. 41, 157 Va. 407.

Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010—Pozar v. Blankenship, 282 P. 52, 154 Wash. 261.

Wis.—Tietz v. Blaier, 26 N.W.2d 551, 250 Wis. 214—Baird v. Edmonds,

was the sole proximate cause thereof,⁷⁷ or was, at | least, a contributory cause thereof.⁷⁸

276 N.W. 306, 226 Wis. 209—Mauermann v. Dixon, 258 N.W. 352, 217 Wis. 29.

Wyo.—Wallis v. Nauman, 157 P.2d 285, 61 Wyo. 231.

42 C.J. p 1237 note 43 [a].

Gross negligence held sufficiently shown by evidence to be proximate cause of injuries.

La.—Law v. Osterland, 3 So.2d 680, 198 La. 421—Rester v. Davidson, App., 29 So.2d 527—Gachassin v. Richard, App., 28 So.2d 371—Cox v. Louisiana Dept. of Highways, App., 25 So.2d 824—Bill v. Nichols, App., 22 So.2d 705—Bolton v. Glowaski, App., 15 So.2d 536—White v. Neff, App., 11 So.2d 289—Dudley v. Surles, App., 11 So.2d 70—Scruggs v. V. Frank Lynn Co., App., 6 So.2d 86—Wells v. Home Indemnity Co., App., 1 So.2d 453—Allen v. Metropolitan Casualty Ins. Co. of New York, App., 190 So. 163—Ellis v. Whitmeyer, App., 183 So. 77—Van Baast v. Thibaut Feed Mills, 151 So. 226.

Mass.—Dombrowski v. Gedman, 12 N.E.2d 80, 299 Mass. 87.

Willful, wanton, or reckless conduct held sufficiently shown by evidence to be proximate cause of injuries

Conn.—Kakluskas v. Somers Motor Lines, 54 A.2d 592, 134 Conn. 35

Ill.—Winson v. Fischer, 77 N.E.2d 48, 333 Ill.App. 222—Smith v. A. Salavitch & Son, 27 N.E.2d 851, 305 Ill.App. 495—Ames v. Armour & Co., 257 Ill.App. 449.

Ind.—Jay v. Holman, 20 N.E.2d 656, 106 Ind.App. 413—Kahan v. Weckslar, 12 N.E.2d 998, 104 Ind.App. 673.

La.—Breeland v. Kelly, App., 32 So.2d 47.

Minn.—Reasmeyer v. Jones, 298 N.W. 709, 210 Minn. 423.

N.M.—Stalcup v. Ruzic, 185 P.2d 298, 51 N.M. 377.

N.Y.—Hukuy v. Pillsbury Mills, 60 N.Y.S.2d 307, 270 App.Div. 866.

Or.—Schairer v. Johnson, 272 P. 1027, 128 Or. 409.

77. U.S.—Sanders v. Leech, C.C.A. Fla., 158 F.2d 486.

Cal.—McCoulou v. Vejar, 297 P. 534, 212 Cal. 49—Johnson v. Johnson, 139 P.2d 38, 59 Cal.App.2d 375—Heslop v. Kinyoun, 136 P.2d 621, 58 Cal.App.2d 287—Gustafson v. Blunk, 41 P.2d 953, 4 Cal.App.2d 630—Donovan v. Hornaday, 38 P.2d 824, 3 Cal.App. 103—Lyons v. Long, 16 P.2d 784, 128 Cal.App. 144—Lincoln v. Williams, 6 P.2d 563, 119 Cal.App. 498—Beatty v. McGuirk, 298 P. 510, 113 Cal.App. 530.

Conn.—Plescik v. Railway Express Agency, 175 A. 919, 119 Conn. 277. La.—Chandler v. Sentell, App., 35 So. 2d 260—New Amsterdam Casualty Co. v. Dambly, App., 8 So.2d 345—

Weltkam v. Johnston, App., 5 So. 2d 582, rehearing denied 6 So.2d 54—Gebbs v. Anderson, App., 2 So. 2d 675—Phillips v. Henderson, App., 200 So. 192—Coon v. Monroe Scrap Material Co., App., 191 So. 607—Bullock v. Fidelity & Casualty Co. of New York, App., 187 So. 93—Coleman v. Danos, App., 186 So. 407—Wilcox v. B. Olinde & Sons Co., App., 182 So. 149—Smith v. Monroe Grocer Co., App., 179 So. 495—Adams v. Morgan, App., 173 So. 540, rehearing denied 174 So. 157—Newton v. Independent Exploration Co., App., 171 So. 875—Levy v. Leopold, App., 142 So. 191—Stortz v. New Orleans Public Service, App., 141 So. 814—Wyble v. Putfork, App., 141 So. 776—Michiels v. Oser, 139 So. 497, 19 La.App. 24—Hyman v. Salzer Plumbing Co., 135 So. 703, 18 La.App. 188, amended 138 So. 132, 18 La.App. 188—Glover v. Southern Transp. Co., 133 So. 474, 16 La.App. 63—Schlesinger v. Foote, 131 So. 717, 14 La.App. 467—Bernadas v. Miller, 130 So. 861, 14 La.App. 581.

Me.—Candage v. Belanger, 57 A.2d 145—Frenyea v. Maine Steel Products Co., 170 A. 515, 132 Me. 271.

Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394.

Mo.—Yontz v. Shernaman, App., 94 S.W.2d 917.

N.J.—Ashburne v. Williams, 154 A. 750, 9 N.J.Misc. 531.

N.Y.—Rush v. White, 51 N.Y.S.2d 294, 268 App.Div. 940.

Ohio—Meuer v. Doerflein, 5 N.E.2d 948, 53 Ohio App. 536.

Pa.—Maguire v. Doughty, 191 A. 348, 326 Pa. 122—Amey v. Erb, 146 A. 141, 296 Pa. 561—Miller v. Siebert, 145 A. 909, 296 Pa. 400.

R.I.—Brey v. Rosenfeld, 50 A.2d 911, 72 R.I. 316.

Tex.—Leary v. Oates, Civ.App., 84 S.W.2d 486 error dismissed.

Utah.—Mehr v. Child, 61 P.2d 624, 90 Utah 348.

Wash.—Rieger v. Kirkland, 111 P.2d 211, 7 Wash.2d 326—Clarke v. Bohemian Breweries, 110 P.2d 197, 7 Wash.2d 487.

Wis.—Klas v. Fenske, 22 N.W.2d 506, 248 Wis. 534.

78. U.S.—Stafford v. Roadway Transit Co., D.C.Pa., 70 F.Supp. 555, motion refused 73 F.Supp. 458, affirmed in part and reversed in part on other grounds, C.C.A., 165 F.2d 920.

Cal.—Bechtold v. Bishop & Co., 105 P.2d 984, 16 Cal.2d 285—Jordan v. Great Western Motorways, 2 P.2d 786, 213 Cal. 606—Krause v. Rarity, 293 P. 62, 210 Cal. 644, 77 A.L.R. 1327—Rodriguez v. Savage Transp. Co., 175 P.2d 77, 77 Cal.App.2d 182—Callison v. Dondero, 124 P.2d 852,

51 Cal.App.2d 403—Cummings v. Kendall, 107 P.2d 282, 41 Cal.App.2d 549—Mecchi v. Lyon Van & Storage Co., 102 P.2d 422, 38 Cal.App.2d 674, hearing denied 104 P.2d 26, 38 Cal.App.2d 674—Sullivan v. Richardson, 6 P.2d 567, 119 Cal.App. 367—Fishman v. Silva, 2 P.2d 473, 116 Cal.App. 1—Bleumel v. Krolsy, 298 P. 825, 113 Cal.App. 585—Edgar v. Citraro, 297 P. 654, 112 Cal.App. 178, followed in 297 P. 652, 112 Cal. App. 761—Truitner v. Knight, 257 P. 447, 83 Cal.App. 655, followed in 257 P. 451, 83 Cal.App. 797.

Colo.—Leonard v. Bauer, 149 P.2d 376, 112 Colo. 247.

Conn.—Rosenberg v. Matulis, 166 A. 397, 116 Conn. 675.

Ill.—Goldberg v. Capitol Freight Lines, 41 N.E.2d 302, 314 Ill.App. 347, affirmed 47 N.E.2d 67, 382 Ill. 283.

Kan.—Earhart v. Tretbar, 80 P.2d 4, 148 Kan. 42.

Ky.—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91—Axton-Fisher Tobacco Co. v. Landrum, 3 S.W.2d 1082, 223 Ky. 446.

La.—Smythe v. Great American Indemnity Co., App., 35 So.2d 267—Scott v. Richard, App., 24 So.2d 175, followed in 24 So.2d 180 and 24 So.2d 179—Abrego v. Tri-State Transit Co., App., 22 So.2d 681—Di Chiara v. Hackett, App., 186 So. 113—Stelly v. Prather, App., 182 So. 171—Bruscato v. Stewart, App., 177 So. 121—Driefus v. Levy, App., 140 So. 259—Grantham v. Smith, 132 So. 805, 18 La.App. 519, rehearing denied 134 So. 263, and reversed on other grounds Loran v. Smith, 138 So. 871, 173 La. 883.

Md.—McClenny v. Przyborowski, 32 A.2d 365, 182 Md. 95.

Mass.—Nash v. Heald, 29 N.E.2d 7, 306 Mass. 518—Isaacson v. Boston, W. & N.Y. St. Ry. Co., 180 N.E. 118, 278 Mass. 378.

Minn.—Murphy v. Dyson, 25 N.W.2d 291, 223 Minn. 19—Cooper v. Hoeglund, 22 N.W.2d 450, 221 Minn. 446—Brown v. Murphy Transfer & Storage Co., 251 N.W. 5, 190 Minn. 81.

Miss.—McCollum v. Thrift, 125 So. 544, 156 Miss. 236.

Mo.—Heitz v. Voss Truck Lines, 175 S.W.2d 583.

Neb.—Olson v. Hansen, 240 N.W. 551, 122 Neb. 492.

N.H.—Charles v. McPhee, 26 A.2d 30, 92 N.H. 111.

N.J.—Palumbo v. Pennsylvania R. Co., 159 A. 322, 10 N.J.Misc. 204.

N.Y.—Gibson v. State, 21 N.Y.S.2d 362, 259 App.Div. 1104.

N.C.—Lewis v. Hunter, 193 S.E. 814, 212 N.C. 504.

Ohio.—Gradison Const. Co. v. Braun, 180 N.E. 274, 41 Ohio App. 389.

More specifically, evidence has been held sufficient to show that the proximate cause, or at least one of several concurring causes, of the injuries was the negligence or misconduct of the operator in passing or attempting to pass another vehicle,⁷⁹

stopping,⁸⁰ backing,⁸¹ turning,⁸² applying brakes,⁸³ parking or leaving the vehicle in the highway⁸⁴ without proper lights or flares,⁸⁵ driving into a highway from a stop road, secondary road, byroad or private way,⁸⁶ or violating statutes, ordinances,

Pa.—Stark v. Rowley, 187 A. 509, 323 Pa. 522.

Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

Tex.—Missouri-Kansas-Texas R. Co. v. McKinney, Civ.App., 126 S.W.2d 789, affirmed Missouri, K. & T. R. Co. of Texas v. McKinney, 145 S.W.2d 1081, 136 Tex. 75.

Vt.—Cote v. Boise, 16 A.2d 175, 111 Vt. 343.

Wyo.—Johnston v. Wortham Machinery Co., 157 P.2d 99, 60 Wyo. 301.

79. U.S.—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65—Horton Motor Lines v. Currie, C. C.A.Va., 92 F.2d 164.

Ark.—Universal Automobile Ins. Co. v. Denton, 50 S.W.2d 592, 185 Ark. 899.

Cal.—McDonald v. Cantley, 3 P.2d 552, 214 Cal. 40—Pretzer v. California Transit Co., 294 P. 382, 211 Cal. 202.

La.—Fogleman v. Interurban Transp. Co., 187 So. 73, 192 La. 115—Franklin v. Cotton Baking Co., App., 16 So.2d 70—Lindsey v. Gulf Ins. Co., App., 7 So.2d 757—Cooper v. Garrett, App., 6 So.2d 209, followed in Veronie v. Garrett, 6 So.2d 215—Goynes v. St. Charles Dairy, App., 197 So. 819—Williams v. Pomes, App., 187 So. 145—Tymon v. Toye Bros. Yellow Cab Co., App., 180 So. 839—Deshotel v. Simmons, App., 149 So. 893—Bergeron v. Gulf States Utilities Co., App., 142 So. 877—Reif v. Tufts, 141 So. 90, 19 La.App. 600.

Mo.—Heitz v. Voss Truck Lines, 175 S.W.2d 583.

Neb.—Anderson v. Lotman, 248 N.W. 309, 124 Neb. 795.

Ohio.—Cheney v. Garrett, App., 76 N.E.2d 96.

Tex.—Mueller v. Bobbitt, Civ.App., 41 S.W.2d 466—Donham v. Rugel, Civ. App., 39 S.W.2d 627—McCall v. Frenzel, Civ.App., 32 S.W.2d 965.

80. U.S.—Skinner v. Pennsylvania Greyhound Lines, C.C.A.Ind., 123 F.2d 497.

Wash.—Caylor v. B. C. Motor Transp., 71 P.2d 162, 191 Wash. 365.

After collision

Tex.—Younger Bros. v. Ross, Civ. App., 151 S.W.2d 621, error dismissed.

81. Cal.—Corvello v. Baumsteiger, 1 P.2d 484, 115 Cal.App. 194.

La.—McHenry v. American Employers Ins. Co., App., 18 So.2d 840—

Wims v. Authorized Appleman Bit Service Co., App., 2 So.2d 715—McCraney v. Hammond Coca Cola Bottling Co., 141 So. 515, 19 La.App. 755.

R.I.—Bucci v. Butler, 53 A.2d 705.

82. Cal.—Miles v. Van Hagen, 128 P.2d 89, 53 Cal.App.2d 750—Armstrong v. Ford, 86 P.2d 385, 30 Cal. App.2d 347—Jesse v. Giguere, 74 P.2d 310, 24 Cal.App.2d 160.

Ill.—Risch v. Consumers Petroleum Co., 53 N.E.2d 286, 321 Ill.App. 438—Kelley v. Miles, 16 N.E.2d 931, 296 Ill.App. 650.

Ky.—Pickering v. Simpkins, 111 S.W.2d 650, 271 Ky. 288.

La.—Gaines v. Standard Acc. Ins. Co., App., 32 So.2d 633—Harris v. Rigby, App., 29 So.2d 805—Howell v. Robinson, 130 So. 666, 14 La.App. 632.

Mass.—Perry v. Pianowski, 5 N.E.2d 424, 296 Mass. 314.

Minn.—Nicol v. Gettler, 247 N.W. 8, 188 Minn. 69.

Mo.—Robinson v. Mayer, App., 94 S.W.2d 1067.

N.M.—Greenfield v. Bruskas, 68 P.2d 921, 41 N.M. 346.

N.Y.—Shepard v. Peck, 5 N.Y.S.2d 865, 254 App.Div. 421.

Tex.—Adams v. Siefferman, Civ. App., 197 S.W.2d 506.

Sole cause

La.—Hollabaugh-Seale Funeral Home v. Standard Acc. Ins. Co., App., 32 So.2d 616—Seale v. Stephens, Employers Cas. Co., Interveners, App., 24 So.2d 651, affirmed 29 So.2d 65, 212 La. 1068—Lively v. State, App., 15 So.2d 617—Sibille v. Highway Ins. Underwriters, App., 12 So.2d 625, followed in 12 So.2d 631—Hemmerling v. Owners' Automobile Ins. Co., App., 151 So. 676.

Ohio.—Schaar v. Blosser, App., 35 N.E.2d 846.

Utah.—Cederloff v. Whited, 169 P.2d 777, 110 Utah 45.

Va.—Mauser v. Hebb, 48 S.E.2d 257, 187 Va. 876.

Wis.—Wendt v. Fintch, 292 N.W. 890, 235 Wis. 220.

Contributing cause

Ill.—Jung v. Dixie Greyhound Lines, 68 N.E.2d 627, 389 Ill.App. 361.

Failure to indicate intention

Cal.—Schomer v. R. L. Craig Co., 31 P.2d 396, 137 Cal.App. 620—Gialdini v. Russell, 25 P.2d 845, 134 Cal. App. 524.

La.—McDonald v. Zurich General Acc. & Liability Ins. Co., App., 25 So.2d 923—Parnell v. Sneed & Sneed, 129 So. 389, 14 La.App. 108.

Wis.—Stenson v. Schumacher, 290 N.W. 285, 234 Wis. 19.

83. Ala.—Watt v. Combs, 12 So.2d 189, 244 Ala. 31, 145 A.L.R. 667, followed in 12 So.2d 197, 244 Ala. 39. Wis.—Monsons v. Euler, 256 N.W. 630, 216 Wis. 133.

84. Ariz.—Herzberg v. White, 66 P.2d 253, 49 Ariz. 313.

Cal.—Miller v. Lyons, 252 P. 330, 200 Cal. 232—Williams v. McDowell, 89 P.2d 155, 32 Cal.App.2d 49.

Conn.—Block v. Pascucci, 149 A. 210, 111 Conn. 58.

D.C.—Bullock v. Dahlstrom, Mun. App., 46 A.2d 370.

Ill.—Belcher v. Citizens Coach Co., 64 N.E.2d 747, 327 Ill.App. 618—Mayhak v. Edward J. Meyers Co., 28 N.E.2d 343, 306 Ill.App. 284.

La.—St. Pierre v. National Casualty Co., App., 2 So.2d 93.

Minn.—Ball v. Gessner, 240 N.W. 100, 185 Minn. 105.

Mo.—Weber v. Evans, App., 15 S.W.2d 370.

Tex.—Safeway Stores of Texas v. Webb, Civ.App., 164 S.W.2d 868, error refused.

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

Wis.—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680—Felix v. Soderberg, 240 N.W. 836, 207 Wis. 76.

Double parking

Cal.—Harrison v. Gamatero, 125 P.2d 904, 52 Cal.App.2d 178—McKay v. Hedger, 34 P.2d 221, 139 Cal.App. 266—Lucke v. Pacific Electric Ry. Co., 19 P.2d 263, 129 Cal.App. 707.

85. Cal.—Callison v. Dondero, 124 P.2d 852, 51 Cal.App.2d 403—Woods v. Walker, 124 P.2d 844, 51 Cal.App.2d 307—McNown v. Pacific Freight Lines, 122 P.2d 582, 50 Cal.App.2d 221.

La.—Coffey v. Lalanne, App., 20 So.2d 614, opinion adhered to 24 So.2d 658.

Mass.—Prout v. Mystic Motor Transp. Co., 58 N.E.2d 121, 317 Mass. 349—Cutler v. Johansson, 28 N.E.2d 529, 306 Mass. 466.

Minn.—Duff v. Bemidji Motor Service Co., 299 N.W. 196, 210 Minn. 456.

N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200.

Tex.—D. & H. Truck Line v. Hopson, Civ.App., 4 S.W.2d 1018, error refused.

86. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

Cal.—Malinson v. Black, 188 P.2d 788, 83 Cal.App.2d 375.

or regulations generally.⁸⁷

Evidence has also been held sufficient to show that the injuries were proximately caused by neg-

ligence or other misconduct in driving on the wrong side of a street or highway,⁸⁸ disregarding a traffic signal,⁸⁹ operating the vehicle while intoxicated,⁹⁰

Ill.—Howard v. Ind, 50 N.E.2d 769, 320 Ill.App. 338.

Iowa.—Hunter v. Irwin, 263 N.W. 84, 220 Iowa 693.

Me.—Stairs v. Quincy, 27 A.2d 911, 139 Me. 133.

N.J.—Henderson v. Abbotts Alderney Dairies, 156 A. 20, 9 N.J.Misc. 802.

N.M.—Bunton v. Hull, 177 P.2d 168, 51 N.M. 5.

Ohio.—Peltier v. Smith, 66 N.E.2d 117, 78 Ohio App. 171—Hayhurst v. Embrey, App, 65 N.E.2d 660.

Tex.—Dedear v. James, Civ.App., 172 S.W.2d 535, error refused.

Vt.—Gregoire v. Willett, 8 A.2d 660, 110 Vt. 459.

Wash.—Angelo v. Lawson, 173 P.2d 124, 26 Wash.2d 198—Weaver v. McClintock-Trunkey Co., 111 P.2d 570, 8 Wash.2d 154 opinion adhered to 114 P.2d 1004, 8 Wash.2d 154.

Wis.—Landskron v. Hartford Accident & Indemnity Co., 6 N.W.2d 178, 241 Wis. 445—Kasper v. Kocher, 4 N.W.2d 158, 240 Wis. 629.

87. U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

La.—Dobrowski v. Henderson, 130 So. 237, 15 La.App. 79.

N.H.—Dube v. Bickford, 31 A.2d 64, 92 NH 362.

N.Y.—McMahon v. Purvis, 7 N.Y.S. 2d 73, 255 App Div. 827.

Va.—Richmond Coca-Cola Bottling Works v. Andrews, 3 S.E.2d 419, 173 Va. 240.

88. U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

La.—Dobrowski v. Henderson, 130 So. 237, 15 La.App. 79.

N.H.—Dube v. Bickford, 31 A.2d 64, 92 NH 362.

N.Y.—McMahon v. Purvis, 7 N.Y.S. 2d 73, 255 App Div. 827.

Va.—Richmond Coca-Cola Bottling Works v. Andrews, 3 S.E.2d 419, 173 Va. 240.

89. U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

La.—Dobrowski v. Henderson, 130 So. 237, 15 La.App. 79.

N.H.—Dube v. Bickford, 31 A.2d 64, 92 NH 362.

N.Y.—McMahon v. Purvis, 7 N.Y.S. 2d 73, 255 App Div. 827.

Va.—Richmond Coca-Cola Bottling Works v. Andrews, 3 S.E.2d 419, 173 Va. 240.

90. U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

La.—Dobrowski v. Henderson, 130 So. 237, 15 La.App. 79.

N.H.—Dube v. Bickford, 31 A.2d 64, 92 NH 362.

N.Y.—McMahon v. Purvis, 7 N.Y.S. 2d 73, 255 App Div. 827.

Va.—Richmond Coca-Cola Bottling Works v. Andrews, 3 S.E.2d 419, 173 Va. 240.

91. U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

La.—Dobrowski v. Henderson, 130 So. 237, 15 La.App. 79.

N.H.—Dube v. Bickford, 31 A.2d 64, 92 NH 362.

N.Y.—McMahon v. Purvis, 7 N.Y.S. 2d 73, 255 App Div. 827.

Va.—Richmond Coca-Cola Bottling Works v. Andrews, 3 S.E.2d 419, 173 Va. 240.

(5) Parking regulation.

U.S.—Jaggers v. Southeastern Greyhound Lines, C.C.A.Tenn., 126 F.2d 762.

Cal.—Thompson v. Stevenson, 126 P.2d 127, 52 Cal.App.2d 250.

Pa.—Community Fire Co. v. Pennsylvania Power & Light Co., 92 Pa. Super. 304.

88. U.S.—Trucking, Inc. v. Krotzer, C.C.A.Ohio, 106 F.2d 447—Peach v. U. S., D.C.Pa., 75 F.Supp. 218—Sanders v. Leech, D.C.Fla., 64 F. Supp. 600.

Ariz.—Haas v. Morrow, 97 P.2d 204, 54 Ariz. 455.

Cal.—Scaletta v. Silva, 126 P.2d 898, 52 Cal.App.2d 730—Stetson v. Blum, 37 P.2d 128, 1 Cal.App.2d 593—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 132—Levy v. Berner, 293 P. 896, 110 Cal.App 65

D.C.—Shu v. Basinger, Mun.App., 57 A.2d 295.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

Ill.—Griffin v. Chicago-Rockford Motor Exp., 76 N.E.2d 528, 332 Ill.App. 663—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12—Stahnke v. American Carloading Corporation, 31 N.E.2d 323, 308 Ill.App. 318—Susenlehl v. Red River Lumber Co., 28 N.E.2d 743, 306 Ill.App. 430—Votrian v. Quick, 271 Ill.App. 259.

Ind.—Keeshin Motor Express Co. v. Sowers, 48 N.E.2d 459, 221 Ind. 440.

Ky.—Southeastern Greyhound Lines v. Donohue, 182 S.W.2d 328, 298 Ky. 139—Davidson v. Ratliffe, 126 S.W.2d 827, 277 Ky. 371—Williams v. Farmer's Adm'x, 115 S.W.2d 589, 273 Ky. 131.

La.—Hardaway v. Hilburn, App., 34 So.2d 283—Miller v. Hayes, App., 29 So.2d 396—Ashley v. Kolb, App., 9 So.2d 865—Cultr v. Jones, App., 9 So.2d 859—Gillespie v. Louisiana Long Leaf Lumber Co., App., 185 So. 116—Watson v. Hightower, App., 181 So. 612—Pitre Bros. v. Malbrough, App., 181 So. 84—Rogers v. Silver Fleet System of Memphis, App., 180 So. 445—Shaffer v. Southern Bell Telephone & Telegraph Company, App., 160 So. 439, annulled 165 So. 651, 184 La. 158—Frye v. Interurban Transp. Co., 139 So. 670, 19 La.App. 510—Pierce v. Leonard Truck Lines, 138 So. 199, 18 La.App. 448—Hebert v. Cullom, 136 So. 663, 17 La.App. 582—Felder v. Horn, 135 So. 121, 16 La.App. 603—Allen v. Campbell, 134 So. 717, 17 La.App. 139—Pruett v. Brantley, 127 So. 2, 13 La.App. 208—Goodson v. Schuster's Wholesale Produce Co., 120 So. 689, 10 La.App. 486.

Mich.—In re Olney's Estate, 14 N.W. 2d 574, 309 Mich. 65—Warwick v. Blackney, 261 N.W. 310, 272 Mich. 231.

Minn.—Peterson v. Miller, 235 N.W. 15, 182 Minn. 532—Harsch v. Breilien, 232 N.W. 710, 181 Minn. 400.

N.Y.—Tonry v. De Paolo, 46 N.Y.S. 2d 457, 267 App Div. 877, appeal denied 47 N.Y.S.2d 485, 267 App.Div. 906.

Tex.—Collins v. Smith, Civ.App., 170 S.W.2d 562, affirmed 175 S.W.2d 407, 142 Tex. 36—Western States Grocery Co. v. Smith, Civ.App., 114 S.W.2d 419, error dismissed.

Wash.—Bernard v. Portland Seattle Auto Freight, 118 P.2d 167, 11 Wash.2d 17—Dyer v. Wallner, 65 P.2d 1281, 189 Wash. 486—Di Denti v. Carrel, 1 P.2d 901, 164 Wash. 79.

Wis.—Uren v. Purty Dairy Co., 32 N.W.2d 615, 252 Wis. 446, rehearing denied 33 N.W.2d 213, 252 Wis. 446—Rberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341.

42 C.J. p 1237 note 43 [a] (3).

Sole cause

Cal.—De La Motte v. Rucker, 130 P. 2d 444, 55 Cal.App.2d 226.

Conn.—Sosnowski v. Lenox, 53 A.2d 388, 133 Conn 624

La.—Thomas v. Stewart, App., 29 So. 2d 604, followed in 29 So.2d 606 and 29 So.2d 607—Coffey v. Baham, App., 29 So.2d 494—Williams v. Geo. A. Hormel & Co., App., 195 So. 634—Dozart v. F. Strauss & Sons, App., 180 So. 654—Andrews v. Foster, App., 169 So. 103, amended 170 So. 563.

N.Y.—Brooks v. McNutt Auto Delivery Co., 214 N.Y.S. 562, 126 Misc. 730.

Or.—Wilson v. Bittner, 276 P. 268, 129 Or. 122, 64 A.L.R. 132.

Wash.—Kellerher v. Porter, 189 P. 2d 223, 29 Wash.2d 650—Purdie v. Brunswick, 146 P.2d 809, 20 Wash. 2d 292.

W.Va.—Marshall v. Conrad, 191 S.E. 553, 118 W.Va. 321.

Contributing cause

Ill.—Hirning v. Contracting & Material Co., 38 N.E.2d 793, 312 Ill. App. 655

Md.—McClenny v. Przyborowski, 32 A.2d 365, 182 Md. 95.

Wis.—Quinnell v. Bowen, 16 N.W.2d 415, 246 Wis. 16—Piesik v. Deuster, 11 N.W.2d 358, 243 Wis. 598.

Wyo.—Johnston v. Wortham Machinery Co., 151 P.2d 89, 60 Wyo. 301.

89. Va.—Dickens v. Goode, 42 S.E.2d 863, 186 Va. 388.

90. U.S.—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8, certiorari denied

overloading,⁹¹ failure to signal intention to start, | tain proper speed or control.⁹³
stop, back, or change course,⁹² or failing to main- | Evidence has also been held sufficient to show

- Milburn v. Heald, 42 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1754, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.Ed. 1754.
- Cal.—Kropin v. Huston, 179 P.2d 575, 79 Cal.App.2d 332—Smith v. Baker, 57 P.2d 960, 14 Cal.App.2d 10—Noble v. Key System, 51 P.2d 887, 10 Cal.App.2d 132—Guisti v. Carloti, 50 P.2d 88, 9 Cal.App.2d 588.
- La.—Orphey v. Sutton, App., 8 So.2d 768, followed in Mitchell v. Sutton, 3 So.2d 769 and Andrus v. Sutton, 3 So.2d 770—Bass v. Burnley, App., 193 So. 200—Allen v. Metropolitan Casualty Ins. Co. of New York, App., 190 So. 163.
- Tex.—Peveto v. Smith, 133 S.W.2d 572, 134 Tex. 308.
91. Conn.—Wells v. Lavitt, 160 A. 617, 115 Conn. 117.
92. Cal.—Pewitt v. Riley, 163 P.2d 873, 27 Cal.2d 310.
- Conn.—Rivkin v. Gouveia, 34 A.2d 634, 130 Conn. 378—McDowell v. Federal Tea Co., 23 A.2d 512, 128 Conn. 437—Do Munda v. Loomis, 16 A.2d 578, 127 Conn. 313—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.
- Ga.—Co-op Cab Co. v. Preston, 21 S. E.2d 251, 67 Ga.App. 580.
- Ill.—Beard v. Zindars, 25 N.E.2d 136, 303 Ill.App. 337.
- Ind.—Drewrys Limited, U. S. A. v. Crippen, 44 N.E.2d 1006, 113 Ind. App. 120.
- La.—Fitch v. Brice, App., 29 So.2d 195—Mallard v. State, App., 194 So. 447.
- Okl.—Smith v. Rohl, 126 P.2d 61, 190 Okl. 603.
- Pa.—Collichio v. Williams, 166 A. 857, 311 Pa. 553.
- Tex.—Le Master v. Fort Worth Transit Co., 160 S.W.2d 224, 138 Tex. 512—Wells v. Ford, Civ.App., 118 S.W.2d 420, error dismissed—O. K. Theater Corporation v. Reh-meyer, Civ.App., 115 S.W.2d 985, error dismissed.
93. U.S.—Blaszky v. Eastern Auto Forwarding Co., C.C.A.N.Y., 134 F. 2d 600—Atlantic Greyhound Corporation v. Loudermilk, C.C.A.Ga., 110 F.2d 596—Bickley v. U. S., D. C.S.C., 77 F.Supp. 454.
- Cal.—Backus v. Sessions, 110 P.2d 51, 17 Cal.2d 380—Flores v. Fitzgerald, 263 P. 369, 204 Cal. 374—Rodriguez v. Savage Transp. Co., 175 P.2d 37, 77 Cal.App.2d 162—McDougall v. Morrison, 130 P.2d 149, 55 Cal.App. 2d 92—McWane v. Hetherington, 125 P.2d 85, 51 Cal.App.2d 508—Haas v. Jones, 85 P.2d 579, 29 Cal.App.2d 650—Hilbert v. Olney, 61 P.2d 941, 17 Cal.App.2d 135—Smith v. Schwartz, 57 P.2d 1386, 14 Cal.App. 2d 160—State Compensation Ins. Fund v. Dalton, 56 P.2d 962, 13 Cal.App.2d 284—Laubscher v. Blake, 46 P.2d 836, 7 Cal.App.2d 376—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600—Davis v. Brown, 267 P. 754, 92 Cal.App. 20.
- Colo.—Dobbs v. Sugiooka, 185 P.2d 784, 117 Colo. 218.
- Conn.—Fogarty v. E. J. Kelley Co., 7 A.2d 851, 125 Conn. 605—Palmer v. R. & H. Pant Co., 167 A. 94, 117 Conn. 124.
- Fla.—Florida Motor Lines v. Casad, 124 So. 180, 98 Fla. 720, followed in 124 So. 181, 98 Fla. 726.
- Ga.—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga.App. 383.
- Ill.—Winson v. Fischer, 77 N.E.2d 48, 333 Ill.App. 222—Crisler v. Zahart, 47 N.E.2d 542, 318 Ill.App. 220—O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 574.
- Ind.—Conner v. Jones, 59 N.E.2d 577, 115 Ind.App. 660, rehearing denied 60 N.E.2d 534, 115 Ind.App. 660—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94—Acton v. Lowery, 34 N.E.2d 972, 109 Ind.App. 581.
- Kan.—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320—McCoy v. Fleming, 113 P.2d 1074, 153 Kan. 780.
- Ky.—Pickering v. Simpkins, 111 S.W.2d 650, 271 Ky. 288—Hunt v. Whitlock's Adm'r, 82 S.W.2d 364, 259 Ky. 286.
- La.—Law v. Oste land, 3 So.2d 680, 198 La. 421—Chandler v. Sentell, App., 35 So.2d 260—Guler v. Humphries, App., 34 So.2d 637—Hardaway v. Hilburn, App., 31 So.2d 283—Rachal v. Balhazar, App., 32 So.2d 483—Tatum Bros v. Her-rin Transp. Co., App., 29 So.2d 799—Rubenstein v. American Fidelity & Cas Ins Co., App., 22 So.2d 842—Blanke v. Miranne, App., 11 So.2d 264—Camden Fire Ins Ass'n v. Fontenot, App., 11 So.2d 99—Cottons, Inc., v. Sullivan, Long & Hagerty, App., 10 So.2d 505—Simon v. Harrison, App., 200 So. 476, followed in 200 So. 481—Harrelson v. McCook, App., 198 So. 532—White v. American Employers Ins. Co., App., 197 So. 803—McDaniel v. Hargrove, App., 197 So. 292—Bunning v. Brock, App., 191 So. 551—Shirley v. Caldwell Bros. & Hart, App., 183 So. 581—Borman v. Lafargue, App., 183 So. 548—Jacobs v. Brooks, App., 182 So. 349—Session v. Kinchen, App., 178 So. 635—Fuld v. Maryland Casualty Co., App., 178 So. 201, followed in 178 So. 205 and 178 So. 206—Tircuit v. Isom, App., 169 So. 98—Penton v. Fisher, App., 155 So. 35, followed in Entrevia v. Fisher, 155 So. 41 and Nettles v. Fisher, 155 So. 41—Ball v. Greyhound
- Vans, App., 154 So. 650—Inge v. Ellis, App., 144 So. 625—McNabb v. Dugas, App., 142 So. 174—Dyer v. Warwick, 140 So. 254, 19 La.App. 354—Allen v. Campbell, 134 So. 717, 17 La.App. 139—Schlesinger v. Foote, 131 So. 717, 14 La.App. 467—Wittenberg v. Massey, 131 So. 708, 14 La.App. 488—Wald v. Board of Com'rs of Port of New Orleans, 124 So. 701, 14 La.App. 337.
- Me.—Plante v. Canadian Nat. Rys., 23 A.2d 814, 138 Me. 215.
- Mass.—Shea v. Butler, 53 N.E.2d 678, 315 Mass. 523—Tookmanian v. Fanning, 31 N.E.2d 536, 308 Mass. 162—Campbell v. Cairns, 20 N.E.2d 427, 302 Mass. 584—Marshall v. Carter, 17 N.E.2d 205, 301 Mass. 372.
- Mich.—Thomas v. Parsons, 270 N.W. 296, 278 Mich. 276—Harding v. Blankenship, 264 N.W. 312, 274 Mich. 118—Collins v. Hull, 240 N.W. 37, 256 Mich. 507.
- Minn.—Berlin v. Kobias, 236 N.W. 307, 183 Minn. 278.
- Miss.—Terry v. Smylie, 133 So. 662, 161 Miss. 31.
- Mo.—Cox v. Reynolds, App., 18 S.W.2d 575—Irwin v. McDougal, 274 S.W. 923, 217 Mo.App. 615.
- Neb.—McKinney v. Wintersteen, 241 N.W. 112, 122 Neb. 679.
- N.M.—Stalcup v. Ruzic, 185 P.2d 298, 51 N.M. 377.
- N.Y.—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App. Div. 1007.
- Pa.—Huey v. Blue Ridge Transp. Co., 39 A.2d 602, 350 Pa. 488—Kotlikoff v. Master, 27 A.2d 35, 345 Pa. 258—Petri v. Pittsburgh Rys. Co., 195 A. 107, 328 Pa. 396.
- R.I.—Barrows v. Neary, 191 A. 721, 58 R.I. 153.
- Tenn.—Hoover Lines v. Whitaker, 120 S.W.2d 983, 22 Tenn.App. 233—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.
- Tex.—Glannukes v. Sfris, 81 S.W.2d 999, 125 Tex. 354—Molter v. Madden, Civ.App., 207 S.W.2d 984—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256, 145 Tex. 283—Wren v. Wilburn, Civ.App., 182 S.W.2d 1007, error refused—Newlin v. Smith, Civ.App., 142 S.W.2d 610, reversed on other grounds 150 S.W.2d 233, 136 Tex. 260—Bantuelle v. Evans, Civ.App., 139 S.W.2d 283—Fuller v. Texas Park Lot, Civ.App., 133 S.W.2d 605—Porter v. Liberty Film Lines, Civ.App., 127 S.W.2d 480, reversed on other grounds Liberty Film Lines v. Porter, 146 S.W.2d 982, 136 Tex. 49—Western States Gro-

that injuries were proximately caused by negligence or other misconduct in improperly entering | or traversing an intersection,⁹⁴ or in improperly

cery Co. v. Smith, Civ.App., 114 S.W.2d 419, error dismissed—Thurman v. Chandler, Civ.App., 52 S.W.2d 315, reversed on other grounds 81 S.W.2d 489, 125 Tex. 34—Wright v. Maddox, Civ.App., 288 S.W. 560. **Vt.**—Nicholson v. Twin State Fruit Corporation, 29 A.2d 819, 113 Vt. 59.

Va.—Stallard v. Atlantic Greyhound Lines, 192 S.E. 800, 169 Va. 223. **Wash.**—Hardman v. Younkers, 131 P.2d 177, 15 Wash.2d 483, 151 A.L.R. 868—Barlow v. Derelko, 63 P.2d 371, 188 Wash. 495.

Wis.—Dinger v. McCoy Transp. Co., 29 N.W.2d 60, 251 Wis. 265—Zeinemann v. Gasser, 29 N.W.2d 49, 251 Wis. 238—Kleiner v. Johnson, 23 N.W.2d 467, 249 Wis. 148—Barrus v. Duxstad, 20 N.W.2d 548, 247 Wis. 647—Kasper v. Kocher, 4 N.W.2d 158, 240 Wis. 629—Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400—Duane v. Feltus, 283 N.W. 299, 229 Wis. 655—Forbes v. Forbes, 277 N.W. 112, 226 Wis. 477—Baird v. Edmunds, 276 N.W. 306, 226 Wis. 209—Wright v. Buckley, 235 N.W. 417, 204 Wis. 520, rehearing denied and mandate amended, 236 N.W. 378, 204 Wis. 520—Praach v. Praach, 228 N.W. 745, 200 Wis. 353.

43 C.J. p 1237 note 43 [a] (5), (7).

Sole cause

US—Peach v. U. S., D.C.Pa., 75 F.Supp. 218—Hebert v. U. S., D.C. La., 39 F.Supp. 267.

Cal.—Dorr v. Rehkopf, 95 P.2d 461, 35 Cal.App.2d 366—Laubscher v. Blake, 46 P.2d 836, 7 Cal.App.2d 376.

Conn.—Sosnowski v. Lenox, 53 A.2d 388, 133 Conn. 624—Dugan v. Byrrolly Transp. Co., 185 A. 85, 121 Conn. 372.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

La.—Mason v. Price, App., 32 So.2d 853—Droddy v. Southern Bus Lines, App., 26 So.2d 761—Mure v. Chambley, App., 16 So.2d 276—Phillips v. New Amsterdam Casualty Co., App., 6 So.2d 98—Pendola v. State, App., 4 So.2d 28, followed in Lococo v. State, 4 So.2d 32—Goynes v. St. Charles Dairy, App., 197 So. 819—Ayres v. Wyatt, App., 185 So. 84—Lambert v. Conrad, App., 152 So. 93—Bethancourt v. Bayhl, App., 141 So. 111—Laughlin v. Sullivan, 131 So. 687, 14 La.App. 491—Jacoby v. Gallaher, 126 So. 86, 12 La.App. 477.

N.Y.—Naylor v. State, 40 N.Y.S.2d 587.

Ohio.—Meuer v. Doerflein, 6 N.E.2d 948, 53 Ohio App. 536.

Okl.—Eagle-Picher Mining & Smelting Co. v. Drinkwine, 141 P.2d 66, 192 Okl. 662.

Tenn.—Young v. City of Nashville, 176 S.W.2d 377, 26 Tenn.App. 658.

Wash.—Kellerher v. Porter, 189 P.2d 223, 29 Wash.2d 650.

Wis.—Klas v. Fenske, 22 N.W.2d 596, 248 Wis. 534.

Contributing cause

Cal.—Adran v. Guyette, 58 P.2d 988, 14 Cal.App.2d 493—Quatacker v. Hutton, 292 P. 140, 108 Cal.App. 606.

Ga.—Patterson v. Jones, 176 S.E. 110, 49 Ga.App. 515.

Ill.—Jung v. Dixie Greyhound Lines, 68 N.E.2d 627, 329 Ill.App. 361.

La.—Smythe v. Great American Indemnity Co., App., 35 So.2d 267—Scott v. Richard, App., 24 So.2d 175, followed in 24 So.2d 180 and 24 So.2d 179—Farnet v. DeCuers, App., 195 So. 797, rehearing denied 196 So. 538—Fugh v. Henritzy, App., 151 So. 668.

Md.—McClenny v. Przyborowski, 32 A.2d 365, 182 Md. 95.

Mich.—Murphy v. Sinen, 274 N.W. 790, 281 Mich. 274.

Mo.—Goggin v. Schoening, App., 199 S.W.2d 87.

N.Y.—McIntyre v. Fisher, 33 N.Y.S.2d 738, 263 App.Div. 1048, affirmed 45 N.E.2d 335, 289 N.Y. 689.

Va.—Murray v. Smithson, 48 S.E.2d 239, 187 Va. 759—Hague v. Valentine, 28 S.E.2d 720, 182 Va. 256—Nicholson v. Garland, 158 S.E. 901, 156 Va. 745.

Wyo.—Kaan v. Kuhn, 187 P.2d 138.

Approaching or negotiating intersection

Ark.—Loda v. Raines, 100 S.W.2d 973, 193 Ark. 513.

Cal.—Pruitt v. Krovitz, 139 P.2d 992, 59 Cal.App.2d 666—Armer v. Dorton, 123 P.2d 94, 60 Cal.App.2d 413—Finley v. Steiner, 104 P.2d 819, 40 Cal.App.2d 331—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272.

Conn.—Ingeneri v. Makris, 37 A.2d 865, 131 Conn. 77—Estabrook v. Main, 147 A. 822, 110 Conn. 271.

Iowa.—Schlotterbeck v. Anderson, 26 N.W.2d 340, 238 Iowa 208.

La.—Golden v. Creole Delicacies, App., 28 So.2d 99—Davilla v. New Orleans Public Service, App., 18 So.2d 357—Olano v. Leathers, App., 2 So.2d 486—O'Conner v. Massachusetts Bonding & Insurance Co., App., 2 So.2d 234—Morris v. Clark, App., 199 So. 437—Tassin v. Downs, App., 190 So. 232—Ford v. Brewer, App., 186 So. 905—Stelly v. Prather, App., 182 So. 171—Wenholz v. New Amsterdam Cas-

ualty Co., App., 181 So. 222—Smith v. City of Alexandria, App., 178 So. 737—Martin v. Toye Bros. Yellow Cab Co., App., 162 So. 257, reheard 164 So. 175—McNeill v. Bougnl, App., 153 So. 352—Loewenberg v. Fidelity Union Casualty Co., App., 147 So. 81—Truxillo v. De Lerno, App., 146 So. 71—Murphy v. Hartley, App., 144 So. 785, followed Hartley v. Murphy, 144 So. 788—Harrison v. Shreveport Yellow Cab Co., App., 142 So. 724—Fossier v. D. H. Holmes Co., 139 So. 709, 19 La.App. 434—Genovese v. Krebs, 138 So. 470, 18 La.App. 639—Hebert v. Cullom, 136 So. 663, 17 La.App. 582—Denham v. Taylor, 131 So. 614, 15 La.App. 545, rehearing denied 132 So. 372, 19 La.App. 814—Chenevert v. Kimball, 129 So. 233, 14 La.App. 83—White v. Thomas Egan's Sons, 128 So. 129, 10 La.App. 780.

N.Y.—Marks v. Thompson, 1 N.Y.S.2d 215.

Okl.—Poston v. Alexander, 132 P.2d 343, 191 Okl. 653.

S.D.—Loffer v. Witte, 28 N.W.2d 698.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

Tex.—Sherwin-Williams Co. of Texas v. Delahoussaye, Civ.App., 124 S.W.2d 870, error dismissed—Meeker v. Teer, Civ.App., 122 S.W.2d 338, error dismissed.

Wash.—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354—Tiosevig v. Wilbourne, 74 P.2d 489, 193 Wash. 21—O'Neil v. Wilshire, 57 P.2d 1234, 186 Wash. 276—Martin v. Brantigan, 38 P.2d 1007, 180 Wash. 60—Thompson v. Florio, 9 P.2d 789, 167 Wash. 495, reheard 12 P.2d 1119, 167 Wash. 495.

Wis.—Jacobson v. Bryan, 12 N.W.2d 789, 244 Wis. 359—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Lurie v. Nickel, 289 N.W. 686, 233 Wis. 420—McGill v. Baumgart, 288 N.W. 799, 233 Wis. 86—Ziemke v. Faber, 266 N.W. 217, 221 Wis. 512.

While drunk

Ark.—Allen v. Ross, 188 S.W.2d 409, 200 Ark. 104.

Cal.—Johnson v. Johnson, 139 P.2d 33, 59 Cal.App.2d 375.

94. U.S.—U. S. v. Goldman, D.C.Pa., 61 F.Supp. 315.

Cal.—Hellman v. Maher, App., 193 P.2d 506.

Ill.—Roberts v. Cipfl, 40 N.E.2d 629, 313 Ill.App. 373.

La.—Glen Falls Ins. Co. v. Copeland, App., 28 So.2d 145—Butler v. O'Neal, App., 26 So.2d 753—Neel v.

entering or traversing a bridge,⁹⁵ or by negligence consisting of a failure to give warning of approach,⁹⁶ intrusting a vehicle to an incompetent driver,⁹⁷ falling asleep,⁹⁸ or failing to maintain a proper lookout.⁹⁹ *Evidence held insufficient.* On the other hand,

Massachusetts Bonding & Insurance Co., App., 13 So.2d 393—Taney v. White Top Cabs, App., 2 So. 2d 281—Folse v. Flynn, App., 200 So. 160—Pier v. Entravia, App., 195 So. 124, followed in Bankston v. Entravia, 195 So. 127 and Chavers v. Entravia, 195 So. 127—Vince v. Burns, App., 192 So. 735—Gares v. Abate, App., 189 So. 165—Wenholz v. New Amsterdam Casualty Co., App., 181 So. 222—Anderson v. Louisiana Power & Light Co., App., 180 So. 243—Balsamo v. Hall, App., 170 So. 402—Tircuit v. Isom, App., 169 So. 98—McCormick & Co. v. Cauley, App., 168 So. 783—Schmidt & Zeigler, Limited, v. Carroll, App., 161 So. 785—Harrison v. Shreveport Yellow Cab Co., App., 142 So. 724.

Me.—Russell v. Nadeau, 29 A.2d 916, 139 Me. 286—Willwerth v. Freeman, 186 A. 428, 134 Me. 499.

Mass.—Hennessey v. Moynihan, 172 N.E. 93, 272 Mass. 165.

Mich.—Knaggs v. Lewis, 283 N.W. 637, 287 Mich. 431—Leader v. Straver, 270 N.W. 280, 278 Mich. 234. Minn.—Duncanson v. Jeffries, 263 N. W. 92, 195 Minn. 347.

N.H.—Moran v. Dumas, 18 A.2d 763, 91 N.H. 336.

Ohio.—Connors v. Dobbs, 66 N.E.2d 546, 77 Ohio App. 247.

Pa.—Curry v. J. M. Willson & Sons, 152 A. 746, 301 Pa. 467—Gaskill v. Melella, 18 A.2d 455, 144 Pa.Super. 78.

R.I.—Fournier v. Goulet, 26 A.2d 480, 68 R.I. 63.

Tex.—Spears Dairy v. Davis, Civ. App., 124 S.W.2d 159.

Wash.—O'Neil v. Wilshire, 57 P.2d 1254, 186 Wash. 276.

Wis.—Meyer v. Niedhoefer & Co., 251 N.W. 237, 213 Wis. 389.

Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.

Failure to yield right of way

Cal.—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272.

Conn.—Decker v. Roberts, 32 A.2d 651, 130 Conn. 174.

La.—Tatar v. Munson, App., 161 So. 361—Fossier v. D. H. Holmes Co., 139 So. 709, 19 La.App. 434—Genovese v. Krebs, 138 So. 470, 18 La. App. 639—McMahon v. Halsall, 137 So. 630, 18 La.App. 1.

Wash.—Boyle v. Lewis, 193 P.2d 332—Mahoney v. Canafax, 162 P.2d 903, 23 Wash.2d 869.

Wis.—Schemm v. Bruch, 29 N.W.2d 66, 251 Wis. 229.

Sole cause

La.—Mason v. Price, App., 32 So.2d 853—Dickinson v. Long Springs Lumber Co., App., 32 So.2d 407—

Kopcs v. Alello, App., 32 So.2d 99, followed in 32 So.2d 101 and 32 So.2d 102—Perkins v. Rusciana, App., 29 So.2d 532.

N.J.—Oliver v. Leonardo, 51 A.2d 129, 135 N.J.Law 210—Iseldyke v. Goldfarb, 22 A.2d 353, 127 N.J.Law 291—Warshawsky v. Liebowitz, 155 A. 780, 9 N.J.Misc. 629.

Va.—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570.

Wis.—Zienke v. Faber, 266 N.W. 217, 221 Wis. 512.

Contributing cause

Ark.—Willbanks v. Laster, 199 S.W. 2d 602, 211 Ark. 88.

Cal.—Truitner v. Knight, 257 P. 447, second case, 83 Cal.App. 664.

La.—Navarrette v. Joseph Laughlin, Inc., App., 20 So.2d 313, reversed on other grounds 24 So.2d 672, 209 La. 417.

Miss.—Baird v. Harrington, 30 So.2d 82.

R.I.—Diets v. United Electric Rys. Co., 21 A.2d 277, 67 R.I. 161.

95. Ala.—Christ v. Spizman, App., 35 So.2d 568.

La.—Hadrick v. Burbank Cooperage Co., App., 177 So. 831.

Tenn.—Texas Co. v. Ingram, 64 S.W. 2d 208, 16 Tenn.App. 267.

Vt.—Page v. McGovern, 3 A.2d 543, 110 Vt. 166.

Wis.—Elkey v. Elkey, 290 N.W. 627, 234 Wis. 149, motion denied 292 N. W. 300, 234 Wis. 149.

96. La.—Jacoby v. Gallaher, 126 So. 86, 12 La.App. 477.

Mo.—Robinson v. Ross, App., 47 S.W. 2d 122.

Pa.—La Posta v. Himmer, 55 A.2d 751.

Tex.—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256—Temple Lumber Co. v. Living, Civ.App., 289 S.W. 746.

42 C.J. p 1237 note 43 [a] (8).

97. Ga.—Crisp v. Wright, 192 S.E. 390, 56 Ga.App. 338.

S.C.—Nettles v. Your Ice Co., 4 S. E.2d 797, 191 S.C. 429.

Defective car

Tex.—Russell Const. Co. v. Ponder, 186 S.W.2d 233, 143 Tex. 412.

98. Conn.—Potz v. Williams, 155 A. 211, 113 Conn. 278.

Ill.—Secrist v. Raffenon, 62 N.E.2d 36, 326 Ill.App. 489.

99. U.S.—Foster v. St. Louis-San Francisco Ry. Co., D.C.Fla., 75 F. Supp. 809.

Cal.—Gates v. McKinnon, 114 P.2d 576, 18 Cal.2d 179—Bedell v. Duniven, 174 P.2d 666, 77 Cal.App.2d 145.

Conn.—Griffin v. Fancher, 20 A.2d 95,

127 Conn. 686, 134 A.L.R. 701—Fogarty v. E. J. Kelley Co., 7 A. 2d 851, 125 Conn. 605.

Ill.—McManaman v. Johns-Manville Products Corp., 73 N.E.2d 741, 331 Ill.App. 178, affirmed 81 N.E.2d 137, 400 Ill. 423.

Ind.—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94—Davis v. Dondanville, 26 N.E.2d 568, 107 Ind.App. 665.

Ky.—Alford v. Beaird, 192 S.W.2d 180, 301 Ky. 512.

La.—Law v. Osterland, 3 So.2d 680, 198 La. 421—Ingram v. State Farm Mut. Auto Ins. Co., App., 35 So.2d 781—Butler v. Humphries, App., 34 So.2d 637—Pitts v. Hayes, App., 27 So.2d 642—Nezat v. General Outdoor Advertising Co., App., 24 So.2d 482—Hartford Fire Ins. Co. v. Romero, App., 5 So.2d 208—O'Conner v. Massachusetts Bonding & Insurance Co., App., 2 So.2d 234—Harrelson v. McCook, App., 198 So. 532—White v. American Employers Ins. Co., App., 197 So. 803—Tassin v. Downs, App., 190 So. 232—Barr v. Fidelity & Casualty Co. of New York, App., 188 So. 521—Ford v. Brewer, App., 186 So. 905—Shirley v. Caldwell Bros. & Hart, App., 183 So. 581—Borman v. Lafargue, App., 183 So. 548—Fuld v. Maryland Casualty Co., App., 178 So. 201, followed in 178 So. 205, and 178 So. 206—Russell v. Tagliavere, App., 153 So. 44—Pugh v. Henritzy, App., 151 So. 668—Loewenberg v. Fidelity Union Casualty Co., App., 147 So. 81—Harris v. Rhea, App., 144 So. 200—Synigol v. Oury, 134 So. 324, 17 La.App. 163—Cavin v. Haragan, 130 So. 137, 14 La.App. 494—Swedman v. Standard Oil Co. of Louisiana, 125 So. 481, 12 La.App. 359—Wald v. Board of Com'rs of Port of New Orleans, 124 So. 701, 14 La. App. 337.

Mass.—Marshall v. Carter, 17 N.E.2d 205, 301 Mass. 372.

Mo.—Ritzheimer v. Marshall, App., 168 S.W.2d 159.

Mont.—Boepple v. Mohalt, 54 P.2d 857, 101 Mont. 417.

N.H.—Robbins v. Green, 42 A.2d 690, 93 N.H. 384—Baker v. Salvation Army, 12 A.2d 514, 91 N.H. 1.

Pa.—Volz v. Dresser, 28 A.2d 493, 150 Pa.Super. 371.

S.D.—Loffer v. Witte, 28 N.W.2d 698.

Tex.—Molter v. Madden, Civ.App., 207 S.W.2d 984—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256—Rojas v. Vuocolo, Civ.App., 177 S. W.2d 957, reversed on other grounds 177 S.W.2d 962, 142 Tex.

or leaving the vehicle in the highway,⁵ violating a statute, ordinance, or regulation,⁶ driving on the wrong side of a road or highway,⁷ turning,⁸ failure to signal intention to stop, back, or change course,⁹ failure to give warning of approach,¹⁰ failure to maintain proper lookout,¹¹ failure to maintain proper speed and control,¹² driving while

under the influence of liquor,¹³ or overcrowding the front seat.¹⁴

Equipment and lights. In particular cases evidence has been held sufficient to show that the injuries were proximately caused by negligence or other misconduct with respect to lights,¹⁵ brakes,¹⁶ or other equipment.¹⁷ On the other hand, evidence

8. Minn.—Gelsen v. Luce, 242 N.W. 8, 185 Minn. 479.

N.Y.—Reardon v. City of New Rochelle, 272 N.Y.S. 399, 151 Misc. 812—Naylon v. State, 40 N.Y.S.2d 587.

Pa.—Ennis v. Atkin, 47 A.2d 217, 354 Pa. 165.

Va.—Dixon v. Einstein, 198 S.E. 881, 171 Va. 205.

Wis.—Hoffmann v. Krause, 20 N.W. 2d 546, 247 Wis. 565.

6. Cal.—Wohlenberg v. Malcewicz, 133 P.2d 12, 56 Cal.App.2d 508—Werk v. Rehkopf, 95 P.2d 464, 35 Cal.App.2d 356.

La.—Bethancourt v. Bayhi, App., 141 So. 111.

R.I.—Pimpare v. McNamara, 193 A. 513, 58 R.I. 515.

7. U.S.—O'Hara v. Dodge Bros., D. C.Nev., 35 F.Supp. 792.

Iowa.—Scoville v. Clear Lake Bakery, 239 N.W. 110, 213 Iowa 534.

La.—Tucker v. Snyder, App., 30 So 2d 160—Birdwell v. Gayle, 127 So. 404, 13 La.App. 421.

Md.—State, to Use of Balderston, v. Hopkins, 196 A. 91, 173 Md. 321.

N.C.—Tysinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717.

Wis.—Swinkels v. Wisconsin Michigan Power Co., 287 N.W. 1, 221 Wis. 280.

Sole cause

La.—Thomas v. Standard Acc. Ins. Co., App., 27 So.2d 394.

2. Conn.—Estabrook v. Main, 147 A. 822, 110 Conn. 271.

La.—Angelo v. Johns, 127 So. 95, 13 La.App. 105.

9. Cal.—De Vito v. Peterson, 25 P.2d 19, 134 Cal.App. 100.

Conn.—Clarieglio v. Jonas, 167 A. 828, 117 Conn. 665.

Ill.—Barthelman v. Braun, 278 Ill. App. 384.

Okl.—Eagle-Picher Mining & Smelting Co. v. Drinkwine, 141 P.2d 66, 192 Okl. 662.

Tex.—Airline Motor Coaches v. Cleveland, 199 S.W.2d 847, refused no reversible error.

10. Cal.—North v. Vinton, 61 P.2d 950, 17 Cal.App.2d 214.

Ill.—Wall v. Greene, 52 N.E.2d 303, 321 Ill.App. 161.

Iowa.—Lauxman v. Tisher, 239 N.W. 675, 213 Iowa 654, followed in Jones v. Tisher, 239 N.W. 676.

11. Tex.—Kindle v. Armstrong Packing Co., Civ.App., 103 S.W.2d 471.

Wis.—Bourestom v. Bourestom, 285 N.W. 426, 231 Wis. 666—Zeller v. Zeller, 275 N.W. 908, 226 Wis. 410—Watkins v. Watkins, 245 N.W. 695, 210 Wis. 606—Balvold v. Pinnow, 208 N.W. 466, 189 Wis. 535.

12. Cal.—Gaston v. Hisashi Tsuruda, 43 P.2d 355, 5 Cal.App.2d 639.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

Ky.—Knecht v. Buckshorn, 25 S.W.2d 727, 233 Ky. 329.

La.—McDonald v. Zurich General Acc. & Liability Ins. Co., App., 25 So.2d 923—Cox v. Louisiana Dept. of Highways, App., 25 So.2d 824—Babington v. Burris, App., 7 So.2d 650—Hudgins v. Gage, App., 194 So. 105, followed in Dance v. Gage, 194 So. 108—Haley v. Black, App., 152 So. 805—Carter v. Carraway, 138 So. 143, 18 La.App. 249.

Miss.—Frazier v. Hull, 127 So. 775, 157 Miss. 303.

N.Y.—Thibodeau v. Gerosa Haulage & Warehouse Corporation, 300 N.Y. S. 686, 252 App.Div. 615, affirmed 16 N.E.2d 98, 278 N.Y. 551.

Pa.—Ondrusek v. Zahn, 52 A.2d 461, 356 Pa. 537.

S.C.—Cummings v. Tweed, 10 S.E.2d 322, 195 S.C. 173.

Tex.—Renner v. National Biscuit Co., Civ.App., 173 S.W.2d 332, error refused—Ramirez v. Salinas, Civ. App., 30 S.W.2d 891, error dismissed 117 S.W.2d 56, 131 Tex. 537—Owings v. Commerce Farm Credit Co., Civ.App., 29 S.W.2d 871.

Vt.—Gould v. Gould, 6 A.2d 24, 110 Vt. 324.

Wash.—Woodward v. Simmons, 108 P.2d 637, 7 Wash.2d 10.

Wis.—Martin v. Barry Transfer & Storage Co., 27 N.W.2d 719, 250 Wis. 574—Stoll v. Andro, 26 N.W. 2d 162, 250 Wis. 26—Langworthy v. Reisinger, 23 N.W.2d 482, 249 Wis. 24, followed in 23 N.W.2d 485, 249 Wis. 29—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1—Struck v. Vetter, 290 N.W. 131, 233 Wis. 540—Wobosel v. Lee, 243 N.W. 425, 209 Wis. 51—Meredit v. City of Milwaukee, 236 N.W. 112, 204 Wis. 344.

Wyo.—O'Mally v. Eagan, 2 P.2d 1063, 43 Wyo. 233, 77 A.L.R. 582, rehearing denied O'Malley v. Eagan, 5 P.2d 276, 43 Wyo. 350—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.

13. Mass.—Reeves v. Margey, 76 N.E.2d 314, 321 Mass. 752.

14. Or.—Ervast v. Sterling, 68 P.2d 137, 156 Or. 432.

15. Cal.—Bays v. Clugston, 161 P. 2d 953, 71 Cal.App.2d 55—Shimizu v. Kurtz, 111 P.2d 1, 43 Cal.App.2d 471—Furuta v. Randall, 62 P.2d 157, 17 Cal.App.2d 384—Chalmers v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Ga.—Bell v. Lewis, 38 S.E.2d 686, 74 Ga.App. 26.

Ill.—Howard v. Ind, 50 N.E.2d 769, 320 Ill.App. 338.

Ind.—Winder & Son v. Blaine, 29 N.E.2d 987, 218 Ind. 68.

La.—Pittman v. Smith, App., 34 So. 2d 639.

Mass.—Tevyaw v. Hemingway Bros Interstate Trucking Co., 188 N.E. 232, 284 Mass. 441.

N.Y.—Gibson v. State, 21 N.Y.S.2d 362, 259 App.Div. 1104.

Okl.—Fairmont Creamery Co. v. Rogers, 116 P.2d 983, 189 Okl. 320.

Pa.—Craig v. Gottlieb, 55 A.2d 573, 161 Pa.Super. 526—Teggart v. Magie & Roth, 9 Fay L.J. 150, 13 Som.Leg J. 116.

Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.

Tex.—Ramirez v. Salinas, 117 S.W. 2d 56, 131 Tex. 537—J. S. Abercrombie Co. v. Delcomyn, Civ.App., 116 S.W.2d 1105, reversed on other grounds 135 S.W.2d 978, 134 Tex. 490—Ramirez v. Salinas, Civ.App., 90 S.W.2d 891, error dismissed 117 S.W.2d 56, 131 Tex. 537—Pennington Produce Co. v. Wonn, Civ.App., 49 S.W.2d 482, error refused.

Utah.—Knight v. Wessler, 248 P. 132, 67 Utah 354.

Wis.—Van Gilder v. Gugel, 265 N.W. 706, 220 Wis. 612, 105 A.L.R. 824. 42 C.J. p 1237 note 43 [a] (1).

16. Mass.—Isaacson v. Boston, W. & N. Y. St. Ry. Co., 180 N.E. 118, 278 Mass. 378.

Neb.—Ziskovsky v. Miller, 231 N.W. 809, 120 Neb. 255.

Pa.—Parker v. Philadelphia Rapid Transit Co., 162 A. 664, 308 Pa. 209.

Tenn.—Garis v. Eberling, 71 S.W.2d 215, 18 Tenn.App. 1.

Tex.—Russell Const. Co. v. Ponder, 186 S.W.2d 233, 143 Tex. 412—Sturtevant v. Pagel, 130 S.W.2d 1017, 134 Tex. 46.

17. Cal.—Graban v. Gonzales, 26 P. 2d 39, 134 Cal.App. 657.

La.—Smith v. Monroe Grocer Co., App., 179 So. 495—Sears v. Inter-

has been held insufficient to show that the injuries were proximately caused by defective or inadequate equipment¹⁸ or by negligence or misconduct with respect to the condition of the car or condition or use of its equipment.¹⁹

Unavoidable accident. In various cases evidence has been held sufficient to disprove, or at least insufficient to prove, that the injuries were the result of an avoidable accident;²⁰ but other evidence has been held sufficient to show that the injuries were the result of such an accident.²¹

§ 520. — Contributory Negligence

- a. General rules
- b. Particular persons; persons in particular situations
- c. Collisions between motor vehicles at intersections

urban Transp. Co., 125 So. 748, 14 La.App. 343.

Tex.—Carey v. Pure Distributing Corporation, 124 S.W.2d 847, 133 Tex. 31.

12. Fla.—Ford Motor Co. v. Floyd, 188 So. 601, 137 Fla. 301.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

La.—Sexton v. Stiles, 130 So. 821, 15 La.App. 148.

Minn.—Cullen v. Pearson, 253 N.W. 117, 191 Minn. 136, reargument denied 254 N.W. 631, 191 Minn. 136.

Miss.—Murphy v. Villingham, 133 So. 213, 160 Miss. 94.

Mont.—Burns v. Eminger, 276 P. 437, 84 Mont. 397.

N.C.—Beaman v. Duncan, 46 S.E.2d 707, 228 N.C. 600.

Wash.—Krings v. City of Bremerton, 155 P.2d 493, 22 Wash.2d 220.

W.Va.—Clise v. Prunty, 152 S.E. 201, 108 W.Va. 635.

Wis.—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680—Watkins v. Watkins, 245 N.W. 695, 210 Wis. 606.

Defective equipment as sole cause held not sufficiently shown.—Kemp v. Stephenson, 247 N.Y.S. 650, 139 Misc. 38.

19. Cal.—Barber v. Gordon, 295 P. 377, 111 Cal.App. 279.

La.—Portier v. Picou, App., 3 So.2d 295.

Brakes

Tex.—Ramirez v. Salinas, Civ.App., 90 S.W.2d 891, error dismissed 117 S.W.2d 56, 131 Tex. 537.

Lights

La.—Odom v. Long, App., 26 So.2d 709.

N.H.—Wells v. O'Keefe, 18 A.2d 836, 91 N.H. 299.

N.C.—Peoples v. Fulk, 18 S.E.2d 147, 220 N.C. 635.

Va.—Pratt v. Miles, 186 S.E. 27, 166 Va. 478.

Windshield wiper

N.M.—Silva v. Waldie, 82 P.2d 282, 42 N.M. 514

20. Cal.—Temple v. DeMirjian, 125 P.2d 544, 51 Cal.App.2d 559—Bright v. Zahler, 111 P.2d 387, 43 Cal.App.2d 706.

Iowa.—Lorimer v. Hutchinson Ice Cream Co., 249 N.W. 220, 216 Iowa 384.

Ky.—Humphries v. Gray, 203 S.W.2d 8, 305 Ky. 205.

La.—Coffey v. Ouachita River Lumber Co., App., 191 So. 561—Lasseigne v. Kent, App., 142 So. 867.

Mo.—Roberts v. Atlas Life Ins. Co., 163 S.W.2d 369, 236 Mo.App. 1162.

N.H.—Dube v. Bickford, 31 A.2d 64, 92 N.H. 362.

N.Y.—Rovella v. Small, 59 N.Y.S.2d 498, 270 App.Div. 784.

Or.—Maletis v. Portland Traction Co., 83 P.2d 141, 160 Or. 30.

Pa.—DeSantis v. Maddalon, 35 A.2d 72, 348 Pa. 296.

Tex.—Dedear v. James, Civ.App., 172 S.W.2d 535. Error refused—Texas Steel Co. v. Rockholt, Civ.App., 142 S.W.2d 842, error refused—Bantuelle v. Evans, Civ.App., 139 S.W.2d 283—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct—Seinsheimer v. Burkhardt, Civ. App., 93 S.W.2d 1231, modified on other grounds 122 S.W.2d 1063, 132 Tex. 336.

Va.—Carter v. Butler, 42 S.E.2d 201, 186 Va. 186—Driver v. Brooks, 10 S.E.2d 887, 176 Va. 317.

Wash.—Hardman v. Younkers, 131 P.2d 177, 15 Wash.2d 483, 151 A.L.R. 868—Taylor v. Lubetich, 97 P.2d 142, 2 Wash.2d 6.

21. U.S.—Scratchfield v. Kennedy, C. C.A.Okla., 103 F.2d 467.

d. Other collisions

e. Acts in emergencies

f. Proximate cause

g. Last clear chance

a. General Rules

The contributory negligence of one injured by the negligent operation of a motor vehicle, or his freedom from contributory negligence, must be proved by a preponderance of the evidence; circumstantial evidence may be sufficient to prove contributory negligence.

In accordance with the rules relating to the weight and sufficiency of the evidence as to contributory negligence in general, as discussed in the C.J.S. title Negligence §§ 247–250, also 45 C.J. p 1273 note 83–p 1278 note 29, in order to bar recovery by one injured by the negligent operation of a motor vehicle it must appear by a preponderance of the evidence that he was negligent;²² there must

Cal.—La Porte v. Houston, App., 189 P.2d 544—Fernholtz v. Bisbee, 109 P.2d 371, 42 Cal.App.2d 579—Garcia v. Conrad, 104 P.2d 527, 40 Cal. App.2d 167.

Conn.—Baum v. Atkinson, 3 A.2d 305, 125 Conn. 72.

La.—Sanders v. Cascio, App., 24 So. 2d 884—Campbell v. F. Hollier & Sons, App., 4 So.2d 576—Lococo v. Pendola, App., 171 So. 125.

Minn.—Marsh v. Henriksen, 7 N.W. 2d 387, 213 Minn. 500—Wilkinson v. Turnbull, 206 N.W. 950, 166 Minn. 29.

N.Y.—Higgins v. Mason, 243 N.Y.S. 630, 230 App.Div. 149, affirmed 174 N.E. 77, 255 N.Y. 104.

N.C.—Pace v. Reliable Transport Co., 5 S.E.2d 547, 216 N.C. 804—Jones v. Bagwell, 160 S.E. 583, 201 N.C. 831—Cranfield v. City of Winston-Salem, 158 S.E. 241, 200 N.C. 680.

Ohio.—Haman v. Goodman, 17 Ohio Supp. 30.

Tex.—Hankamer v. Roberts Undertaking Co., 141 S.W.2d 587, 135 Tex. 139—Blanton v. E. & L. Transport Co., Civ.App., 203 S.W.2d 312, reversed on other grounds 207 S.W.2d 368, 146 Tex. 377—Dedear v. James, Civ.App., 184 S.W.2d 319, error refused.

Wash.—Tomblinson v. Wise, 300 P. 1056, 163 Wash. 341.

Wis.—Seligman v. Orth, 236 N.W. 115, 205 Wis. 199.

22. Cal.—Samuelson v. Siefert, 144 P. 2d 879, 62 Cal.App.2d 320—Killough v. Lee, 40 P.2d 897, 4 Cal.App.2d 309.

Ill.—Loeb v. Corrie, 65 N.E.2d 28, 327 Ill.App. 660—Blachek v. City Ice & Fuel Co., 85 N.E.2d 416, 311 Ill. App. 1.

La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406—Hero v. Toye Bros. Yellow Cab Co., App., 19 So.2d 887—Coleman v. Meriweth-

be substantial evidence of negligence,²³ and a scintilla of evidence,²⁴ or speculative deductions and conclusions drawn therefrom,²⁵ will not suffice; but it has been held that proof to the satisfaction of the jury is not required.²⁶

Where, as discussed supra § 512, the burden is on the person injured to prove his freedom from contributory negligence, he must do so by a prepon-

derance of the evidence²⁷ or make a prima facie showing of such freedom.²⁸

Contributory negligence or its antithesis, freedom from fault, may be established by circumstantial evidence;²⁹ likewise, the exercise of due care is not required to be established by direct and positive proof,³⁰ although it may be so established,³¹ and it can be inferred from the facts shown to ex-

er Supply Co., App., 1 So.2d 849—Harrelson v. McCook, App., 198 So. 532.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Ohio.—Collins v. Zimmerman, App., 57 N.E.2d 245.

Pa.—Hess v. Stiner, 19 A.2d 560, 144 Pa.Super. 249.

S.D.—Alendal v. Madsen, 275 N.W. 352, 65 S.D. 502.

Tex.—Owl Taxi Service v. Saludis, Civ.App., 122 S.W.2d 226, error dismissed—Galveston Truck Line Corporation v. Moore, Civ.App., 107 S.W.2d 426, error dismissed

Va.—Twyman v. Adkins, 191 S.E. 615, 168 Va. 456—Waynick v. Walrond, 154 S.E. 522, 155 Va. 400, 70 A.L.R. 1014.

Wash.—Boyle v. Lewis, 193 P.2d 332—Davidson v. Huerby, 100 P.2d 1035, 3 Wash.2d 460—O'Neil v. Wilshire, 57 P.2d 1254, 186 Wash. 276.

42 C.J. p 1238 note 49.

Defendant may avail himself of any evidence, by whomsoever produced, to establish contributory negligence.—Lee v. City Brewing Corporation, 18 N.E.2d 628, 279 N.Y. 380.

Fair preponderance of evidence U.S.—Gray v. Dieckmann, C.C.A.N. H., 109 F.2d 382.

Fair preponderance or weight of evidence

U.S.—Warlish v. Miller, D.C.Pa., 73 F.Supp. 593.

Mere possibility of negligence

In absence of evidence, the mere possibility that decedent, who came from behind bus after alighting therefrom and was struck by automobile traveling in opposite direction from bus, may have been guilty of negligence, did not preclude recovery for wrongful death from driver of automobile.—Manor v. Gagnon, 32 A.2d 688, 92 N.H. 435.

Action by guest against host

La.—Leiser v. Thomas, App., 150 So. 81, rehearing refused 150 So. 670.

Rate of speed

Where it is sought to raise the issue of an injured bicyclist's rate of speed as being contributory negligence, the rate of speed is not required to be established with mathematical certainty, but is required to be established with some degree of definiteness so as to allow the qual-

ity of the alleged negligent act to be judged.—Jennison v. Darnielle, Tex Civ.App., 146 S.W.2d 788, error dismissed.

Evidence held insufficient to show contributory negligence

(1) Generally.—Rush v. White, 51 N.Y.S.2d 294, 268 App.Div. 940.

(2) Infant plaintiff.—Lembach v. Lester, 28 N.Y.S.2d 108, 263 App.Div. 817.

Skidding

I'a.—Freeman v. MacDonald, Com Pl., 31 Del.Co. 165.

23. Wash.—Boyle v. Lewis, 193 P.2d 332.

Violation of statute or ordinance; prima facie evidence

(1) The violation of an ordinance by a pedestrian is only prima facie evidence of negligence.—Tuttle v. Checker Taxi Co., 274 Ill.App. 525

(2) Prima facie evidence of negligence by violating traffic statute is not necessarily evidence of contributory negligence.—Field v. Webber, 169 A. 732, 132 Me 236.

(3) A mere violation of statutory duty to bring automobile to complete stop within five feet of through street before entering on or crossing such street is not conclusive evidence of contributory negligence, but must be considered by jury, with all other evidence, in determining questions of contributory negligence.—Le Bavin v. Suburban Gas Co., 45 A. 2d 664, 134 N.J.Law 10.

Positions and skid marks after collision are of little probative value.—Roselle v. Beach, 125 P.2d 77, 51 Cal. App.2d 579.

Condition of brakes long after accident was too remote to have any probative value.—Carroll v. Kirk, 19 A. 2d 584, 144 Pa.Super. 211.

Locking of wheels does not necessarily show that brakes were defective.—Roehm v. Heston, 189 A. 298, 325 Pa. 89.

24. Wash.—Boyle v. Lewis, 193 P. 2d 332.

25. La.—Webb v. Dunn, App., 15 So. 2d 129.

26. Pa.—Cain v. Kohlman, 22 A.2d 667, 344 I'a. 63.

27. U.S.—Wolkin v. Cadegan, D.C. Me., 39 F.Supp. 610.

Ill.—Dawson v. Smith, 40 N.E.2d 553, 313 Ill.App. 650.

Iowa.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.

Fair preponderance

Ind.—Capitol Lumber Co. v. Van Hook, 168 N.E. 471, 90 Ind.App. 135

Support of plaintiff's testimony by his witnesses

Rule that plaintiff must establish his freedom from contributory negligence does not require that all plaintiff's witnesses must in every detail support plaintiff's testimony.—Brown v. Bahl, 170 A. 346, 111 Pa. Super. 598.

28. Iowa.—Kortright v. Strater, 269 N.W. 745, 222 Iowa 603.

29. Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140.

Cal.—Robinson v. Thornewill, 297 F. 28, 112 Cal.App. 498.

Ill.—Hann v. Brooks, 73 N.E.2d 624, 331 Ill.App. 535—Nash v. Welch, 57 N.E.2d 648, 324 Ill.App. 225

N.Y.—Fury v. De Robertis, 40 N.Y.S. 2d 197.

Pa.—Juchniewicz v. Hawthorne, 44 A. 2d 301, 158 Pa.Super. 146

Vt.—Bombard v. Newton, 111 A. 510, 94 Vt. 354, 11 A.L.R. 1402.

Even slight circumstantial evidence may be sufficient to justify finding of due care on part of pedestrian struck by automobile.—Tomasko v. Raucci, 155 A. 64, 113 Conn. 274.

Consistency with eyewitnesses' testimony

Circumstantial evidence that deceased motorist was on right side of road at time of collision with truck held consistent with positive testimony of eyewitnesses that deceased recklessly drove from one side of road to the other.—Maysay v. Hickman, 97 S.W.2d 662, 20 Tenn.App. 262.

Suicide

Where circumstantial evidence is relied on to establish suicide, facts must exclude any reasonable hypothesis of natural or accidental death.—Blackwood v. Jones, 149 So. 600, 111 Fla. 528.

30. Ill.—Nash v. Welch, 57 N.E.2d 648, 324 Ill.App. 225—Johnson v. McKnight, 39 N.E.2d 700, 313 Ill. App. 260.

31. Ill.—Smith v. Carter, 23 N.E.2d 738, 302 Ill.App. 235.

ist prior to, and at the time of, the accident,³² and leading to a reasonable inference of due care,³³ due care may be proved in the same manner as negligence.³⁴

Evidence on the issue of contributory negligence is to receive a reasonable interpretation.³⁵ Before a plaintiff suing for injuries from a motor vehicle can be found guilty of contributory negligence as a matter of law, the established facts must be such that the mind can draw no other conclusion than that he was negligent.³⁶

The presumption of due care may be rebutted by incontrovertible physical facts, that is, facts of which the court will take judicial notice, or by evi-

dence;³⁷ such presumption can be overcome by the testimony of disinterested witnesses, even if the testimony is conflicting and disputed.³⁸

b. Particular Persons; Persons in Particular Situations

In particular cases, evidence has been held sufficient or insufficient to prove, or disprove, the contributory negligence of pedestrians, guests, children, and other persons injured in motor vehicle accidents.

In the application of the principles stated supra subdivision a of this section, the weight and sufficiency of evidence adduced in particular cases has been adjudicated in connection with the contributory negligence of motorists generally,³⁹ persons on foot generally,⁴⁰ pedestrians crossing streets or

32. Ill.—Johnson v. McKnight, 39 N. E.2d 700, 313 Ill.App. 260.

33. Ill.—Smith v. Carter, 23 N.E.2d 738, 302 Ill.App. 235

34. Ill.—Hann v. Brooks, 73 N.E.2d 624, 331 Ill.App. 535

35. Mo.—Dennis v. Wood, 211 S.W. 2d 470.

36. Mo.—Taylor v. Sesler, App., 113 S.W.2d 812.

37. Pa.—Perry v. Ryback, 153 A. 770, 302 Pa. 559.

Evidence held sufficient

To overcome presumption of due care on part of motorist.—Swezey v. Valley Transport, 107 P.2d 567, 6 Wash.2d 324, 140 A.L.R. 1, opinion adhered to 111 P.2d 1010, 6 Wash.2d 324, 140 A.L.R. 20.

Effect of admission

Plaintiff, having admitted that his truck was not equipped with rear-vision mirror, was not entitled to benefit of statutory presumption of due care.—Hawley v. Rivolta, 41 A.2d 104, 131 Conn. 540.

38. Wash.—Swezey v. Valley Transport, 107 P.2d 567, 6 Wash.2d 324, 140 A.L.R. 1, opinion adhered to 111 P.2d 1010, 6 Wash.2d 324, 140 A.L.R. 20.

39. Evidence held sufficient to show contributory negligence.

(1) In general.—Greenstein v. Kahan, 78 N.Y.S.2d 236, 273 App.Div. 974 —Mills v. Gabriel, 18 N.Y.S.2d 78, 259 App.Div. 60, affirmed 31 N.E.2d 512, 284 N.Y. 755.

(2) In driving at excessive speed. La.—Dew v. Massachusetts Bonding & Insurance Co., App., 183 So. 592 —Di Salvo v. Nicolosi, 4 La.App. 561.

W.Va.—Morris v. Parris, 157 S.E. 40, 110 W.Va. 102.

(3) In leaving highway to avoid collision.—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243.

Evidence held insufficient to show

contributory negligence or sufficient to show absence thereof.

(1) In general.

U.S.—Rust v. Boyer, C.C.A. La., 101 F.2d 307—Parmiter v. U. S., D.C. Mass., 75 F.Supp. 823.

Cal.—Parker v. Auschwitz, 47 P.2d 341, 7 Cal.App.2d 693, followed in Bernhard v. Auschwitz, 47 P.2d 343, 7 Cal.App.2d 755—Barcroft v. Adkins, 44 P.2d 379, 6 Cal.App.2d 180 La.—Murry v. Salley, App., 35 So.2d 820—Webb v. Dunn, App., 15 So.2d 129—Bryant v. Ritchie Grocery Co., App., 154 So. 472.

Tex.—Texas Steel Co. v. Rockholt, Civ.App., 142 S.W.2d 842, error refused.

(2) In driving at an excessive speed generally.

La.—Willis v. Standard Oil Co. of Louisiana, 135 So. 777, 17 La.App. 217.

Pa.—Phander v. Snyder, Com.Pl., 19 Lehigh Co.L.J. 371.

(3) In intrusting vehicle to a physically incapable driver.—Davis v. Farris, 1 Tenn.App. 144.

(4) In operation of police car.—Town of Amherst v. U. S., D.C.N.Y., 77 F.Supp. 80.

(5) In striking pillar in order to avoid collision.—Mangan v. Terminal Transp. System, 284 N.Y.S. 183, 157 Misc. 627, affirmed 286 N.Y.S. 666, 247 App.Div. 853.

40. Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.

Cal.—Thompson v. Held, 183 P.2d 711, 81 Cal.App.2d 275—Benites v. Adams, 148 P.2d 871, 64 Cal.App. 2d 393—Barry v. Maddalena, 146 P.2d 974, 63 Cal.App.2d 302—Cunningham v. Cox, 15 P.2d 169, 126 Cal.App. 685.

Ill.—Loeb v. Corrie, 65 N.E.2d 28, 327 Ill.App. 660.

Iowa.—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27.

La.—Johnson v. Rolland, General Acc. Fire & Life Assur. Corp.,

Limited, Intervenor, App., 24 So. 2d 686—Stansbury v. Drillon, App., 2 So.2d 662—Henderson v. Percy, App., 159 So. 357, affirmed 162 So. 739, 182 La. 953—Williams v. Lykes Bros. S. S. Co., 125 So. 153, 12 La.App. 127.

Wash.—Hadley v. Simpson, 127 P.2d 260, 14 Wash.2d 93

Wis.—Jackowska-Peterson v. D. Reik & Sons Co., 2 N.W.2d 873, 240 Wis. 197.

42 C.J. p 1238 note 49 [a].

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Generally.

Cal.—Sullivan v. Barra, 70 P.2d 495, 22 Cal.App.2d 20—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671 —Wright v. Foreman, 261 P. 481, 86 Cal.App. 595—Chalmers v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Conn.—Kosinski v. Kosinski, 172 A. 924, 118 Conn. 701.

Fla.—White v. Hughes, 190 So. 446, 139 Fla. 54.

Ill.—Blackck v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1.

Kan.—O'Connell v. Lusk, 250 P. 1059, 122 Kan. 186.

Ky.—Grant v. Adams, 291 S.W. 785, 218 Ky. 535

La.—Bullock v. Fidelity & Casualty Co. of New York, App., 187 So. 93.

Me.—Giles v. Perkins, 22 A.2d 132, 138 Me. 96.

Mass.—Tagerman v. Railway Express Agency, 33 N.E.2d 569, 308 Mass. 517—Pawloski v. Hess, 149 N.E. 122, 253 Mass. 478, affirmed Hess v. Pawloski, 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091.

Mich.—Reedy v. Goodin, 281 N.W. 377, 285 Mich. 614—Stobbelaar v. Berg, 225 N.W. 533, 247 Mich. 121.

Mo.—Ridge v. Jones, 71 S.W.2d 713, 335 Mo. 219.

N.J.—Bedell v. Mandel, 155 A. 383, 108 N.J.Law 22—Redfield v. Hurff, 152 A. 451, 9 N.J.Misc 15.

N.Y.—Nilson v. Oppenheimer, 23 N

highways,⁴¹ in connection with the contributory | negligence of pedestrians moving to or from street-

Y.S.2d 621, 260 App.Div. 670, affirmed 35 N.E.2d 498, 285 N.Y. 824—Smith v. State, 278 N.Y.S. 830, 154 Misc. 849, 851, affirmed 277 N.Y.S. 936, 243 App.Div. 682, affirmed 198 N.E. 400, 268 N.Y. 551—Tooley v. State, 252 N.Y.S. 278, 141 Misc. 4, affirmed 255 N.Y.S. 846, 235 App. Div. 656, affirmed 182 N.E. 223, 259 N.Y. 658.

Tex.—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct. Wis.—Felix v. Soderberg, 240 N.W. 838, 207 Wis. 76—Feller v. Leonard, 239 N.W. 498, 207 Wis. 43. Wyo.—Chapman v. Ewing, 25 P.2d 1019, 46 Wyo. 130.

42 C.J. p 1238 note 49 [b].

(2) Pedestrian on sidewalk
Cal.—Lewin v. Margolis, 59 P.2d 153, 14 Cal.App.2d 746.

La.—Bonner v. Boudreaux, App., 8 So.2d 309.

Mich.—Donahue v. Gordon, 291 N.W. 14, 292 Mich. 581.

Mo.—Murray v. St. Louis Public Service Co., App., 201 S.W.2d 775.

N.Y.—Locicero v. Messina, 267 N.Y. S. 901, 239 App. Div. 635.

Ohio.—Riegel v. Oakwood St. Ry. Co., App., 42 N.E.2d 676.

Wash.—Mechan v. Hesselgrave, 210 P. 2, 121 Wash. 568.

(3) Person struck by car backing out of driveway.—McHenry v. American Employers Ins. Co., La App., 18 So.2d 840.

(4) Evidence held insufficient to refute presumption of exercise of due care.—Anthony v. Hobbie, 155 P. 2d 826, 25 Cal.2d 814.

41. Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.

(1) Generally.

U.S.—Settlemyer v. Van Etten, D.C. Pa., 49 F.Supp. 955.

Ariz.—Garlington v. McLaughlin, 104 P.2d 169, 56 Ariz. 37.

Cal.—Mundy v. Marshall, 65 P.2d 65, 8 Cal.2d 294—Heiter v. Hirschfeld, 271 P. 1051, 205 Cal. 625—Bedell v. Duniven, 174 P.2d 666, 77 Cal. App.2d 145—Drury v. Hagerstrom, 157 P.2d 878, 68 Cal.App.2d 742—Garcia v. Conrad, 104 P.2d 527, 40 Cal.App.2d 167—Hansen v. Steele, 104 P.2d 93, 40 Cal.App.2d 1—Bushey v. Rigby, 92 P.2d 1032, 34 Cal.App.2d 41—Shaw v. Downie, 87 P.2d 895, 31 Cal.App.2d 104—Johnson v. De Four, 51 P.2d 449, 10 Cal.App.2d 119—Stewart v. Langer, 48 P.2d 758, 9 Cal.App.2d 60.

Conn.—Muse v. Page, 4 A.2d 329, 125 Conn. 219—Wilson v. Dunbar, 180 A. 296, 120 Conn. 255—Tynan v. Lassen, 156 A. 861, 113 Conn. 789—Paskewicz v. Hickey, 149 A. 671, 111 Conn. 219.

Ill.—Chattillion v. Diugon, 17 N.E. 2d 726, 297 Ill.App. 651—Pendergast v. Foster, 5 N.E.2d 110, 287 Ill.App. 636.

Iowa.—Whitman v. Pilmer, 239 N.W. 686, 214 Iowa 461.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

La.—Hebert v. Melbaum, 24 So.2d 297, 209 La. 156—Hebert v. Melbaum, App., 19 So.2d 629, affirmed 24 So.2d 297, 209 La. 156—Wilson v. Storwell, App., 18 So.2d 49—Boggs v. L. & K. Transfer Co., 11 So.2d 262, followed in Watts v. L. & K. Transfer Co., App., 11 So.2d 264—Humphries v. Hopkins, App., 157 So. 625—Walker v. Louisiana Stores, App., 151 So. 656—Hernandez v. Lyons, 126 So. 538, 12 La. App. 547.

Me.—Bechard v. Lake, 11 A.2d 267, 136 Me. 385—MacDonald v. Pratt, 152 A. 532, 129 Me. 434.

Mass.—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216.

Mich.—Dewey v. Perkins, 295 N.W. 333, 295 Mich. 611.

Minn.—Bravo v. Reil, 15 N.W.2d 871, 218 Minn. 315.

N.H.—Brown v. Mallhot, 196 A. 764, 89 N.H. 240.

N.Y.—Brew v. Behrenhoff, 41 N.Y.S. 2d 84, 266 App. Div. 744, affirmed 53 N.E.2d 243, 291 N.Y. 778—Jameson v. Payne, 284 N.Y.S. 34, 246 App. Div. 678.

Pa.—Espenshade v. McCorkle, 189 A. 311, 324 Pa. 528—Todd v. Simpers, Com Pl., 29 Del. Co. 503.

Wash.—Hagstrom v. Limbeck, 130 P.2d 895, 15 Wash.2d 399—Cook v. Carleton, 4 P.2d 1098, 165 Wash. 232—Smith v. Blassig, 258 P. 34, 144 Wash. 491.

Wis.—Kleiner v. Johnson, 23 N.W.2d 467, 249 Wis. 148.

42 C.J. p 1238 note 49 [a] (10).

(2) Carrying objects which obscured view.

Ill.—Ingle v. Maloney, 234 Ill.App. 151.

Ind.—Indianapolis Rys. v. Horwitz, 8 N.E.2d 1015, 103 Ind.App. 478.

(3) Contributory negligence as matter of law.

Iowa.—Kortright v. Strater, 269 N.W. 745, 222 Iowa 603—Stawsky v. Wheaton, 263 N.W. 313, 220 Iowa 981.

Md.—Jackson v. Forwood, 47 A.2d 81, 186 Md. 379.

Mich.—Haley v. Grosse Ile Rapid Transit Co., 287 N.W. 536, 290 Mich. 373—Brodie v. City of Detroit, 267 N.W. 576, 275 Mich. 626.

N.C.—Miller v. Lewis & Holmes Motor Freight Corporation, 11 S.E. 2d 300, 218 N.C. 464.

Pa.—Covaleskie v. Schimpf, 185 A. 196, 322 Pa. 65.

Wash.—Rasmussen v. McCarthy, 62 P.2d 1353, 138 Wash. 555.

Wis.—Ebel v. Rehorst, 248 N.W. 799, 212 Wis. 122—Brewster v. Ludtke, 247 N.W. 449, 211 Wis. 344.

(4) Crossing at intersection.

Cal.—El Jitsuda v. Hirt, 111 P.2d 360, 43 Cal.App.2d 681—Fischer v. Keen, 110 P.2d 693, 43 Cal.App.2d 244—Cronkright v. Moss, 2 P.2d 480, 116 Cal.App. 189.

Fla.—Carter v. Florida Power & Light Co., 189 So. 705, 138 Fla. 220.

Ill.—Healy v. Utility Supply Co., 17 N.E.2d 607, 297 Ill.App. 640.

Iowa.—Stawsky v. Wheaton, 263 N.W. 313, 220 Iowa 981.

Ky.—Trescott's Adm'r v. Morrill, 132 S.W.2d 948, 280 Ky. 201—Peak v. Arnett, 26 S.W.2d 1035, 233 Ky. 756—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Roberts v. Duracher, App., 196 So. 576—Bass v. Means, 124 So. 553, 12 La. App. 260—Buckley v. Featherstone Garage, 123 So. 446, 11 La. App. 564.

Mich.—Marion v. Savin, 24 N.W.2d 100, 315 Mich. 448.

Minn.—Reppinger v. Hajek, 296 N.W. 33, 209 Minn. 134.

Wash.—Strom v. Dobrin, 186 P.2d 906, 29 Wash.2d 198.

(5) Darting out from behind parked automobile.—Henderson v. Percy, 162 So. 739, 182 La. 953.

(6) Disobeying traffic signal.

Ky.—Trescott's Adm'r v. Morrill, 132 S.W.2d 948, 280 Ky. 201.

La.—Buckley v. Featherstone Garage, 123 So. 446, 11 La. App. 564.

(7) Failure to keep proper lookout.

Cal.—La. Branch v. Scott, 185 P.2d 823, 82 Cal.App.2d 1—Bedell v. Duniven, 174 P.2d 666, 77 Cal.App. 2d 145—Fischer v. Keen, 110 P.2d 693, 43 Cal.App.2d 244—Fox v. Sherwood, 45 P.2d 1026, 7 Cal.App. 2d 265—Nakamoto v. Testino, 37 P. 2d 864, 2 Cal.App.2d 266—Gulino v. Finocchiaro, 17 P.2d 754, 128 Cal. App. 496.

Conn.—Savage v. Hogan, 165 A. 693, 116 Conn. 724.

Iowa.—Kortright v. Strater, 269 N.W. 745, 222 Iowa 603.

La.—Hebert v. Melbaum, 24 So.2d 297, 209 La. 156—Roberts v. Duracher, App., 196 So. 576—Ford v. Bonnette, App., 156 So. 821.

Me.—Goudreau v. Ouellette, 178 A. 355, 133 Me. 365.

Md.—Jackson v. Forwood, 47 A.2d 81, 186 Md. 379.

Mich.—Marion v. Savin, 24 N.W.2d 100, 315 Mich. 448—Brodie v. City of Detroit, 267 N.W. 576, 275 Mich. 626.

Mo.—Woods v. Moore, App., 48 S.W. 2d 202.

N.H.—Brown v. Mailhot, 196 A. 764, 89 N.H. 240.

N.J.—Schoonover v. De Camp, 151 A. 386, 8 N.J.Misc. 673.

Pa.—Espenshade v. McCorkle, 189 A. 311, 324 Pa. 528.

Tex.—Jewell v. El Paso Electric Co., Civ.App., 47 S.W.2d 328, error dismissed.

Va.—Orndorff v. Howell, 25 S.E.2d 327, 181 Va. 383.

Wash.—Rasmussen v. McCarthy, 62 P.2d 1353, 188 Wash. 555.

Wis.—Besser v. Hill, 271 N.W. 921, 224 Wis. 211—Brewster v. Ludtke, 247 N.W. 449, 211 Wis. 344.

(8) Failure to yield right of way.—Weber v. Barrett, 298 N.W. 53, 238 Wis. 50—Besser v. Hill, *supra*.

(9) Gross negligence.—Law v. Osterland, App., 3 So.2d 674, affirmed 3 So.2d 680, 198 La. 421.

(10) Intoxication.—Gibb v. Cleave, 55 P.2d 938, 12 Cal.App.2d 468.

Wis.—Weber v. Barrett, *supra*.

(11) Jay-walking.—Wash.—Bobst v. Hardisty, 91 P.2d 567, 199 Wash. 304.

Wis.—Weber v. Barrett, *supra*.

(12) Stepping quickly from behind string of moving cars.—Starks v. Long, 11 N.W.2d 716, 234 Iowa 21.

(13) Walking into or against motor vehicle.

Cal.—Drury v. Hagerstrom, 157 P.2d 878, 68 Cal.App.2d 742.

Ill.—Healy v. Utility Supply Co., 17 N.E.2d 607, 297 Ill.App. 640.

Ky.—Peak v. Arnett, 26 S.W.2d 1035, 233 Ky. 756—Leberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Wilson v. Storwell, App., 18 So.2d 49—Faecher v. Claret, App., 162 So. 227.

Minn.—Repplinger v. Hajek, 296 N.W. 23, 209 Minn. 134.

Va.—Bailey v. Fore, 177 S.E. 100, 163 Va. 611.

Wash.—Hagstrom v. Limbeck, 130 P.2d 895, 15 Wash.2d 399.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Generally.

Cal.—Brown v. Regan, 75 P.2d 1063, 10 Cal.2d 519—Hendricks v. Pappas, 187 P.2d 436, 82 Cal.App.2d 774—Le Blanc v. Browne, 177 P.2d 347, 78 Cal.App.2d 63—Schulman v. Los Angeles Ry. Corporation, 111 P.2d 924, 44 Cal.App.2d 123—Vanderpool v. Dunham, 94 P.2d 1023, 35 Cal.App.2d 166—Guillot v. Hagman, 86 P.2d 865, 30 Cal.App.2d 582—Gustafson v. Blunk, 41 P.2d 953, 4 Cal.App.2d 630—Schomer v. R. L. Craig Co., 31 P.2d 396, 137 Cal.App. 620—Rignell v. Font, 266 P. 588, 90 Cal.App. 730—Nichols v. Nelson, 252 P. 739, 80 Cal.App. 590.

Conn.—Chase v. Fitzgerald, 45 A.2d 789, 132 Conn. 461, 163 A.L.R. 247—Squires v. Reynolds, 5 A.2d 877, 125 Conn. 366—Alston v. Consolidated Motor Lines, 173 A. 899, 118 Conn. 707—Porcello v. Finnan, 156 A. 863, 113 Conn. 730—McCaughy v. Smiddy, 146 A. 822, 109 Conn. 417.

Ill.—Szalacha v. Landsman, 60 N.E.2d 643, 325 Ill.App. 691—Young v. United Cab & Drivurself, 6 N.E.2d 283, 288 Ill.App. 634—Fickler v. Herman Seekamp, Inc., 274 Ill.App. 310.

La.—Law v. Osterland, 3 So.2d 680, 198 La. 421—Lervick v. White Top Cabs, App., 10 So.2d 67—Wall v. Aetna Casualty & Surety Co., App., 167 So. 903—Pegg v. Toye Bros. Yellow Cab Co., App., 167 So. 896—McNeill v. Boagni, App., 153 So. 352—Delcourt v. Bernard, 136 So. 909, 18 La.App. 616—Busch v. Scimeca, 8 La.App. 454.

Me.—Ramsdell v. Burke, 36 A.2d 573, 140 Me. 244.

Md.—Lusk v. Lambert, 163 A. 188, 163 Md. 335.

Mass.—McGuigan v. Atkinson, 179 N.E. 627, 278 Mass. 264—Hennessey v. Moynihan, 172 N.E. 93, 272 Mass. 165.

Mich.—Schultz v. Frost, 293 N.W. 716, 294 Mich. 457—Eagan v. Edwards, 293 N.W. 641, 294 Mich. 260.

Mo.—Goldbaum v. James Mulligan Printing & Publishing Co., 149 S.W.2d 348, 347 Mo. 844.

N.J.—Trout v. Bright, 161 A. 354, 10 N.J.Misc. 914—Buckley v. Goldberg, 157 A. 245, 9 N.J.Misc. 1076.

N.Y.—Rabin v. Murphy, 295 N.Y.S. 75, 162 Misc. 562—Schloss v. Kochman, 56 N.Y.S.2d 327.

Or.—Lynch v. Clark, 194 P.2d 416.

Pa.—Maselli v. Stephens, 200 A. 590, 331 Pa. 491—Masl v. Mangione, 167 A. 314, 311 Pa. 589—Prasco v. Di Fabio, 2 A.2d 576, 133 Pa.Super. 299.

Va.—Yellow Cab Corporation of Alexandria v. Henderson, 16 S.E.2d 389, 178 Va. 207.

Wash.—Cox v. Kirch, 123 P.2d 328, 12 Wash.2d 678.

Wis.—Knutson v. Stangl, 220 N.W. 375, 196 Wis. 334.

42 C.J. p 1147 note 38, p 1238 note 49 [b] (15).

(2) To overcome presumption of due care.—Hoppe v. Bradshaw, 108 P.2d 947, 42 Cal.App.2d 334.

(3) Contributory negligence as matter of law.

Pa.—Reiff v. Boland, 24 Pa.Dist. & Co. 321.

Tex.—Boaz v. White's Auto Stores, 172 S.W.2d 481, 141 Tex. 366.

42 C.J. p 1147 note 37.

(4) Crippled pedestrian.—Florman v. Patzer, 24 P.2d 228, 133 Cal.App. 355.

(5) Crossing at intersection.

Cal.—Washko v. Stewart, 67 P.2d 151, 20 Cal.App.2d 345—Brush v. Kurstin, 53 P.2d 777, 11 Cal.App.2d 258—Florman v. Patzer, 24 P.2d 228, 133 Cal.App. 355—Eastman v. Rabbeth, 17 P.2d 1009, 128 Cal.App. 634—Cleveland v. Petrusich, 3 P.2d 384, 117 Cal.App. 71—Gibbons v. Naritoka, 283 P. 845, 102 Cal.App. 669—Minor v. Foote, 280 P. 197, 100 Cal.App. 441—Potter v. Driver, 275 P. 526, 97 Cal.App. 311.

Conn.—Leonard v. Gambardella, 181 A. 542, 120 Conn. 445.

D.C.—Miller v. Clark, 109 F.2d 677, 71 App.D.C. 341.

Ill.—Risch v. Consumers Petroleum Co., 53 N.E.2d 286, 321 Ill.App. 438.

Ind.—King v. Ransburg, 39 N.E.2d 822, 111 Ind.App. 523, rehearing denied 40 N.E.2d 999, 111 Ind.App. 523.

La.—Butler v. Humphries, App., 34 So.2d 637—Tassin v. Downs, App., 190 So. 232—Gallaher v. Ricketts, App., 187 So. 351, annulled on other grounds 191 So. 713.

Mich.—Orme v. Farmer, 256 N.W. 470, 268 Mich. 425—Latsch v. Hilliard, 227 N.W. 547, 248 Mich. 416.

N.J.—Meeker v. Johnson, 145 A. 224, 7 N.J.Misc. 266.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

Wash.—Beck v. Dye, 92 P.2d 1112, 200 Wash. 1, 127 A.L.R. 1022.

(6) Darting out from behind parked automobile.—Scarpas v. Collard Motors, La.App., 178 So. 261.

(7) Failure to keep proper lookout.

Cal.—Grant v. Ryon, 53 P.2d 170, 11 Cal.App.2d 101—Cleveland v. Petrusich, 3 P.2d 384, 117 Cal.App. 71—Brown v. Montgomery Ward & Co., 286 P. 474, 104 Cal.App. 679.

Pa.—Adams v. Armour & Co., 16 A.2d 142, 142 Pa.Super. 280.

Tex.—Brooks v. Enriquez, Civ.App., 172 S.W.2d 794, error refused—Martinez v. Pena, Civ.App., 139 S.W.2d 337, error dismissed, judgment correct.

(8) Failure to use walkway.—McQuown v. Phaup, 2 S.E.2d 330, 172 Va. 419.

(9) Pedestrian in zone of comparative safety in middle of street.—Thornton v. Downes, 14 S.E.2d 845, 177 Va. 451.

(10) Pedestrian struck by motorcycle.—Davidson v. American Drug Stores, La.App., 175 So. 157.

(11) Policeman.—Gardiner v. Hayes, 22 A.2d 627, 128 Conn. 332.

(12) Walking into side of motor vehicle.—Yanowski v. Fort Worth Transit Co., Tex.Civ.App., 204 S.W.2d 1001.

cars or busses,⁴² pedestrians walking on or along | in streets or highways,⁴⁴ persons working on or streets or highways,⁴³ persons standing or sitting |

Crossing at designated or undesignated places

Cal.—Kapitan v. Smith, 161 P.2d 270, 70 Cal.App.2d 454—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183—Johnson v. De Four, 51 P.2d 449, 10 Cal.App.2d 119.

Colo.—Fabling v. Jones, 114 P.2d 1100, 108 Colo. 144.

Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 326.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 178 S.W.2d 706, 27 Tenn.App. 731.

Effect of right-of-way statute

(1) Fact that statute gave motorist right of way over pedestrian was not conclusive as to whether pedestrian was contributorily negligent.—Keys v. Griffith, 55 P.2d 15, 153 Or. 190.

(2) Evidence held to show that pedestrian was not on crosswalk when struck, so that statute giving her right of way was inapplicable.—Brewster v. Ludtke, 247 N.W. 449, 211 Wis. 344.

Failure to avoid crossing highway

The failure of deceased to make a U turn and park his automobile on the other side of the highway so as to avoid crossing on foot was not prima facie evidence of negligence, since pedestrians have the right to use highways.—Synwolt v. Klank, 15 N.E.2d 895, 296 Ill.App. 79.

42. Evidence held sufficient to show contributory negligence, or insufficient to show absence thereof.

(1) Generally.

Cal.—Walters v. Evick, 268 P. 1061, 93 Cal.App. 1.

La.—Kemp v. Donnes, App., 32 So.2d 383.

42 C.J. p 1238 note 49 [a] (7), (8).

(2) As matter of law.

Pa.—Picharella v. Owens Transfer Co., 5 A.2d 408, 135 Pa.Super. 112. Wash.—Gottstein v. Daly, 7 P.2d 610, 166 Wash. 582.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

Cal.—Ladas v. Johnson's Black & White Taxicab Co., 110 P.2d 449, 43 Cal.App.2d 223—Wilson v. Mardakis, 280 P. 989, 100 Cal.App. 678—Wagnitz v. Scharetz, 265 P. 318, 89 Cal.App. 511.

Ky.—Shatz v. Raiser, 158 S.W.2d 627, 289 Ky. 297.

Me.—House v. Ryder, 150 A. 487, 129 Me. 135—Day v. Cunningham, 133 A. 855, 125 Me. 328, 47 A.L.R. 1229.

Mass.—Spain v. Olkemus, 180 N.E. 314, 278 Mass. 544—Wilcox v. Sides, 165 N.E. 871, 267 Mass. 70—Hepburn v. Walters, 160 N.E. 783, 263 Mass. 139.

Minn.—Fox v. Minneapolis St. Ry. Co., 251 N.W. 916, 190 Minn. 343—Russell v. Winters, 241 N.W. 589, 185 Minn. 472.

Pa.—Maguire v. Doughty, 191 A. 348, 326 Pa. 122.

42 C.J. p 1238 note 49 [b] (11), (12).

43. Evidence held sufficient to show contributory negligence.

(1) Generally.

Cal.—Gray v. Hartman, 166 P.2d 374, 73 Cal.App.2d 401.

Conn.—Priday v. Bacon, 5 A.2d 709, 125 Conn. 354.

Ill.—Ross v. Crank, 24 N.E.2d 403, 303 Ill.App. 25.

Ky.—Warren's Adm'r v. Stith, 157 S.W.2d 308, 288 Ky. 833—Page's Adm'r v. Scott, 54 S.W.2d 23, 245 Ky. 648.

La.—Stephens v. Dixie Mercantile Co., 99 So. 632, 155 La. 878—Harris v. Landry, App., 150 So. 671.

Mich.—Funk v. Tessin, 266 N.W. 362, 275 Mich. 312.

Wis.—Rodaks v. Herr, 251 N.W. 453, 213 Wis. 310.

(2) To overcome presumption of exercise of due care.—Gray v. Hartman, 166 P.2d 374, 73 Cal.App.2d 401.

(3) Contributory negligence as matter of law.—Rudolph v. Lavigne, 32 A.2d 815, 92 N.H. 490.

(4) Walking along wrong part of highway.

Ill.—Bouslough v. Schumacher, 270 Ill.App. 79—Novina v. Padley, 258 Ill.App. 519.

La.—Harris v. Landry, App., 150 So. 671.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

Cal.—Barry v. Maddalena, 146 P.2d 974, 63 Cal.App.2d 302—Stealey v. Chessum, 11 P.2d 428, 123 Cal.App. 446.

Conn.—Kupchunos v. Connecticut Co., 26 A.2d 775, 129 Conn. 160—Peterson v. Meehan, 163 A. 757, 116 Conn. 150.

Ga.—Claxton v. Hooks, 23 S.E.2d 101, 68 Ga.App. 383.

La.—Coleman v. Danos, App., 186 So. 407—Booth v. Owens, App., 146 So. 761.

Me.—Cole v. Willson, 143 A. 178, 127 Me. 316.

Mass.—Lucier v. Norcross, 37 N.E.2d 498, 310 Mass. 213, 137 A.L.R. 749—Smith v. Hogan, 185 N.E. 23, 282 Mass. 573.

Ohio.—Sprung v. E. I. Dupont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94.

Pa.—Hoffman v. Herman, 17 Pa.Dist. & Co. 75, reversed on other

grounds 163 A. 452, 107 Pa.Super. 92.

Tenn.—Knight v. Hawkins, 173 S.W.2d 163, 26 Tenn.App. 448.

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Va.—Locker v. Carter, 15 S.E.2d 39, 177 Va. 610.

Wis.—Weddeck v. Grimes, 282 N.W. 593, 229 Wis. 448—Tillier v. Swette, 241 N.W. 341, 207 Wis. 373.

42 C.J. p 1238 note 49 [b] (16).

Violation of statute; prima facie evidence

(1) The violation of statute requiring pedestrian to walk on left side of a roadway, giving way to oncoming traffic, constitutes prima facie evidence of negligence.—Nicholas v. Minnesota Milk Co., 4 N.W.2d 84, 212 Minn. 333—Wojtowicz v. Belden, 1 N.W.2d 409, 211 Minn. 461.

(2) Mere violation of statute prohibiting pedestrian from walking along highway outside of business or residence district otherwise than close to his left-hand edge of highway did not overcome presumption that decedent took ordinary care.—Scaif v. Elcher, 53 P.2d 368, 11 Cal.App.2d 44.

Observation of movements

Evidence that pedestrian was seen to step from a position of safety into path of automobile or that he was seen walking in particular lane of highway was not necessary to support finding of his negligence.—Barry v. Maddalena, 146 P.2d 974, 63 Cal.App.2d 302.

Sudden danger

Evidence held sufficient for jury to infer that pedestrians were within rule that prudent person confronted with sudden danger may fail to use best judgment, omit some precaution, or may not use best available method of meeting danger, and still not be negligent.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Where soldiers were marching under orders at time they were struck by motor vehicle, the fact that they were marching on wrong side of road could not be considered as contributory negligence on their part.—Smith v. Town of Orangetown, D.C.N.Y., 57 F.Supp. 52, affirmed, C.C.A., 150 F.2d 782, certiorari denied 66 S.Ct. 171, 326 U.S. 787, 90 L.Ed. 462.

44. Evidence held sufficient

Va.—South Hill Motor Co. v. Gordon, 200 S.E. 637, 172 Va. 193.

Evidence held insufficient

U.S.—Andruss v. Nieto, C.C.A.Cal., 112 F.2d 250.

Cal.—Bright v. Zabler, 111 P.2d 387,

near streets, highways, or bridges,⁴⁵ bicycle riders | by motor vehicles,⁴⁸ and, likewise, has been adju-
generally,⁴⁶ child bicyclists,⁴⁷ other children struck |

43 Cal.App.2d 706—Moore v. Franchetti, 70 P.2d 492, 22 Cal.App.2d 75—Melikian v. Independent Paper Stock Co., 47 P.2d 539, 8 Cal.App. 2d 186.

Fla.—White v. Hughes, 190 So. 446, 139 Fla. 54.

Ill.—McNally v. Chauncy Body Corporation, 42 N.E.2d 853, 315 Ill.App. 190—Ledford v. Reardon, 25 N.E. 2d 116, 303 Ill.App. 300—Kirman v. Hutchinson, 254 Ill.App. 469.

Kan.—Waltmire v. Ford, 78 P.2d 893, 147 Kan. 732.

La.—Le Blanc v. Jordy, App., 10 So. 2d 64.

Mich.—Ebel v. Bruzewski, 296 N.W. 715, 296 Mich. 654.

N.Y.—Remillard v. Homer Bros., 278 N.Y.S. 2, 243 App Div 829—Rois-tacher v. Hurley, 34 N.Y.S.2d 752, affirmed 41 N.Y.S.2d 220, 266 App Div. 688, motion denied 41 N.Y.S. 2d 955, 266 App.Div. 787.

Pa.—McNeal v. Spencer, 25 A.2d 147, 344 Pa. 417.

Waiting for streetcar

(1) Evidence held sufficient to show contributory negligence.—Arnaz v. Forbes, 197 P. 364, 51 Cal.App. 665.

(2) Evidence held insufficient to establish exercise of due care.—Swanson v. Progress Elec. Co., 67 N.E.2d 426, 329 Ill.App. 188.

(3) Evidence held sufficient to show absence of contributory negligence.—Nelson v. Pauli, 186 N.W. 217, 176 Wis. 1—42 C.J. p 1238 note 49 [b] (14)

Presumption of due care held destroyed by evidence.—Heath v. Klosterman, 23 A.2d 209, 343 Pa. 501.

45. Evidence held sufficient to show contributory negligence.

(1) In general.

Cal.—High v. Bond, 290 P. 145, 107 Cal.App. 153.

Me.—Tibbetts v. Dunton, 174 A. 453, 133 Me. 128.

(2) Helper on truck.—Sheely v. Sall, 3 N.E.2d 943, 286 Ill.App. 466.

(3) Motorist changing tire on or alongside highway.

Kan.—Anderson v. Thompson, 22 P. 2d 438, 137 Kan. 754.

Me.—Tibbetts v. Dunton, 174 A. 453, 133 Me. 128.

(4) Truck driver unloading truck.—Batchelor v. Famous Cleaners & Dyers, 17 N.W.2d 787, 310 Mich. 654.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) In general.

Conn.—Farrell v. L. G. De Felice & Son, 42 A.2d 697, 132 Conn. 81.

Ill.—Koch v. Barker, 41 N.E.2d 329,

314 Ill.App. 378—Paul v. Garman, 34 N.E.2d 884, 310 Ill.App. 447.

La.—Hare v. New Amsterdam Casualty Co., App., 1 So.2d 439—Ellis v. Whitmeyer, App., 183 So. 77.

Wis.—Walker v. Pomush, 238 N.W. 859, 206 Wis. 45.

(2) Toll collector on bridge.—Anderson v. George A. Hormel & Co., 136 So. 906, 18 La App. 398.

(3) Traffic officer.

N.J.—Hughes v. English, 152 A. 473, 9 N.J.Misc. 28.

Wash.—Maskell v. Alexander, 157 P. 872, 91 Wash. 363.

(4) Workmen.

Cal.—King v. Green, 94 P. 777, 7 Cal App. 473.

Conn.—Goodsell v. Brighenti, 24 A. 2d 834, 128 Conn. 581—Yasevac v. New Haven & S. L. Ry. Co., 9 A.2d 278, 126 Conn. 27.

Violation of statute

Evidence held not to show that road worker violated statute requiring pedestrian to walk on left-hand edge of highway.—Jones v. Iledges, 12 P.2d 111, 123 Cal App. 742.

46. Evidence held sufficient to show contributory negligence

Fla.—Miami Transit Co. v. Dalton, 23 So.2d 572, 156 Fla. 485.

Ind.—Arlington v. Brown, App., 73 N.E.2d 774.

La.—Harris v. Brock, App., 191 So. 762—Klotz v. Tru-Fruit Distributors, App., 173 So. 592.

Mich.—Postal Telegraph Cable Co. v. Carpenter, 243 N.W. 19, 258 Mich. 370.

N.J.—Alling v. Walton, 144 A. 324, 7 N.J. Misc. 101.

Va.—Hunter v. Long's Baggage Transfer Co., 195 S.E. 521, 170 Va. 83.

Wis.—Drlessen v. Moder, 289 N.W. 689, 233 Wis. 416.

42 C.J. p 1238 note 49 [a] (1).

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

Cal.—Hart v. Farris, 21 P.2d 432, 218 Cal. 69—Hauskins v. Buck Co., 298 P. 137, 113 Cal App. 176.

La.—Bonner v. Boudreaux, App., 8 So.2d 309.

Mass.—Rizzo v. Ahern, 179 N.E. 244, 278 Mass. 5.

N.J.—Mulligan v. Losi, 139 A. 387, 5 N.J.Misc. 1019.

Va.—Cooke v. Griggs, 33 S.E.2d 764, 183 Va. 851.

42 C.J. p 1238 note 49 [b] (2).

47. Evidence held sufficient to show contributory negligence.

Cal.—Wright v. Sniffin, 181 P.2d 675, 80 Cal.App.2d 358—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382.

Pa.—Lopo v. McFadden, Com.Pl., 39 Luz.Leg.Reg. 279.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

Cal.—Cuadrado v. Tarver, 15 P.2d 898, 127 Cal.App. 434.

Ind.—Gulley v. Hamm, App., 73 N.E. 2d 188.

La.—Commercial Casualty Ins. Co. v. Landry, App., 153 So. 61—Rosarge v. Spiess & Co., App., 145 So. 21.

Minn.—Ludwig v. Haugen Motor Co., 245 N.W. 371, 187 Minn. 315.

Ohio.—Sherburn v. Armstrong, App., 42 N.E.2d 716.

Wis.—Straub v. Schadeberg, 10 N.W. 2d 146, 243 Wis. 257, 147 A.L.R. 476.

Amenable to rule of contributory negligence

In action for death of fourteen-year-old bicyclist struck by bus traveling in same direction, evidence as to his intelligence and capacity was sufficient to show that he was amenable to ordinary rule of contributory negligence as a bar to the action.—Van Dyke v. Atlantic Greyhound Corporation, 10 S.E.2d 727, 218 N.C. 283.

48. Evidence held sufficient to show contributory negligence.

(1) Generally.

Cal.—Raggio v. Mallory, 76 P.2d 660, 10 Cal.2d 723—Walsh v. Van Tuyle, 69 P.2d 189, 21 Cal.App.2d 302.

Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521.

La.—Vallery v. Teche Lines, App., 166 So. 646—Guillory v. United Gas Public Service Co., App., 148 So. 274.

Me.—Barlow v. Lowery, 59 A.2d 702.

Mass.—Lukiwesky v. Kuporotz, 186 N.E. 560, 283 Mass. 524.

Neb.—De Griselles v. Gans, 219 N.W. 235, 116 Neb. 835.

N.J.—Mott v. Lum, 157 A. 125, 108 N.J.Law 211.

N.Y.—Miozzi v. Armstrong Coal Co., 17 N.Y.S.2d 642, 258 App.Div. 1062, appeal dismissed 27 N.E.2d 283, 283 N.Y. 567.

R.I.—Di Chiara v. Interstate Transp. Ass'n, 169 A. 277.

42 C.J. p 1238 note 49 [a] (2).

(2) Boy pedestrian struck at night.—Cunningham v. Cox, 15 P.2d 169, 126 Cal.App. 685.

(3) Contributory negligence as matter of law.

Mich.—Brinker v. Tobin, 270 N.W. 209, 278 Mich. 42—Franks v. Woodward, 243 N.W. 20, 258 Mich. 447.

N.Y.—Gloshinsky v. Bergen Milk Transp. Co., 17 N.E.2d 766, 279 N. Y. 54.

(4) Emerging from behind parked truck.—La Brie v. Lord, Me., 45 A.2d 441.

(5) Failure to yield right of way.

dictated in connection with the contributory negligence of motorcycle riders,⁴⁹ drivers, owners,

—Van Lydegraf v. Scholz, 4 N.W.2d 121, 240 Wis. 599.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Generally.

U.S.—Lewis v. McGill Interstate Exp., C.C.A.N.Y., 156 F.2d 230.

Cal.—Taylor v. Oakland Scavenger Co., 110 P.2d 1044, 17 Cal.2d 594—Ross v. Story, 53 P.2d 760, 11 Cal App.2d 307—Azzaro v. O'Connell, 9 P.2d 345, 121 Cal.App. 617—Wong Kit v. Crescent Creamery Co., 262 P. 481, 87 Cal.App. 563.

Conn.—Plascik v. Railway Express Agency, 175 A. 919, 119 Conn. 277. Ill.—Bunch v. Padva, 76 N.E.2d 544, 333 Ill.App. 24—Crisler v. Zahart, 47 N.E.2d 542, 318 Ill.App. 220—Ehrenheim v. Yellow Cab Co., 239 Ill.App. 403.

Ind.—Gerking v. Johnson, 44 N.E.2d 90, 220 Ind. 501.

La.—Loewenberg v. Fidelity Union Casualty Co., App., 147 So. 81—Booth v. Owens, App., 146 So. 761—Sarry v. Mesman, 135 So. 815, 17 La.App. 346.

Mass.—Friedman v. Berthiaume, 21 N.E.2d 261, 303 Mass. 159—Towle v. Morin, 4 N.E.2d 348, 295 Mass. 583—Hirrell v. Lacey, 174 N.E. 679, 274 Mass. 431—Clark v. Martin, 158 N.E. 265, 261 Mass. 60—Huffam v. Paquin, 156 N.E. 6, 259 Mass. 191—Di Rienzo v. Goldfarb, 153 N.E. 784, 257 Mass. 272.

Mich.—Oakes v. Van Zomeren, 238 N.W. 177, 255 Mich. 372.

N.J.—Rizio v. Public Service Electric & Gas Co., 23 A.2d 585, 128 N.J. Law 60—Scott-Huntington v. Pearson, 168 A. 259, 11 N.J.Misc. 642.

N.Y.—Cross v. Stibbs Transp. Lines, 56 N.Y.S.2d 253, 269 App.Div. 893—Fury v. De Robertis, 40 N.Y.S.2d 197.

Ohio.—Wilkeson v. Erskine & Sons, App., 70 N.E.2d 787—Sears v. Lairson, 13 Ohio Supp. 82.

Tenn.—Garis v. Eberling, 71 S.W.2d 215, 18 Tenn.App. 1.

42 C.J. p 1238 note 49 [b] (3).

(2) Alighting from, or leaving, streetcar.

Cal.—Wilson v. Mardakis, 280 P. 989, 100 Cal.App. 678.

Me.—Day v. Cunningham, 133 A. 855, 125 Me. 328, 47 A.L.R. 1229.

(3) Coasting.—Burns v. Elminger, 261 P. 618, 81 Mont. 79.

(4) Crossing intersection.—Barrett v. Harman, 1 P.2d 458, 115 Cal.App. 283.

Prima facie case; age

(1) Undisputed fact that boy struck by automobile was ten years old made prima facie case of freedom from contributory negligence, subject to right of rebuttal.—Flick-

inger v. Phillips, 267 N.W. 101, 221 Iowa 837.

(2) A showing that plaintiff, injured when sled on which he had been riding and which had been hooked to defendant's automobile was struck by approaching automobile, was between ages of seven and fourteen established a prima facie case of nonnegligence on his part.—Samuelson v. Sherrill, 280 N.W. 596, 225 Iowa 421.

(3) Evidence held to warrant finding that child between four and five years of age, struck by automobile, was too young to take care of himself.—Clark v. Martin, 158 N.E. 265, 261 Mass. 60.

Presumption of due care

Evidence held insufficient to overcome presumption of due care.

Me.—Blanchette v. Miles, 27 A.2d 396, 139 Me. 70.

Va.—American Tobacco Co. v. Harrison, 27 S.E.2d 181, 181 Va. 800.

Violation of coasting ordinance, which would bar recovery for injuries, held not shown—Towle v. Morin, 4 N.E.2d 348, 295 Mass. 583

49. Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.

(1) Generally.

Me.—Bonefant v. Chapdelaine, 158 A. 857, 131 Me. 45—Esponette v. Wiseman, 155 A. 650, 130 Me. 297.

Pa.—Guiducci v. Mason, 192 A. 632, 326 Pa. 490.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195.

Wash.—Allen v. Porter, 143 P.2d 328, 19 Wash.2d 503.

(2) Contributory negligence as matter of law.

Ala.—Dudley v. Alabama Utilities Service Co., 144 So. 5, 225 Ala. 531. Mich.—Saunders v. Berger, 297 N.W. 240, 297 Mich. 199.

Vt.—Parro v. Meagher, 184 A. 885, 108 Vt. 182.

(3) Excessive speed.

Cal.—Spencer v. Schiffman, 7 P.2d 361, 119 Cal.App. 746.

La.—Deffez v. Stephens, General Cas. Co. of America, Intervener, App., 30 So.2d 154.

Me.—Esponette v. Wiseman, 155 A. 650, 130 Me. 297.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195.

(4) Failure to have motorcycle under control.

La.—Deffez v. Stephens, General Cas. Co. of America, Intervener, App., 30 So.2d 154.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195.

(5) Failure to maintain proper lookout.

Cal.—State Compensation Ins. Fund v. Jorn, 200 P. 624, 186 Cal. 782.

La.—Deffez v. Stephens, General Cas. Co. of America, Intervener, App., 30 So.2d 154.

Me.—Eaton v. Ambrose, 180 A. 363, 133 Me 458

Wis.—Serkowski v. Wolf, 30 N.W.2d 223, 251 Wis. 595.

(6) Intersectional collision.

Ala.—Dudley v. Alabama Utilities Service Co., 144 So. 5, 225 Ala. 531.

Cal.—Spencer v. Schiffman, 7 P.2d 361, 119 Cal.App. 746.

Ill.—Kunes v. Garcia, 1 N.E.2d 262, 284 Ill.App. 16.

La.—Deffez v. Stephens, General Cas. Co. of America, Intervener, App., 30 So.2d 154.

Me.—Eaton v. Ambrose, 180 A. 363, 133 Me 458.

Mich.—Saunders v. Berger, 297 N.W. 240, 297 Mich. 199.

Minn.—Wetterlind v. Hintz Feed Co., 263 N.W. 462, 195 Minn. 426.

Miss.—Baird v. Harrington, 30 So.2d 82.

Pa.—Guiducci v. Mason, 192 A. 632, 326 Pa. 490.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195.

Vt.—Parro v. Meagher, 184 A. 885, 108 Vt. 182.

Wash.—Whiting v. Emery, 289 P. 524, 157 Wash. 551.

(7) Motorcycle policeman.

Cal.—Spencer v. Schiffman, 7 P.2d 361, 119 Cal.App. 746

Ill.—Kunes v. Garcia, 1 N.E.2d 262, 284 Ill.App. 16

La.—Deffez v. Stephens, General Cas. Co. of America, Intervener, App., 30 So.2d 154.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Generally.

U.S.—Sanders v. Leech, C.C.A.Fla., 158 F.2d 486—Sanders v. Leech, D. C.Fla., 64 F.Supp. 600.

Cal.—Samuelson v. Siefert, 144 P.2d 879, 62 Cal.App.2d 320—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55.

La.—Lane v. Bourgeois, App., 28 So. 2d 91—Hero v. Toye Bros. Yellow Cab Co., App., 19 So.2d 887—Scruggs v. V. Frank Lynn Co., App., 6 So.2d 86.

Me.—Gustin v. Asskov, 151 A. 443, 129 Me. 494.

Md.—Pitcher v. Daugherty, 8 A.2d 917, 177 Md. 145.

Mass.—Curley v. Mahan, 193 N.E. 34, 288 Mass. 369.

Va.—Gaines v. Campbell, 166 S.E. 704, 159 Va. 504—Waynick v. Walrond, 154 S.E. 522, 155 Va. 400, 70 A.L.R. 1014.

(2) Action in emergency.—Gray v. Elmo, 156 A. 825, 9 N.J.Misc. 1093.

or riders of animals,⁵⁰ guests or passengers in motor vehicles,⁵¹ and in connection with the con-

(3) Driver too near to motorist.—*Globe Indemnity Co. v. Cook*, La.App., 167 So. 115.

(4) Excessive speed. Cal.—*Samuelson v. Siefer*, 144 P.2d 879, 62 Cal.App.2d 320.

La.—*Hero v. Toye Bros. Yellow Cab Co.*, App., 19 So.2d 887.

N.J.—*Stegman v. White House Dairy Products*, 21 A.2d 665, 127 N.J.Law 102.

(5) Intersectional collision. Cal.—*Ederer v. Shanzer*, 25 P.2d 38, 134 Cal.App. 137.

La.—*Hero v. Toye Bros. Yellow Cab Co.*, App., 19 So.2d 887.

(6) Motorcycle policeman. Cal.—*Boyle v. Stewart*, 3 P.2d 326, 116 Cal.App. 714.

Wis.—*Martell v. Kutcher*, 216 N.W. 522, 195 Wis. 19.

Violation of statute or ordinance

(1) Evidence held to show violation of statute or ordinance constituting contributory negligence.

Vt.—*Parro v. Meagher*, 184 A. 885, 108 Vt. 182.

Wash.—*Allen v. Porter*, 143 P.2d 328, 19 Wash.2d 503.

(2) Violation of speed statute or ordinance is not conclusive evidence of contributory negligence—*Stegman v. White House Dairy Products*, 21 A.2d 665, 127 N.J.Law 102.

Overcoming presumption of due care

Presumption that due care was exercised by deceased in operating motorcycle disappeared in face of positive and direct testimony of his lack of due care—*Allen v. Porter*, 143 P.2d 328, 19 Wash.2d 503.

50. Evidence held sufficient to show contributory negligence.

La.—*Pecar v. Toye Bros. Yellow Cab Co.*, App., 8 So.2d 120.

Wash.—*Frowd v. Marchbank*, 283 P. 467, 154 Wash. 634.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Driver of animal-drawn vehicle.—*Smith v. Louisiana Power & Light Co.*, La.App., 158 So. 844—42 C. J. p 1238 note 49 [b] (6), (21).

(2) Owner of dog.—*Jones v. Craddock*, 187 S.E. 558, 210 N.C. 429.

(3) Owner of horse.—*Texeira v. Sundquist*, 192 N.E. 611, 288 Mass. 93.

(4) Owner of mules.—*Grossmann v. Diesel*, 42 N.E.2d 957, 315 Ill.App. 306.

51. Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.

(1) Generally.

Cal.—*Linde v. Emmick*, 61 P.2d 338, 16 Cal.App.2d 676—*Whitsett v. Morton*, 33 P.2d 54, 138 Cal.App. 628.

Conn.—*Tracy v. Welch*, 145 A. 662, 109 Conn. 144.

Fla.—*Union Bus Co. v. Matthews*, 192 So. 811, 141 Fla. 99.

Ill.—*Sugru v. Highland Park Yellow Cab Co.*, 251 Ill.App. 99.

Kan.—*Shrewsbury v. Goodacre*, 10 P. 2d 1, 135 Kan. 230.

Mich.—*Boylon v. Reliable Cartage Co.*, 242 N.W. 231, 258 Mich. 5.

N.Y.—*Farrell v. Kory*, 282 N.Y.S. 355, 245 App.Div. 901.

Wash.—*Allen v. Porter*, 143 P.2d 328, 19 Wash.2d 503.

W.Va.—*Clise v. Prunty*, 163 S.E. 864, 112 W.Va. 181.

42 C.J. p 1238 note 49 [a] (6).

(2) Contributory negligence as matter of law.

Iowa.—*Hutchinson v. Sioux City Service Co.*, 230 N.W. 387, 210 Iowa 9.

Mich.—*Sheathelm v. Consumers Power Co.*, 292 N.W. 355, 293 Mich. 422.

Va.—*Yellow Cab Co. of Virginia v. Gulley*, 194 S.E. 683, 169 Va. 611.

Wis.—*Whyte v. Lindblom*, 255 N.W. 265, 216 Wis. 21, rehearing denied 256 N.W. 244, 216 Wis. 27.

(3) Contributory willfulness as matter of law.—*Nettles v. Your Ice Co.*, 4 S.E.2d 797, 191 S.C. 429.

(4) Failure to keep or maintain proper lookout.

Iowa.—*Hewitt v. Ogle*, 256 N.W. 755, 319 Iowa 46.

La.—*Acosta v. Smith*, App., 23 So.2d 742, followed in 23 So.2d 745 and *Butler v. Smith*, 23 So.2d 745.

Tex.—*Doornbos v. Looney*, Civ App., 159 S.W.2d 155, error refused.

Wis.—*Whyte v. Lindblom*, 255 N.W. 265, 216 Wis. 21, rehearing denied 256 N.W. 244, 216 Wis. 27.

(5) Failure to protest against speed or careless method of driving. Conn.—*Tracy v. Welch*, 145 A. 662, 109 Conn. 144.

Ill.—*McDermott v. McKeown Transp. Co.*, 263 Ill.App. 325.

Pa.—*Guiducci v. Mason*, 192 A. 632, 326 Pa. 490.

W.Va.—*Oney v. Binford*, 180 S.E. 11, 116 W.Va. 242.

Wis.—*Hutzler v. McDonnell*, 7 N.W. 2d 835, 242 Wis. 256.

(6) Failure to warn driver of danger.

Ill.—*Lamesch v. Schmidt*, 24 N.E.2d 579, 303 Ill.App. 58.

N.Y.—*Babish v. Elliott*, 21 N.Y.S.2d 340, 259 App.Div. 1107, appeal denied 22 N.Y.S.2d 528, 260 App.Div. 814, appeal denied.

(7) Intersectional collision.

Ark.—*Graves v. Jewel Tea Co.*, 23 S. W.2d 972, 180 Ark. 980.

Iowa.—*Hewitt v. Ogle*, 256 N.W. 755, 319 Iowa 46.

La.—*Acosta v. Smith*, App., 23 So.2d

742, followed in 23 So.2d 745 and *Butler v. Smith*, 23 So.2d 745.

Mich.—*Sheathelm v. Consumers Power Co.*, 292 N.W. 355, 293 Mich. 422.

Va.—*Yellow Cab Co. of Virginia v. Gulley*, 194 S.E. 683, 169 Va. 611.

Wis.—*Whyte v. Lindblom*, 255 N.W. 265, 216 Wis. 21, rehearing denied 256 N.W. 244, 216 Wis. 27.

(8) Intoxication of plaintiff.—*Union Bus Co. v. Matthews*, 192 So. 811, 141 Fla. 99.

(9) Riding with intoxicated or reckless driver.

Cal.—*Smith v. Maloney*, 78 P.2d 1034, 26 Cal.App.2d 97—*Whitsett v. Morton*, 33 P.2d 54, 138 Cal.App. 628.

Fla.—*Union Bus Co. v. Matthews*, 192 So. 811, 141 Fla. 99.

La.—*Mercier v. Fidelity & Casualty Co. of New York*, App., 10 So.2d 262—*Richard v. Canning*, App., 168 So. 598.

Pa.—*Cassidy v. Evans*, 23 A.2d 449, 343 Pa. 483.

S.C.—*Nettles v. Your Ice Co.*, 4 S.E. 2d 797, 191 S.C. 429.

W.Va.—*Young v. Wheby*, 30 S.E.2d 6, 126 W.Va. 741, 154 A.L.R. 919.

(10) Willful and wanton misconduct.—*Willgeroth v. Maddox*, 281 Ill. App. 480.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Generally.

U.S.—*Skinner v. Pennsylvania Greyhound Lines*, C.C.A.Ind., 123 F.2d 497—*Pepper v. Morrill*, C.C.A. Mass., 24 F.2d 320, 57 A.L.R. 750.

—*Sampson v. Channell*, D.C. Mass., 27 F.Supp. 213, second case, new trial denied 27 F.Supp. 213, first case, affirmed, C.C.A., *Channell v. Sampson*, 108 F.2d 315, vacated on other grounds *Sampson v. Channell*, 110 F.2d 754, 128 A.L.R. 394, certiorari denied *Channell v. Sampson*, 60 S.Ct. 1099, 310 U.S. 650, 84 L.Ed. 1415.

Ark.—*Hammond v. Hamby*, 87 S.W.2d 1000, 191 Ark. 780.

Cal.—*Ellison v. Lang Transp. Co.*, 84 P.2d 510, 12 Cal.2d 355—*McDougall v. Morrison*, 130 P.2d 149, 55 Cal. App.2d 92—*Weddle v. Loges*, 125 P.2d 914, 52 Cal.App.2d 115—*Hernandez v. Murphy*, 115 P.2d 565, 46 Cal.App.2d 201—*Albania v. Kovacevich*, 113 P.2d 251, 44 Cal.App.2d 925—*Noble v. Key System*, 51 P. 2d 887, 10 Cal.App.2d 132—*Chapman v. Pickwick Stages System*, 4 P.2d 283, 117 Cal.App. 560—*Rath v. Bankston*, 281 P. 1081, 101 Cal.App. 274.

Del.—*Burton v. Delaware Poultry Co.*, 15 A.2d 440, 2 Terry 68.

Fla.—*Shams v. Saportas*, 10 So.2d 715, 152 Fla. 48.

Ga.—*Britt v. Davis*, 187 S.E. 125, 53

Ga.App. 783—Poole v. Yawn, 163 S.E. 315, 45 Ga.App. 58.
 Idaho.—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792.
 Ill.—Baumgardner v. Boyer, 51 N.E. 2d 784, 320 Ill.App. 438—Tennes v. Tennes, 50 N.E.2d 132, 320 Ill.App. 19—Connett v. Winget, 34 N.E.2d 878, 310 Ill.App. 533—Beard v. Zindars, 25 N.E.2d 136, 303 Ill.App. 337—Smith v. Carter, 28 N.E.2d 738, 302 Ill.App. 235—Kelley v. Miles, 16 N.E.2d 931, 296 Ill.App. 650—Masten v. Cousins, 216 Ill.App. 268.
 Ind.—Kelley v. Dickerson, 13 N.E.2d 585, 213 Ind. 624—Mattes v. Brugner, 159 N.E. 156, 88 Ind.App. 36.
 Kan.—Cruse v. Dole, 124 P.2d 470, 155 Kan. 292—McCoy v. Pittsburg Boiler & Machine Co., 261 P. 30, 124 Kan. 414.
 La.—Cassar v. Mansfield Lumber Co., App., 35 So.2d 797—Brousseau v. Rheem Mfg. Co., App., 34 So.2d 273—Keowen v. Amite Sand & Gravel Co., App., 4 So.2d 79—Harrelson v. McCook, App., 198 So. 532—Smith v. Monroe Grocer Co., App., 179 So. 495—Bryant v. Ritchie Grocery Co., App., 154 So. 472—Monkhouse v. Johns, App., 142 So. 347—Driefus v. Levy, App., 140 So. 259—Barber v. El Dorado Lumber Co., App., 139 So. 29, reheard 142 So. 718—Sears v. Interurban Transp. Co., 125 So. 748, 14 La App. 343.
 Me.—Plante v. Canadian Nat. Rys., 23 A.2d 814, 138 Me. 215—Davis v. Tobin, 163 A. 780, 131 Me. 426—Kimball v. Bauckman, 158 A. 694, 131 Me. 14—Trumpfoller v. Crandall, 155 A. 646, 130 Me. 279.
 Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394—Moore v. Patrone, 10 N.E.2d 69, 298 Mass. 198—Cycs v. Dugal, 3 N.E.2d 1011, 295 Mass. 417—Orlando v. City of Brockton, 3 N.E.2d 794, 295 Mass. 205—Nichols v. Rougeau, 187 N.E. 710, 284 Mass. 371.
 Mich.—Boyce v. Shtukas, 11 N.W.2d 206, 306 Mich. 467.
 Minn.—Kordiak v. Holmgren, 30 N.W. 2d 16, 225 Minn. 134—Anderson v. Anderson, 248 N.W. 35, 188 Minn. 602.
 Mont.—Simpson v. Miller, 34 P.2d 528, 97 Mont. 328.
 Neb.—Mackechnie v. Lyders, 279 N. W. 328, 134 Neb. 682—Moran v. Moran, 246 N.W. 711, 124 Neb. 379.
 Nev.—Nicora v. Cerveri, 244 P. 897, 49 Nev. 261.
 N.Y.—Preiss v. Public Service Co-ordinated Transport, 166 A. 628, 11 N. J.Misc. 426—Dumphy v. Thompson, 130 A. 639, 3 N.J.Misc. 1086
 N.Y.—Hemmingway v. Town of Dan-nemora, Clinton County, 55 N.Y.S. 2d 830, 269 App.Div. 798—Jones v. Gray, 45 N.Y.S.2d 519, 267 App. Div. 242, appeal denied 47 N.Y.S.2d 606, 267 App.Div. 926—Gibson v. State, 21 N.Y.S.2d 362, 259 App. Div. 1104—Whitbeck v. Ryder, 21

N.Y.S.2d 201, 259 App.Div. 1109—Tyler v. Conway, 1 N.Y.S.2d 563, 253 App.Div. 865—Zamenick v. Easman & Co., 290 N.Y.S. 766, 248 App.Div. 920—Tweedie v. Ballard, 287 N.Y.S. 923, 248 App.Div. 644.
 Or.—Waller v. Hill, 190 P.2d 147.
 Pa.—Fingeret v. Mann, 178 A. 674, 319 Pa. 262.
 S.D.—Schumacher v. Storberg, 7 N. W.2d 141, 69 S.D. 103.
 Tenn.—Harrison v. Graham, 107 S. W.2d 517, 21 Tenn.App. 189—Chumley v. Anderton, 103 S.W.2d 331, 20 Tenn.App. 621.
 Tex.—Jackson v. Edmondson, Civ. App., 129 S.W.2d 369, reversed on other grounds 161 S.W.2d 794, 136 Tex. 405—Phoenix Refining Co. v. Walker, Civ.App., 108 S.W.2d 323, error dismissed.
 Va.—Masters v. Cardi, 42 S.E.2d 203, 186 Va. 261—Hague v. Valentine, 28 S.E.2d 720, 182 Va. 256—Selfe v. Fuller, 18 S.E.2d 254, 179 Va. 30—Hackley v. Robey, 195 S.E. 689, 170 Va. 55—Stubbs v. Parker, 192 S.E. 820, 169 Va. 676, opinion adhered to 195 S.E. 688, 927, 169 Va. 676, dissenting opinion 198 S.E. 363, 169 Va. 676—Howell v. Murdock 158 S.E. 886, 156 Va. 669.
 Wash.—Boyle v. Lewis, 193 P.2d 332
 Wis.—Quinnell v. Bowen, 16 N.W.2d 415, 246 Wis. 16—Landskron v. Hartford Accident & Indemnity Co., 6 N.W.2d 178, 241 Wis. 445—Haight v. Luedike, 1 N.W.2d 882, 239 Wis. 389—Taughner v. Hardware Mut. Casualty Co., 292 N.W. 277, 235 Wis. 55—Williams v. Williams, 246 N.W. 322, 210 Wis. 304—Krause v. Hall, 217 N.W. 290, 195 Wis. 565.
 42 C.J. p 1238 note 49 [b] (7), (8).
 (2) Control over automobile.
 N.C.—York v. York, 194 S.E. 486, 212 N.C. 695.
 N.D.—Wilson v. Oscar H. Kjorlie Co., 12 N.W.2d 526, 73 N.D. 134.
 S.D.—Schumacher v. Storberg, 7 N. W.2d 141, 69 S.D. 103.
 (3) Failure to protest against speed or manner of operating motor vehicle.
 Cal.—Swink v. Gardena Club, 151 P. 2d 313, 65 Cal.App.2d 674
 La.—Brousseau v. Rheem Mfg. Co., App., 34 So.2d 273—Donovan v. Standard Oil Co. of Louisiana, App., 197 So. 320—Morgan v. Lanz, App., 195 So. 128, followed in Schindler v. Lanz, 195 So. 133 and Yeatman v. Lanz, 195 So. 133—Chaney v. Hutches, App., 192 So. 556—Leiser v. Thomas, App., 150 So. 81, rehearing refused 150 So. 670—Barber v. El Dorado Lumber Co., App., 139 So. 29, reheard 142 So. 718.
 Mass.—Gallup v. Lazott, 171 N.E. 658, 271 Mass. 406.
 Mo.—Allison v. Dittbrenner, App., 50 S.W.2d 199.

Neb.—Murphy v. Shibiya, 250 N.W. 746, 125 Neb. 487.
 Tex.—Ford Motor Co. v. Maddin, 76 S.W.2d 474, 124 Tex. 131.
 Wis.—Groh v. W. O. Krahn, Inc., 271 N.W. 374, 223 Wis. 662—Cummings v. Nelson, 250 N.W. 759, 213 Wis. 121.
 (4) Failure to warn driver of danger.
 Cal.—Cate v. Fresno Traction Co., 2 P.2d 364, 213 Cal. 190.
 Ill.—Baumgardner v. Boyer, 51 N.E. 2d 784, 320 Ill.App. 438.
 La.—Cassar v. Mansfield Lumber Co., App., 35 So.2d 797—Scott v. Richard, App., 24 So.2d 175, followed in 24 So.2d 180 and 24 So.2d 179—Gillespie v. Louisiana Long Leaf Lumber Co., 185 So. 116—Meaux v. Gulf Ins. Co., App., 182 So. 158, followed in 182 So. 164, two cases—Johnson v. National Casualty Co., App., 176 So. 235—Rhodes v. Jordan, App., 157 So. 811—Leiser v. Thomas, App., 150 So. 81, rehearing refused 150 So. 670—Law-rason v. Richard, 129 So. 250, 16 La App. 434, affirmed 135 So. 29, 172 La 696.
 Me.—Plante v. Canadian Nat. Rys., 23 A.2d 814, 138 Me. 215.
 Neb.—Murphy v. Shibiya, 250 N.W. 746, 125 Neb. 487.
 Okl.—Eagle-Picher Mining & Smelt-ing Co. v. Drinkwine, 141 P.2d 66, 192 Okl. 662.
 Tex.—Ford Motor Co. v. Maddin, 76 S.W.2d 474, 124 Tex. 131—McWil-liams v. Halley, Civ.App., 95 S.W. 2d 985, error dismissed—Humble Oil & Refining Co. v. Butler, Civ. App., 46 S.W.2d 1043, error dis-missed.
 (5) Going to sleep while riding.
 Or.—Smith v. Williams, 178 P.2d 710, 180 Or. 626, 173 A.L.R. 1220.
 Pa.—Burns v. Wasilindra, Com.Pl., 60 Montg.Co. 28.
 (6) Gross contributory negligence.
 —Murphy v. Shibiya, 250 N.W. 746, 125 Neb. 487.
 (7) Interfering with driver.
 Ill.—Baumgardner v. Boyer, 51 N.E. 2d 784, 320 Ill.App. 438.
 La.—Leiser v. Thomas, App., 150 So. 81, rehearing refused 150 So. 670.
 Minn.—Grengs v. Erickson, 29 N.W. 3d 881, 225 Minn. 153.
 N.D.—Wilson v. Oscar H. Kjorlie Co., 12 N.W.2d 526, 73 N.D. 134.
 R.I.—Pacheco v. Weybosset Pure Food Market, 171 A. 235.
 (8) Intersectional collision.
 Cal.—Swink v. Gardena Club, 151 P. 2d 313, 65 Cal.App.2d 674—Chinnis-v. Pomona Pump Co., 98 P.2d 560, 36 Cal.App.2d 633.
 D.C.—Peake v. Ramsey, Mun.App., 43: A.2d 763.
 Ill.—Serletie v. Jeromell, 57 N.E.2d 896, 324 Ill.App. 233—Barber v. Northcutt, 39 N.E.2d 411, 313 Ill.

tributary negligence of other persons.⁵³

c. Collisions between Motor Vehicles at Intersections

In particular cases, evidence has been held sufficient or insufficient to prove, or disprove, the contributory negligence of persons involved in collisions between motor vehicles at intersections.

In the application of the principles stated supra

subdivision a of this section, evidence adduced in particular actions for personal injuries or property damage resulting from collisions between motor vehicles crossing, or attempting to cross, the paths of each other, or at intersections generally, has been held sufficient to show contributory negligence, or insufficient to show the absence thereof,⁵³ in cutting a corner, or failing to go past the middle of

App. 147—Heinichen v. Evans, 23 N.E.2d 400, 302 Ill.App. 70—Graham v. Dresen, 10 N.E.2d 843, 292 Ill.App. 15.

La.—Simon v. Harrison, App., 200 So. 476, followed in 200 So. 481—Schechnaldre v. Bledsoe, App., 194 So. 45—Cheney v. Hutches, App., 192 So. 556—Barr v. Fidelity & Casualty Co. of New York, App., 188 So. 521.

Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394.

NH.—Gendron v. Glidden, 148 A. 461, 84 N.H. 162.

N.J.—Dunphy v. Thompson, 130 A. 639, 3 N.J.Misc. 1086.

N.Y.—Eaton v. Paige, 24 N.Y.S.2d 522, 261 App.Div. 850.

R.I.—Spaziano v. Raponi, 13 A.2d 810, 65 R.I. 163—Pacheco v. Weybosset Pure Food Market, 171 A. 235.

Va.—Outlaw v. Pearce, 11 S.E.2d 600, 176 Va. 458.

Wis.—Brown v. Haertel, 244 N.W. 633, second case, 210 Wis. 354, amended 246 N.W. 691, 210 Wis. 354—Asmus v. Gams, 244 N.W. 581, 209 Wis. 201.

(9) Intoxication of plaintiff.—Schechnaldre v. Bledsoe, La.App., 194 So. 45—Barber v. El Dorado Lumber Co., La.App., 139 So. 29, reheard 142 So. 718.

(10) Joint enterprise with driver. N.C.—York v. York, 194 S.E. 486, 212 N.C. 695.

Pa.—Fingeret v. Mann, 178 A. 674, 319 Pa. 262.

(11) Riding in car driven at excessive speed.

Cal.—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298.

Kan.—Sponable v. Thomas, 33 P.2d 729, 139 Kan. 725.

(12) Riding in defective vehicle. U.S.—Stafford v. Roadway Transit Co., C.C.A.Pa., 165 F.2d 920.

Nev.—Thorne v. Lampros, 288 P. 601, 52 Nev. 417.

N.C.—York v. York, 194 S.E. 486, 212 N.C. 695.

Tex.—Tippitt v. Gohman, Civ.App., 145 S.W.2d 908, error dismissed, judgment correct.

(13) Riding with intoxicated or careless driver.

Cal.—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal.2d 480—Kropflin v. Huston, 179 P.2d

575, 79 Cal.App.2d 332—McMahon v. Schindler, 102 P.2d 378, 38 Cal.App.2d 642—Earley v. Wolf, 51 P.2d 203, 10 Cal.App.2d 224—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298.

La.—Morgan v. Lanz, App., 195 So. 128, followed in Schindler v. Lanz 195 So. 133 and Yeatman v. Lanz 195 So. 133—Leiser v. Thomas, App., 150 So. 670, refusing rehearing 150 So. 81—Barber v. El Dorado Lumber Co., App., 139 So. 29, reheard 142 So. 718—Waters v. Meriwether Transfer Co., 137 So. 578, 18 La.App. 18—Denham v. Taylor, 131 So. 614, 15 La.App. 545, rehearing denied 132 So. 372, 19 La.App. 814.

Mass.—O'Connell v. McKeown, 170 N.E. 402, 270 Mass. 432.

Mont.—Westergard v. Peterson, 159 P.2d 518, 117 Mont. 550.

N.J.—Zito v. Ingersoll, 147 A. 400, 7 N.J.Misc. 893.

Failure to warn

Jury may consider, on question of automobile guest's contributory negligence in automobile accident case, whether guest failed to warn or protest to driver.—Lazar v. Black & White Cab Co., 179 S.E. 250, 50 Ga. App. 567.

Ownership as showing right to control vehicle

With respect to negligence of plaintiff passenger, passenger's ownership of automobile involved in collision while operated by her minor son, in absence of evidence that she had divested herself of right to control, is sufficient to warrant finding that passenger retained right to control operation of automobile.—Levangie v. Gutterson, 194 N.E. 79, 289 Mass. 287.

52. Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.

Mich.—Saur v. Rowland, 262 N.W. 301, 272 Mich. 520.

Minn.—Norton v. Connolly, 16 N.W. 2d 170, 218 Minn. 366.

Neb.—Eaton v. Merritt, 281 N.W. 620, 135 Neb. 368.

N.Y.—Anderson v. Snell, 282 N.Y.S. 704, 246 App.Div. 570.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

Minn.—Murphy v. Dyson, 25 N.W.2d 291, 223 Minn. 19.

Mont.—McCulloch v. Horton, 56 P.2d 1344, 102 Mont. 135.

N.Y.—Brown v. Babcock, 40 N.Y.S.2d 428, 265 App.Div. 596—Stockham v. Teska, 40 N.Y.S.2d 460.

N.D.—Ziegler v. Ford Motor Co., 272 N.W. 743, 67 N.D. 286.

Or.—Motejl v. Greenwood, 138 P.2d 216, 171 Or. 469.

Wash.—Clarke v. Bohemian Breweries, 110 P.2d 197, 7 Wash.2d 487.

53. U.S.—U. S. v. Goldman, D.C.Pa., 61 F.Supp. 315.

Ark.—Graves v. Jewel Tea Co., 28 S.W.2d 972, 180 Ark. 980.

Cal.—Bischell v. State, 157 P.2d 41, 68 Cal.App.2d 557—Dungey v. Pacific Electric Ry. Co., 117 P.2d 375,

47 Cal.App.2d 94—Almanerz v. San Diego Electric Ry. Co., 59 P.2d 513,

15 Cal.App.2d 423—Clerley v. Uhalt, 10 P.2d 769, 122 Cal.App. 701.

Conn.—Contractor's Supply Co. v. Connecticut Ry. & Lighting Co., 44 A.2d 915, 132 Conn. 431—Carlin v. Haas, 8 A.2d 530, 126 Conn. 8—England v. Watkins Bros., 186 A. 484, 122 Conn. 1.

D.C.—Rasen v. Southern Hotel Supply Co., Mun.App., 31 A.2d 659.

Ill.—Muehle v. Checker Taxi Co., 34 N.E.2d 883, 310 Ill.App. 539—

Jordan v. Railway Express Agency, 27 N.E.2d 309, 305 Ill.App. 491—

Ziellinski v. Pleason, 20 N.E.2d 620, 299 Ill.App. 594—Walker v.

Brandon, 19 N.E.2d 219, 298 Ill. App. 630—Landess v. Mahler, 15 N.

E.2d 13, 295 Ill.App. 498—Crophe v. Central Illinois Produce Co., 12

N.E.2d 46, 293 Ill.App. 623.

La.—Burden v. Capitol Stores, 8 So. 2d 45, 200 La. 329—Sheehan v.

Hanson-Flotte Co., App., 34 So.2d 657—Toye Bros. Yellow Cab Co. v.

V-8 Cab Co., App., 18 So.2d 514—

Austin v. Bruning, App., 16 So.2d 493—Thomas v. Kelly, App., 6 So.

2d 760—Stock v. Davis, App., 187 So. 679—Gardescu v. Taylor, App.,

187 So. 135—Di Chiara v. Hackett, App., 186 So. 113—Gertley v. New

Orleans Public Service, App., 178 So. 270—Buscatto v. Stewart,

App., 177 So. 121—Capillon v. Longfield, App., 171 So. 194—Mo-

reau v. Garritson, App., 168 So. 660—Montgomery v. Peyronnin,

App., 149 So. 291—Kelt v. Teche Transfer Co., App., 145 So. 566—

Hoffman v. Peter Judin, Inc., 134 So. 435, 17 La.App. 183—Jordan v.

the street, in turning within an intersection,⁵⁴ disobeying a traffic signal,⁵⁵ driving, or entering or approaching an intersection at excessive or unlawful speed,⁵⁶ driving in an unreasonable, reckless, or imprudent manner,⁵⁷ driving partly on the wrong side of a road or street,⁵⁸ driving while intoxicat-

Katz & Besthoff, 132 So. 380, 15 La.App. 500—Frans v. Shushan, 131 So. 591, 14 La.App. 465—Nesstor v. Item Co., 131 So. 482, 15 La. App. 339—Ferguson v. Philippl, 125 So. 144, 12 La.App. 57—Maryland Casualty Co. v. Muller, 119 So. 764, 9 La.App. 700
 Me.—McCarthy v. Mason, 171 A. 256, 132 Me. 347—Keller v. Banks, 156 A. 817, 130 Me. 397.
 Md.—Askin v. Long, 6 A.2d 246, 176 Md. 545.
 Mass.—Farina Bros. v. Robinson, 199 N.E. 730, 293 Mass. 269.
 Mich.—Major v. Southwestern Motor Sales, 22 N.W.2d 96, 314 Mich. 122—Carrothers v. French, 15 N.W.2d 662, 309 Mich. 340—Nicewander v. Diamond, 4 N.W.2d 533, 302 Mich. 239—Alexander v. Sanders, 272 N.W. 870, 279 Mich. 465—Security Storage & Transfer Co. v. Quimby, 256 N.W. 331, 268 Mich. 259.
 Neb.—Wortman v. Zimmerman, 280 N.W. 588, 119 Neb. 682.
 N.Y.—Same v. Navison, 1 N.Y.S.2d 374, 253 App.Div. 123—Bertsch v. Smith, 261 N.Y.S. 45, 237 App.D.v. 836, reargument denied 261 N.Y.S. 1009, 237 App.Div. 896—Swartout v. Van Auken, 228 N.Y.S. 671, 132 Misc. 89, affirmed 235 N.Y.S. 732, 227 App.Div. 644.
 N.C.—Vinson v. Everette, 13 S.E.2d 531, 219 N.C. 862.
 Pa.—Spear & Co. v. Altmyer, 187 A. 309, 124 Pa.Super. 9—Miller v. Devine, Com.Pl., 54 Dauph.Co. 418.
 R.I.—Blackburn v. McKenna, 152 A. 691—De Robbio v. Burrows & Kenyon, 152 A. 253.
 Tenn.—Denton v. Watson, 65 S.W.2d 196, 16 Tenn.App. 451.
 Wash.—Whisler v. Weiss, 174 P.2d 766, 26 Wash.2d 446—Cirtedge v. Allen, 170 P.2d 660, 25 Wash.2d 300—Mancinelli v. Brown, 155 P.2d 497, 22 Wash.2d 209—Butke v. Hendrickson, 20 P.2d 7, 172 Wash. 302.
 Wis.—Lurie v. Nickel, 289 N.W. 686, 238 Wis. 420—Hansen v. Biron, 242 N.W. 498, 208 Wis. 215.
 42 C.J. p 1238 note 49 [a] (3).
Gross contributory negligence
 La.—Montifue v. American Mut. Liability Ins. Co., App., 26 So.2d 407.
Contributory negligence as matter of law
 Cal.—Cope v. Goble, 103 P.2d 598, 39 Cal.App.2d 448—Henderson v. Braden, 94 P.2d 625, 35 Cal.App. 2d 88.
 Mich.—Lacayse v. Roe, 17 N.W.2d 765, 310 Mich. 591—Heckler v. Laing, 1 N.W.2d 484, 300 Mich.

139—Kendall v. Bean, 263 N.W. 883, 273 Mich. 657.
 Minn.—Chandler v. Buchanan, 216 N.W. 254, 173 Minn. 31.
 Mo.—Roberts v. Consolidated Paving & Material Co., 70 S.W.2d 543, 335 Mo. 6.
 Pa.—Papkin v. Helfand & Katz, 31 A.2d 112, 346 Pa. 485—Mathasen v. Brennan, 179 A. 438, 318 Pa. 577—Dougherty v. Merchants' Baking Co., 169 A. 753, 313 Pa. 557.
 S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445, 67 S.D. 613.
 Va.—Stillman v. Williams, 27 S.F. 2d 186, 181 Va. 863—Penoso v. D. Pender Grocery Co., 13 S.E.2d 310, 177 Va. 245.
 Wash.—Hoenig v. Kohl, 46 P.2d 728, 182 Wash. 245.
 Wis.—Manchuk v. Milwaukee Electric Ry & Light Co., 294 N.W. 42, 235 Wis. 579—Whyte v. Lindblom, 255 N.W. 265, 216 Wis. 21, rehearing denied 256 N.W. 244, 216 Wis. 27.

Presumption of due care held overcome by physical facts.—Reichert v. Rex Accessories Co., 279 N.W. 645, 228 Wis. 425.

54. Tex.—Adams v. Stefferman, Civ. App., 197 S.W.2d 506.
 Wash.—Levine v. A. A. Owen Lumber Co., 84 P.2d 353, 196 Wash. 673

Prima facie evidence

Proof of plaintiff driver's violation of statutory rule that driver turning to left at road intersection shall pass beyond meeting point of medial lines of intersecting ways is prima facie evidence of negligence, but must be considered with all other attending facts in determining whether he exercised due care under circumstances.—Tibbetts v. Harbach, 198 A. 610, 135 Me. 397.

55. Tex.—Walker v. Houston Electric Co., Civ.App., 155 S.W.2d 973, error refused.

56. U.S.—Autrey v. Swisher, C.C.A. Fla., 155 F.2d 18.
 Cal.—Weaver v. Landis, 151 P.2d 884, 66 Cal.App.2d 34—Solloway v. Watts, 137 P.2d 477, 58 Cal.App.2d 595—Cope v. Goble, 103 P.2d 598, 39 Cal.App.2d 448—Werk v. Rehkopf, 95 P.2d 464, 35 Cal.App.2d 356—Lipp v. Moon, 280 P. 710, 100 Cal.App. 618—Adams v. Tuxedo Land Co., 267 P. 926, 92 Cal.App. 266.
 Conn.—Contractor's Supply Co. v. Connecticut Ry. & Lighting Co., 44 A.2d 916, 132 Conn. 431—Wilson v. M & M Transp. Co., 3 A.2d 309, 125 Conn. 36.

Ill.—Spangler v. Blackburn, 23 N.E. 2d 405, 301 Ill.App. 625.
 Iowa.—Plummer v. Wright, 242 N.W. 28, 214 Iowa 318.
 Ky.—Hilsenrad v. Bowling, 166 S.W. 2d 847, 292 Ky. 368.

La.—Gomez v. Broussard, App., 34 So.2d 643, rehearing denied 35 So. 2d 477—Acosta v. Smith, App., 23 So.2d 742, followed in 23 So.2d 745 and Butler v. Smith, 23 So.2d 745—Garland v. Stretzinger, App., 22 So.2d 146—Meyer v. Rein, App., 18 So.2d 69—Chatters v. Tricon, App., 17 So.2d 862—McBride v. Gili, App., 15 So.2d 643—Gumbel v. Jackson Brewing Co., App., 15 So.2d 391—Terrebonne v. Toye Bros. Yellow Cab Co., App., 3 So.2d 224—Smith v. Jackson, App., 198 So. 174—Home Ins. Co. of New York v. Duhe, App., 188 So. 505—Vincent v. Simon, App., 186 So. 362—Bruscatto v. Stewart, App., 177 So. 121—Martin v. Missouri Pac Transp Co., App., 172 So. 558—Capillon v. Lengsfeld, App., 171 So. 194—Toye v. Richmond, App., 157 So. 556—Thomas v. Thomas, App., 155 So. 67—Burthe v. Lee, App., 152 So. 100, rehearing refused 152 So. 589—Murphy v. Star Checker Cab, App., 150 So. 79—Watson v. Munding, App., 144 So. 620—Todd v. Vige, App., 142 So. 802—Plick v. Tusa, 124 So. 678, 14 La.App. 330—Middleton v. Jordan, 120 So. 668, 10 La.App. 189.
 N.M.—Langenegger v. McNally, 171 P.2d 316, 50 N.M. 96.
 N.Y.—Areson v. Majek, 65 N.Y.S.2d 474.

Okl.—Wilson & Co. v. Campbell, 157 P.2d 465, 195 Okl. 323.

Pa.—Spear & Co. v. Altmyer, 187 A. 309, 124 Pa.Super. 9.
 R.I.—Bischoff v. Dunn, 161 A. 114.

Wash.—Young v. City of Seattle, 172 P.2d 222, 25 Wash.2d 888—Stanley v. Smith, 117 P.2d 207, 10 Wash.2d 461.

Wis.—Anderson v. Potts, 27 N.W.2d 495, 250 Wis. 510—Zigler v. Kinney, 27 N.W.2d 433, 250 Wis. 338—Kilcoyne v. Trausch, 269 N.W. 276, 222 Wis. 528—Ziemke v. Faber, 266 N.W. 217, 221 Wis. 512.

Negligence established prima facie
 Miss.—Moore v. Adballa, 19 So.2d 502, 197 Miss. 125.

57. La.—Burthe v. Lee, App., 152 So. 100, rehearing refused 152 So. 589—Watson v. Munding, App., 144 So. 620.

Or.—Ervast v. Sterling, 68 P.2d 187, 156 Or. 432.

58. La.—Vincent v. Simon, App., 186 So. 362.

ed,⁵⁹ driving with defective brakes,⁶⁰ driving without lights,⁶¹ failing to bring or have the vehicle under control,⁶² failing to maintain a proper lookout,⁶³ failing to see the approaching motor vehicle,⁶⁴ failing to signal for a turn,⁶⁵ failing to slow down,⁶⁶ failing to sound the horn,⁶⁷ failing to stop before entering a highway or an intersection,⁶⁸ failing to stop on neutral ground,⁶⁹ failing to yield the right of way,⁷⁰ failing to turn in the traffic lane

Wis.—Kilcoyne v. Trausch, 269 N. W. 276, 222 Wis. 528.

59. Cal.—Weaver v. Landis, 151 P. 2d 884, 66 Cal.App.2d 34.

60. La.—Bertuocini v. Toye Bros. Yellow Cab Co., App. 11 So.2d 247—Swaggerty v. Little, App., 156 So. 782, followed in 156 So. 784

61. La.—Thomas v. Thomas, App. 155 So. 67.

62. La.—Gomez v. Broussard, App. 34 So.2d 643, rehearing denied 35 So.2d 477—Garland v. Stretzinger, App., 22 So.2d 146—McBride v. Gill, App., 15 So.2d 643.

Wis.—Ziemke v. Faber, 266 N.W. 217, 221 Wis. 512.

Reasonable control

Ky.—Hilsenrad v. Bowling, 166 S.W. 2d 847, 292 Ky. 368.

63. Cal.—Weaver v. Landis, 151 P. 2d 884, 66 Cal.App.2d 34—Solloway v. Watts, 137 P.2d 477, 58 Cal.App.2d 595—Stup v. Higgins, 106 P.2d 931, 41 Cal.App.2d 379—Cope v. Goble, 103 P.2d 598, 39 Cal.App. 2d 448—Chinnis v. Pomona Pump Co., 98 P.2d 560, 36 Cal.App.2d 633—Henderson v. Braden, 94 P. 2d 625, 35 Cal.App.2d 88—Chronister v. Brennan, 81 P.2d 479, 27 Cal.App.2d 509.

D.C.—Raeen v. Southern Hotel Supply Co., Mun.App., 31 A.2d 659.

Ky.—Hilsenrad v. Bowling, 166 S.W.2d 847, 292 Ky. 368.

La.—Guarisco Motor Co. v. Carline, App., 28 So.2d 364—Saucier v. Kellett, App., 23 So.2d 772—Acosta v. Smith, App., 23 So.2d 742, followed in 23 So.2d 745 and Butler v. Smith, 23 So.2d 745—Garland v. Stretzinger, App., 22 So.2d 146—Chatters v. Tricon, App., 17 So.2d 362—General Exchange Ins. Corporation v. Kelly, App., 198 So. 376—Smith v. Jackson, App., 198 So. 174—Home Ins. Co. of New York v. Duhe, App., 188 So. 505—Vincent v. Simon, App., 186 So. 362—Martin v. Missouri Pac. Transp. Co., App., 172 So. 558—Bruscatto v. Stewart, App., 177 So. 121—Toye v. Richmond, App., 157 So. 556—Burthe v. Lee, App., 152 So. 100, rehearing refused 152 So. 589—Annen v. Harrell, App., 143 So. 76—Martens v. Penton, 130 So. 364, 15 La.App. 35, followed in 130 So. 360, 15 La.App. 60 and 130 So. 360, 15 La.App. 61.

Mich.—Francis v. Rumsey, 6 N.W.2d 766, 303 Mich. 526—Heckler v. Laing, 1 N.W.2d 484, 300 Mich. 139.

Minn.—Kane v. Locke, 12 N.W.2d 495, 216 Minn. 170

Or.—Ervast v. Sterling, 68 P.2d 137, 156 Or. 432

Pa.—Carroll v. Kirk, 19 A.2d 584, 144 Pa.Super. 211—Spear & Co. v. Altmeyer, 187 A. 309, 124 Pa.Super. 9—Godshall v. Dietrich, 13 Pa.Dist. & Co. 452, 22 Berks Co. 71

S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445, 67 S.D. 613 Tex.—Traweek v. Magnolia Gas Products Co., Civ.App., 110 S.W.2d 593—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed.

Wash.—Plenderleith v. McGuire, 180 P.2d 808, 27 Wash.2d 841—Whisler v. Weiss, 174 P.2d 766, 26 Wash.2d 446—Mancinelli v. Brown, 155 P.2d 497, 22 Wash.2d 299—Levine v. A. A. Owen Lumber Co., 84 P. 2d 353, 196 Wash. 673

Wis.—Manchuk v. Milwaukee Electric Ry. & Light Co., 294 N.W. 42, 235 Wis. 579—Ziemke v. Faber, 266 N.W. 217, 221 Wis. 512—Brown v. Haertel, 244 N.W. 630, 210 Wis. 345.

Evidence overcoming presumption

Presumption that motorist made proper observations for approaching traffic after having stopped at stop sign was overcome by evidence that he had a clear and unobstructed view of the through highway in direction from which defendant's vehicle was approaching—Heckler v. Laing, 1 N.W.2d 484, 300 Mich. 139.

64. D.C.—Raeen v. Southern Hotel Supply Co., Mun.App., 31 A.2d 659.

La.—Saucier v. Kellett, App., 23 So.2d 772—Smith v. Freese, App., 175 So. 89—Martin v. Missouri Pac. Transp. Co., App., 172 So. 558.

Mich.—Lacaeyse v. Roe, 17 N.W.2d 765, 310 Mich. 591—Heckler v. Laing, 1 N.W.2d 484, 300 Mich. 139—Pierason v. Bailey Products Co., 298 N.W. 518, 298 Mich. 243.

N.H.—Leavitt v. Bacon, 200 A. 399, 89 N.H. 383.

N.Y.—Areson v. Majek, 65 N.Y.S.2d 474.

Pa.—Miller v. Devine, Com.Pl., 54 Dauph.Co. 418.

R.I.—Keenan v. Providence Journal Co., 157 A. 302, 52 R.I. 54.

Va.—Penoso v. D. Pender Grocery Co., 13 S.E.2d 310, 177 Va. 245.

65. Cal.—Rocha v. Superior Wheeler Cake Corporation, 72 P.2d 238, 23 Cal.App.2d 153—Ross v. Tistaert, 41 P.2d 172, 4 Cal.App.2d 502.

Pa.—Dougherty v. Merchants' Baking Co., 169 A. 753, 313 Pa. 557.

Va.—Stillman v. Williams, 27 S.E. 2d 186, 181 Va. 863.

66. Cal.—Cope v. Goble, 103 P.2d 598, 39 Cal.App.2d 448.

Conn.—Contractor's Supply Co. v. Connecticut Ry. & Lighting Co., 44 A.2d 915, 132 Conn. 431.

La.—Toye v. Richmond, App., 157 So. 556.

N.Y.—Areson v. Majek, 65 N.Y.S.2d 474.

67. La.—Kelt v. Teche Transfer Co., App., 145 So. 566

N.Y.—Areson v. Majek, 65 N.Y.S.2d 474.

68. Ill.—Spangler v. Blackburn, 22 N.E.2d 405, 301 Ill.App. 625

Iowa.—Hogan v. Nesbit, 246 N.W. 270, 216 Iowa 75—Hollingsworth v. Hall, 242 N.W. 39, 214 Iowa 285

La.—Martin v. Missouri Pac. Transp. Co., App., 172 So. 558—Plick v. Tusa, 124 So. 678, 14 La.App. 330.

Mich.—Wilson v. Corwin, 300 N.W. 857, 299 Mich. 494—Huber v. Paquette, 292 N.W. 334, 293 Mich. 370

—Toussaint v. Conta, 290 N.W. 830, 292 Mich. 366—Hekman Biscuit Co. v. Commercial Credit Co., 289 N.W. 113, 291 Mich. 156—In re King's Estate, 284 N.W. 705, 288 Mich. 218.

S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445, 67 S.D. 613.

69. La.—Kelt v. Teche Transfer Co., App., 145 So. 566.

70. Cal.—Solloway v. Watts, 137 P. 2d 477, 58 Cal.App.2d 595—Adams v. Tuxedo Land Co., 267 P. 926, 92 Cal.App. 266.

La.—Adger v. Voloto, 138 So. 157, 18 La.App. 242—William P. Ross, Inc., v. Corcoran, 120 So. 883, 10 La.App. 305—Middleton v. Jordan, 120 So. 668, 10 La.App. 189

Minn.—Kane v. Locke, 12 N.W.2d 495, 216 Minn. 170

N.Y.—Areson v. Majek, 65 N.Y.S.2d 474.

Ohio.—Security Ins. Co. v. Smith, Mun., 72 N.E.2d 693.

Pa.—Gasperoni v. Datt, 19 A.2d 376, 341 Pa. 448—Dougherty v. Merchants' Baking Co., 169 A. 753, 313 Pa. 557—Sweet v. Rounds, 36 A. 2d 815, 349 Pa.Super. 152—Powers v. Wiebe, 86 Pa.Super. 392.

Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed.

Wash.—Mancinelli v. Brown, 155 P. 2d 497, 22 Wash.2d 299—Hoenig v. Kohl, 46 P.2d 728, 182 Wash. 245

nearest to the right-hand curb,⁷¹ passing within the limits of an intersection,⁷² and swerving to the left.⁷³

On the other hand, evidence adduced in other

cases has been held insufficient to show contributory negligence, or sufficient to show the absence thereof, in connection with collisions between motor vehicles crossing, or attempting to cross, the paths of each other, or at intersections generally;⁷⁴

- Butske v. Hendrickson, 20 P.2d 7, 172 Wash. 302.
- Wis.—Kilcoyne v. Trausch, 269 N. W. 276, 222 Wis. 528—Ziemke v. Faber, 266 N.W. 217, 221 Wis. 512.
71. Wis.—Reichert v. Rex Accessories Co., 279 N.W. 645, 228 Wis. 425.
72. Cal.—Miller v. Pacific Freight Lines, 104 P.2d 1069, 40 Cal.App.2d 451.
73. R.I.—Bischoff v. Dunn, 161 A. 114.
74. U.S.—Kansas City Public Service Co. v. McMullin, C.C.A.Kan., 142 F.2d 116.
- Cal.—Brindamour v. Murray, 69 P. 2d 1009, 7 Cal.2d 73—Leblanc v. Coverdale, 3 P.2d 312, 213 Cal. 654 —Hershey v. Laswell, 146 P.2d 509, 63 Cal.App.2d 219—Fruitt v. Krovitz, 139 P.2d 992, 59 Cal.App. 2d 666—Zehnder v. Spaulding, 127 P.2d 620, 53 Cal.App.2d 268—Cox v. Tyrone Power Enterprises, 121 P.2d 829, 49 Cal.App.2d 383—Anderson v. San Francisco Examiner, 112 P.2d 297, 44 Cal.App.2d 349 —Inouye v. McCall, 96 P.2d 386, 35 Cal.App.2d 634—Page v. Cudahy Packing Co., 87 P.2d 913, 31 Cal.App.2d 282—Kennedy v. Berg, 62 P.2d 1374, 18 Cal.App.2d 53—Wantz v. Ammons, 46 P.2d 210, 7 Cal. App.2d 643—Day v. Pickwick Stages System, 25 P.2d 16, 134 Cal. App. 92—Shamlian v. Minardi, 11 P.2d 402, 123 Cal.App. 495—Van Derhoof v. Chambon, 8 P.2d 925, 121 Cal.App. 118—Demers v. Sutherland, 4 P.2d 187, 117 Cal.App. 489 —Sawyer v. Nelson, 1 P.2d 1068, 115 Cal.App. 490—Wauchope v. Baumbach, 296 P. 310, 112 Cal.App. 64—Bennett v. Hardy, 291 P. 903, 108 Cal.App. 473—Wynne v. Wright, 286 P. 1057, 105 Cal.App. 17—Daniel v. Asbill, 276 P. 149, 97 Cal.App. 731—Olds & Stoller v. Seifert, 254 P. 289, 81 Cal.App. 423.
- Colo.—Markley v. Hilkey Bros., 160 P.2d 394, 113 Colo. 562—Andrus v. Hall, 27 P.2d 495, 93 Colo. 526.
- Conn.—Squires v. Wolcott, 52 A.2d 406, 133 Conn. 449—Pizzarello v. Sheldon, 36 A.2d 376, 130 Conn. 643—Decker v. Roberts, 32 A.2d 651, 130 Conn. 174—Camarotta v. Kling, 143 A. 881, 108 Conn. 602.
- D.C.—Bland v. Hershey, 50 F.2d 991, 60 App.D.C. 226.
- Idaho.—Madron v. McCoy, 126 P.2d 566, 63 Idaho 703.
- Ill.—Ritter v. Nieman, 74 N.E.2d 911, 332 Ill.App. 283—Nash v. Welch, 57 N.E.2d 648, 824 Ill.App. 225—
- Barber v. Northcutt, 39 N.E.2d 411, 313 Ill.App. 147—Gragg v. Pasqualini, 17 N.E.2d 75, 297 Ill.App. 631 —Darling & Co. v. Yellow Cab Co., 238 Ill.App. 326.
- Ind.—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624—Earle v. Porter, 40 N.E.2d 381, 112 Ind.App. 71—Teegarden v. Brown, 39 N.E.2d 793, 111 Ind.App. 159—Jones v. Kasper, 33 N.E.2d 816, 109 Ind. App. 465—Coats v. Strawmeyer, 21 N.E.2d 433, 107 Ind. App. 102.
- Kan.—Spohn v. Southern Kansas Stage Lines Co., 50 P.2d 1001, 142 Kan. 595—Ragnall v. Hunt, 293 P. 733, 131 Kan. 805—Kersting v. Reese, 255 P. 74, 123 Kan. 277.
- La.—Hollabaugh-Seale Funeral Home v. Standard Acc. Ins. Co., App., 32 So.2d 616—Lewis v. Groetsch, App., 32 So.2d 396—Kopeso v. Alello, App., 32 So.2d 99, followed in 32 So.2d 101 and 32 So.2d 102—Loret v. Armour & Co., App., 32 So.2d 55—Culver v. Toye Bros. Yellow Cab Co., App., 26 So.2d 296—Barro v. Tilbury, App., 24 So.2d 838—Waller v. Rapides Grocery Co., App., 22 So.2d 407—Ferris v. Quinn, App., 21 So.2d 106—Kelly v. Neff, App., 14 So.2d 657—White v. Neff, App., 11 So.2d 289—Phillips v. New Amsterdam Casualty Co., App., 6 So.2d 96—Hartford Fire Ins. Co. v. Romero, App., 5 So.2d 208—Isaac v. Frederick, App., 5 So.2d 176—Olano v. Leathers, App., 2 So.2d 486—Taney v. White Top Cabs, App., 2 So.2d 281—Simon v. Harrison, App., 200 So. 476, followed in 200 So. 481—White v. American Employers Ins. Co., App., 197 So. 803—Chandler v. F. Strauss & Son, App., 194 So. 133—Schexnaildre v. Bledsoe, App., 194 So. 45—Allen v. Metropolitan Casualty Ins. Co. of New York, App., 190 So. 163—Meredith v. Arkansas Louisiana Gas Co., App., 185 So. 498—Vassar v. Levy, App., 184 So. 255—Becker v. U. S. Rubber Products, App., 183 So. 596, amended on other grounds and reinstated 186 So. 99—Bertucci v. Arjonilla, App., 172 So. 445—Tircuit v. Isom, App., 169 So. 98—Boykin v. Plauche, App., 168 So. 741, rehearing denied and amended 169 So. 131—Alcantara v. Halk, App., 153 So. 357—Cucchiara v. Siple, App., 153 So. 338—Long v. White, App., 149 So. 133—McClary v. Endom's Transfer & Storage Garage, 139 So. 702, 19 La.App. 515—Fuller v. Moore, 139 So. 679, 19 La.App. 93—Armour & Co. v. Hicks Co., 138 So. 676, 18 La.App. 504—Gassiot v. Southland Produce Co., 138 So. 214, 18 La. App. 437—Willis v. Standard Oil Co. of Louisiana, 135 So. 777, 17 La.App. 217—Shields v. Succession of Hodge, 128 So. 530, 13 La. App. 546—Reeves v. Heymann, 128 So. 47, 13 La. App. 376—Dietrich & Wiltz v. H. T. Cottam & Co., 120 So. 262, 9 La. App. 740.
- Me.—Atherton v. Crandlemire, 33 A. 2d 303, 140 Me. 28—Libby v. Heikinen, 32 A.2d 604, 140 Me. 23—Hill v. Janson, 31 A.2d 236, 139 Me. 344.
- Md.—Jones v. Dickerson, 41 A.2d 492, 184 Md. 499.
- Mass.—Gibbs v. Swiman, 38 N.E.2d 930, 310 Mass. 830—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 207.
- Mich.—Wright v. Barron, 28 N.W.2d 278, 318 Mich. 409—Slivensky v. Wayne, 12 N.W.2d 331, 307 Mich. 443.
- Neb.—Coburn v. Loetscher, 243 N.W. 127, 123 Neb. 407—Stiefler v. Miller, 232 N.W. 620, 120 Neb. 6.
- N.J.—Barnes v. Browell Bus Co., 32 A.2d 286, 130 N.J.Law 193—Bowen v. Healy's Inc., 197 A. 655, 116 N. J.Misc. 113, appeal dismissed Fisher v. Healy's Special Tours, 1 A. 2d 848, 121 N.J.Law 198—Taylor v. Adkins, 158 A. 924, 10 N.J. Misc. 289—Samuel v. Christiansen, 158 A. 479, 10 N.J.Misc. 223—Henderson v. Abbotts Alderney Dairies, 156 A. 20, 9 N.J. Misc. 802—Carragher v. Brown & White Cab, 154 A. 736, 9 N.J. Misc. 549—Napollitano v. Moore, 152 A. 705, 9 N.J.Misc. 49.
- N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.
- N.Y.—Reynolds v. State, 28 N.Y.S.2d 851, 262 App.Div. 927, appeal dismissed 40 N.E.2d 34, 287 N.Y. 745 —Woodward v. Phipps, 26 N.Y.S. 2d 393, 261 App.Div. 865, reargument denied 27 N.Y.S.2d 456, 261 App.Div. 1025—Walrath v. Jennings, 1 N.Y.S.2d 549, 253 App.Div. 865—Guthrie v. Thomas, 24 N.Y.S. 2d 934, affirmed 24 N.Y.S.2d 936, 260 App.Div. 1041, appeal denied 25 N.Y.S.2d 1001, 261 App.Div. 836—Devuono v. Muller, 214 N.Y.S. 557, 126 Misc. 669, reversed in part on other grounds 219 N.Y.S. 83, 128 Misc. 501.
- Ohio.—Connors v. Dobbs, 66 N.E.2d 546, 77 Ohio App. 247—Peltier v. Smith, 66 N.E.2d 117, 78 Ohio App. 171.
- Pa.—Jones v. Williams, 58 A.2d 57, 358 Pa. 559—Luckenbaugh v. Haughawout, 46 A.2d 163, 353 Pa.

in disobeying a traffic signal;⁷⁵ driving, or entering or approaching an intersection, at excessive or unlawful speed;⁷⁶ or recklessly;⁷⁷ driving without lights or with dim lights;⁷⁸ entering an intersection after it has been preempted by another motor vehicle;⁷⁹ failing to avoid a fire truck;⁸⁰ failing to drive to the right of the center of a street;⁸¹

failing to equip an automobile with the special equipment required by a driver's license;⁸² failing to keep to the right at an intersection;⁸³ failing to maintain a constant or proper lookout;⁸⁴ failing to maintain control of the motor vehicle;⁸⁵ failing to see the approaching motor vehicle;⁸⁶ failing to sig-

528—Curry v. J. M. Willson & Sons, 152 A. 746, 301 Pa. 467—Lambert v. Barry, 96 Pa.Super. 221—Smith v. Blaffkin, 95 Pa.Super. 520—Arrigo v. Luff, Com.Pl., 57 Montg.Co. 266.

R.I.—National Sugar Refining Co. v. Knight, 11 A 2d 918, 64 R.I. 279
Tex.—Pure Oil Co. v. Crabb, Civ. App., 151 S.W.2d 962, error refused—Moncada v. Snyder, Civ.App., 129 S.W.2d 817, affirmed 152 S.W.2d 1077, 137 Tex. 112—Roddy v. Herren, Civ.App., 125 S.W.2d 1057—O. K. Theater Corporation v. Reh-meyer, Civ.App., 115 S.W.2d 985, error dismissed—South Texas Coaches v. Eastland, Civ.App., 101 S.W.2d 878, error dismissed—Cruise v. Chacon, Civ.App., 67 S.W.2d 399, error dismissed

Vt.—Gregoire v. Willett, 8 A 2d 660, 110 Vt. 459.

Va.—Hatfield v. Thomas, 41 S E 2d 460, 186 Va. 7—Temple v. Moses, 8 S E 2d 262, 175 Va. 320.

Wash.—O'Neil v. Wilshire, 57 P.2d 1254, 186 Wash. 276—Comstock v. Smith, 48 P.2d 255, 183 Wash 94—Martin v. Brantigan, 38 P.2d 1007, 180 Wash 60—Church v. Shaffer, 297 P. 1097, 162 Wash. 126—Wilker v. Vincent, 252 P. 925, 142 Wash 184.

Wis.—Klas v. Fenske, 22 N.W.2d 596, 248 Wis 534—Jacobson v. Bryan, 12 N W 2d 789, 244 Wis. 359—Horn v. Snow White Laundry & Dry Cleaning Co., 3 N.W.2d 380, 240 Wis 312—Tofte v. Crollius, 220 N. W. 225, 196 Wis. 608.

42 C.J. p 1238 note 49 [b] (4).

Contributory negligence as matter of fact

Mich.—Moquin v. Nastwold, 21 N.W. 2d 116, 313 Mich. 243

Contributory negligence as matter of law

Kan.—Damitz v. Christian, 21 P.2d 324, 137 Kan. 562.

Minn.—Behr v. Schmidt, 288 N.W. 722, 206 Minn. 378.

Neb.—Whitaker v. Keogh, 14 N.W. 2d 596, 144 Neb. 790, followed in 14 N.W.2d 600, 144 Neb. 796.

R.I.—United Electric Rys. Co. v. Pennsylvania Petroleum Products Co., 178 A. 861, 55 R.I. 154.

Willful and wanton misconduct

Ill.—Heinichen v. Evans, 23 N.E.2d 400, 302 Ill.App. 70.

Presumption of lawful operation

Defendant's testimony did not

overcome presumption of lawful operation by driver of other vehicle involved in collision which had the right of way—General Exchange Ins. Co. v. Elizer, Ohio App., 31 N E.2d 147.

75. Ill.—Ambrose v. Doyle, 76 N.E. 2d 802, 333 Ill.App. 161.

Tex.—Sam v. Sullivan, Civ.App., 189 S.W.2d 69, refused for want of merit.

76. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

Cal.—Laine v. Wedtall, 173 P.2d 567, 78 Cal.App.2d 610—Fruitt v. Krovitz, 139 P.2d 992, 59 Cal.App.2d 666—Bennett v. Hardy, 291 P. 903, 108 Cal App. 473—Johnson v. Wehner, 263 P. 553, 88 Cal App. 399—Snyder v. Reeg, 260 P. 600, 86 Cal App 231.

Ill.—Wallace v. Yellow Cab Co., 238 Ill.App. 283.

Ind.—Lautif v. Blades, 180 N.E. 609, 94 Ind App 266

La.—Kopco v. Alello, App., 32 So.2d 99, followed in 32 So.2d 101 and 32 So.2d 102—Home Ins. Co. v. Warren, App., 29 So.2d 551—Gachassin v. Richard, App., 28 So.2d 371—Glen Falls Ins. Co. v. Copeland, App., 28 So.2d 145—Droddy v. Southern Bus Lines, App. 26 So.2d 761—Butler v. O'Neal, App., 26 So.2d 753—Neel v. Massachusetts Bonding & Insurance Co., App. 13 So.2d 393—Cole v. Sherrill, App., 7 So.2d 205—Hartford Fire Ins. Co. v. Romero, App. 5 So.2d 208—Olano v. Leathers, App., 2 So.2d 486—Cavin v. Camus, App., 164 So 645—Hamilton v. Lee, App., 144 So 249—Genovese v. Krebs, 138 So 470, 18 La.App. 639.

N.J.—Becker v. Waring, 53 A.2d 311, 135 N.J.Law 535—Vischia v. Benjamin Motor Exp., 48 A.2d 391, 24 N.J.Misc. 255.

Ohio.—Peltier v. Smith, 66 N.E.2d 117, 78 Ohio App. 171—General Exchange Ins Co v. Elizer, App., 31 N.E.2d 147—Coshun v. Mauseau, 23 N.E.2d 656, 62 Ohio App. 249.

Pa.—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248.

Tex.—Erwin v. Welborn, Civ.App., 207 S.W.2d 124, refused no reversible error—Sam v. Sullivan, Civ.App., 189 S.W.2d 69, refused for want of merit.

Va.—Virginia Stage Lines v. Duff, 39 S.E.2d 634, 185 Va. 592.

Wash.—Mahoney v. Canafax, 162 P.

2d 903, 23 Wash.2d 869—Staatz v. Tucker, 71 P.2d 401, 191 Wash. 404—Wilker v. Vincent, 252 P. 925, 142 Wash. 184.

Wis.—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341.

77. Ind.—Lautif v. Blades, 180 N. E. 609, 94 Ind App. 266.

78. Ill.—Greene v. Citro, 18 N.E.2d 237, 298 Ill.App. 25, reversed on other grounds Greene v. Noonan, 23 N.E.2d 720, 372 Ill. 286.

La.—Hamilton v. Lee, App., 144 So. 249.

79. La.—Meredith v. Arkansas Louisiana Gas Co., App., 185 So. 498.

80. Me.—Russell v. Nadeau, 29 A.2d 916, 139 Me. 286.

81. Wash.—Bleiler v. Wolff, 161 P. 2d 145, 23 Wash.2d 368.

82. Wash.—Bleiler v. Wolff, supra.

83. Conn.—Decker v. Roberts, 32 A. 2d 651, 130 Conn. 174.

84. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22—Dubac v. M. & G. Convoy, D.C.Pa., 52 F.Supp. 414.

Cal.—Zehnder v. Spaulding, 127 P.2d 620, 53 Cal.App.2d 268.

La.—Gachassin v. Richard, App., 28 So.2d 371—Cole v. Sherrill, App., 7 So.2d 205.

Mich.—Slivensky v. Wayne, 12 N.W. 2d 331, 307 Mich. 443.

Miss.—Trowolla v. Garrett, 27 So.2d 887, 200 Miss. 563.

Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.

Pa.—Swift v. Corrado, 141 A. 491, 292 Pa 543.

S.D.—Federal Land Bank of Omaha v. Kinsman, 30 N.W.2d 8.

Wis.—Klas v. Fenske, 22 N.W.2d 596, 218 Wis 534—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis 341—Forecki v. Kohlberg, 295 N.W. 7, 237 Wis. 67, rehearing denied 296 N.W. 619, 237 Wis. 67.

85. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

La.—Cote v. Sherrill, App., 7 So.2d 205.

Wis.—Klas v. Fenske, 22 N.W.2d 596, 238 Wis. 534—Horn v. Snow White Laundry & Dry Cleaning Co., 3 N. W.2d 380, 240 Wis. 312—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341

86. La.—Capps v. American Auto

nal properly for a turn;⁸⁷ failing to slow down;⁸⁸ failing to sound a warning signal;⁸⁹ failing to stop before entering a highway or an intersection;⁹⁰ failing to yield the right of way;⁹¹ making a turn from the wrong traffic lane;⁹² operating an automobile in other than a reasonably prudent manner;⁹³ passing at an intersection;⁹⁴ violating a law as to stopping;⁹⁵ or violating an ordinance as to turning.⁹⁶

A conflict in plaintiff's testimony as to the precaution he took does not bar his recovery.⁹⁷ Since it is the duty of the jury to reconcile his inconsistent statements and determine which should prevail.⁹⁸

Ins. Co., App., 35 So.2d 263—Lewis v. Groetsch, App., 32 So.2d 396—Home Ins. Co. v. Warren, App., 29 So.2d 551—Butler v. O'Neal, App., 26 So.2d 753—Guilbeau v. Horecky, App., 185 So. 79.
Neb.—Roberts v. Carlson, 8 N.W.2d 175, 142 Neb. 851.
N.Y.—Merrill v. Hinckley, 56 N.Y.S. 2d 63.
Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.
Pa.—Smith v. Blafkin, 95 Pa. Super. 520.
Wash.—Warner v. Keebler, 94 P.2d 175, 200 Wash. 608.

Failure as not conclusive evidence of negligence

(1) Fact that plaintiff, whose vehicle was struck by defendant's at intersection, did not see defendant's vehicle was not conclusive evidence that she was negligent.—Gaines v. Ratnowsky, 41 N.E.2d 25, 311 Mass. 254.

(2) Fact that neither plaintiff saw defendants' approaching automobile at intersection was not conclusive evidence that plaintiffs were negligent, although it was a factor of importance.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394.

87. Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.

88. La.—Hamilton v. Lee, App., 144 So. 249.

Mich.—Slivensky v. Wayne, 12 N.W. 2d 331, 307 Mich. 443

89. Cal.—Laine v. Weddell, 173 P. 2d 567, 76 Cal.App.2d 592.

La.—Hollabaugh-Seale Funeral Home v. Standard Accident Ins. Co., App., 32 So.2d 616—Bertuccini v. Toye Bros. Yellow Cab Co., App., 11 So. 2d 247.

Tex.—Texas Landscape Co. v. Longoria, Civ.App., 30 S.W.2d 423, error dismissed.

90. La.—Easley v. Roberts, App., 25 So.2d 245—Bertuccini v. Toye Bros. Yellow Cab Co., App., 11 So.2d 247.

91. Cal.—McDougall v. Morrison,

130 P.2d 149, 55 Cal.App.2d 92—Lundgren v. Converse, 93 P.2d 819, 34 Cal.App.2d 445.

Ill.—Brown v. Steed, 47 N.E.2d 114, 317 Ill.App. 541.

La.—Bernadas v. Miller, 130 So. 861, 14 La.App. 581.

Tex.—Magouirk v. Cantrell, Civ.App., 16 S.W.2d 337.

Wash.—McLean v. Continental Baking Co., 114 P.2d 159, 9 Wash.2d 176

92. Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.

93. S.D.—Federal Land Bank of Omaha v. Kinsman, 30 N.W.2d 8.

94. Md.—Gavin v. Tinkler, 184 A. 903, 170 Md. 461.

95. La.—Isaac v. Frederick, App., 5 So.2d 176.

Stopping without signaling

Ia.—Farmer v. Nevin Bus Lines, 163 A. 41, 107 Ia.Super. 153.

96. La.—Schexnaidre v. Bledsoe, App., 194 So. 45.

97. Pa.—Steingart v. Kaney, 19 A. 2d 499, 144 Pa.Super. 534

98. Pa.—Steingart v. Kaney, supra.

99. Degree of excessiveness of speed

In action for damages in automobile collision in fog in which plaintiff's speed was shown to be excessive, it was not necessary to prove degree of excessiveness.—Shoffner v. Schmerin, 175 A. 516, 316 Pa. 323.

Evidence held to make prima facie case of compliance with statute requiring signaling of intent to make left turn.—Anway v. Lombardi Bros., 262 P. 379, 87 Cal.App. 681.

Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.

(1) Generally.

U.S.—Wolkin v. Cadegan, D.C.Me., 39 F.Supp. 610.

Cal.—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App.2d 1—Sinclair v. Harp, 63 P.2d 876, 18 Cal.App.2d 167—Isham v. Trimble, 43 P.2d 581, 5 Cal.App.2d 648—

d. Other Collisions

In particular cases, evidence has been held sufficient or insufficient to prove, or disprove, the contributory negligence of persons involved in collisions between motor vehicles meeting or approaching each other, or one of which is overtaking or passing the other, or one of which is parked or standing, or in other collisions involving one or more motor vehicles.

In the application of the principles stated supra subdivision a of this section, the weight and sufficiency of evidence as showing or not showing contributory negligence have been adjudicated in particular actions for personal injuries or property damage resulting from collisions between motor vehicles meeting or approaching each other;⁹⁹ be-

Bailin v. Phoenix, 282 P. 421, 102 Cal.App. 117.

Ill.—Cipnerly v. Carmack, 258 Ill. App. 593.

Kan.—King v. Consolidated Products Co., 157 P.2d 541, 159 Kan. 608, 158 A.L.R. 1248.

La.—Smythe v. Great American Indemnity Co., App., 35 So.2d 267—Godechaux Sugars v. Honore, App., 26 So.2d 392—Beshear v. Hutchins, App., 24 So.2d 489—James v. White, App., 19 So.2d 383—Trippe Motors v. Kennedy, App., 181 So. 676—Culbertson v. McGinnis, App., 159 So. 139—Rollin v. Cuvler, 136 So. 779, 18 La.App. 138, followed in 136 So. 781, 18 La.App. 129.

Me.—Callahan v. Amos D. Bridges Sons, 147 A. 423, 128 Me. 346.

N.J.—Arnold v. McCullough Gentle Trucking Co., 144 A. 180, 7 N.J. Misc. 99.

N.Y.—Low v. Reinig, 5 N.Y.S.2d 548, 254 App.Div. 920, reargument denied 7 N.Y.S.2d 224, 255 App.Div. 748, appeal denied 17 N.E.2d 684, 279 N.Y. 810.

Tex.—Pool v. Gilbert, Civ.App., 199 S.W.2d 798, error refused, no reversible error—Phoenix Dairy v. White, Civ.App., 169 S.W.2d 492, error refused—Blocker v. Brown Express, Civ.App., 144 S.W.2d 451, error refused.

Wash.—Williams v. Clayton, 64 P.2d 1017, 189 Wash. 282
42 C.J. p 1238 note 49 [a] (3).

(2) Contributory negligence as matter of law.

Cal.—Kindscher v. Dyer, 177 P.2d 782, 78 Cal.App.2d 323.

Ky.—Peden's Adm'r v. Reynolds, 154 S.W.2d 708, 287 Ky. 641.

Ohio.—Kern v. Contract Cartage Co., 9 N.E.2d 869, 55 Ohio App. 481.

(3) Driving in wrong lane.

Cal.—Alward v. Paola, 179 P.2d 5, 79 Cal.App.2d 1—Cohan v. Brodie, 134 P.2d 498, 57 Cal.App.2d 307.

Va.—Williams v. Greene, 26 S.E.2d 89, 181 Va. 707.

Wash.—Williams v. Clayton, 64 P.2d 1017, 189 Wash. 282.

(4) Driving wholly or partly upon wrong side of highway.

Cal.—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421—Dicken v. Souther, 138 P.2d 408, 59 Cal.App.2d 203—Baldwin v. Pacific Auto Stages, Inc., 257 P. 130, 83 Cal.App. 635.

Ga.—Etheridge v. Guest, 12 S.E.2d 483, 63 Ga.App. 637.

Ill.—Schuster v. Jefferson Ice Co., 65 N.E.2d 239, 328 Ill.App. 124.

La.—Daw v. Matthews, Texas Indemnity Ins. Co., Intervenor, App., 34 So.2d 666—De Soto Wholesale Grocery Co. v. Allen, App., 31 So.2d 245—Le Blanc v. New Orleans Public Service, App., 22 So.2d 294—Schmidt v. Moore, App., 180 So. 226—Daniels v. Louisiana Power & Light Co., App., 171 So. 612—Jacob v. Edwards, App., 171 So. 165—Woods v. Moffett, App., 162 So. 426—Misita v. Inter-City Express Lines, App., 143 So. 677.

N.Y.—Farrell v. Kory, 282 N.Y.S. 355, 245 App.Div. 901—Marcus v. Serpison, 43 N.Y.S.2d 194.

Wash.—Webb v. Miller, 60 P.2d 703, 187 Wash. 653.

Wis.—Quinnell v. Bowen, 16 N.W.2d 415, 246 Wis. 16—Plesiek v. Deuster, 11 N.W.2d 358, 243 Wis. 598—Ernst v. Karlman, 8 N.W.2d 280, 242 Wis. 516.

Wyo.—Johnston v. Wortham Machinery Co., 151 P.2d 89, 60 Wyo. 301.

(5) Driving without lights.

U.S.—Uhl v. Dalton, D.C.Nev., 56 F. Supp. 656, appeal dismissed, C.C.A., 151 F.2d 502.

Cal.—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App.2d 1.

(6) Excessive speed.

Cal.—Cohan v. Brodie, 134 P.2d 498, 57 Cal.App.2d 307—Dam v. Bond, 251 P. 818, 80 Cal.App. 342.

Ind.—Cousins v. Glassburn, 24 N.E.2d 1013, 216 Ind. 431.

La.—De Soto Wholesale Grocery Co. v. Allen, App., 31 So.2d 245—Godchaux Sugars v. Honore, App., 26 So.2d 392—Beshear v. Hutchins, App., 24 So.2d 489—James v. White, App., 19 So.2d 383—Woods v. Moffett, App., 162 So. 426.

N.Y.—Farrell v. Kory, 282 N.Y.S. 355, 245 App.Div. 901.

Tex.—Southern Pine Lumber Co. v. Andrade, 124 S.W.2d 334, 132 Tex. 372—Akers v. Epperson, Civ.App., 172 S.W.2d 512, certified question answered 171 S.W.2d 483, 141 Tex. 189, 156 A.L.R. 1028—Phenix Dairy v. White, Civ.App., 169 S.W.2d 492, error refused.

Wash.—Johnson v. Ohman, 117 P.2d 217, 10 Wash.2d 466.

(7) Failure to dim headlights.—Stammerjohan v. Sims, S.D., 31 N.W.2d 449.

(8) Failure to maintain proper lookout.

Cal.—Kindscher v. Dyer, 177 P.2d 782,

78 Cal.App.2d 323—Dicken v. Souther, 138 P.2d 408, 59 Cal.App.2d 203.

La.—James v. White, App., 19 So.2d 383.

Wis.—Quinnell v. Bowen, 16 N.W.2d 415, 246 Wis. 16.

(9) Failure to turn to right.

Md.—Oberfeld v. Eilers, for Himself and to Use of California Ins. Co., 189 A. 203, 171 Md. 332.

Wis.—Plesiek v. Deuster, 11 N.W.2d 358, 243 Wis. 598.

Wyo.—Johnston v. Wortham Machinery Co., 151 P.2d 89, 60 Wyo. 301.

(10) Falling asleep.—Ballin v. Phoenix, 282 P. 421, 102 Cal.App. 117.

(11) Police officer.—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Generally.

U.S.—National Mut. Casualty Co. of Tulsa, Okl., v. Eisenhower, C.C.A. Kan., 116 F.2d 891—Wade v. U. S. D.C.Mass., 75 F.Supp. 729, affirmed, C.A., 170 F.2d 298—Peach v. U. S. D.C.Pa., 75 F.Supp. 218—Carroll v. Harrison, D.C.Va., 49 F.Supp. 283, affirmed, C.C.A., 139 F.2d 427—Sitton v. Lindley, D.C.Mo., 39 F.Supp. 853.

Ark.—Universal Automobile Ins. Co. v. Denton, 50 SW 2d 592, 185 Ark. 899.

Cal.—Jackson v. Lactein Co., 288 P. 781, 209 Cal. 520—Heslop v. Kinyoun, 136 P.2d 621, 58 Cal.App.2d 287—Miles v. Van Hagen, 128 P.2d 89, 53 Cal.App.2d 750—Scaletta v. Silva, 126 P.2d 898, 52 Cal.App.2d 730—McWane v. Hetherton, 125 P. 2d 85, 51 Cal.App.2d 508—Whitfield v. Debrincat, 123 P.2d 591, 50 Cal. App.2d 389—Gardini v. Arakelian, 64 P.2d 181, 18 Cal.App.2d 424—White v. Kretz Bros., 10 P.2d 198, 122 Cal.App. 197—Continental Ins. Co. of New York v. Pacific Greyhound Lines, 111 P.2d 37, 43 Cal. App.2d Supp. 877.

Conn.—Bolinsky v. Shobrinsky, 172 A. 922, 118 Conn. 703—De Antonio v. New Haven Dairy Co., 136 A. 567, 105 Conn. 663.

Ill.—Griffin v. Chicago-Rockford Motor Exp., 76 N.E.2d 528, 332 Ill.App. 663—Washington v. Peterson, 49 N. E.2d 883, 320 Ill.App. 140—Kellenberger v. Mitchell, 44 N.E.2d 73, 316 Ill.App. 112—Beery v. Breed, 36 N.E.2d 591, 311 Ill.App. 469—Susemlehl v. Red River Lumber Co., 28 N.E.2d 743, 306 Ill.App. 430—Gunn v. Meyer, 267 Ill.App. 592.

Iowa.—Rogers v. Lagomarcino-Grupe Co., 248 N.W. 1, 215 Iowa 1270.

Kan.—Duncan v. Branson, 110 P.2d 789, 153 Kan. 344.

Ky.—Bohn v. Sams, 193 S.W.2d 459, 302 Ky. 63.

La.—Hardaway v. Hilburn, App., 34

So.2d 283—Automobile Ins. Co. of Hartford, Conn., v. Barnard, App., 30 So.2d 142—Miller v. Hayes, App., 29 So.2d 396—Seale v. Stephens, Employers Casualty Co., Intervenor, App., 24 So.2d 651, affirmed 29 So.2d 65, 210 La. 1068—Camden Fire Ins. Ass'n v. Fontenot, App., 11 So.2d 99—Aguillard v. State, App., 7 So.2d 645—Williams v. Geo. A. Hormel & Co., App., 195 So. 634—Jacobs v. Brooks, App., 182 So. 349—Watson v. Hightower, App., 181 So. 612—Frazier v. F. Strauss & Son, App., 172 So. 385, rehearing denied 173 So. 343—Griessen v. Cook, App., 164 So. 260—Reif v. Tufts, 141 So. 90, 19 La.App. 600—Frye v. Interurban Transp. Co., 139 So. 670, 19 La.App. 510—E. B. Norman & Co. v. Mulheun, 138 So. 211, 18 La.App. 253—Viator v. Talbot, 137 So. 84, 18 La.App. 124—Holden v. Fred Brenner Lumber Co., 134 So. 301, 17 La.App. 84—Manget Bros. v. Henry, 127 So. 51, 13 La. App. 57—Pitcher v. Erwin, 120 So. 229, 10 La.App. 534—Richey v. Brasher, 7 La.App. 506.

Me.—Atherton v. Crandemire, 33 A. 2d 303, 140 Me. 28.

Mich.—In re Olney's Estate, 14 N.W. 2d 574, 309 Mich. 65—Derby v. Culver, 258 N.W. 244, 270 Mich. 197.

Minn.—Turnmire v. Jefferson Transp. Co., 278 N.W. 159, 202 Minn. 307.

Mont.—Adami v. Murphy, 164 P.2d 150, 118 Mont. 172.

N.Y.—Jones v. Gray, 45 N.Y.S.2d 519, 267 App.Div. 242, stay granted 47 N.Y.S.2d 281, 267 App.Div. 853. Appeal denied 47 N.Y.S.2d 606, 267 App.Div. 926.

Ohio.—Thompson v. Kerr, App., 51 N.E.2d 742.

Or.—Heinrichs v. Carstens Packing Co., 270 P. 486, 127 Or. 103.

Tex.—Bantuelle v. Evans, Civ.App., 139 S.W.2d 283—Sprague v. Hubert, Civ.App., 77 S.W.2d 738—McCall v. Frenzel, Civ.App., 32 S.W.2d 965.

Vt.—Cote v. Boise, 16 A.2d 175, 111 Vt. 343.

Wash.—Miller v. Stevens, 128 P.2d 494, 14 Wash.2d 489—Tutewiler v. Shannon, 111 P.2d 215, 8 Wash.2d 23—Cook v. Rafferty, 93 P.2d 376, 200 Wash. 234.

Wis.—Steuhing v. L. G. Arnold, Inc., 246 N.W. 554, 210 Wis. 513—Stewart v. Rudis, 246 N.W. 552, 210 Wis. 523.

42 C.J. p 1238 note 49 [b] (4).

(2) Driving wholly or partly on wrong side of highway.

Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140.

Cal.—Jones v. O'Neal, 122 P.2d 589, 50 Cal.App.2d 76—Parker v. Auschwitz, 47 P.2d 341, 7 Cal.App.2d 693, followed in Bernhard v. Auschwitz, 47 P.2d 343, 7 Cal.App.2d 755.

Ga.—Whitley v. Henry, 16 S.E.2d 214, 65 Ga.App. 668.

Ill.—Werlik v. Murray, 46 N.E.2d

tween motor vehicles one of which is overtaking | or passing the other;¹ between motor vehicles one

- 138, 317 Ill.App. 378—Ambuehl v. Steiner, 32 N.E.2d 994, 309 Ill.App. 437.
- Kan.—Meneley, by Myers, v. Montgomery, 64 P.2d 550, 145 Kan. 109.
- Ky.—Bohn v. Sams, 193 S.W.2d 459, 302 Ky. 63—Pickering v. Simpkins, 111 S.W.2d 650, 271 Ky. 288.
- La.—Stevens v. Streun, App., 200 So. 182—Thibodaux v. Culotta, App., 192 So. 712—Glover v. Southern Transp. Co., 133 So. 474, 16 La.App. 63.
- Neb.—Moore v. Krejci, 297 N.W. 913, 139 Neb. 562.
- Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.
- Tex.—Phoenix Refining Co. v. Morgan, Civ.App., 178 S.W.2d 175, error refused.
- Wis.—Leonard v. Bottomley, 245 N.W. 849, 210 Wis. 411, followed in 245 N.W. 852, 210 Wis. 420, and 245 N.W. 853, 210 Wis. 421.
- (3) Driving without lights.
- Cal.—Robinson v. Thornewill, 297 P. 28, 112 Cal.App. 498.
- Tex.—Rhône v. Fox, Civ.App., 142 S.W.2d 542, error dismissed.
- Wis.—Terrien v. Roenitz, 252 N.W. 689, 214 Wis. 263.
- (4) Excessive speed.
- Cal.—Ivle v. Enterprise Poultry Farm, 275 P. 514, 97 Cal.App. 242.
- Ill.—Werlik v. Murray, 46 N.E.2d 138, 317 Ill.App. 378.
- La.—Drawes v. Miller, App., 25 So.2d 820—Stevens v. Streun, App., 200 So. 182—Hobgood v. Louisiana & A. Ry. Co., App., 156 So. 657—Glover v. Southern Transp. Co., 133 So. 474, 16 La.App. 63.
- Tenn.—American Trust & Banking Co. v. Parsons, 108 S.W.2d 187, 21 Tenn.App. 202.
- Wis.—Zelnemann v. Gasser, 29 N.W. 2d 49, 251 Wis. 238.
- (5) Failure to maintain proper lookout.
- Mont.—Adami v. Murphy, 164 P.2d 150, 118 Mont. 172.
- Tex.—Stotts v. Love, Civ.App., 184 S.W.2d 308, error refused.
- Wis.—Zelnemann v. Gasser, 29 N.W. 2d 49, 251 Wis. 238.
- (6) Failure to see approaching motor vehicle.—Thorstenson v. Degler, 129 P.2d 996, 15 Wash.2d 211.
- (7) Failure to slow down.—Frazier v. F. Strauss & Son, La.App., 172 So. 385, rehearing denied 173 So. 343.
- (8) Failure to stop.—Kress v. Roush, 198 N.E. 491, 50 Ohio App. 376.
- (9) Failure to swerve to avoid approaching motor vehicle.
- Ill.—Harrison v. Bingheim, 182 N.E. 750, 350 Ill. 269.
- Mich.—Paton v. Stealy, 261 N.W. 131, 272 Mich. 57.
- (10) Intoxication.—Roper v. Brooks, 9 So.2d 485, 201 La. 135—Frazier v. F. Strauss & Son, La.App., 172 So. 385, rehearing denied 173 So. 343.
- (11) Management and control of motor vehicle.
- Mont.—Adams v. Murphy, 164 P.2d 150, 118 Mont. 172.
- Wis.—Zelnemann v. Gasser, 29 N.W. 2d 49, 251 Wis. 238.
- (12) Occupancy of front seat by four persons.—Bell v. Lewis, 38 S.E. 2d 686, 74 Ga.App. 26.
1. Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.
- (1) Generally.
- Ark.—Greenlee v. Rolfe, 60 S.W.2d 568, 187 Ark. 1162.
- Cal.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.
- D.C.—Mead v. Kane Transfer Co., Mun.App., 36 A.2d 567.
- Idaho.—McKinley v. Wagner, 170 P. 2d 796, 67 Idaho 101.
- Ill.—Snively v. Barber, 54 N.E.2d 836, 323 Ill.App. 69.
- Kan.—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 164 Kan. 376.
- La.—Jones v. Miacar, App., 34 So.2d 810—Gibbs v. Whittlessey, App., 31 So.2d 241—Magazine Lumber Co. v. De Paula, App., 197 So. 806—Long v. Shreveport Yellow Cabs, App., 180 So. 651—Ferris v. Cooley, App., 171 So. 142—Newbern v. Louisiana Iron & Supply Co., App., 150 So. 416—Giles v. Post, 135 So. 775, 17 La.App. 225—Smith v. Chadick-Hayes Co., 139 So. 689, 19 La.App. 523.
- Minn.—Peterson v. Raymond Bros Motor Transp., 278 N.W. 471, 202 Minn. 320.
- Mo.—Bear v. Devore, App., 177 S.W. 2d 674.
- Wis.—O'Leary v. Ruhrow, 25 N.W.2d 449, 249 Wis. 559.
- 42 C.J. p 1238 note 49 [a] (3).
- (2) To rebut presumption of due care.—Dawson v. Boyd, 143 P.2d 373, 61 Cal.App.2d 471.
- (3) Contributory negligence as matter of law.
- Mo.—Bear v. Devore, App., 177 S.W. 2d 674.
- N.Y.—Diem v. Adams, 42 N.Y.S.2d 55, 266 App.Div. 307, appeal granted 44 N.Y.S.2d 264, 266 App.Div. 948.
- Wash.—Cronin v. Shell Oil Co., 112 P.2d 824, 8 Wash.2d 404.
- (4) Driving at excessive speed.
- Ark.—Albritton v. C. M. Ferguson & Son, 122 S.W.2d 620, 197 Ark. 436.
- La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406—Cassar v. Mansfield Lumber Co., App., 35 So. 2d 797—Geter v. DeSoto Lumber Co., Commercial Standard Ins. Co., Intervenor, App., 26 So.2d 314—Ferris v. Cooley, App., 171 So. 142. N.D.—Delaloye v. Kainershot, 10 N.W.2d 593, 72 N.D. 637.
- Pa.—Shoffner v. Schmerin, 175 A. 516, 316 Pa. 323.
- Wash.—Cronin v. Shell Oil Co., 112 P. 2d 824, 8 Wash.2d 404.
- (5) Driving while under influence of liquor.—Kemper v. Land, La.App., 2 So.2d 248.
- (6) Failure to bring motor vehicle under control.—Cassar v. Mansfield Lumber Co., La.App., 35 So.2d 797.
- (7) Failure to give audible warning.
- Cal.—Moore v. Miller, 125 P.2d 576, 51 Cal.App.2d 674.
- La.—Geter v. DeSoto Lumber Co., Commercial Standard Ins. Co., App., Intervenor, 26 So.2d 314.
- (8) Failure to heed signal.—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 164 Kan. 376.
- (9) Failure to maintain proper lookout.
- La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406—Hudson v. Brown, App., 190 So. 860—Giles v. Post, 135 So. 775, 17 La.App. 225.
- Wash.—Bissell v. Seattle Vancouver Motor Freight, 168 P.2d 390, 25 Wash.2d 68—Cronin v. Shell Oil Co., 112 P.2d 824, 8 Wash.2d 404.
- Wis.—Homerding v. Pospychalla, 280 N.W. 409, 228 Wis. 606.
- (10) Failure to see approaching vehicle.
- La.—Gibbs v. Whittlessey, App., 31 So.2d 241.
- Mo.—Bear v. Devore, App., 177 S.W. 2d 674.
- (11) Lack or loss of control of motor vehicle.
- Ill.—Schampon v. Speis, 1 N.E.2d 499, 285 Ill.App. 23.
- Tenn.—Russell v. Furniture Renewal, 151 S.W.2d 1066, 177 Tenn. 525.
- Wis.—Homerding v. Pospychalla, 280 N.W. 409, 228 Wis. 606.
- (12) Overcrowding front seat.—Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.
- (13) Passing on hill.—Geter v. De Soto Lumber Co., Commercial Standard Ins. Co., Intervenor, La.App., 26 So.2d 314.
- (14) Stopping without giving signal.
- N.Y.—Sills v. Meyers, 11 N.Y.S.2d 106, 171 Misc. 63.
- Wis.—Schneider v. Nedry, 228 N.W. 509, 201 Wis. 111.
- (15) Swerving without warning.—Kemper v. Land, La.App., 2 So.2d 248.
- Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

of which is parked or standing;³ between motor | vehicles one of which leaves, or rolls from, its

- (1) Generally.
Cal.—Rogers v. Interstate Transit Co., 297 P. 884, 212 Cal. 36, certiorari denied Interstate Transit Co. v. Rogers, 52 S.Ct. 22, 284 U.S. 640, 76 L.Ed. 545—Mahar v. Mackay, 132 P.2d 42, 55 Cal.App.2d 869—Farmer v. Matsutani, 119 P.2d 740, 48 Cal.App.2d 332—Ingram v. City of Delano, 88 P.2d 232, 31 Cal.App.2d 451—Brooks v. City and County of San Francisco, 295 P. 344, 111 Cal.App. 254—Le Blond v. Townsley, 290 P. 1051, 108 Cal.App. 81.
- Ill.—Dunn v. Bertram, 78 N.E.2d 126, 333 Ill.App. 656—Killillay v. Hawk, 250 Ill.App. 222.
- Kan.—McCoy v. Fleming, 113 P.2d 1074, 153 Kan. 780.
- La.—Ford v. Leonard Truck Lines, App., 26 So.2d 309—Rose-Neath Funeral Home v. Cudahy Packing Co. of Louisiana, App., 12 So.2d 717—Dudley v. Surles, App., 11 So.2d 70—Rutler v. Houma Ice Co., App., 2 So.2d 286—Van Baast v. Thibaut Feed Mills, App., 151 So.228—Jenkins v. Hammond Stage Lines, App., 143 So. 116—Griffen v. Teche Transfer Co., 140 So. 113, 19 La.App. 157—Burgess v. Blackwell, 120 So. 231, 9 La.App. 729.
- Me.—Crawford v. Lancaster, 157 A. 559, 130 Me. 525.
- Mass.—Baker v. Hemingway Bros. Interstate Trucking Co., 12 N.E.2d 95, 299 Mass. 76—Cannon v. Bassett, 162 N.E. 772, 261 Mass. 383.
- Ohio—Carle v. Courtright, 40 N.E.2d 431, 69 Ohio App. 69, rehearing denied 43 N.E.2d 296, 69 Ohio App. 69.
- R.I.—Tillinghast v. Rhode Island Motor Sales Co., 150 A. 753.
- Tex.—Yturria v. Lankford, Civ.App., 4 S.W.2d 210, error dismissed—Yturria v. Everton, Civ.App., 4 S.W.2d 211, error dismissed.
- Va.—Neal v. Spencer, 26 S.E.2d 70, 181 Va. 668.
- Wash.—Miller v. Stevens, 128 P.2d 494, 14 Wash.2d 489.
- 42 C.J. p 1238 note 49 [b] (4).
- (2) Absence of taillight or rear light.
U.S.—Bennett v. Gillette Motor Transport Co., D.C.Mo., 59 F.Supp. 475.
- Ill.—Green v. Sartwell, 22 N.E.2d 401, 301 Ill.App. 619.
- La.—Holland v. Gross, App., 195 So. 828.
- (3) Defective brakes.—Alengi v. Hartford Accident & Indemnity Co., La.App., 167 So. 130.
- (4) Driving at excessive or unlawful speed.
Ill.—Mortvedt v. Western Austin Co., 50 N.E.2d 764, 320 Ill.App. 337.
- La.—Dudley v. Surles, App., 11 So.2d 70—Federal Ins. Co. v. Employers' Liability Ins. Corporation, App., 4 So.2d 626.
- Tex.—Office Equipment Co. v. Smerke, Civ.App., 138 S.W.2d 972, affirmed Smerke v. Office Equipment Co., 158 S.W.2d 302, 138 Tex. 236.
- (5) Encroaching on left half of highway.—Vasquez v. Morrow, 107 P.2d 246, 106 Colo. 540.
- (6) Failure to display adequate taillight.—Hickman v. Sullivan, Tex. Civ.App., 128 S.W.2d 457, error dismissed, judgment correct.
- (7) Failure to give warning or signal for passing.—Carruthers v. Holloway, La.App., 16 So.2d 746—Dudley v. Surles, La.App., 11 So.2d 70—Monroe Hardware Co. v. Monroe Transfer & Warehouse Co., La.App., 167 So. 498.
- (8) Failure to see overtaken motor vehicle in time to avoid collision.—Shimizu v. Kurtz, 111 P.2d 1, 43 Cal. App.2d 471.
- (9) Loss of control of motor vehicle.—Vasquez v. Morrow, 107 P.2d 246, 106 Colo. 540.
- (10) Making left turn in unauthorized manner.—Hopkins v. Pearce, C. C.A.Va., 115 F.2d 784.
- (11) Returning to outside lane without giving warning sign.—Popoff v. Mott, 126 P.2d 597, 14 Wash.2d 1.
- (12) Stopping suddenly or without warning.—Adam v. English, La.App., 21 So.2d 633—Carruthers v. Holloway, La.App., 16 So.2d 746.
- Testimony as to previous accidents**
In action by operator of road sweeper for injuries sustained when sweeper was struck in rear by delivery truck, evidence of statement made at scene of accident, by timekeeper of operator's employer, that they had had accidents before with that kind of equipment, if admissible as part of the res gestae, would not tend to prove contributory negligence of operator.—Pryor v. Safeway Stores, 83 P.2d 241, 196 Wash. 382, opinion adhered to on rehearing 85 P.2d 1045, 196 Wash. 382.
- Avowed recklessness of driver**
Evidence was held insufficient to establish that motorist was avowed reckless driver so as to bar recovery for injuries received in accident while overtaking another automobile.—Martin v. Breaux, La.App., 165 So. 743.
- 2. Evidence held sufficient to show contributory negligence or insufficient to show absence thereof.**
(1) Contributory negligence as matter of law.
Ill.—Cooney v. F. Landon Cartage Co., 32 N.E.2d 403, 308 Ill.App. 444.
- Iowa.—Shannahan v. Borden Produce Co., 263 N.W. 39, 220 Iowa 702.
- N.Y.—Diem v. Adams, 42 N.Y.S.2d 55, 266 App.Div. 307, appeal granted 44 N.Y.S.2d 264, 266 App.Div. 948.
- Pa.—Gaber v. Weinberg, 188 A. 187, 324 Pa. 385.
- Tex.—Texas Consolidated Theatres v. Mauldin, Civ.App., 152 S.W.2d 930, error refused—Gulf States Utilities Co. v. Selman, Civ.App., 137 S.W.2d 122, error dismissed, judgment correct—Herman Hale Lumber Co. v. Belser, Civ.App., 30 S.W.2d 409, affirmed Belser v. Herman Hale Lumber Co., Com.App., 41 S.W.2d 208.
- Vt.—Frederick v. Gay's Express, 24 A.2d 349, 112 Vt. 349.
- Va.—Perdue v. Patrick, 29 S.E.2d 371, 182 Va. 398.
- (2) Colliding with parked or standing motor vehicle generally.
Cal.—Paulsen v. Spencer, 177 P.2d 597, 78 Cal.App.2d 268.
- Ill.—Cooney v. F. Landon Cartage Co., 32 N.E.2d 403, 308 Ill.App. 444—James v. Motor Transit Management Co., 260 Ill.App. 246.
- Iowa.—Shannahan v. Borden Produce Co., 263 N.W. 39, 220 Iowa 702—Dearing v. Keller, 257 N.W. 206, 219 Iowa 1.
- Kan.—Haines v. Carroll, 267 P. 986, 126 Kan. 408.
- La.—Iluth v. Crescent Forwarding & Transportation Co., App., 187 So. 673—Horn v. Barras, App., 172 So. 451—Fulton v. Murov, App., 146 So. 360.
- Neb.—Redwelski v. Omaha & Council Bluffs Street Ry. Co., 290 N.W. 904, 137 Neb. 681.
- N.J.—Byer v. V. Cladd & Sons, 159 A. 317, 10 N.J.Misc. 381.
- N.Y.—Diem v. Adams, 42 N.Y.S.2d 55, 266 App.Div. 307, appeal granted 44 N.Y.S.2d 264, 266 App.Div. 948—Bedell v. City of New York, 37 N.Y.S.2d 528, 265 App.Div. 830.
- Pa.—Gaber v. Weinberg, 188 A. 187, 324 Pa. 385.
- Tenn.—Frye v. Elkins, 122 S.W.2d 827, 22 Tenn.App. 317.
- 42 C.J. p 1238 note 49 [a] (3).
- (3) Control or management of motor vehicle.
Va.—Perdue v. Patrick, 29 S.E.2d 371, 182 Va. 398.
- Wis.—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.
- (4) Driving at excessive or unlawful speed.
Cal.—Paulsen v. Spencer, 177 P.2d 597, 78 Cal.App.2d 268.
- Iowa.—Shannahan v. Borden Produce Co., 263 N.W. 39, 220 Iowa 702.
- Kan.—Wright v. National Mut. Casualty Co. of Tulsa, 129 P.2d 371, 155 Kan. 728.

parked position,⁸ or, likewise, between motor vehicles one of which enters or drives into a highway

La.—Mickens v. F. Straus & Son, App., 28 So.2d 84.—Huth v. Crescent Forwarding & Transportation Co., App., 187 So. 973.

Tex.—Rankin v. Joe D. Hughes, Inc., App., 161 S.W.2d 883, error refused.—Herman Hale Lumber Co. v. Belser, Civ.App., 30 S.W.2d 409, affirmed Belser v. Herman Hale Lumber Co., Com.App., 41 S.W.2d 208.

Va.—Ferdue v. Patrick, 29 S.E.2d 371, 182 Va. 398.

Wis.—Kane v. Loyd's Am. Line, 19 N.W.2d 296, 247 Wis. 145.

(5) Failure to have proper or legal lights.

N.Y.—Lewis v. Rowland, 232 N.Y.S. 71, 225 App.Div. 25.

Ohio.—Buescher v. Ellenberger, App., 34 N.E.2d 1013.

Tex.—Standard Paving Co. v. Webb, Civ.App., 118 S.W.2d 456.

Vt.—Frederick v. Gay's Express, 24 A.2d 349, 112 Vt. 349.

(6) Failure to maintain proper lookout.

Iowa.—Shannahan v. Borden Produce Co., 263 N.W. 39, 220 Iowa 702.

Me.—Baker v. McGary Transp. Co., 36 A.2d 6, 140 Me. 190.

Neb.—Buresh v. George, 31 N.W.2d 106, 149 Neb. 340.

Tex.—Texas Consolidated Theaters v. Mauldin, Civ.App., 152 S.W.2d 930, error refused.—Standard Paving Co. v. Webb, Civ.App., 118 S.W.2d 456.—Billbrey v. Gentle, Civ.App., 107 S.W.2d 597, error dismissed.

Wis.—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.

(7) Failure to reduce speed when blinded by lights of approaching vehicle.—Safety Tire Service v. Murov, 140 So. 879, 19 La.App. 663.

(8) Parking generally. Cal.—Nicholas v. Chloupek, 73 P.2d 561, 23 Cal.App.2d 184.

Ill.—Hand v. Greathouse, 13 N.E.2d 1010, 294 Ill.App. 383.

La.—Hudson v. Provonsano, App., 149 So. 240.

42 C.J. p 1238 note 49 [a] (3).

(9) Parking on paved portion of highway.

La.—Boudreaux v. Iseringhausen, App., 177 So. 412.

Tex.—Gulf States Utilities Co. v. Selman, Civ.App., 137 S.W.2d 122, error dismissed, judgment correct.

(10) Parking on wrong side of highway.—Bonded Freightways v. Codington, 22 N.Y.S.2d 365, 260 App. Div. 832.

(11) Parking without lights.—Bergstrom v. Lind, 78 N.E.2d 114, 333 Ill.App. 656.

(12) To overcome presumption of exercise of ordinary or due care.

Cal.—Paulsen v. Spencer, 177 P.2d 597, 78 Cal.App.2d 268.

Minn.—Hack v. Johnson, 275 N.W. 381, 201 Minn. 9.

Evidence held insufficient to show contributory negligence or sufficient to show absence thereof.

(1) Generally.

Ark.—Missouri Pac. Transp. Co. v. Allen, 184 S.W.2d 961, 208 Ark. 122.

Cal.—Wallner v. Pickwick Stages System, 20 P.2d 90, 130 Cal.App. 472.

Conn.—Small v. Thames River Line, 186 A. 493, 121 Conn. 554.

Fla.—Wilson v. King, 156 So. 694, 116 Fla. 752.

La.—Stafford v. Nelson Bros., 130 So. 234, 15 La.App. 51, followed in Hyde v. Nelson Bros., 130 So. 237, 15 La.App. 90.

Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.

Minn.—Brazney v. Barnard, 211 N.W. 949, 169 Minn. 501.

N.Y.—Weeks v. Byrnes, 33 N.Y.S.2d 65.

Pa.—Volz v. Dresser, 28 A.2d 493, 150 Pa.Super. 371.

Tenn.—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn.App. 379.

42 C.J. p 1238 note 49 [b] (4).

(2) Absence of lights or flares.

Iowa.—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771.

Or.—Gossett v. Van Egmond, 155 P.2d 304, 176 Or. 134.

(3) Colliding with parked or standing motor vehicle generally.

Ark.—Rose v. Greb, 112 S.W.2d 961, 195 Ark. 532.

Cal.—McNown v. Pacific Freight Lines, 122 P.2d 582, 50 Cal.App.2d 221.—Grimes v. Richfield Oil Co. of California, 289 P. 245, 106 Cal.App. 416.

Colo.—Grunsfeld v. Yenter, 69 P.2d 309, 100 Colo. 570.

Conn.—Anderson v. R. E. Cunniff & Co., 164 A. 500, 116 Conn. 712.

Ill.—Becherer v. Belleville-St. Louis Coach Co., 53 N.E.2d 731, 322 Ill. App. 37.—Cushman Motor Delivery Co. v. Monark Motor Freight System, 48 N.E.2d 540, 318 Ill.App. 638.—Goodman v. Keeshin Motor Express Co., 278 Ill.App. 227.—Spiers v. Anderson Motor Service Co., 271 Ill.App. 178.—Herberger v. Anderson Motor Service Co., 268 Ill.App. 403.

Iowa.—Knaus Truck Lines v. Commercial Freight Lines, 29 N.W.2d 204, 238 Iowa 1356.

La.—Herring v. Hollier Gas Co., App., 22 So.2d 868.

Mass.—Rotefsky v. Bova, 174 N.E. 192, 274 Mass. 23.

Mich.—Meyer v. Welmaster, 270 N.W. 715, 278 Mich. 370.

N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200.

N.M.—Duncan v. Madrid, 101 P.2d 382, 44 N.M. 249.

Ohio.—Mostov v. Unkefer, 157 N.E. 714, 24 Ohio App. 420.

Va.—Ferguson v. Virginia Tractor Co., 197 S.E. 438, 170 Va. 486.

Wash.—Nicholson v. Nelson, 178 P.2d 739, 27 Wash.2d 472.—Brauns v. Housden, 56 P.2d 1313, 186 Wash. 149.

(4) Contributory negligence as matter of law.—Universal Transport & Distributing Co. v. Cantu, Tex.Civ. App., 84 S.W.2d 327, error refused.

(5) Driving at excessive speed.

Cal.—Sawdey v. R. W. Rasmussen Co., 290 P. 684, 107 Cal.App. 467.

Tex.—Universal Transport & Distributing Co. v. Cantu, supra.

(6) Failure to comply with legal headlight requirements.—Sawdey v. R. W. Rasmussen Co., supra.

(7) Failure to see parked motor vehicle.—Sawdey v. R. W. Rasmussen Co., supra.

(8) Parking.

Cal.—Borror v. Berry, 125 P.2d 537, 51 Cal.App.2d 552.

La.—Thiaville v. Toups, App., 25 So. 2d 361.

Va.—Voigt v. Raber, 46 S.E.2d 15, 187 Va. 157.

(9) Taking position of manifest and imminent danger.—Magasiny v. T. M. Smithian Trucking Co., 163 A. 314, 107 Pa.Super. 84.

Assumption of absence of illegal obstructions

Evidence authorized finding that trucks of both defendants were illegally parked and that one defendant's truck was stopped illegally, so that such trucks constituted "illegal obstructions" upon highway within meaning of statute giving plaintiff's truck driver right to assume, until he knew or should have known otherwise, that there were no illegal obstructions upon highway.—Knaus Truck Lines v. Commercial Freight Lines, 29 N.W.2d 204, 238 Iowa 1356.

3. Evidence held sufficient

(1) To show contributory negligence of motorist driving parked automobile from curb into street.—Frankel v. Railway Express Agency, 4 N.Y.S.2d 247, 254 App.Div. 797.

(2) To show due care of oncoming driver.

Ill.—Strawn v. Perbix, 40 N.E.2d 93, 313 Ill.App. 351.—Miller v. Odell, 28 N.E.2d 581, 306 Ill.App. 295.

Me.—Nickerson v. Barber, 191 A. 901, 135 Me. 508.

Mass.—Pelland v. D'Allesandro, 73 N.E.2d 590, 321 Mass. 387.

Evidence held insufficient

(1) To show fault of oncoming driver or that he could have avoided collision.

from a private way;⁴ between a motor vehicle and an animal-drawn vehicle;⁵ between a motor vehicle and a railroad train or other vehicle on railroad tracks;⁶ and between a motor vehicle and an airplane taxiing down a runway.⁷

e. Acts in Emergencies

In particular cases involving injuries from the operation of motor vehicles, the sufficiency of evidence has been adjudged as to the existence of an emergency, the person causing it, and the exercise of reasonable prudence in the emergency.

In particular cases the evidence adduced has been held sufficient to show that plaintiff or decedent motorist contributed to, or caused, the creation of an emergency,⁸ that defendant motorist created an emergency,⁹ or to show that in view of an existing emergency reasonable prudence was exercised by,

or that there was no contributory negligence on the part of, a motorist,¹⁰ a motorcyclist,¹¹ or a pedestrian.¹²

In other cases evidence has been held to show, in connection with the question of contributory negligence, that there was no emergency.¹³

f. Proximate Cause

In order to bar recovery for injury caused by the negligent operation of a motor vehicle, contributory negligence must be shown by a preponderance of evidence to have proximately caused, or contributed proximately to cause, the injury.

In order to bar recovery by one injured by the negligent operation of a motor vehicle on the ground of his contributory negligence, it must appear by a preponderance of the evidence that the injured person's negligence proximately caused, or

La.—McCraney v. Hammond Coca Cola Bottling Co., 141 So. 515, 19 La.App. 755.

Wash.—Jellum v. Grays Harbor Fuel Co., 295 P. 939, 160 Wash. 585.

(2) To show freedom of oncoming driver from negligence.—Gaubert v. Ed E Hebert Co., La.App., 174 So. 716.

4. Evidence held sufficient to show negligence of emerging driver.—Harkkey v. Luckeche, 65 P.2d 77, 19 Cal. App.2d 130.

Evidence held insufficient to show contributory negligence of driver on highway approaching private way.

(1) Defective brakes.—Menefee v. Ralsch Improvement Co., 248 P. 1031, 78 Cal.App. 785.

(2) Failure to turn in order to avoid collision.—Menefee v. Ralsch Improvement Co., supra.

(3) Failure either to stop or turn in time to avoid collision.—Gardner v. Leighton, 58 P.2d 1111, 144 Kan. 335.

Violation of statute relating to duty of motorist entering highway from private road or driveway to yield right of way to approaching vehicles on highway is prima facie evidence of negligence.—Schnore v. Baldwin, 14 N.W.2d 447, 217 Minn. 394.

5. Evidence held sufficient to show contributory negligence of driver of animal-drawn vehicle.—Byars v. Holimon, 153 So. 748, 228 Ala. 494.

Evidence held insufficient to show contributory negligence of:

(1) Driver of animal-drawn vehicle. Ky.—Higgins v. Forkner, 277 S.W. 983, 211 Ky. 588.

La.—Meaux v. Gulf Ins. Co., App., 182 So. 158, followed in 182 So. 164, two cases.—Howard v. Rowan, App., 154 So. 382.

Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, 299 S.W. 665, reversed on other grounds, Com.App., 7 S.W.2d 521.

42 C.J. p 1238 note 49 [b] (6).

(2) Occupant of animal-drawn vehicle.—Howard v. Rowan, La.App., 154 So. 382.

6. Evidence held sufficient to show contributory negligence of:

(1) Motorist.—De Temple v. Schaffer Bros. Logging Co., 13 P.2d 446, 169 Wash. 102.

(2) Operator of railroad motor car, failing to signal approach to crossing.—Thompson v. Morgan, 119 So. 496, 9 La.App. 186, affirmed 119 So. 69, 167 La. 335.

(3) Railroad violating statute requiring highway crossing to be kept in a condition which would not impair free use of highway.—Chicago, I. & L. Ry. Co. v. Downey, 5 N.E.2d 656, 103 Ind.App. 672.

(4) Switchman.—Ames v. Armour & Co., 246 Ill.App. 118.

Evidence held insufficient to show contributory negligence of:

(1) Locomotive fireman.—Penn v. Pearce, 163 So. 288, 121 Fla. 3.

(2) Operator of railroad speeder.—Allen v. Ingersoll-Rand Co., 78 P.2d 1086, 194 Wash. 708.

(3) Switchman.—J. Lee Vilbig & Co. v. Lucas, Tex.Civ.App., 23 S.W.2d 516, error dismissed.

7. Evidence held sufficient to show contributory negligence of pilot in failing to look carefully for obstructions.—Read v. New York City Airport, 259 N.Y.S. 245, 145 Misc. 294.

8. La.—Fulmer v. U. S. Fidelity & Guaranty Co., Great American Indemnity Co., Intervener, App., 5 So. 2d 923, followed in Bacon v. U. S. Fidelity & Guaranty Co., 5 So.2d 927, and Hartford Fire Ins. Co. v.

U. S. Fidelity & Guaranty Co., 5 So.2d 927.

Wyo.—Hill v. Walters, 100 P.2d 98, 55 Wyo. 334.

9. La.—Andrews v. Foster, App., 169 So. 103, amended on other grounds 170 So. 563.

Va.—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320.

10. Cal.—De La Motte v. Rucker, 130 P.2d 444, 55 Cal.App.2d 226.

La.—Seale v. Stephens, Employers Cas. Co., Interveners, App., 24 So. 2d 651, affirmed 29 So.2d 65, 210 La. 1068.—Brown v. Dickson, App., 3 So.2d 562.

Va.—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320.

Turning to left to avoid head-on collision

Conn.—White v. Herler, 159 A. 654, 114 Conn. 734.

Impossibility of stopping within clear distance

Iowa.—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 377.

11. Cal.—Smith v. Rothschild, 39 P. 2d 464, 3 Cal.App.2d 273.

12. Cal.—Cannon v. Kemper, 73 P. 2d 268, 23 Cal.App.2d 239.

La.—Weinfeld v. Yellow Cab Co., 120 So. 420, 10 La.App. 313.

Crossing street

Ill.—Westman v. Tires Inc., 3 N.E.2d 342, 286 Ill.App. 613.

Me.—MacPherson v. Warren, 186 A. 615, 134 Me. 501.

Leaping in front of automobile

Vt.—Porter v. Fleming, 156 A. 903, 104 Vt. 76.

13. La.—Hopson v. Neighbors, App., 197 So. 282.

Pa.—Xenos v. White Star Lines, Com.Pl., 19 Wash.Co. 145.

Pedestrian

La.—Hopson v. Neighbors, App., 197 So. 282.

contributed proximately to cause, his injury.¹⁴ So, in particular cases the evidence adduced has been held sufficient for this purpose,¹⁵ as in the case of pedestrians generally;¹⁶ intoxicated pedestrians;¹⁷ pedestrians walking along the highway;¹⁸ pedestrians crossing the street or highway generally;¹⁹

or crossing diagonally²⁰ or elsewhere than at a crosswalk²¹ or an intersection,²² or without maintaining a proper lookout;²³ pedestrians failing to yield the right of way in attempting to cross;²⁴ bicyclists;²⁵ motorcyclists;²⁶ children;²⁷ guests or

14. U.S.—Gray v. Dieckmann, C.C. A.N.H., 109 F.2d 382.
Cal.—Samuelson v. Siefer, 144 P.2d 879, 62 Cal.App.2d 320.
Ohio.—Collins v. Zimmerman, App., 87 N.E.2d 245.
Va.—Gaines v. Campbell, 166 S.E. 704, 159 Va. 504.
42 C.J. p 1239 note 50.

Contributory negligence as matter of law

In order to authorize finding that automobile occupant was guilty of contributory negligence as matter of law, evidence must show beyond question that injury resulted from his own acts.—Ford Motor Co v. Madden, 42 S.W.2d 165, affirmed Ford Motor Co. v. Madden, Civ.App., 76 S.W.2d 474, 124 Tex. 131.

Violation of statute; overcoming prima facie evidence

(1) While violation of a statute prohibiting driving where there is such a number of persons in the front seat as to obstruct operator's view, and providing that presence of more than three persons over sixteen in front seat of a noncommercial vehicle shall be deemed such a number, is prima facie evidence of negligence, its probative force may be overcome by proof that violation was not proximate producing or contributing cause of accident.—Schnack v. Sterling, 300 N.Y.S. 297, 252 App.Div. 894, appeal denied.

(2) Violation of statute or ordinance as contributory negligence see supra § 461.

15. Ark.—Coffee v. Arkansas Power & Light Co., 113 S.W.2d 1100, 195 Ark. 559.
Conn.—Contractor's Supply Co. v. Connecticut Ry. & Lighting Co., 44 A.2d 915, 132 Conn. 431.
La.—Smyth v. Great Am. Indem. Co., App., 35 So.2d 267—B. Stern Co v. Travelers Ins. Co., App., 21 So.2d 104—Naremore v. Beene Motor Co., App., 159 So. 426.
Miss.—Hammond v. Morris, 126 So. 906, 156 Miss. 802.
Mo.—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243.
N.H.—Moulton v. Nesmith, 46 A.2d 133, 94 N.H. 23.
N.Y.—Meitzler v. Hill, 253 N.Y.S. 343, 233 App.Div. 603.
Tenn.—Walton v. Duke, App., 307 S.W.2d 595.
Va.—Williams v. Greene, 26 S.E.2d 89, 181 Va. 707.

- Wis.—Lurie v. Nickel, 289 N.W. 686, 233 Wis. 420.
42 C.J. p 1239 note 50 [a].

Violation of ordinance

(1) In general.—Kenney v. J. A. Folger & Co., Mo.App., 192 S.W.2d 73.

(2) Blackout ordinance.—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App.2d 1.

(3) Fire escape ordinance.—Belmont Garage Corp. v. W. Petersen Coal Co., 66 N.E.2d 513, 328 Ill.App. 575.

Horseback rider

La.—Pecar v. Toye Bros. Yellow Cab Co., App., 8 So.2d 120.

16. Cal.—Balasco v. Chick, 192 P. 2d 76, 84 Cal.App.2d 802—Gaston v. Hisashi Tsuruda, 43 P.2d 355, 5 Cal.App.2d 639—Treacy v. Sunrise Laundry Co., 36 P.2d 244, 1 Cal.App.2d 204.

La.—Coleman v. Terrebonne Ice Co., App., 8 So.2d 313—Walker v. Mira, App., 197 So. 798—Decay v. Flucke, App., 168 So. 374.

Mich.—Frye v. Brinker, 262 N.W. 263, 272 Mich. 339.

42 C.J. p 1239 note 50 [a] (3).

Pedestrian struck at street intersection

La.—Bass v. Means, 124 So. 553, 12 La.App. 260.

17. Cal.—Drury v. Hagerstrom, 157 P.2d 878, 68 Cal.App.2d 712.

18. Cal.—Gray v. Hartman, 166 P. 2d 374, 73 Cal.App.2d 401—McGough v. Hendrickson, 136 P.2d 110, 58 Cal.App.2d 60.

Ky.—Girtman's Adm'r v. Akins, 120 S.W.2d 660, 275 Ky. 2.

19. Cal.—Bedell v. Duniven, 174 P. 2d 666, 77 Cal.App.2d 145—Gaston v. Hisashi Tsuruda, 43 P.2d 355, 5 Cal.App.2d 639.

Fla.—Carter v. Florida Power & Light Co., 189 So. 705, 138 Fla. 220.
La.—Boggs v. L. & K. Transfer Co., App., 11 So.2d 262, followed in Watts v. L. & K. Transfer Co., 11 So.2d 264—Parker v. Thompson, App., 146 So. 181—Hernandez v. Lyons, 126 So. 538, 12 La.App. 547.
Wash.—Smith v. Bissig, 258 P. 34, 144 Wash. 491.

Crossing at night

Cal.—Fox v. Sherwood, 45 P.2d 1026, 7 Cal.App.2d 265—Botti v. Savill, 275 P. 1029, 97 Cal.App. 524.

20. Cal.—Thompson v. White, 56 Cal.App. 173, 204 P. 561.

21. Cal.—O'Dea v. Leland, 52 P.2d 510, 10 Cal.App.2d 551.

Wis.—Kleiner v. Johnson, 23 N.W. 2d 467, 249 Wis. 148—Weber v. Barrett, 298 N.W. 53, 238 Wis. 50.

22. La.—Samuel v. McGowan, App., 157 So. 145.

23. Cal.—Bedell v. Duniven, 174 P. 2d 666, 77 Cal.App.2d 145—Fox v. Sherwood, 45 P.2d 1026, 7 Cal.App. 2d 265.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan. 611.

La.—Hebert v. Melbaum, 24 So.2d 297, 209 La. 156.

Me.—Goudreau v. Ouelette, 178 A. 355, 133 Me. 365.

Wis.—Langworthy v. Reisinger, 23 N.W.2d 482, 249 Wis. 24, followed in 23 N.W.2d 485, 249 Wis. 29.

24. Wis.—Langworthy v. Reisinger, supra—Weber v. Barrett, 298 N. W. 53, 238 Wis. 50.

25. Cal.—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382.

Ind.—Arlington v. Brown, 73 N.E. 2d 774, 117 Ind.App. 535.

La.—Francisco v. Diaz, App., 181 So. 47.

Mich.—Duffy v. Enright Topham Co., 276 N.W. 715, 282 Mich. 662.

Mo.—Dipaoli v. Langemann, App., 192 S.W.2d 35.

Signagging across highway

Mich.—Morrison v. Hall, 22 N.W.2d 838, 314 Mich. 522.

26. Cal.—Glynn v. Vaccari, 149 P.2d 409, 64 Cal.App.2d 718.

La.—Reneau v. Seybert, App., 170 So. 375.

Miss.—Baird v. Harrington, 30 So. 2d 82.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195.

Wash.—Allen v. Porter, 143 P.2d 328, 19 Wash.2d 503—Miller v. Morgan, 46 P.2d 732, 182 Wash. 254.

27. U.S.—Madden v. U. S., D.C.Fla., 76 F.Supp. 41.

Cal.—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195.

Cause as matter of law

Neb.—De Griselles v. Gans, 219 N. W. 235, 116 Neb. 835.

Running against automobile

Ky.—Knecht v. Buckshorn, 25 S.W. 2d 727, 233 Ky. 329.

Permitting play in streets without proper supervision

Cal.—Burton v. Los Angeles Ry.

passengers in motor vehicles;²⁸ collisions at intersections generally;²⁹ head-on collisions generally;³⁰ rear-end collisions generally;³¹ persons cutting the corner in making a turn;³² driving beyond the center line;³³ driving on the wrong side of the road;³⁴

driving while intoxicated;³⁵ driving without lights, or without proper lights;³⁶ and driving the wrong way on a one-way street;³⁷ excessive speed generally;³⁸ and excessive speed in approaching or en-

Corp., 180 P.2d 867, 79 Cal.App.2d 605.

Boy thrown from wagon in collision
Ala.—Byars v. Hollimon, 153 So. 748, 228 Ala. 494.

28. Kan.—Earhart v. Tretbar, 80 P. 2d 4, 148 Kan. 42.

Aiding and abetting in reckless driving

La.—Bresland v. Kelly, App., 32 So. 2d 47.

29. U.S.—U. S. v. Goldman, D.C. Pa., 61 F.Supp. 315.

Ala.—Griffith Freight Lines v. Benson, 176 So. 370, 234 Ala. 613.

Cal.—Adams v. Tuxedo Land Co., 267 P. 926, 92 Cal.App. 266.

Conn.—Wilson v. M & M Transp. Co., 3 A.2d 309, 125 Conn. 36.

Kan.—Earhart v. Tretbar, 80 P.2d 4, 148 Kan. 42—Forsberg v. Snow, 22 P.2d 421, 137 Kan. 886.

La.—Harrell v. Goodwin, App., 32 So.2d 758—Montifue v. American Mut. Liability Ins. Co., App., 26 So.2d 407—Acosta v. Smith, App., 23 So.2d 742, followed in 23 So.2d 745 and Butler v. Smith, 23 So.2d 745—Ernst v. General Baking Co., App., 16 So.2d 259—Daly v. Employers Liability Assur. Corporation, Limited, of London, England, App., 15 So.2d 396—Baker v. Travelers Ins. Co., App., 13 So.2d 65, rehearing denied and amended on other grounds 13 So.2d 758—Arline v. Alexander, App., 2 So.2d 710—Di Leo v. Du Montier, App., 195 So. 74—Franklin v. Shreveport Yellow Cabs, App., 187 So. 811—Gurdescu v. Taylor, App., 187 So. 135—Di Chiara v. Hackett, App., 186 So. 113—Lannes v. Escousse, App., 179 So. 106—Bruscatto v. Stewart, App., 177 So. 121—Capilon v. Lengsfeld, App., 171 So. 194—Ferris v. Cooley, App., 171 So. 142—Herbert v. Langhoff, App., 164 So. 262, set aside on other grounds in part 168 So. 608, 185 La. 105—Sewell v. Newton, App., 152 So. 389—Pugh v. Henritzy, App., 151 So. 668—Krieger v. Miradona, App., 150 So. 78—Watson v. Mundinger, App., 144 So. 620—Ferrandou v. Katz, App., 142 So. 852—Todd v. Vige, App., 142 So. 802—Bayer v. Whitley, 138 So. 702, 18 La.App. 443—Sontheimer v. Littlejohn, 137 So. 219, 17 La.App. 675—Arena v. Morris & Co., 130 So. 565, 14 La.App. 563—Heath v. Baudin, 122 So. 726, 11 La.App. 40—Middleton v. Jordan, 120 So. 668, 10 La.App. 189—Giordano v. Gaude, 120 So. 550, 10 La.App. 197.

Me.—Erswell v. Harmon, 27 A.2d 107, 139 Me. 47.

Mich.—Duffy v. Enright Topham Co., 276 N.W. 715, 282 Mich. 662.

Mo.—Kenney v. J. A. Folger & Co., App., 192 S.W.2d 73.

Pa.—Craig v. Gottlieb, 55 A.2d 573, 161 Pa. Super. 526.

Tenn.—Trimble v. Bridges, 180 S. W.2d 530, 27 Tenn.App. 320.

Tex.—Adams v. Siefferman, Civ.App., 197 S.W.2d 506—Pertsch v. White, Civ.App., 138 S.W.2d 195—Burrage v. Red Arrow Taxi Co., Civ.App., 123 S.W.2d 731—Tinker v. Yellow Cab Co., Civ.App., 74 S.W.2d 521.

Va.—Brown v. Lee, 189 S.E. 339, 167 Va. 284.

Wash.—Whisler v. Weiss, 174 P.2d 766, 26 Wash.2d 446—Cartledge v. Allen, 170 P.2d 660, 25 Wash.2d 300—Dennett v. Karnowsky, 166 P.2d 192, 24 Wash.2d 487—Ellestad v. Leonard, 138 P.2d 200, 18 Wash.2d 118—Stangle v. Smith, 117 P.2d 207, 10 Wash.2d 461.

Wis.—Manchuk v. Milwaukee Electric Ry & Light Co., 294 N.W. 42, 235 Wis. 579

Cause as matter of law

N.H.—Pickard v. Morris, 13 A.2d 609, 91 N.H. 65.

30. Ky.—Peden's Adm'r v. Reynolds, 154 S.W.2d 708, 287 Ky. 641.

La.—Bituminous Fire & Marine Ins. Co. v. Travelers Indem. Co., App., 33 So.2d 104—Henderson v. Marmande, App., 177 So. 827.

Tex.—Blocker v. Brown Express, Civ. App., 144 S.W.2d 451, error refused.

Va.—Garrison v. Burns, 16 S.E.2d 306, 178 Va. 1.

Wash.—Johnson v. Ohman, 117 P.2d 217, 10 Wash.2d 466.

Wyo.—Kaan v. Kuhn, 187 P.2d 138—Johnston v. Wortham Machinery Co., 151 P.2d 89, 60 Wyo. 301

31. La.—Odom v. Long, App., 26 So.2d 709—Bill v. Nichols, App., 22 So.2d 705—Pacific Fire Ins. Co. v. Orgeron, App., 8 So.2d 337—Kemper v. Land, App., 2 So.2d 248.

Mo.—Baker v. McGary Transp. Co., 36 A.2d 6, 140 Me. 190.

Neb.—Buresh v. George, 31 N.W.2d 106, 149 Neb. 340.

Va.—Webb v. Smith, 10 S.E.2d 503, 176 Va. 235, 131 A.L.R. 558.

Collision with stopped car

N.C.—Austin v. Overton, 21 S.E.2d 887, 222 N.C. 89.

32. La.—T. Defatta & Sons v. Southwestern Gas & Electric Co., 138 So. 686, 18 La.App. 452.

Tex.—Adams v. Siefferman, Civ.App., 197 S.W.2d 506.

33. La.—De Soto Wholesale Grocery Co. v. Allen, App., 31 So.2d 245.

34. La.—Bituminous Fire & Marine Ins. Co. v. Travelers Indem. Co., App., 33 So.2d 104—Henderson v. Marmande, App., 177 So. 827—Badden v. Globe Indemnity Co., App., 146 So. 784—Community Stores of Louisiana v. Kelly, App., 141 So. 485.

Prima facie showing

Fact that automobile was driven on wrong side of road when involved in collision with other automobile makes prima facie showing of proximate cause as matter of law, and, to avoid such effect, it must be shown that being on wrong side occurred without fault, unless collision be defensible under last clear chance doctrine.—Olson v. Rose, 151 P.2d 454, 21 Wash.2d 464.

35. Cal.—Weaver v. Landis, 151 P.2d 884, 66 Cal.App.2d 34.

La.—Kemper v. Land, App., 2 So.2d 248.

36. Cal.—King v. City of Long Beach, 153 P.2d 445, 67 Cal.App.2d 1.

La.—Lannes v. Escousse, App., 179 So. 106.

Ohio.—Ruescher v. Ellenberger, App., 34 N.E.2d 1013.

Pa.—Craig v. Gottlieb, 55 A.2d 573, 161 Pa. Super. 526.

Tex.—Standard Paving Co. v. Webb, Civ.App., 118 S.W.2d 456.

Vt.—Frederick v. Gay's Express, 24 A.2d 349, 112 Vt. 349.

Wash.—Allen v. Porter, 143 P.2d 328, 19 Wash.2d 503.

Clearance lights

Miss.—Mangum v. Reid, 173 So. 284, 178 Miss. 352.

Plaintiff's violation of statute with respect to headlights was held to make out prima facie case of contributory negligence resulting in collision with parked auto.—Steele v. Fuller, 158 A. 666, 104 Vt. 303.

37. La.—Daly v. Employers Liability Assur. Corporation, Limited, of London, England, App., 15 So.2d 396.

38. U.S.—Weakley v. U. S., C.C.A. Va., 158 F.2d 703.

Cal.—Weaver v. Landis, 151 P.2d 884, 66 Cal.App.2d 34.

Ga.—Hayden v. Lindsay & Morgan Co., 160 S.E. 688, 43 Ga.App. 855.

Ky.—Hilsenrad v. Bowling, 166 S. W.2d 847, 292 Ky. 368.

tering an intersection;³⁹ failure to maintain a proper lookout;⁴⁰ failure to observe an approaching motor vehicle;⁴¹ failure to slow down;⁴² failure to sound a warning;⁴³ failure to stop at an intersection or stop sign;⁴⁴ failure to turn or keep to the right;⁴⁵ failure to yield the right of way;⁴⁶ lack of control of a motor vehicle;⁴⁷ passing another

vehicle at or near an intersection;⁴⁸ reckless driving;⁴⁹ stopping suddenly without signal or warning;⁵⁰ swerving suddenly or without warning;⁵¹ and swerving to the left.⁵²

On the other hand, the evidence adduced in particular cases has been held not to show contribu-

La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406—Smythe v. Great Am. Indem. Co., App., 35 So.2d 267—De Soto Wholesale Grocery Co. v. Allen, App., 31 So.2d 245.

Me.—Dansky v. Kotimaki, 130 A. 871, 125 Me. 72.

Miss.—Coca Cola Bottling Works of Greenwood v. Hand, 191 So. 674, 186 Miss 893

Tex.—Southern Pine Lumber Co. v. Andrade, 124 S.W.2d 334, 132 Tex. 372—Davis v. Estes, Com.App., 44 S.W.2d 952—Rankin v. Joe D. Hughes, Inc., Civ App., 161 S.W.2d 883, error refused.

Wash.—Johnson v. Ohman, 117 P.2d 217, 10 Wash.2d 466.

Wis.—Anderson v. Potts, 27 N.W.2d 495, 250 Wis. 510—Kane v. Loyd's Am. Line, 19 N.W.2d 296, 247 Wis. 145.

Wyo.—Kaan v. Kuhn, 187 P.2d 138—Hill v. Walters, 100 P.2d 98, 55 Wyo. 334.

Cause as matter of law

Tex.—Texas Pacific Coal & Oil Co. v. Wells, Civ.App., 151 S.W.2d 927, affirmed Wells v. Texas Pac Coal & Oil Co., 164 S.W.2d 660, 140 Tex. 2.

Va.—Perdue v. Patrick, 29 S.E.2d 371, 182 Va. 398

39. Conn.—Wilson v. M & M Transp. Co., 3 A.2d 309, 125 Conn. 36.

Ill.—Wallace v. Yellow Cab Co., 238 Ill.App. 283.

La.—Acosta v. Smith, App., 23 So. 2d 742, followed in 23 So.2d 745 and Butler v. Smith, 23 So.2d 745—Lannes v. Escousse, App., 179 So. 106—Bruscatto v. Stewart, App., 177 So. 121—Herbert v. Langhoff, App., 164 So. 262, set aside on other grounds in part 168 So 508, 185 La. 105—Sewell v. Newton, App., 152 So. 389—Watson v. Munding, App., 144 So. 620—Ferrandou v. Katz, App., 142 So. 852—Todd v. Vige, App., 142 So. 802—Sontheimer v. Littlejohn, 137 So. 219, 17 La.App. 675.

N.H.—Pickard v. Morris, 13 A.2d 609, 91 N.H. 65.

Tex.—Fertsch v. White, Civ.App., 138 S.W.2d 195—Burrage v. Red Arrow Taxi Co., Civ.App., 123 S.W.2d 731.

Wash.—Bennett v. Karnowsky, 166 P.2d 192, 24 Wash.2d 487—Stangle v. Smith, 117 P.2d 207, 10 Wash. 2d 461.

Wis.—Kilcoyne v. Trausch, 269 N. W. 276, 222 Wis. 528.

Wyo.—Pierce v. Bean, 115 P.2d 660, 57 Wyo. 189.

40. Cal.—Kindscher v. Dyer, 177 P. 2d 782, 78 Cal.App.2d 323—Bedell v. Duniven, 174 P.2d 666, 77 Cal App 2d 145—Weaver v. Landis, 151 P.2d 884, 66 Cal App 2d 34

Ky.—Hilsenrad v. Bowling, 166 S.W. 2d 847, 292 Ky 368

La.—Burns v. Evans Cooperage Co., 23 So.2d 165, 208 La. 406—Acosta v. Smith, App., 23 So.2d 742, followed in 23 So.2d 745 and Butler v. Smith, 23 So.2d 745—Baker v. Travelers Ins Co., App., 13 So.2d 65, rehearing denied and amended on other grounds 13 So.2d 758—Walker v. Mire, App., 197 So. 798—Di Leo v. Du Montier, App., 195 So. 74—Lannes v. Escousse, App., 179 So 106—Bruscatto v. Stewart, App., 177 So 121—Pugh v. Henritzy, App., 151 So. 668—Krieger v. Miradona, App., 150 So. 78—Sexton v. Stiles, 130 So. 821, 15 La App. 148

Me.—Baker v. McGary Transp. Co., 36 A.2d 6, 140 Me. 190.

Neb.—Buresh v. George, 31 N.W.2d 106, 149 Neb. 340

Tex.—Fertsch v. White, Civ App., 138 S W 2d 195—Burrage v. Red Arrow Taxi Co., Civ App., 123 S.W.2d 731—Standard Paving Co. v. Webb, Civ.App., 118 S.W.2d 456.

Wash.—Whisler v. Weiss, 174 P.2d 766, 26 Wash.2d 446—Bennett v. Karnowsky, 166 P.2d 192, 24 Wash. 2d 487.

Wis.—Quinnell v. Bowen, 16 N.W.2d 415, 216 Wis 16—Walker v. Kroger Grocery & Baking Co., 252 N. W. 721, 214 Wis. 519, 92 A.L.R. 680—Stuart v. Collins, 229 N.W. 533, 201 Wis. 170.

Cause as matter of law

Tex.—Texas Consolidated Theaters v. Mauldin, Civ.App., 152 S.W.2d 930, error refused.

Wis.—Manchuk v. Milwaukee Electric Ry. & Light Co., 294 N.W. 42, 235 Wis. 579.

41. Ill.—Lindholm v. Dohm, 76 N.E. 2d 813, 333 Ill.App. 220.

Mich.—Pierson v. Bailey Products Co., 298 N.W. 518, 298 Mich. 243.

42. La.—Thibodaux v. Pittman Bros. Const. Co., App., 199 So 159.

43. Cal.—Moore v. Miller, 125 P.2d 676, 51 Cal.App.2d 674.

44. Kan.—Forsberg v. Snow, 22 P. 2d 421, 137 Kan. 886.

La.—Ernst v. General Baking Co.,

App., 16 So.2d 259—Krieger v. Miradona, App., 150 So. 78.

Tenn.—Trimble v. Bridges, 180 S.W. 2d 590, 27 Tenn.App. 320.

Tex.—Burrage v. Red Arrow Taxi Co., Civ App., 123 S.W.2d 731.

45. Wis.—Quinnell v. Bowen, 16 N. W.2d 415, 246 Wis. 16—Piesik v. Denster, 11 N.W.2d 358, 243 Wis. 598.

Wyo.—Johnston v. Wortham Machinery Co., 151 P.2d 89, 60 Wyo. 301—Hill v. Walters, 100 P.2d 98, 55 Wyo. 334.

46. Cal.—Glynn v. Vaccari, 149 P. 2d 409, 64 Cal App 2d 718—Adams v. Tuxedo Land Co., 267 P. 926, 92 Cal App. 266.

La.—Arena v. Morris & Co., 130 So. 565, 14 La App 563—Middleton v. Jordan, 120 So. 668, 10 La App. 189.

Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521.

Wis.—Langworthy v. Reisinger, 23 N.W.2d 482, 249 Wis 24, followed in 23 N.W.2d 485, 249 Wis. 29.

47. Ky.—Hilsenrad v. Bowling, 166 S.W.2d 847, 292 Ky. 368

La.—Smythe v. Great Am. Indem Co., App., 35 So.2d 267—Thibodeaux v. Pittman Bros. Const. Co., App., 199 So. 159.

Miss.—Coca Cola Bottling Works of Greenwood v. Hand, 191 So. 674, 186 Miss 893.

Wis.—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.

Wyo.—Kaan v. Kuhn, 187 P.2d 138—Hill v. Walters, 100 P.2d 98, 55 Wyo. 334.

Cause as matter of law

Va.—Perdue v. Patrick, 29 S.E.2d 371, 182 Va. 398.

48. Ala.—Griffith Freight Lines v. Benson, 176 So. 370, 231 Ala. 613.

La.—Ferris v. Cooley, App., 171 So. 142.

49. Ia.—Breckland v. Kelly, App., 32 So.2d 47—Watson v. Munding, App., 144 So. 620.

50. Wash.—Miller v. Morgan, 46 P. 2d 732, 182 Wash. 254.

51. La.—Kemper v. Land, App., 2 So.2d 248—Wright v. Rodriguez, App., 179 So. 619.

Mo.—Dipaoli v. Langemann, App., 192 S.W.2d 35.

52. La.—Harper v. Ouachita Nehl Bottling Co., 128 So. 668, 14 La. App. 200.

tory negligence proximately causing, or proximately contributing to cause, the injury complained of;⁵³ as in the case of a pedestrian crossing a street;⁵⁴ or crossing at a place where there is no public crossing;⁵⁵ crossing outside the lane of pedestrian traffic;⁵⁶ or crossing an intersection against traffic signals;⁵⁷ intoxication of a pedestrian;⁵⁸ motorcyclists;⁵⁹ children;⁶⁰ and guests or passengers in motor vehicles;⁶¹ collisions at intersections gener-

ally;⁶² head-on collisions generally;⁶³ rear-end collisions generally;⁶⁴ driving without lights, or without proper lights;⁶⁵ excessive speed generally;⁶⁶ excessive speed in approaching or entering an intersection;⁶⁷ failure to carry lights on a buggy;⁶⁸ failure to drive near the right-hand curb;⁶⁹ failure to note the approach of a motor vehicle;⁷⁰ failure to renew an expired operator's license;⁷¹ failure to sound the horn;⁷² failure to yield the

53. U.S.—Peach v. U. S., D.C.Pa., 75 F.Supp. 218.

Cal.—Johnson v. Johnson, 139 P.2d 33, 59 Cal.App.2d 375—McWane v. Hetherton, 125 P.2d 85, 51 Cal App 2d 508—Bixby v. Pickwick Stage Co., 21 P.2d 972, 131 Cal.App. 739.

Ill.—Paul v. Garman, 34 N.E.2d 884, 310 Ill.App. 447.

Ky.—Challinor v. Axton, 54 S.W.2d 600, 246 Ky. 76.

La.—Cottons, Inc., v. Sullivan, Long & Hagerty, App., 10 So.2d 505—Gebbs v. Anderson, App., 2 So.2d 675—Richie v. Natchitoches Oil Mill, App. 178 So. 752.

Miss.—Randall v. Skinner, 192 So. 311, 187 Miss. 602.

N.H.—Baker v. Salvation Army, 12 A.2d 514, 91 N.H. 1.

Tenn.—Price-Bass Co. v. Owen, 146 S.W.2d 149, 24 Tenn App. 474, 42 C.J. p 1239 note 50 [b].

Workman's failure to place warning sign

Conn.—Goodsell v. Brighenti, 24 A.2d 834, 128 Conn. 581.

Failure to have special equipment required by driver's license—Blieker v. Wolff, 161 P.2d 145, 23 Wash.2d 368.

54. La.—Bougon v. Volunteers of America, App., 151 So. 797.

55. Ga.—Jackson v. Crimer, 24 S.E. 2d 603, 69 Ga App 18.

56. Tex.—Seinsheimer v. Burkhardt, Civ.App., 93 S.W.2d 1231, modified on other grounds 122 S.W.2d 1063, 132 Tex 336.

57. Cal.—Ikenberg v. Carlock, 58 P.2d 672, 14 Cal.App.2d 577.

58. La.—Coleman v. Meriwether Supply Co., App., 1 So.2d 849.

N.Y.—Becker v. Underwood, 65 N.Y.S.2d 916.

59. La.—Adams v. Golson, 174 So. 876, 187 La. 363.

N.M.—White v. Montoya, 126 P.2d 471, 46 N.M. 241.

60. La.—Smith v. City of Alexandria, App., 178 So. 737.

S.D.—Alendal v. Madsen, 275 N.W. 352, 65 S.D. 502.

61. La.—Smith v. Monroe Grocer Co., App., 179 So. 495.

Me.—Davis v. Simpson, 23 A.2d 320, 138 Me. 137.

Minn.—Kordiak v. Holmgren, 30 N.W.2d 16, 225 Minn. 134.

Pa.—Twardowski v. Olock, Com.Pl., 56 Mont Co. 222.

Tex.—Crosby v. Strain, Civ.App., 99 S.W.2d 659, error dismissed.

Vt.—Round v. Pike, 148 A. 283, 102 Vt. 324.

Failure to warn host

Wis.—Forecki v. Kohlberg, 295 N.W. 7, 237 Wis. 67, rehearing denied 296 N.W. 619, 237 Wis. 67.

Grasping wheel

Cal.—Elm v. Bennett, 278 P. 906, 99 Cal.App. 573.

Riding on running board

Tex.—Thurman v. Chandler, Civ. App., 52 S.W.2d 315, reversed on other grounds 81 S.W.2d 489, 125 Tex. 34.

62. Ark.—Loda v. Raines, 100 S.W. 2d 973, 193 Ark. 513.

Conn.—Decker v. Roberts, 32 A.2d 651, 130 Conn. 174.

Ill.—Nash v. Welch, 57 N.E.2d 648, 324 Ill App. 225—Wallace v. Yellow Cab Co., 238 Ill App 283.

Ind.—Coats v. Strawmeyer, 21 N.E. 2d 433, 107 Ind App 102.

La.—Mason v. Price, App., 32 So.2d 853—Pender v. Bonfanti, App., 13 So.2d 105—O'Conner v. Massachusetts Bonding & Insurance Co., App., 2 So.2d 234—Simon v. Harrison, App., 200 So. 476, followed in 200 So. 481—Morris v. Clark, App., 199 So. 437—Anderson v. Louisiana Power & Light Co., App., 180 So. 243—McCormick & Co. v. Cauley, App., 168 So. 783.

63. Tex.—Younger Bros. v. Ross, Civ App., 151 S.W.2d 621, error dismissed.

64. La.—Wells v. Home Indemnity Co., App., 1 So.2d 453.

Tenn.—Price-Bass Co. v. Owen, 146 S.W.2d 149, 24 Tenn App. 474.

65. La.—Thomas v. Stewart, App., 29 So.2d 604, followed in 29 So.2d 606 and 29 So.2d 607—Crow v. State Farm Mut. Automobile Ins. Co., App., 10 So.2d 105.

Wagon

La.—Harper v. Holmes, App., 189 So. 463.

66. Ariz.—Anderson v. Alabam Freight Lines, 169 P.2d 865, 64 Ariz. 313.

La.—Dickinson v. Long Springs Lumber Co., App., 32 So.2d 407—McDonald v. Zurich General Acc

& Liability Ins. Co., App., 25 So. 2d 923—Richie v. Natchitoches Oil Mill, App., 178 So. 752—Grimsley v. Brown, App., 143 So. 532.

Ohio.—Schaar v. Blosser, App., 35 N.E.2d 846.

Tex.—Wright v. McCoy, Civ.App., 131 S.W.2d 52.

Wis.—Zigler v. Kinney, 27 N.W.2d 433, 250 Wis. 338.

42 C.J. p 1239 note 50 [b] (1).

67. Ark.—Loda v. Raines, 100 S.W. 2d 973, 193 Ark. 513.

La.—Simon v. Harrison, App., 200 So. 476, followed in 200 So. 481—Anderson v. Louisiana Power & Light Co., App., 180 So. 243—McCormick & Co. v. Cauley, App., 168 So. 783.

Pa.—Craig v. Gottlieb, 55 A.2d 573, 161 Pa Super 526.

Tex.—Magouirk v. Cantrell, Civ.App., 16 S.W.2d 337.

Wis.—Horn v. Snow White Laundry & Dry Cleaning Co., 3 N.W.2d 380, 240 Wis 312.

68. Va.—Kinsey v. Brugh, 161 S.E. 41, 157 Va. 407.

69. Cal.—House v. Fry, 30 Cal.App. 157, 157 P 500.

La.—Genovese v. Krebs, 138 So. 470, 18 La.App. 639.

70. La.—Chandler v. Sentell, App., 35 So.2d 260.

71. N.H.—Copadis v. Haymond, 47 A.2d 120, 94 N.H. 103.

N.M.—White v. Montoya, 126 P.2d 471, 46 N.M. 241.

Ohio.—Security Ins. Co. v. Smith, Mun., 72 N.E.2d 693—Peltier v. Smith, 66 N.E.2d 117, 78 Ohio App. 171.

Pa.—Craig v. Gottlieb, 55 A.2d 573, 161 Pa Super. 526.

Tex.—Roddy v. Herren, Civ.App., 125 S.W.2d 1057—Magouirk v. Cantrell, Civ.App., 16 S.W.2d 337.

Wash.—Blieker v. Wolff, 161 P.2d 145, 23 Wash.2d 368.

Wis.—Zigler v. Kinney, 27 N.W.2d 433, 250 Wis. 338—Horn v. Snow White Laundry & Dry Cleaning Co., 3 N.W.2d 380, 240 Wis. 312—Hots v. Ingels, 253 N.W. 177, 214 Wis. 356.

Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.

72. N.H.—Copadis v. Haymond, 47 A.2d 120, 94 N.H. 103.

right of way;⁷³ intoxication of a driver;⁷⁴ lack of control of a motor vehicle;⁷⁵ manner of parking;⁷⁶ operation by an unlicensed driver;⁷⁷ stopping without warning or signal;⁷⁸ and swerving to the wrong side of the road.⁷⁹

g. Last Clear Chance

In an action involving a motor vehicle accident, a case can be made under the last clear chance doctrine only by a preponderance of evidence; circumstantial evidence of negligence may be sufficient.

In an action involving a motor vehicle accident, a party seeking to make a case under the doctrine variously known as the last clear chance, humanitarian, or subsequent negligence doctrine, or the doctrine of apparent or discovered peril, must do so by a preponderance or greater weight of the evidence.⁸⁰ A motorist's alleged last clear chance to

avoid an accident cannot rest on conjecture or speculation,⁸¹ but must be established by substantial⁸² or substantive⁸³ evidence. In this connection, a motorist's discovery or awareness of a pedestrian's perilous position may be shown by circumstantial evidence,⁸⁴ and the motorist's testimony that he did not discover it, or was not aware of it, is not conclusive of the matter;⁸⁵ likewise, the fact that the motorist could have stopped in time may be proved by circumstantial evidence.⁸⁶

The evidence adduced in particular cases has been held sufficient to render the doctrine applicable or to make out a case thereunder,⁸⁷ as in the case of injuries to pedestrians generally,⁸⁸ pedestrians crossing streets or highways,⁸⁹ bicyclists,⁹⁰ and children,⁹¹ and in the case of collision at intersections,⁹² and, likewise, according to the de-

Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.

73. Ohio.—Security Ins. Co. v. Smith, Mun., 72 N.E.2d 693.

74. Ind.—Wahl Co. v. Compton, 36 N.E.2d 942, 109 Ind.App. 631.

75. Wis.—Hotz v. Ingels, 253 N.W. 177, 214 Wis. 356.

76. Tex.—Galveston Truck Line Corporation v. Moore, Civ.App., 107 S.W.2d 426, error dismissed.

77. Me.—Davis v. Simpson, 23 A.2d 320, 138 Me. 137.

78. La.—Wells v. Home Indemnity Co., App., 1 So.2d 453—Swedman v. Standard Oil Co. of Louisiana, 125 So. 481, 12 La.App. 359.

79. La.—Shaffer v. Southern Bell Telephone & Telegraph Company, App., 160 So. 439, annulled on other grounds 165 So. 651, 184 La. 158.

80. U.S.—McElwee v. Curtis-Wright Corp., D.C.Mo., 70 F.Supp. 97.

81. Mo.—Swain v. Anders, 140 S.W. 2d 730, 235 Mo.App. 125.

Va.—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320—Paytes v. Davis, 157 S.E. 557, 156 Va. 229.

82. Mo.—Swain v. Anders, 140 S.W. 2d 730, 235 Mo.App. 125.

Accuracy in gauging time and distance

Under the humanitarian doctrine, neither the court, in ruling on demurrer to plaintiff's evidence, nor jury, in resolving question of facts submitted to it, need gauge time and distances with fine accuracy in determining whether defendant could have stopped his truck, slackened speed thereof, or swerved to the right, and thereby avoided injury to deceased.—Swain v. Anders, supra.

Distance in which stop possible

In action by pedestrian against motorist under humanitarian doctrine, evidence that motorist actually

stopped automobile within space of two feet, although not introduced in response to hypothetical question, was sufficient to meet requirement that there be evidence adduced as to distance in which automobile could have been brought to stop.—Robinson v. O'Shanksy, Mo.App., 98 S.W.2d 895.

83. U.S.—McElwee v. Curtis-Wright Corp., D.C.Mo., 70 F.Supp. 97.

84. Del.—Baker v. Reid, 57 A.2d 103. Tex.—Surkey v. Smith, Civ.App., 136 S.W.2d 893, error refused.

85. Del.—Baker v. Reid, 57 A.2d 103. Tex.—Surkey v. Smith, Civ.App., 136 S.W.2d 893, error refused.

86. Mo.—Smithers v. Barker, App., 97 S.W.2d 121, reversed on other grounds 111 S.W.2d 47, 341 Mo. 1617.

87. La.—Santos v. Duvic, 133 So. 399, 16 La.App. 105.

Mo.—Iman v. Walter Freund Bread Co., 58 S.W.2d 477, 332 Mo. 461—Gurwell v. Jefferson City Lines, App., 192 S.W.2d 683—Conway v. Silver King Oil & Gas Co., App., 94 S.W.2d 942.

Neb.—Carnes v. Deklotz, 291 N.W. 490, 137 Neb. 787.

42 C.J. p 1235 note 28 [a].

Prima facie case under humanitarian rule held made.—Speneman v. Uhri, 60 S.W.2d 9, 332 Mo. 821.

88. La.—Oliphant v. Town of Lake Providence, App., 193 So. 516—Loewenberg v. Fidelity Union Casualty Co., App., 147 So. 81—Robichaux v. Dorion, 134 So. 784, 17 La. App. 159—Paquet v. Renken, App., 30 So.2d 218.

Va.—Dobson-Peacock v. Curtis, 186 S. E. 13, 166 Va. 550.

89. Cal.—Ladas v. Johnson's Black & White Taxicab Co., 110 P.2d 449, 43 Cal.App.2d 223.

La.—Taylor v. Shreveport Yellow

Cabs, App., 163 So. 737—Norwood v. Bahrn, App., 127 So. 475, rehearing denied 129 So. 183, 14 La.App. 261—Lervick v. White Top Cabs, App., 10 So.2d 67.

Mo.—Wright v. Osborn, 201 S.W.2d 935, 356 Mo. 382.

Tex.—Martinez v. Pena, Civ.App., 139 S.W.2d 337, error dismissed, judgment correct.

90. La.—Kaough v. Hadley, App., 165 So. 748.

Mo.—Webb v. Cox, App., 53 S.W.2d 1057.

91. Cal.—Rocha v. Garcia, 263 P. 238, 203 Cal. 167.

Mo.—Wright v. Osborn, 201 S.W.2d 935, 356 Mo. 382—Murphy v. Quick Tire Service, App., 47 S.W.2d 202. N.H.—Lapolice v. Austin, 157 A. 73, 85 N.H. 244.

Child playing in street

Utah.—Graham v. Johnson, 172 P.2d 665, 109 Utah 365.

92. Ariz.—Casey v. Marshall, 168 P. 2d 240, 64 Ariz. 232, rehearing denied 169 P.2d 84, 64 Ariz. 260.

Cal.—Girdner v. Union Oil Co. of California, 13 P.2d 915, 216 Cal. 197.

Colo.—Independent Lumber Co. v. Leatherwood, 79 P.2d 1052, 102 Colo. 460.

La.—Daw v. Matthews, Texas Indem. Ins. Co., Intervenor, App., 84 So.2d 666—Antoine v. Werner, App., 172 So. 800—Kaough v. Hadley, App., 165 So. 748—Loewenberg v. Fidelity Union Casualty Co., App., 147 So. 81—Truxillo v. De Lerno, App., 146 So. 71.

Mo.—Martin v. Kiefer, App., 95 S.W. 2d 1214—Crane v. Sirkin & Needles Moving Co., App., 85 S.W.2d 911.

Tex.—Pure Oil Co. v. Crabb, Civ. App., 151 S.W.2d 982, error refused—Leap v. Brazier, Civ.App., 93 S. W.2d 1213, modified on other grounds 121 S.W.2d 334, 132 Tex. 213.

cisions in the case of head-on collisions,⁹³ and rear-end collisions.⁹⁴

In other cases, the evidence adduced has been held insufficient to render the doctrine applicable or to make out a case thereunder,⁹⁵ as in the case

of injuries to pedestrians generally,⁹⁶ pedestrians crossing streets or highways,⁹⁷ a person standing near the edge of a highway,⁹⁸ bicyclists,⁹⁹ motorcyclists,¹ children,² and persons coasting,³ and in the case of collisions at intersections,⁴ head-on collisions,⁵ and rear-end collisions.⁶

Injury to occupant of horse-drawn vehicle

La.—Sarpay v. Mesman, 135 So. 915, 17 La.App. 346.

93. Mo.—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326. Tex.—South Texas Coaches v. Woodard, Civ.App., 123 S.W.2d 395.

94. Collision with horse-drawn vehicle

Mo.—Knebel v. Poese, App., 153 S.W. 2d 844.

95. U.S.—Virginia Motor Express v. Jimenez, C.C.A.Va., 76 F.2d 694.

Cal.—Dam v. Bond, 251 P. 818, 80 Cal. App. 342—Erwin v. Morris, 51 P.2d 149, 10 Cal.App.2d 168—Isham v. Trimble, 43 P.2d 581, 5 Cal.App.2d 648—Toby v. Hubbard, 13 P.2d 569, 125 Cal.App. 261.

Conn.—Bracken v. Curtiss, 145 A. 23, 109 Conn. 573.

N.H.—Fontaine v. Charas, 181 A. 417, 87 N.H. 424.

N.Y.—Sherman v. Leicht, 264 N.Y.S. 492, 238 App.Div. 271.

Tex.—Wells v. Texas Pac. Coal & Oil Co., 164 S.W.2d 680, 140 Tex. 2.

Vt.—Brooks v. Holmes, 35 A.2d 374, 113 Vt. 456.

Va.—Virginia Stage Lines v. Lesny, 8 S.E.2d 259, 175 Va. 351.

Wyo.—Hill v. Walters, 100 P.2d 98, 55 Wyo. 334.

42 C.J. p. 1235 note 28 [b].

Prima facie case under doctrine of discovered peril held not made out.—Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380.

96. Conn.—Doolan v. Werner, 34 A. 2d 731, 130 Conn. 394—Rix v. Stone, 163 A. 258, 115 Conn. 658.

Iowa—Reid v. Brooke, 266 N.W. 477, 221 Iowa 808.

Ky.—Peak v. Arnett, 26 S.W.2d 1035, 233 Ky. 756—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Bailey v. Reggie, App., 22 So.2d 698—Stansbury v. Drillon, App. 2 So.2d 662—Gomez v. State Farm Mut. Auto Ins. Co., App., 191 So. 139—Guillory v. United Gas Public Service Co., App., 148 So. 274—Perret v. Geraci, 181 So. 72, 15 La.App. 329.

Md.—Jendrzewski v. Baker, 31 A.2d 611, 182 Md. 41.

Mo.—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26.

Tex.—Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44—Airline Motor Coaches v. Parks, Civ.App., 190 S.W.2d 142, affirmed

Parks v. Airline Motor Coaches, 193 S.W.2d 967, 145 Tex. 44—Surkey v. Smith, Civ.App., 136 S.W.2d 893, error refused—Gersdorf-Sloan Ambulance Service v. Kenty, Civ.App., 75 S.W.2d 903, error dismissed.

Va.—Paytes v. Davis, 157 S.E. 557, 156 Va. 229—Saunders v. Temple, 153 S.E. 691, 154 Va. 714.

97. U.S.—McElwee v. Curtiss-Wright Corp., D.C.Mo., 70 F.Supp. 97.

Cal.—Curtis v. Pacific Electric Ry. Co., 59 P.2d 890, 15 Cal.App.2d 580—Stewart v. Langer, 48 P.2d 758, 9 Cal.App.2d 60.

Colo.—Fahling v. Jones, 114 P.2d 1100, 108 Colo. 144.

Conn.—Caplan v. Arndt, 196 A. 631, 123 Conn. 585, 119 A.L.R. 1037—Lanfear v. Putnam, 161 A. 242, 115 Conn. 267, overruling McLaughlin v. Schreiber, 136 A. 467, 105 Conn. 610—Correnti v. Catino, 160 A. 892, 115 Conn. 213.

Ky.—Runge v. Haller, 33 S.W.2d 317, 236 Ky. 423.

La.—Fontenot v. Freudenstein, App., 199 So. 677—Ledet v. Toye Bros Yellow Cab Co., App., 160 So. 442.

Mich.—Brinker v. Tobin, 270 N.W. 209, 278 Mich. 42.

R.I.—Kallif v. Udin, 159 A. 644, 52 R.I. 191.

Tenn.—Harbor v. Wallace, App., 211 S.W.2d 172.

Crossing at night

Ariz.—Garlington v. McLaughlin, 104 P.2d 169, 56 Ariz. 37.

Md.—Jackson v. Forwood, 47 A.2d 81, 186 Md. 379.

Mich.—Agranowitz v. Levine, 298 N.W. 388, 298 Mich. 18.

Va.—Orndorff v. Howell, 25 S.E.2d 327, 181 Va. 383.

Drunken pedestrian

Ia.—Bolssao v. Kleinpeter, App., 191 So. 157.

98. Cal.—Bright v. Zabler, 111 P.2d 387, 43 Cal.App.2d 706.

99. U.S.—Dugan v. Fry, C.C.A.N.J., 34 P.2d 723.

Mo.—Dipaoli v. Langemann, App., 192 S.W.2d 35—McCoy v. Home Oil & Gas Co., App., 60 S.W.2d 715.

Tex.—Pardue Const. Co. v. Hollis, Civ.App., 204 S.W.2d 860.

1. Cal.—Henslee v. Fox, 51 P.2d 1176, 10 Cal.App.2d 202.

2. Cal.—Uribe v. McCorkle, 146 P.2d 22, 63 Cal.App.2d 61—Johnston v. Associated Terminals Co., 56 P.2d 259, 18 Cal.App.2d 121.

Ky.—Arthur v. Rose, 158 S.W.2d 652, 289 Ky. 402.

La.—Fontenot v. Freudenstein, App., 199 So. 677.

Mich.—Brinker v. Tobin, 270 N.W. 209, 278 Mich. 42.

Mo.—Wells v. Raber, 166 S.W.2d 1073, 350 Mo. 586.

Mont.—Collins v. Crimp, 8 P.2d 796, 91 Mont. 326.

Tex.—Burks v. Dallas Railway & Terminal Co., Civ.App., 116 S.W.2d 884.

Va.—Hutcheson v. Misenheimer, 194 S.E. 665, 169 Va. 511.

3. N.H.—Legere v. New England Furniture Co., 1 A.2d 924, 89 N.H. 423.

4. U.S.—Pearman v. Crain, C.C.A. Mo., 166 F.2d 109.

Cal.—Washam v. Peerless Automatic Staple Mach. Co., 113 P.2d 724, 45 Cal.App.2d 174—Bogardus v. Snyder, 62 P.2d 153, 17 Cal.App.2d 411—Poncino v. Reid-Murdoch & Co., 28 P.2d 932, 136 Cal.App. 223—Van Derhoof v. Chambon, 8 P.2d 925, 121 Cal.App. 118.

Colo.—Markley v. Hilkey Bros., 160 P.2d 394, 113 Colo. 562.

Ky.—Peak v. Arnett, 26 S.W.2d 1035, 233 Ky. 756—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

La.—Austin v. Baker-Lawhon & Ford, App., 188 So. 416, followed in Standard Gin & Manufacturing Co. v. Baker-Lawhon & Ford, 188 So. 420, and Employers Casualty Co. v. Baker-Lawhon & Ford, 188 So. 421—Stock v. Davis, App., 187 So. 679—Todd v. Vige, App., 142 So. 802—Kelly v. Neff, App., 14 So.2d 657—New Amsterdam Casualty Co. v. Dambly, App., 8 So.2d 345—Arline v. Alexander, App., 2 So.2d 710.

Mo.—Bach v. Diekroeger, App., 184 S.W.2d 755—Bashkow v. McBride, App., 177 S.W.2d 637—McCoy v. Home Oil & Gas Co., App., 60 S.W.2d 715.

Tex.—South Texas Coaches v. Eastland, Civ.App., 101 S.W.2d 878, error dismissed.

Wash.—Saad v. Langworthy, 280 P. 74, 153 Wash. 598.

5. La.—Williams v. Geo. A. Hormel & Co., App., 195 So. 634—Aguillard v. State, App., 7 So.2d 645.

N.D.—Ramage v. Trepanier, 283 N.W. 471, 69 N.D. 19.

6. Cal.—Uribe v. McCorkle, 146 P.2d 22, 63 Cal.App.2d 61.

4. TRIAL, JUDGMENT, AND REVIEW

§ 521. Questions of Law and Fact

The general rules governing the functions of the court and jury in civil actions apply in actions to recover damages for injuries caused by the operation of motor vehicles, and, accordingly, questions of fact are for the determination of the jury and questions of law are for the court.

The general rules governing the functions of the court and jury in civil actions apply in actions to recover damages for injuries caused by the operation of motor vehicles.⁷ Accordingly, where the evidence is conflicting or is of such a character

that different inferences might reasonably be drawn therefrom, the case is properly submitted to the jury,⁸ and it is the jury's province to determine the credibility of the witnesses,⁹ and the weight or probative value of the evidence.¹⁰ Where, because of the legal insufficiency of the evidence or for other reasons, there is no liability on the part of defendant, as a matter of law it is proper for the court to grant a nonsuit or to direct a verdict for defendant,¹¹ and, where the evidence indisputably shows that defendant was guilty of negligence proximate-

7. Nev.—Carter v. City of Fallon, 11 P.2d 817, 54 Nev. 195.

42 C.J. p 1240 note 72.

8. Ariz.—Womack v. Preach, 163 P. 2d 280, 63 Ariz. 390, opinion supplemented 165 P.2d 657, 64 Ariz. 61.

Ill.—Hirning v. Contracting & Material Co., 38 N.E.2d 793, 312 Ill.App. 655.

Ind.—McDonald v. Swanson, 1 N.E. 2d 684, 103 Ind.App. 171.

Iowa.—In re Goretaka's Estate, 13 N. W.2d 432, 234 Iowa 1080—Gorham v. Richard, 272 N.W. 512, 223 Iowa 364.

Ky.—Malcolm v. Poland, 126 S.W.2d 1098, 277 Ky. 512.

Md.—Bowman v. Williams, 165 A. 182, 164 Md. 397—Dwyer v. Chew, 131 A. 350, 149 Md. 281.

Mass.—Mernagh v. Lillie, 45 N.E.2d 473, 312 Mass. 697—Askowith v. Massell, 156 N.E. 875, 260 Mass. 202.

Mo.—Kneezle v. Scott County Milling Co., App., 113 S.W.2d 817—Smith v. Gately Stores, App., 24 S.W.2d 200.

N.H.—Mitrich v. Tuttle, 11 A.2d 818, 90 N.H. 512.

N.J.—Stalter v. Schuyler, 51 A.2d 213, 135 N.J.Law 228—Mulligan v. Clappis, 1 A.2d 414, 121 N.J.Law 119—Blume v. Barrett, 196 A. 464, 119 N.J.Law 340.

N.Y.—Alessi v. Lovell, 273 N.Y.S. 637, 152 Misc. 411—Staunton v. Robbins, 239 N.Y.S. 565, 136 Misc. 197.

N.C.—Caulder v. Gresham, 30 S.E.2d 312, 224 N.C. 402—Smith v. Matthews, 170 S.E. 648, 205 N.C. 828.

Pa.—Churchey v. Johnstown Motors, 18 Pa.Dist. & Co. 282—Hertzog v. Rausch, Com.Pl., 34 Berks Co.L.J. 282—Hall v. Spriggs, Com.Pl., 22 Wash. Co. 166—Phelps v. Deardorff, Com.Pl., 56 York Leg.Rec. 165.

S.D.—Russell v. Crow, 245 N.W. 249, 60 S.D. 230.

Tex.—Taber v. Smith, Civ.App., 26 S. W.2d 722.

9. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.

Ark.—Kurry v. Frost, 162 S.W.2d 48, 204 Ark. 386.

Cal.—Hicks v. Reis, 134 P.2d 788, 21 Cal.2d 654—Angelo v. Esau, 93 P.2d 205, 34 Cal.App.2d 130—Asbury v. Goldberg, 47 P.2d 311, 8 Cal.App.2d 70—Wynne v. Wright, 286 P. 1057, 105 Cal.App. 17.

Ill.—Shellabarger v. Nattier, 7 N.E.2d 365, 289 Ill.App. 473—Lachenmyer v. Glotfelty, 2 N.E.2d 180, 284 Ill. App. 397.

Iowa.—Hartman v. Red Ball Transp. Co., 233 N.W. 23, 211 Iowa 61.

Ky.—Willett v. Bradas & Ghcens, 142 S.W.2d 139, 283 Ky. 525—Fremd v. Glviden, 24 S.W.2d 915, 233 Ky. 38.

Me.—Cole v. Wilson, 143 A. 178, 127 Me 316.

Md.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151.

Mass.—Mitchell v. Silverstein, 70 N. E.2d 306, 320 Mass. 524—Wilson v. Grace, 173 N.E. 524, 273 Mass. 146.

Mich.—Zolton v. Rotter, 32 N.W.2d 30, 321 Mich. 1.

Minn.—Weber v. McCarthy, 7 N.W.2d 681, 214 Minn. 76.

Mo.—Cook v. Day, 172 S.W.2d 648.

N.H.—Macgowan v. Mills, 35 A.2d 797, 93 N.H. 84—Lal'fante v. Rouseau, 18 A.2d 777, 91 N.H. 330.

N.J.—Samuel v. Christiansen, 158 A. 479, 10 N.J.Misc. 223—Loccisano v. Feltus, 156 A. 332, 9 N.J. Misc. 1045.

N.Y.—Lee v. City Brewing Corporation, 18 N.E.2d 628, 279 N.Y. 380.

Pa.—Haverkamp v. Sussman, 176 A. 206, 317 Pa. 187.

Tenn.—Roddy Mfg. Co. v. Dixon, 105 S.W.2d 513, 21 Tenn.App. 81.

Vt.—Barrows v. Powell, 29 A.2d 708, 113 Vt. 109, followed in 29 A.2d 712, 113 Vt. 117—Johnson v. Cone, 28 A. 2d 384, 112 Vt. 459.

Va.—Mausser v. Hebb, 48 S.E.2d 257, 187 Va. 146—Marks v. Ore, 45 S.E. 2d 894, 187 Va. 876.

Wis.—McCartie v. Muth, 284 N.W. 529, 230 Wis. 604—Suschnick v. Underwriters Casualty Co., 248 N. W. 477, 211 Wis. 474, followed in Cater v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 484, and Hoenisch v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 483.

Different versions by same witness

Whether witness' version of automobile accident on direct examination or different version on cross-examination was correct was for jury.—Lucy v. Dowd, 267 N.W. 839, 276 Mich. 289.

10. US—Zentz v. Buchman, C.C.A. Pa., 103 F.2d 850.

Ala.—Duncan v. Robertson, 132 So. 57, 24 Ala.App. 157, reversed on other grounds 132 So. 58, 222 Ala. 131.

Cal.—Arundel v. Turk, 60 P.2d 486, 16 Cal App 2d 293—Wynne v. Wright, 286 P. 1057, 105 Cal.App. 17.

Ill.—Shellabarger v. Nattier, 7 N.E. 2d 365, 289 Ill.App. 473—Smithers v. Henriquez, 4 N.E.2d 793, 287 Ill. App. 95, affirmed 15 N.E.2d 499, 368 Ill. 588.

Iowa.—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23—Lane v. Varlamos, 239 N.W. 689, 213 Iowa 795.

Md.—Yellow Cab Co. v. Henderson, 39 A.2d 546, 183 Md. 546.

Mass.—Watson v. Forbes, 30 N.E.2d 228, 307 Mass. 383.

Mich.—Zolton v. Rotter, 32 N.W.2d 30, 321 Mich. 1.

Mo.—Christie v. Randol, 38 S.W.2d 538, 225 Mo.App. 744.

N.C.—Shipp v. United Stage Lines, 135 S.E. 339, 192 N.C. 475.

Pa.—Johnston v. Cheyney, 146 A. 551, 297 Pa. 199.

Wash.—Schalow v. Oakley, 139 P.2d 296, 18 Wash.2d 347—Cannon v. City Electric & Fixture Co., 290 P. 828, 158 Wash. 66.

Determination on testimony rather than presumption

Where circumstances of automobile collision are fully testified to, jury should determine cause on testimony, not on presumption that one party obeyed law.—Tyson v. Burton, 294 P. 750, 110 Cal.App. 428.

11. Ill.—Sturgeon v. Quarton, 44 N. E.2d 766, 316 Ill.App. 308.

La.—Schwartz v. Rauch, App., 144 So. 280.

Md.—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 298.

ly causing the accident, and that plaintiff was not contributorily negligent, the court may properly direct a verdict for plaintiff on the question of liability.¹² The question whether the evidence is sufficient to justify submitting the case to the jury depends on the facts of the particular case.¹³ A motor vehicle accident case will not be withdrawn from the jury for want of legally sufficient evidence if there is any competent and pertinent evidence, however slight, legally sufficient as tending

to prove negligence.¹⁴

The specific questions of fact, which arise during the course of the trial, are for the jury's determination,¹⁵ including such questions as whether a collision occurred between plaintiff's vehicle and defendant's vehicle,¹⁶ the nature and extent of plaintiff's injury,¹⁷ the manner in which the accident occurred,¹⁸ questions pertaining to the place of the accident,¹⁹ physical facts with respect to the

Mass.—Maffioli v. George L. Griffin & Son, 194 N.E. 726, 289 Mass. 488.
N.C.—Ledford v. City of Winston-Salem, 41 S.E.2d 82, 227 N.C. 698.
Tex.—Skelly Oil Co. v. Johnston, Civ. App., 151 S.W.2d 863, error refused.
Wis.—School v. Milwaukee Automobile Ins. Co., 291 N.W. 311, 234 Wis. 332.

Contributory negligence

In action by pedestrian for injuries alleged to have resulted from defendant's negligence in operating truck, causing pedestrian to run into path of motor vehicle of a third person, refusing to direct a verdict for defendant was error, where evidence showed that pedestrian was guilty of contributory negligence as a matter of law.—Turnquist v. Rosaia Bros., 83 P.2d 353, 196 Wash. 434.

Notice

Where recovery in automobile negligence action against city police officer was based on negligent operation of police patrol car and city was not made a party to action, and complaint failed to allege filing with city comptroller and with officer of notices required by statute as it read at time of accident, denial of motion for directed verdict in officer's favor was error.—Feisthamel v. Rorzen, 78 N.Y.S.2d 21, 273 App.Div. 937.

12. Ill.—Harrison v. Bingham, 182 N.E. 750, 350 Ill. 269, affirming 267 Ill.App. 417.

13. Md.—A. S. Abell Co. v. Sopher, 22 A.2d 462, 179 Md. 687.

14. Md.—Yellow Cab Co. v. Henderson, 39 A.2d 546, 183 Md. 546.

15. Ala.—Tindell v. Guy, 10 So.2d 862, 248 Ala. 535—Jefferson County Burial Soc. v. Cotton, 133 So. 256, 222 Ala. 578—Brown v. Bush, 124 So. 300, 220 Ala. 130—Myers v. Baker, 135 So. 643, 24 Ala.App. 387.
Cal.—Dean v. Feld, 175 P.2d 278, 77 Cal.App. 327—Tanaka v. Graneli, 290 P. 515, 107 Cal.App. 547—Bakos v. Shell Co. of California, 271 P. 127, 94 Cal.App. 243.

D.C.—Estes v. Nicola, 13 F.2d 287, 56 App.D.C. 315.

Idaho.—Griffin v. Clark, 42 P.2d 297, 55 Idaho 364.

Ill.—Netter v. King, 73 N.E.2d 798, 331 Ill.App. 619—Whipkey v. Ashbaugh, 267 Ill.App. 452.

Me.—Chaisson v. Williams, 156 A. 154, 130 Me. 341.

Mass.—Le Blanc v. Pierce Motor Co., 30 N.E.2d 684, 307 Mass. 535.

Mich.—Camp v. Wilson, 241 N.W. 844, 258 Mich. 38.

Minn.—Heath v. Wolesky, 233 N.W. 239, 181 Minn. 492.

Mo.—Madison v. Taxi Owners Ass'n, App., 148 S.W.2d 106—Wells v. Wells, App. 48 S.V.2d 109.

Neb.—Primiano v. Venuto, 239 N.W. 734, 122 Neb. 879.

N.J.—Parave v. Public Service Interstate Transp. Co., 160 A. 375, 109 N.J.Law 155—Grav v. Elmo, 156 A. 825, 9 N.J.Misc. 1093.

N.Y.—Montayne v. White, 31 N.Y.S.2d 153, 263 App.Div. 782—Simenson v. Carotenuto, 8 N.Y.S.2d 247, 255 App.Div. 985.

Ohio.—Hayhurst v. Embrey, App., 65 N.E.2d 660.

Pa.—Kissell v. Motor Age Transit Lines, 53 A.2d 593, 357 Pa. 204—Zimmer v. Clark, 156 A. 815, 103 Pa. Super. 145—McGarvey v. Mages, Com.Pl., 50 Dauph. Co. 128—Hilgert v. Halterman, 5 Monroe L.R. 20.

R.I.—Powers v. Goodwin, 192 A. 767, 58 R.I. 372.

Wash.—Schalow v. Oakley, 139 P.2d 296, 18 Wash.2d 347—Lund v. Western Union Telegraph Co., 74 P.2d 220, 192 Wash. 579.

42 C.J. p 1240 note 72.

16. Ky.—Pendergrass v. Salyer, 178 S.W.2d 828, 296 Ky. 866.

17. Va.—Wade v. Peebles, 174 S.E. 769, 162 Va. 479.

18. Iowa.—Kaffenberger v. Holle, 22 N.W.2d 804, 237 Iowa 542.

Me.—Lawry v. Yeaton, 23 A.2d 890, 138 Me. 230.

Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223.

Mass.—McGovern v. Thomas, 59 N.E.2d 718, 317 Mass. 740.

Mich.—Barkman v. Montague, 298 N.W. 273, 297 Mich. 538.

Mo.—Golden v. Onerem, App., 123 S.W.2d 617.

N.H.—Cedergren v. Hadaway, 18 A.2d 380, 91 N.H. 270.

19. Cal.—Salsberry v. Smith, App., 192 P.2d 73—Corcoran v. Ward, 1 P.2d 455, 115 Cal.App. 180.

Conn.—Minacci v. Logudice, 11 A.2d 354, 126 Conn. 345.

Fla.—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635.

Ill.—Mortvedt v. Western Austin Co., 50 N.E.2d 761, 320 Ill.App. 337—Rasmussen v. Wiley, 39 N.E.2d 57, 312 Ill.App. 404.

Iowa.—Fichternacht v. Herny, 275 N.W. 576, 224 Iowa 317—Wambeam v. Hayes, 219 N.W. 813, 205 Iowa 1394.

Me.—Lerman v. O'Donnell, 16 A.2d 109, 137 Me. 329.

Md.—Pegelow v. Johnson, 9 A.2d 645, 177 Md. 345.

Mich.—White v. Huffmaster, 32 N.W.2d 447, 321 Mich. 225.

Mo.—Gurwell v. Jefferson City Lines, App., 192 S.W.2d 653.

Or.—Hanna v. Royce, 249 P. 173, 119 Or. 450.

Pa.—McClellan v. Fox, 177 A. 823, 318 Pa. 433.

Wash.—Williams v. Brockman, 193 P.2d 863—Trudeau v. Snohomish Auto Freight Co., 96 P.2d 599, 1 Wash.2d 574—Libbee v. Handy, 1 P.2d 312, 163 Wash. 410.

Wis.—Fronczek v. Sink, 293 N.W. 153, 235 Wis. 398—Jenks v. Hetzel, 285 N.W. 737, 231 Wis. 243.

Particular questions

(1) Whether the accident occurred upon a street or highway or elsewhere.

Mass.—Di Franco v. West Boston Gas Co., 160 N.E. 326, 262 Mass. 387.

Mo.—Steinmetz v. Saathoff, App., 84 S.W.2d 434.

Mont.—Burns v. Eminger, 276 P. 437, 84 Mont. 397.

Wash.—Myers v. Weyerhaeuser, 85 P.2d 1091, 197 Wash. 407.

(2) On which side of the street or highway the accident occurred.

Ill.—Carr v. Blackstock, 49 N.E.2d 279, 319 Ill.App. 369—Davis v. Bankert, 19 N.E.2d 137, 298 Ill.App. 629.

Iowa.—Quick v. Paulson, 292 N.W. 853, 228 Iowa 666—Rabenold v. Hutt, 283 N.W. 865, 226 Iowa 321.

Me.—Beauchesne v. Sargent, 16 A.2d 110, 137 Me. 329.

Mont.—Brunnabend v. Tibbles, 246 P. 536, 76 Mont. 288.

N.J.—Eichelberger v. Inter-City Transp. Co., 10 A.2d 267, 123 N.J.Law 595, affirmed 15 A.2d 758, 125 N.J.Law 365.

accident,²⁰ whether the vehicle was parked upon the highway,²¹ whether the vehicle was operated in such a manner as to be a nuisance,²² whether plaintiff was engaged in a criminal enterprise at the time of the accident,²³ whether the motor vehicle was properly registered at the time of the accident,²⁴ whether the motor vehicle was operated with the consent of defendant,²⁵ whether defendant, at the time of the accident, was acting in good faith in the discharge of his duties as an air raid warden

within an immunity statute,²⁶ what was the law of the state where the accident occurred,²⁷ and questions as to the amount of damages to be recovered.²⁸

Questions of law are for the determination of the court,²⁹ and, where the evidence pertaining to an issue is not sufficient for submission to the jury,³⁰ or where the evidence pertaining to an issue is not substantially conflicting and is not subject to different reasonable inferences,³¹ the issue is

N.C.—Smith v. Dillon Supply Co., 199 S.E. 392, 214 N.C. 406.

Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135.

R.I.—Carroll v. Nardolillo, 24 A.2d 417, 67 R.I. 389.

Tenn.—Municipal Paving & Construction Co. v. Hunt, 123 S.W.2d 843, 22 Tenn.App. 380.

Tex.—Willingham v. Kindy, Civ. App., 203 S.W.2d 991.

Vt.—McKenna v. McDonald, 10 A.2d 208, 111 Vt. 60.

W.Va.—Broyles v. Hagerman, 180 S.E. 99, 116 W.Va. 287.

(3) Whether the accident occurred at the intersection.

Fla.—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635.

Ky.—Smith v. Goodwin, 165 S.W.2d 976, 292 Ky. 37—Hinternisch v. Brewsaugh, 87 S.W.2d 934, 261 Ky. 432.

Me.—Field v. Webber, 169 A. 732, 132 Me. 236.

(4) The place within the intersection where the accident occurred.

Mo.—Barker v. Monts, 70 N.E.2d 264, 330 Ill.App. 129.

R.I.—Sullivan v. Caruso, 29 A.2d 539, 68 R.I. 476.

(5) Whether an injury to a pedestrian occurred at the edge or upon the shoulder of the highway.

Ky.—Smith v. Dunning, 122 S.W.2d 781, 275 Ky. 733.

Mich.—Herzberg v. Knight, 286 N.W. 145, 289 Mich. 29.

(6) Whether an injury to a pedestrian occurred upon the sidewalk, crosswalk, or sidewalk lane.

Cal.—Taha v. Finegold, 184 P.2d 533, 81 Cal.App.2d 536.

Ill.—Panella v. Weil-McLain Co., 67 N.E.2d 699, 329 Ill.App. 240.

Neb.—Bancroft v. Kite, 5 N.W.2d 196, 143 Neb. 178.

20. U.S.—Schwarz v. Fast, C.C.A. Neb., 103 F.2d 865—Falstaff Brewing Corporation v. Thompson, C.C. A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.

Minn.—Weber v. McCarthy, 7 N.W.2d 681, 214 Minn. 76.

Pa.—Weinberg v. Pavitt, 155 A. 867, 304 Pa. 312—Lynch's Estate v.

Letterman, Com.Pl., 29 Erie Co. 52.

Physical condition of street or highway

Ala.—Brown v. Bush, 124 So. 300, 220 Ala. 130.

Ohio.—Hayhurst v. Embrey, App., 65 N.E.2d 660.

21. Vt.—Palmer v. Marcelle, 175 A. 31, 34, 106 Vt. 500.

22. Conn.—Zatkin v. Katz, 11 A.2d 843, 126 Conn. 445.

23. Ariz.—Salt River Valley Water Users' Ass'n v. Green, 104 P.2d 162, 56 Ariz. 22.

24. Mass.—Harnden v. Smith, 26 N.E.2d 310, 305 Mass. 485—Burns v. Winchell, 25 N.E.2d 752, 305 Mass. 276—Bellenger v. Nally, 185 N.E. 346, 282 Mass. 523—Balian v. Ogassian, 179 N.E. 232, 277 Mass. 525, 78 A.L.R. 1021—Walsh v. Alfred Sears Co., 169 N.E. 805, 270 Mass. 296.

Residence of owner

(1) Determination of place of residence of applicant for registration of motor vehicle is commonly question of fact.—Doyle v. Goldberg, 1 N.E.2d 1, 294 Mass. 105.

(2) Whether applicant was acting with complete honesty of purpose accompanied by blameless oversight when he made application for registration of motorcycle when stating merely his street address and not name of the city in which he resided was question for jury.—Le Blanc v. Cutler Co., 25 N.E.2d 715, 305 Mass. 283.

(3) Where motorist in applying for registration gave as his address and place of residence a furnished beach cottage which he had rented and not the house which he owned and lived in for nine years prior to taking of the beach house, it was for the jury to determine whether motorist's residence and address were correctly stated in the application.—Harnden v. Smith, 26 N.E.2d 310, 305 Mass. 485.

(4) Other questions pertaining to residence.—Jenkins v. North Shore Dye House, 194 N.E. 823, 289 Mass. 561—Avila v. Du Pont, 180 N.E. 124, 278 Mass. 83.

25. R.I.—Deming v. Venditti, 53 A.2d 498.

Authority of defendant's employee to loan vehicle

W.Va.—Miller v. Douglas, 5 S.E.2d 799, 121 W.Va. 638.

26. N.Y.—Jones v. Gray, 45 N.Y.S.2d 519, 267 App.Div. 242, stay granted 47 N.Y.S.2d 281, 267 App.Div. 853, appeal denied 47 N.Y.S.2d 606, 267 App.Div. 926.

Proceeding to post during blackout

N.Y.—Jones v. Gray, supra.

27. R.I.—Powers v. Goodwin, 192 A. 767, 68 R.I. 372.

28. Ill.—Harrison v. Bingham, 182 N.E. 750, 350 Ill. 269.

Ohio.—Winslow v. Ohio Bus Line Co., 73 N.E.2d 504, 148 Ohio St. 101—Hayhurst v. Embrey, App., 65 N.E.2d 660.

Punitive damages

U.S.—Hider v. Gelbach, C.C.A.S.C., 135 F.2d 693.

Ala.—J. C. Byram & Co. v. Bryan, 140 So. 768, 224 Ala. 466.

S.C.—Lumpkin v. Mankin, 134 S.E. 503, 136 S.C. 506.

29. Cal.—Bertiz v. City of Los Angeles, 241 P. 921, 74 Cal.App. 792.

Governmental act

Whether city engaged in governmental act in maintaining garage for city motor vehicles was a question of law.—Bertiz v. City of Los Angeles, supra.

30. Mass.—Rolfe v. Walsh, 64 N.E.2d 16, 318 Mass. 733.

Evidence on particular issues held insufficient

(1) Punitive damages.—McDonald v. Moore, 131 So. 824, 159 Miss. 326.

(2) Right of vehicle to be upon highway.—O'Halleron v. Miller, 175 N.E. 94, 274 Mass. 508.

(3) Whether operation of automobile constituted a nuisance.—De Mare v. Guerin, 5 A.2d 711, 125 Conn. 362.

(4) Whether road was very rough.—Nicolino v. E. O. Dahlquist Const. Co., 235 N.W. 297, 211 Iowa 1190.

31. Mass.—Caverne v. Houghton, 1 N.E.2d 4, 294 Mass. 110.

properly withdrawn from the jury and determined by the court as a matter of law. Whether evidence is uncontradicted,³² or whether there is sufficient evidence for the jury,³³ is a question of law for the court.

§ 522. — Proximate Cause

- a. In general
- b. Negligence

a. In General

The issue of proximate cause of an injury allegedly

resulting from the operation of a motor vehicle, and issues pertaining to proximate cause, are for the determination of the jury or other trier of the facts where the evidence is conflicting or reasonable minds might differ in their conclusions therefrom.

Where the evidence concerning the proximate cause of an injury allegedly resulting from the operation of a motor vehicle is in conflict, or the evidence is such that reasonable minds might differ in their conclusions therefrom, the issue of proximate cause of the injury,³⁴ and all disputed issues pertaining to proximate cause,³⁵ are questions of fact for the determination of the jury or

Legality of registration of motor vehicle

Mass.—Caverno v. Houghton, *supra*.

Place of accident

Iowa—Potter v. Robinson, 9 N.W.2d 457, 233 Iowa 479.

32. N.J.—Corsaro v. Ambrose, 153 A. 712, 9 N.J.Misc. 323.

33. N.C.—Cheek v. Barnwell Warehouse & Brokerage Co., 183 S.E. 729, 209 N.C. 569.

34. Ala.—McDermott v. Sibert, 119 So. 681, 218 Ala. 670.

Ariz.—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 43 Ariz. 57.

Cal.—Pruitt v. Krovitz, 139 P.2d 992, 59 Cal.App.2d 666—Shapiro v. Ingersoll, 53 P.2d 771, 11 Cal.App.2d 202—Riley v. Berkeley Motors, 36 P.2d 398, 1 Cal.App.2d 217—Lucke v. Pacific Electric Ry. Co., 19 P.2d 263, 129 Cal.App. 707—Bennett v. Hardy, 291 P. 903, 108 Cal.App. 473.

Conn.—Zatkin v. Waterbury Wrecking Co., 21 A.2d 924, 128 Conn. 280

Fla.—Ford Motor Co. v. Floyd, 188 So. 601, 137 Fla. 301.

Ga.—Bell v. Lewis, 38 S.E.2d 686, 74 Ga.App. 26—Speed Oil Co. v. Jones, 1 S.E.2d 760, 59 Ga.App. 625—Houston v. Taylor, 179 S.E. 207, 50 Ga.App. 811.

Idaho.—Griffin v. Clark, 42 P.2d 297, 55 Idaho 364—Hooker v. Schuler, 260 P. 1027, 45 Idaho 83.

Ill.—Hirning v. Contracting & Material Co., 38 N.E.2d 793, 312 Ill. App. 655—Marks v. Marks, 31 N.E.2d 399, 308 Ill.App. 276—Partridge v. Enterprise Transfer Co., 30 N.E.2d 947, 307 Ill.App. 386—Smithers v. Henriquez, 4 N.E.2d 793, 287 Ill.App. 95, affirmed 15 N.E.2d 499, 368 Ill. 588.

Iowa.—Cerny v. Secor, 234 N.W. 193, 211 Iowa 1232.

Kan.—Atkins v. Morton, 191 P.2d 909, 164 Kan. 626—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 164 Kan. 376.

Ky.—Cook v. Gillespie, 82 S.W.2d 347, 259 Ky. 281—Jellico Grocery Co. v. Biggs, 68 S.W.2d 429, 252 Ky. 827—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246

Ky. 758—Murphey's Ex'x v. Clinkinger, 50 S.W.2d 942, 244 Ky. 336.

La.—Fontenot v. Fontenot, App., 150 So. 40

Me.—Peabody v. Sweet, 152 A. 312, 129 Me. 375.

Mass.—Hubbard v. Conti, 75 N.E.2d 639, 321 Mass. 743.

Mich.—White v. Huffmaster, 32 N.W.2d 447, 321 Mich. 235—Allen v. Edelson, 251 N.W. 319, 265 Mich. 110—National Liberty Ins. Co. v. Foth, 235 N.W. 821, 254 Mich. 152.

Miss.—Williams v. Lumpkin, 152 So. 842, 169 Miss. 146.

Mo.—Cox v. Frank L. Schaab Stove & Furniture Co., App., 83 S.W.2d 211—Allison v. Dittbrener, App., 50 S.W.2d 199—Ligon v. Exhibitors' Film Delivery & Service Co., App., 22 S.W.2d 1058—Graber v. Wells, App., 7 S.W.2d 719

N.J.—Eastlack v. Mitten, 162 A. 551, 109 N.J.Law 556.

N.C.—Nichols v. Goldston, 46 S.E.2d 320, 228 N.C. 514—Shipp v. United Stage Lines, 135 S.E. 339, 192 N.C. 475.

N.D.—Kohler v. Stephens, 24 N.W.2d 64, 74 N.D. 655.

Ohio.—Pasku v. Friedman Transfer & Const. Co., App., 78 N.E.2d 182.

Or.—Ronner v. Bekin's Moving, Storage & Household Shipping Co., 266 P. 627, 125 Or. 280.

Pa.—Shellenberger v. Reading Transp. Co., 154 A. 297, 303 Pa. 122—Community Fire Co. v. Pennsylvania Power & Light Co., 92 Pa.Super. 304.

R.I.—Tillinghast v. Rhode Island Motor Sales Co., 150 A. 753.

S.C.—Bowers v. Carolina Public Service Co., 145 S.E. 790, 148 S.C. 161.

Tenn.—Duling v. Burnett, 124 S.W.2d 294, 22 Tenn.App. 522.

Tex.—Blakesley v. Kircher, Com. App., 41 S.W.2d 53—A. B. C. Storage & Moving Co. v. Herron, Civ. App., 138 S.W.2d 211, error dismissed, judgment correct—Foster v. Woodward, Civ.App., 134 S.W.2d 417, error refused.

Va.—Williams v. Greene, 26 S.E.2d 89, 181 Va. 707—Wade v. Peebles, 174 S.E. 749, 162 Va. 479—Baise

v. Hollifield, 164 S.E. 657, 158 Va. 498.

Wash.—Hemsworth v. Shoemaker, 281 P. 84, 145 Wash. 520.

42 C.J. p 1242 note 77.

Collisions in rapid succession

Where the vehicle in which plaintiff was riding was involved in two collisions in rapid succession, whether plaintiff's injuries were sustained in the first or second collision was a question for the jury.—Leinbach v. Pickwick Greyhound Lines, 10 P.2d 33, 135 Kan. 40.

Statutory provision

The provision of guest statute, that question of proximate cause shall be solely for the jury, does not constitute an unconstitutional attempt on the part of the legislature to exercise judicial power, since such provision does not prevent courts from passing on legal sufficiency of the evidence, but is merely surplusage and adds nothing to power of jury that jury did not already possess.—Cormier v. Williams, 4 So.2d 525, 148 Fla. 201.

35. Cal.—Weddle v. Loges, 125 P.2d 914, 52 Cal.App.2d 115.

Iowa.—Shuck v. Keefe, 218 N.W. 31, 205 Iowa 365.

Miss.—Standard Oil Co. v. Crane, 23 So.2d 297, 199 Miss. 69

N.Y.—Kelly v. United Dressed Beef Co. of New York, 293 N.Y.S. 446, 249 App.Div. 586.

Tex.—A. B. C. Storage & Moving Co. v. Herron, Civ.App., 138 S.W.2d 211, error dismissed, judgment correct.

Particular issues

(1) Cause of skidding.

S.D.—Bowers v. Guhin, 233 N.W. 283, 57 S.D. 441.

Wash.—Trunk v. Wilkes, 297 P. 1091, 162 Wash. 114.

(2) Whether vehicle could have been parked upon shoulder of highway.—Becherer v. Belleville-St. Louis Coach Co., 53 N.E.2d 731, 322 Ill. App. 37.

(3) Cause of ignition of gasoline after collision.—Walborn v. Epley, 24 A.2d 668, 148 Pa.Super. 417.

other trier of the facts. The rule has been applied where the injuries were received in a collision between motor vehicles traveling in the same or opposite directions upon the same street or highway,³⁶ between motor vehicles colliding at an in-

tersection of streets or highways,³⁷ or between moving and stationary motor vehicles;³⁸ or where the injuries were sustained by a person on foot,³⁹ or on a vehicle other than a motor vehicle,⁴⁰ or by a guest in defendant's motor vehicle, where the

(4) Extent to which use of intoxicating liquors contributed to motor vehicle wreck.—*Shannon v. Jamestown Tp.*, 232 N.W. 371, 251 Mich 597.

(5) Age of driver.—*Collins v. Liddle*, 247 P. 476, 67 Utah 242.

36. Ark.—*Oviatt v. Garretson*, 171 S.W.2d 287, 205 Ark. 792—*Standard Materials Corporation v. Johnson*, 169 S.W.2d 590, 205 Ark. 562.

Cal.—*Smith v. Cantlay & Tanxola*, 189 P.2d 542, 83 Cal.App.2d 689—*Boyd v. Theetge*, 177 P.2d 637, 78 Cal.App.2d 346—*National Automobile Ins. Co. v. Cunningham*, 107 P.2d 643, 41 Cal.App.2d 828—*Sweet v. Sager*, 82 P.2d 201, 28 Cal.App.2d 211—*Moore v. Re*, 22 P.2d 45, 131 Cal.App. 557.

Fla.—*Wharton v. Day*, 10 So.2d 417, 151 Fla. 772.

Ill.—*Hopfinger v. O'Banion*, 73 N.E. 2d 145, 331 Ill.App. 302.

Mass.—*Hubbard v. Conti*, 75 N.E.2d 639, 321 Mass. 743.

Mich.—*Grud v. Warren*, 298 N.W. 276, 297 Mich. 546.

Mo.—*Cantwell v. Cremins*, 149 S.W. 2d 343, 347 Mo. 836.

N.M.—*Silva v. Waldie*, 82 P.2d 282, 42 N.M. 514.

N.C.—*Wadsworth v. National Convoy & Trucking Co.*, 166 S.E. 898, 203 N.C. 730—*Murphy v. Asheville-Knoxville Coach Co.*, 156 S.E. 550, 200 N.C. 92.

N.D.—*Leonard v. North Dakota Co-Op. Wool Marketing Ass'n*, 6 N.W.2d 576, 72 N.D. 310.

Ohio.—*Satterthwaite v. Morgan*, 48 N.E.2d 653, 141 Ohio St. 447—*Sheen v. Kubiak*, 1 N.E.2d 943, 131 Ohio St. 52.

Okl.—*Dierksen v. Hollingworth*, 89 P.2d 358, 184 Okl. 611—*Padgett v. McKissick*, 280 P. 409, 138 Okl. 63.

S.C.—*Daniel v. Tower Trucking Co.*, 32 S.E.2d 5, 205 S.C. 333.

Tex.—*Calhoun v. Grant, Civ.App.*, 129 S.W.2d 762—*Straus-Bodenheimer Co. v. Marshall, Civ.App.*, 91 S.W.2d 865.

37. Ala.—*Utility Trailer Works v. Phillips*, 29 So.2d 289, 249 Ala. 61.

Cal.—*Mize v. Davy*, 165 P.2d 26, 72 Cal.App.2d 607—*Sinsbaugh v. Clark*, 294 P. 462, 110 Cal.App. 340.

Conn.—*Bennett v. De Leonardo*, 145 A. 61, 109 Conn. 402, followed in *Shelton v. De Leonardo*, 145 A. 63, 109 Conn. 608.

Ill.—*Schaefer v. Then*, 68 N.E.2d 624, 327 Ill.App. 206—*Mueth v.*

Jaska, 23 N.E.2d 805, 302 Ill.App. 289.

Ky.—*Stephens v. Glass*, 176 S.W.2d 139, 296 Ky. 90.

Minn.—*Eichten v. Central Minn. Co-op. Power Ass'n of Redwood County*, 28 N.W.2d 862, 224 Minn. 180—*Leitner v. Pacific Gamble Robinson Co.*, 26 N.W.2d 228, 223 Minn. 260.

Neb.—*Hamblen v. Steckley*, 27 N.W. 2d 178, 148 Neb. 283—*DeBus v. Amen*, 5 N.W.2d 92, 142 Neb. 109. N.C.—*McMillan v. Butler*, 11 S.E.2d 877, 218 N.C. 582.

R.I.—*Little v. Rubin*, 6 A.2d 683, 62 R.I. 438.

Tenn.—*Southern Coach Lines v. Had-dock, App.*, 194 S.W.2d 347.

Tex.—*Adams v. Slefferman, Civ.App.*, 197 S.W.2d 506.

38. Cal.—*Kline v. Barkett*, 158 P.2d 51, 68 Cal.App.2d 765.

Ga.—*Hudgins Contracting Co. v. Smith*, 188 S.E. 732, 54 Ga.App. 687—*S. C. Jones Co. v. Yawn*, 188 S.E. 603, 54 Ga.App. 826—*Burnsed v. Spivey*, 184 S.E. 410, 52 Ga.App. 646.

Ill.—*Meng v. Lucash*, 69 N.E.2d 367, 329 Ill.App. 512—*Nielsen v. Pyles*, 54 N.E.2d 753, 322 Ill.App. 574—*Wedig v. Kroger Grocery & Baking Co.*, 282 Ill.App. 370—*Miller v. Burch*, 254 Ill.App. 387.

Ohio.—*Rutherford v. Western Union Tel. Co.*, 60 N.E.2d 938, 75 Ohio App. 176.

Pa.—*Bricker v. Gardner, Com.Pl.*, 56 Dauph. Co. 384, affirmed 48 A.2d 209, 355 Pa. 35.

Tex.—*McCullough Box & Crate Co. v. Liles, Civ.App.*, 162 S.W.2d 1055, error refused—*Western Development Corporation v. Simmons, Civ. App.*, 124 S.W.2d 414, error refused—*Humble Oil & Refining Co. v. Ooley, Civ.App.*, 46 S.W.2d 1038, error dismissed—*Hewitt v. Green, Civ.App.*, 28 S.W.2d 892.

39. U.S.—*American Ry. Express Co. v. Erskine, C.C.A.*, 38 F.2d 475.

Ark.—*Coca Cola Bottling Co. v. McAnulty*, 50 S.W.2d 577, 185 Ark. 970.

Cal.—*Benton v. Douglas*, 187 P.2d 469, 82 Cal.App.2d 784—*Douglas v. Hoff*, 185 P.2d 607, 82 Cal.App. 2d 82.

Conn.—*Fitzgerald v. Savin*, 174 A. 177, 119 Conn. 63—*Miceli v. Chap-pell*, 160 A. 508, 111 Conn. 723.

Ga.—*Wright v. Bales*, 7 S.E.2d 765, 62 Ga.App. 328.

Ill.—*Schneff v. Mirring*, 69 N.E.2d 352, 329 Ill.App. 512—*Bartels v.*

McGarvey, 63 N.E.2d 617, 327 Ill. App. 206—*Kraaz v. Henke*, 62 N.E. 2d 44, 326 Ill.App. 466—*Meltzer v. Shklowsky*, 53 N.E.2d 272, 321 Ill. App. 400—*Metropolitan Trust Co. v. Bowman Dairy Co.*, 11 N.E.2d 847, 292 Ill.App. 492, affirmed 15 N.E.2d 838, 369 Ill. 222.

Ind.—*Pfisterer v. Key*, 33 N.E.2d 330, 218 Ind. 521—*Vogel v. Ridens*, 44 N.E.2d 238, 112 Ind.App. 493—*Cottrell v. Lorenz*, 4 N.E.2d 655, 102 Ind.App. 659.

Kan.—*Hill v. Southern Kansas Stage Lines Co.*, 53 P.2d 923, 143 Kan. 44.

Mass.—*Hart v. Morris & Co.*, 156 N. E. 15, 259 Mass. 211.

Mont.—*Koppang v. Sevier*, 75 P.2d 790, 106 Mont. 79.

Neb.—*Tews v. Bamrick*, 26 N.W.2d 499, 148 Neb. 59.

Ohio.—*Wolfe v. Baskin*, 28 N.E.2d 629, 137 Ohio St. 281—*Van Sickie v. Walper*, 22 N.E.2d 585, 61 Ohio App. 366.

Or.—*Dixon v. Raven Dairy*, 75 P.2d 347, 158 Or. 186.

Va.—*Catron v. Birchfield*, 165 S.E. 499, 159 Va. 60.

Explosion

In action against owner of automobile hearse for injuries to undertaker who had leased hearse for a funeral, evidence that defendant's driver, in order to prime carburetor in attempting to start hearse which had stalled, poured in an excessive quantity of gasoline which exploded when he stepped on starter, and sprayed burning gasoline on undertaker, presented jury question as to cause of explosion.—*Dunmire v. Fitzgerald*, 37 A.2d 596, 349 Pa. 511.

Injury to child

Ga.—*Allyn & Bacon Book Pub. Co. v. Nicholson*, 7 S.E.2d 316, 61 Ga. App. 672.

Ill.—*Ehrenheim v. Yellow Cab Co.*, 239 Ill.App. 403.

Mass.—*Locking v. Wiswell*, 61 N.E. 2d 15, 318 Mass. 160.

Mo.—*Kuba v. Nagel, App.*, 124 S.W. 2d 597.

N.J.—*Amabile v. Crane*, 135 A. 692, 5 N.J.Misc. 149.

Ohio.—*Denison Coal & Supply Co. v. Bartelheim*, 171 N.E. 835, 122 Ohio St. 374.

40. Bicycle

U.S.—*Johnson v. Railway Express Agency, C.C.A.*, 131 F.2d 1009.

Cal.—*Hunt v. Los Angeles Ry. Corporation*, 294 P. 745, 110 Cal.App. 456.

vehicle overturned or struck an object not upon the street or highway.⁴¹ No question of fact as to proximate cause of the injury is presented for the jury's determination in the absence of evidence showing a causal relationship,⁴² since the jury may not be allowed to guess as to the cause of the injury.⁴³

Where the evidence concerning proximate cause is not substantially conflicting and is susceptible of but one reasonable inference, the question of proximate cause of plaintiff's injury is a question of law for the court.⁴⁴

b. Negligence

(1) In general

(2) Of defendant

Ga.—Asphalt Products Co. v. Wright, 2 S.E.2d 818, 60 Ga.App. 110.

Mass.—Bernasconi v. Bassi, 158 N.E. 341, 261 Mass. 26.

Horse-drawn vehicle

Proximate cause of horses' fright was for jury where ho ses drawing a buggy occupied by plaintiff became frightened in vicinity of truck whose canvas cover was flapping in wind and making noise audible one or two blocks away.—Buchanan v. Hurd Creamery Co., 246 N.W. 41, 215 Iowa 415.

41. U.S.—Bankers Indemnity Co. v. Leake, C.C.A.La., 84 F.2d 191.

Fla.—Warner v. Ware, 182 So. 605, 136 Fla. 466.

Iowa.—Maland v. Tesdall, 5 N.W.2d 327, 232 Iowa 959.

Mich.—Schneider v. Draper, 267 N.W. 831, 276 Mich. 259.

Wis.—Helms v. Bluhm, 228 N.W. 599, 200 Wis. 321.

Wyo.—Collins v. Anderson, 260 P. 1089, 37 Wyo. 275.

Fog

In action for injuries to guest when host misjudged slight jog in road and vehicle went into shallow, sloping ditch and, through some failure of control, vehicle came out of ditch and ran into a tree, whether hazards of fog contributed causally to the accident, was a question for the jury.—Jansen v. Herkert, 23 N.W.2d 503, 249 Wis. 124.

42. Ark.—Lewis v. Jackson, 83 S.W.2d 69, 191 Ark. 102.

Iowa.—Winter v. Davis, 251 N.W. 770, 217 Iowa 424.

Minn.—Bauer v. Miller Motor Co., 267 N.W. 206, 197 Minn. 352.

Tex.—Dallas Railway & Terminal Co. v. Helton, Civ.App., 145 S.W.2d 655, error dismissed, judgment correct.

Wis.—Archer v. Chicago, M., St. P. & P. Ry. Co., 255 N.W. 67, 215 Wis. 509, 95 A.L.R. 851.

43. Iowa.—Sproll v. Burkett Motor Co., 274 N.W. 63, 223 Iowa 902.

44. Ark.—Duckworth v. Stephens, 30 S.W.2d 840, 182 Ark. 161.

Ky.—Louisville Taxicab & Transfer Co. v. Warren, 205 S.W.2d 695, 305 Ky. 861.

Va.—Williams v. Greene, 26 S.E.2d 89, 181 Va. 707.

45. Ga.—Tallman v. Green, 41 S.E.2d 339, 74 Ga.App. 731.—Southern Stages v. Clements, 30 S.E.2d 429, 71 Ga.App. 169.—Eldson v. Felder, 22 S.E.2d 523, 68 Ga.App. 188.

Iowa.—Goldapp v. Core, 19 N.W.2d 673, 236 Iowa 548.

Okl.—Maloney v. Wallis, 151 P.2d 789, 194 Okl. 364.

46. U.S.—Hill Transp. Co. v. Everett, C.C.A.N.H., 145 F.2d 746.

Ark.—Pinkerton v. Davis, 207 S.W.2d 742, 212 Ark. 796.

Cal.—Reilly v. California St. Cable R. Co., 173 P.2d 872, 76 Cal.App.2d 620.—Day v. General Petroleum Corporation, 89 P.2d 718, 32 Cal.App.2d 220.—Winger v. Elmore, 57 P.2d 1369, 14 Cal.App.2d 241.—Riley v. Berkeley Motors, 36 P.2d 398, 1 Cal.App.2d 217.—Dougherty v. Ellingson, 275 P. 456, 97 Cal.App. 87.—Offordahl v. Motor Transit Co., 252 P. 773, 80 Cal.App. 667.

Conn.—Anderson v. C. E. Hall & Sons, 38 A.2d 787, 131 Conn. 232.

Ga.—Tallman v. Green, 41 S.E.2d 339, 74 Ga.App. 731.—Southern Stages v. Clements, 30 S.E.2d 429, 71 Ga.App. 169.—Eldson v. Felder, 22 S.E.2d 523, 68 Ga.App. 188.—Moore v. Shirley, 21 S.E.2d 925, 68 Ga.App. 38.—Floyd v. Williams, 188 S.E. 467, 64 Ga.App. 557.

Ill.—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265.

Iowa.—Goldapp v. Core, 19 N.W.2d 673, 236 Iowa 548.

Kan.—Mulich v. Graham Ship By Truck Co., 174 P.2d 98, 162 Kan. 61.

(3) Of plaintiff

(4) Of operator of vehicle occupied by plaintiff

(1) In General

Questions with respect to what negligence or whose negligence proximately caused the motor vehicle accident, or whether the accident was unavoidable, are questions for the determination of the jury or other trier of the facts where the evidence is conflicting or more than one conclusion can reasonably be drawn therefrom.

Where the evidence as to the circumstances of a motor vehicle accident is conflicting, or more than one conclusion can reasonably be drawn therefrom, questions with respect to what negligence⁴⁵ or whose negligence⁴⁶ proximately caused the acci-

Md.—Thurshy v. O'Rourke, 23 A.2d 656, 180 Md. 223.

Miss.—Trotter v. Staggers, 28 So.2d 237, 201 Miss. 9.

N.J.—Silverstein v. Schneider, 164 A. 480, 110 N.J.Law 239.

Pa.—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149.—Webb v. Hess, Com.Pl., 46 Dauph.Co. 84.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596.

W.Va.—Fischer v. Clark, 158 S.E. 504, 110 W.Va. 420.

Wis.—John v. Pierce, 178 N.W. 297, 172 Wis. 44.

Collision by vehicles traveling upon same highway or street

U.S.—Hill Transp. Co. v. Everett, C. C.A.N.H., 145 F.2d 746.

Ga.—Bailey Produce Co. v. Harden, 192 S.E. 237, 56 Ga.App. 171.

Ill.—Schultz v. Live Stock Nat. Bank of Chicago, 7 N.E.2d 636, 289 Ill.App. 626, certiorari denied 58 S.Ct. 481, 302 U.S. 766, 82 L.Ed. 595, rehearing denied 58 S.Ct. 609, 303 U.S. 666, 82 L.Ed. 1123, and 58 S.Ct. 1052, 304 U.S. 590, 82 L.Ed. 1549, and 59 S.Ct. 98, 305 U.S. 566, 83 L.Ed. 356.

Ky.—Hilsenrad v. Bowling, 166 S.W.2d 847, 292 Ky. 368.—Rutherford v. Smith, 145 S.W.2d 533, 284 Ky. 592.—Jones v. Sharp's Admr., 139 S.W.2d 731, 282 Ky. 638, followed in Jones v. Vance, 139 S.W.2d 735, 282 Ky. 646.

N.J.—Claypoole v. Motor Finance Corporation, 15 A.2d 794, 125 N.J.Law 440.

N.Y.—Volberg v. Hegeman Farms Co., 1 N.Y.S.2d 547, 253 App.Div. 839.

Tex.—Adams v. Siefertman, Civ.App., 197 S.W.2d 506.

W.Va.—Dangerfield v. Akers, 33 S.E.2d 140, 127 W.Va. 409.

Wis.—Leisch v. Tigerton Lumber Co., 27 N.W.2d 367, 250 Wis. 463.

dent, and whether negligence of a third person was the proximate cause,⁴⁷ are questions of fact for the determination of the jury or other trier of the facts. Where the evidence thereon is not substantially conflicting and is susceptible of but one reasonable inference, such questions are questions of law for the court.⁴⁸

Unavoidable accident. Whether the accident was unavoidable and due to a cause other than negligence is for the determination of the jury where

the evidence is conflicting or more than one conclusion can reasonably be drawn therefrom,⁴⁹ but, where the only reasonable conclusion which can be drawn from the evidence is that plaintiff's injury was due to unavoidable accident, the court should determine the question as a matter of law in favor of defendant.⁵⁰ It has been held that the issue of unavoidable accident is in every collision case where, on the evidence, the jury can properly return a verdict freeing both parties of negligence proximately causing the accident.⁵¹ Where no

Collision by vehicles meeting at intersection

Ala.—Sloss-Sheffield Steel & Iron Co. v. Allred, 25 So.2d 174, 32 Ala.App. 183, certiorari denied 25 So.2d 179, 247 Ala. 499.

Ark.—Pinkerton v. Davis, 207 S.W. 2d 742, 212 Ark. 796—Jelks v. Rogers, 165 S.W.2d 258, 204 Ark. 877.

Cal.—Roller v. Daleys, Inc., 28 P. 2d 345, 219 Cal. 542—Bramble v. McEwan, 104 P.2d 1054, 40 Cal. App.2d 400—Winger v. Elmore, 57 P.2d 1369, 14 Cal.App.2d 241.

Colo.—Amos v. Remington Arms Co., 188 P.2d 896, 117 Colo. 399.

Ky.—Mann v. Woodward, 290 S.W. 333, 217 Ky. 491.

Mich.—Stabler v. Copeland, 7 N.W.2d 122, 304 Mich. 1.

Mo.—Gabelman v. Bolt, App., 68 S.W.2d 909, transferred, see, 80 S.W.2d 171, 336 Mo. 539.

W.Va.—Vaughan v. Oates, 37 S.E.2d 479, 128 W.Va. 554.

Collision between moving and stationary vehicles

Ala.—Burns v. Bythwood, 184 So. 346, 28 Ala.App. 335, certiorari denied 184 So. 349, 236 Ala. 639.

Cal.—Hunton v. California Portland Cement Co., 123 P.2d 947, 50 Cal. App.2d 684.

D.C.—Brooks Transp. Co. v. McCutcheon, 154 F.2d 841, 80 U.S.App. D.C. 406.

Pa.—Lute v. Ross, 190 A. 391, 125 Pa. Super. 584.

Wis.—Kline v. Johannesen, 24 N.W. 2d 595, 249 Wis. 316.

Injury to pedestrian

Cal.—Fennessey v. Pacific Gas & Electric Co., 124 P.2d 51, 20 Cal. 2d 141.

Ga.—Eubanks v. Mullis, 181 S.E. 604, 51 Ga.App. 728.

Md.—Thursby v. O'Rourke, 28 A.2d 656, 180 Md. 223.

Mo.—Levins v. Vigne, 98 S.W.2d 737, 339 Mo. 660.

R.I.—Walling v. Jenks, 194 A. 600, 59 R.I. 129.

47. Del.—Elliott v. Camper, 194 A. 130, 8 W.Va. 504.

Ga.—Moore v. Shirley, 21 S.E.2d 925, 68 Ga.App. 38.

N.Y.—Harnik v. Astoria Mahogany Co., 215 N.Y.S. 219, 127 Misc. 41.

Tex.—Hooks v. Orton, Civ.App., 30 S.W.2d 681.

Negligence of operator of vehicle occupied by plaintiff as proximate cause see *infra* subdivision b (4) of this section.

Boy starting tractor

Whether ten-year-old boy's act in starting tractor backward while playing thereon was proximate cause of ensuing damage to property, so as to absolve tractor owner from liability therefor, was question for jury.—Bronk v. Davenny, 171 P.2d 237, 25 Wash.2d 443.

Interference with parked vehicle

In action for injuries sustained from negligently parked vehicle which rolled downhill and struck plaintiff, whether a third person interfered with the vehicle was for jury.—Baker v. Corse, Tex.Civ.App., 120 S.W.2d 817, error dismissed.

Parking upon highway

Whether motor vehicle collision was proximately caused by a third person's truck being parked upon highway at time of collision was for jury.—Swift & Co. v. Eanes, Tex.Civ.App., 92 S.W.2d 522, error dismissed.

Teamster on wrong side of highway

Wis.—Schwingel v. Boyd, 284 N.W. 28, 230 Wis. 336.

48. Negligence of third person

Iowa.—Foster v. Flaugh, 271 N.W. 503, 223 Iowa 40.

Minn.—Ind v. Bailey, 269 N.W. 638, 198 Minn. 217.

49. Cal.—Lotta v. City of Oakland, 154 P.2d 25, 67 Cal.App.2d 411—

Purcell v. Goldberg, 93 P.2d 578, 34 Cal.App.2d 344—Smith v. Hollander, App., 257 P. 577.

Fla.—Orr v. Avon Florida Citrus Corporation, 177 So. 612, 130 Fla. 306

Ill.—Davis v. Davis, 45 N.E.2d 48, 316 Ill.App. 310.

N.Y.—Rovella v. Small, 59 N.Y.S.2d 498, 270 App.Div. 784.

Tex.—Hankamer v. Roberts Undertaking Co., 141 S.W.2d 587, 185 Tex.

139—Bransford v. Pageway Coaches, 104 S.W.2d 471, 129 Tex. 327—

Price v. Leon, Civ.App., 202 S.W.2d 309, error refused no reversible error

—Craig v. Barret, Civ.App., 202 S.W.2d 257—McClelland v. Moun-

ger, Civ.App., 107 S.W.2d 901, error

dismissed by agreement—Mays v. Smith, Civ.App., 95 S.W.2d 1342, error dismissed—Swift & Co. v. Eanes, Civ.App., 92 S.W.2d 522, error dismissed—Kuykendall v. Johnson Funeral Parlor, Civ.App., 38 S.W.2d 601—McCall v. Frenzel, Civ. App., 32 S.W.2d 965—Humble Pipe Line Co. v. Kincaid, Civ.App., 19 S.W.2d 144, error refused.

42 C.J. p 1242 note 76.

Highway and weather conditions

N.J.—Rynar v. Lincoln Transit Co., 30 A.2d 406, 129 N.J.Law 525.

Okl.—Hartman v. Dunn, 95 P.2d 897, 186 Okl. 9.

S.C.—Montgomery v. National Convey & Trucking Co., 195 S.E. 247, 186 S.C. 167.

Tex.—Blanton v. E. & L. Transport Co., 207 S.W.2d 368—Hankamer v. Roberts Undertaking Co., Civ. App., 139 S.W.2d 865, error dismissed 141 S.W.2d 587, 135 Tex. 139—Sherwin-Williams Co. of Texas v. Delahoussaye, Civ.App., 124 S.W.2d 870, error dismissed—Winn v. Taylor, Civ.App., 111 S.W.2d 1149.

Sudden appearance of person or object upon highway

Iowa.—Winegardner v. Manny, 21 N.W.2d 209, 237 Iowa 412.

La.—Jones for Use and Benefit of Jones v. Nugent, App., 166 So. 193.

Mass.—Mroczek v. Craig, 44 N.E.2d 644, 312 Mass. 236—Warner v.

Town Taxi, 22 N.E.2d 598, 304 Mass. 10.

Tenn.—Bourne v. Barlar, 67 S.W.2d 751, 17 Tenn.App. 375.

Unforeseeable mechanical failure or latent defect

Cal.—Temple v. De Mirjian, 125 P.2d 544, 51 Cal.App. 559.

Iowa.—Maland v. Tesdall, 5 N.W.2d 327, 232 Iowa 959.

N.H.—Watkins v. Holmes, 35 A.2d 395, 93 N.H. 53.

Okl.—Bewley v. Western Creameries, 57 P.2d 859, 177 Okl. 132.

R.I.—Pizza v. O'Malley, 195 A. 342, 59 R.I. 298.

Wash.—Manos v. James, 110 P.2d 887, 7 Wash.2d 695—Lauber v. Lyon, 63 P.2d 389, 188 Wash. 644.

50. Ky.—Tate v. Collins, 98 S.W.2d 938, 266 Ky. 322.

51. Tex.—Hankamer v. Roberts Un-

evidence of unavoidable accident or insufficient evidence thereof to support a verdict is introduced,⁵² or where the only reasonable inference from the evidence is that the accident was caused by the negligence of one or both of the parties,⁵³ no question of unavoidable accident is presented for the determination of the jury.

(2) Of Defendant

(a) In general

(b) Specific acts of negligence

(a) In General

Whether the defendant's negligence was the proximate cause of the plaintiff's injuries allegedly sustained in a motor vehicle accident is a question of fact for the determination of the jury or other trier of the facts where the evidence is conflicting or is such that reasonable men may differ in their conclusions therefrom.

Where there is a conflict in the evidence, or where the evidence is such that reasonable men may differ in their conclusions therefrom, the question whether plaintiff's injuries which were allegedly sustained in a motor vehicle accident and for which recovery is sought were proximately caused by defendant's negligence,⁵⁴ such as whether the injuries were caused by his failure to comply with motor vehicle or traffic laws,⁵⁵ is a question of fact for the determination of the jury or other trier of the facts. Accordingly, under conflicting evidence or evidence subject to different inferences, it is a question of fact for the jury whether defendant's negligence was the proximate cause of an injury to another's motor vehicle or to an occupant of another's motor vehicle, sustained in a collision between

dertaking Co., Civ.App., 139 S.W.2d 865, error dismissed 141 S.W.2d 587, 135 Tex. 139—Winn v. Taylor, Civ.App., 111 S.W.2d 1149.

52. Tex.—Dallas Railway & Terminal Co. v. Helton, Civ.App., 145 S.W.2d 655, error dismissed, judgment correct—Red Arrow Freight Lines v. Smith, Civ.App., 93 S.W.2d 495, error dismissed.

Statement of opinion

Statement of guest in vehicle that he regarded accident as unavoidable was insufficient to raise issue that accident was unavoidable, where other evidence showed that vehicle had run off highway because unguided or improperly guided when driver turned head to speak to back-seat occupants—Kaley v. Huntley, Mo. App., 88 S.W.2d 200.

53. Mo.—Kaley v. Huntley, supra. Tex.—Houston Electric Co. v. McLeroy, Civ.App., 153 S.W.2d 617, reversed on other grounds 163 S.W.2d 1062, 139 Tex. 170—Scroggs v. Morgan, Civ.App., 107 S.W.2d 911, reversed on other grounds 130 S.W.2d 283, 133 Tex. 581.

54. U.S.—Blaszky v. Eastern Auto Forwarding Co., C.C.A.N.Y., 134 F.2d 600—Perez v. Fayard, C.C.A. Miss., 64 F.2d 667—Van Wie v. U.S., D.C.Iowa, 77 F.Supp. 22. Ark.—Coca-Cola Bottling Co. of Southwest Arkansas v. Carter, 154 S.W.2d 824, 202 Ark. 1026. Cal.—Siebel v. Shapiro, 137 P.2d 56, 58 Cal.App.2d 509—Smith v. Rothschild, 39 P.2d 464, 3 Cal.App.2d 273.

Conn.—Baum v. Atkinson, 3 A.2d 805, 125 Conn. 72. Fla.—City of Miami v. Thigpen, 11 So.2d 300, 151 Fla. 800—Frazee v. Gillespie, 124 So. 8, 98 Fla. 582. Ill.—Gleason v. Cunningham, 44 N.E.2d 940, 316 Ill.App. 286—Jones v.

Esenberg, 20 N.E.2d 906, 299 Ill. App. 551.

Ind.—Tabor v. Continental Baking Co., 38 N.E.2d 257, 110 Ind.App. 633. Iowa—Sergeant v. Challis, 238 N.W.442, 213 Iowa 57.

Ky.—Elliott v. Drury's Adm'x, 200 S.W.2d 141, 304 Ky. 93—Miles v. Southeastern Motor Truck Lines, 173 S.W.2d 990, 295 Ky. 156.

La.—Honeycutt v. Carver, App., 25 So.2d 99.

Me.—Pearl v. Cumberland Sand & Gravel Co., 31 A.2d 413, 139 Me. 411.

Md.—Yellow Cab Co. v. Henderson, 39 A.2d 546, 183 Md 546—Lange v. Affleck, 155 A. 150, 160 Md 695, 79 A.L.R. 1274—Brawner v. Hooper, 135 A. 420, 151 Md. 579.

Mass.—Abdow v. Silverbrand, 17 N.E.2d 163, 301 Mass 337—Isaacson v. Boston, W. & N. Y. St. Ry. Co., 180 N.E. 118, 278 Mass. 378.

Mo.—Browne v. Creek, 209 S.W.2d 900—Kourik v. English, 100 S.W.2d 901, 340 Mo. 367—Schlue v. Missouri Pacific Transp. Co., App., 62 S.W.2d 934.

Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.

N.J.—Parave v. Public Service Interstate Transp. Co., 160 A. 375, 109 N.J.Law 155—Barlow v. Sterr, 166 A. 708, 11 N.J.Misc. 453, affirmed 169 A. 692, 112 N.J.Law 86—McKeag v. Franklin Contracting Co., 135 A. 773, 5 N.J.Misc. 130.

N.Y.—Mugman v. Brooklyn & Queens Transit Corporation, 37 N.Y.S.2d 564, 265 App.Div. 832—Volberg v. Hegeman Farms Co., 1 N.Y.S.2d 547, 253 App.Div. 839.

Ohio.—Focht v. Justis, 77 N.E.2d 506, 81 Ohio App. 297.

Pa.—Amey v. Erb, 146 A. 141, 296 Pa. 561—Jenkins v. Fady, 144 A. 429, 294 Pa. 490.

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d

981—Caldwell v. Hodges, 77 S.W.2d 817, 18 Tenn.App. 355.

Va.—Temple v. Ellington, 12 S.E.2d 826, 177 Va. 134—Virginia Electric & Power Co. v. Morgan's Adm'r, 173 S.E. 373, 162 Va. 123.

Wash.—Leach v. Erickson, 17 P.2d 859, 171 Wash 236—Trunk v. Wilkes, 297 P. 1091, 162 Wash. 114—Maddock v. International Motor Transit Co. of Washington, 297 P. 184, 161 Wash 450.

Wis.—Mellor v. Heggaton, 236 N.W. 558, 205 Wis. 42.

42 C.J. p 1241 note 74.

Barrel falling from truck

Whether damage to motor vehicle and injuries to occupant's as result of barrel falling from passing truck was proximately caused by negligence or recklessness of truck driver or owner was for jury.—Munn v. Price, 165 S.E. 777, 167 S.C. 98.

Collision with motorcycle

Ariz.—Keeler v. Maricopa Tractor Co., 123 P.2d 166, 59 Ariz. 94.

Ill.—Reilly v. Peterson Furniture Co., 40 N.E.2d 780, 314 Ill.App. 46. 42 C.J. p 1253 note 40.

55. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F.Supp. 22.

Ariz.—City of Phoenix v. Mullen, 174 P.2d 422, 65 Ariz. 83.

Mass.—Butler v. Curran, 18 N.E.2d 340, 302 Mass. 1.

N.J.—Farley v. Kearson, 3 A.2d 591, 121 N.J.Law 622—Niles v. Phillips Express Co., 193 A. 183, 118 N.J. Law 455.

N.C.—Beaman v. Duncan, 46 S.E.2d 707, 238 N.C. 600—King v. Pope, 163 S.E. 447, 202 N.C. 554.

Ohio.—Cailey v. Hutsel, 79 N.E.2d 383, 82 Ohio App. 117.

S.C.—Flickhoff v. Beard-Laney, Inc., 20 S.E.2d 153, 199 S.C. 500, 141 A.L.R. 1010.

Va.—Baise v. Warren, 164 S.E. 655, 158 Va. 505.

W.Va.—Skaff v. Dodd, 44 S.E.2d 621.

motor vehicles traveling in the same or opposite directions upon the same street or highway,⁵⁶ in a collision between motor vehicles crossing at an intersection of streets or highways,⁵⁷ or in a collision by a moving motor vehicle with a stationary

motor vehicle;⁵⁸ whether defendant's negligence was the proximate cause of an injury to a guest or passenger in the motor vehicle operated or controlled by defendant;⁵⁹ whether defendant's neg-

56. U.S.—Rubin v. Schupp, C.C.A. Cal., 127 F.2d 625.
 Ala.—Smith v. Tripp, 20 So.2d 870, 246 Ala. 421.
 Cal.—Morris v. Fortier, 138 P.2d 368, 59 Cal.App.2d 132—Day v. General Petroleum Corporation, 89 P.2d 718, 32 Cal.App.2d 220—Falasco v. Hulén, 44 P.2d 469, 6 Cal.App.2d 224.
 Conn.—Horvath v. Tontini, 11 A.2d 846, 126 Conn. 462.
 Del.—Lynch v. Lynch, 195 A. 799, 9 W.W.Harr. 1.
 Ill.—Ritholz v. Yellow Cab Co., 50 N.E.2d 114, 319 Ill.App. 647.
 Iowa.—Goldapp v. Core, 19 N.W.2d 673, 236 Iowa 548—Sanford v. Nesbitt, 11 N.W.2d 695, 234 Iowa 14—McKinnon v. Guthrie, 265 N.W. 620, 221 Iowa 400—Henriksen v. Cran- dic Stages, 246 N.W. 913, 216 Iowa 643.
 Kan.—Leinbach v. Pickwick Grey- hound Lines, 10 P.2d 33, 135 Kan. 40.
 Ky.—Hogge v. Anchor Motor Freight of Delaware, 126 S.W.2d 877, 277 Ky. 460—Jellico Grocery Co. v. Biggs, 68 S.W.2d 429, 252 Ky. 827—Bell & Bell v. Rascoe, 63 S.W.2d 932, 250 Ky. 756—Axtón-Fisher To- bacco Co. v. Landrum, 3 S.W.2d 1082, 223 Ky. 446.
 Me.—Abbott v. Zirpolo, 171 A. 251, 132 Me. 368.
 Mass.—Cerez v. Webber, 63 NE 2d 889, 318 Mass 703—Luff v. Mahlo- witz, 5 N.E.2d 45, 296 Mass 206— Monaghan v. Keith Oil Corpora- tion, 183 N.E. 252, 281 Mass. 129.
 Mich.—Gleason v. Hanafin, 13 N.W.2d 196, 308 Mich. 31—Braendle v. Drum, 236 N.W. 806, 254 Mich. 372.
 Minn.—Erickson v. Kuehn, 262 N.W. 56, 195 Minn. 164.
 Mo.—Johnesse v. Central States Oil Co., App., 200 S.W.2d 383—Ever- hardt v. Garner, App., 100 S.W.2d 71.
 Mont.—Adami v. Murphy, 164 P.2d 150, 118 Mont. 127.
 Neb.—In re Potts' Estate, 14 N.W.2d 323, 144 Neb. 729.
 N.J.—Claypoole v. Motor Finance Corporation, 15 A.2d 794, 125 N.J. Law 440—Krauss v. Dowd, 164 A. 454, 110 N.J.Law 344—Gorman v. Elizabeth-Union-Irvington Line, 147 A. 402, 105 N.J.Law 602—Lyon v. Fabricant, 169 A. 548, 12 N.J. Misc. 39, affirmed 172 A. 567, 113 N.J.Law 62.
 N.H.—Jewett v. Holt, 37 A.2d 13, 93 N.H. 163—Woodbridge v. Desroche- rer, 35 A.2d 802, 93 N.H. 87—Keck v. Hinkley, 6 A.2d 165, 90 N.H. 181.
 N.C.—Yates v. Thomasville Chair Co., 189 S.E. 500, 211 N.C. 200—Cook v. Horne, 153 S.E. 315, 198 N.C. 739.
 Ohio.—Schaar v. Blosser, App., 35 N. E.2d 846—Judd v. Reinhardt Trans- fer Co., 17 Ohio Supp. 105.
 Pa.—Schiele v. Motor Freight Ex- press, 36 A.2d 467, 348 Pa. 525, fol- lowed in Parsons v. Motor Freight Express, 36 A.2d 470, 348 Pa. 530— Landis v. Conestoga Transp. Co., 36 A.2d 465, 349 Pa. 97.
 S.D.—Pooley v. Leith, 255 N.W. 153, 62 S.D. 554.
 Tenn.—Collins v. Desmond, 1 Tenn. App. 54.
 Tex.—Airline Motor Coaches v. Fields, Civ App., 180 S.W.2d 216, error refused.
 Va.—Isenhour v. McGranighan, 17 S. E.2d 383, 178 Va. 365—Saunders v. Hall, 11 S.E.2d 592, 176 Va. 526
 Wash.—Caylor v. B. C. Motor Transp. 71 P.2d 162, 191 Wash. 365—Space v. Tacoma Durant Co., 296 P. 822, 161 Wash. 232—Todd v. Alexander, 294 P. 545, 160 Wash. 3
 42 C.J. p 1248 note 76, p 1249 note 81.
Imminent peril
 Tex.—Beck v. Browning, 101 S.W.2d 545, 129 Tex. 7.
Negligence after discovery of plain- tiff's peril
 Mass.—Fitzgerald v. Packard, 58 N. E.2d 755, 317 Mass. 431
 Okl.—Aydelotte & Young v. Saun- ders, 77 P.2d 50, 182 Okl. 226.
Vehicle being towed
 Wash.—Lewis v. Bertero, 77 P.2d 786, 194 Wash. 186.
 57. U.S.—Meissner v. Papas, C.C.A. Wis., 124 F.2d 720—Frates v. East- man, C.C.A. Okl., 57 F.2d 522.
 Ark.—East v. Woodruff, 193 S.W.2d 664, 209 Ark. 1046—Smith Arkan- sas Traveler Co. v. Simmons, 28 S. W.2d 1052, 181 Ark. 1024.
 Cal.—Anderson v. Lang, 109 P.2d 981, 42 Cal.App.2d 725—Browne v. Fer- nandez, 36 P.2d 122, 140 Cal.App. 689.
 Fla.—Ore v. Avon Florida Citrus Corporation, 177 So. 612, 130 Fla. 306.
 Ga.—Longino v. Moore, 187 S.E. 203, 53 Ga.App. 674.
 Ill.—Rose v. Meyer, 25 N.E.2d 413, 303 Ill. App. 365—Waud v. Landuyt, 20 N.E.2d 834, 300 Ill.App. 614.
 Ind.—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507—McDonald v. Swanson, 1 N.E.2d 684, 103 Ind. App. 171.
 Iowa.—McIntyre v. O. B. West Co., 281 N.W. 353, 225 Iowa 789—Miz- ner v. Lohr, 238 N.W. 584, 213 Iowa 1182—Sexauer v. Dunlap, 222 N.W. 420, 207 Iowa 1018.
 Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 307.
 Mass.—O'Brien v. Guiterman, 152 N. E. 883, 256 Mass. 560.
 Mich.—Seymour v. Carr, 11 N.W.2d 344, 307 Mich. 109—Stabler v. Copeland, 7 N.W.2d 122, 304 Mich. 1.
 Minn.—Delyea v. Goossen, 32 N.W.2d 179, 226 Minn. 91—Eichten v. Cen- tral Minn. Co-op. Power Ass'n of Redwood County, 28 N.W.2d 862, 224 Minn. 180—Ryan v. Interna- tional Harvester Co. of America, 283 N.W. 129, 204 Minn. 177—Kun- kel v. Paulson, 266 N.W. 441, 197 Minn. 107.
 Miss.—Friedman v. Allen, 118 So. 828, 152 Miss. 377.
 Mo.—Brooks v. Menaugh, App., 10 S. W.2d 327.
 N.M.—Chavez v. Worley, 152 P.2d 393, 48 N.M. 449.
 N.Y.—Lee v. City Brewing Corpora- tion, 18 NE 2d 628, 279 N.Y. 380.
 R.I.—Jurgiewicz v. Adams, 43 A.2d 310, 71 R.I. 239.
 Tex.—Polasek v. Gaines Bros. Civ. App., 185 S.W.2d 609, error refused.
 Vt.—Purlington v. Newton, 49 A.2d 98, 114 Vt. 490.
 Va.—Doss v. Rader, 46 S.E.2d 434, 187 Va. 231—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570—Temple v. Ellington, 12 S.E.2d 826, 177 Va. 134—Fruit Growers Express Co. v. Hulfish, 3 S.E.2d 160, 173 Va. 27.
 W.Va.—Vaughan v. Oates, 37 S.E.2d 479, 128 W.Va. 554.
 Wis.—Tietz v. Blaler, 26 N.W.2d 551, 250 Wis. 214.
 42 C.J. p 1249 note 93.
Wanton or willful negligence
 Ala.—Birmingham Elec. Co. v. Free- man, 27 So.2d 231, 32 Ala.App. 479.
Collision with motorcycle
 U.S.—Van House v. Acorn Steel Co., D.C.Pa., 53 F.Supp. 990, affirmed C. C.A., 144 F.2d 204.
 58. U.S.—Ryan-Richards, Inc., v. Whitesides, C.C.A.Okl., 96 F.2d 826.
 N.J.—Rogosa v. Mahoney, 136 A. 196, 5 N.J.Misc. 247.
Successive collisions
 Wash.—Thornton v. Enderoth, 30 P.2d 951, 177 Wash. 1.
 59. Fla.—Ward v. Stanley, 178 So. 398, 130 Fla. 642—Carver v. Chase, 174 So. 408, 128 Fla. 287.
 Ga.—Powell v. Berry, 89 S.E. 753, 145 Ga. 696, L.R.A.1917A 306.
 Mich.—Thomas v. Currier Lumber Co., 277 N.W. 557, 283 Mich. 134.

ligence was the proximate cause of an injury to a | person on foot,⁶⁰ or the proximate cause of an in-

Minn.—Shuster v. Vecchi, 279 N.W. 841, 203 Minn. 76.

Miss.—Cox v. Dempsey, 171 So. 788, 177 Miss. 678.

Mo.—Cable v. Johnson, App., 63 S.W. 2d 433.

Neb.—Mackechnie v. Lyders, 279 N.W. 328, 134 Neb. 682.

N.H.—Lagasse v. Laporte, 58 A.2d 312—Jewett v. Holt, 37 A.2d 13, 93 N.H. 163.

N.C.—Groome v. Davis, 2 S.E.2d 771, 215 N.C. 510.

Tenn.—Shook v. Simmons, 137 S.W. 2d 332, 23 Tenn.App. 685—Claxton v. Claxton, 64 S.W.2d 854, 16 Tenn. App. 399—Coppedge v. Blackburn, 15 Tenn.App. 587.

Tex.—Robertson v. Holden, Civ.App., 297 S.W. 327, reversed on other grounds Robertson & Mueller v. Holden, Com.App., 1 S.W.2d 570.

Va.—Worcester v. McClurkin, 5 S.E.2d 509, 174 Va. 221—Garrett v. Hammack, 173 S.E. 535, 162 Va. 42.

W.Va.—Shrimplin v. Simmons Auto Co., 9 S.E.2d 49, 122 W.Va. 248.

Wis.—Zurn v. Whatley, 251 N.W. 435, 213 Wis. 365.

Wyo.—Collins v. Anderson, 260 P. 1089, 37 Wyo. 275.

Gross negligence

Cal.—Malone v. Clemow, 295 P. 70, 111 Cal.App. 13.

Ga.—Barbre v. Scott, 43 S.E.2d 760, 75 Ga.App. 524—Evans v. Caldwell, 163 S.E. 920, 45 Ga.App. 193.

Or.—Pointer v. Osborne, 76 P.2d 1134, 158 Or. 573.

Reckless disregard of rights of others

S.C.—Cummings v. Tweed, 10 S.E.2d 322, 195 S.C. 173.

Reckless operation of vehicle

Iowa.—Cerny v. Secor, 234 N.W. 193, 211 Iowa 1232.

Neb.—Graham v. Higgins, 236 N.W. 689, 121 Neb. 217.

Wanton or willful misconduct

Cal.—Gibson v. Easley, 32 P.2d 983, 138 Cal.App. 303.

Ind.—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65.

60. U.S.—Salsa v. Lilja, C.C.A.Mass., 76 F.2d 380.

D.C.—Regal Cleaners & Dyers v. Pesagno, 109 F.2d 453, 71 App.D.C. 199.

Ga.—American Bakeries Co. v. Johnson, 200 S.E. 485, 59 Ga.App. 150.

Ill.—Schmidt v. Anderson, 21 N.E.2d 825, 301 Ill.App. 28—Lotesto v. Baker, 246 Ill.App. 425.

Ind.—Dullin v. Long, 54 N.E.2d 652, 115 Ind.App. 94.

Ky.—Heekamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky. 618—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.

Md.—Holler v. Lowery, 200 A. 353, 175 Md. 149—Lashley v. Dawson,

160 A. 738, 162 Md. 549—Williams v. State, 155 A. 339, 161 Md. 39.

Mass.—Skudris v. Williams, 192 N.E. 63, 287 Mass. 568.

Mich.—Hinchey v. J. P. Burroughs & Son, 215 N.W. 346, 240 Mich. 273.

Minn.—Roadman v. C. E. Johnson Motor Sales, 297 N.W. 166, 210 Minn. 59.

Mo.—Breitschaft v. Wyatt, App., 167 S.W.2d 931—Ritz v. Cousins Lumber Co., 59 S.W.2d 1072, 227 Mo. App. 1167—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W. 2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

N.J.—Hyman v. Bierman, 31 A.2d 762, 130 N.J.Law 170.

N.Y.—Group v. Szenher, 20 N.Y.S.2d 803, 260 App.Div. 308, affirmed 31 N.E.2d 508, 284 N.Y. 741—Burger v. Fifth Ave. Coach Co., 225 N.Y.S. 627, 222 App.Div. 187, reversed on other grounds 184 N.E. 592, 249 N.Y. 583.

Ohio—Focht v. Justis, 77 N.E.2d 506, 81 Ohio App. 297.

Utah—Nelson v. Lott, 17 P.2d 272, 81 Utah 265—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.

Va.—L. Bromm Baking Co. v. West, 186 S.E. 289, 166 Va. 357.

Wash.—Harry v. Pratt, 285 P. 440, 155 Wash. 552.

Wis.—Salsich v. Bunn, 238 N.W. 394, 205 Wis. 524, 79 A.L.R. 1069.

42 C.J. p 1250 note 7.

Bystanders injured by ignited gasoline

N.J.—Molnar v. Hildebrecht Ice Cream Co., 164 A. 300, 110 N.J.Law 246.

Child

Cal.—Jones v. Davies, 24 P.2d 364, 133 Cal.App. 389.

Ga.—Aristocrat Dairy Products Co. v. George, 34 S.E.2d 107, 72 Ga.App. 494.

Idaho.—Byington v. Horton, 102 P. 2d 652, 61 Idaho 389.

Ill.—Herndobler v. Goodwin, 34 N.E. 2d 8, 310 Ill.App. 267.

Iowa.—McMahon v. Rauch, 298 N.W. 908, 230 Iowa 674.

Ky.—Ballback's Adm'r v. Boland-Maloney Lumber Co., 208 S.W.2d 940, 306 Ky. 647.

Mass.—Brown v. Daley, 173 N.E. 546, 273 Mass. 432.

N.H.—Grogan v. York, 38 A.2d 395, 93 N.H. 184—Martineau v. Waldman, 36 A.2d 627, 93 N.H. 147—Humphreys v. Ash, 6 A.2d 436, 90 N.H. 223.

N.J.—Rizio v. Public Service Electric & Gas Co., 23 A.2d 585, 128 N.J. Law 60.

N.C.—Yokeley v. Kearns, 25 S.E.2d 602, 223 N.C. 196—Letterman v.

Miller, 184 S.E. 525, 209 N.C. 709—Smith v. Miller, 183 S.E. 370, 209 N.C. 170.

Ohio.—Wilkeson v. Erskine & Son, 61 N.E.2d 201, 145 Ohio St. 218—Bluebird Baking Co. v. McCarthy, App., 36 N.E.2d 801.

Okla.—Fay v. Brewer, 75 P.2d 425, 181 Okl. 554.

Tenn.—Finton v. Mercury Motors, App., 194 S.W.2d 354.

Va.—Edgerton v. Norfolk Southern Bus Corp., 47 S.E.2d 409, 187 Va. 642.

42 C.J. p 1256 note 61.

Foreseeability of injury

Tex.—Seinsheimer v. Burkhardt, 122 S.W.2d 1063, 132 Tex. 336.

Pedestrian cut by falling light globe

R.I.—Pizzia v. O'Malley, 195 A. 342, 59 R.I. 298.

Pedestrian crossing street or highway

U.S.—Malone v. Suburban Transit Co., D.C.S.C., 64 F.Supp. 859, affirmed, C.C.A., Suburban Transit Corp. v. Malone, 156 F.2d 422—Hrabak v. Hummel, D.C.Pa., 55 F.Supp. 775, affirmed, C.C.A., 143 F.2d 594, certiorari denied 65 S.Ct. 57, 323 U.S. 724, 89 L.Ed. 582.

Cal.—Wiswell v. Shunners, 117 P.2d 677, 47 Cal.App.2d 156.

Conn.—Branch v. Mashkin Freight Lines, 57 A.2d 136, 134 Conn. 278—Travis v. Balfour, 161 A. 521, 115 Conn. 711.

D.C.—Spund v. Myers, 90 F.2d 380, 67 App.D.C. 135.

Ga.—Eubanks v. Mullis, 181 S.E. 604, 51 Ga.App. 728.

Iowa.—O'Hara v. Chaplin, 233 N.W. 516, 211 Iowa 404.

Ky.—Ramsey v. Sharpley, 171 S.W.2d 427, 294 Ky. 286—Davidson v. Ratliffe, 126 S.W.2d 827, 277 Ky. 371.

Mass.—Buckman v. McCarthy Freight System, 70 N.E.2d 524, 320 Mass. 551—Connell v. Kelleher, 58 N.E.2d 645, 317 Mass. 413.

N.J.—Stern v. Stulz-Sickles Co., 162 A. 571, 109 N.J.Law 415.

Ohio.—Glasco v. Mendelman, 56 N.E. 2d 210, 143 Ohio St. 649.

Pa.—Fidelity-Philadelphia Trust Co. v. Strats, 57 A.2d 830, 358 Pa. 344—Burton v. Morvay, 41 A.2d 865, 351 Pa. 620.

S.C.—Marks v. I. M. Pearlstine & Sons, 26 S.E.2d 835, 203 S.C. 318.

Vt.—McKale v. Weeks, 55 A.2d 199.

W.Va.—Skaff v. Dodd, 44 S.E.2d 621.

Pedestrian on sidewalk or curb

Ala.—Montgomery City Lines v. Calahan, 22 So.2d 339, 247 Ala. 23.

Cal.—Sunseri v. Dime Taxi Corporation, 135 P.2d 654, 57 Cal.App.2d 926.

Iowa.—Remer v. Takin Bros. Freight Lines, 289 N.W. 477, 227 Iowa 908,

jury to a person on horseback,⁶¹ on a bicycle,⁶² on a horse-drawn vehicle,⁶³ on a street car,⁶⁴ or on another type of vehicle;⁶⁵ or whether defendant's negligence was the proximate cause of damage to property other than a motor vehicle, and the resulting monetary loss from the damage.⁶⁶

Where the evidence of defendant's negligence as the proximate cause of plaintiff's injury is not substantially conflicting and reasonable minds may

reach but one conclusion therefrom, the question whether defendant's negligence was the proximate cause of plaintiff's injury is a question of law for the court.⁶⁷ So, if there is no substantial evidence of defendant's negligence or of a causal connection between his negligence and plaintiff's injury, the question should not be submitted to the jury but the court should determine the question as a matter of law in favor of defendant;⁶⁸ and in like manner,

Pa.—Young v. Yellow Cab Co., 180 A. 63, 118 Pa.Super. 495.
42 C.J. p 1252 note 20.

Pedestrian walking along street or highway
Cal.—Anthony v. Hobbie, 155 P.2d 826, 25 Cal.2d 814.

Mo.—Johannes v. Edward G. Becht Laundry Co., 274 S.W. 377.
Neb.—Bancroft v. Kite, 5 N.W.2d 196, 142 Neb. 178.

Person alighting from vehicle
U.S.—Wawin Coal Co. v. Orr, C.C.A. Minn., 33 F.2d 27.

Md.—Feldser v. Beeman, 4 A.2d 750, 176 Md. 377, 123 A.L.R. 786.
R.I.—Walling v. Jenks, 194 A. 600, 59 R.I. 129.

Person standing, sitting, or lying upon street or highway

U.S.—Kennedy v. E. H. Scott Transp. Co., C.C.A.N.Y., 60 F.2d 717.
Mich.—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 680.

Minn.—Anderson v. Johnson, 294 N.W. 224, 208 Minn. 373.

Mo.—Vitale v. Blando, App., 52 S.W.2d 24, certiorari quashed State ex rel. Blando v. Hald, Sup., 60 S.W.2d 38.

Ohio.—Ward v. Koors, App., 33 N.E.2d 669.

Vt.—Emerson v. Hickens, 164 A. 381, 105 Vt. 197.
42 C.J. p 1252 note 18.

Person working on or adjacent to street or highway

U.S.—Rovinski v. Rowe, C.C.A. Mich., 131 F.2d 687.

Iowa.—Youngman v. Sloan, 281 N.W. 130, 325 Iowa 558.

Md.—Guthridge, on Behalf and to Use of Ring Engineering Co v. Gorsuch, 8 A.2d 885, 177 Md. 109.

Mass.—Connolly v. Eby, 73 N.E.2d 848, 321 Mass. 395.

61. Kan.—Thornton v. Franse, 12 P.2d 728, 135 Kan. 782.

62. Ill.—Oran v. Kraft-Phenix Cheese Corp., 58 N.E.2d 731, 324 Ill.App. 463.

Iowa.—Tuthill v. Alden, 30 N.W.2d 726.

Mich.—Stockfish v. Fox, 267 N.W. 754, 275 Mich. 630.

N.H.—Halley v. Brown, 24 A.2d 267, 93 N.H. 1.

N.J.—Hammersma v. Smith, 165 A. 555, 110 N.J.Law 523—Mahan v.

Walker, 114 A. 246, 96 N.J.Law 78, affirmed Mehan v. Walker, 117 A. 609, 97 N.J.Law 304.

N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.
Pa.—Wittman v. Stalford, Com Pl., 32 Del Co. 145.

Tex.—Hanson v. Haymann, Civ.App., 280 S.W. 869
42 C.J. p 1253 note 34.

Person directing bicyclist to ride without lights

Whether scoutmaster's negligence in riding bicycle without lights on right-hand side of pavement after dark and in commanding boy scout to follow him on another bicycle without lights was a proximate cause of accident caused when driver of oncoming vehicle crossed to wrong side of road and struck boy scout was held for trier of facts—Young v. Boy Scouts of America, 51 P.2d 191, 9 Cal App 2d 760.

63. Mass.—Washburn v. R. F. Owens Co., 155 N.E. 432, 258 Mass. 446.

Tenn.—Collins v. Desmond, 1 Tenn. App. 54
42 C.J. p 1254 note 45.

64. Md.—Harner v. Russell, 45 A.2d 273, 185 Md 519.

N.J.—Byron v. Public Service Co-ordinated Transport, 5 A.2d 483, 122 N.J.Law 451.

Wis.—Meyer v. Niedhoefer & Co., 251 N.W. 237, 213 Wis. 389.

65. Operator of steam shovel
Minn.—Weirick v. Thornton Bros. Co., 210 N.W. 399, 168 Minn. 465.

66. Damage to scales
Kan.—Atherton v. Goodwin, 180 P.2d 296, 163 Kan. 22.

Damage to valve pipe
Md.—Singer Transfer Co. v. Buck Glass Co., 181 A. 672, 169 Md. 358.

Fall of basement wall
Ohio.—Koch v. O'Brien & Nye Cartage Co., App., 46 N.E.2d 438.

Injury to colt
Ala.—Maddox v. Jones, 89 So. 38, 205 Ala. 598.

67. Iowa.—Sergeant v. Challis, 238 N.W. 442, 213 Iowa 57.

Ky.—State Highway Commission v. Hall, 119 S.W.2d 666, 274 Ky. 586.
Wis.—Schneider v. Steindler, 205 N.W. 797, 188 Wis. 129.

42 C.J. p 1242 note 78.

68. U.S.—Medina v. All Am. Bus Lines, C.C.A.Tex., 152 F.2d 61.

D.C.—Howard v. Swagart, 161 F.2d 451, 82 U.S.App.D.C. 147.

Ind.—Pontiac-Chicago Motor Exp Co. v. George Cassons & Son, 34 N.E.2d 171, 109 Ind.App. 248.

Iowa.—Sproll v. Burkett Motor Co., 274 N.W. 63, 223 Iowa 902—Nicolino v. E. O. Dahlquist Const. Co., 235 N.W. 297, 211 Iowa 1190.

Ky.—Louisville Taxicab & Transfer Co. v. Warren, 205 S.W.2d 695, 305 Ky. 861

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355.

Mass.—Cioffi v. Lowell, 55 N.E.2d 411, 316 Mass. 256.

Miss.—Holloway v. Coker, 192 So. 557, 187 Miss 696.

N.J.—Hansen v. Great Lakes Stages, 162 A. 653, 109 N.J.Law 529.

N.C.—Russell v. Ritchie, 185 S.E. 638, 210 N.C. 827.

Ohio.—Dunn v. Curran, 29 N.E.2d 219, 65 Ohio App 99.

Wash.—Millsbaugh v. Alert Transfer & Storage Co., 259 P. 22, 145 Wash. 111.

Collision between approaching or passing vehicles

La.—Lee v. Coulon, App., 180 So. 182.

N.C.—Burke v. Carolina Coach Co., 150 S.E. 636, 198 N.C. 8.

W.Va.—Stewart v. Phillips, 22 S.E.2d 368, 124 W.Va. 744.

Collision between vehicles crossing at intersection

Iowa.—May v. Hall, 266 N.W. 297, 221 Iowa 609.

Collision between moving and stationary vehicles

Ark.—Twin City Coach Co. v. Stewart, 190 S.W.2d 629, 209 Ark. 310.

Conn.—Curcio v. Goodwin, 18 A.2d 360, 127 Conn. 483.

Ind.—Montgomery v. Polk Milk Co., App., 79 N.E.2d 108.

Tenn.—Stem v. Harmon, 113 S.W.2d 1203, 21 Tenn.App. 604.

Damage to house
R.I.—Randall v. Holmes, 31 A.2d 17, 69 R.I. 41.

Injury to bicyclist
Mass.—Ellis v. Ellison, 175 N.E. 502, 275 Mass. 272.

N.J.—McMillan v. Mather, 36 A.2d 408, 131 N.J.Law 309.

if all the substantial and credible evidence shows clearly and conclusively that defendant's negligence was the proximate cause of plaintiff's injury, the question should not be submitted to the jury but the court should determine the question as a matter of law in favor of plaintiff.⁶⁹

Intervening cause. Where the evidence is conflicting or different reasonable inferences may be derived therefrom, the question whether an intervening occurrence or an intervening act by another person, rather than defendant's negligence, was the proximate cause of plaintiff's injury is a question of fact for the jury.⁷⁰ So, ordinarily, it is a

question for the jury whether the intervening occurrence or act should reasonably have been foreseen by defendant as a consequence of his negligence.⁷¹ Where there is no substantial evidence of a new and independent cause, there is no question of independent cause for the determination of the jury.⁷²

Concurrent negligence. Where the evidence is conflicting or subject to different reasonable inferences, the question whether plaintiff's injury was caused by the concurrent negligence of defendant and a third person or codefendant,⁷³ or by defendant's negligence combining with circumstances

S.C.—Porter v. Cook, 13 S.E.2d 486, 196 S.C. 433.

Injury to guest

Ala.—Smith v. Roland, 10 So.2d 367, 243 Ala. 400—Chapman v. Nelson, 200 So. 763, 241 Ala. 21

Ky.—Spivey's Adm'r v. Hackworth, 200 S.W.2d 131, 304 Ky. 141—Herry v. Jorris, 199 S.W.2d 616, 303 Ky. 799.

Mont.—Cowden v. Crippen, 53 P.2d 98, 101 Mont. 187

Tex.—Aycock v. Green, Civ. App., 94 S.W.2d 894, error dismissed.

Injury to person on foot

(1) In general

N.J.—Church v. Daffany, 11 A.2d 55, 124 N.J. Law 100

N.C.—Tvinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717. Pa.—Pfendler v. Speer, 185 A. 618, 323 Pa. 443.

W. Va.—Fleming v. McMillan, 26 S.E.2d 8, 125 W. Va. 356

(2) Child—Maliet v. Sears, Roebuck & Co., 71 N.E.2d 809, 330 Ill. App. 619.

Injury to person on horseback

Ky.—Myers v. Salyer, 127 S.W.2d 158, 277 Ky. 696.

69. Ky.—Davis v. Kunkle, 191 S.W.2d 513, 302 Ky. 258.

Va.—Temple v. Ellington, 12 S.E.2d 826, 177 Va. 134.

70. Ala.—Smith v. Tripp, 20 So.2d 870, 246 Ala. 421.

Ark.—Bona v. S. R. Thomas Auto Co., 208 S.W. 306, 137 Ark. 217

Cal.—Rodriguez v. Savage Transp. Co., 175 P.2d 37, 77 Cal.App.2d 162—Reynosa v. Pickwick Stages System, 1 P.2d 548, 115 Cal.App. 383.

Conn.—Zalkin v. Waterbury Wrecking Co., 21 A.2d 924, 128 Conn. 280

Corey v. Phillips, 10 A.2d 370, 126 Conn. 246—Fagan v. Ohler, 153 A. 778, 112 Conn. 667.

Ga.—McDaniel v. Richards, 13 S.E.2d 710, 64 Ga.App. 612—Houston v. Taylor, 179 S.E. 207, 50 Ga.App. 811.

Iowa.—Knaus Truck Lines v. Com-

mercial Freight Lines, 29 N.W.2d 204, 238 Iowa 1356.

Ky.—Alford v. Bealrd, 192 S.W.2d 180, 301 Ky. 512.

Minn.—Eichten v. Central Minn. Coop. Power Ass'n of Redwood County, 28 N.W.2d 862, 221 Minn. 180—Walker v. Stecher, 17 N.W.2d 317, 219 Minn. 152—Duff v. Bemidji Motor Service Co., 299 N.W. 196, 210 Minn. 456

Mo.—McCloskey v. Renne, 37 S.W.2d 950, 225 Mo. App. 810.

N.J.—Lyon v. Fabricant, 169 A. 548, 12 N.J. Misc. 39, affirmed 172 A. 567, 113 N.J. Law 62

N.Y.—Corrigan v. Reiber, 257 N.Y.S. 569, 235 App. Div. 557

Ohio.—Pugh v. Akron-Chicago Transp. Co., 28 N.E.2d 1015, 64 Ohio App. 479, affirmed 28 N.E.2d 501, 137 Ohio St. 164—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207

Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226.

Pa.—Bricker v. Gardner, 48 A.2d 209, 355 Pa. 35—Weibel v. Ferguson, 19 A.2d 357, 342 Pa. 113—Kovacs v. Ajhar, 196 A. 876, 130 Pa. Super. 149.

S.C.—Ayers v. Atlantic Greyhound Corp., 37 S.E.2d 737, 208 S.C. 267.

Tex.—Tarry Warehouse & Storage Co. v. Duvall, 115 S.W.2d 401, 131 Tex. 466.

Collision with vehicles previously colliding

Whether negligence of motorist in colliding with an approaching vehicle was the proximate cause of a subsequent collision occurring when a large tank truck and trailer ran into both vehicles was a question for the jury.—Hetherington v. Crossley Transp. Co., 191 P.2d 463, 84 Cal. App.2d 722.

Injury in rendering assistance after accident

(1) Where plaintiff went to the rescue of driver and passenger involved in automobile accident, in response to driver's plea for help, and was injured in effecting the rescue, whether driver's negligence in caus-

ing the accident was the proximate cause of plaintiff's injuries was for jury.—Brugh v. Bigelow, 16 N.W.2d 668, 310 Mich. 74, 158 A.L.R. 184.

(2) Where negligence of driver caused motor vehicle to overturn on a curve, question whether such negligence was the proximate cause of injury sustained by one of the occupants who cut his wrist on broken glass in attempting to tip the vehicle back on its wheels was properly submitted to jury.—Hatch v. Small, 23 N.W.2d 460, 249 Wis. 183.

Injury while attempting to avoid injury.

Tex.—Foster v. Woodward, Civ. App., 134 S.W.2d 417, error refused.

Skidding

Mo.—Rafferty v. Levy, App., 153 S.W.2d 765.

71. Cal.—Reed v. City of San Diego, 177 P.2d 21, 77 Cal. App.2d 860.

Mass.—Wheeler v. Darmochwat, 183 N.E. 55, 280 Mass. 553

Tex.—Sullivan v. Flores, 132 S.W.2d 110, 134 Tex. 35.

Va.—L. Farmer, Inc. v. Cimino, 41 S.E.2d 1, 185 Va. 865.

Wash.—Bronk v. Davenny, 171 P.2d 237, 25 Wash.2d 443.

72. Tex.—Dallas Railway & Terminal Co. v. Helton, Civ. App., 145 S.W.2d 656, error dismissed, judgment correct.

73. U.S.—Atlantic Greyhound Corp. v. Hunt, C.C.A.N.C., 163 F.2d 117, certiorari denied 68 S.Ct. 154—Woods v. Gettelfinger, C.C.A.Ga., 108 F.2d 549—Copley v. Stone, D.C.S.C., 75 F.Supp. 203.

Ark.—Priest v. Silbernagel & Co., 96 S.W.2d 466, 192 Ark. 973.

Cal.—Jordan v. Great Western Motorways, 2 P.2d 788, 213 Cal. 606—Stephenson v. Phoenix Wood & Coal Co., 163 P.2d 457, 71 Cal.App.2d 788

—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765—Morris v. Fortier, 138 P.2d 368, 59 Cal.App.2d 132—

Stevenson v. Fleming, 117 P.2d 717, 47 Cal.App.2d 225—Bramble v. McEwan, 104 P.2d 1054, 40 Cal.

App.2d 400—Smith v. Schwartz, 57

which by themselves would render the accident unavoidable,⁷⁴ is a question of fact for the jury. Where there is no substantial evidence of concurrent negligence proximately causing the injury,⁷⁵ or where the evidence indisputably and conclusively shows that the accident would not have occurred but for the concurrent negligence of several defendants,⁷⁶ the question is one of law for the court.

(b) Specific Acts of Negligence

On conflicting evidence, the question whether specific acts of negligence charged were the proximate cause of the plaintiff's injury is one of fact.

Where the evidence is conflicting or where different inferences may reasonably be drawn therefrom, the question whether specific acts of negligence charged were the proximate cause of plaintiff's injury is a question of fact to be determined by the jury.⁷⁷ Accordingly, whether specific acts of negligence charged were the proximate cause of plaintiff's injury are questions of fact, such as defendant's negligence in operating the motor vehicle although he is incompetent to do so,⁷⁸ or in permitting its operation by an incompetent driver;⁷⁹ negligence in starting the motor vehicle;⁸⁰

P.2d 1386, 14 Cal.App.2d 160—
Hill v. Peres, 28 P.2d 946, 136
Cal.App. 132—Dougherty v. Elling-
son, 275 P. 456, 97 Cal.App. 87—
Springer v. Pacific Fruit Exchange,
268 P. 961, 92 Cal.App. 732.
Colo.—Amos v. Remington Arms Co.,
188 P.2d 896, 117 Colo. 399.
Ga.—Shepherd v. Amos, 42 S.E.2d
775, 75 Ga.App. 221—Tallman v.
Green, 41 S.E.2d 339, 74 Ga.App.
731—Mishoe v. Davis, 14 S.E.2d
187, 64 Ga.App. 700—Floyd v. Wil-
liams, 188 S.E. 467, 54 Ga.App. 557.
Ill.—Fitzgerald v. Davis, 237 Ill.App.
488.
Ind.—Lorber v. People's Motor Coach
Co., 164 N.E. 859, 172 N.E. 526,
89 Ind.App. 139.
Iowa.—Futter v. Hout, 281 N.W. 286,
225 Iowa 723.
Me.—Banville v. Field Bros. & Gross
Co., 147 A. 40, 128 Me. 511.
Md.—Davidson Transfer & Storage
Co. v. State, for Use of Brown,
22 A.2d 582, 180 Md. 63—Brawner
v. Hooper, 135 A. 420, 151 Md. 579.
Mass.—Nash v. Heald, 29 N.E.2d 7,
306 Mass. 518.
Miss.—Greer v. Pierce, 147 So. 303,
167 Miss. 65.
N.H.—Sanders v. H. P. Welch Co.,
26 A.2d 34, 92 N.H. 74.
N.Y.—Straukamp v. Bourke, 282 N.
Y.S. 641, 246 App.Div. 549.
N.C.—Sample v. Spencer, 24 S.E.2d
241, 222 N.C. 580—Parker v. Witty,
5 S.E.2d 837, 216 N.C. 577.
Ohio.—Mitchell v. Great Eastern
Stages, 19 N.E.2d 910, 60 Ohio App.
144.
Okl.—All Am. Bus Lines v. Saxon,
172 P.2d 424, 197 Okl. 395.
Or.—Peters v. Johnson, 264 P. 459,
124 Or. 237—Ross v. Willamette
Valley Transfer Co., 248 P. 1088,
119 Or. 395.
Pa.—Petri v. Pittsburgh Rys. Co.,
195 A. 107, 328 Pa. 396—Iute v.
Ross, 190 A. 391, 125 Pa.Super. 584.
Tex.—Dixie Motor Coach Corpora-
tion v. Galvan, 86 S.W.2d 633, 126
Tex. 109.
Vt.—Russell v. Pilger, 37 A.2d 408,
113 Vt. 537.
Va.—Luck v. Rice, 29 S.E.2d 238, 182
Va. 373—Birtcherds Dairy v. Ran-

dall, 23 S.E.2d 229, 180 Va. 311
—Lavenstein v. 'Maile, 132 S.E.
844, 146 Va. 789.
Question of joint or several liability
see infra § 525.
Injury to pedestrian
Ala.—Hubbard v. Thrasher, 157 So.
680, 26 Ala.App. 252.
Ga.—Letton v. Kitchen, 139 S.E. 155,
37 Ga.App. 111, affirmed 142 S.E.
658, 166 Ga. 121.
Mich.—Wallace v. Kramer, 296 N.W.
838, 296 Mich. 680.
N.Y.—Edick v. Davenport, 218 N.Y.
S. 120, 218 App.Div. 198.
Pa.—Bailey v. C. Lewis Lavine, Inc.,
153 A. 422, 302 Pa. 273.
74. Minn.—Olson v. Buskey, 19 N.
W.2d 57, 220 Minn. 155.
Icy condition of highway
S.C.—Montgomery v. National Con-
voy & Trucking Co., 195 S.E. 247,
186 S.C. 167.
75. Minn.—Peterson v. Fulton, 256
N.W. 901, 192 Minn. 360.
76. Cal.—Traylen v. Citraro, 297 P.
649, 112 Cal.App. 172, followed in
297 P. 652, 112 Cal.App. 763.
77. Cal.—Graves v. Kern County
Transp. Corporation, 296 P. 902,
112 Cal.App. 261.
Md.—White v. Parks, 140 A. 70, 154
Md. 195.
N.C.—Tarrant v. Pepsi Cola Bottling
Co., 20 S.E.2d 565, 221 N.C. 390.
Utah.—Rollow v. Ogden City, 243 P.
791, 66 Utah 475.
Foreseeability of injury
Where invitee assisting motorist
in jacking up car was injured when
he tried to prevent car from roll-
ing backward and was struck on
head by lid of automobile trunk
which was defectively secured, to
motorist's knowledge, whether the
particular injury sustained was one
of a class reasonably foreseeable
was a question of fact for jury to
determine.—Daugherty v. Hunt, 38
N.E.2d 250, 110 Ind.App. 264.
Going to sleep while driving
Ky.—Thompson v. Kost, 181 S.W.2d
445, 298 Ky. 32.
Pulling automobile from ditch
Where automobile collided with de-

fendants' tow truck on dark, foggy
night when truck crossed highway
in act of pulling another automobile
out of ditch on opposite side, wheth-
er defendants' act in moving truck
was proximate cause of injury was
held for jury.—Lindquist v. Schmidt,
7 N.E.2d 501, 289 Ill.App. 614.
78. N.J.—Hala v. Worthington, 31
A.2d 844, 130 N.J.Law 162.
N.C.—Eller v. Dent, 166 S.E. 330,
203 N.C. 435.
Driving while intoxicated
Cal.—Lindemann v. San Joaquin Cot-
ton Oil Co., 55 P.2d 870, 5 Cal.2d
480—Kroplin v. Huston, 179 P.2d
575, 79 Cal.App.2d 332—Tomlinson
v. Kiramidjian, 24 P.2d 559, 133
Cal.App. 418.
Ga.—Towell v. Berry, 89 S.E. 753,
145 Ga. 696, L.R.A.1917A 306.
Or.—Pointer v. Osborne, 76 P.2d
1134, 158 Or. 573—Hartley v. Berg,
25 P.2d 932, 145 Or. 44.
Tex.—Peveto v. Smith, 133 S.W.2d
572, 134 Tex. 308.
Wash.—Burget v. Saginaw Logging
Co., 85 P.2d 271, 197 Wash. 318.
79. Mass.—Le Blanc v. Pierce Mo-
tor Co., 30 N.E.2d 684, 307 Mass.
535.
N.J.—Hala v. Worthington, 31 A.2d
844, 130 N.J.Law 162.
Operation by intoxicated person
Cal.—Knight v. Gosselin, 12 P.2d
454, 124 Cal.App. 290.
Operation by minor
Miss.—Somerville v. Keeler, 145 So.
721, 165 Miss. 244.
N.C.—Eller v. Dent, 166 S.E. 330, 203
N.C. 439—Taylor v. Stewart, 95 S.
E. 167, 175 N.C. 199.
Ohio.—Danner v. Avery, 168 N.E. 52,
32 Ohio App. 301.
Tex.—Jones v. Gibson, Civ.App., 18
S.W.2d 744.
Wash.—Smith v. Nealey, 298 P. 345,
162 Wash. 160.
80. Mo.—Forsythe v. Railway Ex-
press Agency, App., 125 S.W.2d
539.
Throwing of rock
In action for injuries sustained
when motorist started automobile
which was stalled on a pile of rocks

negligence in operating or permitting the operation of a motor vehicle in a defective condition⁸¹ or without proper lights;⁸² negligence in entering the highway;⁸³ negligence in operating the motor vehicle at a speed which is excessive under the law or under the circumstances of the case generally;⁸⁴ or

and a rock was thrown against plaintiff standing at rear of automobile, evidence whether motorist's negligent application of power to wheels of automobile was proximate cause of injury was for jury. —Kaffenberger v. Holle, 22 N.W.2d 804, 237 Iowa 1031.

Sl. Ga.—Railway Exp. Agency v. Standridge, 24 S.E.2d 504, 68 Ga. App. 836, followed in 24 S.E.2d 508, 68 Ga. App. 843.

Mo.—Lochmoeller v. Kiel, App, 137 S.W.2d 625—Shannon v. Unsell, App., 50 S.W.2d 1059.

Wash.—Sheddy v. Inland Motor Freight, 63 P.2d 430, 189 Wash. 48, 42 C.J. p 1243 note 5.

Absence of horn

Ala.—McGough Bakeries Corp v. Reynolds, 35 So 2d 332

Or.—Mansfield v. Southern Oregon Stages, 1 P.2d 591, 136 Or 669, followed in Longden v. Southern Oregon Stages, 1 P.2d 596, 136 Or. 684.

Absence of rear-view mirror

S.C.—Dobson v. Henrietta Mills, 197 S.E 313, 187 S.C. 281.

Defective brakes

(1) In general.

Ariz.—Womack v. Preach, 163 P.2d 280, 63 Ariz 390, opinion supplemented 165 P.2d 657. 64 Ariz. 61.

Idaho.—Byington v. Horton, 102 P. 2d 652, 61 Idaho 389.

Or.—Bogart v. Cohen-Anderson Motor Co., 98 P.2d 720, 164 Or. 233—

Mansfield v. Southern Oregon Stages, 1 P.2d 591, 136 Or. 669, followed in Longden v. Southern Oregon Stages, 1 P.2d 596, 136 Or. 684.

(2) Whether father, who permitted minor son to take automobile with defective brakes on highway, should have foreseen that injury might result to some member of the traveling public because thereof, was for the jury, and it was not required that the exact injury, or the exact method by which injury might be inflicted, be foreseen.—Sturtevant v. Pagel, 130 S.W.2d 1017, 134 Tex. 46.

Defective steering wheel

N.Y.—Levine v. Stollar, 276 N.Y.S. 235, 243 App.Div. 563.

Defective tire

Wis.—Jensen v. Jensen, 279 N.W. 628, 228 Wis. 77.

Unclean windshield

Cal.—Wilkerson v. Brown, 190 P.2d 958, 84 Cal.App.2d 401.

82. Ala.—Clift v. Donegan, 186 So. 476, 237 Ala. 304.

Cal.—Guinou v. Webster, 22 P.2d 231, 132 Cal.App. 29—Tiemann v. Red Top Cab Co., 3 P.2d 381, 117

Cal.App. 40—Fouch v. Werner, 279 P. 183, 99 Cal.App. 557.

Ill.—Benestad v. Vander Molen, 76 N.E.2d 351, 332 Ill.App. 660—Johnson v. Gustafson, 233 Ill.App. 216.

Md.—Lashley v. Dawson, 160 A. 738, 162 Md. 549.

Mich.—Diederichs v. Duke, 207 N.W. 874, 234 Mich. 136.

Minn.—Shockman v. Union Transfer Co., 19 N.W.2d 812, 220 Minn 334

—Carlson v. Peterson, 284 N.W. 847, 205 Minn. 20.

Miss.—Walker v. Dickerson, 184 So. 438, 183 Miss. 642.

Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630

Neb.—Johnson v. Mallory, 243 N.W. 872, 123 Neb. 706.

N.Y.—Mancuso v. Ungerland, 269 N. Y.S 803, 241 App.Div 740.

Ohio.—Stoops v. Youngstown Suburban Transp. Co., 169 N.E. 456, 121 Ohio St 437—Shaeffer-Weaver Co v. Mallonn, 186 N.E. 514, 45 Ohio App 1

Tex.—J. S. Abercrombie Co v. Delcomyn, Civ App, 116 S.W.2d 1105, reversed on other grounds 135 S W 2d 978, 134 Tex 490

Wash.—Sheddy v. Inland Motor Freight, 63 P.2d 430, 189 Wash 48

Wis.—McGuigan v. Hiller Bros., 245 N.W. 97, 209 Wis 402.

42 C.J. p 1244 note 9.

Presence of reflector on rear of truck did not establish as matter of law that violation of statute respecting tail lamp was not proximate cause of rear-end collision.—Hamel v. Chase Cos., 152 A. 59, 112 Conn. 286.

Failure to dim lights

Ark.—Ward v. Walker, 178 S.W.2d 62, 206 Ark. 988.

Ga.—American Bakeries Co v. Johnson, 200 S.E 485, 59 Ga App 150

Injury to child on foot

Tex.—Ramirez v. Salinas, Civ App, 90 S.W.2d 891, error dismissed 117 S.W.2d 56, 131 Tex. 537

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

83. Ariz.—Keeler v. Maricopa Tractor Co., 123 P.2d 166, 59 Ariz 94.

Cal.—Nix v. Woodworth, 53 P.2d 765, 11 Cal.App.2d 322—Springer v. Pacific Fruit Exchange, 268 P. 951, 92 Cal.App. 732.

Mo.—Sparks v. Auslander, 182 S.W. 2d 167, 353 Mo. 177—Greer v. St. Louis Public Service Co., App., 87 S.W.2d 240, followed in 87 S.W.2d 247.

Pa.—Van Tine v. Cornelius, 50 A.2d 299, 355 Pa. 584—Emblem Oil Co. v. Taylor, 179 A. 773, 118 Pa.Super. 259.

Va.—Wright v. Vlar, 174 S.E. 766, 162 Va. 510.

Injury to child on sled

N.Y.—Davis v. Gerard, 44 N.Y.S.2d 904, 266 App.Div. 1021.

84. Ark.—Sauve v. Ingram, 143 S. W 2d 541, 200 Ark. 1181.

Cal.—Morris v. Fortier, 138 P.2d 368, 59 Cal.App.2d 132—Huber v. Scott, 10 P.2d 150, 122 Cal.App. 334.

Del.—Lynch v. Lynch, 195 A. 799, 9 W.W.Harr. 1.

Iowa.—Coon v. Rieke, 6 N.W.2d 309, 232 Iowa 859.

Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.

Ky.—O'Neil & Hearne v. Bray's Adm'x, 90 S.W.2d 353, 262 Ky. 377.

Md.—Beall v. Ward, 149 A. 543, 158 Md 646.

Mich.—Michigan Fire & Marine Ins. Co. v. Pretty Lake Vacation Camp, 25 N.W.2d 166, 316 Mich 197—Kolehmainen v. E. E. Mills Trucking Co., 3 NW 2d 298, 301 Mich 340

Minn.—Corpus Juris cited in Berlin v. Koblas, 236 N.W. 307, 183 Minn. 278.

Miss.—Rhodes v. Fulhlove, 134 So 840, 161 Miss. 41.

Mo.—Wright v. Spieldoch, 193 S.W. 2d 42, 354 Mo 1076—Dodson v. Gate City Oil Co., 88 SW 2d 866,

338 Mo. 183—Johnessee v. Central States Oil Co., App, 200 S.W.2d 383—Bear v. Devore, App, 177 S.

W.2d 674—Bear v. Devore, App, 176 S.W.2d 862—Allen v. Wilkerson, App, 87 S.W.2d 1056—Bramblett v. Harlow, App, 75 S.W.2d 626—Smith v. Weibacher Truck Service Co., App., 35 S.W.2d 996.

N.H.—Woodbridge v. Desrocher, 35 A.2d 802, 93 NH 87—Weiss v. Wasserman, 15 A.2d 861, 91 N.H. 164.

N.J.—Berglund v. Hild, 135 A. 52, 4 N.J Misc 973, affirmed 137 A. 916, 103 N.J Law 696.

N.Y.—Mancuso v. Ungerland, 269 N. Y.S. 803, 241 App.Div. 710

N.C.—King v. Pope, 163 S.E 447, 202 N.C. 554.

Ohio.—American Security & Trust Co. of Washington, D. C. v. White, 181 N.E. 918, 42 Ohio App. 272.

Okl.—Shead v. Mann, 185 P.2d 691, 199 Okl. 275—Aydelotte & Young v. Saunders, 77 P.2d 50, 182 Okl. 226.

Or.—Cockerham v. Potts, 20 P.2d 422, 143 Or. 80.

Pa.—Landis v. Conestoga Transp. Co., 36 A.2d 465, 349 Pa. 97.

S.D.—McMahon v. De Kraay, 16 N. W.2d 308, 70 S.D. 180.

where the motor vehicle is on a curve or turn⁸⁵ or ways;⁸⁶ failure to keep a proper lookout;⁸⁷ failure is approaching an intersection of streets or high- to signal or to give proper warning;⁸⁸ negligence

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d 981.

Tex.—Texas Farm Products Co. v. Johnson, Civ.App., 190 S.W.2d 178
—Anderson v. Reichart, Civ.App., 116 S.W.2d 772, error dismissed—
Jones v. Gibson, Civ.App., 18 S.W.2d 744.

Vt.—Purinton v. Newton, 49 A.2d 98.

Va.—Mausser v. Hebb, 48 S.E.2d 257, 187 Va. 876.

Wash.—Sheddy v. Inland Motor Freight, 63 P.2d 430, 189 Wash. 48
—Copeland v. North Coast Transp. Co., 13 P.2d 65, 169 Wash. 84—
Rosenstrom v. North Bend Stage Line, 280 P. 932, 154 Wash. 57.
42 C.J. p 1245 notes 19, 26.

Injury to guest

(1) In general.
Minn.—Berlin v. Koblas, 236 N.W. 307, 183 Minn. 278.
R.I.—Parenteau v. Parenteau, 153 A. 872, 51 R.I. 263.
Wis.—Demochitz v. Wells, 253 N.W. 790, 214 Wis. 599.

(2) Whether blowout of a tire which caused defendant's automobile to leave the road when it was being driven at high speed and turn over, injuring guest, might reasonably have been anticipated was a question for the jury—Grant v. Matson, 3 N.W.2d 118, 68 S.D. 402.

Injury to pedestrian

(1) In general.
Cal.—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217—Bennett v. Robertson, 150 P.2d 547, 65 Cal.App.2d 278.

Conn.—Gates v. Crane Co., 139 A. 782, 107 Conn. 201.

D.C.—Goodyear Service v. Pretzfelder, 84 F.2d 242, 65 App.D.C. 389.

Ind.—Vogel v. Ridens, 44 N.E.2d 238, 112 Ind.App. 493—Fishman v. Eads, 168 N.E. 495, 90 Ind.App. 137.

Ky.—Murphy v. Homans, 150 S.W.2d 14, 286 Ky. 191—Wildner v. Cadle, 13 S.W.2d 497, 227 Ky. 486.

Mass.—Mitchell v. Silverstein, 70 N.E.2d 506, 320 Mass. 524.

Mich.—Clark v. Lawrence Baking Co., 215 N.W. 387, 240 Mich. 352.

Mo.—Lewis v. St. Louis Independent Packing Co., 3 S.W.2d 244—Blackwill v. Franke, App., 49 S.W.2d 211, certiorari quashed State ex rel. Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76—Phillips v. Yellow Cab Co., 86 S.W.2d 419, 225 Mo.App. 1172.

Nev.—Styrils v. Folk, 146 P.2d 782, 62 Nev. 208, 139 P.2d 614.

N.C.—Jones v. Bagwell, 177 S.E. 170, 207 N.C. 878.

Tex.—Southern Transp. Co. v. Adams, Civ.App., 141 S.W.2d 739, error dismissed, judgment correct.

(2) Child.

Iowa.—Luse v. Nickoley, 3 N.W.2d 503—Riddle v. Frankl, 247 N.W. 493, 215 Iowa 1083.

Mass.—Holden v. Bloom, 50 N.E.2d 193, 314 Mass. 809, 147 A.L.R. 722.

Mo.—Huils v. Miller, App., 299 S.W. 85.

N.H.—Humphreys v. Ash, 6 A.2d 436, 90 N.H. 223—Rullard v. McCarthy, 195 A. 355, 89 N.H. 158.

Ohio.—Rothe v. Dworkin, App., 70 N.E.2d 146.

R.I.—Knight v. Trainor, 194 A. 713, 59 R.I. 208.

Tenn.—Finton v. Mercury Motors, App., 194 S.W.2d 354.

Injury to person on bicycle

Mo.—Nash v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 570.

85. Iowa.—Albert v. Maher Bros Transfer Co., 243 N.W. 561, 215 Iowa 197.

Injury to guest

Ky.—Cadle v. McHargue, 60 S.W.2d 973, 249 Ky. 385.

Mont.—McNair v. Berger, 15 P.2d 834, 92 Mont. 441.

Pa.—Zimmer v. Little, 10 A.2d 911, 138 Pa. Super. 374.

86. U.S.—Meissner v. Papas, C.C.A. Wis., 124 F.2d 720

Ala.—Sloss-Sheffield Steel & Iron Co. v. Allred, 25 So.2d 174, 32 Ala.App. 183, certiorari denied 25 So.2d 179, 247 Ala. 499.

Cal.—Matsuda v. Luond, 126 P.2d 359, 52 Cal. App.2d 453—Setsuko Nitta v. Haslam, 33 P.2d 678, 138 Cal.App. 736—Demers v. Sutherland, 4 P.2d 187, 117 Cal.App. 489.

Ill.—Nelson v. Nihan, 74 N.E.2d 549, 331 Ill. App. 610.

Minn.—Mahowald v. Beckrich, 2 N.W.2d 569, 212 Minn. 78

Mo.—Hillis v. Home Owners' Loan Corporation, 154 S.W.2d 761, 348 Mo. 601—Reed v. Coleman, App., 167 S.W.2d 125—Wengert v. Lyons, 273 S.W. 143, 221 Mo.App. 362.

N.J.—Zochowski v. Zukowski, 176 A. 364, 114 N.J. Law 437—Wiese v. Baldanza Bros., 179 A. 377, 13 N.J. Misc. 472

N.C.—Turner v. Lipe, 188 S.E. 108, 210 N.C. 627.

S.C.—Coney v. Cox, 162 S.E. 596, 165 S.C. 26.

S.D.—Fester v. George, 25 N.W.2d 455

Va.—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570.

Wis.—Canzoneri v. Heckert, 269 N.W. 716, 223 Wis. 25.

87. U.S.—Meissner v. Papas, C.C.A. Wis., 124 F.2d 720—Southern Fruit Distributors v. Fulmer, C.C.A.Va., 107 F.2d 456—Atlantic Greyhound Corporation v. Lyon, C.C.A.Va., 107 F.2d 157, certiorari denied 60 S.Ct. 592, 309 U.S. 667, 84 L.Ed. 1014.

Cal.—Elford v. Hiltabrand, 146 P.2d

Cal.—Elford v. Hiltabrand, 146 P.2d

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Cal.—Elford v. Hiltabrand, 146 P.2d

Pa.—Atkinson v. Coakey, 47 A.2d 156, 354 Pa. 297.

Wash.—Hinton v. Carmody, 45 P.2d 32, 182 Wash. 123.

Injury to person on bicycle

Iowa.—Tuthill v. Alden, 30 N.W.2d 726.

Wis.—Trautmann v. Charles Schefft & Sons Co., 228 N.W. 741, 201 Wis. 113—Trautmann v. Charles Schefft & Sons Co., 228 N.W. 744, 201 Wis. 122.

87. U.S.—Meissner v. Papas, C.C.A. Wis., 124 F.2d 720.

Ark.—Sauve v. Ingram, 143 S.W.2d 541, 200 Ark. 1181.

Ill.—Nelson v. Nihan, 74 N.E.2d 549, 331 Ill.App. 610.

Iowa.—Fischer v. Steinhauer, 10 N.W.2d 649, 233 Iowa 777—Griffin v. McNeil, 201 N.W. 78, 198 Iowa 1359.

Mo.—Hornbuckle v. McCarty, 243 S.W. 327, 295 Mo. 162, 25 A.L.R. 1508.

N.C.—Godfrey v. Queen City Coach Co., 159 S.E. 412, 201 N.C. 264.

Injury to guest

Cal.—Weis v. Davis, 82 P.2d 487, 28 Cal. App.2d 240.

Conn.—Silver v. Silver, 143 A. 240, 108 Conn. 371, 65 A.L.R. 943, affirmed 50 S.Ct. 57, 280 U.S. 117, 74 L.Ed. 221, 65 A.L.R. 939.

Wis.—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1.

Injury to pedestrian

(1) In general.

Cal.—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217.

D.C.—Yellow Cab Co. of D. C. v. Griffith, Mun. App., 40 A.2d 340.

Ky.—Wildner v. Cadle, 13 S.W.2d 497, 227 Ky. 486.

N.J.—Hyman v. Bierman, 31 A.2d 762, 130 N.J. Law 170.

Pa.—Fidelity-Philadelphia Trust Co. v. Staats, 57 A.2d 830, 358 Pa. 344.

Tex.—Southern Transp. Co. v. Adams, Civ.App., 141 S.W.2d 739, error dismissed, judgment correct.

Va.—Dobson-Peacock v. Curtis, 186 S.E. 13, 166 Va. 550.

(2) Child.

Ind.—Mays v. Welsh, 32 N.E.2d 701, 218 Ind. 356.

Mo.—Gillis v. Singer, App., 86 S.W.2d 352.

Ohio.—Rothe v. Dworkin, App., 70 N.E.2d 146.

Tenn.—Finton v. Mercury Motors, App., 194 S.W.2d 354.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

88. U.S.—Meissner v. Papas, C.C.A. Wis., 124 F.2d 720—Southern Fruit Distributors v. Fulmer, C.C.A.Va., 107 F.2d 456—Atlantic Greyhound Corporation v. Lyon, C.C.A.Va., 107 F.2d 157, certiorari denied 60 S.Ct. 592, 309 U.S. 667, 84 L.Ed. 1014.

Cal.—Elford v. Hiltabrand, 146 P.2d

Cal.—Elford v. Hiltabrand, 146 P.2d

Cal.—Elford v. Hiltabrand, 146 P.2d

Cal.—Elford v. Hiltabrand, 146 P.2d

in turning or changing the course of the motor vehicle;⁸⁹ negligence in failure to yield the right of way at an intersection;⁹⁰ negligence in failure to stop;⁹¹ negligence in driving on the wrong side⁹² or negligence under certain circumstances in

510, 63 Cal.App.2d 65—Uribe v. McCorkle, 146 P.2d 22, 83 Cal.App.2d 61—Duncan v. J. H. Corder & Son, 62 P.2d 1387, 18 Cal.App.2d 77. Colo.—Barsch v. Hammond, 135 P. 2d 519, 110 Colo. 441.

Ga.—Whatley v. Henry, 16 S.E.2d 214, 65 Ga.App. 668.

Ill.—Benestad v. Vander Molen, 76 N.E.2d 851, 332 Ill.App. 660—Gleason v. Cunningham, 44 N.E.2d 940, 316 Ill.App. 286.

Ind.—Fishman v. Eads, 168 N.E. 495, 90 Ind.App. 137.

Ky.—Wilburn v. Simons, 196 S.W. 2d 356, 302 Ky. 752—Hilsenrad v. Bowling, 166 S.W.2d 847, 292 Ky. 368—Wright v. Clausen, 92 S.W. 2d 93, 263 Ky. 298—Wilder v. Cadle, 13 S.W.2d 497, 227 Ky. 486.

Me.—Field v. Webber, 169 A. 732, 132 Me. 236.

Mass.—O'Brien v. Gulterman, 152 N.E. 883, 256 Mass. 560.

Mich.—Stahl v. Bell, 267 N.W. 779, 276 Mich. 37.

Mo.—Bradley v. Becker, 11 S.W.2d 8, 321 Mo. 405—Greer v. St Louis Public Service Co., App., 87 S.W. 2d 240, followed in 87 S.W.2d 247.

N.J.—Grauss v. Alpert, 169 A. 847, 12 N.J.Misc. 67.

N.Y.—Wood v. Socony-Vacuum Oil Co., 21 N.Y.S.2d 317, 259 App Div 1106, reargument denied 22 N.Y.S. 2d 534, 260 App Div. 816, appeal denied.

Ohio.—Ruffo v. Randall, 52 N.E.2d 750, 72 Ohio App. 396—Buckeye Union Casualty Co. v. Oelschlaeger, App., 36 N.E.2d 152.

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d 981.

Tex.—Jones v. Gibson, Civ.App., 18 S.W.2d 744.

Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

42 C.J. p 1246 notes 36, 37.

Injury to pedestrian

(1) In general.

D.C.—Yellow Cab Co. of D. C. v. Griffith, Mun.App., 40 A.2d 340.

Iowa.—Lawlor v. Gaylord, 10 N.W. 2d 531, 233 Iowa 834.

Mo.—Cox v. Reynolds, App., 18 S.W.2d 575.

N.J.—Kovacs v. Ford, 158 A. 473, 108 N.J.Law 379.

(2) Infant pedestrian.

Ga.—Letton v. Kitchen, 142 S.E. 658, 166 Ga. 121.

Idaho.—Byington v. Horton, 102 P. 2d 652, 61 Idaho 389.

Ind.—Mays v. Welsh, 32 N.E.2d 701, 218 Ind. 356.

Neb.—Tews v. Beamrick, 26 N.W.2d 499, 148 Neb. 59.

Ohio.—Rothe v. Dworkin, App., 70 N.E.2d 146.

Or.—Maletis v. Portland Traction Co., 83 P.2d 141, 160 Or. 30.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

(3) Pedestrian struck by animal frightened at approach of overtaking automobile.—Lawson v. Fordyce, 12 N.W.2d 301, 234 Iowa 632.

Injury to person on bicycle

Ariz.—Southwestern Freight Lines v. Floyd, 119 P.2d 120, 58 Ariz. 249.

Mo.—Nash v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 570.

89. U.S.—Atlantic Greyhound Corp v. Hunt, C.C.A.N.C., 163 F.2d 117, certiorari denied 68 S.Ct. 154, 332 U.S. 815, 92 L.Ed. —.

Ala.—Roberts v. McCall, 17 So.2d 159, 245 Ala. 359.

Cal.—Gunter v. Claggett, 151 P.2d 271, 65 Cal.App.2d 636—Green v. Merced County, 144 P.2d 874, 62 Cal.App.2d 570—Gomez v. Lindberg, 54 P.2d 1153, 11 Cal.App.2d 730—Manning v. O'Rourke, 8 P. 2d 181, 120 Cal.App. 432.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. O'Neill, 200 A. 359, 175 Md. 47.

Mo.—Long v. Mild, 149 S.W.2d 853, 347 Mo. 1002.

N.J.—Oliver v. Leonardo, 51 A.2d 129, 135 N.J.Law 210.

N.M.—Greenfield v. Bruskas, 68 P.2d 921, 41 N.M. 346.

Okl.—Maloney v. Wallis, 151 P.2d 789, 194 Okl. 364.

Pa.—Siffes v. American Stores Co., 53 A.2d 610, 357 Pa. 176.

Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181.

Wash.—Strong v. Ernst, 14 P.2d 697, 169 Wash. 617.

42 C.J. p 1247 note 57.

Sudden swerving

Colo.—Boltz v. Bonner, 35 P.2d 1015, 95 Colo. 350, followed in 35 P.2d 1019, first case, 95 Colo. 358, and 35 P.2d 1019, second case, 95 Colo. 359.

Ill.—Hanusik v. Hanlon, 258 Ill.App. 114.

Kan.—Cathcart v. Dunn, 69 P.2d 698, 146 Kan. 193.

Ohio.—Calley v. Hutzal, 79 N.E.2d 383, 82 Ohio App. 117.

Turning around on street or highway

Ill.—Rennie v. Haufla, 40 N.E.2d 85, 313 Ill.App. 352.

90. Ariz.—Lemke v. Gardner, 179 P. 2d 788, 65 Ariz. 303.

Mich.—Fabbro v. Soderstrom, 233 N.W. 378, 252 Mich. 455.

S.C.—Coney v. Cox, 162 S.E. 596, 165 S.C. 26.

Wash.—Carlson v. Whelan, 84 P.2d 1001, 197 Wash. 104.

91. Ky.—Arno'd v. Sauer, 202 S.W. 2d 1001, 305 Ky. 48.

Md.—Carlin v. Worthington, 192 A. 556, 172 Md. 505.

Mass.—Thibault v. Nicholas Zeo, Inc., 17 N.E.2d 687, 301 Mass. 478.

N.Y.—Hessler v. Nelipowitz, 55 N.Y. S.2d 692.

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d 981.

At approach of fire apparatus

Wash.—Hudley v. Arms & Scott, 241 P. 26, 136 Wash. 632.

At red traffic light

N.J.—Daniel v. Gielty Trucking Co., 182 A. 638, 116 N.J.Law 172.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

At stop sign or before crossing through street or highway

Cal.—Angelo v. Esau, 93 P.2d 205, 34 Cal.App.2d 130.

Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321.

Iowa.—Wheeler v. Peterson, 240 N.W. 683, 213 Iowa 1239.

W.Va.—Vaughan v. Oates, 37 S.E.2d 479, 128 W.Va. 554.

92. Ill.—Davis v. Commercial Fuel & Service Co., 47 N.E.2d 506, 318 Ill.App. 225.

Iowa.—Hawkins v. Burton, 281 N.W. 790, 225 Iowa 1138—Waldman v. Sanders Motor Co., 243 N.W. 555, 214 Iowa 1139.

Md.—Davidson Transfer & Storage Co. v. State, for Use of Brown, 22 A.2d 582, 180 Md. 63.

Mass.—Kerr v. Deveau, 40 N.E.2d 872, 311 Mass. 210.

N.C.—Wallace v. Longest, 37 S.E.2d 112, 226 N.C. 161—Wyrick v. Ballard & Ballard Co., 29 S.E.2d 900, 224 N.C. 301—King v. Pope, 163 S.E. 447, 202 N.C. 554.

Or.—Kitchel v. Gallagher, 270 P. 488, 126 Or. 373.

Tex.—American General Ins. Co. v. Fort Worth Transit Co., Civ.App., 201 S.W.2d 869—Texas Farm Products Co. v. Johnson, Civ.App., 190 S.W.2d 178—Mercer v. Evans, Civ. App., 173 S.W.2d 206—Browning v. Beck, Civ.App., 73 S.W.2d 626, error granted.

Va.—Adkins v. Young Men's Christian Ass'n of Lynchburg, 141 S.E. 117, 149 Va. 193—Lavenstein v. Malle, 132 S.E. 844, 146 Va. 789.

Wis.—Swanson v. Schultz, 270 N.W. 43, 223 Wis. 278.

driving in the center⁹³ of the street or highway; negligence in passing on a curve⁹⁴ or at an intersection;⁹⁵ negligence in attempting to pass a preceding vehicle when the street or highway ahead is not free;⁹⁶ negligence in driving too close to pedestrians;⁹⁷ negligence in following a preceding vehicle too closely;⁹⁸ negligence in stopping⁹⁹ or backing¹ the motor vehicle; or negligence in parking the motor vehicle² on the street or highway;³

Wrong side on curve

Iowa.—Albert v. Maher Bros. Transfer Co., 243 N.W. 561, 215 Iowa 197.

Ky.—Black v. Bishop, 207 S.W.2d 22, 306 Ky. 524.

93. Miss.—Cox v. Dempsey, 171 So. 788, 177 Miss. 678.

Pa.—Long v. Pennsylvania Truck Lines, 6 A.2d 224, 335 Pa. 236.

Failure to drive close to curb

Whether failure of driver of truck which struck pedestrian to drive as close to right-hand curb as possible, as required by ordinance, was proximate cause of plaintiff's injuries, was held to be a question for jury.—Heibel v. Ahrens, Mo., 55 S.W.2d 473—Smart v. Raymond, Mo. App., 142 S.W.2d 100.

94. U.S.—Rubin v. Schupp, C.C.A. Cal., 127 F.2d 625.

Minn.—Dux v. Ringdahl, 235 N.W. 383, 182 Minn. 611.

95. Cal.—Dieckmann v. Signorini, 118 P.2d 319, 47 Cal.App.2d 481.

96. U.S.—Herzig v. Swift & Co., C.C.A.N.Y., 154 F.2d 64.

Foreseeability of injury

Mass.—Wheeler v. Darmochwat, 183 N.E. 55, 280 Mass. 553.

Miss.—Wheat v. Teche Lines, 179 So. 553, 181 Miss. 408.

98. Ark.—Jones v. King, 204 S.W.2d 548, 211 Ark. 1084.

Cal.—Hardin v. Sutherland, 289 P. 900, 106 Cal.App. 473.

99. Ga.—Farrar v. Farrar, 152 S.E. 278, 41 Ga.App. 120.

Wash.—Harry v. Pratt, 285 P. 440, 155 Wash. 552.

Stopping for short interval

Ky.—Turpin v. Scrivner, 178 S.W.2d 971, 297 Ky. 365.

Wash.—Cunningham v. Dills, 145 P.2d 273, 19 Wash.2d 845—Thornton v. Eneroth, 30 P.2d 951, 177 Wash. 1.

Sudden stopping

U.S.—Cram v. Eveloff, C.C.A.Minn., 127 F.2d 486.

Ark.—Clift v. Jordan, 178 S.W.2d 1009, 207 Ark. 66.

Cal.—Elford v. Hiltabrand, 146 P.2d 510, 63 Cal.App.2d 65.

Ill.—Ritholz v. Yellow Cab Co., 50 N.E.2d 114, 819 Ill.App. 647.

Mo.—Bowman v. Moore, 167 S.W.2d 675, 237 Mo.App. 1163—Setzer v. Ulrich, App., 90 S.W.2d 154.

Neb.—O'Brien v. J. I. Case Co., 2 N.W.2d 107, 149 Neb. 847.

N.C.—Bechtler v. Bracken, 11 S.E.2d 721, 218 N.C. 515.

S.C.—Beard v. Cabaniss, 164 S.E. 441, 166 S.C. 173.

1. N.H.—Labreque v. Childs, 55 A.2d 473.

N.Y.—Szablewski v. Michael, 28 N.Y.S.2d 163, 262 App.Div. 801.

42 C.J. p 1247 note 63, p 1256 note 61 [b].

Negligently permitting vehicle to back

N.J.—Eastlack v. Mitten, 162 A. 561, 109 N.J.Law 556.

2. Ala.—Leeper Cleaning & Dyeing Co. v. McKinney, 161 So. 529, 230 Ala. 462.

Cal.—Thomson v. Bayless, 150 P.2d 413, 24 Cal.2d 543.

Ill.—Rhoden v. Peoria Creamery Co., 278 Ill.App. 452.

Iowa.—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 377.

Injury to minor on sled

Ind.—Tabor v. Continental Baking Co., 38 N.E.2d 257, 110 Ind.App. 633.

Obstructing view

Whether stopping of passenger bus in front of school bus stopped to discharge passengers, thus compelling one of them to cross highway between buses and obstructing her view of automobile approaching from opposite direction, constituted a proximate contributing cause of her injury and death as result of being struck by such automobile, was for jury.—Morgan v. Carolina Coach Co., 36 S.E.2d 263, 225 N.C. 668.

3. Cal.—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765—Doane v. Smith, 147 P.2d 650, 63 Cal.App.2d 691—Williams v. McDowell, 89 P.2d 155, 32 Cal.App.2d 49—Flynn v. Bledsoe Co., 267 P. 887, 92 Cal. App. 145.

Iowa.—Smith v. Pust, 6 N.W.2d 315, 232 Iowa 1194.

Mass.—Conrey v. Abramson, 2 N.E.2d 203, 294 Mass. 431.

Minn.—Bartley v. Fritz, 285 N.W. 484, 205 Minn. 192—Fleenor v. Rowley, 269 N.W. 370, 198 Minn. 163.

Mo.—Clason v. Lenz, 61 S.W.2d 727, 332 Mo. 1113—Proctor v. Jacob Ruppert, 159 S.W.2d 328, 236 Mo. App. 684—Ridenhour v. Oklahoma Contracting Co., App., 45 S.W.2d 108.

Neb.—Huston v. Robinson, 13 N.W.2d 885, 144 Neb. 553.

Ohio.—Mitchell v. Great Eastern Stages, 19 N.E.2d 910, 60 Ohio App. 144—Shaeffer-Weaver Co. v.

Mallonn, 186 N.E. 514, 45 Ohio App. 1.

Tex.—Lone Star Gas Co. v. Fouché, Civ.App., 190 S.W.2d 501, refused for want of merit—Tippit v. Gohman, Civ.App., 145 S.W.2d 908, error dismissed, judgment correct—Southern Ice & Utilities Co. v. Richardson, Civ.App., 60 S.W.2d 308, reversed on other grounds 95 S.W.2d 956, 128 Tex. 82.

Vt.—Ferren v. McMahon, 1 A.2d 726, 110 Vt. 55.

Wash.—Swanson v. Gilpin, 169 P.2d 356, 25 Wash.2d 147.

Wis.—Weir v. Caffery, 18 N.W.2d 327, 427 Wis. 70—Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.

42 C.J. p 1247 note 68.

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42 C.J. p 1247 note 68.

without lights or with improper lights,⁴ or in parking the vehicle without taking precautions that it would not be put in motion.⁵

On the other hand, where there is no evidence on the issue, or where the evidence is not in substantial conflict and reasonable minds may reach but one conclusion therefrom, the question whether

the specific act of negligence charged was a proximate cause of the injury is one of law for the court.⁶ Under such circumstances, particular questions have been held to be questions of law, such as defendant's negligence in operating or permitting the operation of a motor vehicle in a defective condition⁷ or without proper lights;⁸ operating the motor vehicle at an excessive speed;⁹ failure to

Parking on wrong side of street or highway

Cal.—Knecht v. Lombardo, 91 P.2d 917, 33 Cal.App.2d 447.

Ga.—Hansberger Motor Transp. Co. v. Pate, 181 S.E. 796, 51 Ga.App. 877.

Minn.—Edblad v. Brower, 227 N.W. 493, 178 Minn. 465.

4. U.S.—Bos v. Richards, C.C.A.Ill., 71 F.2d 262.

Ariz.—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 43 Ariz. 57.

Cal.—Paulsen v. Spencer, 177 P.2d 597, 78 Cal.App.2d 268—Stephenson v. Phoenix Wood & Coal Co., 163 P.2d 457, 71 Cal.App.2d 788—Carswell v. Pacific Greyhound Lines, 46 P.2d 297, 7 Cal.App.2d 466.

Ga.—Georgia Power Co. v. Jones, 188 S.E. 566, 54 Ga.App. 578.

Ill.—Wilson v. Decatur Cartage Co., 39 N.E.2d 379, 313 Ill.App. 148.

Ind.—Opplie v. Ray, 195 N.E. 81, 208 Ind. 450.

Iowa.—Prewitt v. Rutherford, 30 N.W.2d 141, 238 Iowa 1321—Johnson v. Overland Transp. Co., 288 N.W. 601, 227 Iowa 481—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 377.

Kan.—Towell v. Staley, 166 P.2d 699, 161 Kan. 127.

Ky.—Lowery v. Hopkinsville Transfer Co., 61 S.W.2d 23, 249 Ky. 454.

Mass.—Bresnahan v. Froman, 43 N.E.2d 336, 312 Mass. 97—Price v. Pearson, 16 N.E.2d 855, 301 Mass. 260—Levellie v. Wright, 15 N.E.2d 247, 300 Mass. 382.

Minn.—Anderson v. Johnson, 294 N.W. 224, 208 Minn. 373—Johnson v. Sunshine Creamery Co., 274 N.W. 404, 200 Minn. 428.

Mo.—Taylor v. Silver King Oil & Gas Co., App., 203 S.W.2d 147—McGrory v. Thurnau, App., 84 S.W.2d 147.

Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.

N.H.—Everett v. Littleton Const. Co., 46 A.2d 317, 94 N.H. 43—Brickell v. Boston & M. Transp. Co., 36 A.2d 622, 93 N.H. 140—Putnam v. Bowman, 195 A. 865, 89 N.H. 200.

N.J.—Podolsky v. Sautter, 183 A. 189, 102 N.J.Law 593.

N.D.—Billingsley v. McCormick Transfer Co., 237 N.W. 714, 61 N.D. 184.

Ohio.—Matz v. J. L. Curtis Cartage Co., 7 N.E.2d 220, 132 Ohio St.

271—Darby v. Jarrett, 159 N.E. 858, 26 Ohio App. 194.

Okl.—Spicers, Inc., v. Rudd, 188 P.2d 692—Ross v. Gearin, 291 P. 534, 145 Okl. 66.

Pa.—Wolfe v. Beardsley, 53 A.2d 92—Kline v. Moyer, 191 A. 43, 325 Pa. 357, 111 A.L.R. 406.

S.C.—Jones v. American Fidelity & Cas. Co., 43 S.E.2d 355, 210 S.C. 470.

Tenn.—Main St. Transfer & Storage Co. v. Smith, 63 S.W.2d 665, 166 Tenn. 482.

Tex.—Southwestern Greyhound Lines v. Wafer, Civ.App., 208 S.W.2d 614, error refused, no reversible error—Bailey v. Walker, Civ.App., 163 S.W.2d 864, error refused—Parker v. Jakovich, Civ.App., 115 S.W.2d 790, error dismissed.

Vt.—Johnson v. Cone, 28 A.2d 384, 112 Vt. 453—Hunter v. Preston, 166 A. 17, 105 Vt. 327.

Va.—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.

Wash.—Todd v. Alexander, 294 P. 545, 160 Wash. 3.

Wis.—Bornemann v. Lusha, 266 N.W. 789, 221 Wis. 359—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.

Failure to signal warning

Pa.—Boor v. Schreiber, 33 A.2d 648, 152 Pa.Super. 458.

Parking in wrong position without lights

Iowa.—Trailer v. Schelm, 288 N.W. 865, 227 Iowa 780.

Mo.—McLarney v. Cary, App., 98 S.W.2d 144.

5. Wash.—Bronk v. Davenney, 171 P.2d 237, 25 Wash.2d 443.

Leaving ignition turned on or key in ignition

D.C.—Schaff v. R. W. Claxton, Inc., 144 F.2d 532, 79 U.S.App.D.C. 207.

Ill.—Moran v. Borden Co., 33 N.E.2d 166, 309 Ill.App. 391.

N.H.—Barlow v. Verrill, 183 A. 857, 88 N.H. 25, 104 A.L.R. 1126.

S.C.—Pfaehler v. Ten Cent Taxi Co., 18 S.E.2d 331, 198 S.C. 476.

Parking on incline

Mass.—Fone v. Elloian, 7 N.E.2d 737, 297 Mass. 139.

Minn.—Guild v. Miller, 271 N.W. 332, 199 Minn. 141.

Tenn.—Garis v. Eberling, 71 S.W.2d 215, 18 Tenn.App. 1.

Wash.—Elliott v. Seattle Chain & Mfg. Co., 251 P. 117, 141 Wash. 157.

6. Mo.—Smith v. Siedhoff, 209 S.W.2d 233.

Tex.—Baughn v. Platt, 72 S.W.2d 580, 123 Tex. 486.

Injury from explosion of lime

Evidence that injury to infant from explosion of unslaked lime which fell from defendant's truck on highway and which the infant placed in a pail of damp earth was a proximate result of the driving of defendant's truck overloaded with lime upon the highway was held insufficient for jury, since the result was so remote and unlikely that defendant was under no duty to anticipate its existence. Leonl v. Reinhard, 194 A. 490, 327 Pa. 391.

7. Defective brakes

Or.—Bogart v. Cohen-Anderson Motor Co., 98 P.2d 720, 164 Or. 233.

Defective steering gear

Neb.—In re O'Byrne's Estate, 277 N.W. 74, 133 Neb. 750.

8. Wash.—Ferguson v. City of Seattle, 176 P.2d 445, 27 Wash.2d 55.

9. U.S.—Warren v. Haines, C.C.A.N.J., 126 F.2d 160, certiorari denied 62 S.Ct. 1279, 316 U.S. 688, 86 L.Ed. 1760.

Iowa.—Mowrey v. Schulz, 296 N.W. 822, 230 Iowa 102.

Md.—Mudge v. Fabrizio, 20 A.2d 172, 179 Md. 517.

Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.

Tex.—Thurmond v. Pepper, Civ.App., 119 S.W.2d 900, error dismissed—Ramin v. Cosio, Civ.App., 85 S.W.2d 802, certificate dismissed 79 S.W.2d 617, 124 Tex. 471.

Injury to child on sled

Minn.—Draxton v. Katzmarek, 280 N.W. 288, 203 Minn. 161.

Injury to person on foot

(1) In general

Ky.—Whalen's Adm'r v. Sundell, 199 S.W.2d 426, 303 Ky. 752.

Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.

Wash.—Paddock v. Tone, 172 P.2d 481, 25 Wash.2d 940.

W.Va.—Fleming v. McMillan, 26 S.E.2d 8, 125 W.Va. 356.

(2) Child.

Mo.—Jacobson v. Beffa, App., 282 S.W. 161.

keep a proper lookout;¹⁰ failure to signal or to give proper warning;¹¹ driving on the wrong side of the street or highway;¹² stopping the motor vehicle;¹³ or in parking the motor vehicle¹⁴ without proper lights.¹⁵

(3) Of Plaintiff

(a) In general

(b) Specific acts of negligence

(a) In General

Whether the plaintiff's contributory negligence was a proximate cause of his injuries is a question of fact for the determination of the jury or other trier of the facts where the evidence is conflicting or is such that reasonable men may differ in their conclusions therefrom.

Where there is a conflict in the evidence, or where the evidence is such that reasonable men

may differ in their conclusions therefrom, the question whether the injuries which were allegedly sustained in a motor vehicle accident and for which recovery is sought were proximately caused by plaintiff's contributory negligence¹⁶ such as whether the injuries were caused by plaintiff's failure to comply with motor vehicle or traffic laws,¹⁷ and disputed questions material to the issue of contributory negligence,¹⁸ are questions of fact for the determination of the jury or other trier of the facts. Accordingly, under conflicting evidence or evidence subject to different inferences, it is a question of fact for the jury whether plaintiff's negligence was a proximate cause of his injuries where plaintiff was injured while operating a motor vehicle which collided with another motor vehicle traveling in the same or opposite direction on the same street or highway,¹⁹ with another motor ve-

N.C.—Fox v. Barlow, 173 S.E. 43, 206 N.C. 66.

Ohio.—Dunn v. Curran, 29 N.E.2d 219, 65 Ohio App. 99.

10. Mo.—Miller v. Wilson, App., 288 S.W. 997.

Wis.—Neuser v. Thelen, 244 N.W. 801, 209 Wis. 262, followed in 244 N.W. 804, 209 Wis. 271.

Falling asleep

Action of motorist in becoming drowsy and falling asleep while operating automobile, thereby losing control of automobile resulting in its running off the road and overturning, was, as a matter of law, the proximate cause of injury sustained by guest in the accident—Tennes v. Tennes, 50 N.E.2d 132, 320 Ill.App. 19.

11. Cal.—Petersen v. Lewis, 42 P. 2d 311, 2 Cal.2d 569.

12. U.S.—Texas Co. v. Hood, C.C.A. Tex., 161 F.2d 618, certiorari denied 68 S.Ct. 206, 332 U.S. 829, 92 L.Ed. — Warren v. Haines, C. C.A.N.J., 126 F.2d 160, certiorari denied 62 S.Ct. 1279, 316 U.S. 688, 86 L.Ed. 1760.

Conn.—Mott v. Hillman, 52 A.2d 861.

Ky.—Thronton v. Phillips, 90 S.W. 2d 347, 262 Ky. 346.

Mo.—Borrini v. Pevely Dairy Co., App., 183 S.W.2d 839.

S.C.—Leek v. New South Express Lines, 7 S.E.2d 459, 192 S.C. 527.

13. Wis.—Cole v. Phephles, 5 N.W. 2d 755, 241 Wis. 155.

Sudden stopping
Ky.—Couch's Adm'r v. Black, 190 S.W.2d 681, 301 Ky. 24.

14. Ky.—Suter's Adm'r v. Kentucky Power & Light Co., 76 S.W. 2d 29, 256 Ky. 356.

Double parking
Cal.—Newman v. Steuernagel, 40 P. 2d 925, 4 Cal.App.2d 185.

Parking on wrong side of street or highway

Md.—Dallas v. Diegal, 41 A.2d 161, 184 Md. 372.

15. Blinding lights

Miss.—Simon v. Dixie Greyhound Lines, 176 So. 160, 179 Miss. 568.

16. U.S.—Dyess v. W. W. Clyde & Co., C.C.A. Utah, 132 F.2d 972.

Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244—McCaleb v. Reed, 144 So. 28, 225 Ala. 564.

Cal.—Mize v. Davy, 165 P.2d 26, 72 Cal.App.2d 607—Elford v. Hiltabrand, 146 P.2d 510, 63 Cal.App.2d 65—Long v. Bevers, 58 P.2d 1295, 15 Cal.App.2d 47—Smith v. Rothschild, 39 P.2d 464, 3 Cal.App.2d 273—Morales v. L. W. Blinn Lumber Co., 33 P.2d 16, 139 Cal.App. 53.

Colo.—Fey v. Parrish, 174 P.2d 345, 115 Colo. 363.

Ga.—Farrar v. Farrar, 152 S.E. 278, 41 Ga.App. 120.

Kan.—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 184 Kan. 376—Mulich v. Graham Ship Ry Truck Co., 174 P.2d 98, 162 Kan. 61.

Me.—Campbell v. Langdo, 28 A.2d 311, 139 Me. 188.

Md.—Ausherman v. Frisch, 163 A. 852, 164 Md. 78.

Mich.—Diederichs v. Duke, 207 N.W. 874, 234 Mich. 136.

Miss.—Friedman v. Allen, 118 So. 828, 152 Miss. 377.

Mo.—Lewis v. St. Louis Independent Packing Co., 3 S.W.2d 244—Wheeler v. Breeding, App., 109 S. W.2d 1237.

N.H.—MacDonald v. Appleyard, 53 A. 2d 434.

N.J.—Claypoole v. Motor Finance Corporation, 15 A.2d 794, 125 N.J. Law 440.

N.C.—Liske v. Walton, 153 S.E. 318, 198 N.C. 741.

Pa.—Johannes v. Shumway, 22 A.2d 650, 343 Pa. 326—Winner v. Greenleaf, Com.Pl., 63 Montg.Co. 94.

S.C.—Flowers v. South Carolina State Highway Dept., 34 S.E.2d 769, 206 S.C. 454—Munn v. Price, 165 S.E. 777, 167 S.C. 98.

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d 981—Duling v. Burnett, 124 S.W. 2d 291, 22 Tenn.App. 522—Norvell & Wallace v. Lester, 14 Tenn.App. 62.

Tex.—Thurman v. Chandler, 81 S.W. 2d 489, 125 Tex. 34.

42 C.J. p 1241 note 75.

17. Ala.—McCaleb v. Reed, 144 So. 28, 225 Ala. 564.

Md.—Miles v. State, for Use of Wisting, 198 A. 724, 174 Md. 292.

Mass.—Clay v. Pope & Cottle Co., 172 N.E. 880, 273 Mass. 40.

N.Y.—Tyne v. B. F. Goodrich Co., 297 N.Y.S. 425, 252 App.Div. 24.

N.D.—Fagerlund v. Jensen, 24 N.W. 2d 816, 74 N.D. 766.

Ohio.—Calley v. Hutzler, 79 N.E.2d 383, 82 Ohio App. 117.

Tenn.—Sutherland v. Keene, App., 203 S.W.2d 917.

18. Whether signal was heard

Cal.—Lucas v. City of Los Angeles, 75 P.2d 599, 10 Cal.2d 476.

19. Ill.—Hopfinger v. O'Banion, 73 N.E.2d 145, 331 Ill.App. 302.

Ky.—Hogge v. Anchor Motor Freight of Delaware, 126 S.W.2d 877, 277 Ky. 460.

Me.—Willwerth v. Freeman, 186 A. 423, 134 Me. 499.

Mass.—Hubbard v. Conti, 75 N.E.2d 639, 321 Mass. 743—Monaghan v. Keith Oil Corporation, 183 N.E. 252, 281 Mass. 129.

N.C.—Smith v. Carolina Coach Co., 199 S.E. 90, 214 N.C. 314.

Ohio.—Calley v. Hutzler, 79 N.E.2d 383, 82 Ohio App. 117.

hicle crossing at an intersection of streets or highways,²⁰ or with a stationary motor vehicle;²¹ where plaintiff was injured while a guest or passenger in the motor vehicle operated by defendant;²² where plaintiff was injured while a guest or passenger in the motor vehicle struck by defendant's vehicle;²³ where plaintiff was injured while on a horse-drawn vehicle²⁴ or on a bicycle;²⁵ or

where plaintiff was injured while on foot.²⁶

Where there is no evidence of plaintiff's negligence as the proximate cause of his injury, or where the evidence thereof is not substantially conflicting and reasonable minds may reach but one conclusion therefrom, the question whether plaintiff's negligence was the proximate cause of his injury is a question of law for the court.²⁷

Okl.—Shabino v. Dolese Bros. Co., 49 P.2d 686, 174 Okl. 69

Wash.—Farmer v. School Dist. No. 214, King County, 17 P.2d 899, 171 Wash. 278

Wis.—Leisch v. Tigerton Lumber Co., 27 N.W.2d 367, 250 Wis. 463

Motorcyclist

Cal.—Gunter v. Claggett, 151 P.2d 271, 65 Cal.App.2d 636.

20. Cal.—Mize v. Davy, 165 P.2d 26, 72 Cal.App.2d 607—Lubenko v. San Joaquin Baking Co., 31 P.2d 1053, 138 Cal.App. 127—l'ascos v. Payne, 12 P.2d 1091, 121 Cal.App. 528.

Ill.—Rose v. Meyer, 25 N.E.2d 413, 303 Ill.App. 365.

Ind.—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507

Iowa.—Short v. Powell, 291 NW 406, 228 Iowa 333

Kan.—Jones v. McCullough, 83 P.2d 669, 148 Kan 561.

Mich.—Sevmour v. Carr, 11 NW 2d 344, 307 Mich 109

Minn.—Leitner v. Pacific Gamble Robinson Co., 26 NW 2d 228 223 Minn. 260—Ristow v. Von Berg, 300 N.W. 444, 211 Minn 150

Mo.—Smithers v. Barker, 111 S.W.2d 47, 341 Mo 1017.

N.M.—Williams v. Haas, 189 P.2d 632—Chavez v. Worley, 152 P.2d 393, 48 N.M. 449

Ohio.—Pesta v. Ruf, App., 48 N.E.2d 876.

Tenn.—Sutherland v. Keene, App., 203 S.W.2d 917—Walters v. Staton, 111 S.W.2d 381, 21 Tenn App 401

Tex.—Polasek v. Gauves Bros., Civ. App., 185 S.W.2d 609, error refused—Moncada v. Snyder, Civ App., 129 S.W.2d 817, affirmed 152 S.W.2d 1077, 137 Tex 112.

Utah.—Hess v. Robinson, 163 P.2d 510, 109 Utah 60

Vt.—Fletcher v. White, 45 A.2d 569, 114 Vt 877—Skoll v. Cushman, 13 A.2d 180, 111 Vt. 160.

Va.—Doss v. Rader, 46 S.E.2d 434, 187 Va. 231.

W.Va.—Vaughan v. Oates, 37 S.E.2d 479, 128 W.Va. 554.

42 C.J. p 1264 note 75.

Motorcyclist

U.S.—Van House v. Acorn Steel Co., D.C.Pa., 53 F.Supp. 990, affirmed, C. C.A., 144 F.2d 204.

21. Cal.—Shriver v. Silva, 151 P.2d 528, 65 Cal.App.2d 763.

Ga.—Georgia Power Co. v. Jones, 188 S.E. 566, 54 Ga.App. 578.

Ill.—Meng v. Lucash, 49 N.E.2d 367, 329 Ill.App. 512.

N.J.—Steber v. Malanka, 182 A. 890, 14 N.J.Misc. 141, affirmed 189 A. 373, 117 N.J.Law 444—Hayes v. Malanka, 182 A. 890, 14 N.J.Misc. 141, affirmed 189 A. 373, 117 N.J. Law 443.

Pa.—Cormican v. Menke, 159 A. 36, 306 Pa 156.

Tenn.—Virginia Ave Coal Co. v. Bailey, 205 S.W.2d 11, 185 Tenn. 242

22. U.S.—Crowell v. M. R. & R. Trucking Co., CCA Fla., 157 F. 2d 963—Robins v. Pitcairn, C.C.A. Ill., 124 F.2d 734

Del.—Elliott v. Camper, 194 A. 130, 8 W.W.Harr 504.

Fla.—Ward v. Stanley, 178 So 398, 130 Fla 642

Ia.—Adams v. Morgan, App., 173 So. 540, rehearing denied 174 So 157.

Mass.—Haines v. Chereskie, 16 N.E. 2d 680, 301 Mass 112

Or.—Koski v. Anderson, 71 P.2d 1009, 157 Or. 349.

23. S.C.—Daniel v. Tower Trucking Co., 32 S.E.2d 5, 205 S.C. 333.

24. Colo.—Rosenbaum v. Fueller, 123 P. 648, 52 Colo. 638.

Injury to wagon and team

Tex.—Headstream v. Mangum, Civ. App., 174 S.W.2d 496.

25. Mich.—Bladell v. Wooley, 219 NW 651, 243 Mich. 3—Reed v. Martin, 125 N.W. 61, 160 Mich 253

N.J.—Hammersma v. Smith, 165 A. 555, 110 N.J.Law 523.

S.C.—Murray v. Martin, 199 S.E. 301, 188 S.C. 334.

Tenn.—Holt v. Walsh, 174 S.W.2d 657, 180 Tenn. 307.

26. Cal.—Fuentes v. Ling, 130 P.2d 121, 21 Cal.2d 59—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217—Johnson v. Jow, 46 P.2d 800, 8 Cal.App.2d 126.

Conn.—Caplan v. Arndt, 196 A. 631, 123 Conn. 585, 119 A.L.R. 1037—

Puza v. Hamway, 193 A. 776, 123 Conn. 205.

Fla.—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635.

Ga.—American Bakeries Co. v. Johnson, 200 S.E. 485, 59 Ga.App. 150.

Ill.—Schneff v. Mirring, 69 N.E.2d 352, 329 Ill.App. 511—Derango v.

Rubin, 34 N.E.2d 719, 310 Ill.App. 536.

Ind.—King v. Ransburg, 39 N.E.2d 822, 111 Ind.App. 523, rehearing denied 40 N.E.2d 999, 111 Ind App. 523.

Ky.—Heskamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky. 618.

Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md 223.

Mich.—Haszczyn v. Detroit Creamery Co., 275 N.W. 211, 281 Mich. 467.

Miss.—Brand v. Tinnin, 200 So. 588, 190 Miss 412.

Nev.—Styris v. Folk, 146 P.2d 782, 62 Nev. 208.

N.C.—Poplin v. Adickes, 166 S.E. 908, 203 N.C. 726

Ohio.—Betras v. G. M. McKelvey Co., 76 N.E.2d 280, 148 Ohio St. 523.

Pa.—Tancredi v. M. Buten & Sons, 38 A.2d 55, 350 Pa 35.

S.C.—Crouch v. Cudd, 155 S.E. 136, 158 S.C. 1.

Tex.—Merritt v. Phoenix Refining Co., Civ App., 103 S.W.2d 415—**Cornus Juris quoted in Spears Dairy v. Bohrer, Civ.App., 54 S.W.2d 872, 876.**

Wis.—Ford v. Werth, 221 N.W. 729, 197 Wis. 211.

42 C.J. p 1267 note 12.

Person alighting from bus or street car

Ga.—Sanders v. Sisk, 23 S.E.2d 503, 68 Ga App 572

Tenn.—Tiffany v. Shipley, 161 S.W. 2d 373, 25 Tenn App 539.

Child

Ind.—Ponsterer v. Key, 33 N.E.2d 330, 218 Ind 521.

N.H.—Humphreys v. Ash, 6 A.2d 436, 90 N.H. 223.

N.J.—Sakos v. Byers, 169 A. 705, 112 N.J.Law 256.

Va.—Edgerton v. Norfolk Southern Bus Corp., 47 S.E.2d 409, 187 Va. 642.

Wis.—Kealty v. Sponholz, 227 N.W. 247, 200 Wis. 80.

27. Ala.—Christ v. Spizman, App., 35 So.2d 568.

Ky.—State Highway Commission v. Hall, 119 S.W.2d 666, 274 Ky. 586.

Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657—

Solomon v. Mote, App., 49 N.E.2d 703.

Tex.—Burton v. Billingsly, Civ.App., 129 S.W.2d 439, error refused.

(b) Specific Acts of Negligence

On conflicting evidence or where different inferences may reasonably be drawn therefrom, the question whether the plaintiff's specific acts of negligence contributed to his injury is one of fact.

Where a specific act of negligence on the part of plaintiff is contended to have caused or contributed to the accident, and the evidence is conflicting or subject to different reasonable inferences, it is

a question of fact for the determination of the jury whether the proximate cause of plaintiff's injury was his own specific act of negligence,²⁸ such as plaintiff's negligence in riding in or operating a vehicle in a defective condition²⁹ or without proper lights;³⁰ operating the vehicle at an excessive speed³¹ or riding in a vehicle operated by another at an excessive speed;³² failure to look or to maintain a proper lookout;³³ failure to signal or to give

Child coasting on sled

Ind.—Tabor v. Continental Baking Co., 38 N.E.2d 257, 110 Ind.App. 633.

28. Ill.—Melton v. Heaton, 50 N.E. 2d 117, 320 Ill.App. 178.

Va.—Doss v. Rader, 46 S.E.2d 434, 187 Va. 231.

Position of damaged property

Whether plaintiff's violation of a city ordinance by placing a gasoline pump on the sidewalk was the proximate cause of damage to the pump from being struck by an automobile was a question for the jury. —Schindler v. Kappler, 133 N.E. 519, 77 Ind.App. 385.

Use of scales after damage

Petition by grain company for damages, which alleged that its scales were thrown out of adjustment by defendants' driver improperly driving truck across scale platform at an angle, presented question for the jury whether plaintiff company, in continuing to use scale, was guilty of contributory negligence constituting an efficient intervening cause. —Atherton v. Goodwin, 180 P. 2d 296, 163 Kan. 22.

29. Absence of rear-view mirror

Or.—Kuehl v. Hamilton, 297 P. 1043, 136 Or. 240.

Curtain over window

Cal.—Roselle v. Beach, 125 P.2d 77, 51 Cal.App.2d 579.

Defective brakes

Cal.—Astone v. Oldfield, 155 P.2d 398, 67 Cal.App.2d 702.

Mo.—Weisman v. Arrow Trucking Co., App., 176 S.W.2d 37.

Defective tire

Mass.—Seymour v. Dunville, 164 N.E. 79, 265 Mass. 78.

Obstructed windshield

Mich.—Strong v. Kittenger, 1 N.W. 2d 479, 300 Mich. 126.

30. Cal.—Mahar v. Mackay, 132 P. 2d 42, 65 Cal.App.2d 869.

Ill.—Skamenca v. Reeser, 13 N.E.2d 668, 294 Ill.App. 216.

Iowa.—Hansen v. Kemmish, 208 N.W. 277, 201 Iowa 1008, 45 A.L.R. 498.

Ky.—Fry & Kain v. Keen, 59 S.W. 2d 3, 248 Ky. 548.

Mass.—Price v. Pearson, 16 N.E.2d 855, 301 Mass. 260.

Minn.—White v. Cochrane, 249 N.W.

328, 189 Minn. 300—Krinke v. Grammer, 246 N.W. 376, 187 Minn. 595—Harrsch v. Brellien, 232 N.W. 710, 181 Minn. 400.

Miss.—Harper v. Wilson, 140 So 693, 163 Miss. 199.

Or.—Kiddle v. Schnitzer, 117 P.2d 983, 167 Or. 316.

S.D.—Dwyer v. Peters, 236 N.W. 301, 58 S.D. 357.

42 C.J. p 1263 note 43 [a].

Bicycle

Cal.—Joseph v. Vogt, 95 P.2d 947, 35 Cal App 2d 439.

Idaho—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642

Ind.—Bechstein v. Saylor, 179 N.E. 581, 93 Ind App 686

Md—Miles v. State, for Use of Wisting, 198 A. 724, 174 Md 292

Mass—Butler v. Curran, 18 NE 2d 340, 302 Mass. 1.

Mich—Ertzbischoff v Smith, 282 N. W. 159, 286 Mich 306—Brown v. Tanner, 274 N.W 744, 281 Mich. 150.

N.Y.—Viscardo v Galloway, 236 N.Y. S. 249, 227 App Div. 672

Wash.—Everest v. Riecken, 174 P. 2d 762.

Horse-drawn vehicle

Idaho—Tendoy v. West, 9 P.2d 1026, 51 Idaho 679.

Mo—Knebel v. Poese, App., 153 S. W 2d 844.

Ohio—Miller v. Schneider, App, 40 N.E 2d 219

Tex—Jones Pine Bread Co v. Cook, Civ.App., 154 S.W 2d 889.

42 C.J. p 1267 note 2 [b].

Motorcycle

Mass—Kzcowski v. Johnowicz, 192 N.E. 6, 287 Mass 441.

Ohio—Page v. Neland, 178 N.E. 710, 40 Ohio App 141.

Sled

Wash—Fabbio v. Diesel Oil Sales Co, 95 P.2d 788, 1 Wash 2d 234.

31. U.S.—Blaszzyk v. Eastern Auto Forwarding Co., C.C.A N.Y., 134 F. 2d 400.

Ark.—Blakeley & Son v. Jones, 57 S. W 2d 1032, 186 Ark. 1169.

Cal.—Bauer v. Davis, 111 P.2d 716, 43 Cal.App.2d 764—Smith v.

Schwartz, 96 P.2d 816, 35 Cal.App. 2d 659—Theren v. Hodorowicz, 62 P.2d 749, 17 Cal.App.2d 653—Pascoe v. Payne, 12 P.2d 1091, 124

Cal App. 528—Skaggs v. Wiley, 292 P. 132, 108 Cal App. 429—Skaggs v. Wiley, 292 P. 132, 108 Cal.App. 429.

Colo.—Drake v. Hodges, 161 P.2d 338, 114 Colo. 10.

Ill.—Mortvedt v. Western Austin Co., 50 N.E.2d 764, 320 Ill.App. 337.

Iowa.—McIntyre v. O. B. West Co., 281 N.W. 353, 225 Iowa 739.

Ky.—Fry & Kain v. Keen, 59 S.W.2d 3, 248 Ky. 548.

Mich.—Socony Vacuum Oil Co v. Marvin, 21 N.W.2d 841, 313 Mich. 528—Transcontinental Ins Co v.

Daniels, 254 N.W. 205, 266 Mich. 562.

Minn.—Duffey v. Curtis, 258 N.W. 744, 193 Minn. 358.

Mo—Larsen v. Webb, 58 S.W.2d 967, 332 Mo. 370, 90 A.L.R. 67.

N.H.—Judd v. Perkins, 138 A. 312, 83 N.H. 39.

Ohio—Schaar v. Blosser, App, 35 N E 2d 846—Transcontinental Car

Forwarding Co. v. Sladden, 195 N. E. 256, 49 Ohio App. 53.

S.C.—Fann v. State Highway Department, 165 S.E. 785, 167 S.C. 84.

Tex.—Gonzales v. Orsak, Civ.App., 205 S.W.2d 793—Akers v. Epperson, Civ.App., 172 S.W.2d 512, certified question answered 171 S.W.

2d 483, 141 Tex. 189, 156 A.L.R. 1028—Rankin v. Joe D. Hughes, Inc., Civ App., 161 S.W.2d 883, error refused—Elzenman v. Jaynes, Civ.App, 33 S.W.2d 254—Herman

Hale Lumber Co. v. Belser, Civ. App., 30 S.W.2d 409, affirmed, Com. App., Belser v. Herman Hale Lum-

ber Co., 41 S.W.2d 208—White v. Beaumont Implement Co., Civ.App., 21 S.W.2d 559.

Va.—Doss v. Rader, 46 S.E.2d 434, 187 Va. 231.

Wis.—Mader v. Boehm, 250 N.W. 854, 213 Wis 55, followed in 250 N.W.

856, 213 Wis. 62.

42 C.J. p 1263 note 49.

Bicycle

Mich.—Swift v. Kenbeek, 286 N.W. 658, 289 Mich. 391.

Motorcycle

Mass.—Bogert v. Thompson, 156 N. E. 884, 260 Mass. 206.

32. S.D.—Lapp v. J. Lauesen & Co., 293 N.W. 586, 67 S.D. 411.

33. U.S.—Lucas v. Interstate Motor

proper warning;³⁴ turning or changing the course of the vehicle;³⁵ failing to stop the vehicle³⁶ or to yield the right of way;³⁷ operating the vehicle on the wrong side of the street or highway³⁸ or not keeping it near to the edge of the street or high-

way;³⁹ towing a vehicle of excessive weight;⁴⁰ operating or occupying an overcrowded vehicle or one carrying an illegal number of persons;⁴¹ assuming a dangerous position in or on the vehicle;⁴²

Freight System, C.C.A.Wis., 115 F. 2d 602.

Ark.—Blakeley & Son v. Jones, 57 S. W.2d 1032, 186 Ark. 1169.

Cal.—Bauer v. Davis, 111 P.2d 715, 43 Cal.App.2d 764.

Colo.—Denver Equipment Co. v. Newell, 169 P.2d 174, 115 Colo. 23.

D.C.—Shu v. Basinger, Mun.App., 57 A.2d 295.

Iowa.—Goldapp v. Core, 19 N.W.2d 673, 236 Iowa 548—Rurbridge v. Briggs, 15 N.W.2d 909, 235 Iowa 12.

Minn.—Butcher v. Tomczik, 273 N.W. 706, 200 Minn. 262.

Ohio.—Solomon v. Mote, App., 49 N. E.2d 703.

Pa.—Grimes v. Yellow Cab Co., 25 A. 2d 294, 344 Pa. 298.

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d 981.

Va.—Doss v. Rader, 46 S.E.2d 434, 187 Va. 231.

Guest or passenger in vehicle

(1) In general—Potter v. Potter, 272 N.W. 34, 224 Wis. 251.

(2) Guest or passenger going to sleep.

U.S.—Pagenkamp v. Devillez, C.C.A. Ill., 80 F.2d 485.

Ill.—Barmann v. McConachie, 6 N.E. 2d 918, 289 Ill.App. 196.

Or.—Smith v. Williams, 178 P.2d 710, 180 Or. 626, 173 A.L.R. 1220.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596.

Pedestrian

(1) In general.

Cal.—Douglas v. Hoff, 185 P.2d 607, 82 Cal.App.2d 82.

Ind.—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94.

Mo.—Frees v. Hosack, App., 119 S. W.2d 460.

Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204.

(2) Child.—Connell v. Petri, Fla., 30 So.2d 922.

Person alighting from bus or street-car

Md.—Feldser v. Beeman, 4 A.2d 750, 176 Md. 377, 123 A.L.R. 786.

R.I.—Walling v. Jenks, 6 A.2d 540, 62 R.I. 424.

34. Cal.—Uribe v. McCorkle, 146 P. 2d 22, 63 Cal.App.2d 61—Hardin v. Sutherland, 289 P. 900, 106 Cal. App. 473.

Ill.—Warneke v. Torstenson, 26 N.E. 2d 675, 304 Ill.App. 597.

Iowa.—Sexauer v. Dunlap, 222 N.W. 420, 207 Iowa 1018.

Mass.—O'Brien v. Gutterman, 152 N. E. 883, 256 Mass. 560.

Mich.—Stahl v. Bell, 267 N.W. 779, 276 Mich. 37.

Minn.—Spencer v. Johnson, 281 N.W. 879, 203 Minn. 402—Hansen v. Larson, 245 N.W. 835, 187 Minn. 389.

N.H.—Judd v. Perkins, 138 A. 312, 83 N.H. 39.

N.C.—Brown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626.

Ohio.—Gould v. Youngstown Municipal Ry. Co., 28 N.E.2d 939, 64 Ohio App. 385.

Tex.—Porter v. Polis, Civ.App., 169 S.W.2d 216, error refused.

Wash.—Haines v. Pinney, 18 P.2d 496, 171 Wash. 568.

Motorcyclist

Iowa.—Fischer v. Steinhauer, 10 N. W.2d 649, 233 Iowa 777.

35. Cal.—Dieckmann v. Signorini, 118 P.2d 319, 47 Cal.App.2d 481.

Me.—Tibbetts v. Harbach, 198 A. 610, 135 Me. 397.

Minn.—Spencer v. Johnson, 281 N.W. 879, 203 Minn. 402.

Miss.—Delta Cotton Oil Co. v. Elliott, 172 So. 737, 179 Miss. 200, suggestion of error overruled 174 So. 550, 179 Miss. 200.

N.H.—Boston v. B. & M. Super Service, 20 A.2d 633, 91 N.H. 392.

N.J.—Lipschitz v. New York & New Jersey Produce Corporat.on, 168 A. 390, 111 N.J.Law 392.

Okla.—Milam v. Hood, 60 P.2d 769, 177 Okl. 470.

Pa.—Warta v. Swarr, Com.Pl., 48 Lanc.L.Rev. 94.

Wis.—Gilbert v. Whittenberg, 207 N. W. 264, 189 Wis. 181.

42 C.J. p 1263 note 58.

36. Ind.—Teegarden v. Brown, 39 N.E.2d 793, 111 Ind.App. 159—Lindley v. Skidmore, 33 N.E.2d 797, 109 Ind.App. 178.

Kan.—Huggins v. Kansas Power & Light Co., 187 P.2d 491, 164 Kan. 27—Jones v. McCullough, 83 P.2d 669, 148 Kan. 561.

Ky.—R. B. Tyler Co. v. Curd, 42 S. W.2d 298, 240 Ky. 253.

Mass.—Nestor v. Tewksbury, 182 N. E. 335, 280 Mass. 199.

Mich.—Odell v. Powers, 278 N.W. 819, 284 Mich. 201.

Minn.—Harrsch v. Brellien, 232 N. W. 710, 181 Minn. 400.

Miss.—Reid v. Halpin, 178 So. 88.

N.C.—Pearson v. Luther, 193 S.E. 739, 212 N.C. 412.

Ohio.—Buckeye Union Casualty Co. v. Oelschlaeger, App., 36 N.E.2d 152.

R.I.—Audette v. New England Transp. Co., 46 A.2d 570, 71 R.I. 420.

Tex.—J. S. Abercrombie Co. v. Delcomyn, 135 S.W.2d 978, 134 Tex. 490.

Wash.—Luther v. Pacific Fruit & Produce Co., 255 P. 365, 143 Wash. 308.

Wis.—Svenson v. Vondrak, 227 N.W. 240, 200 Wis. 312.

37. Tex.—Morelos v. Milde, Civ.App., 43 S.W.2d 133, error dismissed.

38. Mass.—Wall v. King, 182 N.E. 855, 280 Mass. 577.

Wash.—Carlson v. Whelan, 84 P.2d 1001, 197 Wash. 104.

Wis.—Svenson v. Vondrak, 227 N.W. 240, 200 Wis. 312.

37. Tex.—Morelos v. Milde, Civ.App., 43 S.W.2d 133, error dismissed.

38. Mass.—Wall v. King, 182 N.E. 855, 280 Mass. 577.

Wash.—Carlson v. Whelan, 84 P.2d 1001, 197 Wash. 104.

Bicycle

Mass.—Butler v. Curran, 18 N.E.2d 340, 302 Mass. 1.

39. Pa.—Sabatelli v. Scull, Com.Pl., 29 Del.Co. 456.

Bicycle

Wash.—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 466.

40. Tenn.—Chattanooga Ice Delivery Co. v. George F. Burnett Co., 147 S.W.2d 750, 24 Tenn.App. 535.

41. Mass.—Seymour v. Dunville, 164 N.E. 79, 265 Mass. 78.

Pa.—McClelland v. Copeland, 50 A.2d 221, 355 Pa. 405.

Wash.—Portland - Seattle Auto Freight v. Jones, 131 P.2d 736, 15 Wash.2d 603—Edwards v. Washkuhn, 119 P.2d 905, 11 Wash.2d 425—Bernard v. Portland Seattle Auto Freight, 118 P.2d 167, 11 Wash.2d 17.

Double riding on bicycle

Idaho.—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 612.

Mich.—Stockfisch v. Fox, 267 N.W. 754, 275 Mich. 630.

N.J.—Kuczeko v. Prudential Oil Corporation, 164 A. 308, 110 N.J.Law 111.

Motorcycle

Wash.—Bredemeyer v. Johnson, 36 P. 2d 1062, 179 Wash. 225.

42. Minn.—Guile v. Greenberg, 268 N.W. 418, 197 Minn. 635.

On motorcycle

Cal.—Schubkegel v. Dunn, 87 P.2d 875, 31 Cal.App.2d 312.

On running board

Cal.—Varner v. Hattenhaber, 42 P. 2d 674, 5 Cal.App.2d 199.

stopping⁴³ or parking⁴⁴ the vehicle; assuming a dangerous position by a stalled or parked vehicle;⁴⁵ violation of a law prohibiting coasting on sleds on public streets or highways;⁴⁶ walking along a street or highway,⁴⁷ such as walking on the wrong side of the highway;⁴⁸ crossing a street or highway other than at the intersection or crosswalk⁴⁹ or in crossing a street or highway diagonally;⁵⁰ or failure of a pedestrian to yield the right of way in crossing a street or highway,⁵¹ and in stepping into

the path of a moving motor vehicle.⁵²

On the other hand, where there is no evidence showing that plaintiff's act caused or contributed to the accident or where there is not a substantial conflict in the evidence and reasonable minds may reach but one conclusion therefrom, the question becomes one of law.⁵³ Accordingly, under such circumstances questions such as plaintiff's negligence in riding in or operating a vehicle with defective equipment or in a defective condition,⁵⁴ op-

Conn.—Cosgrove v. Shusterman, 26 A.2d 471, 129 Conn. 1.

N.C.—Roberson v. Carolina Taxi Service, 200 S.E. 363, 214 N.C. 624.

Resting elbow on automobile window

Me.—Tomlinson v. Clement Bros., 154 A. 355, 130 Me. 189.

Sitting on another passenger's lap
Cal.—Hawthorne v. Gunn, 11 P.2d 411, 123 Cal.App. 452.

43. Minn.—Landeen v. De Jung, 17 N.W.2d 648, 219 Minn. 287.

44. Colo.—Dillon v. Sterling Rendering Works, 106 P.2d 358, 106 Colo. 407.

Tex.—Gulf States Utilities Co. v. Selman, Civ.App., 137 S.W.2d 122, error dismissed, judgment correct.

Double parking
Mass.—Thibault v. Nicholas Zoo, Inc., 17 N.E.2d 687, 301 Mass. 478.

Parking on wrong side of street
Pa.—Vunak v. Walters, 43 A.2d 536, 157 Pa.Super. 660

Parking without proper lights
Iowa.—Hayungs v. Falk, 27 N.W.2d 15, 238 Iowa 285.

Minn.—Erickson v. Morrow, 287 N.W. 628, 206 Minn. 58.

Or.—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 375—Martin v. Oregon Stages, 277 P. 291, 129 Or. 435.

Pa.—Purol, Inc., v. Great Eastern System, 197 A. 543, 130 Pa.Super. 341—Hanawalt v. Ranshaw, Orph., 34 Del.Co. 551.

S.D.—Descombaz v. Klock, 235 N.W. 502, 58 S.D. 173, affirmed 240 N.W. 495, 59 S.D. 461.

45. Miss.—Rhodes v. Fullilove, 134 So. 840, 161 Miss. 41.

Ohio.—Basinger v. Yarian, App., 49 N.E.2d 104.

46. N.Y.—Tyne v. B. F. Goodrich Co., 297 N.Y.S. 425, 252 App.Div. 24.

After coasting completed

Whether violation of town ordinance prohibiting coasting by boy struck by automobile immediately after he had completed coasting and while he was walking dragging his sled behind him, at dusk of a sleety day, was so intimately connected with his injuries as a proximate

cause as to preclude recovery was for jury to determine, under evidence—Sadak v. Tucker, 37 N.E.2d 495, 310 Mass. 153.

47. Ga.—Sims v. Martin, 126 S.E. 872, 33 Ga.App. 486.
Ohio—Sprung v. E. I. Dupont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 186 Ohio St. 94.

Failure to keep to center grass plot
N.Y.—Tedla v. Ellman, 19 N.E.2d 987, 280 N.Y. 124.

Pushing lawn mower

Even if pedestrian struck by automobile while pushing lawn mower along street five feet from curb violated traffic ordinance, question whether violation thereof was proximate cause of injury was held for jury—Blodgett v. Preston, 5 P.2d 25, 118 Cal.App. 297.

Intoxicated pedestrian

Cal.—Coakley v. Ajuria, 290 P. 33, 209 Cal. 745—Renton v. Douglas, 187 P.2d 469, 82 Cal.App.2d 784.

Mass.—Martin v. Florin, 172 N.E. 895, 273 Mass. 13

N.H.—Dane v. MacGregor, 52 A.2d 290, 94 N.H. 294—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

48. Cal.—Summers v. Dominguez, 84 P.2d 237, 29 Cal.App.2d 308—Sharick v. Galloway, 66 P.2d 185, 19 Cal.App.2d 693—Scalf v. Eichler, 53 P.2d 368, 11 Cal.App.2d 44.

Va.—Clay v. Bishop, 30 S.E.2d 585, 182 Va. 748.

Wash.—Baltuff v. Bowen, 162 P.2d 829, 23 Wash.2d 886.

Person leading animal

In action for injuries sustained when a cow which pedestrian was leading became frightened at approach of overtaking automobile and lunged against pedestrian, whether pedestrian's negligence in failing to walk on the left side of the highway contributed to his injury was for jury.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28—Lawson v. Fordyce, 12 N.W.2d 301, 234 Iowa 632.

Wrong side of bridge

Va.—Bray v. Boston Lumber & Builders' Corporation, 173 S.E. 296, 161 Va. 686.

49. U.S.—Western Union Telegraph

Co. v. Hudson, C.C.A.Cal., 82 F.2d 992.

D.C.—Yellow Cab Co. of D. C. v. Griffith, Mun.App., 40 A.2d 340.
Fla.—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635.

Ind.—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94.

Ky.—Murphy v. Homans, 150 S.W.2d 14, 286 Ky. 191.

Minn.—Smith v. Barry, 17 N.W.2d 324, 219 Minn. 182.

Nev.—Styris v. Folk, 146 P.2d 782, 63 Nev. 208, 139 P.2d 614.

Ohio—Smith v. Zone Cabs, 21 N.E.2d 336, 135 Ohio St. 415—Mansperker v. Ehrnsfeld, 17 N.E.2d 271, 59 Ohio App. 74.

Tex.—Seinsheimer v. Burkhardt, 122 S.W.2d 1063, 132 Tex. 336—Brooks v. Enriquez, Civ.App., 172 S.W.2d 794, error refused.

W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545.

Wis.—Ford v. Werth, 221 N.W. 729, 197 Wis. 211.

50. Mass.—Crowley v. Freeman, 195 N.E. 926, 291 Mass. 105.

Child

Ala.—Graham v. Werfel, 157 So. 201, 229 Ala. 385.

51. D.C.—Yellow Cab Co. of D. C. v. Griffith, Mun.App., 40 A.2d 340.

Ind.—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94—Vogel v. Ridders, 44 N.E.2d 238, 112 Ind.App. 493.

52. Cal.—Gulino v. Finocchiaro, 17 P.2d 754, 128 Cal.App. 496.

Child's sudden appearance in path of vehicle

N.H.—Humphreys v. Ash, 6 A.2d 436, 90 N.H. 223.

Tenn.—Finton v. Mercury Motors, App., 194 S.W.2d 354.

53. Iowa.—Rless v. Long, 294 N.W. 592, 229 Iowa 378.

Miss.—Coca Cola Bottling Works of Greenwood v. Hand, 191 So. 674, 186 Miss. 893.

Mo.—Wininger v. Bennett, App., 104 S.W.2d 413.

54. Without proper lights

(1) Motor vehicle.—Bulle v. Smith, 17 P.2d 224, 81 Utah 179.

(2) Bicycle.—Miles v. State, for Use of Wisting, 198 A. 724, 174 Md 292.

crating the vehicle at an excessive speed,⁵⁵ failure to look or to maintain a proper lookout,⁵⁶ turning or changing the course of the vehicle,⁵⁷ failure to stop the vehicle,⁵⁸ assuming a dangerous position in or on the vehicle,⁵⁹ or walking on or along the highway while intoxicated⁶⁰ have been held to be questions of law.

(4) Of Operator of Vehicle Occupied by Plaintiff

Whether the plaintiff's injuries were proximately caused by the negligence of the person operating the vehicle occupied by the plaintiff is a question of fact for the determination of the jury where the evidence is conflicting or is such that reasonable men may differ in their conclusions therefrom.

55. U.S.—Cain v. Bowlby, C.C.A.N. M., 114 F.2d 519, certiorari denied 61 S.Ct. 319, 311 U.S. 710, 85 L. Ed. 462.

Bicycle

Tex.—Jennison v. Darnielle, Civ. App., 146 S.W.2d 788, error dismissed.

56. Conn.—Puza v. Hamway, 193 A. 776, 123 Conn. 205.

Md.—Madge v. Fabrizio, 20 A.2d 172, 179 Md. 517.

Wash.—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354.

Pedestrian

Tex.—Norris Bros v. Mattinson, Civ. App., 118 S.W.2d 460, error dismissed.

57. Tex.—Burton v. Billingsly, Civ. App., 129 S.W.2d 439, error refused.

58. Bicycle

Iowa.—Mowrey v. Schulz, 296 N. W. 822, 230 Iowa 103.

59. Clinging to outside of bus

Mass.—Scott v. Boston Elevated Ry. Co., 60 N.E.2d 5, 318 Mass. 31.

On fender

Ohio.—Central Transfer & Storage Co. v. Frost, App., 36 N.E.2d 494.

Wis.—Wiese v. Polzer, 248 N.W. 113, 212 Wis. 337.

60. Absence of evidence of conduct

Mere intoxication of a pedestrian, in absence of any evidence of conduct on part of pedestrian, in an action against a motorist for death of pedestrian, is insufficient to take to jury an issue of contributory negligence proximately contributing to the accident.—Lynch v. Clark, Or., 194 P.2d 416.

61. Cal.—Graves v. Kern County Transp. Corporation, 296 P. 902, 112 Cal.App. 261.

Ga.—Farrar v. Farrar, 152 S.E. 278, 41 Ga.App. 120.

Iowa.—Mizner v. Lohr, 238 N.W. 584, 213 Iowa 1182.

Tex.—Horton & Horton v. House, Com.App., 29 S.W.2d 984.

Wis.—Webster v. Krembs, 282 N.W. 564, 230 Wis. 252.

Violation of traffic law

The mere fact that plaintiff's driver was violating the traffic law at the time of the accident does not require the conclusion as a matter of law that the violation of law was the sole cause of the accident.—Nash v. Heald, 29 N.E.2d 7, 306 Mass. 518.

Specific acts of negligence

(1) Driver's intoxication

Idaho.—Evans v. Davidson, 77 P.2d 661, 58 Idaho 600.

Or.—Hartley v. Berg, 25 P.2d 932, 145 Or. 44.

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

Wash.—Crown v. Miller, 91 P.2d 713, 199 Wash. 354.

Wis.—Steinkrause v. Eckstein, 175 N.W. 988, 170 Wis. 487.

(2) Driving on wrong side of highway or street.—Socony Vacuum Oil Co. v. Marvin, 21 N.W.2d 841, 313 Mich. 528.

(3) Excessive speed

Ill.—O'Connell v. Chicago & N. W. R. Co., 27 N.E.2d 644, 305 Ill.App. 430.

Mich.—Losey v. Wetters, 270 N.W. 735, 278 Mich. 422.

Va.—Temple v. Ellington, 12 S.E.2d 826, 177 Va. 134.

W.Va.—Gilbert v. Lewisburg Ice Cream Co., 184 S.E. 244, 117 W. Va. 107.

Wis.—Canzoneri v. Heckert, 269 N. W. 716, 223 Wis. 25.

(4) Failure to signal or give warning.

Ark.—Jones v. King, 204 S.W.2d 548, 211 Ark. 1084.

La.—Swedman v. Standard Oil Co. of Louisiana, 125 So. 481, 12 La.App. 359.

(5) Failure to stop.—Southland Greyhound Lines v. King, Tex.Civ. App., 77 S.W.2d 281, error granted.

(6) Turning to left to avoid defendant's motor vehicle.—Gilbert v. Lewisburg Ice Cream Co., 184 S.E. 244, 117 W.Va. 107.

62. Ky.—Paducah Coca-Cola Bot-

Where, in order to exonerate defendant from liability or to lessen his liability, it is alleged that the proximate cause of plaintiff's injury was the negligence of the person operating the vehicle in which plaintiff was a passenger, and there is a conflict in the evidence or the evidence is such that reasonable men may differ in their conclusions therefrom, the question is a question of fact for the determination of the jury.⁶¹ The rule has been applied where the injuries were sustained in a collision between approaching or passing vehicles traveling on the same street or highway,⁶² in a collision between vehicles crossing at an intersection,⁶³ and in a collision between a moving and a stationary vehicle.⁶⁴

tlings Co. v. Reeves, 88 S.W.2d 39, 261 Ky. 539.

Mich.—Lindenfeld v. Michigan Interstate Truck Co., 265 N.W. 501, 274 Mich. 481.

Neb.—O'Brien v. J. I. Case Co., 2 N. W.2d 107, 140 Neb. 847.—Hardung v. Sheldon, 275 N.W. 586, 133 Neb. 427.

N.M.—Silva v. Waldie, 82 P.2d 282, 42 N.M. 514.

S.D.—Bak v. Walberg, 273 N.W. 381, 65 S.D. 292.

63. Cal.—Pollind v. Polich, 177 P.2d 63, 78 Cal.App.2d 87.

Colo.—Buerger Bros. Supply Co. v. Denver Fire Reporter & Protective Co., 113 P.2d 671, 108 Colo. 40.

Ill.—Mueth v. Jaska, 23 N.E.2d 805, 303 Ill.App. 289.

Ind.—Wagoner v. Rose, 193 N.E. 108, 100 Ind.App. 192.

Iowa.—Enfield v. Butler, 264 N.W. 546, 221 Iowa 615.

Md.—Hess v. Loftus, 195 A. 556, 173 Md. 284.

Mich.—Rak v. Lake, 260 N.W. 162, 271 Mich. 274.

N.C.—Nichols v. Goldston, 46 S.E. 2d 320, 228 N.C. 514.

Tex.—City of Port Arthur v. Wallace, Civ. App., 167 S.W.2d 549, affirmed 171 S.W.2d 480, 141 Tex. 201.

Va.—Temple v. Ellington, 12 S.E. 2d 826, 177 Va. 134.

Wis.—Becker v. Luick, 264 N.W. 242, 220 Wis. 481.

64. U.S.—Jaggers v. Southeastern Greyhound Lines, C.C.A.Tenn., 126 F.2d 762.

Ala.—Leeper Cleaning & Dyeing Co. v. McKinney, 161 So. 529, 230 Ala. 462.

Ga.—Hansberger Motor Transp. Co. v. Pate, 181 S.E. 796, 51 Ga.App. 877.

Ind.—Gerlot v. Swartz, 7 N.E.2d 960, 212 Ind. 292.

Iowa.—Johnson v. Overland Transp. Co., 288 N.W. 601, 227 Iowa 487.—Newman v. Hotz, 285 N.W. 287, 226 Iowa 834.—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 877.

Where there is no evidence to show that the proximate cause of plaintiff's injuries was the negligence of the person operating the vehicle in which plaintiff was a passenger, or where the evidence pertaining thereto is not substantially conflicting and reasonable minds may reach but one conclusion therefrom, the question is one of law for the court.⁶⁵

§ 523. — Identity

The identity of the motor vehicle involved in the accident, or the driver's identity, is a question of fact for the determination of the jury where the evidence

is conflicting or is subject to different reasonable inferences.

Where the evidence is conflicting or is subject to different reasonable inferences, the question of the identity of the motor vehicle involved in the accident,⁶⁶ or the question of the driver's identity,⁶⁷ is a question of fact for the determination of the jury; but, where there is no substantial evidence pertaining to identification or where there is substantial evidence and it is clear and uncontradicted, the question of the identity of the motor vehicle,⁶⁸ or the question of the driver's identity,⁶⁹ is a question of law for the determination of the court.

Kan.—Meneley, by Myers, v. Montgomery, 64 P.2d 550, 145 Kan 109.
Mass.—Prout v. Mystic Motor Transp. Co., 58 N.E.2d 121, 317 Mass. 349.
Minn.—Olson v. Purity Baking Co., 242 N.W. 283, 185 Minn. 571.
Miss.—Davidson v. Knight, 29 So.2d 656.
Mo.—Dennis v. Creek, App., 211 S.W. 2d 59—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299—McCloskey v. Renne, 37 S.W.2d 950, 225 Mo.App. 810.
Neb.—Huston v. Robinson, 13 N.W. 2d 885, 144 Neb. 553.
N.C.—Barrier v. Thomas & Howard Co., 171 S.E. 626, 205 NC 425.
Ohio.—Matz v. J. L. Curtis Cartage Co., 7 N.E.2d 220, 132 Ohio St 271.
Pa.—Bricker v. Gardner, Com.Pl., 56 Dauph.Co. 384, affirmed 48 A.2d 209, 355 Pa. 35.
65. Ark.—Twin City Coach Co. v. Stewart, 190 S.W.2d 623, 209 Ark 310.
N.C.—Caulder v. Gresham, 30 S.E.2d 312, 224 N.C. 402.
Intoxication:
Minn.—Olson v. Kennedy Trading Co., 272 N.W. 381, 199 Minn 493.
66. U.S.—Gary v. Consolidated Forwarding Co., CCA Wis., 115 F.2d 632—Arnold v. Owens, C.C.A.N.C., 78 F.2d 495.
Ark.—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912.
Ky.—Silver Fleet Motor Express v. Gilbert, 165 S.W.2d 541, 291 Ky. 696—Glasgow Ice Cream Co. v. Fuitts' Adm'r, 105 S.W.2d 135, 268 Ky. 447.
Md.—Brown v. Bendix Radio Div. of Bendix Aviation Corp., 51 A.2d 292—Davidson Transfer & Storage Co. v. State, for Use of Brown, 22 A.2d 582, 180 Md. 63.
Mass.—Frasciello v. Baer, 24 N.E.2d 653, 304 Mass. 643.
Mich.—Zolton v. Rotter, 32 N.W.2d 30, 321 Mich. 1—Wilkins v. Bradford, 225 N.W. 609, 247 Mich. 157.
Mo.—Padgett v. Missouri Motor Distributing Corporation, 177 S.W.2d

490—Glick v. Arink, 58 S.W.2d 714.
N.J.—Mistretta v. Docterman, 162 A. 658, 109 N.J.Law 498—Grauss v. Alpert, 169 A. 847, 12 N.J.Misc. 67.
N.Y.—Hogan v. Bredenbach, 284 N.Y.S. 673, 246 App.Div. 862.
Or.—Kohaneck v. Rudie Wilhelm Warehouse Co., 276 P. 693, 129 Or. 642.
Pa.—Devlin v. McCauley, 144 A. 828, 295 Pa. 101.
R.I.—Deming v. Venditti, 53 A.2d 498.
Tenn.—H. G. Hill Co. v. Squires, 153 S.W.2d 425, 25 Tenn.App. 164—Fulmer v. Jennings, 148 S.W.2d 39, 24 Tenn.App. 635.
Va.—Hoover v. J. P. Neff & Son, 31 S.E.2d 265, 183 Va. 56—Sanders v. Newsome, 19 S.E.2d 883, 179 Va. 582.
Wash.—Bennett v. King County Cab Co., 27 P.2d 125, 175 Wash. 216.
Wis.—Hanson v. Weber, 291 N.W. 800, 234 Wis. 593.
42 C.J. p 1242 note 81.
67. U.S.—Walls v. Ellington, C.C. A.Tenn., 31 F.2d 285.
Ala.—Jones v. Colvard, 109 So. 877, 215 Ala. 216.
Ark.—Kurry v. Frost, 162 S.W.2d 48, 204 Ark. 386.
Cal.—Stoneburner v. Theodoratos, App., 30 P.2d 1001, rehearing granted 31 P.2d 1042.
Conn.—Katz v. Cohn, 186 A. 494, 121 Conn. 545.
Ga.—Jones v. Britt, 42 S.E.2d 648, 75 Ga.App. 142.
Ind.—Van Drake v. Thomas, 38 N.E. 2d 878, 110 Ind.App. 586.
Ky.—Oldfield v. Owens, 165 S.W.2d 952, 292 Ky. 183—Huber & Huber Motor Express v. Martin's Adm'r, 96 S.W.2d 595, 265 Ky. 228.
Mass.—Frasciello v. Baer, 24 N.E.2d 653, 304 Mass. 643—Sutherland v. Feinberg, 158 N.E. 783, 261 Mass. 394.
Miss.—Harrington v. Gough, 145 So. 621, 164 Miss. 802.
Mo.—Ruby v. Clark, 208 S.W.2d 251—Madison v. Taxi Owners Ass'n, App., 148 S.W.2d 106—Anderson v.

Northrop, 96 S.W.2d 521, 230 Mo. App. 1225.
N.H.—Dorrien v. Sirois, 175 A. 236, 87 N.H. 144—O'Brien v. Donohoe, 169 A. 424, 86 N.H. 372.
N.J.—Mulligan v. Clappis, 1 A.2d 414, 121 N.J.Law 119—Horowitz v. Schanerman, 187 A. 346, 117 N.J. Law 314.
N.Y.—Christie v. B. F. Vineburg, Inc., 19 N.Y.S.2d 252, 259 App.Div. 342.
N.C.—Jones v. Craddock, 187 S.E. 558, 210 N.C. 429.
Ohio.—Schenck v. Co-Op. Cab Co., App., 60 N.E.2d 796.
Pa.—Flick v. Shlimer, 17 A.2d 332, 340 Pa. 481.
R.I.—Deming v. Venditti, 53 A.2d 498.
Tex.—Richmond v. Champagne's Bakery, Civ.App., 118 S.W.2d 493, error refused.
Vt.—Friot v. Jordan, 41 A.2d 146, 114 Vt. 163.
Va.—Vaughn v. Huff, 41 S.E.2d 482, 186 Va. 141.
Wis.—Schultz v. Pahlow Oil Co., 270 N.W. 85, 223 Wis. 188.
42 C.J. p 1242 note 83.
68. Ky.—Poll v. Patterson, 198 S. W. 567, 178 Ky. 22.
Evidence held insufficient for jury
U.S.—Wright v. Gordon's Transport, C.C.A.Miss., 162 F.2d 590.
Md.—Morris v. Twigg, 58 A.2d 719.
Miss.—Jakup v. Lewis Grocer Co., 200 So. 597, 190 Miss. 444.
69. Ark.—Tucker v. Ford, 146 S.W. 2d 542, 201 Ark. 680.
D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.
N.J.—Oliveri v. Vander May, 165 A. 284, 11 N.J.Misc. 241.
Evidence held insufficient for jury
Mass.—Hinds v. Bowen, 167 N.E. 332, 268 Mass. 55.
Pa.—Furer v. May, 174 A. 630, 115 Pa.Super. 28.
Wis.—Kaiser v. Streich, 26 N.W.2d 160, 249 Wis. 615.

§ 524. — Ownership

Questions of ownership either of the motor vehicle causing, or the motor vehicle receiving, the injury, are, on conflicting evidence or evidence subject to different reasonable inferences, for the determination of the jury.

Questions of ownership either of the motor vehicle causing,⁷⁰ or the motor vehicle receiving,⁷¹ the injury are, on conflicting evidence or evidence subject to different reasonable inferences, for the

jury to determine, but, where no substantial evidence on the matter is introduced or where the evidence is clear and uncontroverted, questions of ownership of the motor vehicle causing⁷² or receiving⁷³ the injury are questions of law for the determination of the court.

Name on vehicle. The presumption or inference of ownership arising from the presence of de-

70. Ala.—Southeastern Const. Co. v. Robbins, 27 So.2d 705, 248 Ala. 387, followed in 27 So.2d 709, first and third cases, 248 Ala. 371, 372—Drummonds v. Donahoo, 114 So. 277, 22 Ala. App. 215.
 Ariz.—Consolidated Motors v. Ketcham, 66 P.2d 246, 49 Ariz. 295.
 Ark.—Vaughn v. Herring, 113 S.W.2d 512, 195 Ark. 639—Watts v. Safeway Cab & Storage Co., 100 S.W.2d 965, 193 Ark. 413
 Cal.—Helmuth v. Frame, 115 P.2d 816, 46 Cal.App.2d 372—Dahl v. Spotts, 16 P.2d 774, 128 Cal.App. 133—Perry v. A. Paladini Inc., 264 P. 580, 89 Cal.App. 275
 Conn.—Lockwood v. Helfant, 13 A.2d 136, 126 Conn. 584.
 D.C.—Walsh v. Rosenberg, 81 P.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388—Callas v. Independent Taxi Owners' Ass'n, 66 P.2d 192, 62 App.D.C. 212, certiorari denied Independent Taxi Owners' Ass'n v. Callas, 54 S.Ct. 89, 290 U.S. 669, 78 L.Ed. 578.
 Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.
 Idaho.—Illil v. Bice, 139 P.2d 1010, 65 Idaho 167—Franklin v. Wooters, 45 P.2d 804, 55 Idaho 619.
 Ill.—Aarseth v. Stein, 278 Ill.App. 16.
 Ind.—Gardner v. Vance, 113 N.E. 1006, 63 Ind.App. 27.
 Iowa.—Putnum v. Bussing, 266 N.W. 559, 221 Iowa 871—Tigue Sales Co. v. Reliance Motor Co., 221 N.W. 514, 207 Iowa 567.
 Ky.—Oldfield v. Owens, 165 S.W.2d 952, 292 Ky. 183—Huber & Huber Motor Express v. Martin's Adm'r, 96 S.W.2d 595, 265 Ky. 228—Euster v. Vogel, 13 S.W.2d 1028, 227 Ky. 735.
 Mass.—Kelly v. Railway Express Agency, 52 N.E.2d 411, 315 Mass. 301—Harnden v. Smith, 26 N.E.2d 310, 305 Mass. 485—Capano v. Melchionno, 7 N.E.2d 593, 297 Mass. 1.
 Mich.—Gates v. Pfeiffer Brewing Co., 265 N.W. 783, 275 Mich. 81.
 Minn.—Holmes v. Lillygren Motor Co., 275 N.W. 416, 201 Minn. 44—Ludwig v. Haugen Motor Co., 245 N.W. 371, 187 Minn. 315.
 Miss.—Delta Cotton Oil Co. v. Elliott, 174 So. 550, 179 Miss. 200—Merchants Co. v. Tracy, 166 So. 340,

175 Miss. 49—Aycock v. Burnett, 128 So. 100, 157 Miss. 510.
 Mo.—Padgett v. Missouri Motor Distributing Corporation, 177 S.W.2d 490—Madison v. Taxi Owners Ass'n, App., 148 S.W.2d 106—Proffitt v. Farmers' Produce Exchange Co-op Ass'n, No. 277, App., 64 S.W.2d 746
 Neb.—Mackechnie v. Lyders, 279 N.W. 328, 134 Neb. 682.
 N.J.—Mulligan v. Clappis, 1 A.2d 414, 121 N.J.Law 119—Horowitz v. Schanerman, 187 A. 346, 117 N.J. Law 314—Smith v. Kirby, 172 A. 41, 113 N.J.Law 10—Lilly v. Duckworth, 140 A. 397, 104 N.J.Law 387—Yohannan v. Benisch, 135 A. 876, 103 N.J. Law 462—Sapienza v. Dobrsky, 158 A. 116, 10 N.J.Misc. 168.
 N.Y.—Buono v. Stewart Motor Trucks, 26 N.Y.S.2d 986, 261 App. Div. 1095—Christie v. B. F. Vineburg, Inc., 19 N.Y.S.2d 252, 259 App.Div. 342—Cutter v. Maxwell Corporation, 10 N.Y.S.2d 394, 256 App.Div. 948, modified on other grounds 24 N.E.2d 129, 281 N.Y. 467—Gerard v. Simpson, 299 N.Y.S. 348, 252 App.Div. 340—Hecker v. Zullo, 280 N.Y.S. 917, 245 App.Div. 788—Herman v. Western Union Telegraph Co., 246 N.Y.S. 609, 231 App.Div. 298—Staunton v. Robbins, 239 N.Y.S. 565, 136 Misc. 197
 N.C.—Misenheimer v. Hayman, 143 S.E. 1, 195 N.C. 613.
 Pa.—Nadler v. Warner Co., 184 A. 3, 321 Pa. 139—Griffith v. V. A. Simrell & Son Co., 155 A. 299, 304 Pa. 165—Vance v. Freedom Oil Works Co., 173 A. 496, 113 Pa.Super. 280.
 R.I.—Deming v. Venditti, 53 A.2d 498, S.C.—Hewitt v. Fleming, 173 S.E. 808, 172 S.C. 266.
 Tenn.—English v. George Cole Motor Co., 111 S.W.2d 386, 21 Tenn.App. 408.
 Tex.—McIver v. Gloria, Civ.App., 163 S.W.2d 890, affirmed 169 S.W.2d 710, 140 Tex. 566—Richmond v. Champagne's Bakery, Civ.App., 149 S.W.2d 304, error dismissed, judgment correct—Richmond v. Champagne's Bakery, Civ.App., 118 S.W.2d 493, error refused—Gregg v. De Shong, Civ.App., 107 S.W.2d 893, error dismissed—Harper v. Highway Motor Freight Lines, Civ.App., 89 S.W.2d 448, error dismissed—England v. Pitts, Civ.App., 56 S.W.2d 493, error dismissed—Universal Transp. Co. v. Ramos, Civ.App., 37

S.W.2d 238, error dismissed—Connor v. Crain, Civ.App., 289 S.W. 712.
 Vt.—Friot v. Jordan, 41 A.2d 146, 114 Vt. 163.
 Wash.—Stam v. Johnson, 17 P.2d 4, 170 Wash. 534, adhered to 23 P.2d 1118, 173 Wash. 700.
 Wis.—Reynolds v. Wargus, 2 N.W.2d 842, 240 Wis. 94.
 42 C.J. p 1242 note 85.
Ownership by husband or wife
 Ga.—Hilsman v. Smith, 146 S.E. 328, 39 Ga.App. 149.
 N.J.—Presslaff v. Gallo, 176 A. 351, 114 N.J. Law 276.
 30 C.J. p 1034 notes 36, 37.
 71. Cal.—Livezey v. Rogers, 88 P.2d 169, 31 Cal.App.2d 412.
 Mass.—Burns v. Winchell, 25 N.E.2d 752, 305 Mass. 276—Murray v. Indursky, 165 N.E. 91, 266 Mass. 220.
 42 C.J. p 1242 note 86.
 72. U.S.—Constitution Pub. Co. v. Dale, C.C.A. Ala., 164 F.2d 210.
 Cal.—Helmuth v. Frame, 115 P.2d 846, 46 Cal.App.2d 372
 Iowa.—McLain v. Armour & Co., 218 N.W. 69, 205 Iowa 343.
 Ky.—Wheeldon v. Regenhart Const. Co., 145 S.W.2d 527, 284 Ky. 603—Spencer's Adm'r v. Fisel, 71 S.W.2d 955, 254 Ky. 503.
 Tex.—Thomas v. Southern Lumber Co., Civ.App., 181 S.W.2d 111.
 42 C.J. p 1242 note 87.
Evidence held insufficient for jury
 Fla.—Fletcher Motor Sales v. Cooney, 27 So.2d 289, 158 Fla. 223.
 Iowa.—Craddock v. Bickelhaupt, 288 N.W. 109, 227 Iowa 202, 135 A.L.R. 474.
 Ky.—Bradley v. Clarke, 293 S.W. 1082, 219 Ky. 438.
 Mass.—Smith v. Rapid Transit, 58 N.E.2d 754, 317 Mass. 469.
 Mo.—Shade v. Brinkopf, App., 119 S.W.2d 444.
 Or.—Hayes v. Ogle, 21 P.2d 223, 143 Or. 1.
 R.I.—Gendron v. Stockley, 34 A.2d 758, 69 R.I. 437.
 S.C.—Craig v. Clearwater Mfg. Co., 200 S.E. 765, 189 S.C. 176.
 Tex.—J. P. Word Transfer Co. v. Lewis, Civ.App., 118 S.W.2d 641—English v. Mills, Civ.App., 299 S.W. 342.
 73. Ala.—Mitchell v. Crandall, 182 So. 93, 28 Ala.App. 233.

defendant's name on a commercial motor vehicle is sufficient to take the question of ownership to the jury,⁷⁴ even though defendant introduces uncontradicted evidence that he is not the owner,⁷⁵ unless the evidence is positive and unequivocal and clearly establishes the fact of nonownership by defendant.⁷⁶

License plates or registration. Evidence of defendant's ownership of the license plates on the motor vehicle,⁷⁷ or registration of the vehicle in his name,⁷⁸ at the time of the accident is sufficient to take to the jury the question whether defendant owned the vehicle at that time, even though the presumption or inference arising from the ownership of the license plates,⁷⁹ or registration of the vehicle,⁸⁰ is rebutted by uncontradicted oral testimony of defendant's witnesses. A question for the jury is not presented if the presumption or inference from the ownership of the license plates,⁸¹ or registration of the vehicle,⁸² is rebutted by positive, uncontradicted, and conclusive proof.

§ 525. — Joint or Several Liability

On conflicting evidence, the question of several or joint liability is for the jury.

74. Cal.—Nash v. Wright, 186 P.2d 686, 82 Cal.App.2d 467.

Pa.—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Readshaw v. Montgomery, 189 A. 135, 313 Pa. 206—Talarico v. Baker Office Furniture Co., 149 A. 883, 298 Pa. 211—Hartig v. American Ice Co., 137 A. 867, 290 Pa. 21.

Tex.—Mrs. Baird's Bakery v. Davis, Civ.App., 54 S.W.2d 1031.

75. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 801, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Young v. Wilky Carrier Corporation, D.C.Pa., 54 F.Supp. 912, affirmed, C.C.A., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Pa.—Sweeney v. City of Pittsburgh, 34 A.2d 67, 348 Pa. 80—Sefton v. Valley Dairy Co., 28 A.2d 313, 345 Pa. 324—Talarico v. Baker Office Furniture Co., 149 A. 883, 298 Pa. 211—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538.

76. Mo.—Arnold v. Haskins, 147 S.W.2d 469, 347 Mo. 320—Frohoff v. Adams, App., 108 S.W.2d 615.

Nonownership held not conclusively shown

Pa.—Talarico v. Baker Office Furniture Co., 149 A. 883, 298 Pa. 211.

77. Pa.—Conley v. Mervis, 188 A. 350, 324 Pa. 577, 108 A.L.R. 160.

78. Minn.—Flaugh v. Egan Chevrolet, 279 N.W. 582, 202 Minn. 615. Tenn.—Woodfin v. Insel, 13 Tenn. App. 493.

79. Pa.—Frew v. Barto, 26 A.2d 905, 345 Pa. 217—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538—Walker v. Hornbeck, Com.Pl., 45 Lack. Jur. 257—Seman v. Schwartz, Com.Pl., 4 Sch.Reg. 394, 51 York Leg. Rec. 143.

80. Tenn.—Williams v. Bass, 8 Tenn. App. 482.

81. **Evidence held not conclusive**
Idaho.—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.

82. Tenn.—Greer v. McKee, 13 Tenn. App. 625—Williams v. Bass, 8 Tenn. App. 482.

Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520.

Evidence held not conclusive
Minn.—Flaugh v. Egan Chevrolet, 279 N.W. 582, 202 Minn. 615.

83. Ill.—Van Meter v. Gurney, 240 Ill.App. 165.

Mich.—Fitzcharles v. Mayer, 278 N.W. 788, 284 Mich. 122.

S.D.—Krumvieda v. Hammond, 27 N.W.2d 583.

42 C.J. p 1242 note 88.

Question of concurrent negligence as proximate cause see supra § 522.

Where there is conflicting evidence as to the concurrent negligence of several defendants,⁸³ as to whether the negligence of each or all constitutes a proximate cause of plaintiff's injury,⁸⁴ as to whether several defendants had a joint power of control over the driver of the vehicle,⁸⁵ or as to whether the several defendants were engaged in a common enterprise,⁸⁶ the question of several or joint liability is for the jury under proper instructions by the court. It is for the jury to determine the liability of one of a number of defendants where there is some evidence in the case tending to show his control of the driving by another.⁸⁷

Where no substantial evidence to support joint liability is presented, plaintiff is not entitled to have the question of joint liability submitted to the jury.⁸⁸

§ 526. — Negligence

- a. In general
- b. Willful, wanton, or reckless acts
- c. Equipment and conditions of vehicle; lights
- d. Specific acts
- e. Conduct generally in particular situations

84. N.Y.—Edick v. Davenport, 218 N.Y.S. 120, 218 App.Div. 198

Wash.—Thornton v. Eneerth, 30 P.2d 951, 177 Wash. 1.

85. Pa.—Kissell v. Motor Age Transit Lines, 53 A.2d 593, 357 Pa. 204.

86. Cal.—Di Vita v. Martinelli, 11 P.2d 423, 123 Cal.App. 392.

Mo.—Kneezle v. Scott County Milling Co., App., 113 S.W.2d 817.

Ohio.—Bennett v. Sinclair Refining Co., 57 N.E.2d 776, 144 Ohio St. 139, 42 C.J. p 1242 note 90.

87. Mass.—Hutchings v. Vacca, 112 N.E. 652, 224 Mass. 269.

88. Ky.—C. L. & L. Motor Express Co. v. Achenbach, 82 S.W.2d 335, 259 Ky. 228.

Md.—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299.

Injury caused by guest opening door

Evidence that driver of motor vehicle and his wife were taking occupants of back seat of vehicle for a ride, at time one of such occupants opened back door which struck pedestrian, was insufficient to present jury question whether driver and wife were engaged in a joint mission or a joint enterprise with occupant opening door, so as to make the driver jointly liable with the occupant, since status of parties was that of host and guest.—Landers v. Overaker, Tex.Civ.App., 141 S.W.2d 451, error dismissed, judgment correct.

- f. Conduct toward particular persons
- g. Injuries to persons or property not upon highway
- h. Injuries to animals
- i. Injuries resulting from articles projecting, falling, or thrown from vehicle
- j. Injuries caused by vehicles used in saving life or property or enforcing law

- k. Liability for acts of third person
- l. Competency of operator; intoxication

a. In General

The negligence of the defendant in the operation of a motor vehicle ordinarily is a question of fact for the jury or for the trial court in actions tried without a jury.

The question of defendant's negligence in the operation of his motor vehicle is ordinarily one of fact for the jury or, in trials without a jury, for the court.⁸⁹ Accordingly, negligence is a ques-

89. U.S.—Constitution Pub. Co. v. Dale, C.C.A.Ala., 164 F.2d 210—Roedegir v. Phillips, C.C.A.N.C., 85 F.2d 995—Sampson v. Channell, D.C.Mass., 27 F.Supp. 213, second case, new trial denied 27 F.Supp. 213, first case, affirmed, C.C.A., Channell v. Sampson, 108 F.2d 315, vacated on other grounds Sampson v. Channell, 110 F.2d 754, 128 A.L.R. 394, certiorari denied Channell v. Sampson, 60 S.Ct. 1099, 310 U.S. 650, 84 L.Ed. 1415.
- Ala.—Crotwell v. Cowan, 184 So. 195, 236 Ala. 578—Rochelle v. Lude, 180 So. 257, 235 Ala. 596—Britling Cafeteria Co. v. Irwin, 159 So. 228, 229 Ala. 687.
- Cal.—Siebel v. Shapiro, 137 P.2d 56, 58 Cal.App.2d 509—Morales v. L. W. Blinn Lumber Co., 33 P.2d 16, 139 Cal.App. 53—Dodd v. Gifford, 16 P.2d 279, 127 Cal.App. 629—Di Vita v. Martinelli, 11 P.2d 423, 123 Cal.App. 392—Shaver v. United Parcel Service, 266 P. 606, 90 Cal. App. 764—Lawrence v. Butler, 249 P. 840, 79 Cal.App. 436—Duggan v. Forrester, 249 P. 533, 79 Cal.App. 339.
- Conn.—Anderson v. Colucci, 163 A. 610, 116 Conn. 67—Dole v. Lublin, 153 A. 856, 112 Conn. 603—Wrenn v. Allen, 148 A. 132, 110 Conn. 697—Camarotta v. Kling, 143 A. 881, 108 Conn. 602.
- D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.
- Fla.—Palmer v. McCready, 9 So.2d 722, 151 Fla. 340.
- Ga.—Tallman v. Green, 41 S.E.2d 339, 74 Ga.App. 731—Thrash v. La-Grange Coach Co., 38 S.E.2d 814, 74 Ga.App. 81.
- Idaho—Asumendi v. Ferguson, 65 P. 2d 713, 57 Idaho 450.
- Ill.—Holgard v. Yellow Cab Co., 150 N.E. 911, 320 Ill. 317—Smithers v. Henriquez, 4 N.E.2d 793, 287 Ill. App. 95, affirmed 15 N.E.2d 499, 368 Ill. 588—King v. Meeker, 269 Ill. App. 67—Gordon v. Current, 263 Ill. App. 435—City of Galena v. Alt-filisch, 245 Ill.App. 454—Elliot v. Trandel, 227 Ill.App. 359.
- Ind.—Indiana Ins. Co. v. Handlon, 24 N.E.2d 1003, 216 Ind. 442—Keltner v. Patton, 185 N.E. 270, 204 Ind. 550—Daugherty v. Hunt, 38 N.E.2d 250, 110 Ind.App. 264—Clevenger v. Kern, 197 N.E. 731, 100 Ind.App. 581.
- Iowa.—Huffman v. King, 268 N.W. 144, 222 Iowa 150—Schuster v. Gillispie, 251 N.W. 735, 217 Iowa 386—Dickeson v. Lzicar, 225 N.W. 406, 208 Iowa 275—Stilson v. Ellis, 225 N.W. 346, 208 Iowa 1157—Olson v. Shafer, 221 N.W. 949, 207 Iowa 1001—Williams v. Seibel, 207 N.W. 760.
- Kan.—Drennan v. Pennsylvania Cas. Co., 176 P.2d 522, 162 Kan. 286.
- Ky.—Danville Cab Co. v. Hendren, 201 S.W.2d 561, 304 Ky. 528—Elliott v. Drury's Adm'r, 200 S.W.2d 141, 304 Ky. 93—State Highway Commission v. Hall, 119 S.W.2d 666, 274 Ky. 586—Wilhelmi v. Berns, 119 S.W.2d 625, 274 Ky. 618—Huber & Huber Motor Express v. Martin's Adm'r, 96 S.W.2d 595, 266 Ky. 228—Robinson v. O'Keefe's Ex'r, 66 S.W.2d 37, 253 Ky. 256—Park v. Schell, 295 S.W. 161, 220 Ky. 317.
- La.—Honeycutt v. Carver, App., 25 So.2d 99.
- Me.—Jenkins v. Case, 131 A. 573, 125 Me. 508.
- Mass.—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 297—Minnehan v. Iiland, 180 N.E. 295, 276 Mass. 518—Sutherland v. Feinberg, 158 N.E. 783, 261 Mass. 394—Dooley v. Laird, 155 N.E. 599, 258 Mass. 517.
- Minn.—Blom v. McNeal, 272 N.W. 599, 199 Minn. 506—Jenson v. Gle-maker, 263 N.W. 624, 195 Minn. 556—Nolan v. Newfert, 229 N.W. 97, 179 Minn. 293—Weirick v. Thornton Bros. Co., 210 N.W. 399, 168 Minn. 465.
- Mo.—Holmes v. McNeil, 204 S.W.2d 303, 356 Mo. 846—Smithers v. Barker, App., 97 S.W.2d 121, reversed on other grounds 111 S.W.2d 47, 341 Mo. 1017—Peck v. W. F. Williamson Advertising Service in St. Louis, App., 68 S.W.2d 847—Ford v. Pieper, App., 24 S.W.2d 1054—Wilson v. Spuhler, App., 20 S.W.2d 556—Snyder v. Murray, 17 S.W.2d 639, 223 Mo.App. 671, followed in 17 S.W.2d 646.
- Neb.—Baumann v. Hutchinson, 245 N.W. 596, 124 Neb. 188—Schrage v. Miller, 242 N.W. 649, 123 Neb. 266.
- N.H.—Greenie v. Nashua Buick Co., 158 A. 817, 85 N.H. 316.
- N.J.—Rynar v. Lincoln Transit Co., 30 A.2d 406, 129 N.J.Law 525—Willett v. Heyer, 140 A. 411, 104 N.J.Law 391—Padula v. Public Service Co-ordinated Transport, 165 A. 123, 11 N.J.Misc. 69—Ravese v. Hock, 142 A. 343, 6 N.J.Misc. 629—Kelly v. Johnson, 137 A. 849, 5 N.J.Misc. 665.
- N.Y.—Kotcher v. Gilbert, 67 N.Y.S.2d 144, 271 App.Div. 899—Steinberg v. Socony-Vacuum Oil Co., 66 N.Y.S.2d 471, 271 App.Div. 882, appeal denied 67 N.Y.S.2d 711, 271 App.Div. 928—Macri v. Dalen, 65 N.Y.S.2d 675, 271 App.Div. 831—Crellin v. Van Duzer, 55 N.Y.S.2d 590, 269 App.Div. 806, followed in 56 N.Y.S.2d 403, 269 App.Div. 807—Wood v. Pergament, 46 N.Y.S.2d 433, 267 App.Div. 875—Merritt v. Newman, 46 N.Y.S.2d 34, 267 App.Div. 855, appeal denied 49 N.Y.S.2d 270, 267 App.Div. 1034—Goes v. Gifford Sales & Service, 40 N.Y.S.2d 912, 265 App.Div. 796, affirmed 53 N.E.2d 959, 291 N.Y. 744—Murray v. Brainard, 40 N.Y.S.2d 52, 266 App.Div. 698—De Santes v. Mural Transp. Corporation, 19 N.Y.S.2d 189, 259 App.Div. 836, reargument denied 20 N.Y.S.2d 1018, 259 App.Div. 1012, appeal dismissed 29 N.E.2d 657, 284 N.Y. 577, motion denied 29 N.E.2d 662, 284 N.Y. 584 and 32 N.E.2d 819, 285 N.Y. 518, affirmed 34 N.E.2d 486, 285 N.Y. 711—Baumgart v. Pinewood, 7 N.Y.S.2d 74, 255 App.Div. 826—Volberg v. Hegeman Farms Co., 1 N.Y.S.2d 547, 253 App.Div. 839—King v. Latham, 290 N.Y.S. 381, 248 App.Div. 933—Estes v. Slater, 289 N.Y.S. 485, 248 App.Div. 805—Hogel v. Bee Line, 284 N.Y.S. 848, 246 App.Div. 833—Van Wagenen v. Adams, 280 N.Y.S. 102, 244 App.Div. 878—Euvrard v. Thorn, 275 N.Y.S. 585, 243 App.Div. 540.
- N.C.—Stroud v. Southern Oil Transp. Co., 3 S.E.2d 297, 215 N.C. 726, 122 A.L.R. 1018—Murphy v. Asheville-Knoxville Coach Co., 156 S.E. 550, 200 N.C. 92—Fowler v. Underwood, 137 S.E. 155, 193 N.C. 402.
- N.D.—Kohler v. Stephens, 24 N.W.2d 64, 74 N.D. 655—Newton v. Gretter, 236 N.W. 254, 60 N.D. 635.
- Ohio.—Manchester v. Starr Transfer Co., App., 67 N.E.2d 133—Ohm v.

tion of fact where there is a conflict in the evidence⁹⁰ or where the evidence is such that reasonable men may differ in their conclusions therefrom.⁹¹ The weight of the evidence and the credibility of the witnesses are also for the jury.⁹² If the facts proved establish the more reasonable probability that defendant has been guilty of actionable negligence, the case may not be withdrawn from the jury, although the possibility of

accident may arise on the evidence.⁹³ Where the evidence is sufficient to go to the jury on one or more grounds of negligence, it is proper to overrule defendant's demurrer to the evidence at the close of the whole case.⁹⁴

On the other hand, there must be evidence legally sufficient to prove defendant's negligence before the case may be submitted to the jury,⁹⁵ and

Miller, 167 N.E. 482, 31 Ohio App. 446.

Okl.—Gibson Oil Co. v. Westbrooke, 16 P.2d 127, 160 Okl. 26

Or.—Cockerham v. Potts, 20 P.2d 423, 143 Or. 80—Peters v. Johnson, 264 P. 459, 124 Or. 237.

Pa.—Van Tine v. Cornelius, 50 A.2d 299, 355 Pa. 584—Musgrave v. Slutsky, 133 A. 795, 286 Pa. 298—Masters v. Philadelphia Transp. Co., 50 A.2d 532, 160 Pa. Super. 178—Wenrich v. Laysor, Com.Pl., 39 Berks Co.L.J. 183—Morris v. Emmons, Com.Pl., 32 Del.Co. 389—Flowers v. Dolan, Com.Pl., 6 Fay L.J. 217, affirmed 38 A.2d 429, 155 Pa. Super. 378—Fahringer v. Trembath, Com.Pl., 38 Luz. Leg. Reg. 226—Havanas v. Citro, Com.Pl., 18 Wash. Co. 125.

R.I.—Parenteau v. Parenteau, 153 A. 872, 51 R.I. 263.

Tenn.—Elmore v. Thompson, 14 Tenn. App. 78—Goebel v. Fleming, 13 Tenn. App. 473—Kennedy v. Bruce, 5 Tenn. App. 583—Stacy v. Keller, 1 Tenn. App. 80.

Tex.—American Asphalt Co. v. O'Rear, Civ. App., 41 S.W.2d 322—Cohen v. Hill, Civ. App., 286 S.W. 661.

Va.—Twyman v. Adkins, 191 S.E. 615, 168 Va. 456—Harris v. Royer, 182 S.E. 276, 165 Va. 461.

Wash.—Robinson v. Ebert, 39 P.2d 992, 130 Wash. 387—Webber v. Park Auto Transp. Co., 244 P. 718, 138 Wash. 325, 47 A.L.R. 590.

Wis.—Ott v. Tschantz, 300 N.W. 766, 239 Wis. 47.

42 C.J. p 1242 note 96.

Questions of law and fact as to defendant's negligence generally see the C.J.S. title Negligence §§ 252, 253, also 45 C.J. p 1279 note 28 et seq.

Negligence is peculiarly jury question in actions for injuries in highway collisions between motor vehicles.—Fox v. McCullough-Gentle Trucking Co., 149 A. 826, 8 N.J. Misc. 282.

Presence or absence of reasonable care is predominantly a jury question—Virginia Ave. Coal Co. v. Bailey, 205 S.W.2d 11, 185 Tenn. 242.

Except in plain and undisputable cases negligence is question for jury.—Speed Oil Co. v. Jones, 1 S.E.2d 760, 59 Ga. App. 625.

Effect of former trial

Where on appeal the evidence at a former trial has been held to present a question of fact for the jury, a submission of the case to the jury at the second trial is required where the evidence is practically the same as at the first.—Clark v. Sweaney, 97 S.E. 474, 176 N.C. 529

Injury to person effecting rescue

Where plaintiff went to rescue of driver and passenger involved in automobile accident, in response to driver's plea for help, and was injured in effecting rescue, whether driver in causing accident was negligent was for jury.—Brugh v. Bogle, 16 N.W.2d 668, 310 Mich. 74, 158 A.L.R. 184

90. Ala.—Atlantic Pacific Stages v. Yandle, 140 So. 603, 224 Ala. 481—Ruffin Coal & Transfer Co. v. Rich, 108 So. 600, 214 Ala. 622—Mobile Pure Milk Co. v. Coleman, 161 So. 826, 26 Ala. App. 402, certiorari denied 161 So. 829, 230 Ala. 432

Ark.—Searcy Wholesale Grocer Co. v. Baltz, 192 S.W.2d 111, 209 Ark. 620—Lewis v. Prescott, 99 S.W.2d 590, 193 Ark. 379

Cal.—Ketchum v. Pattee, 98 P.2d 1051, 37 Cal. App.2d 122.

D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388

Fla.—Baggett v. Davis, 169 So. 372, 124 Fla. 701

Ga.—Bell v. Lewis, 38 S.E.2d 686, 74 Ga. App. 26

Ill.—Bandet v. Burns, 266 Ill. App. 382

Miss.—Citizens' Oil Co. v. McCallum, 106 So. 443, 140 Miss. 764.

N.H.—Greenle v. Nashua Buick Co., 158 A. 817, 85 N.H. 316

N.J.—Terminal Cab Co. v. Mikolasy, 25 A.2d 253, 128 N.J. Law 275.

N.C.—Sisson v. Royster, 45 S.E.2d 351, 228 N.C. 298.

Okl.—Wagner v. McKernan, 177 P. 2d 511, 198 Okl. 425.

Pa.—Shoemaker v. Williams, 200 A. 255, 131 Pa. Super. 546—Snyder v. Coleman, Com.Pl., 26 Erie Co. 234—Graham v. Lee, Com.Pl., 23 Erie Co. 353.

R.I.—Douglas v. Silvia, 180 A. 359, 55 R.I. 260—Bennett v. E. Rosen Co., 139 A. 301.

SC.—Foster v. Tate, 162 S.E. 456, 164 S.C. 432.

Wash.—Reamer v. Walter H. C. Griffiths, Inc., 291 P. 714, 158 Wash. 665.

42 C.J. p 1243 note 97.

91. Ariz.—Dixon v. Alabama Freight Co., 112 P.2d 584, 57 Ariz. 173.

Ill.—Reidel v. Camp, 37 N.E.2d 579, 311 Ill. App. 656—McCarthy v. O'H. Yates & Co., 14 N.E.2d 254, 294 Ill. App. 474.

Me.—King v. Wolf Grocery Co., 137 A. 62, 126 Me. 202

Mo.—Edwards v. Bell, App., 103 S.W.2d 315, hearing denied 123 S.W.2d 83, 343 Mo. 824—Snyder v. Murray, 17 S.W.2d 639, 223 Mo. App. 671, followed in 17 S.W.2d 646.

Neb.—Hardung v. Sheldon, 275 N.W. 586, 133 Neb. 427

N.J.—Mulligan v. Clappis, 1 A.2d 414, 121 N.J. Law 119.

N.D.—Trihub v. City of Minot, 23 N.W.2d 753, 74 N.D. 552

Pa.—Vunak v. Walters, 43 A.2d 526, 157 Pa. Super. 660.

42 C.J. p 1243 note 98

92. U.S.—Speich v. Cromley, C.C.A. Pa., 94 P.2d 543

Mo.—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379.

Pa.—Bricker v. Gardner, Com.Pl., 56 Dauph Co. 384, affirmed 48 A.2d 209, 355 Pa. 35

Violation of rule of road is a material fact for the jury to consider along with all evidence bearing on the question of negligence—Dawson v. Bertolini, 38 A.2d 765, 70 R.I. 325.

93. N.C.—Etheridge v. Etheridge, 24 S.E.2d 477, 222 N.C. 616.

94. Mo.—Swain v. Anders, 163 S.W.2d 1045, 349 Mo. 963.

95. Ariz.—Seiler v. Whiting, 84 P.2d 452, 52 Ariz. 542

Cal.—Gouzeau v. Pacific Greyhound Lines, 169 P.2d 398, 74 Cal. App. 2d 794.

Conn.—Mlynar v. A. H. Merriman & Sons, 159 A. 658, 114 Conn. 647

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355—Thompson v. Sun Cab Co., 184 A. 576, 170 Md. 299.

N.Y.—Gigli v. Shapiro, 16 N.Y.S.2d 782.

N.C.—Mitchell v. Melts, 18 S.E.2d 406, 220 N.C. 793—Grimes v. Carolina Coach Co., 166 S.E. 599, 203 N.C. 605.

if the evidence is legally insufficient the court may direct a verdict for defendant,⁹⁶ sustain a demurrer to the evidence,⁹⁷ or nonsuit plaintiff.⁹⁸ Evidence which establishes no more than a conjecture or possibility of negligence is insufficient to require submission to the jury.⁹⁹ The negligence of defendant should not be submitted to the jury where the evidence shows plaintiff's contributory negligence as a matter of law.¹

Where the facts are undisputed and the evidence is reasonably susceptible of but a single inference, the question of defendant's negligence is one of law for the court.² Generally, however, it cannot be assumed as a matter of law that certain circumstances do or do not constitute negligence on the part of a motorist.³ Although the case must be very clear to warrant the court in holding a driver to be negligent as a matter of

law,⁴ where there is no conflict in the evidence and the evidence proves a clear case of negligence on the part of the operator of an automobile, and where there is no evidence of contributory negligence, it has been held that it is the duty of the court to adjudge a recovery as a matter of law.⁵

The rule that, when an automobile accident is one which ordinarily would not have happened if the motorist had used proper care, the accident affords some evidence that it arose from want of proper care, considered supra § 511, permits the jury, but not the court, to draw an inference of negligence.⁶

Violation of statute or ordinance generally. The violation of a statute or ordinance regulating the operation of a motor vehicle ordinarily does not constitute negligence as a matter of law,⁷ but

Pa.—Bloom v. Bailey, 141 A. 150, 292 Pa. 348, 57 A.L.R. 585—Diggan v. York-Ruffalo Motor Express, Com.Pl., 13 Northumb.Leg.J. 381.

Evidence as to marks found on pavement after collision between automobile and truck was insufficient to take the question of truck driver's negligence to jury—Powell v. Commercial Standard Ins. Co., 170 S.W. 2d 857, 294 Ky. 7.

96. U.S.—Wickham v. Horlacher Delivery Service, C.C.A.Pa., 130 F.2d 356.

Ark.—Wilson v. Holloway, 208 S.W. 2d 178, 212 Ark. 878—Sallee v. Shoptaw, 198 S.W.2d 842, 210 Ark. 600.

Cal.—Dungey v. Pacific Electric Ry. Co., 117 P.2d 375, 47 Cal.App.2d 94.

Colo.—Denver-Los Angeles Trucking Co. v. Ward, 164 P.2d 730, 114 Colo. 348.

N.Y.—Hardy v. Queensboro Gas & Electric Co., 24 N.Y.S.2d 347, 260 App.Div. 1032.

Ohio.—Focht v. Justis, 77 N.E.2d 506, 81 Ohio App. 297—Brazis v. National Telephone Supply Co., App. 48 N.E.2d 873—Czerwinski v. Edgar T. Ward Sons Co., 154 N.E. 361, 23 Ohio App. 304.

If no reasonable person can draw conclusion that defendant was negligent, directed verdict for defendant is proper.—Dixon v. Alabama Freight Co., 112 P.2d 584, 57 Ariz. 178.

Cross petition

Where evidence in action for injuries sustained in automobile collision, wherein defendant filed a cross petition seeking damages for injuries, established that defendant was guilty of negligence more than slight, court had duty to direct verdict against defendant on his cross

petition—Stocker v. Roach, 300 N.W. 627, 140 Neb. 561.

Directed verdict held properly refused

Ala.—Crotwell v. Cowan, 184 So. 195, 236 Ala. 578.

Ill.—Gleason v. Cunningham, 44 N.E. 2d 940, 316 Ill.App. 286.

Tenn.—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn.App. 379.

97. Okl.—Smith v. Clark, 256 P. 36, 125 Okl. 18.

General demurrer to plaintiff's evidence, offered at close of case, is properly overruled where plaintiff has made out case for jury without regard to election by plaintiff of issues on which case is to be submitted.—Benzel v. Anishanzlin, Mo.App., 297 S.W. 180.

98. Ga.—May v. Ahelman, 179 S.E. 221, 50 Ga.App. 521.

N.C.—Horton v. Ross, 155 S.E. 925, 199 N.C. 630.

Pa.—Franzen v. Goodman, 190 A. 888, 325 Pa. 518.

Wis.—Kaiser v. Streich, 26 N.W.2d 160, 249 Wis. 615.

99. Miss.—Conley v. McCommon, 33 So. 2d 306.

1. Cal.—Hoppe v. Bradshaw, 108 P. 2d 947, 42 Cal.App.2d 314.

Mo.—Woods v. Moore, App., 48 S.W.2d 202.

Ohio.—Focht v. Justis, 77 N.E.2d 506, 81 Ohio App. 297.

Contributory negligence as question of law or fact see infra § 527.

2. Mich.—Bishop v. Gaudio, 248 N.W. 551, 263 Mich. 65.

N.D.—Trihub v. City of Minot, 23 N.W.2d 753, 74 N.D. 552.

Tex.—Texas Electric Service Co. v. Hawthorne, Civ.App., 135 S.W.2d

531, error dismissed, judgment correct.

42 C.J. p. 1242 note 95.

Facts disproving negligence

Testimony that defendant's automobile went but a short distance after striking plaintiff does not, as a matter of law, disprove defendant's negligence—Motisi v. Brown, 232 N.Y.S. 540, 225 App.Div. 821.

3. Va.—Holland v. Edelblute, 20 S.E.2d 506, 179 Va. 685.

4. RI.—Parenteau v. Parenteau, 153 A. 872, 51 R.I. 263.

5. U.S.—Hawthorne v. Eckerson Co., C.C.A.Vt., 77 F.2d 844.

Ill.—Harrison v. Bingham, 267 Ill. App. 417, affirmed 182 N.E. 750, 350 Ill. 269.

Ky.—Hollis v. Bourne, 167 S.W.2d 50, 232 Ky. 578—Puckering v. Simpkins, 111 S.W.2d 650, 271 Ky. 288.

Mich.—Bishop v. Gaudio, 248 N.W. 551, 263 Mich. 65.

N.J.—Hurr v. Metropolitan Distributors, 56 A.2d 882, 136 N.J.Law 583.

Ohio.—Marchal v. Frankman, App., 58 N.E.2d 679.

Pa.—Chapman v. Weimar, 195 A. 473, 129 Pa. Super. 373.

Wis.—Leanna v. Goethe, 300 N.W. 490, 238 Wis. 616—Neuser v. Thelen, 244 N.W. 801, 209 Wis. 262.

followed in Neuser v. Thelen, 244 N.W. 804, 209 Wis. 271.

6. N.C.—Etheridge v. Etheridge, 24 S.E.2d 477, 222 N.C. 616.

7. Ark.—Shipp v. Missouri Pac. Transp. Co., 122 S.W.2d 593, 197 Ark. 104.

La.—Bourgeois v. Longman, App., 199 So. 142.

Neb.—Dickman v. Hackney, 31 N.W. 2d 232, 149 Neb. 367—Anderson v. Robbins Incubator Co., 8 N.W.2d

446, 143 Neb. 40.

whether the violation in a given case is or is not negligence is a matter to be determined by the jury.⁸ The neglect of duty imposed by a statute or ordinance is evidence of negligence sufficient to require the question of negligence to be submitted to the jury.⁹ It has been held, however, that where the violation of a statute or ordinance is found by the jury or is undisputed, defendant is deemed guilty of negligence as a matter of law.¹⁰ On conflicting evidence it is for the jury to determine whether defendant violated a statute or ordinance regulating the operation of motor vehicles.¹¹ The question of the applicability of a motor vehicle statute to the case should not be left to the jury.¹² Where a statute declaring what care shall be exercised under certain circumstances is claimed to be applicable, the sole

question is whether the conduct in question complies with the statute and the jury may not substitute its own conclusion.¹³

b. Willful, Wanton, or Reckless Acts

On conflicting evidence or where more than one inference reasonably may be drawn from the evidence, it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was guilty of willful, wanton, or reckless acts.

Where the evidence is legally sufficient and is conflicting or different inferences reasonably may be drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of willfulness or wantonness,¹⁴ or whether the defendant in the oper-

N.J.—Costanza v. Cavanaugh, 35 A. 2d 612, 131 N.J. Law 175.

N.Y.—Roles v. John A. Schwartz, Inc., 278 N.Y.S. 307, 244 App. Div. 729—Walker v. Bradt, 233 N.Y.S. 388, 225 App. Div. 415.

Violation of statute or ordinance as negligence per se generally see the C.J.S. title Negligence § 19, also 45 C.J. p 720 note 75 et seq.

Failure to comply literally with all provisions of statute relating to method of operation of automobile does not constitute negligence per se—Grunsfeld v. Yenter, 69 P.2d 309, 100 Colo. 570.

S. U.S.—Sheehan v. Nims, C.C.A.Vt., 75 F.2d 293.

Fla.—Allen v. Hooper, 171 So. 513, 126 Fla. 458.

Mass.—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326, applying Florida law.

Mo.—Heibel v. Ahrens, 55 S.W.2d 473.

N.J.—Costanza v. Cavanaugh, 35 A. 2d 612, 131 N.J. Law 175—MacDonald v. Weart, 150 A. 578, 8 N.J. Misc. 445.

N.Y.—Schaeffer v. Caldwell, 78 N.Y. S.2d 652, 273 App. Div. 263—Walker v. Bradt, 233 N.Y.S. 388, 225 App. Div. 415.

N.C.—Sherwood v. Southeastern Express Co., 173 S.E. 605, 206 N.C. 243.

Jurors determine degree of blameworthiness in violating statute respecting operating motor vehicle so as to endanger lives.—Dzura v. Phillips, 175 N.E. 629, 275 Mass. 283.

9. Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

Tenn.—Stearns v. Williams, 12 Tenn. App. 427.

"Accurately speaking, where the statute or ordinance has fixed the

standard of care, the failure to observe such standard is negligence, and when in the trial of a case—the other elements being proven—it is shown that the defendant failed to observe the standard of care thus fixed, a case is made for the jury in the first instance. In such case, the defendant may offer proof excusing his failure to observe such legal standard of care. If, however, he fails to furnish proof of such legal excuse, then it is accurate to say that negligence is established as a matter of law."—Kisling v. Thierman, 243 N.W. 552, 554, 214 Iowa 911.

10. U.S.—Van Wie v. U. S., D.C. Iowa, 77 F. Supp. 22.

Iowa—Kisling v. Thierman, 243 N.W. 552, 214 Iowa 911.

Tex.—Davis v. Estes, Com App., 44 S.W.2d 952.

Generally constitutes negligence Cal.—Ferguson v. Nakahara, 110 P. 2d 1091, 43 Cal. App. 2d 435.

11. Mo.—Roland v. Anderson, App., 282 S.W. 752.

Right of way

Whether motorist violated statute with respect to right of way generally is one of fact, but evidence may be such that court will be warranted in declaring one or the other driver guilty of negligence as matter of law.—Van Zandt v. Goodman, 179 P.2d 724, 181 Or. 80.

12. N.Y.—Roles v. John A. Schwartz, Inc., 278 N.Y.S. 307, 244 App. Div. 729.

13. Wis.—Klitzka v. Wheeler Transp. Co., 279 N.W. 611, 228 Wis. 28.

14. U.S.—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8, certiorari denied Milburn v. Heald, 62 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1754, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.

Ed. 1754—M. & M. Transp. Co. v. Cochran, C.C.A.R.I., 100 F.2d 207.

Ala.—Alabama Power Co. v. Buck, 35 So.2d 355—Roberts v. McCall, 17 So.2d 159, 245 Ala. 359—Seitz v. Heep, 10 So.2d 148, 243 Ala. 372—Barrett v. McFerren, 165 So. 226, 231 Ala. 382—Daniel v. Motes, 153 So. 727, 228 Ala. 454—Newton v. Altman, 150 So. 698, 227 Ala. 465—Caruth v. Sparkman, 147 So. 884, 226 Ala. 594—Faulkner v. Gilchrist, 143 So. 803, 225 Ala. 391—Cannon v. Scarborough, 137 So. 900, 223 Ala. 674—Allison Coal & Transfer Co. v. Davis, 129 So. 9, 221 Ala. 334.

Ariz.—Womack v. Preach, 162 P.2d 280, 63 Ariz. 390, opinion supplemented 165 P.2d 657, 64 Ariz. 61.

Ark.—Miller v. Blanton, 210 S.W.2d 293.

Cal.—Frank v. Myers, 60 P.2d 144, 16 Cal. App. 2d 16.

Ill.—Schneiderman v. Interstate Transit Lines, 69 N.E.2d 293, 394 Ill. 569—Mower v. Williams, 78 N.E.2d 529, 334 Ill. App. 16—Winson v. Fischer, 77 N.E.2d 48, 333 Ill. App. 222—Baumgardner v. Boyer, 51 N.E.2d 784, 320 Ill. App. 438—Styblo v. McNeil, 45 N.E.2d 1011, 317 Ill. App. 316—Drefahl v. Hinchcliff, 33 N.E.2d 898, 310 Ill. App. 110—Henderson v. Johnson, 21 N.E.2d 42, 300 Ill. App. 613—City of Lake Forest v. Janowitz, 14 N.E.2d 894, 295 Ill. App. 289—McCarty v. O. H. Yates & Co., 14 N.E.2d 254, 294 Ill. App. 474—Wedel v. Calloway, 13 N.E.2d 87, 293 Ill. App. 632—Brown v. Woodcock, 12 N.E.2d 911, 293 Ill. App. 629—Roberts v. Calloway, 11 N.E.2d 289, 292 Ill. App. 638—Schoenbacher v. Kadetsky, 7 N.E.2d 768, 290 Ill. App. 28—Stout v. Skinner, 283 Ill. App. 330—Browder v. Beckman, 275 Ill. App. 193—Robeson v. Greyhound Lines, 257 Ill. App. 278—Mantonya v. Wil-

ation was guilty of an intentional wrong,¹⁵ or gross negligence,¹⁶ or recklessness,¹⁷ or needless and reckless disregard of the rights or safety of others.¹⁸

The evidence must be legally sufficient to justify submission to the jury¹⁹ and in various cases the evidence has been held insufficient to warrant or require submission to the jury of questions with respect to defendant's willfulness or wantonness²⁰

bur Lumber Co., 251 Ill.App. 364—
Killilay v. Hawk, 250 Ill.App. 222.
Mass.—Isaacson v. Boston, W. & N.
Y. St. Ry. Co., 180 N.E. 118, 278
Mass. 378—Leonard v. Conquest,
174 N.E. 677, 274 Mass. 347.
Miss.—Reid v. Halpin, 178 So. 88.
Mo.—Agee v. Herring, 298 S.W. 250,
221 Mo App. 1022.

Ohio—Tighe v. Diamond, 80 N.E.2d
122, 149 Ohio St. 520—Reserve
Trucking Co. v. Fairchild, 191 N.E.
745, 128 Ohio St. 519.

S.C.—Lawson v. Duncan, 174 S.E.
495, 173 S.C. 34—Dickson v. Inter-
Carolinas Motor Bus Co., 159 S.E.
625, 161 S.C. 297—Bowers v. Carolina
Public Service Co., 145 S.E.
790, 148 S.C. 161.

Injuries to guests see *infra* subdivision
f (11) of this section.
Willful or wanton acts generally see
supra § 258.

**Whether violation of statute was
evidence of willfulness** was fact to
be considered with other facts where
occupant was injured, and if more
than one inference could reasonably
be drawn from testimony issue was
for jury—Lawson v. Duncan, 174
S.E. 495, 173 S.C. 34.

Collision with bicycle

Ala.—Godfrey v. Vinson, 110 So. 13,
215 Ala. 166.

Collision with street car

Ala.—J. C. Byram & Co. v. Byram,
140 So. 768, 224 Ala. 466.

Injuries to children

Ala.—Graham v. Werfel, 157 So. 201,
229 Ala. 385—Culverhouse v. Gam-
mill, 115 So. 105, 217 Ala. 137.

Ill.—Heneghan v. Goldberg, 16 N.E.
2d 139, 296 Ill.App. 253.

Injuries to licensee

Ala.—First Nat. Bank v. Sanders,
149 So. 848, 227 Ala. 313.

Injuries to pedestrians

Ala.—Jack Cole, Inc., v. Walker, 200
So. 768, 240 Ala. 683—J. C. Byram
& Co. v. Livingston, 143 So. 461,
225 Ala. 442.

Ga.—Elrod v. Anchor Duck Mills, 179
S.E. 188, 50 Ga.App. 531.

Ill.—Langford v. Smith, 51 N.E.2d
789, 320 Ill.App. 684—Moore v.
Young, 46 N.E.2d 852, 317 Ill.App.
474—Schmidt v. Anderson, 21 N.E.
2d 825, 301 Ill.App. 28—Pillow v.
Long, 20 N.E.2d 896, 299 Ill.App.
542—Wargo v. Buske, 273 Ill.App.
28—Gannon v. Kiel, 252 Ill.App.
550.

Ohio.—Masters v. Von Lehmden, 173
N.E. 303, 36 Ohio App. 414.

Injuries to person working on high- way

Ill.—Paul v. Garman, 34 N.E.2d 884,
310 Ill.App. 447.

Injuries to trespasser

Ohio.—Coca-Cola Bottling Works Co.
v. Meyer, 162 N.E. 826, 28 Ohio
App. 468.

Keeping lookout

Ala.—Duke v. Gaines, 140 So. 600,
224 Ala. 519.

Ill.—Ritter v. Nieman, 67 N.E.2d 417,
329 Ill.App. 163—Layton v. Ogo-
noski, 256 Ill.App. 461.

Parking vehicle unattended without lights

Ala.—Claude Jones & Son v. Lair,
17 So.2d 577, 245 Ala. 441.

Speed

(1) Generally.

Ala.—Mobile City Lines v. Alexan-
der, 30 So.2d 4—Brown Hauling
Co. v. Newsome, 2 So.2d 782, 241
Ala. 300—Lindsey v. Kindt, 128 So.
139, 221 Ala. 190

Ill.—Heb v. City of Chicago, 66 N.E.
2d 491, 328 Ill.App. 488—Wheeler
v. Rudek, 65 N.E.2d 611, 328 Ill.
App. 283, reversed on other
grounds 74 N.E.2d 601, 397 Ill.
438—Nepil v. Zeman, 52 N.E.2d
836, 321 Ill.App. 308—Granlie v.
Valha, 37 N.E.2d 931, 312 Ill.App.
181—Jones v. Kramer, 235 Ill.App.
362.

(2) Excessive speed of automobile
does not always indicate, as matter
of law, driver's attitude of indif-
ference to consequences, as required
to constitute wantonness.—Elliott v.
Peters, 185 P.2d 139, 163 Kan. 631.

Wrong side of road

Ala.—Mobile City Lines v. Alexan-
der, 30 So.2d 4, 249 Ala. 107.

Ill.—Powell v. Myers Sherman Co.,
32 N.E.2d 663, 309 Ill.App. 12—
Prien v. Wieck 15 N.E.2d 30, 295
Ill.App. 623—Skamenca v. Reeser,
13 N.E.2d 668, 294 Ill.App. 216.

15. Mass.—Isaacson v. Boston, W.
& N. Y. St. Ry. Co., 180 N.E. 118,
278 Mass. 378.

16. Cal.—Goodwin v. Goodwin, 43 P.
2d 332, 5 Cal.App.2d 644—Tomlin-
son v. Kiramidjian, 24 P.2d 559,
133 Cal.App. 418

Ga.—White v. Boyd, 198 S.E. 81, 58
Ga.App. 219.

Wis.—Zurn v. Whatley, 251 N.W.
435, 213 Wis. 365.

Injuries to children

Ga.—Houston v. Taylor, 179 S.E. 207,
50 Ga.App. 811.

Injuries to pedestrian

Mich.—Sudinski v. Krohn, 219 N.W.
665, 242 Mich. 497.

Keeping lookout

Ga.—White v. Boyd, 198 S.E. 81,
58 Ga.App. 219—Capers v. Mar-
tin, 188 S.E. 465, 54 Ga.App. 555.

Speed

Fla.—Heitman v. Davis, 172 So. 705,
127 Fla. 1.

17. Ala.—Luquire Ins Co v. Mc-
Calla, 13 So.2d 865, 244 Ala. 479—
Smith v. Clemmons, 112 So. 442,
216 Ala. 52

Iowa.—Wright v. Mahaffa, 270 N.W.
402, 222 Iowa 872.

Mass.—Leonard v. Conquest, 174 N.
E. 677, 274 Mass. 347.

S.C.—Dickson v. Inter-Carolinas Mo-
tor Bus Co., 159 S.E. 625, 161 S.
C. 297.

Tenn.—Neal v. Midgett, App., 198 S.
W.2d 32.

18. Ill.—Johnson v. Sandberg, 283
Ill.App. 509.

Mo.—Spalding v. Robertson, 206 S.
W.2d 517.

Ordinarily fact question

Conn.—Bowen v. Hartford Accident
& Indemnity Co., 191 A. 530, 122
Conn. 621.

19. **It is preliminary question for
judge whether there is any evidence
on which jury can properly find a
verdict for the party producing it
and having the burden of proof.**—M.
& M. Transp Co v. Cochran, C.C.A.
R.I., 100 F.2d 207.

20. Ala.—Holman v. Brady, 3 So.2d
30, 241 Ala. 487—Law v. Saks, 1
So.2d 28, 241 Ala. 37.

Ill.—Strunk v. Stronberg, 62 N.E.
2d 27, 326 Ill.App. 265—Edmiston
v. Hampton, 42 N.E.2d 963, 315 Ill.
App. 305—Rowley v. Rust, 26 N.E.
2d 520, 304 Ill.App. 364—Proud v.
Adelberg, 8 N.E.2d 678, 290 Ill.
App. 319—Johnson v. Englehardt,
256 Ill.App. 557.

Mass.—Sullivan v. Napolitano, 178 N.
E. 654, 277 Mass. 341—Farr v.
Whitney, 156 N.E. 863, 260 Mass.
163.

Ohio—Reserve Trucking Co v Fair-
child, 191 N.E. 745, 128 Ohio St.
519.

Pa.—Seret v. Carbley, 39 A.2d 607,
350 Pa. 434.

Assault and battery

In action of trespass on case by
pedestrian who was struck by au-
tomobile, where there was no evi-
dence of a willful or intentional
trespass by defendant, count in tres-
pass for assault and battery should

or recklessness.²¹ Where the evidence is undisputed and but one inference reasonably may be drawn therefrom, it is a question of law for the court as to defendant's willfulness or wantonness²² or gross negligence.²³

c. Equipment and Condition of Vehicle; Lights

In an action for damages for injuries resulting from the operation of a motor vehicle, the negligence of the defendant with respect to the equipment or condition of his motor vehicle is a question of fact where the evidence is legally sufficient and conflicting or more than one inference may be drawn therefrom.

Where the evidence is legally sufficient and is

conflicting or more than one inference may be drawn therefrom, it is a question of fact for the jury, or for the court in trials without a jury, whether defendant was guilty of negligence in respect of the equipment or condition of his motor vehicle.²⁴ On the other hand, where there is not sufficient legal evidence to show negligence with respect to the condition or equipment of the vehicle, the case may not be submitted to the jury.²⁵

The above rules have been applied with respect to various kinds of equipment,²⁶ such as brakes,²⁷ rear-view mirror,²⁸ steering apparatus,²⁹ wheels, tires and rims,³⁰ and, likewise, have been applied

not have been submitted to the jury, but the jury should have been directed to return a verdict for defendant on the count.

Conn.—Mooney v. Wabrek, 27 A.2d 631, 129 Conn. 302.

R.I.—Deming v. Venditti, 53 A.2d 498.

21. Mass.—Sullivan v. Napolitano, 178 N.E. 654, 277 Mass. 341—Farr v. Whitney, 156 N.E. 863, 260 Mass. 163.

N.C.—Tysinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717. Pa.—Seret v. Carbler, 39 A.2d 607, 350 Pa. 434.

22. Ala.—Simon v. Goodman, 13 So. 2d 679, 244 Ala. 422.

23. Cal.—Goodwin v. Goodwin, 43 P.2d 332, 5 Cal.App.2d 644.

24. U.S.—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 713.

Ark.—Pullen v. Faulkner, 117 S.W.2d 28, 196 Ark. 231.

Cal.—Sherman v. Frank, 146 P.2d 704, 63 Cal.App.2d 278.

Ga.—Railway Exp. Agency v. Standridge, 24 S.E.2d 504, followed in 24 S.E.2d 608, 60 Ga.App. 843.

Mo.—Weisman v. Arrow Trucking Co., App., 176 S.W.2d 37.

Wash.—Forman v. Shields, 48 P.2d 599, 133 Wash. 333.

Wis.—Schleif v. Honeck, 24 N.W.2d 602, 249 Wis. 276.

42 C.J. p 1243 note 4.

Care required as to equipment and condition of vehicle in general see *supra* §§ 260-263.

Rotten flooring of van or truck

Mo.—Reed v. Swift & Co., App., 117 S.W.2d 636.

Okl.—Simpson v. White, 157 P.2d 913, 195 Okl. 375.

25. Ga.—Holbrooks v. Ford Rental System, 130 S.E. 363, 34 Ga.App. 583.

Or.—Bogart v. Cohen-Anderson Motor Co., 98 P.2d 720, 164 Or. 233.

S.C.—Googe v. Speaks, 9 S.E.2d 439, 194 S.C. 206.

26. Ark.—Pullen v. Faulkner, 117 S.W.2d 28, 196 Ark. 231.

42 C.J. p 1243 note 4 [a].

Driving in rain without windshield wiper

N.Y.—Lowy v. Green, 70 N.Y.S.2d 547, 272 App.Div. 238.

27. Question for jury

U.S.—Sugg v. Hendrix, C.C.A.Miss., 153 F.2d 240.

Ala.—Centennial Ice Co. v. Mitchell, 112 So. 239, 215 Ala. 688.

Ark.—Pullen v. Faulkner, 117 S.W.2d 28, 196 Ark. 231.

Cal.—Rogers v. Foppiano, 72 P.2d 239, 23 Cal.App.2d 87—Hupp v. Griffith Co., 15 P.2d 211, 127 Cal. App. 63—Phillips v. Pickwick Stages, Northern Division, 259 P. 968, 85 Cal.App. 571.

Colo.—Stahl v. Cooper, 188 P.2d 894, 117 Colo. 445.

Ga.—Peck v. Baker, 46 S.E.2d 751, 76 Ga.App. 588.

Idaho.—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.

Ky.—Remmers' Ex'r v. Mayhugh, 197 S.W.2d 450, 303 Ky. 366.

Mass.—Gangi v. Adley Express Co., 63 N.E.2d 897, 318 Mass. 762.

Mich.—Bathke v. Traverse City, 13 N.W.2d 184, 308 Mich. 1—Black v. Amba, 12 N.W.2d 381, 307 Mich. 644.

Mo.—Weisman v. Arrow Trucking Co., App., 176 S.W.2d 37.

N.H.—Carr v. Orrill, 166 A. 270, 86 N.H. 226.

N.Y.—Schaeffer v. Caldwell, 78 N.Y. S.2d 652, 273 App.Div. 263.

N.C.—Pinnix v. Griffin, 12 S.E.2d 667, 219 N.C. 35—Yates v. Thomasville Chair Co., 139 S.E. 500, 211 N.C. 200.

Or.—Bogart v. Cohen-Anderson Motor Co., 98 P.2d 720, 164 Or. 233.

Yarbrough v. Carlson, 202 P. 739, 102 Or. 422.

Tex.—Parker v. Bridgeport Mach. Co., Civ.App., 91 S.W.2d 807.

Evidence held insufficient for jury

Ill.—Pastore v. Sasso, 46 N.E.2d 857, 317 Ill.App. 538.

N.C.—Tysinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717.

Or.—Bogart v. Cohen-Anderson Motor Co., 98 P.2d 720, 164 Or. 233.

Wis.—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66.

Nonsuit held proper

Ga.—Holbrooks v. Ford Rental System, 130 S.E. 363, 34 Ga.App. 588.

Violation of statute

Where there is proof of occurrence wholly without fault of person charged with violation of statute requiring all motor vehicles to be provided with two sets of brakes in good working order, which made it impossible for such person to comply with requirements of statute and which due care could not have guarded against, whether unintentional violation of statute amounted to actionable negligence is for jury, and it is only where no legal excuse is offered for admitted violation that negligence is established as matter of law.—Lochmoeller v. Kiel, Mo. App., 137 S.W.2d 625.

28. Question for jury

U.S.—Countryman v. Coogler, C.C.A. Ga., 157 F.2d 503.

Conn.—Tappin v. Rider Dairy Co., 178 A. 428, 119 Conn. 591.

N.H.—Lemariet v. A. Towle Co., 51 A.2d 42, 94 N.H. 246.

29. Question for jury

U.S.—Gunn v. Standard Oil Co., C. C.A.N.D., 275 F. 932.

Cal.—Shapiro v. Ingersoll, 53 P.2d 771, 11 Cal.App.2d 202.

Mich.—Bathke v. Traverse City, 13 N.W.2d 184, 308 Mich. 1.

Tex.—White v. Akers, Civ.App., 125 S.W.2d 388.

30. Question for jury

Ala.—Motor Terminal & Transportation Co. v. Millican, 12 So.2d 96, 244 Ala. 39.

Cal.—Sherman v. Frank, 146 P.2d 704, 63 Cal.App.2d 278.

Me.—Dostie v. Lewiston Crushed Stone Co., 8 A.2d 393, 136 Me. 284.

Mass.—Van Steenberg v. Barrett, 190 N.E. 597, 286 Mass. 400.

Pa.—Hutchinson v. Brumbaugh, Com.Pl., 24 West.Co.L. 113.

with respect to equipment such as chains on the tires.³¹ The absence of chains does not, as a matter of law, under ordinary circumstances constitute negligence.³²

Lights. Where the evidence thereon is conflicting or such that different inferences may be drawn therefrom, questions as to negligence with respect to lights on the vehicle,³³ or with respect to their being lit,³⁴ or whether they conformed to the requirements of statutes or ordinances³⁵ are questions of fact. The extent of interference of lights on an oncoming vehicle and the effect of the interference on the conduct of the motorist are usually questions of fact and not of law;³⁶ and ordinarily it is for the jury to determine whether the failure of defendant to dim his lights constituted negligence.³⁷

According to some authorities where it is undisputed that defendant has violated a statute or ordinance with respect to lights on the motor vehicle involved in the accident, negligence exists

as a matter of law,³⁸ but according to other authorities the violation of such regulations is not negligence as a matter of law.³⁹

d. Specific Acts

- (1) Control
- (2) Speed
- (3) Lookout
- (4) Horn, whistle, bell, or hand signals
- (5) Stopping, backing, and turning
- (6) Parking or leaving vehicle unattended

(1) Control

In an action for damages for injuries resulting from the operation of a motor vehicle, it is usually for the jury to determine whether the operator had his motor vehicle under control at the time of the accident.

In an action for damages for injuries resulting from the operation of a motor vehicle, the question whether the driver had his car under control at the time of the accident is usually for the jury,⁴⁰

Evidence held insufficient for jury
Iowa.—Tyrrell v. Skelly Oil Co., 270 N.W. 857, 222 Iowa 1257.

31. Question of fact

Conn.—C. A. Johnson, Inc., v. Bruce, 44 A.2d 917, 132 Conn. 429.
Iowa.—Burwell v. Siddens, 25 N.W. 2d 864, 238 Iowa 645.
Pa.—Miles v. Myers, 45 A.2d 50, 353 Pa. 316.

Evidence held insufficient for jury
Vt.—Johnson v. Buike, 183 A. 495, 108 Vt. 164.

32. Pa.—Wertz v. Shade, 182 A. 789, 121 Pa Super. 4.

33. Ala.—Godfrey v. Vinson, 110 So. 13, 215 Ala. 166.

Iowa.—Isaacs v. Bruce, 254 N.W. 57, 218 Iowa 759—Carlson v. Jacob E. Decker & Sons, 247 N.W. 296, 216 Iowa 581.

Mich.—Martin Parry Corporation v. Berner, 244 N.W. 180, 259 Mich. 621.

Wis.—Wenninger v. Witt, 236 N.W. 649, 205 Wis. 49.
42 C.J. p 1243 note 7.

Lights on parked or unattended vehicle see *infra* subdivision d (6) of this section.

Clearance lights on left side of truck
Ariz.—Seller v. Whiting, 84 P.2d 452, 52 Ariz. 642.

Tailight

Ky.—Fry & Kain v. Keen, 59 S.W.2d 3, 248 Ky. 548.

Sufficiency of lights

Conn.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355.

Wash.—Copeland v. North Coast Transp. Co., 13 P.2d 65, 169 Wash. 84.

34. Cal.—Taha v. Finegold, 184 P.

2d 533, 81 Cal.App.2d 536—Takashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal.App.2d 107.

Ohio.—Stoops v. Youngstown Suburban Transp. Co., 169 N.E. 456, 121 Ohio St. 437.

42 C.J. p 1243 note 8.

Headlights

Me.—Perry v. Butler, 48 A.2d 631.

Tailight

Cal.—Takashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal.App.2d 107.

Conn.—Hamel v. Chase Cos., 152 A. 59, 112 Conn. 286.

Ill.—Spiers v. Anderson Motor Service Co., 271 Ill.App. 178—Herberger v. Anderson Motor Service Co., 268 Ill.App. 403.

Tex.—Lincoln v. Stone, Civ App., 42 S.W.2d 128, reversed on other grounds, Com.App., 59 S.W.2d 100.

Wash.—Peterson v. King County, 90 P.2d 729, 199 Wash. 106.

Lights on snowplow

Minn.—Smith v. Ramsey County, 16 N.W.2d 169, 218 Minn. 325.

Evidence held insufficient to go to jury

Colo.—Zang v. Wright, 23 P.2d 580, 93 Colo. 80.

35. Ill.—Spiers v. Anderson Motor Service, 271 Ill.App. 178—Herberger v. Anderson Motor Service Co., 268 Ill.App. 403.

Wash.—O'Neill v. Gruhn, 85 P.2d 1064, 197 Wash. 557.

Brilliance or intensity of light

Ariz.—Seller v. Whiting, 84 P.2d 452, 52 Ariz. 642.

Conn.—Miles v. Sherman, 166 A. 250, 116 Conn. 678.

Minn.—Carlson v. Peterson, 284 N. W. 847, 205 Minn. 20.

Pa.—Little v. Straw, 192 A. 894, 326 Pa. 577.

36. Cal.—Huddleston v. Pound, 68 P.2d 376, 21 Cal.App.2d 128.

Automobile traveling uphill

Cal.—Guinou v. Webster, 22 P.2d 231, 132 Cal.App. 29.

37. Ark.—Ward v. Walker, 178 S.W. 2d 62, 206 Ark. 988.

38. Cal.—Phillips v. Hobbs-Parsons Co., 227 P. 622, 67 Cal.App. 199.

42 C.J. p 1243 note 6.

Failure to obey regulations as to lights as negligence see *supra* § 263.

39. La.—Ledoux v. Beyt, App., 35 So 2d 472.

Failure to display rear light on truck over half hour after sunset on day of fatal accident, partly due to such failure, constituted violation of statute, justifying inference of negligence, which precluded dismissal of action as against truck owner.—Brown v. McCullough, 270 N.Y. S. 37, 240 App.Div. 381, appeal denied 191 N.E. 618, 264 N.Y. 669, affirmed 193 N.E. 429, 265 N.Y. 652.

40. U.S.—Brinegar v. Green, C.C.A. Iowa, 117 F.2d 316—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F. Supp. 521.

Ala.—Sinclair v. Taylor, 173 So. 878, 27 Ala.App. 418.

Cal.—Musgrove v. Zobrist, 187 P.2d 782, 83 Cal.App.2d 101.

Ga.—Peck v. Baker, 46 S.E.2d 751, 76 Ga.App. 588.

Iowa.—Holden v. Hanner, 1 N.W.2d 671, 231 Iowa 468—Rogers v. Jefferson, 285 N.W. 701, 226 Iowa

as is also the question whether defendant, in losing control,⁴¹ or in his use of the emergency brake,⁴² acted negligently. On conflicting evidence, the cause of an operator losing control of the vehicle is a question for the jury.⁴³

There must be sufficient evidence to show that the operator failed to have his motor vehicle under control at the time of the injury in order to justify the submission of the issue to the jury;⁴⁴ the uncontroverted evidence may show absence of

negligence as a matter of law.⁴⁵

Skidding. The skidding of a motor vehicle does not constitute negligence on the part of the operator as a matter of law,⁴⁶ but ordinarily is a question for the jury.⁴⁷ Accordingly, the question of the negligence of the operator at the time of the skidding is for the jury, or for the trial court in trials without a jury, where the evidence is conflicting or different inferences can be drawn therefrom.⁴⁸

- 1047—Hawkins v. Burton, 281 N. W. 342, 225 Iowa 707—Hartman v. Lee, 272 N.W. 140, 223 Iowa 32—Minks v. Stenberg, 250 N.W. 883, 217 Iowa 119—Lane v. Variamas, 239 N.W. 689, 213 Iowa 795—Sergeant v. Challis, 238 N.W. 442, 213 Iowa 57—O'Hara v. Chaplin, 233 N.W. 516, 211 Iowa 404—Miller v. Wood Bros. Thresher Co., 222 N.W. 551.
- Ky.—Lundy v. Brown's Adm'r, 205 S.W.2d 498, 305 Ky. 721—Short Way Lines v. Sutton's Adm'r, 164 S.W.2d 809, 291 Ky. 541—Wilder v. Cadie, 13 S.W.2d 497, 227 Ky. 486.
- Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.
- Neb.—Roh v. Opocensky, 251 N.W. 102, 125 Neb. 551.
- N.J.—Lipschitz v. New York & New Jersey Produce Corporation, 168 A. 390, 111 N.J.Law 392.
- N.Y.—Di Carlo v. Feldman, 284 N.Y.S. 467, 246 App.Div. 682.
- Or.—Keys v. Griffith, 55 P.2d 15, 153 Or. 190—Nolen v. Corvallis Auto Transit Co., 4 P.2d 624, 138 Or. 98.
- Pa.—Vinorick v. Revetta, Com.Pl. 5 Fay.L.J. 165, reversed on other grounds 33 A.2d 655, 152 Pa.Super. 455.
- Tex.—Southland Greyhound Lines v. Richards, Civ.App., 77 S.W.2d 272, error dismissed.
- Wash.—Sheddy v. Inland Motor Freight, 63 P.2d 430, 189 Wash. 48—Larson v. Olson, 9 P.2d 68, 167 Wash. 253.
- W.Va.—Fleider v. Service Cab Co., 11 S.E.2d 115, 122 W.Va. 522.
- Wis.—Zolnemann v. Gasser, 29 N.W.2d 49, 251 Wis. 238—O'Leary v. Buhrow, 25 N.W.2d 449, 249 Wis. 559—Schulz v. General Casualty Co., 283 N.W. 803, 233 Wis. 118—Hein v. Huber, 252 N.W. 692, 214 Wis. 230—Salsich v. Bunn, 238 N.W. 394, 205 Wis. 524, 79 A.L.R. 1069.
- 42 C.J. p 1244 note 11.
- Care as to control see supra §§ 290-299.
- Intersections or crossings**
- U.S.—Meissner v. Papas, C.C.A.Wis., 124 F.2d 720.
- Iowa.—Luther v. Jones, 261 N.W. 817, 220 Iowa 95.
- Ky.—Heskamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky. 618—Tate v. Shaver, 152 S.W.2d 259, 287 Ky. 29.
- Pa.—Lane v. Samuels, 39 A.2d 626, 350 Pa. 446.
- S.C.—Neese v. Toms, 12 S.E.2d 859, 196 S.C. 67.
- Va.—Fruit Growers Express Co. v. Huihsh, 3 S.E.2d 160, 173 Va. 27. 42 C.J. p 1244 note 11 [a].
- Striking children**
- Iowa.—Kallansrud v. Libbey, 13 N.W.2d 684, 234 Iowa 700.
- Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189—Vansant v. Holbrook's Adm'r, 146 S.W.2d 337, 255 Ky. 88.
- Neb.—Crecehus v. Gamble-Skogmo, Inc., 13 N.W.2d 627, 144 Neb. 394.
- Ohio.—Rothe v. Dworkin, App., 70 N.E.2d 146.
- Pa.—Stevenson v. Sarfert, 165 A. 225, 310 Pa. 458.
41. Ga.—Elrod v. Anchor Duck Mills, 179 S.E. 188, 50 Ga.App. 531.
- Iowa.—Falt v. Krug, 32 N.W.2d 781.
- Me.—Hamlin v. N. H. Bragg & Sons, 147 A. 602, 128 Me. 358.
- Neb.—Kauffman v. Pundaburg, 242 N.W. 658, 123 Neb. 340.
- N.Y.—Lorenz v. Connors, 218 N.Y.S. 121, 218 App.Div. 199.
- Vt.—Williamson v. Clark, 153 A. 448, 103 Vt. 288.
- Wis.—De Goey v. Hermesen, 288 N.W. 770, 233 Wis. 69.
- Going down hill**
- N.Y.—Halvorsen v. W. T. Mitchell Trucking Corporation, 272 N.Y.S. 881, 242 App.Div. 686—Lorenz v. Connors, 218 N.Y.S. 121, 218 App.Div. 199.
- W.Va.—Woodley v. Steiner, 164 S.E. 294, 112 W.Va. 356.
42. Mass.—Dudley v. Kingsbury, 85 N.E. 76, 199 Mass. 258.
43. U.S.—Greer v. Hendrix, C.C.A. Ill., 69 F.2d 404.
- Mo.—Holt v. Bartlett, 1 S.W.2d 1030, 222 Mo.App. 138.
44. **Evidence held insufficient for jury**
- Iowa.—Tharp v. Rees, 277 N.W. 758, 224 Iowa 962.
- Minn.—Draxton v. Katzmarek, 280 N.W. 288, 203 Minn. 161.
- N.Y.—Zerberini v. M. & M. Transp. Co., 71 N.Y.S.2d 803.
- Wis.—Oelke v. Schneider, 26 N.W.2d 170, 250 Wis. 86.
45. Iowa.—Ryan v. Trenkle, 200 N.W. 318, 199 Iowa 636.
- 42 C.J. p 1244 note 14.
46. Ky.—Hewitt's Adm'r v. Central Truckaway System, 194 S.W.2d 999, 302 Ky. 459.
- Md.—Fillings v. Diehlman, 177 A. 400, 168 Md. 306.
- Utah.—West v. Standard Fuel Co., 17 P.2d 292, 81 Utah 300.
- Wash.—Cartwright v. Boyce, 8 P.2d 968, 167 Wash. 175.
47. W.Va.—Sigmon v. Mundy, 25 S.E.2d 636, 125 W.Va. 591.
48. U.S.—Siembab v. Burgess Exp. Co., D.C.R.I., 40 F.Supp. 485.
- Conn.—De Antonio v. New Haven Dairy Co., 136 A. 567, 105 Conn. 663.
- Ill.—Reed v. Landau, 52 N.E.2d 306, 321 Ill.App. 19—Mazer v. Consumers Co., 13 N.E.2d 862, 294 Ill.App. 609.
- Ind.—Acton v. Lowery, 34 N.E.2d 972, 109 Ind.App. 581.
- Ky.—Hewitt's Adm'r v. Central Truckaway System, 194 S.W.2d 999, 302 Ky. 459—Gilreath v. Blue & Gray Transp. Co., 108 S.W.2d 1002, 269 Ky. 787, followed in 108 S.W.2d 1004, 269 Ky. 791—Tente v. Jaglowicz, 44 S.W.2d 845, 241 Ky. 720.
- Me.—Frye v. Kenney, 3 A.2d 433, 136 Me. 112.
- Mass.—Levin v. Twin Tanners, 60 N.E.2d 6, 318 Mass. 13—Hiller v. De Sautels, 169 N.E. 494, 269 Mass. 437.
- Mich.—Humphries v. Complete Auto Transit, 9 N.W.2d 55, 305 Mich. 188—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 680.
- Ohio.—Kaczmarek v. Murphy, 70 N.E.2d 784, 78 Ohio App. 449.
- Pa.—Miles v. Myers, 45 A.2d 50, 353 Pa. 316—Laessig v. Cerro, 27 A.2d 731, 149 Pa.Super. 155—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437—Corse v. Ferguson, 180 A. 65, 118 Pa.Super. 606—Glover v. Stoeitzien, Com.Pl., 26 Erie Co. 178

(2) Speed

In an action for damages for injuries resulting from the operation of a motor vehicle, questions relative to the speed of the vehicle causing the injury are for the jury where the evidence is conflicting or different inferences may reasonably be drawn from the evidence.

In an action for damages for injuries resulting from the operation of a motor vehicle, wherever the evidence is conflicting or different inferences

may reasonably be drawn therefrom, questions as to what the speed of the vehicle causing the injury was at the time of the accident⁴⁹ whether the accident occurred within a certain district in which a certain speed limit is prescribed,⁵⁰ whether the motor vehicle was of such type and kind as to come within a statute or ordinance prescribing a certain speed,⁵¹ and whether driving at a certain speed was negligent⁵² in connection with other

—Krammes v. Tryon, Com Pl., 48 Lanc L.Rev. 493—Potance v. Cipriano, Com Pl., 39 Luz Leg Reg. 63, 13 Som.Leg.J. 73—Shupe v. Boyle Co., 95 Pittsb.Leg.J. 339—Miller v. Rishel, Com.Pl., 5 Sch.Reg. 84.

R.I.—Powers v. Goodwin, 192 A. 767 58 R.I. 372

Tenn.—Grizzard & Cuzzort v. O'Neill 15 Tenn.App. 395.

Va.—Saunders v. Hall, 11 S.E.2d 592 176 Va. 526—Slason v. Anderson, 183 S.E. 431, 165 Va. 629.

Wash.—Weaver v. Windust, 80 P.2d 766, 195 Wash. 240—Gayson v. Daugherty, 66 P.2d 1148, 190 Wash. 133—Haines v. Pinney, 18 P.2d 496, 171 Wash. 568—Martin v. Bear, 9 P.2d 365, 167 Wash. 327.

Where motorist applied brakes to avoid collision with automobile entering highway, and skidded into automobile on left-hand side of highway, negligence of motorist was for jury—National Liberty Ins Co v Foth, 235 N.W. 821, 254 Mich 152

Proper method

Whether driver adopted proper method to end skidding promptly and whether there was time and opportunity to do so were for the jury—Marr v. Hicks, 1 A.2d 271, 136 Me 33

Whether skidding caused truck to swerve to left or whether swerve to left caused skidding was for jury—Davin v. Levin, 55 A.2d 364, 357 P.1a 554

Whether defendant should have anticipated ice on highway, which caused skidding, was for jury—Bowlers v. Guhn, 233 N.W. 23, 57 S.D. 441.

Evidence held insufficient for jury Mass.—Sherwood v. Radovsky, 57 N.E.2d 912, 317 Mass. 307.

49. Cal.—Ferrula v. Santa Fe Bus Lines, 189 P.2d 294, 83 Cal.App.2d 416—Kehlar v. Satterlee, 98 P.2d 759, 39 Cal.App.2d 116.

Fla.—Independent Ice & Cold Storage Co. v. Tampa Sand & Material Co., 171 So. 797, 126 Fla. 846.

Ill.—Heneghan v. Goldberg, 16 N.E.2d 139, 296 Ill.App. 253.

Ky.—Louisville Taxicab & Transfer Co. v. Byrnes, 178 S.W.2d 4, 296 Ky. 560.

Mass.—Stiles v. Wright, 33 N.E.2d 220, 308 Mass. 326.

Mich.—Burton v. Yellow & Checker Cab & Transfer Co., 278 N.W. 106, 283 Mich. 384—Newell v. Ritter, 256 N.W. 464, 268 Mich. 405—Scott v. Dow, 127 N.W. 712, 162 Mich 636

Mo.—Gambell v. Irvine, App., 102 S.W.2d 784—Allen v. Wilkerson, App., 87 S.W.2d 1056—Wilson v. Spuhler, App., 20 S.W.2d 556—Roland v. Anderson, App., 282 S.W. 752

S.C.—Coney v. Cox, 162 S.E. 596, 165 S.C. 26—Lumpkin v. Mankin, 134 S.E. 503, 136 S.C. 506.

Tex.—J. A. & E. D. Transport Co. v. Rusin, Civ App., 202 S.W.2d 693, order denying rehearing set aside 206 S.W.2d 95—Texas Farm Products Co. v. Johnson, Civ App., 190 S.W.2d 178.

Wash.—Pyle v. Wilbert, 98 P.2d 664, 2 Wash.2d 429—Trudeau v. Snomish Auto Freight Co., 96 P.2d 599, 1 Wash.2d 574—Davis v. Pinkerton, 92 P.2d 706, 199 Wash. 579

Wis.—Reynolds v. Madison Bus Co., 26 N.W.2d 653, 250 Wis. 294—Ludke v. Burck, 152 N.W. 190, 160 Wis. 440, L.R.A. 1915D 968.

42 C.J. p 1244 note 16.

Care as to speed see supra §§ 290-299.

Striking animal

Miss.—Lucedale Automobile Co. v. Daughdrill, 123 So. 871, 154 Miss. 707.

Pa.—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248.

Skid marks

Although a witness may describe skid marks, the inference to be drawn from them is solely for jury—Ward v. Zerzanek, 289 N.W. 443, 227 Iowa 918.

Submission of speed ordinance

Tenn.—East End Tire & Oil Co. v. Mallory, 2 Tenn.App. 101.

50. Ohio.—Hamilton v. Gilkey, 10 N.E.2d 1014, 56 Ohio App. 438—Reed v. Hensel, 159 N.E. 843, 26 Ohio App. 79.

Business or residential district

Mich.—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 480.

Residential district

Cal.—Galwey v. Pacific Auto Stages, 273 P. 866, 96 Cal.App. 169.

Iowa.—Doherty v. Edwards, 290 N.W. 672, 227 Iowa 1264.

51. Mo.—Gambell v. Irvine, App., 102 S.W.2d 784.

52. U.S.—Wawin Coal Co. v. Orr, C.C.A.Minn., 33 F.2d 27.

Ala.—Brown v. Bush, 124 So. 300, 220 Ala. 130.

Ariz.—McIver v. Allen, 262 P. 5, 33 Ariz. 28.

Cal.—Mairo v. Yellow Cab Co. of California, 281 P. 66, 208 Cal. 350

—Sherman v. Frank, 146 P.2d 704, 63 Cal.App.2d 278—Dollnar v. Pedone, 146 P.2d 237, 63 Cal.App.2d 169—Kehlor v. Satterlee, 98 P.2d 759, 37 Cal.App.2d 116—Garrison v. Williams, 17 P.2d 1072, 128 Cal. App 598

Ga.—Batchelor v. Anglin, 13 S.E.2d 110, 64 Ga App. 342.

Idaho—Corpus Juris cited in Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 170, 53 Idaho 367

Iowa—Hanson v. Manning, 239 N.W. 793, 213 Iowa 625—Lane v. Varlamos, 239 N.W. 689, 213 Iowa 795—Starry v. Hanold, 211 N.W. 696, 202 Iowa 1180.

Ky.—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554—Wildor v. Cadle, 13 S.W.2d 497, 227 Ky. 486

Mass.—Hiller v. De Sautels, 169 N.E. 494, 269 Mass. 437.

Mich.—Bathke v. Traverse City, 13 N.W.2d 184, 308 Mich. 1

Minn.—Bakken v. Lewis, 26 N.W.2d 478, 223 Minn 329.

Mo.—Nash v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 570

—McCarter v. Burger, App. 6 S.W.2d 979.

Neb.—Monasmith v. Cosden Oil Co., 246 N.W. 623, 124 Neb. 327.

N.H.—Jewett v. Holt, 37 A.2d 13, 93 N.H. 163—Manor v. Gagnon, 32 A.2d 688, 92 N.H. 435—Gagnon v. Krikorian, 31 A.2d 49, 92 N.H. 344.

N.J.—Chiesa v. Public Service Coordinated Transport, 24 A.2d 369, 128 N.J. Law 69.

N.C.—Patrick v. Treadwell, 21 S.E.2d 818, 222 N.C. 1—Yates v. Thomasville Chair Co., 189 S.E. 500, 211 N.C. 200.

Okl.—Ironside v. Ironside, 108 P.2d 157, 188 Okl. 267, 134 A.L.R. 621.

Or.—Luster v. North Coast Transp. Co., 275 P. 666, 128 Or. 850.

Pa.—Knox v. Simmerman, 151 A. 678, 301 Pa. 1—Wilson v. Consolidated Dressed Beef Co., 145 A. 81, 295 Pa. 168—German v. Riddell, 27 A.2d 680, 149 Pa.Super. 647.

circumstances existing in the particular case,⁵³ are for the jury, or for the trial court in actions tried without a jury. The weight of the evidence and the credibility of the witnesses as to speed are for the jury.⁵⁴ Where there is substantial evidence that defendant was driving at an excessive speed at the time of the accident, the fact that such evidence is contradicted by testimony of apparently disinterested witnesses does not justify a directed verdict for defendant.⁵⁵

Under statutes limiting speed to a rate that is safe and reasonable, or careful and prudent, what is a safe and reasonable or careful and prudent speed under the circumstances of a particular case is for the jury;⁵⁶ proof of excessive speed does not, under such statutes, establish negligence as a matter of law.⁵⁷ Where the statute prescribes that driving at a certain rate of speed or less

shall be presumptively lawful or that driving beyond a certain rate of speed shall be presumptively unlawful, the question of the lawfulness of the speed at time of the accident ordinarily is for the jury.⁵⁸ Whether driving at a speed less than that fixed by ordinance was negligent under the circumstances,⁵⁹ or at what distance away from an intersecting road, under the conditions shown to exist, a driver going at a rate otherwise legal should reduce his speed,⁶⁰ is generally a question for the jury.

The rule requiring the submission to the jury of the question of negligent operation of a motor vehicle because of excessive speed where the evidence is conflicting or different inferences reasonably may be drawn from the evidence has been applied in various situations,⁶¹ as, for example, in cases involving the meeting or collision of ve-

S.C.—Powell v. Drake, 18 S.E.2d 745, 199 S.C. 212—Bedford v. Armory Wholesale Grocery Co., 10 S.E.2d 330, 195 S.C. 150.

Tex.—Texas Farm Products Co. v. Johnson, Civ.App., 190 S.W.2d 178.

Va.—Walton v. Light, 26 S.E.2d 29, 181 Va. 609.

Wis.—Schleif v. Honeck, 24 N.W.2d 602, 249 Wis. 276.

42 C.J. p 1244 note 17.

Ordinarily jury question

Mo.—State ex rel. Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76.

Tex.—McClelland v. Mounger, Civ. App., 107 S.W.2d 901, error dismissed by agreement—Morrison v. Antwine, Civ.App., 51 S.W.2d 820.

Ordinarily, but not necessarily, jury question

Vt.—Parro v. Meagher, 184 A. 885, 108 Vt. 182—Sulham v. Bernasconi, 170 A. 913, 106 Vt. 192.

53. Cal.—Sherman v. Frank, 146 P. 2d 704, 63 Cal.App.2d 278—Bakos v. Shell Co. of California, 271 P. 127, 94 Cal.App. 243.

Ill.—West v. Porritt, 48 N.E.2d 199, 318 Ill.App. 636.

Mich.—Hettler v. Holtrop, 281 N.W. 434, 285 Mich. 570.

N.H.—Greenle v. Nashua Buick Co., 158 A. 817, 85 N.H. 316.

Or.—Davis v. Lavenik, 165 P.2d 277, 178 Or. 90.

Pa.—Fuller v. Palazzolo, 197 A. 225, 329 Pa. 93.

Vt.—Nicholson v. Twin State Fruit Corporation, 29 A.2d 819, 118 Vt. 59.

42 C.J. p 1244 note 18.

54. U.S.—White v. State of Maryland, to Use of Anderson, C.C.A. Md., 106 F.2d 392.

Cal.—Pruitt v. Krovitz, 139 P.2d 992, 59 Cal.App.2d 666.

Md.—Taxicab Co. v. Ottenritter, 135 A. 587, 151 Md. 525.

Mass.—Goodwin v. Walton, 11 N.E. 2d 460, 298 Mass. 451.

Mich.—Wright v. Barron, 28 N.W.2d 278, 318 Mich. 409.

Mo.—Hollister v. A. S. Aloe Co., 156 S.W.2d 606, 348 Mo. 1055.

N.H.—La Plante v. Rousseau, 18 A. 2d 777, 91 N.H. 330.

Ohio.—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207.

Pa.—Ferguson v. Charis, 170 A. 131, 314 Pa. 164—Cherry v. Nusbaum, 149 A. 110, 299 Pa. 91.

S.D.—Pemberton v. Fritts, 228 N.W. 409, 56 S.D. 374.

Wash.—Turnquist v. Rosala Bros., 83 P.2d 353, 196 Wash. 434—Larson v. Olson, 9 P.2d 68, 167 Wash. 253.

Ability of witness to estimate speed

Trial court could not ignore eyewitness' estimate of speed of truck, although distance which witness observed it travel limited his ability to make estimate; such fact raising merely questions of credibility and weight of evidence.—Strange v. Los Angeles Examiner, 12 P.2d 678, 124 Cal.App. 419.

55. U.S.—D'Allessandro v. Bechtol, C.C.A.Fla., 104 F.2d 845, certiorari denied 60 S.Ct. 295, 308 U.S. 619, 84 L.Ed. 517.

56. U.S.—Brinegar v. Green, C.C.A. Iowa, 117 F.2d 316.

Cal.—Ferrula v. Santa Fe Bus Lines, 189 P.2d 294, 83 Cal.App.2d 416—Greenwood v. Summers, 149 P.2d 35, 64 Cal.App.2d 516—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App.2d 738—Tieiman v. Red Top Cab Co., 3 P.2d 381, 117 Cal.App. 40—Dougherty v. Ellingson, 275 P. 456, 97 Cal.App. 87—Moeller v. Packard, 261 P. 315, 86 Cal.App. 459.

Ill.—Wallace v. Yellow Cab Co., 238 Ill.App. 283.

Iowa.—Rogers v. Jefferson, 285 N.W. 701, 226 Iowa.1047.

Okla.—Knox v. Loose-Wiles Biscuit

Co. of Okla., 154 P.2d 59, 194 Okl. 611—National Tank Co. v. Scott, 130 P.2d 316, 191 Okl. 613—Ironside v. Ironside, 108 P.2d 157, 188 Okl. 267, 134 A.L.R. 621—Townsend v. Cotten, 68 P.2d 790, 180 Okl. 128.

Pa.—Eisenhower v. Hall's Motor Transit Co., 40 A.2d 458, 351 Pa. 200.

42 C.J. p 1245 note 25.

57. Ariz.—Butane Corp. v. Kirby, 187 P.2d 325, 63 Ariz. 272.

N.C.—Fleeman v. Citizens Transfer & Coal Co., 198 S.E. 596, 214 N.C. 117—Woods v. Freeman, 195 S.E. 812, 213 N.C. 314.

58. U.S.—Blaszzyk v. Eastern Auto Forwarding Co., C.C.A.N.Y., 134 F. 2d 600.

Ala.—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359.

Idaho.—Dawson v. Salt Lake Hardware Co., 136 P.2d 733, 64 Idaho 666—Brixey v. Craig, 288 P. 152, 49 Idaho 319.

Ind.—D Graff & Sons v. Williams, 61 N.E.2d 72, 115 Ind.App. 597.

Ky.—Allerger Co. v. Browning's Adm'x., 1 S.W.2d 116, 242 Ky. 273.

Minn.—Mahowald v. Beckrich, 2 N.W.2d 569, 212 Minn. 78.

N.H.—Bennett v. Bennett, 31 A.2d 374, 92 N.H. 379.

N.C.—Morris v. Johnson, 199 S.E. 390, 214 N.C. 402.

Ohio.—Solomon v. Mote, App., 49 N.E.2d 703.

Wis.—Beno v. Peasley, 239 N.W. 407, 206 Wis. 237.

59. Iowa.—Shaffer v. Miller, 170 N.W. 787, 185 Iowa 472.

42 C.J. p 1245 note 22.

60. Cal.—Lawrence v. Goodwill, 186 P. 781, 44 Cal.App. 440—Blackburn v. Marple, 184 P. 875, 43 Cal.App. 141.

61. Ark.—Sauve v. Ingram, 143 S.W.2d 541, 200 Ark. 1181.

hicles;⁶² likewise, the rule has been applied in a | number of cases involving the striking of pedestri-

Mich.—Savas v. Beals, 7 N.W.2d 231, 304 Mich. 84.

Ohio.—Representative Bus Co. v. Simmons, 159 N.E. 846, 26 Ohio App. 367.

42 C.J. p 1244 notes 17, 18.

Approaching blinker traffic light

N.J.—Melnik v. Ellis, 156 A. 281, 9 N.J.Misc. 986.

Automobile forced off road

N.Y.—Hart v. Ruduk, 253 N.Y.S. 615, 233 App.Div. 463.

Children in street or on highway

Ark.—Monk v. Jones, 83 S.W.2d 526, 190 Ark. 1117.

Fla.—Connell v. Petri, 30 So.2d 922.

Mass.—Brown v. Daley, 173 N.E. 545, 273 Mass. 432—Gaulin v. Yagobian, 158 N.E. 352, 261 Mass. 145.

Minn.—Otterness v. Hathaway, 282 N.W. 687, 204 Minn. 88.

N.Y.—Byrd v. City of New York, 35 N.Y.S.2d 209, 264 App.Div. 255.

Pa.—Gettemy v. Grennan Bakeries, 21 A.2d 465, 145 Pa.Super. 405.

W.Va.—Vance v. Logan Williamson Bus Co., 46 S.E.2d 783.

42 C.J. p 1244 note 18 [I].

Damage to filling station pump

Vt.—Standard Oil Co. of New York v. Flint, 183 A. 336, 108 Vt. 157.

Entering street from alley

Mo.—Peck v. W. F. Williamson Advertising Service in St. Louis, App., 68 S.W.2d 847.

Going downgrade

Wash.—Davis v. North Coast Transp. Co., 295 P. 921, 160 Wash. 576.

W.Va.—Fidler v. Service Cab Co., 11 S.E.2d 115, 122 W.Va. 522.

42 C.J. p 1244 note 18 [O].

Injury at railroad crossing to person on railroad speeder

Wash.—Petersen v. Ingersoll-Rand Co., 78 P.2d 1083, 194 Wash. 584.

Injuries to guests or passengers

Ill.—Ritholz v. Yellow Cab Co., 50 N.E.2d 114, 319 Ill.App. 647.

Mo.—Bear v. Devore, App., 176 S.W.2d 862.

Neb.—Roh v. Opocensky, 251 N.W. 102, 125 Neb. 551.

Tex.—Bigelow v. Rupp, Civ.App., 192 S.W.2d 791, refused no reversible error.

Wis.—Rebholz v. Wettengel, 248 N.W. 109, 211 Wis. 285.

42 C.J. p 1244 note 17 [d].

On wrong side of road

Mo.—Lerbs v. Machetascheck, App., 49 S.W.2d 240.

Passing around vehicle

U.S.—Stolte v. Larkin, C.C.A.Minn., 110 F.2d 226—D'Allessandro v. Bechtol, C.C.A.Fla., 104 F.2d 845, certiorari denied 60 S.Ct. 295, 308 U.S. 619, 84 L.Ed. 517.

Ill.—Eldridge v. Boismenue, 49 N.E.2d 321, 319 Ill.App. 383—Wall v.

Greene, 52 N.E.2d 303, 321 Ill.App. 161.

Iowa.—Hartman v. Lee, 272 N.W. 140, 223 Iowa 32.

Neb.—Roby v. Auker, 32 N.W.2d 491, 149 Neb. 734.

Pa.—Haney v. Bobish, 33 A.2d 268, 153 Pa.Super. 191.

Wash.—Popoff v. Mott, 126 P.2d 597, 14 Wash.2d 1—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 466.

42 C.J. p 1244 note 18 [c].

Through crowded street

Mich.—Zylstra v. Graham, 221 N.W. 318, 244 Mich. 319, affirmed 224 N.W. 343, 246 Mich. 91.

N.Y.—Day v. Johnson, 39 N.Y.S.2d 203, 265 App.Div. 383.

42 C.J. p 1244 note 18 [I].

Truck crashing into house

Mass.—Gangi v. Adley Express Co., 63 N.E.2d 897, 318 Mass. 762.

Distance covered by defendant before stopping

U.S.—Meissner v. Papas, C.C.A.Wis., 124 F.2d 720—Skinner v. Pennsylvania Greyhound Lines, C.C.A.Ind., 123 F.2d 497—Bell v. Shoff, C.C.A.Pa., 89 F.2d 339—Yellow Cab Co. of Philadelphia v. Kelly, C.C.A.Pa., 62 F.2d 1032.

Neb.—Sgroi v. Yellow Cab & Baggage Co., 247 N.W. 355, 124 Neb. 525.

N.C.—Morris v. Johnson, 199 S.E. 390, 214 N.C. 402.

Or.—Ross v. Robinson, 124 P.2d 918, 169 Or. 293, reversed on other grounds 128 P.2d 956, 169 Or. 293.

42 C.J. p 1244 note 18 [v].

62. U.S.—Blaszky v. Eastern Auto Forwarding Co., C.C.A.N.Y., 134 F.2d 600—Jarman v. Philadelphia-Detroit Lines, C.C.A.N.C., 131 F.2d 728—Dixie Ohio Express Co. v. Lowery, C.C.A.Ga., 115 F.2d 56—Cope v. Heath, C.C.A.Ark., 108 F.2d 854—Schwarz v. Fast, C.C.A.Neb., 103 F.2d 865—U. S. Can Co. v. Ryan, C.C.A.Mo., 39 F.2d 445, certiorari denied 51 S.Ct. 23, 282 U.S. 842, 75 L.Ed. 748.

Ark.—Lewis v. Shackleford, 157 S.W.2d 509, 203 Ark. 500—J. Foster & Co. v. Wooldridge, 134 S.W.2d 526, 199 Ark. 551.

Cal.—Sherman v. Frank, 146 P.2d 704, 63 Cal.App.2d 278—Morris v. Fortier, 138 P.2d 368, 59 Cal.App.2d 132—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 133—Graves v. Kern County Transp. Corporation, 296 P. 902, 112 Cal.App. 261.

Cal.—Sherman v. Frank, 146 P.2d 704, 63 Cal.App.2d 278—Morris v. Fortier, 138 P.2d 368, 59 Cal.App.2d 132—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 133—Graves v. Kern County Transp. Corporation, 296 P. 902, 112 Cal.App. 261.

Cal.—Sherman v. Frank, 146 P.2d 704, 63 Cal.App.2d 278—Morris v. Fortier, 138 P.2d 368, 59 Cal.App.2d 132—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 133—Graves v. Kern County Transp. Corporation, 296 P. 902, 112 Cal.App. 261.

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Cal.—Sherman v. Frank, 146 P.2d 704, 63 Cal.App.2d 278—Morris v. Fortier, 138 P.2d 368, 59 Cal.App.2d 132—Hill v. Peres, 28 P.2d 946, 136 Cal.App. 133—Graves v. Kern County Transp. Corporation, 296 P. 902, 112 Cal.App. 261.

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Del.—Lynch v. Lynch, 195 A. 799, 9 W.W.Harr. 1.

Ill.—Goad v. Grissom, 57 N.E.2d 514, 324 Ill.App. 123—Wolfgram v. Bennehoff, 56 N.E.2d 849, 324 Ill.App. 16—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1—Davis v. Bankert, 19 N.E.2d 137, 298 Ill. App. 629—Gardner v. Wolfe, 10 N.E.2d 366, 291 Ill.App. 619—Fisher v. Wittler, 1 N.E.2d 908, 285 Ill. App. 261.

Ind.—Buddenberg v. Morgan, 38 N.E.2d 287, 110 Ind.App. 609.

Iowa.—Hawkins v. Burton, 281 N.W. 342, 225 Iowa 707—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23—Carlson v. Jacob E. Decker & Sons, 253 N.W. 923, 218 Iowa 54—Carlson v. Jacob E. Decker & Sons, 247 N.W. 296, 216 Iowa 581—Sergeant v. Challis, 238 N.W. 442, 213 Iowa 57—Duncan v. Rhombert, 236 N.W. 638, 212 Iowa 389.

Ky.—Foley's Adm'r v. Witt, 172 S.W.2d 81, 294 Ky. 498—Ward v. Martin, 147 S.W.2d 1027, 285 Ky. 337.

Md.—Wolfe v. State, for Use of Brown, 194 A. 832, 173 Md. 103—Jackson v. Leach, 152 A. 813, 160 Md. 139.

Mass.—Hubbard v. Conti, 75 N.E.2d 639, 321 Mass. 743—Sheriff v. Gil- low, 67 N.E.2d 754, 320 Mass. 46—Bessey v. Salem, 19 N.E.2d 75, 302 Mass. 188, 123 A.L.R. 1156—Herman v. Sladofsky, 17 N.E.2d 879, 301 Mass. 534—Murray v. Indursky, 165 N.E. 91, 266 Mass. 220.

Mich.—Gleason v. Hanafin, 13 N.W.2d 196, 308 Mich. 31—Hollingshead v. Gunderman, 239 N.W. 280, 256 Mich. 299.

Minn.—Kapla v. Lehti, 30 N.W.2d 685, 225 Minn. 325—Johnson v. Reinhard Bros. Co., 285 N.W. 536, 205 Minn. 212.

Miss.—Sternberg Dredging Co. v. Screws, 166 So. 754, 175 Miss. 383.

Mo.—Swain v. Anders, 163 S.W.2d 1045, 349 Mo. 963—Marlow v. Nafziger Baking Co., 63 S.W.2d 115, 333 Mo. 790—Johnessee v. Central States Oil Co., App., 200 S.W.2d 383—Bear v. Devore, App., 177 S.W.2d 674—Everhardt v. Garner, App., 100 S.W.2d 71—Burow v. St. Louis Public Service Co., App., 79 S.W.2d 478—Gay v. Samples, 57 S.W.2d 768, 227 Mo.App. 771—Dillinder v. Weeks, App., 50 S.W.2d 152.

Neb.—In re Potts' Estate, 14 N.W.2d 323, 144 Neb. 729.

N.H.—Woodbridge v. Desrocher, 35 A.2d 802, 93 N.H. 87—Wiggin v. Kingston, 20 A.2d 625, 91 N.H. 397—Kelley v. Lee, 193 A. 228, 89 N.H. 100.

N.J.—Trafford v. Howes, 181 A. 159, 115 N.J. Law 557.

N.Y.—Rodgers v. Schenectady Ry. Co., 51 N.Y.S.2d 410, 268 App.Div.

ans,⁶⁸ workmen on the highway,⁶⁴ and children;⁶⁵ | and in cases involving accidents occurring at inter-

938—Burlingame Motors Corporation v. Thurber, 81 N.Y.S.2d 223, 263 App.Div. 781, reargument denied Shields v. Thurber, 32 N.Y.S.2d 806, 263 App.Div. 909—Kelly v. United Dressed Beef Co. of New York, 293 N.Y.S. 446, 249 App.Div. 586.
N.C.—Williams v. Thomas, 14 S.E.2d 797, 219 N.C. 727—Woods v. Freeman, 195 S.E. 812, 213 N.C. 314—Hancock v. Wilson, 189 S.E. 631, 211 N.C. 129—Newman v. Queen City Coach Co., 169 S.E. 808, 205 N.C. 26.
N.D.—Leonard v. North Dakota Co-op. Wool Marketing Ass'n, 6 N.W.2d 576, 72 N.D. 310—Newton v. Gretter, 236 N.W. 254, 60 N.D. 635.
Or.—Nyhart v. Oregon Stages, 268 P. 982, 126 Or. 105.
Pa.—Stern v. Passaro, 190 A. 881, 326 Pa. 187.
Tenn.—Colonial Baking Co. v. Acquino, 103 S.W.2d 613, 20 Tenn. App. 695.
Tex.—Younger Bros. v. Marino, Civ. App., 198 S.W.2d 109—Freeman v. Texas Bread Co., Civ. App., 111 S.W.2d 307.
Vt.—Williamson v. Clark, 153 A. 448, 103 Vt. 288.
Va.—Howe v. Jones, 174 S.E. 764, 162 Va. 442—Virginia Electric & Power Co. v. Morgan's Adm'r, 173 S.E. 373, 162 Va. 123.
Wash.—Sheddy v. Inland Motor Freight, 63 P.2d 430, 189 Wash. 48—Galloway v. Segerstrom, 267 P. 40, 147 Wash. 624.
Wis.—Hein v. Huber, 252 N.W. 692, 214 Wis. 230.
43 C.J. p 1244 note 17 [a].
63. U.S.—D'Allessandro v. Bechtol, C.C.A.Fla., 104 F.2d 845, certiorari denied 60 S.Ct. 295, 308 U.S. 619, 84 L.Ed. 517—Bell v. Shoff, C.C.A. Pa., 89 F.2d 339—Ringstrom v. De Witt, C.C.A.Minn., 58 F.2d 137.
Ark.—Brotherton v. Walden, 161 S.W.2d 391, 204 Ark. 92—Allen v. Ross, 138 S.W.2d 409, 200 Ark. 104.
Cal.—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217—Jones v. Heinrich, 122 P.2d 304, 49 Cal.App.2d 702—Hoppe v. Bradshaw, 108 P.2d 947, 42 Cal.App.2d 334—Casalegno v. Leonard, 105 P.2d 125, 40 Cal.App.2d 575—Thompson v. Baldwin, 80 P.2d 198, 26 Cal.App.2d 703—Welch v. Sink, 74 P.2d 832, 24 Cal.App.2d 231—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App.2d 738—Coughman v. Harman, 26 P.2d 851, 135 Cal.App.49—Sonstelle v. Bush, 283 P. 336, 102 Cal.App. 396.
D.C.—Goodyear Service v. Pretzfelder, 84 F.2d 242, 65 App.D.C. 389.
Ga.—Peck v. Baker, 46 S.E.2d 751, 76 Ga.App. 588.
Idaho.—Stearns v. Graves, 111 P.2d 882, 62 Idaho 312.

Ill.—Young v. Patrick, 153 N.E. 623, 323 Ill. 200—Langford v. Smith, 51 N.E.2d 789, 320 Ill.App. 684—Knight v. Citizens Coach Co., 30 N.E.2d 180, 307 Ill.App. 251—Blumb v. Getz, 13 N.E.2d 1019, 294 Ill.App. 432—Kirman v. Hutchinson, 254 Ill.App. 469.
Ind.—Fishman v. Eads, 168 N.E. 495, 90 Ind. App. 137.
Iowa.—Hayes v. Stunkard, 10 N.W.2d 19, 233 Iowa 582—Hartman v. Lee, 272 N.W. 140, 223 Iowa 32—Minks v. Stenberg, 250 N.W. 883, 217 Iowa 119—Lorimer v. Hutchinson Ice Cream Co., 249 N.W. 220, 216 Iowa 384—O'Hara v. Chaplin, 233 N.W. 516, 211 Iowa 404.
Ky.—Short Wav Lines v. Sutton's Adm'r, 164 S.W.2d 809, 291 Ky 541.
Mass.—Griffin v. Feeney, 181 NE 710, 279 Mass 602—Puccia v. Sevigne, 154 NE 765, 258 Mass 234
Mich.—Hanna v. McClave, 263 N.W. 742, 273 Mich 571—Siegel v. Detroit Cab Co., 225 N.W. 601, 246 Mich. 620—Halize v. Hargreaves, 206 N.W. 356, 233 Mich 234
Minn.—Smith v. Barry, 17 N.W.2d 324, 219 Minn 182—Anderson v. Kellev, 265 NW 821, 196 Minn 578—Schmitt v. Jackson, 219 N.W. 912, 174 Minn 577.
Miss.—Snyder v. Campbell, 110 So. 678, 145 Miss. 287, 49 A.L.R. 1402
Mo.—Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo App 380
—Loughlin v. Marr-Bridger Grocer Co., App., 10 S.W.2d 75
Mont.—Hill v. Haller, 90 P.2d 977, 108 Mont 251.
N.J.—Mursky v. Brody, 181 A. 273, 13 N.J.Misc. 725—Myles v. Sussman, 171 A. 547, 12 N.J.Misc 341—Devine v. Chester, 144 A. 322, 7 N.J. Misc 131.
N.C.—Pinnix v. Griffin, 12 S.E.2d 667, 219 N.C. 35—Templeton v. Kelley, 2 S.E.2d 696, 215 N.C. 577—Morris v. Johnson, 199 S.E. 390, 214 N.C. 402.
Ohio.—Smith v. Hoskins, 17 NE 2d 955, 59 Ohio App 298—Souder v. Hassenfeldt, 194 N.E. 47, 48 Ohio App 377.
Okl.—Phillips Petroleum Co. v. Johnson, 72 P.2d 488, 181 Okl. 256.
Or.—Greenslitt v. Three Bros. Baking Co., 133 P.2d 597, 170 Or 345—Krieger v. Doolittle, 18 P.2d 1041, 142 Or. 122—Hansen v. Bedell Co., 285 P. 823, 132 Or 332.
Pa.—McClellan v. Fox, 177 A. 823, 318 Pa. 433—Hierchelroth v. Jaffe, 35 A.2d 594, 154 Pa.Super. 54—Schulte v. Yellow Cab Co. of Philadelphia, 158 A. 184, 101 Pa.Super. 130.
R.I.—Riley v. Tsagarakis, 145 A. 12, 50 R.I. 62.
Tex.—Miller v. Rhodius, Civ.App., 153 S.W.2d 491, error refused—Norris

Bros. v. Mattinson, Civ.App., 145 S. W.2d 204.
Utah.—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.
Va.—Adkins v. Young Men's Christian Ass'n of Lynchburg, 141 S.E. 117, 149 Va. 193.
Wash.—Paddock v. Tone, 172 P.2d 481, 25 Wash.2d 940—Young v. Smith, 7 P.2d 1, 166 Wash. 411—Cannon v. City Electric & Fixture Co., 290 P. 828, 158 Wash. 66.
Wis.—Ford v. Werth, 221 N.W. 729, 197 Wis. 211.
42 C.J. p 1244 note 17 [b].
Negligence in striking pedestrian as question of law or fact generally see infra subdivision f (1) of this section.
64. Mass.—Ferrairs v. Hawes, 16 N. E.2d 674, 301 Mass. 116.
R.I.—Ball v. Webster, 13 A.2d 278, 65 R.I. 34.
W.Va.—Tilley v. Cole, 13 S.E.2d 153, 123 W.Va. 28
Negligence in striking workmen on highway as question of law or fact generally see infra subdivision f (2) of this section.
65. Ala.—Conner v. Foregger, 7 So. 2d 856, 242 Ala. 275—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359.
Cal.—De Nardi v. Palanca, 8 P.2d 220, 120 Cal.App. 371—Mize v. Duffy, 288 P. 798, 106 Cal.App. 15.
Conn.—Di Leo v. Dolinsky, 27 A.2d 126, 129 Conn. 203.
Fla.—Connell v. Petri, 30 So.2d 922
Ill.—Wall v. Greene, 52 NE.2d 303, 321 Ill.App. 161—Popadowski v. Bergaman, 26 NE.2d 722, 301 Ill. App. 422—Glassman v. Keller, 9 N.E.2d 589, 291 Ill.App. 262—Lupton v. Bonser, 6 N.E.2d 281, 288 Ill. App. 634.
Iowa.—Luse v. Nickoley, 8 N.W.2d 503.
Ky.—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666.
La.—Jones for Use and Benefit of Jones v. Nugent, App., 166 So. 193.
Md.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151.
Mass.—Holden v. Bloom, 50 NE.2d 193, 314 Mass. 309, 147 A.L.R. 722—Wright v. Carlson, 45 N.E.2d 840, 312 Mass. 584—Fitzgerald v. Brennan, 197 N.E. 20, 291 Mass. 179—Brown v. Daley, 173 N.E. 545, 273 Mass. 432—Linnane v. Millman, 159 N.E. 523, 261 Mass. 491—Clark v. Martin, 158 N.E. 265, 261 Mass. 60.
Mich.—Zylstra v. Graham, 221 N.W. 318, 244 Mich. 319, affirmed 224 N. W. 343, 246 Mich. 91.
Mo.—Wood v. Claussen, App., 207 S. W.2d 802—Gillis v. Singer, App., 86 S.W.2d 352—Erxleben v. Kaster, App., 21 S.W.2d 195.
N.H.—Bullard v. McCarthy, 195 A. 355, 89 N.H. 158.

sections and crossings⁶⁶ and, likewise, in cases involving accidents occurring at or on corners and

- N.J.—*Minarsick v. Blank*, 132 A. 251, 102 N.J.Law 231.
- N.Y.—*Byrd v. City of New York*, 35 N.Y.S.2d 209, 264 App.Div. 255—*Tyne v. B. F. Goodrich Co.*, 297 N.Y.S. 425, 252 App.Div. 24—*Shulman v. Roseth Corporation*, 238 N.Y.S. 575, 227 App.Div. 577.
- N.C.—*Sparks v. Willis*, 44 S.E.2d 343, 228 N.C. 25—*Caulder v. Kivett Motor Sales*, 20 S.E.2d 338, 221 N.C. 437.
- Ohio.—*Rothe v. Dworkin*, App. 70 N.E.2d 146.
- Pa.—*Fedorovich v. Glenn*, 9 A.2d 358, 337 Pa. 60—*Urbanick v. Croneweth Dairy Co.*, 35 A.2d 83, 154 Pa. Super. 44—*Haney v. Bobish*, 33 A.2d 268, 153 Pa. Super. 191—*Haas v. Wesley*, 14 A.2d 179, 140 Pa. Super. 453—*Rosenfeld v. Stauffer*, 182 A. 714, 121 Pa. Super. 103.
- Tenn.—*Cummins v. Woody*, 152 S.W. 2d 246, 177 Tenn. 636—*Carney v. Cook*, 13 S.W.2d 322, 158 Tenn. 333.
- Va.—*Scott v. Crawford*, 2 S.E.2d 301, 172 Va. 517.
- 42 C.J. p 1244 note 17 [c]
- Negligence in striking children as question of law or fact generally see *infra* subdivision f (8) of this section.
66. U.S.—*Dillon v. Evansville Refining Co.*, C.C.A.Ind., 127 F.2d 13—*Meissner v. Papas*, C.C.A.Wis., 124 F.2d 720—*Nielsen v. Richman*, C.C.A.S.D., 114 F.2d 343, certiorari denied *Richman v. Nielsen*, 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 458—*Bell v. Shoff*, C.C.A.Pa., 89 F.2d 339—*Jones v. Thompson*, C.C.A.Tex., 80 F.2d 456—*Perez v. Payard*, C.C.A.Miss., 64 F.2d 667.
- Ark.—*Herring v. Bollinger*, 29 S.W. 2d 676, 181 Ark. 925.
- Cal.—*Carpenter v. Gibson*, 181 P.2d 953, 80 Cal.App.2d 269—*Pollind v. Polich*, 177 P.2d 63, 78 Cal.App.2d 87—*Matsuda v. Luond*, 126 P.2d 359, 52 Cal.App.2d 453—*Harrison v. Gamatero*, 125 P.2d 904, 52 Cal.App. 2d 178—*Young v. Tassop*, 118 P.2d 371, 47 Cal.App.2d 557—*Thompson v. Baldwin*, 80 P.2d 198, 26 Cal. App.2d 703—*Welch v. Sink*, 74 P.2d 832, 24 Cal.App.2d 231—*Morrow v. Mendleson*, 58 P.2d 1302, 15 Cal. App.2d 15—*Evans v. Mitchell*, 38 P.2d 437, 2 Cal.App.2d 702—*Ederer v. Shanzer*, 25 P.2d 38, 134 Cal.App. 137—*Anderson v. Ott*, 15 P.2d 526, 127 Cal.App. 122—*Clark v. Wallman*, 2 P.2d 562, 116 Cal.App. 278—*Mize v. Duffy*, 288 P. 798, 106 Cal. App. 15.
- Colo.—*Stahl v. Cooper*, 188 P.2d 894, 117 Colo. 445—*Morgan v. Gore*, 44 P.2d 918, 96 Colo. 508.
- Conn.—*Peckham v. Knoffa*, 36 A.2d 740, 130 Conn. 646—*Di Leo v. Dolinsky*, 27 A.2d 126, 129 Conn. 203—*Atkinson v. Molstein*, 191 A. 344, 122 Conn. 611—*Guhring v. Gumpfer*, 169 A. 189, 117 Conn. 548.
- Fla.—*Bassett v. Edwards*, 30 So.2d 374—*Baston v. Shelton*, 13 So.2d 453, 152 Fla. 879—*Turner v. Modern Beauty Supply Co.*, 10 So.2d 488, 152 Fla. 3—*Toll v. Waters*, 189 So. 393, 138 Fla. 349.
- Ga.—*Callaway v. Nicholas*, 33 S.E.2d 523, 72 Ga. App. 284.
- Idaho.—*Dawson v. Salt Lake Hardware Co.*, 136 P.2d 733, 64 Idaho 666.
- Ill.—*Nelson v. Nihan*, 74 N.E.2d 549, 331 Ill. App. 610—*La Belle v. Hillman*, 71 N.E.2d 107, 330 Ill. App. 332—*Panella v. Weil-McLain Co.*, 67 N.E.2d 699, 329 Ill. App. 240—*Heh v. City of Chicago*, 66 N.E.2d 491, 328 Ill. App. 488—*Nepil v. Zeman*, 52 N.E.2d 836, 321 Ill. App. 308—*De Buck v. Gadge*, 49 N.E.2d 789, 319 Ill. App. 609—*Lagerstrom v. Jago*, 44 N.E.2d 330, 316 Ill. App. 156—*Lomax v. Brooks*, 43 N.E.2d 421, 315 Ill. App. 567—*Waud v. Landuvt*, 20 N.E.2d 834, 300 Ill. App. 611—*Scally v. Flannery*, 11 N.E.2d 123, 292 Ill. App. 349—*Shellabarger v. Nattier*, 7 N.E.2d 365, 289 Ill. App. 473—*Ituddiman v. Eclipse Laundry Co.*, 6 N.E.2d 694, 289 Ill. App. 609
- Ind.—*Lindley v. Sink*, 30 N.E.2d 456, 218 Ind. 1—*H. E. McConigal, Inc. v. Etherington*, App. 79 N.E.2d 777.
- Iowa.—*Falt v. Krug*, 32 N.E.2d 781—*Kallansrud v. Libbey*, 13 N.W.2d 684, 234 Iowa 700—*Odegard v. Gregerson*, 12 N.W.2d 559, 234 Iowa 325—*Davidson v. Vast*, 10 N.W.2d 12, 233 Iowa 534—*Holden v. Hanner*, 1 N.W.2d 671, 231 Iowa 468—*Lathrop v. Knight*, 297 N.W. 291, 230 Iowa 272—*Hinrichs v. Mengel*, 293 N.W. 452, 228 Iowa 1124—*Rogers v. Jefferson*, 285 N.W. 701, 226 Iowa 1017—*Bletzer v. Wilson*, 276 N.W. 836, 224 Iowa 884—*Elby v. Sanford*, 273 N.W. 918, 223 Iowa 805—*Huffman v. King*, 268 N.W. 144, 222 Iowa 150—*Minks v. Stenberg*, 250 N.W. 883, 217 Iowa 119—*Lorimer v. Hutchinson Ice Cream Co.*, 249 N.W. 220, 216 Iowa 381—*Waldman v. Sanders Motor Co.*, 213 N.W. 555, 214 Iowa 1139—*Hartman v. Red Ball Transp. Co.*, 233 N.W. 23, 211 Iowa 64—*Shuck v. Keefe*, 218 N.W. 31, 205 Iowa 365
- Kan.—*Steele v. Russell*, 176 P.2d 251, 162 Kan. 271—*Hurla v. Capper Publications*, 87 P.2d 552, 149 Kan. 369—*Claggett v. Phillips Petroleum Co.*, 73 P.2d 1015, 146 Kan. 846—*Porter v. Walker*, 300 P. 1095, 133 Kan. 432.
- Ky.—*Stephens v. Glass*, 176 S.W.2d 139, 296 Ky. 90—*Smith v. Goodwin*, 165 S.W.2d 976, 292 Ky. 37.
- La.—*Yarberry v. Biggs*, App., 192 So. 752.
- Me.—*Libby v. Heikkinen*, 32 A.2d 604, 140 Me. 23—*Eaton v. Marcella*, 29 A.2d 162, 139 Me. 256—*Collins v. Kelley*, 179 A. 65, 133 Me. 410.
- Md.—*Hess v. Loftus*, 195 A. 556, 173 Md. 284—*Jackson v. Leach*, 152 A. 813, 160 Md. 139—*Taxicab Co. v. Ottenritter*, 135 A. 587, 151 Md. 525.
- Mass.—*Cloutre v. Lees*, 75 N.E.2d 242, 321 Mass. 679—*Preston v. Clanci*, 73 N.E.2d 246, 321 Mass. 297—*Pawloski v. Hess*, 149 N.E. 122, 253 Mass. 478, affirmed *Hess v. Pawloski*, 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091.
- Mich.—*Arnold v. Krug*, 273 N.W. 322, 279 Mich. 702—*Swainston v. Kennedy*, 235 N.W. 240, 253 Mich. 518—*Smith v. Ormiston*, 219 N.W. 618, 242 Mich. 600—*Halize v. Hargreaves*, 206 N.W. 356, 233 Mich. 234.
- Minn.—*Eichten v. Central Minn. Cop. Power Ass'n of Redwood County*, 28 N.W.2d 862, 224 Minn. 180—*Mahowald v. Beckrich*, 2 N.W.2d 569, 212 Minn. 78—*Odegard v. Connolly*, 1 N.W.2d 137, 211 Minn. 342—*Bavers v. Bongfeldt*, 277 N.W. 239, 201 Minn. 546—*Johnston v. Jordan*, 258 N.W. 433, 193 Minn. 298—*Wiester v. Kaufer*, 247 N.W. 237, 188 Minn. 341—*Dohm v. R. N. Carдозо & Bro.*, 206 N.W. 377, 165 Minn. 193.
- Miss.—*Mississippi Power Co. v. McCrary*, 176 So. 165, 179 Miss. 427.
- Mo.—*Fisher v. Ozark Milk Service*, 201 S.W.2d 305, 356 Mo. 95—*Lowry v. Mohr*, 195 S.W.2d 652—*Jungeblut v. Maris*, 172 S.W.2d 861, 351 Mo. 301—*Pence v. Kansas City Laundry Service Co.*, 59 S.W.2d 633, 332 Mo. 930—*Ross v. Wilson*, 163 S.W.2d 342, 236 Mo. App. 1178—*Finley v. Austin*, App., 132 S.W. 2d 1109—*Bramblett v. Harlow*, App., 75 S.W.2d 626—*Bullmore v. Beeler*, App., 33 S.W.2d 161—*Roark v. Stone*, 30 S.W.2d 647, 224 Mo. App. 554—*Erleben v. Kaester*, App., 21 S.W.2d 195
- Neb.—*Spaulding v. Howard*, 27 N.W. 2d 832, 148 Neb. 496—*Meyer v. Platte Val. Const. Co.*, 25 N.W.2d 412, 147 Neb. 860—*Parks v. Metz*, 299 N.W. 643, 140 Neb. 235—*Moncrief v. Interstate Transit Lines*, 261 N.W. 163, 129 Neb. 168.
- N.H.—*Dovle v. Telegraph Pub. Co.*, 35 A.2d 394, 93 N.H. 61—*Spear v. Penna*, 27 A.2d 92, 92 N.H. 190—*Bourque v. Strusa*, 25 A.2d 127, 92 N.H. 91—*Weiss v. Wasserman*, 15 A.2d 861, 91 N.H. 164—*Carlin v. Drake*, 192 A. 568, 89 N.H. 52.
- N.J.—*Itizio v. Public Service Electric & Gas Co.*, 23 A.2d 585, 128 N.J.Law 60—*Malinowski v. Jersey City & Lyndhurst Bus Co.*, 169 A. 636, 112 N.J.Law 103—*Lipschitz v. New York & New Jersey Produce Corporation*, 168 A. 390, 111 N.J.Law 392.
- N.M.—*Williams v. Haas*, 189 P.2d 632.

curves,⁸⁷ or where the accident occurs while the | operator's view is obstructed,⁶⁸ or, likewise, in cas-

N.Y.—Schuvert v. Werner, 50 N.E.2d 533, 291 N.Y. 32—DuChessi v. D'Allesandro, 38 N.Y.S.2d 662, 265 App. Div. 982, appeal denied 41 N.Y.S.2d 224, 266 App.Div. 700—Armstrong v. Koller, 25 N.Y.S.2d 984, 261 App. Div. 1017—Wagner v. Brooklyn Bus Corporation, 290 N.Y.S. 646, 248 App.Div. 911—Albrunzo v. Haber, 284 N.Y.S. 515, 246 App.Div. 864.
N.C.—Nichols v. Goldston, 46 S.E. 2d 320, 228 N.C. 514—Manheim v. Blue Bird Taxi Corporation, 200 S. E. 382, 214 N.C. 689—Kelly v. Hunsucker, 189 S.E. 664, 211 N.C. 153—Turner v. Lipe, 188 S.E. 108, 210 N.C. 627.
Ohio.—Solomon v. Mote, App., 49 N. E.2d 703—Esterly v. Youngstown Arc Engraving Co., 17 N.E.2d 416, 59 Ohio App. 207—Souder v. Hasenfeldt, 194 N.E. 47, 48 Ohio App. 377.
Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186—Nolen v. Corvallis Auto Transit Co., 4 P.2d 624, 138 Or. 98—Noble v. Sears, 257 P. 809, 122 Or. 162.
Pa.—Atkinson v. Coskey, 47 A.2d 156, 354 Pa. 297—Mellott v. Tuckey, 38 A.2d 40, 350 Pa. 74—Kelly v. Venezia, 35 A.2d 67, 348 Pa. 325—Hoban v. Conroy, 32 A.2d 769, 347 Pa. 487—Maio v. Fahs, 14 A.2d 105, 339 Pa. 180—Rankin v. Boyle, 195 A. 36, 328 Pa. 284—Boehm v. Heston, 189 A. 298, 325 Pa. 89—Scullio v. Scholz, 188 A. 121, 324 Pa. 268—Rymer v. Devon, Com.Pl., 32 Del. Co. 271—Matys v. Consumers Ice & Coal Co., Com.Pl., 37 Luz Leg.Reg. 6, reversed on other grounds 36 A. 2d 821, 154 Pa Super 568—Mashinsky v. City of Philadelphia, Com. Pl., 30 Mun L.R. 177.
R.I.—Harding v. Pierce, 13 A.2d 276, 64 R.I. 490.
S.D.—Bowers v. Guhin, 233 N.W. 283, 57 S.D. 441.
Tenn.—Sutherland v. Keene, App., 203 S.W.2d 917—Dullng v. Burnett, 124 S.W.2d 294, 22 Tenn App. 522.
Tex.—Polasek v. Gaines Bros., Civ. App., 185 S.W.2d 609, error refused—Parker v. Bridgeport Mach. Co., Civ.App., 91 S.W.2d 807.
Utah.—Martin v. Sheffield, 189 P.2d 127.
Vt.—Purinton v. Newton, 49 A.2d 98, 114 Vt. 490—Ferraro v. Earle, 164 A. 886, 105 Vt. 243.
Va.—Mausser v. Hebb, 48 S.E.2d 257, 187 Va. 876—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570—Greenleaf v. Richards, 16 S.E.2d 374, 178 Va. 40.
Wash.—Pyle v. Wilbert, 98 P.2d 664, 2 Wash.2d 429—Jamieson v. Taylor, 95 P.2d 791, 1 Wash.2d 217—Anderson v. Wheeler, 46 P.2d 726, 182 Wash. 249—Garrett v. Byerly, 284 P. 343, 155 Wash. 351, 68 A.L.R.

254—Carrigan v. Ashwell, 266 P. 686, 147 Wash. 597, 58 A.L.R. 1194.
Wis.—Lang v. Baumann, 251 N.W. 461, 213 Wis. 258—Brown v. Haertel, 244 N.W. 630, 210 Wis. 345—Hein v. Wendlandt, 240 N.W. 815, 207 Wis. 139.
42 C.J. p 1244 note 18 [a], [b].
Collision of sled with automobile
Pa.—Smith v. Pachter, 19 A.2d 85, 342 Pa. 21.
Speed of twenty miles per hour in approaching intersection of city street in residential district was not negligent speed as matter of law in and of itself, but whether it was reasonable depended on surrounding conditions, including observations made by automobile driver in approaching and passing through intersection.—Carpenter v. Gibson, 181 P. 2d 953, 80 Cal App 2d 269.
67. Ark.—Roark Transp. v. Sneed, 68 S.W.2d 996, 188 Ark 928.
Cal.—Kehlor v. Satterlee, 98 P.2d 759, 37 Cal.App 2d 116.
Fla.—Merchants' Transp Co v. Daniel, 149 So. 401, 109 Fla 496
Idaho—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792.
Ill.—Hanson v. Blatt, 53 N.E.2d 143, 321 Ill App 364.
Ky.—Gilreath v. Blue & Gray Transp Co., 108 S.W.2d 1002, 269 Ky. 787, followed in 108 S.W.2d 1004, 269 Ky 791—Cadle v. McHargue, 60 S.W.2d 973, 249 Ky. 385.
Mass.—O'Brien v. Bernol, 8 N.E.2d 780, 297 Mass 271.
Neb.—Robison v. Union Transfer Co., 4 N.W.2d 558, 141 Neb. 574—Ross v. Carroll, 291 N.W. 726, 138 Neb. 1.
N.J.—Sembler v. Scott, 32 A.2d 79, 130 N.J Law 184—Itullis v. Public Service Electric & Gas Co., 155 A. 455, 9 N.J.Misc 738
N.C.—Patrick v. Treadwell, 21 S.E.2d 818, 222 N.C. 1—Reid v. City Coach Co., 2 S.E.2d 578, 215 N.C. 469, 123 A.L.R. 140.
Pa.—Fabel v. Hazlett, 43 A.2d 373, 157 Pa Super 416.
Va.—Bell v. Kenney, 23 S.E.2d 781, 181 Va 24.
W.Va.—Gilbert v. Lewisburg Ice Cream Co., 184 S.E. 244, 117 W.Va. 107.
42 C.J. p 1244 note 18 [e].
68. Cal.—Hamm v. San Joaquin & Kings River Canal Co., 111 P.2d 940, 44 Cal.App.2d 47—Whelan v. Bigelow, 92 P.2d 952, 33 Cal.App.2d 717.
Iowa.—Altfillisch v. Wessel, 225 N.W. 862, 208 Iowa 361.
Ky.—Wilburn v. Simons, 196 S.W.2d 356, 302 Ky. 752.
N.C.—Rudd v. Holmes, 152 S.E. 894, 198 N.C. 640.

Pa.—German v. Riddell, 27 A.2d 680, 149 Pa.Super. 647—Wright v. Moyer, Com.Pl., 32 Del.Co. 79.
Va.—Gregory v. Daniel, 4 S.E.2d 786, 173 Va. 442.
Wis.—Schulz v. General Casualty Co., 288 N.W. 803, 233 Wis. 118—Hein v. Wendlandt, 240 N.W. 815, 207 Wis. 139.
42 C.J. p 1244 note 18 [s].
Blinded by lights of approaching or parked car
Idaho—Maler v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642
Ill.—Paul v. Garman, 34 N.E.2d 884, 310 Ill.App 447.
Kan.—Anderson v. Thompson, 22 P.2d 438, 137 Kan 754.
Md.—Jackson v. Forwood, 47 A.2d 81, 186 Md 379.
Pa.—Adams v. Fields, 162 A. 177, 308 Pa. 301—Kelly v. Irvin, 163 A. 344, 106 Pa Super. 329—Witman v. Victor Lynn Lines, Com.Pl., 34 Del. Co 39.
Tenn.—Virginia Ave. Coal Co v. Bailey 205 S.W.2d 11, 185 Tenn. 242.
Va.—Howe v. Jones, 174 S.E. 764, 162 Va 442.
Wash.—Smith v. Bratnober, 62 P.2d 455, 188 Wash. 244—Skates v. Conmitt, 280 P. 15, 153 Wash. 538.
42 C.J. p 1244 note 18 [t].
Blinded by sun
N.D.—Martin v. Parkins, 213 N.W. 574, 55 N.D. 339.
Dusty roads
Mo.—Nixon v. Hill, 52 S.W.2d 208, 227 Mo.App. 312.
Fog or mist
Ark.—Brundrett v. Briggs, 158 S.W. 2d 708, 203 Ark. 773.
Cal.—Anthony v. Hobbie, 155 P.2d 826, 25 Cal.2d 814—Wilkerson v. Brown, 190 P.2d 958, 84 Cal.App.2d 401—Porter v. Signal Trucking Service, 138 P.2d 753, 59 Cal.App.2d 289.
Iowa.—Rabenold v. Hutt, 283 N.W. 865, 226 Iowa 321—Caudle v. Zenor, 251 N.W. 69, 217 Iowa 77.
Mass.—Campbell v. Ashler, 70 N.E.2d 302, 320 Mass. 475.
Mich.—Petersen v. Lundin, 211 N.W. 86, 236 Mich. 590.
Tenn.—Tiffany v. Shipley, 161 S.W.2d 373, 25 Tenn.App. 539.
Wis.—Colby Cheese Box Co. v. Dalandorfer, 251 N.W. 447, 213 Wis. 321.
42 C.J. p 1244 note 18 [u].
Rain or drizzle
Ark.—Rose v. Greb, 112 S.W.2d 961, 195 Ark. 532.
Cal.—Watkins v. Nutting, 110 P.2d 384, 17 Cal.2d 490—Wright v. Ponitz, 112 P.2d 25, 44 Cal.App.2d 215.
Mass.—Le Blanc v. Pierce Motor Co., 30 N.E.2d 684, 307 Mass. 535.
Mich.—Petersen v. Lundin, 211 N.W. 86, 236 Mich. 590.

es where the accident occurs during the nighttime,⁶⁹ or while he is racing,⁷⁰ or where the condition of the street or highway is dangerous.⁷¹

There must be some evidence that the speed was unreasonable under the circumstances in order to

take the case to the jury on the issue of speed,⁷² and in various cases the evidence has been held to be insufficient to warrant or justify the submission to the jury of defendant's negligence arising from excessive or unreasonable speed at the time of the accident;⁷³ but direct testimony as to

Wash.—Sellman v. Hess, 130 P.2d 688, 15 Wash.2d 310.

Smoke

Ky.—Bong v. Webster, 290 S.W. 662, 217 Ky. 781.

Minn.—Becker v. Northland Transp. Co., 274 N.W. 180, 200 Minn. 272, affirmed 275 N.W. 510, 200 Minn. 272.

Neb.—Jones v. Union Pac. R. Co., 2 N.W.2d 624, 141 Neb. 112, rehearing denied 4 N.W.2d 875, 141 Neb. 112.

Or.—French v. Christner, 143 P.2d 674, 173 Or. 158.

S.D.—Richards v. Kingdon, 264 N.W. 183, 64 S.D. 19.

Wis.—Leonard v. Bottomley, 245 N.W. 849, 210 Wis. 411, followed in 245 N.W. 852, 210 Wis. 420 and 245 N.W. 853, 210 Wis. 421.
42 C.J. p 1244 note 18 [u].

Through snowstorm

Conn.—Svenlberg v. Subotkouski, 50 A.2d 441, 133 Conn. 329.

Pa.—Bursese v. Beaver Valley Motor Coach Co., 34 A.2d 61, 348 Pa. 95.

69. U.S.—White v. State of Maryland, to Use of Anderson, C.C.A. Md., 106 F.2d 392.

Ariz.—Butane Corp. v. Kirby, 187 P.2d 325, 66 Ariz. 272.

Cal.—Anthony v. Hobbie, App., 193 P.2d 748—O'Brien v. Schellberg, 140 P.2d 159, 59 Cal.App.2d 764.

Ill.—Edmiston v. Hampton, 42 N.E.2d 963, 315 Ill.App. 305—Rothblum v. Gelatt, 10 N.E.2d 680, 291 Ill.App. 614.

Iowa.—Scott v. McKelvey, 290 N.W. 729, 228 Iowa 264.

Mass.—Le Blanc v. Pierce Motor Co., 30 N.E.2d 684, 307 Mass. 535—Buczek v. Damian, 29 N.E.2d 682, 307 Mass. 167.

Minn.—Olson v. Evert, 28 N.W.2d 753, 224 Minn. 528—Kemerer v. Kemerer, 269 N.W. 832, 198 Minn. 316.

N.H.—Humphreys v. Ash, 6 A.2d 436, 90 N.H. 223.

N.J.—Hamilton v. Althouse, 178 A. 792, 115 N.J. Law 248.

Pa.—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Jenkins v. Poley, 50 A.2d 32, 160 Pa.Super. 6—Bert v. Walker, 21 A.2d 488, 146 Pa.Super. 50.

S.D.—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.

42 C.J. p 1244 note 18 [r].

Blackout or dimout

Cal.—Bennett v. Robertson, 150 P.2d 547, 65 Cal.App.2d 278.

Mass.—Mitchell v. Silverstein, 70 N.E.2d 306, 320 Mass. 524.

Driving without lights

Ind.—Indiana Ins. Co. v. Handlon, 24 N.E.2d 1003, 216 Ind. 442.
42 C.J. p 1244 note 18 [q].

70. Ind.—Lee Bros. v. Jones, 54 N.E.2d 108, 114 Ind.App. 688.

Mont.—Jones v. Northwestern Auto Supply Co., 18 P.2d 305, 93 Mont. 224.

42 C.J. p 1244 note 18 [g].

71. Conn.—Nirenstein v. Sachs, 167 A. 822, 117 Conn. 343.

Ice or snow

U.S.—Channell v. Sampson, C.C.A. Mass., 108 F.2d 315, vacated on other grounds 110 F.2d 754, 128 A.L.R. 394, certiorari denied 60 S.Ct. 1099, 310 U.S. 650, 84 L.Ed. 1415.

Idaho.—York v. Alho, 16 P.2d 980, 52 Idaho 528.

Ill.—Short v. Chrisman, 53 N.E.2d 731, 322 Ill.App. 71.

Kan.—Walls v. Consolidated Gas Utilities Corporation, 96 P.2d 656, 150 Kan. 919.

Mich.—Brown v. Arnold, 6 N.W.2d 914, 303 Mich. 616.

Minn.—Ralston v. Tomlinson, 292 N.W. 21, 207 Minn. 485—Kemerer v. Kemerer, 269 N.W. 832, 198 Minn. 316.

Mo.—Wright v. Spieldoch, 193 S.W.2d 42, 354 Mo. 1076.

N.H.—Burns v. Cote, 164 A. 771, 86 N.H. 167.

N.C.—Brown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626.

Ohio.—Kaczmarek v. Murphy, 70 N.E.2d 784, 78 Ohio App. 449.

Pa.—Rosenberg v. Walker, 50 A.2d 209, 355 Pa. 378—Yunak v. Walters, 43 A.2d 536, 157 Pa.Super. 660.

Tenn.—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn.App. 379.

Wis.—Burt v. Meunier, 32 N.W.2d 241, 252 Wis. 581.

Loose gravel

Miss.—Wheat v. Teche Lines, 179 So. 553, 181 Miss. 408.

Oil on road

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

Rough and dangerous road

N.Y.—Wallace v. Bennett, 16 N.Y.S.2d 987, 258 App.Div. 1033, appeal denied 18 N.Y.S.2d 751, 259 App. Div. 788.

Wet pavements

U.S.—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.

Cal.—Rogers v. Foppiano, 72 P.2d 239, 23 Cal.App.2d 87—Graves v.

Kern County Transp. Corporation, 296 P. 902, 112 Cal.App. 261.

Ill.—Koch v. Barker, 41 N.E.2d 329, 314 Ill.App. 378.

N.Y.—Mancuso v. Ungerland, 269 N.Y.S. 803, 241 App.Div. 740—Glennie v. Falls Equipment Co., 263 N.Y.S. 124, 238 App.Div. 7.

Ohio.—Saeger v. Canton City Lines, 69 N.E.2d 533, 78 Ohio App. 211.

Pa.—Davlin v. Levin, 55 A.2d 364, 357 Pa. 554—Potance v. Cipriano, Com. Pl., 39 Luz Leg.Reg. 63, 13 Som. Leg.J. 73.

Va.—Gregory v. Daniel, 4 S.E.2d 786, 173 Va. 442—Sisson v. Anderson, 183 S.E. 431, 165 Va. 629.

42 C.J. p 1244 note 18 [n].

72. Ky.—Wener v. Pope, 273 S.W. 92, 209 Ky. 553.

42 C.J. p 1245 note 20.

73. U.S.—Greyhound Lines v. Noller, C.C.A. Ill., 36 F.2d 443.

Cal.—Farmer v. Fairbanks, 162 P.2d 26, 71 Cal.App.2d 70.

D.C.—Adams v. Capital Transit Co., 154 F.2d 859, 81 U.S.App.D.C. 78.

Ill.—La Prise v. Carr-Leasing, Inc., 62 N.E.2d 26, 326 Ill.App. 514—Pastore v. Sasso, 46 N.E.2d 857, 317 Ill.App. 538—Parks v. Gott, 12 N.E.2d 925, 293 Ill.App. 640.

Iowa.—Welch v. Greenberg, 14 N.W.2d 266, 235 Iowa 159—Tharp v. Rees, 277 N.W. 758, 224 Iowa 962—King v. Gold, 276 N.W. 774, 224 Iowa 890—Howk v. Anderson, 253 N.W. 32, 218 Iowa 358—McNeely v. Conlon, 248 N.W. 17, 216 Iowa 796.

Kan.—Allen v. Pearce Dental Supply Co., 88 P.2d 1057, 149 Kan. 549.

Ky.—Hatfield v. Sargent's Adm'r, 208 S.W.2d 306, 306 Ky. 782—Whalen's Adm'r v. Sundell, 199 S.W.2d 426, 303 Ky. 752—Atlantic Greyhound Corp. v. Franklin, 192 S.W.2d 753, 301 Ky. 867—Bowling Green-Hopkinsville Bus Co. v. Edwards, 59 S.W.2d 584, 248 Ky. 684—Consolidated Coach Corporation v. Hopkins' Adm'r, 37 S.W.2d 1, 238 Ky. 136.

Minn.—Laiti v. MacNaughtin, 271 N.W. 481, 199 Minn. 167.

Mo.—Freed v. Mason, App., 137 S.W.2d 673.

Neb.—Adamek v. Tilford, 249 N.W. 300, 125 Neb. 139.

N.H.—Walsh v. Public Service Co. of New Hampshire, 30 A.2d 494, 92 N.H. 331—Coleman v. Stacy, 13 A.2d 466, 91 N.H. 60.

N.J.—Poole v. Twentieth Century Operating Co., 195 A. 386, 119 N.J. Law 204, reversed on other grounds. 1 A.2d 389, 121 N.J. Law 244.

speed is not required, evidence of facts sufficient to justify as inference of negligence being sufficient.⁷⁴

Where the evidence as to speed is uncontradicted and but one inference may be drawn therefrom, the question is one of law;⁷⁵ and where the evidence of defendant's speed is not in conflict and proves a clear case of negligence on his part proximately causing the injury, and there is no proof of contributory negligence, it has been held that the court may adjudge a recovery as a matter of law.⁷⁶ The driver of a motor vehicle on encountering a fog is not bound as a matter of law to stop and wait for the fog to lift in order to escape the charge of negligence.⁷⁷

Violation of speed regulations as negligence. Although, it is undisputed that defendant at the time of the injury was violating a statute or ordinance regulating the speed of motor vehicles,

it has been held that negligence does not exist as a matter of law;⁷⁸ but it has also been held that a speed in excess of the speed allowed by law constitutes negligence as a matter of law.⁷⁹

Assured clear distance ahead. Where it is charged that defendant was operating his motor vehicle in violation of a statute providing that no person shall operate a motor vehicle at a speed greater than will permit him to bring the vehicle to a stop within the assured clear distance ahead, it is for the jury, on conflicting evidence or where different inferences may be drawn from the evidence, to determine what was the assured clear distance ahead in a particular case,⁸⁰ whether the operator was driving at a speed which, under the existing circumstances, constituted a violation of the statute,⁸¹ and whether defendant has shown such a state of facts as would excuse him from the operation of the statute.⁸²

N.Y.—Zerberini v. M. & M. Transp. Co., 71 N.Y.S.2d 803.

N.C.—Proctor v. Carter Fabrics Corp., 40 S.E.2d 472, 227 N.C. 698—Mitchell v. Melts, 18 S.E.2d 406, 220 N.C. 793.

Ohio.—Willard v. Fast, 61 N.E.2d 807, 75 Ohio App. 225.

Or.—Storla v. Spokane, Portland & Seattle Transp. Co., 297 P. 367, 136 Or. 315, rehearing denied 298 P. 1065, 136 Or. 315.

Pa.—Valley Motor Transit Co. v. Allison, 33 A.2d 485, 163 Pa.Super. 221.

Tex.—Gibson v. Texas Co., Civ.App., 20 S.W.2d 349, error dismissed.

Evidence very unsatisfactory

Refusing to submit pedestrian's action for personal injuries on theory of defendant's negligent speed in turning into street was not error, where evidence as to speed in turning movement was very unsatisfactory.—Rhoads v. Herbert, 148 A. 693, 298 Pa. 522.

Place of accident

In action for injury sustained by child who ran into highway before automobile, evidence that accident occurred in residential district, so as to establish that defendant was traveling at excessive speed was insufficient for jury.—Fox v. Barlow, 173 S.E. 43, 206 N.C. 66.

Whether traction company violated statute relating to speed in business districts was question of fact and law not required to be submitted.—Community Traction Co. v. Konte, 172 N.E. 533, 35 Ohio App. 361, affirmed 172 N.E. 442, 122 Ohio St. 514.

74. Ill.—Young v. Patrick, 153 N.E. 623, 323 Ill. 200.
42 C.J. p 1245 note 21.

75. N.J.—Burr v. Metropolitan Dis-

tributors, 56 A.2d 882, 136 N.J.Law 583.

Place of accident

(1) Where there was no dispute in facts, question whether certain district was a "closely built-up" portion of municipal corporation, within statute providing that in such a place speed of a designated number of miles per hour shall be prima facie lawful, was question of law for court.—Titus v. Stouffer, Ohio App., 40 N.E.2d 178.

(2) Where evidence as to number of separate dwellings or business houses fronting on street at place of automobile accident was not conflicting, submission of issues whether street was in residence district and permissible speed thereon was error.—Adrian v. Guyette, 58 P.2d 988, 14 Cal App 2d 493.

76. Directed verdict for plaintiff

N.J.—Burr v. Metropolitan Distributors, 56 A.2d 882, 136 N.J.Law 583

77. Iowa.—Rabenold v. Hutt, 283 N.W. 865, 226 Iowa 321.

Me.—Peasley v. White, 152 A. 530, 129 Me 450, 73 A.L.R. 1017.

N.M.—Silva v. Waldie, 82 P.2d 282, 42 N.M. 514.

78. Ariz.—Butane Corp. v. Kirby, 187 P.2d 325, 66 Ariz. 272.

Cal.—Bennett v. Robertson, 150 P.2d 547, 65 Cal.App.2d 278—Matsuda v. Luond, 126 P.2d 359, 52 Cal.App.2d 453—Moss v. Stubbs, 295 P. 572, 111 Cal.App. 359, rehearing denied 296 P. 86, 111 Cal.App. 359.

Md.—State, for Use of Parks, v. Insley, 29 A.2d 904, 181 Md. 347.

Minn.—Tully v. Flour City Coal & Oil Co., 253 N.W. 22, 191 Minn. 84.

N.J.—Martens v. Martens, 167 A. 227, 11 N.J.Misc. 705.

N.J.—Higgins v. Metzger, 143 A. 391, 101 Vt. 285.

Prima facie evidence of negligence

Cal.—Atkins v. Barnum, 23 P.2d 103, 132 Cal App. 506.

Repeated statute

Tenn.—Woodfin v. Insel, 13 Tenn. App 493.

79. Tex.—Davis v. Estes, Com.App., 44 S.W.2d 952.

Wash.—Rhodes v. Johnson, 299 P. 976, 163 Wash 54, followed in 299 P. 978, 163 Wash 701.

80. Ohio.—Sweeney v. Schneider, 53 N.E.2d 820, 73 Ohio App 157.

Assured-clear-distance-ahead statutes generally see supra § 293.

81. Iowa.—Semler v. Oertwig, 12 N.W.2d 265, 234 Iowa 233—Janes v. Roach, 290 N.W. 87, 228 Iowa 129

—Ikemer v. Takin Bros Freight Lines, 289 N.W. 477, 227 Iowa 903

—Lukin v. Marvel, 259 N.W. 782, 219 Iowa 773.

Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521.

Ohio.—Tamplin v. Pennsylvania R. Co., App., 51 N.E.2d 736—Titus v. Stouffer, App., 40 N.E.2d 178.

Okla.—National Tank Co. v. Scott, 180 P.2d 316, 191 Okl. 613.

Pa.—Hoy v. Wolfgang, Com.Pl., 7 Sch.Reg. 77.

Evidence held insufficient for jury

Iowa.—Tharp v. Rees, 277 N.W. 758, 224 Iowa 962—Wells v. Wildin, 277 N.W. 308, 224 Iowa 913, 115 A.L.R. 169.

82. Iowa.—Swan v. Dalley-Luce Auto Co., 293 N.W. 468, 228 Iowa 880

—Swan v. Dalley-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89.

Ohio.—Glasco v. Mendelman, 56 N.E.2d 210, 143 Ohio St. 649.

Speed preventing stop within length of vision. The driving of an automobile at a speed which prevents stopping within the length of vision is not negligence as a matter of law,⁸³ but it may constitute negligence as a matter of fact.⁸⁴ In some jurisdictions it is not negligence as a matter of law to drive at nighttime at such speed as to render it impossible to stop within the distance illuminated by the headlights of the motor vehicle.⁸⁵ In other jurisdictions the operation of a motor vehicle at night at such a speed that it cannot be stopped within the distance illuminated by the headlights is negligence as a matter of law,⁸⁶ although it has been held that such rule is not without exceptions⁸⁷ and does not apply in those cases where reasonable minds may differ on the question of whether or not the operator exercised the care, caution, and prudence required

of him under the circumstances of the particular situation,⁸⁸ or where there is evidence from which the jury may find that there were disconcerting circumstances affecting the operator's actions at the time of the collision.⁸⁹

(3) Lookout

In an action for damages for injuries resulting from the operation of a motor vehicle, the question whether the driver of the vehicle causing the injury was keeping a lookout at the time of the accident ordinarily is one of fact.

Wherever the evidence is conflicting or different inferences may reasonably be drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether the driver of the vehicle causing the injury was keeping a reasonably careful lookout at the time of the accident.⁹⁰ What is a proper lookout in a

Evidence held insufficient for jury

Iowa.—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771.

83. N.Y.—Collichio v. Chapman, 261 N.Y.S. 44, 237 App.Div. 837.

84. N.M.—Lopez v. Townsend, 82 P. 2d 921, 42 N.M. 601.

85. U.S.—Swinger v. Firman Equipment Corporation, C.C.A.III., 94 F. 2d 269.

Me.—Barker v. Perry, 2 A.2d 625, 136 Me 510.

Mont.—Broberg v. Northern Pac. Ry. Co., 182 P.2d 851.

Pa.—Stein v. Taylor, Com.Pl., 56 Mont.Co. 199.

Tenn.—Virginia Ave. Coal Co. v. Bailey, 205 S.W.2d 11, 185 Tenn. 232—Faulk v. McPherson, 182 S.W. 2d 130, 27 Tenn.App. 506.

Vt.—Towne v. Rizzico, 32 A.2d 129, 113 Vt. 205.

86. Neb.—Miers v. McMaken, 22 N.W. 2d 422, 147 Neb. 133—Roth v. Blomquist, 220 N.W. 572, 117 Neb. 444, 58 A.L.R. 1473.

87. Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

88. Neb.—Dickman v. Hackney, 31 N.W.2d 232, 149 Neb. 367—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

Question is for jury in such cases.—Miers v. McMaken, 22 N.W.2d 422, 147 Neb. 133.

89. Wyo.—Merback v. Blanchard, 105 P.2d 272, 56 Wyo. 152, rehearing denied 109 P.2d 49, 56 Wyo. 286.

90. Cal.—Christiansen v. Hollings, 112 P.2d 723, 44 Cal.App.2d 332.

Ind.—Lee Bros. v. Jones, 54 N.E.2d 108, 114 Ind.App. 688.

Mo.—Swain v. Anders, 163 S.W.2d 1045, 349 Mo. 963.

Neb.—Thrapp v. Meyers, 209 N.W. 238, 114 Neb. 689, 47 A.L.R. 585.

N.M.—Langenegger v. McNally, 171 P.2d 316, 50 N.M. 96.

Pa.—Circuitella v. C. C. Callaghan, Inc., 200 A. 588, 331 Pa. 465.

Utah.—Morrison v. Perry, 140 P.2d 772, 104 Utah 151.

Wash.—Carlson v. Ahl, 98 P.2d 1081, 2 Wash.2d 545—Larson v. Olson, 9 P.2d 68, 167 Wash. 253.

Wis.—Schulz v. General Casualty Co., 288 N.W. 803, 233 Wis. 118—Hefgoe v. Bade, 229 N.W. 541, 201 Wis. 193 42 C.J. p 1245 note 29.

Care required in keeping lookout see supra §§ 284-287.

Lookout over entire area

Under statutes, making the careless operation of a vehicle upon a highway unlawful and requiring motor vehicles to be equipped with headlights of specified illuminating power, a motorist at night is not required as a matter of law to keep a lookout over entire area within highway boundaries.—Ott v. Tschantz, 300 N.W. 766, 239 Wis. 47.

Collision

(1) Generally

U.S.—Meissner v. Papas, C.C.A.Wis., 124 F.2d 720.

Ala.—Ruffin Coal & Transfer Co. v. Rich, 108 So. 596, 214 Ala. 633.

Iowa.—Starry v. Hanold, 211 N.W. 696, 202 Iowa 1180.

Ky.—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533.

Mo.—Swain v. Anders, 163 S.W.2d 1045, 349 Mo. 963—Bauer v. Fahr, App., 282 S.W. 150.

Vt.—Ferraro v. Earle, 164 A. 886, 105 Vt. 243.

Va.—Wright v. Viar, 174 S.E. 766, 162 Va. 510.

Wis.—Rebholz v. Wettengel, 248 N.W. 109, 211 Wis. 285.

42 C.J. p 1245 note 29 [b].

(2) With vehicle going in same direction.

Ala.—Langley Bus Co. v. Messer, 133 So. 287, 222 Ala. 533.

Ariz.—Pickwick Stages Corporation

v. Williams, 287 P. 440, 36 Ariz. 530—McIver v. Allen, 262 P. 5, 33 Ariz. 28.

Ark.—Jones v. King, 204 S.W.2d 548, 211 Ark 1084—Home Ice Co. v. Calk, 57 S.W.2d 1051, 186 Ark. 1197.

Cal.—Wohlenberg v. Malcewicz, 133 P.2d 12, 56 Cal.App.2d 508—Coppock v. Pacific Gas & Electric Co., 30 P.2d 549, 137 Cal.App. 80—Putnam v. Pickwick Stages, Northern Division, 276 P. 1055, 98 Cal.App. 268.

Colo.—Morgan v. Gore, 44 P.2d 918, 96 Colo 508.

Conn.—Hedberg v. Cooley, 161 A. 665, 115 Conn. 352.

Ill.—Warneke v. Torstenson, 26 N.E. 2d 675, 304 Ill.App. 579—Warneke v. Torstenson, 7 N.E.2d 506, 289 Ill. App. 621.

Iowa.—Semler v. Oertwig, 12 N.W.2d 265, 234 Iowa 233—McWilliams v. Beck, 262 N.W. 781, 220 Iowa 906—Luther v. Jones, 261 N.W. 817, 220 Iowa 95.

Kan.—Lechleitner v. Cummings, 162 P.2d 423, 160 Kan. 453—Lechleitner v. Cummings, 152 P.2d 843, 159 Kan. 171—Rierson v. Southern Kansas Stage Lines Co., 69 P.2d 1, 146 Kan 30.

Ky.—Consolidated Coach Corporation v. Saunders, 17 S.W.2d 233, 229 Ky. 284—Overbacker Coffee Co. v. Koop, 280 S.W. 146, 212 Ky. 824.

Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—Resnik v. Trumbull-Chevrolet Sales Co., 16 N.W.2d 723, 310 Mich. 214—Rossien v. Berry, 9 N.W.2d 895, 305 Mich. 693.

Minn.—Fredholm v. Smith, 259 N.W. 80, 193 Minn. 569—Harrington v. Wagner, 223 N.W. 603, 176 Minn. 383.

Mo.—Jones v. Central States Oil Co., 164 S.W.2d 914, 350 Mo. 91—Schlue v. Missouri Pacific Transp. Co., App., 62 S.W.2d 934.

given situation, and whether it includes the duty to listen as well as to look, are for the jury.⁹¹ Where, however, the uncontroverted evidence establishes the fact of defendant's duty to keep a lookout at the place of the accident, that he failed to do so and that he could have seen the danger if he had looked in time to have prevented the injury, his negligence and its operation as the proximate cause of the injury are established as matter of law.⁹²

The question whether a driver who looks sees all that he should is one of fact.⁹³ It is generally a question of fact whether a driver of a motor vehicle has been negligent in failing to see an object in the road in front of him in time to avoid striking it; the matter becomes a question of law only in cases where the object in the road is so plainly visible that reasonable minds could not differ as to the duty of the driver to have seen it.⁹⁴ Whether the color of an object so blends with the color of the road that a motorist ex-

ercising ordinary care with respect to lookout may not discover it until too close to it to avoid colliding with it or whether the object sufficiently blends with the color of the road to prevent a proper lookout from disclosing its presence in time to avoid a collision is for the jury.⁹⁵

It is not negligence as a matter of law, under all conditions and all circumstances, for the driver of an automobile to go to sleep while he is operating a car.⁹⁶

(4) Horn, Whistle, Bell, or Hand Signals

On conflicting evidence or where different inferences reasonably may be drawn, it is for the jury to determine whether the failure to give warning signals constitutes negligence.

Where the evidence is conflicting or different inferences may reasonably be drawn therefrom, questions as to whether a warning signal was given,⁹⁷ whether, if it was given, it was an adequate signal under the circumstances,⁹⁸ and whether, if it was not given, such failure was negligence,⁹⁹ are

Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418.

N.J.—Wilson v. G. R. Wood, Inc., 1 A.2d 416, 121 N.J. Law 41—Wallach v. Lightening Electric Co., 161 A. 680, 10 N.J. Misc. 954.

N.Y.—Sheehan v. New York Cent. R. Co., 5 N.Y.S.2d 872, 254 App.Div. 386.

N.C.—Newbern v. Leary, 1 S.E.2d 384, 215 N.C. 134—Dempster v. Flite, 167 S.E. 33, 203 N.C. 697.

Ohio.—Feiss v. Hensch, 162 N.E. 456, 28 Ohio App. 42.

Pa.—Neff v. Firth, 47 A.2d 193, 354 Pa. 308, 165 A.L.R. 1414—Simmons v. Jesse C. Stewart Co., 29 A.2d 55, 346 Pa. 54—Johannes v. Shumway, 22 A.2d 650, 343 Pa. 326—Cirquitella v. C. C. Callaghan, Inc., 200 A. 588, 331 Pa. 465.

R.I.—Morin v. Nash Co. of Providence, 186 A. 599—Douglas v. Silvia, 180 A. 359, 55 R.I. 260.

Tenn.—Davis v. Farris, 1 Tenn.App. 144.

Tex.—Rankin v. Nash-Texas Co., Civ. App., 73 S.W.2d 680, error granted.

Vt.—Towne v. Rizzico, 32 A.2d 129, 113 Vt. 205.

Va.—Diamond Cab Co. v. Jones, 174 S.E. 675, 162 Va. 412.

Wash.—Grubbs v. Grayson, 5 P.2d 1033, 165 Wash. 548—Jacklin v. North Coast Transp. Co., 5 P.2d 325, 165 Wash. 236—Field v. North Coast Transp. Co., 2 P.2d 672, 164 Wash. 123, 76 A.L.R. 1114—Hunter v. Lincoln Stages, 297 P. 179, 161 Wash. 634—Harry v. Pratt, 285 P. 440, 165 Wash. 552.

Wis.—Schneider v. Nedry, 228 N.W. 509, 201 Wis. 111.

42 C.J. p 1245 note 29 [b] (2).

(3) With vehicle moving out from curb

Ark.—J. Foster & Co. v. Wooldridge, 134 S.W.2d 526, 199 Ark. 551

Pa.—Clancy v. Yellow Cab Co., 97 Pa. Super. 439

Wash.—Bell v. Northwest Cities Gas Co., 2 P.2d 644, 164 Wash. 450.

Striking pedestrian

Conn.—Miles v. Sherman, 166 A. 250, 116 Conn. 678.

Minn.—Lowen v. Pates, 18 N.W.2d 455, 219 Minn. 566

12 C.J. p 1245 note 29 [c].

Striking children

Mass.—Pinto v. Brennan, 150 N.E. 86, 254 Mass. 298.

Wis.—Stoffe v. Hilker, 207 N.W. 685, 189 Wis. 414, followed in 207 N.W. 687, 189 Wis. 419

42 C.J. p 1245 note 29 [d]

Driving with ice on windshield

Wash.—Thornton v. Eneroth, 30 P.2d 951, 177 Wash. 1

Evidence held insufficient for jury

(1) Collision

Cal.—Farmer v. Fairbanks, 162 P.2d 26, 71 Cal.App.2d 70.

N.C.—Alphin v. Southerland, 5 S.E.2d 124, 216 N.C. 802.

(2) Striking pedestrian—Paddock v. Tone, 172 P.2d 481, 25 Wash.2d 940.

91. Va.—Doss v. Rader, 46 S.E.2d 434, 187 Va. 231

92. Ohio.—Marchal v. Frankman, App., 58 N.E.2d 679

Pa.—Kutz v. General Baking Co., 87 Pa.Super. 297.

42 C.J. p 1246 note 31.

93. Cal.—Leader v. Atkinson, 121 P.2d 759, 49 Cal.App.2d 265—Prato v. Snyder, 55 P.2d 255, 12 Cal.App.2d 88.

94. Cal.—Leader v. Atkinson, 121 P.2d 759, 49 Cal.App.2d 265.

95. Wis.—Zorlin v. Kaiser, 296 N.W. 611, 237 Wis. 299

96. Ala.—Gilliland v. Harris, 150 So. 184, 25 Ala.App. 549

97. Cal.—Dullanty v. Smith, 265 P. 814, 203 Cal. 621—Saltzen v. Associated Oil Co. of California, 244 P. 338, 198 Cal. 157.

Kv.—Wilburn v. Simons, 196 S.W.2d 356, 302 Ky. 752.

Md.—Fotterall v. Hilleary, 13 A.2d 358, 178 Md. 335

Mo.—Wilson v. Spuhler, App., 20 S.W.2d 556.

Tex.—Southwestern Bell Telephone Co. v. Doell, Civ.App., 1 S.W.2d 501.

Va.—Wright v. Viar, 174 S.E. 766, 162 Va. 510.

42 C.J. p 1246 note 33.

Care required as to signals or warnings of approach see *supra* § 288.

98. N.H.—Grogan v. York, 38 A.2d 295, 93 N.H. 184.

42 C.J. p 1246 note 34.

99. U.S.—Meissner v. Papas, C.C.A. Wis., 124 F.2d 720—Van Wie v. U.S., D.C.Iowa, 77 F.Supp. 22.

Ala.—Ruffin Coal & Transfer Co. v. Rich, 108 So. 596, 214 Ala. 633

Cal.—Dullanty v. Smith, 265 P. 814, 203 Cal. 621—Marston v. Pickwick Stages, 248 P. 930, 78 Cal.App. 526.

Ind.—Lorber v. People's Motor Coach Co., 164 N.E. 859, 172 N.E. 526, 89 Ind.App. 139.

Ky.—Patton v. Gannett, 177 S.W.2d 888, 296 Ky. 533—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666—Jackson's Adm'r v. Rose, 40 S.W.2d 343, 239 Ky. 754—Best's Adm'r v. Adams, 28 S.W.2d 484, 234 Ky. 702.

for the jury. Where the evidence on the issue is positive and uncontradicted, it may be held as a matter of law that defendant gave the proper signal,¹ that an obstruction to the view, making it obligatory on defendant under the statute to give a warning, existed,² or that defendant was not negligent.³

Sufficiency of evidence for jury. There must be some evidence in the case tending to show that defendant did not give the proper signal to take that issue to the jury.⁴ Affirmative testimony of a single witness that no signals were given will, however, be sufficient for this purpose.⁵ Negative testimony of plaintiff that he did not hear the signal has been held sufficient for this purpose in the absence of positive evidence that defendant gave such warning.⁶ Where there is in the case negative testimony that the signals were not heard and positive testimony to the effect that they were given, some authorities hold that the conflict carries the issue to the jury,⁷ especially when supplemented by evidence that the witness who testifies he did not hear was listening and could have heard.⁸ Other authorities hold that negative testimony of plaintiff that he did not hear will not take the case to the jury in the face of positive testimony of disinterested witnesses that the signal was given⁹ or in the absence of positive testimony of plaintiff

that he was giving heed to passing vehicles and listening for their signals.¹⁰

Hand signals. Where the evidence is conflicting or different inferences may reasonably be drawn therefrom as to whether or not the driver of the vehicle causing the injury gave a proper hand signal at the time of the accident, questions as to whether such signal was given¹¹ and whether a failure to give such signal was negligence¹² are for the jury. Where the case contains testimony by plaintiff that he watched defendant's vehicle and saw no signal and also the testimony of others that the driver gave a signal, the question whether the signal was given is for the jury.¹³

(5) Stopping, Backing, and Turning

In an action for damages for injuries resulting from the operation of a motor vehicle, it is for the jury, on conflicting evidence or where different inferences reasonably may be drawn from the evidence, to determine whether the defendant in stopping, backing, or turning his vehicle was guilty of negligence.

In an action for damages for injuries due to the operation of a motor vehicle, where the evidence is conflicting or different inferences may reasonably be drawn therefrom, the question whether defendant was negligent in stopping his car as he did under the circumstances of the particular case is a question for the jury, or for the trial court in actions tried without a jury.¹⁴

Me—Gravel v. Le Blanc, 162 A. 789, 131 Me. 325.

Mass—Pawloski v. Hess, 149 N.E. 122, 253 Mass. 478, affirmed Hess v. Pawloski, 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091.

Minn—Odegard v. Connolly, 1 N.W. 2d 137, 211 Minn. 342—Guile v. Greenberg, 257 N.W. 649, 192 Minn. 548—Schmitt v. Jackson, 219 N.W. 912, 174 Minn. 577.

Mo.—Brinkley v. United Biscuit Co. of America, 164 S.W.2d 325, 349 Mo. 1227—Peck v. W. F. Williamson Advertising Service in St. Louis, App. 68 S.W.2d 847—Jones v. Southwest Pump & Machinery Co., 60 S.W.2d 754, 227 Mo.App. 990.

N.H.—Carlin v. Drake, 192 A. 568, 89 N.H. 52.

N.Y.—Wood v. Socony-Vacuum Oil Co., 21 N.Y.S.2d 317, 259 App.Div. 1106, reargument denied 22 N.Y.S. 2d 534, 260 App.Div. 816, appeal denied 29 N.E.2d 976, 284 N.Y. 823.

Wis.—Leckwe v. Ritter, 241 N.W. 339, 207 Wis. 338.

42 C.J. p 1246 note 35.

Necessity of using horn or giving other warning ordinarily is a question for the jury.—Chappell v. Doeppel, 192 S.W.2d 809, 301 Ky. 622—Fork Ridge Bus Line v. Matthews, 58 S.W.2d 615, 248 Ky. 419—Gretton

v. Duncan, 38 S.W.2d 448, 238 Ky. 554.

1. Wash.—Shipley v. Nelson, 207 P. 1046, 121 Wash. 39.

Wis.—Werner v. Yellow Cab Co., 188 N.W. 77, 177 Wis. 592.

2. Iowa—Carlson v. Meusberger, 204 N.W. 432, 200 Iowa 65.

3. Wash.—Walker v. Butterworth, 210 P. 813, 122 Wash. 412.

4. Wash.—Walker v. Butterworth, supra, 42 C.J. p 1246 note 41.

5. Mo.—Ternetz v. St. Louis Lime, etc., Co., 252 S.W. 65.

Pa.—Flanigan v. McLean, 110 A. 370, 267 Pa. 553.

Weight of positive and negative evidence generally see Evidence § 1037.

6. Pa.—Kuehne v. Brown, 101 A. 77, 257 Pa. 37.

Weight of negative testimony ordinarily is for jury; but when physical conditions and attending circumstances render it highly improbable that they could hear, rule is otherwise.—Russell v. Watkins, 164 P. 867, 49 Utah 598.

7. Pa.—McNulty v. Atlantic Refining Co., 84 Pa.Super. 424—Silfies v. American Stores Co., Com.Pl., 31

North Co. 79, affirmed 53 A.2d 610, 357 Pa. 176.

42 C.J. p 1246 note 44.

8. Md.—Hempel v. Hall, 110 A. 210, 136 Md. 174, 9 A.L.R. 1245.

42 C.J. p 1246 note 45.

9. N.Y.—Mitchell v. Newham, 190 N.Y.S. 459, 198 App.Div. 372.

10. Mich.—Moreau v. Grandmaison, 189 N.W. 860, 220 Mich. 238.

11. Tex.—Manlove v. Lavelle, Civ. App. 235 S.W. 324.

12. Ga.—Edison v. Felder, 22 S.E.2d 523, 68 Ga. App. 188.

Mo.—Shedron v. Union Electric Light, etc., Co., App., 223 S.W. 760.

13. Tex.—Alamo Iron Works v. Prado, Civ. App., 220 S.W. 282.

14. U.S.—Skinner v. Pennsylvania Greyhound Lines, C.C.A. Ind., 123 F. 2d 497—D'Allessandro v. Bechtol, C.C.A. Fla., 104 F.2d 845, certiorari denied 60 S.Ct. 295, 308 U.S. 619, 84 L.Ed. 517—Swift v. Hoffer, D. C.Pa., 52 F.Supp. 839.

Ark.—A. S. Barboro & Co. v. James, 168 S.W.2d 202, 205 Ark. 53—Missouri Pacific Transp. Co. v. Sacker, 138 S.W.2d 371, 200 Ark. 92.

Cal.—Stoltz v. Converse, 172 P.2d 78, 75 Cal.App.2d 909—Hawkinson v. Scholz, 57 P.2d 945, 13 Cal.App.2d 687.

Backing. Where the evidence is conflicting or different inferences may reasonably be drawn therefrom, questions are for the jury, or for the trial court in actions tried without a jury, as to whether defendant backed his automobile as alleged,¹⁵ and, if he did so, whether he was guilty of negligence under the circumstances of the particular case.¹⁶

The act of backing a motor vehicle in such manner as to trench on the sidewalk is evidence of negligence, but is not negligence as a matter of law.¹⁷

Turning. Where the evidence is conflicting or different inferences may reasonably be drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether

Colo.—Denver Tramway Corporation v. Burke, 28 P.2d 253, 94 Colo. 25.
Ill.—Williams v. Matlin, 66 N.E.2d 719, 328 Ill.App. 645—Reidel v. Camp, 37 N.E.2d 579, 311 Ill.App. 656.
Mass.—Hladick v. Williams, 198 N.E. 662, 292 Mass. 470—Minnehan v. Hilland, 180 N.E. 295, 278 Mass. 518.
Mo.—Matthews v. Mound City Cab Co., App., 205 S.W.2d 243.
N.H.—Weiss v. Wasserman, 15 A.2d 861, 91 N.H. 164.
N.Y.—Golja v. Davis, 13 N.Y.S.2d 961, 257 App.Div. 1055, affirmed 26 N.E. 2d 831, 282 N.Y. 735—Miller v. Perroni, 291 N.Y.S. 977, 249 App. Div. 763.
Ohio.—Sidle v. Baker, 3 N.E.2d 537, 52 Ohio App. 89.
S.C.—Mullis v. Pinnacle Flour & Feed Co., 159 S.E. 509, 161 S.C. 113—Mullis v. Pinnacle Flour & Feed Co., 149 S.E. 329, 152 S.C. 239.
Tex.—Southwestern Greyhound Lines v. Wafer, Civ.App., 208 S.W.2d 614, error refused, no reversible error—Humble Oil & Refining Co. v. Ooley, Civ.App., 46 S.W.2d 1038, error dismissed.
Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.
Wash.—Caylor v. B. C. Motor Transp., 71 P.2d 162, 191 Wash. 365—Thornton v. Eneroth, 30 P.2d 951, 177 Wash. 1.
42 C.J. p 1247 note 65.
Care as to stopping see supra §§ 300–304.
Failure to give signal or warning
U.S.—Cram v. Eveloff, C.C.A.Minn., 127 F.2d 486.
Ark.—Clift v. Jordan, 178 S.W.2d 1009, 207 Ark. 66—A. S. Barboro & Co. v. James, 168 S.W.2d 202, 205 Ark. 53.
Cal.—Donahue v. Mazzoli, 80 P.2d 743, 27 Cal.App.2d 102.
Fla.—Miami Transit Co. v. Karses, 200 So. 372, 146 Fla. 163.
Ill.—Ritholz v. Yellow Cab Co., 50 N.E.2d 114, 319 Ill.App. 647—Starr v. Rossin, 23 N.E.2d 740, 302 Ill. App. 325.
Iowa.—Harrington v. Fortman, 8 N.W.2d 713, 233 Iowa 92.
Kan.—Strimple v. O. K. Warehouse Co., 98 P.2d 169, 151 Kan. 98.
La.—Hebert v. Keller, App., 17 So.2d 746.
Minn.—Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 215 Minn. 394, 147 A.L.R. 945—Peter-

son v. Doll, 238 N.W. 324, 184 Minn. 213.
Miss.—Collins Baking Co. v. Wicker, 142 So. 8, 166 Miss. 264.
Mo.—Matthews v. Mound City Cab Co., App., 205 S.W.2d 243.
Neb.—O'Brien v. J. I. Case Co., 2 N.W.2d 107, 140 Neb. 847.
N.J.—Goolaby v. Public Service Coordinated Transport, 157 A. 124, 9 N.J.Misc. 1158.
N.Y.—Corsack v. Eastern Parkway, Brownsville & East New York Transit Relief Ass'n, 230 N.Y.S. 470, 472, 224 App.Div. 760.
N.C.—Glosson v. Trollinger, 40 S.E. 2d 606, 227 N.C. 84—Bechtler v. Bracken, 11 S.E.2d 731, 218 N.C. 515—Holland v. Strader, 5 S.E.2d 311, 216 N.C. 436—Smith v. Carolina Coach Co., 199 S.E. 90, 214 N.C. 314.
Okla.—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36—Smith v. Rohl, 126 P.2d 61, 190 Okl. 603.
Pa.—Mansur v. Josephson, 5 A.2d 102, 333 Pa. 467—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa. Super. 547.
R.I.—Riccio v. Ginsberg, 139 A. 652, 49 R.I. 32, 62 A.L.R. 967.
Wash.—Henry v. Larsen, 143 P.2d 841, 19 Wash.2d 690.
Stopping on bridge
Miss.—Collins Baking Co. v. Wicker, 142 So. 8, 166 Miss. 264.
Car involuntarily stopping
U.S.—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718.
Evidence held insufficient for jury
Iowa.—Isaacs v. Bruce, 254 N.W. 57, 218 Iowa 759.
Ky.—Couch's Adm'r v. Black, 190 S.W.2d 681, 301 Ky. 24.
N.J.—Cox v. Scott, 140 A. 390, 104 N.J.Law 371.
R.I.—Riccio v. Ginsberg, 139 A. 652, 49 R.I. 32, 62 A.L.R. 967.
Motorist was not negligent as matter of law in stopping on highway to observe conditions ahead and determine whether to proceed or turn back where veil of snow blowing across highway totally obscured vision and unobstructed passage of not less than eighteen feet of roadway remained notwithstanding presence of parked automobile.—Haight v. Luedtke, 1 N.W.2d 882, 239 Wis. 389.
15. Md.—Askin v. Moulton, 131 A. 82, 149 Md. 140.
Pa.—Kinsey v. Dixon, 174 A. 585, 114 Pa. Super. 244.

Care as to backing see supra §§ 300–304.

16. Cal.—Caraveo v. Pickwick Stages System, 298 P. 516, 113 Cal. App. 443.
Ill.—Whipkey v. Ashbaugh, 267 Ill. App. 452.
Mich.—Wallis v. Cox, 281 N.W. 543, 286 Mich. 76.
Minn.—Stock v. Fryberger, 267 N.W. 368, 197 Minn. 399.
Neb.—Hief v. Roberts Dairy Co., 296 N.W. 331, 138 Neb. 885.
N.C.—Phillips v. Nessmith, 37 S.E. 2d 178, 226 N.C. 173.
Pa.—Brenton v. Colbert, 157 A. 619, 315 Pa. 277—Magasiny v. T. M. Smithian Trucking Co., 183 A. 314, 107 Pa. Super. 84.
R.I.—Town of Barrington v. De Stefano, 142 A. 164.
42 C.J. p 1247 note 62.

Without looking or signaling
N.H.—Labreque v. Childs, 55 A.2d 473.
N.J.—Lozio v. Perrone, 168 A. 764, 111 N.J.Law 549.
Tex.—Southwestern Bell Telephone Co. v. Doell, Civ.App., 1 S.W.2d 501.
42 C.J. p 1247 note 62 [c].

Backing automobile out of driveway
Me.—Farwell v. Daues, 165 A. 625, 132 Me. 485.
Mass.—Russell v. Berger, 50 N.E.2d 642, 314 Mass. 500.
Mich.—Story v. Page, 273 N.W. 384, 280 Mich. 34.
N.H.—Kardasinski v. Koford, 190 A. 702, 88 N.H. 444, 111 A.L.R. 1017.
N.J.—Krause v. Emanuel E. Katz, Inc., 185 A. 537, 14 N.J. Misc. 424.
Ohio.—Pau'ison v. Embrey, App., 65 N.E.2d 660.

Backing into street from behind parked cars
N.H.—Labreque v. Childs, 55 A.2d 473.

There is no duty as a matter of law imposed on one who backs his automobile to make sure such movement can be made in safety or to cause signals of intention visible outside the vehicle to be made, and existence of any such duty must rest on fact that one in exercise of ordinary care under similar circumstances would have so acted.—Blaine v. Yeager, Ohio App., 44 N.E.2d 481.

17. N.J.—Kapner v. Strauss, 166 A. 113, 11 N.J. Misc. 373.

er defendant was guilty of negligence in turning or changing the course of his vehicle.¹⁸ On such evidence it is for the jury to determine whether defendant was negligent in cutting corners and driving on the wrong side of the street in making a left turn into an intersecting street,¹⁹ or in rounding a curve at the speed and under the circumstances testified to,²⁰ or in making too sharp a turn around another vehicle in the street.²¹ Whether defendant made the turn at a reasonably

safe angle is for the jury.²² Where the evidence is conflicting, the question whether defendant had knowledge of plaintiff's car following him at the time he turned his own car across the path of the plaintiff's car is for the jury.²³

There must be some evidence of defendant's negligence in turning or changing the course of his automobile in order to warrant or require submission to the jury.²⁴ Where the entire evidence

18. Iowa.—McManus v. Emmetsburg Farmers' Co-op Creamery Co., 259 N.W. 921, 219 Iowa 860

Mass.—Seymour v. Dunville, 164 N.E. 79, 265 Mass. 78.

Mo.—Wilson v. Spuhler, App., 20 S. W.2d 556.

Pa.—Stadale v. John J. Felin & Co., 181 A 327, 119 Pa Super 364—Hilgert v. Halterman, Com Pl., 5 Monroe L.R. 20

42 C.J. p 1247 note 53.

Care as to turning see supra §§ 300—304.

Failure to give signal as question of law or fact see supra subdivision c (4) of this section.

Vehicles going in same direction

US.—Bates v. Miller, C.C.A.N.Y., 133 F.2d 645, certiorari denied Miller v. Bates, 63 S.Ct. 1446, 320 U.S. 210, 87 L.Ed. 1818—Garv v. Consolidated Forwarding Co., C.C.A. Wis., 115 F.2d 632—Southern Fruit Distributors v. Fulmer, C.C.A. Va., 107 F.2d 456—Zentz v. Buchman, C.C.A. Pa., 103 F.2d 850—Cardell v. Tennessee Electric Power Co., C.C.A. Ga., 79 F.2d 934—Wesley v. English, C.C.A. Fla., 71 F.2d 392.

Ark.—Southern Kansas Stage Lines Co. v. Ruff, 101 S.W.2d 968, 193 Ark. 684—Saliba v. Allison, 96 S.W.2d 443, 192 Ark. 1021—Madison-Smith Cadillac Co. v. Lloyd, 43 S.W.2d 729, 184 Ark. 542.

Cal.—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435—Simpson v. Steinhoff, 21 P.2d 960, 131 Cal.App. 660

Conn.—Ruff v. Federal Tea Co., 29 A.2d 441, 129 Conn. 455—Tappin v. Rider Dairy Co., 178 A. 428, 119 Conn. 591.

Ill.—Pfle v. Owens, 73 N.E.2d 445, 331 Ill.App. 390—Orban v. Stoll, 66 N.E.2d 316, 328 Ill.App. 398—Rennie v. Haufler, 40 N.E.2d 85, 313 Ill.App. 352—Gorman v. Piszynski, 21 N.E.2d 909, 301 Ill.App. 597—Grimm v. Dunn, 21 N.E.2d 331, 300 Ill.App. 609—Roberts v. Calloway, 11 N.E.2d 239, 292 Ill.App. 638.

Iowa.—Anderson v. Strack, 17 N.W.2d 719, 236 Iowa 1—Sanford v. Nesbit, 11 N.W.2d 695, 234 Iowa 14—Thomas v. Charter, 278 N.W. 920, 224 Iowa 1278—McManus v. Emmetsburg Farmers' Co-op Creamery Co., 259 N.W. 921, 219 Iowa 860.

Ky.—Dixie Ice Cream Co. v. Ravena Grocery Co., 306 S.W.2d 824, 306 Ky. 182—C. I. & L. Motor Express v. Lyons, 53 S.W.2d 978, 245 Ky. 611.

Me.—Pillsbury v. Kesslen Shoe Co., 188 A 726, 134 Me. 504.

Md.—Gavin v. Tinkler, 184 A. 903, 170 Md. 461.

Mass.—Golden v. Carnevale, 173 N.E. 498, 273 Mass. 159—Clay v. Pope & Cottle Co., 172 N.E. 880, 273 Mass. 40—Seymour v. Dunville, 164 N.E. 79, 265 Mass. 78

Mich.—Michigan Fire & Marine Ins. Co. v. Pretty Lake Vacation Camp, 25 N.W.2d 166, 316 Mich. 197—Bugbee v. Fowle, 269 N.W. 570, 277 Mich. 485—McLaughlin v. Curry, 218 N.W. 698, 242 Mich. 228

Mo.—Gower v. Trumbo, 181 S.W.2d 653.

N.H.—Lloulzis v. Corliss, 54 A.2d 365—Cutler v. Young, 6 A.2d 162, 90 N.H. 203—Howe v. Phofolos, 161 A. 379, 85 N.H. 539.

N.J.—Maloney v. Carey, 9 A.2d 791, 123 N.J.Law 501—O'Neill v. Jacobus, 169 A. 703, 112 N.J.Law 145—Winter v. North Jersey Bus Co., 135 A. 473, 5 N.J. Misc. 42.

N.Y.—Farr v. Wright, 7 N.E.2d 692, 273 N.Y. 560—Zwilling v. Harrison, 199 N.E. 761, 269 N.Y. 461—Amsden v. Washington Bridge Express Lines, 287 N.Y.S. 855, 248 App.Div. 645.

N.C.—Killough v. Williams, 29 S.E. 2d 697, 224 N.C. 254—Stevens v. Rostan, 145 S.E. 555, 196 N.C. 314.

Ohio.—Ruffo v. Randall, 52 N.E.2d 750, 72 Ohio App. 396—Buckeye Union Casualty Co. v. Oelschlaeger, App., 36 N.E.2d 152.

Pa.—Rasener v. Atlantic Refining Co., 181 A. 456, 119 Pa. Super 395—Kinsey v. Dixon, 174 A. 585, 114 Pa. Super. 244—Church v. American Stores Co., 157 A. 633, 103 Pa. Super. 427—Liebert v. Freihofer Baking Co., 97 Pa. Super. 467—Logan v. Hughes, Com.Pl., 45 Lack. Jur. 94.

R.I.—Tillinghast v. Rhode Island Motor Sales Co., 150 A. 753.

S.C.—Dobson v. Henrietta Mills, 197 S.E. 313, 187 S.C. 281.

Tex.—Calhoun v. Grant, Civ.App.,

129 S.W.2d 752—Holland v. De Leon, Civ.App., 118 S.W.2d 489, error refused—Lone Star Gas Co. v. Haire, Civ.App., 41 S.W.2d 424. Va.—Robinson v. Kittrell, 189 S.E. 142, 167 Va. 280.

Wash.—Trudeau v. Snohomish Auto Freight Co., 96 P.2d 599, 1 Wash. 2d 574—Russ v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600—Lashbrook v. Spokane-Wallace Stages, 10 P.2d 241, 168 Wash. 24—Byrne v. Stanford, 292 P. 1014, 159 Wash. 271

Wis.—Scioplor v. Shea, 31 N.W.2d 199, 252 Wis. 185.

42 C.J. p 1247 note 53 [a].

Vehicles going in opposite directions
Colo.—Bursch v. Hammond, 135 P.2d 519, 110 Colo. 441.

Mass.—White v. Calcutt, 168 N.E. 815, 269 Mass. 252.

42 C.J. p 1247 note 53 [b].

Making U-turn

In action against taxicab driver and owners and driver of oncoming automobile for injuries sustained by motorist in collision with oncoming automobile which swerved to avoid hitting taxicab which was making U-turn in front of it, whether driver of taxicab, who saw automobile coming toward him at sixty miles an hour, was negligent in taking chance on making U-turn in front of automobile, was for jury.—Fitzcharles v. Mayer, 278 N.W. 788, 284 Mich. 122.

19. Wash.—Kane v. Nakamoto, 194 P. 381, 113 Wash. 476.

42 C.J. p 1247 note 54.

20. N.Y.—Bolton v. Madsen, 199 N.Y.S. 353, 205 App.Div. 180.

21. Or.—Taylor v. Fremont Fuel Co., 198 P. 243, 100 Or. 495.

22. Ky.—Wilburn v. Simons, 196 S.W.2d 356, 302 Ky. 752.

23. Ala.—Government St. Lumber Co. v. Ollinger, 94 So. 177, 18 Ala. App. 518.

24. Evidence held insufficient for jury

Cal.—Robbiano v. Bovet, 24 P.2d 466, 218 Cal. 589.

Ky.—White v. McClintock-Field Co., 47 S.W.2d 527, 242 Ky. 688.

Md.—Meese v. Goodman, 176 A. 621, 167 Md. 653, 98 A.L.R. 480.

in the case as to the negligent turning of his car by defendant is equally consistent with the existence or nonexistence of negligence, it is not sufficient to be submitted to the jury.²⁵

(6) Parking or Leaving Vehicle Unattended

The questions whether the defendant was negligent in parking his motor vehicle or leaving it on the highway unattended are for the jury where the evidence is conflicting or different inferences may reasonably be drawn from the evidence.

Where the evidence is legally sufficient and is conflicting or different inferences may reasonably be drawn therefrom, questions whether defendant was negligent in parking his motor vehicle or leaving it in the highway unattended as he did under the circumstances of the particular case are for the jury, or for the trial court in trials without a jury.²⁶ The rule has been applied with respect to negligence as to the place where the vehicle was left or parked,²⁷ the posi-

25. Ala.—Lessman v. West, 101 So. 515, 20 Ala.App. 289.

26. U.S.—Jaggers v. Southeastern Greyhound Lines, C.C.A.Tenn., 126 F.2d 762—Budd v. John B. Southee, Inc., C.C.A.N.Y., 85 F.2d 513.

Ark.—England v. White, 155 S.W.2d 576, 202 Ark. 1155—Healy & Roth v. Balmat, 74 S.W.2d 242, 189 Ark. 442.

Cal.—Woods v. Walker, 124 P.2d 844, 51 Cal.App.2d 307—Hunton v. California Portland Cement Co., 123 P.2d 947, 50 Cal.App.2d 684—Silvey v. Harm, 8 P.2d 570, 120 Cal.App. 561.

Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Ga.—Shepherd v. Amos, 42 S.E.2d 775, 75 Ga.App. 221—Donahoo v. Goldin, 7 S.E.2d 820, 61 Ga.App. 841—S. C. Jones Co. v. Yawn, 188 S.E. 603, 54 Ga.App. 826.

Ill.—Bell v. Illinois Farm Supply Co., 78 N.E.2d 838, 334 Ill.App. 216—Belcher v. Citizens Coach Co., 57 N.E.2d 659, 324 Ill.App. 226—Rhoden v. Peoria Creamery Co., 278 Ill. App. 452.

Iowa.—Peckinpugh v. Engelke, 247 N.W. 822, 215 Iowa 1248.

Ky.—Midland Baking Co. v. Kitchen, 168 S.W.2d 372, 293 Ky. 160—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533—Fleck's Adm'r v. Bell Line, 144 S.W.2d 483, 284 Ky. 288—Robinson Transfer Co. v. Turner, 50 S.W.2d 546, 244 Ky. 181.

Me.—Nadeau v. Perkins, 193 A. 877, 135 Me. 215—Hatch v. Globe Laundry Co., 171 A. 387, 132 Me. 379.

Md.—Frederick & Baltimore Transp. Co. v. Mumford, 139 A. 541, 154 Md. 8.

Mass.—Kirsch v. J. G. Riggs & Sons, 162 N.E. 355, 264 Mass. 233.

Mich.—Hautala v. Cochran, 286 N.W. 663, 289 Mich. 409.

Minn.—Bartley v. Fritz, 285 N.W. 484, 205 Minn. 192—Guild v. Miller, 271 N.W. 332, 199 Minn. 141.

Mo.—Browne v. Creek, 209 S.W.2d 900—Chamberlain v. Missouri-Arkansas Coach Lines, 173 S.W.2d 57, 351 Mo. 203—Brinkley v. United Biscuit Co. of America, 164 S.W.2d 326, 349 Mo. 1227.

Neb.—Huston v. Robinson, 13 N.W. 2d 885, 144 Neb. 553—Anderson v.

Robbins Incubator Co., 8 N.W.2d 446, 143 Neb. 40.

N.J.—Ford v. Canelidis, 8 A.2d 366, 123 N.J.Law 321—Niles v. Phillips Express Co., 193 A. 183, 118 N.J. Law 455—Daly v. Singac Auto Supply Co., 135 A. 868, 103 N.J. Law 416.

N.Y.—Krttil v. City of New York, 20 N.Y.S.2d 981, 259 App.Div. 1049—Peck v. Independent Automobile Forwarding Corporation, 8 N.Y.S.2d 754, 256 App.Div. 859, affirmed 21 N.E.2d 215, 280 N.Y. 728—Levy v. Stotchik, 230 N.Y.S. 196, 132 Misc 453.

N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390—Smithwick v. Colonial Pine Co., 157 S.E. 612, 200 N.C. 519.

N.D.—Gausvik v. Larsen Richter Co., 212 N.W. 846, 55 N.D. 218.

Okl.—Shefts Supply Co. v. Purkapile, 36 P.2d 275, 169 Okl. 157.

Or.—Watt v. Associated Oil Co., 260 P. 1012, 123 Or. 50.

Pa.—Henry v. S. Liebovitz & Sons, 167 A. 304, 312 Pa. 397—Harkins v. Somerset Bus Co., 162 A. 163, 308 Pa. 109—Marron v. Elmquist, 200 A. 207, 132 Pa.Super. 12—Venorick v. Revetta, Com.Pl., 5 Fay I.J. 165, reversed on other grounds 33 A.2d 655, 152 Pa.Super. 455—Kaufman v. McClain, Com.Pl., 13 Northumb.Leg.J. 369—Henry v. Manifold, Com.Pl., 51 York Leg. Rec. 205.

Tenn.—Brown v. Wallace, 15 Tenn. App. 187.

Tex.—Harper v. Highway Motor Freight Lines, Civ.App., 89 S.W.2d 448, error dismissed—Evans v. Bryant, Civ.App., 29 S.W.2d 484, error refused—Hawitt v. Green, Civ.App., 28 S.W.2d 892.

Wash.—O'Neill v. Gruhn, 85 P.2d 1064, 197 Wash. 557—Graves v. Mickel, 29 P.2d 405, 176 Wash. 329—Pozar v. Blankenship, 282 P. 52, 154 Wash. 261—McMoran v. Associated Oil Co., 257 P. 846, 144 Wash. 276.

Wis.—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680—Cameron v. Union Automobile Ins. Co., 246 N.W. 420, 210 Wis. 659, rehearing denied 247 N.W. 453, 210 Wis. 659.

42 C.J. p 1247 note 67.
Care required in parking or leaving

car unattended see supra §§ 329-338.

Negligence of operator in striking parked vehicle as question of law or fact see infra subdivision e (6) of this section.

Jury could take into consideration kind of vehicle and projections thereon.—Flynn v. Bledsoe Co., 267 P. 887, 92 Cal.App. 145.

27. U.S.—Jaggers v. Southeastern Greyhound Lines, C.C.A.Tenn., 126 F.2d 762.

Ala.—Cosby v. Flowers, 30 So.2d 694, 249 Ala. 227.

Ariz.—Salt River Valley Water Users' Ass'n v. Green, 104 P.2d 162, 56 Ariz. 22.

Cal.—Doane v. Smith, 147 P.2d 650, 63 Cal.App.2d 691.

Ill.—Johnson v. Mueller, 41 N.E.2d 125, 314 Ill.App. 201—Barnstable v. Calandro, 270 Ill.App. 57.

Iowa.—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 377.

Kan.—Waltmire v. Ford, 78 P.2d 893, 147 Kan. 732.

Miss.—Teeche Lines v. Danforth, 12 So.2d 784, 195 Miss. 226.

Mo.—Jones v. Missouri Freight Transit Corporation, 40 S.W.2d 465, 225 Mo.App. 1076.

Neb.—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.

N.H.—Berounsky v. Ogden, 9 A.2d 510, 90 N.H. 334.

N.J.—Byer v. V. Cladd & Sons, 159 A. 317, 10 N.J.Misc. 381.

N.Y.—Bardwell v. New York Tel. Co., 33 N.Y.S.2d 739, 263 App.Div. 1050, appeal denied 35 N.Y.S.2d 284, 264 App.Div. 797.

N.C.—Leary v. Norfolk Southern Bus Corporation, 18 S.E.2d 426, 220 N.C. 745.

Ohio.—Reeves v. Joe O. Frank Co., 62 N.E.2d 886, 76 Ohio App. 1—Sidle v. Baker, 3 N.E.2d 537, 53 Ohio App. 89—Doran v. Bethards, 160 N.E. 110, 26 Ohio App. 426.

Or.—Watt v. Associated Oil Co., 260 P. 1012, 123 Or. 50.

Pa.—Bricker v. Gardner, Com.Pl., 56 Dauph. Co. 384, affirmed 48 A.2d 209, 355 Pa. 35.

Vt.—Palmer v. Marcellie, 175 A. 31, 106 Vt. 500.

Wash.—Gilbert v. Solberg, 289 P. 1003, 157 Wash. 490.

tion of the vehicle,²⁸ the precautions taken against the starting of the vehicle²⁹ by third persons,³⁰ and with respect to lights on the vehicle left parked or unattended,³¹ according to the decisions on the

Wis.—Weir v. Caffery, 18 N.W.2d 327, 247 Wis. 70—Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215—Delfosse v. New Franken Oil Co., 230 N.W. 31, 201 Wis. 401.

Car protruding from driveway onto highway

Ky.—Suter's Adm'r v. Kentucky Power & Light Co., 76 S.W.2d 29, 256 Ky. 358.

Failure to leave required clearance on highway

Minn.—Brown v. Murphy Transfer & Storage Co., 251 N.W. 5, 190 Minn. 81

Pa.—Venorick v. Revetta, Com Pl. 5 Fay L.J. 165, reversed on other grounds 33 A.2d 656, 152 Pa Super. 455

Tex.—Ruggles v. John Deere Plow Co., Civ App., 146 S.W.2d 456, error refused.

Wis.—Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215.

Parking in "No Parking" zone

Pa.—Bricker v. Gardner, 48 A 2d 209, 355 Pa. 35—Bricker v. Gardner, Com Pl., 56 Dauph.Co. 384.

Parking within certain distance from intersection

Pa.—Ennis v. Atkin, 47 A 2d 217, 354 Pa. 165.

Temporary parking on paved portion of highway for purposes connected with travel is not per se negligence as a matter of law, subject to provisions of statute with respect to lights in the nighttime.—Miller v. Douglas, 5 S.E.2d 799, 121 W.Va. 638

Stop for repairs

Ark.—Presley v. Schenebeck, 110 S. W.2d 5, 194 Ark. 1069.

Iowa.—Smith v. Pust, 6 N.W.2d 315, 232 Iowa 1194.

Minn.—Brown v. Murphy Transfer & Storage Co., 251 N.W. 5, 190 Minn. 81.

Wyo.—Merhack v. Blanchard, 105 P. 2d 272, 56 Wyo. 152, rehearing denied 109 P.2d 49.

N.J.—Apgar v. Hoffman Const. Co., 11 A.2d 26, 124 N.J. Law 86.

Wash.—Boyd v. Cole, 63 P.2d 931, 189 Wash. 81.

Disabled vehicle

(1) In general.

Mass.—Levelllee v. Wright, 15 N.E.2d 247, 300 Mass. 382.

Miss.—Davidson v. Knight, 29 So.2d 656.

N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200.

Wis.—Schields v. Fredrick, 288 N.W. 241, 232 Wis. 595—Callaway v. Kryzen, 279 N.W. 702, 228 Wis. 53—Bornemann v. Lusha, 266 N.W. 789, 221 Wis. 359.

(2) Where vehicle is so disabled that it is physically impossible to

move it, leaving it on main traveled portion of highway until it is reasonably practicable to remove it, is not negligence as matter of law.—Barone v. Jones, 176 P.2d 392, 77 Cal App.2d 656, rehearing denied and opinion modified on other grounds 177 P.2d 30, 77 Cal App.2d 656—Woods v. Walker, 124 P.2d 844, 51 Cal App.2d 307—Scoville v. Keglör, 80 P.2d 162, 27 Cal App.2d 17, motion denied 84 P. 2d 212, 29 Cal App.2d 66.

(3) Whether driver was negligent in running out of gas, so as to make it impossible for him to park completely off pavement, was for jury.—Casey v. Gritsch, 36 P.2d 696, 1 Cal App.2d 206.

28. Ill.—Jones v. Illinois Iowa Power Co., 41 N.E.2d 115, 314 Ill App. 204

Iowa.—Peckinpaugh v. Engelke, 247 N.W. 822, 215 Iowa 1218

S.C.—Flowers v. South Carolina State Highway Dept., 34 S.E.2d 769, 206 S.C. 454

Wash.—Cunningham v. Dills, 145 P. 2d 273, 19 Wash.2d 845.

29. N.H.—Barlow v. Verrill, 183 A. 857, 88 N.H. 25, 104 A.L.R. 1126
N.Y.—Rintel v. Barvin's League Co-op Ass'n, 34 N.Y.S.2d 348, 178 Misc. 348

Pa.—Henderson v. Harner, 135 A. 203, 287 Pa. 298—Don v. J. S. Ivins Sons, 90 Pa Super. 105.

Parking on hill or grade

U.S.—Billor v. Meyer, C.C.A. Wis., 33 F.2d 440, 66 A.L.R. 436.

Mass.—Latos v. Sullivan, 76 N.E.2d 557—Glaser v. Schroeder, 168 N.E. 809, 269 Mass. 337.

Mich.—Bacon v. Shashall, 213 N.W. 705, 238 Mich. 457

Minn.—Guild v. Miller, 271 N.W. 332, 199 Minn. 141

Miss.—Williams v. Larkin, 147 So. 337, 166 Miss. 837.

N.J.—Sheridan v. Arrow Sanitary Laundry Co., 146 A. 191, 105 N.J. Law 608.

Pa.—Smith v. Jamison, 89 Pa. Super. 99.

Tenn.—Whitaker v. Bandy, 4 Tenn. App. 202.

Tex.—Ketchum v. Gillespie, Civ App., 145 S.W.2d 215—Long v. Metcalf, Civ. App., 134 S.W.2d 485, error dismissed, judgment correct.

Wash.—Elliott v. Seattle Chain & Mfg. Co., 251 P. 117, 141 Wash. 157

Wis.—Hughes v. Rentschler Floral Co., 213 N.W. 625, 193 Wis. 49. 42 C.J. p 1247 note 67 [a].

Negligence in setting brakes of truck going downhill in driver's absence was for jury.—Hughes v. Rentschler Floral Co., supra.

30. Electric truck started by children

Negligence of driver of electric truck in parking it on left side of street headed downhill, without turning front wheels toward curb or removing key to prevent power from passing to motor, was fact issue for presiding justice in action for injuries to one attempting to stop truck after small boys started it.—Hatch v. Globe Laundry Co., 171 A. 387, 132 Me. 379.

Leaving car unlocked

D.C.—Schaff v. R. W. Claxton, Inc., 144 F.2d 532, 79 U.S. App. D.C. 207.

31. U.S.—Swinger v. Firman Equipment Corporation, C.C.A. Ill., 94 F. 2d 269.

Ala.—Cosby v. Flowers, 30 So.2d 694, 219 Ala. 227—Hreden v. Cudahy Packing Co., 171 So. 632, 233 Ala. 369—Newell Contracting Co. v. Berry, 134 So. 868, 223 Ala. 111

Ark.—Blakeley & Son v. Jones, 57 S. W.2d 1032, 186 Ark. 1169—Coca Cola Bottling Co. v. Shipp, 297 S. W. 856, 174 Ark. 130.

Cal.—Shriver v. Silva, 151 P.2d 528, 65 Cal App.2d 753—Gammon v. Wales, 300 P. 988, 115 Cal App. 133

—Grimes v. Richfield Oil Co. of California, 289 P. 245, 106 Cal App. 416.

Fla.—Hull v. Laine, 173 So. 701, 127 Fla. 433

Ga.—Hudgins Contracting Co. v. Smith, 188 S.E. 732, 54 Ga App. 687

Idaho.—Nelson v. Inland Motor Freight Co., 92 P.2d 790, 60 Idaho 413—Stanger v. Hunter, 291 P. 1060, 49 Idaho 723.

Ill.—Barto v. Liberty Trucking Co., 74 N.E.2d 735, 332 Ill. App. 281—Russell v. Consolidated Forwarding Corp., 71 N.E.2d 853, 330 Ill. App. 529—McKav v. Hannah, 51 N. E.2d 608, 320 Ill App. 437—Wilson v. Decatur Cartage Co., 39 N.E.2d 379, 313 Ill App. 148.

Iowa.—Prewitt v. Rutherford, 30 N. W.2d 141, 238 Iowa 1321—Johnson v. Overland Transp. Co., 288 N.W. 601, 227 Iowa 487—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 377.

Kan.—Towell v. Staley, 166 P.2d 699, 161 Kan. 127—Harrison v. Travelers Mut. Casualty Co., 134 P.2d 681, 156 Kan. 492—Berry v. Weeks, 73 P.2d 1086, 146 Kan. 969.

Ky.—Kentucky Transport Corporation v. Simcox, 137 S.W.2d 708, 282 Ky. 50.

La.—Ledoux v. Beyt, App., 35 So.2d 472.

Me.—Estabrook v. Barton, 25 A.2d 217, 138 Me. 272—Nadeau v. Perkins, 193 A. 877, 135 Me. 215.

Md.—Robert v. Wells, 184 A. 923, 170 Md. 367.

question, such as taillights,³² and the placing of | proaching vehicles.³³
flares on the highway or otherwise warning ap- | There must be legally sufficient evidence in

- Mass.**—McGaffee v. P. B. Nutrie Motor Transp., 42 N.E.2d 841, 311 Mass. 730—Rotevsky v. Bova, 174 N.E. 192, 274 Mass. 23—Woolner v. Perry, 163 N.E. 750, 265 Mass. 74.
- Mich.**—Russell v. Szczawinski, 255 N.W. 731, 268 Mich. 112.
- Minn.**—Cowperthwait v. Tadsen, 2 N.W.2d 429, 212 Minn. 49—Ward v. Bandel, 231 N.W. 244, 181 Minn. 32—Knutson v. Farmers' Co-op. Creamery of Jenkins, 230 N.W. 270, 180 Minn. 116.
- Mo.**—Herrington v. Hoey, 139 S.W.2d 477, 345 Mo. 1108—Clason v. Lenz, 61 S.W.2d 727, 332 Mo. 1113—Davis v. Howell, 27 S.W.2d 13, 324 Mo. 1227—Taylor v. Silver King Oil & Gas Co., App., 203 S.W.2d 147—Weaver v. Stephens, App., 78 S.W.2d 903—Jones v. Missouri Freight Transit Corporation, 40 S.W.2d 465, 225 Mo.App. 1076.
- Neb.**—Buresh v. George, 31 N.W.2d 106, 149 Neb. 340—Lewis v. Rapid Transit Lines, 252 N.W. 804, 126 Neb. 158—Johnson v. Mallory, 243 N.W. 872, 123 Neb. 706.
- N.H.**—MacDonald v. Appleyard, 53 A.2d 434.
- N.J.**—Shappell v. Apex Express, 37 A.2d 849, 131 N.J.Law 583—Donohue v. Habich, 187 A. 360, 14 N.J.Misc. 785—Treftz v. Kirby, 146 A. 688, 7 N.J.Misc. 555—Ellis v. Robinson, 145 A. 870, 7 N.J.Misc. 470—Bradley v. Shreve, 142 A. 642, 6 N.J.Misc. 729—Vollinger v. Schwarz & Son, 137 A. 646, 5 N.J.Misc. 588—Shallcross v. Isbell Porter Co., 132 A. 507, 4 N.J.Misc. 328.
- N.Y.**—Dobbins v. Mumbrow, 12 N.Y.S. 2d 859, 257 App.Div. 1017—Van Buren v. Schreiber, 5 N.Y.S.2d 624, 254 App.Div. 921—Hager v. Paddicford, 299 N.Y.S. 722, 252 App.Div. 819, affirmed 15 N.E.2d 672, 278 N.Y. 515—Stepp v. Tyne-Willey, 292 N.Y.S. 577, 249 App.Div. 892.
- N.C.**—Pago v. McLamb, 3 S.E.2d 275, 215 N.C. 789.
- Okl.**—Spicers, Inc., v. Rudd, 188 P.2d 692—Allen v. Cubbison, 3 P.2d 677, 150 Okl. 116—Ross v. Gearin, 291 P. 534, 145 Okl. 66.
- Or.**—Hickerson v. Jossey, 282 P. 768, 131 Or. 612, rehearing denied 283 P. 1119, 131 Or. 612.
- Pa.**—Wolfe v. Beardsley, 53 A.2d 92, 357 Pa. 1—Kerr v. Hofer, 32 A.2d 402, 347 Pa. 356—Gaber v. Weinberg, 188 A. 187, 324 Pa. 385.
- S.C.**—Jones v. American Fidelity & Cas. Co., 43 S.E.2d 355, 210 S.C. 470.
- Tenn.**—Patterson v. Kirkpatrick, 11 Tenn.App. 162.
- Tex.**—Parker v. Jakovich, Civ.App., 115 S.W.2d 790, error dismissed—
- Swift v. Michaelis**, Civ.App., 110 S.W.2d 933, error dismissed.
- Vt.**—Johnson v. Cone, 28 A.2d 384, 112 Vt. 459.
- Wash.**—Todd v. Alexander, 294 P. 545, 160 Wash. 3—Pozar v. Blankenship, 282 P. 52, 154 Wash. 261.
- Wyo.**—Jackson v. W. A. Norris, Inc., 93 P.2d 498, 54 Wyo. 403—Hester v. Coliseum Motor Co., 285 P. 781, 41 Wyo. 345.
- 42 C.J. p 1247 note 67 [b].
- Parking unlighted truck on curve**
N.C.—McGee v. Warren, 153 S.E. 162, 198 N.C. 672.
- Testimony that vehicle had no lights** was not merely negative, but sufficient to take to jury question whether rear light was lit, as defendant's witnesses testified—Hirth v. Marano, 170 A. 438, 112 Pa Super. 187.
- Collision with remains of burned bus**
N.J.—Lewis v. M. & V. Motor Co., 146 A. 659, 7 N.J.Misc. 638, affirmed 150 A. 919, 106 N.J.Law 572.
- Absence of clearance lights on truck**
Neb.—LaFleur v. Poesch, 252 N.W. 902, 126 Neb. 263.
- Wis.**—Bielke v. Knaack, 242 N.W. 176, 207 Wis. 490.
- Lights blinding driver of other vehicle**
Cal.—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765.
- Vt.**—Hunter v. Preston, 166 A. 17, 105 Vt. 327.
- W.Va.**—Flinn v. Henthorne, 173 S.E. 882, 114 W.Va. 807.
- 32. U.S.**—Miller v. Advance Transp. Co., C.C.A.III, 126 F.2d 442, certiorari denied Advance Transp. Co. v. Miller, 63 S.Ct. 32, 317 U.S. 641, 87 L.Ed. 516—Central Surety & Insurance Corporation v. Murphy, C.C.A.Kan., 103 F.2d 117—Imperial Tobacco Co., Limited, of Great Britain and Ireland v. Lambe, C.C.A.N.C., 77 F.2d 90.
- Ark.**—Floyd v. Johnston, 100 S.W.2d 975, 193 Ark. 518.
- Cal.**—Carswell v. Pacific Greyhound Lines, 46 P.2d 297, 7 Cal.App.2d 466—Jessen v. Angelus Furniture & Mfg. Co., 42 P.2d 1063, 5 Cal.App.2d 477—Pattee v. King, 24 P.2d 564, 133 Cal.App. 601—Silvey v. Harm, 8 P.2d 570, 120 Cal.App. 561—Gonzalez v. Nichols, 294 P. 758, 110 Cal.App. 738—Burke v. Dillingham, 258 P. 627, 84 Cal.App. 736.
- Conn.**—Cavlova v. Shea, 165 A. 788, 116 Conn. 569.
- Ga.**—Burnsed v. Spivey, 184 S.E. 410, 52 Ga.App. 646.
- Ill.**—Meng v. Lucash, 69 N.E.2d 367, 329 Ill.App. 513—Russell v. Consolidated Forwarding Corp., 62 N.E.2d 44, 327 Ill.App. 204—Johnson v. Mueller, 41 N.E.2d 125, 314 Ill. App. 204—Carroll v. Krause, 15 N.E.2d 323, 295 Ill.App. 552—Barnstable v. Calandro, 270 Ill.App. 57.
- Iowa.**—Kimmel v. Mitchell, 249 N.W. 151, 216 Iowa 386—Jack v. McDougall Const. Co., 246 N.W. 595, 216 Iowa 516.
- Md.**—Robert v. Wells, 184 A. 923, 170 Md. 367—Miles v. Webb, 159 A. 782, 162 Md. 269.
- Mass.**—Bresnahan v. Proman, 43 N.E.2d 336, 312 Mass. 97—Price v. Pearson, 16 N.E.2d 855, 301 Mass. 260—Ouillette v. Sheerin, 9 N.E.2d 713, 297 Mass. 536—Jacobs v. Moniz, 192 N.E. 515, 288 Mass. 102.
- Mich.**—Park v. Gaudio, 281 N.W. 565, 286 Mich. 133—Camp v. Wilson, 241 N.W. 844, 258 Mich. 38—Lett v. Summerfield & Hecht, 214 N.W. 939, 239 Mich. 699.
- Minn.**—Szyperski v. Swift & Co., 269 N.W. 401, 198 Minn. 154—Martin v. Tracy, 246 N.W. 6, 187 Minn. 529—Olson v. Purity Baking Co., 242 N.W. 283, 185 Minn. 571.
- Miss.**—Solomon v. Continental Baking Co., 160 So. 732, 172 Miss. 388.
- Mo.**—Davis v. F. M. Stamper Co., 148 S.W.2d 765, 347 Mo. 761—McGrory v. Thurnau, App., 84 S.W.2d 147—Junk v. Tucker Transp. Co., App., 52 S.W.2d 570.
- Neb.**—LaFleur v. Poesch, 252 N.W. 902, 126 Neb. 263.
- N.H.**—Laflamme v. Lewis, 192 A. 851, 89 N.H. 69.
- N.Y.**—Rutledge v. City of New York, 10 N.Y.S.2d 417, 256 App.Div. 515.
- N.C.**—Leonard v. Tatum & Dalton Transfer Co., 12 S.E.2d 729, 218 N.C. 667—Lambert v. Caronna, 175 S.E. 303, 206 N.C. 616.
- Pa.**—Kline v. Moyer, 191 A. 43, 325 Pa. 357, 111 A.L.R. 406—Hirth v. Marano, 170 A. 438, 112 Pa Super. 187.
- Vt.**—Hunter v. Preston, 166 A. 17, 105 Vt. 327.
- Va.**—Barry v. Tyler, 199 S.E. 496, 171 Va. 381.
- Wash.**—Green v. Floe, 183 P.2d 771, 28 Wash.2d 620—Pozar v. Blankenship, 282 P. 52, 154 Wash. 261.
- Wis.**—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.
- 42 C.J. p 1247 note 67 [c].
- 33. U.S.**—Miller v. Advance Transp. Co., C.C.A.III, 126 F.2d 442, certiorari denied Advance Transp. Co. v. Miller, 63 S.Ct. 32, 317 U.S. 641, 87 L.Ed. 516—Swinger v. Firman Equipment Corporation, C.C.A.III, 94 F.2d 269—Bos v. Richards, C.C.A.III, 71 F.2d 262.
- Cal.**—Ouchida v. Potter, App., 192 P.2d 493—Anderson v. Pacific Tank Lines, 126 P.2d 153, 52 Cal.App.2d 244—Callison v. Dondero, 124 P.2d

the case tending to show that defendant was negligent in parking his motor vehicle or leaving it unattended in order to take the issue to the jury, and in various cases the evidence has been held insufficient to warrant or require submission of defendant's negligence or of some question incidental thereto.³⁴ Where the facts are undisputed, on a motion by defendant for a directed verdict, it is for the court to decide whether or not a reasonable mind might conclude that defendant acted as a prudent person would have done under the circumstances.³⁵ The parking of a motor truck within a safety zone for the purpose of being loaded is not negligence as a matter of law.³⁶

e. Conduct Generally in Particular Situations

- (1) In general; acts in emergencies
- (2) Driving on wrong side of road

- (3) Passing vehicles
- (4) Crossing intersections
- (5) Towing and being towed
- (6) Colliding with vehicle parked or at rest

(1) In General; Acts in Emergencies

Where the evidence is conflicting, the question whether the defendant's conduct in particular situations constituted negligence is one of fact.

Defendant's liability where the negligence charged in the operation of a motor vehicle concerns his general conduct in particular situations is a question of fact wherever the evidence is conflicting or different inferences may be reasonably drawn therefrom.³⁷ The evidence must be legally sufficient to justify submission to the jury of defendant's negligence or of some question incidental thereto.³⁸ Where the evidence as to defendant's

852, 51 Cal App.2d 403—*Frates v. Ghirardi*, 120 P.2d 82, 48 Cal App 2d 596—*Petersen v. Lang Transp Co.*, 90 P.2d 94, 32 Cal App 2d 462—*Silvey v. Harm*, 8 P.2d 570, 120 Cal. App 561.

Ill.—*Quirk v. Schramm*, 77 N.E.2d 417, 333 Ill.App. 293—*McKay v. Hannah*, 51 N.E.2d 608, 320 Ill App. 437.

Iowa.—*Knaus Truck Lines v. Commercial Freight Lines*, 29 N.W.2d 204, 238 Iowa 1356—*Johnson v. Overland Transp. Co.*, 288 N.W. 601, 227 Iowa 487.

Kan.—*Harrison v. Travelers Mut Casualty Co.*, 134 P.2d 681, 156 Kan. 492.

La.—*Ledoux v. Beyt*, App., 35 So.2d 472

Mich.—*Russell v. Szczawinski*, 255 N. W. 731, 268 Mich. 112.

Minn.—*Olson v. Neubauer*, 300 N.W. 613, 211 Minn 218—*Twa v. Northland Greyhound Lines*, 275 N.W. 846, 201 Minn. 234—*Johnson v. Sunshine Creamery Co.*, 274 N.W. 404, 200 Minn. 428—*Brown v. Murphy Transfer & Storage Co.*, 251 N.W. 5, 190 Minn. 81.

Neb.—*Grantham v. Watson Bros Transp. Co.*, 6 N.W.2d 372, 142 Neb 362, rehearing denied 9 N.W.2d 157, 142 Neb. 362—*Gleason v. Baack*, 289 N.W. 349, 137 Neb. 272.

N.H.—*MacDonald v. Appleyard*, 53 A.2d 434.

N.J.—*Niles v. Phillips Express Co.*, 193 A. 183, 118 N.J.Law 455.

Pa.—*Harkins v. Somerset Bus Co.*, 162 A. 163, 308 Pa. 109—*Boor v. Schreiber*, 33 A.2d 648, 152 Pa.Super. 458—*Emrick v. Phillips*, 4 A. 2d 238, 134 Pa.Super. 45.

S.C.—*Ayers v. Atlantic Greyhound Corp.*, 37 S.E.2d 737, 208 S.C. 267.

Tex.—*Bailey v. Walker*, Civ.App., 163 S.W.2d 864, error refused.

Wis.—*Knauf v. Diamond Cartage Co.*, 275 N.W. 903, 226 Wis. 111.

Use of flashlights

Iowa.—*Johnson v. Overland Transp Co.*, 288 N.W. 601, 227 Iowa 487.
Va.—*Dody, Fender & Brake Corporation v. Matter*, 200 S.E. 589, 172 Va 26.

Negligence in parking truck to repair lights on trailer without warning other travelers was for jury, where automobile following truck skidded into path of approaching automobile.—*Reed v. Ogden*, 233 N.W. 315, 252 Mich 362.

Whether reflector device on rear of truck parked on highway at night was properly adjusted and operated so as not to render truck owner negligent because electric tail-light was not burning was for jury.—*Brothers v. Berg*, 254 N.W. 384, 214 Wis. 661.

34. Colo.—*Denver - Los Angeles Trucking Co v Ward*, 164 P.2d 730, 114 Colo 318

Ky.—*Basham's Adm'x v. Witt*, 159 S. W.2d 990, 289 Ky. 639.

Mass.—*Litos v. Sullivan*, 76 N.E.2d 557.

Mo.—*Snyder v. Murray*, 17 S.W.2d 639, 223 Mo.App. 671, followed in 17 S.W.2d 646.

N.H.—*MacDonald v. Appleyard*, 53 A.2d 434.

N.Y.—*Nezheda v. Port of New York Authority*, 39 N.Y.S.2d 848, 265 App. Div. 1048, affirmed 54 N.Y.S.2d 386, 292 N.Y. 548—*Zerberini v. M. & M Transp. Co.*, 71 N.Y.S.2d 803.

N.C.—*Hammitt v. Miller*, 40 S.E.2d 480, 227 N.C. 10.

Ohio.—*Townley v. Union Fork & Hoe Co.*, 22 N.E.2d 211, 60 Ohio App. 544, appeal dismissed 19 N.E.2d 511, 135 Ohio St. 96.

Or.—*Frame v. Arrow Towing Service*, 64 P.2d 1312, 155 Or. 522.

Pa.—*Valley Motor Transit Co. v. Allison*, 33 A.2d 485, 153 Pa.Super. 221—*Cortier v. Hanna*, Com.Pl., 32 Del Co 13—*Martin v. Diskin*, Com. Pl., 38 Lack Jur. 212.

R.I.—*Kelly v. Davis*, 135 A. 602, 48 R.I. 94.

S.C.—*Hunsucker v. State Highway Department*, 189 S.E. 652, 182 S.C. 441

Vt.—*Jones v. Gay's Express*, 9 A.2d 121, 110 Vt. 531.

Wash.—*Newton v. Pacific Highway Transport Co.*, 139 P.2d 725, 48 Wash 2d 507—*Knight v. Trogon Truck Co.*, 71 P.2d 1003, 191 Wash. 616

Failure to place flares or guards

Ark.—*Riley v. Motor Express*, 102 S.W.2d 850, 193 Ark. 780.

Colo.—*Denver-Los Angeles Trucking Co v Ward*, 164 P.2d 730, 114 Colo. 348.

Mich.—*Iindenfeld v. Michigan Interstate Truck Co.*, 265 N.W. 501, 274 Mich. 681

Negligence in failing to place warnings near service car and bus which had skidded from pavement was insufficient for jury.—*Snyder v. Murray*, 17 S.W.2d 639, 223 Mo.App. 671, followed in 17 S.W.2d 646.

35. Cal.—*James v. White Truck & Transfer Co.*, 36 P.2d 401, 1 Cal. App 2d 37.

36. Ky.—*Louisville Taxicab & Transfer Co. v. Reno*, 35 S.W.2d 902, 237 Ky. 452.

37. Ill.—*Sheridan v. Fullerton*, 18 N.E.2d 741, 298 Ill.App. 622.

Mo.—*Wilson v. Spuhler*, App., 20 S.W.2d 556.

42 C.J. p 1248 note 70.

38. Evidence held insufficient for jury

U.S.—*Mikolajczyk v. Allcutt, C.C.A. Pa.*, 102 F.2d 82.

conduct is not contradicted and only a single inference as to whether or not it constituted negligence can reasonably be made therefrom, the case is not a proper one to be submitted to the jury.³⁹

Where a collision occurs on a highway, the negligence of defendant ordinarily is a question for the jury, or for the trial court in actions tried without a jury.⁴⁰ A motorist is not to be held negligent as a matter of law when his only fault is the failure to avoid a collision under conditions that may not be reasonably anticipated.⁴¹

In cases involving collisions between leading and following vehicles, the questions as to what due care required and whether under the circumstances due care was exercised are for the jury

except when reasonable minds may not differ.⁴² On conflicting evidence or where different inferences reasonably may be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether the operator of a leading vehicle was negligent in causing injury to the driver of a following vehicle⁴³ or to the driver of a vehicle approaching from the opposite direction.⁴⁴

Acts in emergencies. Where the evidence is conflicting or different inferences reasonably may be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant was confronted with an emergency,⁴⁵ the nature and ex-

39. Md.—Brotman v. McNamara, 29 A.2d 264, 181 Md. 224.
42 C.J. p 1248 note 72.

40. Cal.—Himes v. Daniel, 15 P.2d 791, 127 Cal.App. 327—Offerdahl v. Motor Transit Co., 252 P. 773, 80 Cal.App. 667.

Ill.—Elston Fuel Corporation v. Diamond Coal Co., 31 N.E.2d 427, 308 Ill.App. 325.

Mass.—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 207—White v. Calcutt, 168 N.E. 815, 269 Mass. 252.

Minn.—Carlson v. Peterson, 284 N.W. 847, 205 Minn. 20.

S.C.—Cox v. McGraham, 45 S.E.2d 595, 211 S.C. 378.

Tex.—O. K. Theater Corporation v. Rehmyer, Civ.App., 115 S.W.2d 985, error dismissed.

Plaintiff backing into street from driveway

N.H.—Spear v. Penna, 27 A.2d 92, 92 N.H. 190

N.J.—Smith v. Montclair Brown & White Cab Co., 139 A. 904, 6 N.J. Misc. 57.

R.I.—Harding v. Pierce, 13 A.2d 276, 64 R.I. 490.

Disputed testimony as to positions on highway of moving vehicles at time of collision and opportunity of drivers to see each other should generally be left to jury.—Peters v. Wurzburg, 255 N.W. 316, 267 Mich. 45.

41. Pa.—Hoffman v. Herman, 163 A. 452, 107 Pa.Super. 92.

42. U.S.—Cardell v. Tennessee Electric Power Co., C.C.A.Ga., 79 F.2d 934.

Okl.—Union Transp. Co. v. Lamb, 123 P.2d 660, 190 Okl. 327.

Pa.—Sabatelli v. Scull, Com.Pl., 29 Del.C. 456.

Questions of law or fact:
Contributory negligence see infra § 527.

Negligence:

In running down horse-drawn vehicles see *infra* subdivision f (6) (b) of this section

Of operator of following vehicle in

Passing or attempting to pass see *infra* subdivision e (3) (a) of this section.

Running down leading vehicle see *supra* subdivision d (3) of this section

Whether automobile trailed another so closely as to constitute negligence depends on circumstances, and is usually for jury, or trial judge sitting without jury.—Adams v. Morgan, La.App., 173 So. 540, rehearing denied 174 So. 157.

Distance between vehicles

It is not negligence as matter of law for automobile driver to follow another automobile within thirty-five to forty-eight feet.—Starr v. Rossin, 23 N.E.2d 740, 302 Ill.App. 325.

43. Iowa.—Gookin v. Guy W. Baker & Son, 276 N.W. 418, 224 Iowa 967.

Ky.—Hogland v. Dolan, 81 S.W.2d 869, 259 Ky. 1.

Ohio.—Reeves v. Joe O Frank Co., 62 N.E.2d 886, 76 Ohio App. 1.

Tenn.—Chattanooga Ice Delivery Co. v. George F. Burnett Co., 147 S.W. 2d 750, 24 Tenn.App. 535.

Negligence of operator of leading vehicle in turning or stopping see *supra* subdivision d (5) of this section.

Leading vehicle suddenly reducing speed

U.S.—Dixie Motor Coach Corporation v. Lane, C.C.A.Tex., 116 F.2d 264.

Leading vehicle preventing passage of following vehicle

U.S.—Warlich v. Miller, C.C.A.Pa., 141 F.2d 168.

N.C.—Murphy v. Asheville-Knoxville Coach Co., 156 S.E. 550, 200 N.C. 92.

Causing collision with oncoming vehicle

Cal.—Scaletta v. Silva, 126 P.2d 898, 52 Cal.App.2d 730

Ohio.—Judt v. Reinhardt Transfer Co., 17 Ohio Supp. 105

Where plaintiff's automobile passed defendant's truck, and collision followed soon after, and issue was raised as to whether truck ran into automobile or automobile into truck, directed verdict for defendant was not proper.—Heringer v. Underwood Typewriter Co., 131 A. 322, 103 Conn. 675.

Evidence held insufficient for jury

Wis.—Swinkels v. Wisconsin Michigan Power Co., 267 N.W. 1, 227 Wis. 280

Directed verdict for defendant held proper

Ark.—Ward v. Haralson, 120 S.W.2d 322, 196 Ark. 755.

Md.—Brotman v. McNamara, 29 A. 2d 264, 181 Md. 224

44. Cal.—Day v. General Petroleum Corporation, 89 P.2d 718, 32 Cal. App.2d 220.

45. U.S.—Meissner v. Papas, C.C.A. Wis., 124 F.2d 720.

Cal.—De Ponce v. System Freight Service, 152 P.2d 234, 66 Cal.App.2d 295—Coughman v. Harman, 26 P. 2d 851, 135 Cal.App. 49—Musante v. Guerrini, 13 P.2d 965, 125 Cal. App. 556—Miller v. Geary, 298 P. 843, 113 Cal.App. 573—Marshall v. Golden State Milk Products Co., 297 P. 109, 113 Cal.App. 43.

Conn.—Oginskas v. Fredsal, 143 A. 888, 108 Conn. 505.

Ga.—Economy Gas & Appliance Co. v. Kinslow, 39 S.E.2d 899, 74 Ga. App. 418.

Ill.—Rhoden v. Peoria Creamery Co., 278 Ill.App. 452.

Iowa.—Edwards v. Perley, 274 N.W. 910, 223 Iowa 1119—Jeck v. McDougall Const. Co., 246 N.W. 595, 216 Iowa 516.

Ky.—Moreland's Adm'r v. Stone, 166 S.W.2d 998, 292 Ky. 521.

tent of the emergency,⁴⁶ whether the emergency was created by defendant,⁴⁷ and whether defendant conducted himself in the emergency as an ordinarily prudent person in like circumstances might have done.⁴⁸ Where the evidence is undisputed and but one inference reasonably may be drawn therefrom,

it is a question of law whether there was an emergency which would excuse defendant from liability⁴⁹ and whether in such emergency defendant acted as a reasonably prudent person would have acted under the circumstances.⁵⁰

Minn.—Zickrick v. Strathern, 1 N. W. 2d 134, 211 Minn. 329—Oxborough v. Murphy Transfer & Storage Co., 260 N.W. 305, 194 Minn. 335.

Mo.—Sparks v. Auslander, 182 S.W. 2d 167, 353 Mo. 177.

Neb.—Whitney v. Penrod, 32 N.W. 2d 131, 149 Neb. 636.

N.H.—Bennett v. Bennett, 31 A.2d 374, 92 N.H. 379.

N.J.—Dobrow v. Hertz, 15 A.2d 749, 125 N.J. Law 347.

N.C.—Smith v. Carolina Coach Co., 199 S.E. 90, 214 N.C. 314.

Pa.—Arbie v. Murray, 58 A.2d 143, 359 Pa. 12—Goldscheiter v. Heilman Co., 89 Pittsb. Leg. J. 89.

R.I.—Piazza v. O'Malley, 195 A. 342, 59 R.I. 298—Garabedian v. Dizjain, 191 A. 257, 58 R.I. 74.

Tenn.—Getz v. Weiss, 160 S.W.2d 438, 25 Tenn. App. 520—Stanford v. Holloway, 157 S.W. 2d 864, 25 Tenn. App. 379—Hatcher v. Cantrell, 65 S.W.2d 247, 16 Tenn. App. 544—Nohsey & Schwab v. Slover, 14 Tenn. App. 42—Cullom v. Glasgow, 3 Tenn. App. 443.

Va.—Saunders v. Hall, 11 S.E.2d 592, 176 Va. 526.

Wis.—Basile v. City of Milwaukee, 26 N.W.2d 168, 250 Wis. 35—Pierner v. Mann, 25 N.W.2d 83, 249 Wis. 469—Scharine v. Huchsch, 234 N.W. 358, 203 Wis. 261.

Acts in emergency as ground for liability in general see supra § 257.

Defendant grabbing steering wheel of automobile

N.C.—Jernigan v. Jernigan, 175 S.E. 713, 207 N.C. 851.

Tex.—Hooks v. Orton, Civ. App., 30 S.W.2d 681.

Whether blowout in rear tire created emergency so as to relieve driver of responsibility for subsequent acts resulting in injury to guest, was for jury—Bankers Indemnity Co. v. Leake, C.C.A.La., 84 F.2d 191.

46. Iowa.—Luppes v. Harrison, 32 N.W.2d 809.

47. Conn.—Gross v. Rubbo, 53 A.2d 653, 133 Conn. 639.

Minn.—Zickrick v. Strathern, 1 N.W.2d 134, 211 Minn. 329.

N.J.—Dobrow v. Hertz, 15 A.2d 749, 125 N.J. Law 347.

R.I.—Piazza v. O'Malley, 195 A. 342, 59 R.I. 298.

S.C.—Southern v. Cudahy Packing Co., 159 S.E. 32, 160 S.C. 496.

Tenn.—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn. App. 379—Johnson v. Maury County Trust Co., 15

Tenn. App. 326—Nohsey & Schwab v. Slover, 14 Tenn. App. 42.

Va.—Saunders v. Hall, 11 S.E.2d 592, 176 Va. 526.

Wash.—Baltuff v. Bowen, 162 P.2d 829, 23 Wash.2d 886—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

Wis.—Pierner v. Mann, 25 N.W.2d 83, 249 Wis. 469—Haskins v. Thencell, 286 N.W. 555, 232 Wis. 97.

Ordinarily jury question

Pa.—Kins v. Deere, 58 A.2d 335, 359 Pa. 106—Casey v. Siciliano, 165 A. 1, 310 Pa. 238.

48. U.S.—Brinegar v. Green, C.C.A. Iowa, 117 F.2d 316—Palmer v. Moren, D.C.Pa., 44 F.Supp. 704. Ala.—Conner v. Foregger, 7 So.2d 856, 242 Ala. 275—Green v. City of Birmingham, 4 So.2d 394, 241 Ala. 684—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359.

Ariz.—Cox v. Enloe, 70 P.2d 331, 50 Ariz. 201.

Cal.—Gamalia v. Badillo, 128 P.2d 184, 53 Cal. App. 2d 375—Gambrel v. Duensting, 16 P.2d 284, 127 Cal. App. 593.

Conn.—Caplan v. Arndt, 196 A. 631, 123 Conn. 585, 119 A.L.R. 1037.

Ga.—Economy Gas & Appliance Co. v. Kinslow, 39 S.E.2d 899, 74 Ga. App. 418.

Ill.—Goldberg v. Capitol Freight Lines, 47 N.E.2d 67, 382 Ill. 283—Roady v. Rhodes, 61 N.E.2d 584, 326 Ill. App. 49—Itzeszewski v. Barth, 58 N.E.2d 269, 324 Ill. App. 345—Vernon v. Small, 9 N.E.2d 440, 291 Ill. App. 613—Hicks v. Swift & Co., 1 N.E.2d 918, 285 Ill. App. 1.

Ky.—Moreland's Adm'r v. Stone, 166 S.W.2d 998, 292 Ky. 521—Rose v. Edmonds, 111 S.W.2d 427, 271 Ky. 36.

Me.—Gravel v. Le Blanc, 162 A. 789, 131 Me. 325—Coombs v. Markley, 143 A. 261, 127 Me. 335.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. O'Neill, 200 A. 359, 175 Md. 47.

Mich.—Wiles v. New York Cent. R. Co., 19 N.W.2d 90, 311 Mich. 540.

Minn.—Zickrick v. Strathern, 1 N.W.2d 134, 211 Minn. 329—Schweikert v. Peters Sausage Co., 289 N.W. 828, 206 Minn. 596.

Mo.—Padgett v. Missouri Motor Distributing Corporation, 177 S.W.2d 490.

Neb.—Spaulding v. Howard, 27 N.W.2d 832, 148 Neb. 496—Anderson v. Lee, 264 N.W. 666, 130 Neb. 258.

N.H.—Sullivan v. Sullivan, 18 A.2d 828, 91 N.H. 341.

N.J.—Dobrow v. Hertz, 15 A.2d 749, 125 N.J. Law 347.

N.C.—Woods v. Freeman, 195 S.E. 812, 213 N.C. 314.

Ohio.—Satterthwaite v. Morgan, 48 N.E.2d 653, 141 Ohio St. 447—Woodward v. Gray, 29 Ohio N.P.N. S. 141, affirmed 188 N.E. 304, 46 Ohio App. 177.

Or.—Goebel v. Vaught, 269 P. 491, 126 Or. 332—Hansen v. Bedell Co., 268 P. 1020, 126 Or. 155.

Pa.—Schiele v. Motor Freight Express, 36 A.2d 467, 348 Pa. 525, followed in Parsons v. Motor Freight Express, 36 A.2d 470, 348 Pa. 530—Korenkiewicz v. York Motor Express Co., 10 A.2d 864, 138 Pa. Super. 210—Smith v. Gross, 173 A. 478, 113 Pa. Super. 568.

R.I.—Piazza v. O'Malley, 195 A. 342, 59 R.I. 298—Garabedian v. Dizjain, 191 A. 257, 58 R.I. 74.

Tenn.—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn. App. 379.

Utah.—Graham v. Johnson, 172 P.2d 665, 109 Utah 365.

Va.—Dixon v. Einstein, 198 S.E. 881, 171 Va. 205—Lavenstein v. Malle, 132 S.E. 844, 116 Va. 789.

Wash.—Henry v. Larsen, 143 P.2d 841, 19 Wash.2d 690—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

Wis.—Pierner v. Mann, 25 N.W.2d 83, 249 Wis. 469—Hein v. Huber, 252 N.W. 692, 214 Wis. 230—Watkins v. Watkins, 245 N.W. 695, 210 Wis. 606—Abraham v. Clark, 232 N.W. 865, 202 Wis. 451—Loehr v. Crocker, 211 N.W. 299, 191 Wis. 422, followed in 211 N.W. 302, 191 Wis. 429, 430.

Ordinarily jury question

N.Y.—McMillan v. Van Epps, 40 N.Y.S.2d 162, 179 Misc. 851, reversed on other grounds 44 N.Y.S.2d 104, 266 App. Div. 903.

N.C.—Bullock v. Williams, 193 S.E. 170, 212 N.C. 113.

49. Iowa.—Fraser v. Brannigan, 293 N.W. 50, 228 Iowa 572.

Miss.—Vann v. Tankersly, 145 So. 642, 164 Miss. 748.

50. Ind.—Gamble v. Lewis, App., 78 N.E.2d 878.

N.Y.—McMillan v. Van Epps, 40 N.Y.S.2d 162, 179 Misc. 851, reversed on other grounds 44 N.Y.S.2d 104, 266 App. Div. 903.

N.C.—O'Kelly v. Barbee, 25 S.E.2d 750, 223 N.C. 282—Patterson v. Ritchie, 164 S.E. 117, 202 N.C. 725.

(2) Driving on Wrong Side of Road

The negligence of the defendant in driving on the wrong side of the road ordinarily is a question for the jury.

The driving of a motor vehicle on the wrong side of the road, or to the left of center of the highway, is not, of itself negligence as a matter of law;⁵¹ but whether such an operation constitutes negligence usually presents a question of fact for the jury, or for the trial court in actions tried without a jury, in connection with other pertinent facts in evidence.⁵² Testimony showing that a driver failed to keep to the right of the center of a highway as required by the rules of the road is sufficient evidence to warrant the court in submitting the case to the jury on the question of the driver's negligence.⁵³ On conflicting evidence or where different inferences reasonably may be drawn from the evidence, it is for the jury or trial court to determine whether defendant was driving on the wrong side of the road⁵⁴ or which of two motor vehicles was being operated on the wrong side of the road.⁵⁵

The evidence must be legally sufficient to justify submission to the jury of defendant's negligence in driving on the wrong side of the road⁵⁶ or of some question incidental thereto.⁵⁷

(3) Passing Vehicles

- (a) Going in same direction
- (b) Going in opposite directions

(a) Going in Same Direction

On conflicting evidence or where different inferences may reasonably be drawn from the evidence, it is for the jury to determine whether the defendant was negligent in passing or attempting to pass another motor vehicle going in the same direction.

Where evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is for the jury, or the trial court in actions tried without a jury, to determine whether defendant in passing or attempting to pass another motor vehicle going in the same direction was guilty of negligence.⁵⁸ On such evidence it is for the jury or trial court to de-

Wash.—Murray v. Banning, 134 P.2d 715, 17 Wash.2d 1.

51. Cal.—Mathers v. Riverside County, 141 P.2d 419, 22 Cal.2d 781. Ohio.—Collins v. McClure, App., 49 N.E.2d 181, affirmed 56 N.E.2d 171, 143 Ohio St. 569.

R.I.—Williams v. Carpentier, 9 A.2d 275, 63 R.I. 459.

Utah.—Thompson v. Civil Service Commission of Provo City, 134 P.2d 188, 103 Utah 162.

Va.—Howe v. Jones, 174 S.E. 764, 162 Va. 442.

Position of motor vehicle on road generally see supra §§ 274-283.

52. Ala.—Smith v. Tripp, 20 So.2d 870, 246 Ala. 421.

Ark.—Riceland Petroleum Co. v. Moore, 12 S.W.2d 415, 178 Ark. 599.

Cal.—Musgrove v. Zobrist, 187 P.2d 782, 83 Cal.App.2d 101—Greenwood v. Summers, 149 P.2d 35, 64 Cal. App.2d 516—McLellan v. Cocola, 24 P.2d 200, 133 Cal.App. 9.

Conn.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355.

Ind.—Lorber v. People's Motor Coach Co., 164 N.E. 859, 89 Ind.App. 133, concurring opinion 172 N.E. 526, 89 Ind.App. 139.

Mass.—Jackson v. Anthony, 185 N.E. 389, 282 Mass. 540.

Mo.—Lerbs v. Machetascheck, App., 49 S.W.2d 240.

Ohio.—Satterthwaite v. Morgan, 48 N.E.2d 653, 141 Ohio St. 447.

Pa.—Dempsey v. Cuneo Eastern Press Ink Co. of Pennsylvania, 179 A. 220, 318 Pa. 557—Eckenrode v. Produce Trucking Co., Com.Pl., 49

Daugh Co. 271—Considine v. Michlovitz, Com.Pl., 45 Daugh Co. 255—Pampalone v. Michlovitz, Com.Pl., 45 Daugh Co. 252.

Tenn.—Roddy Mfg. Co. v. Dixon, 105 S.W.2d 513, 21 Tenn.App. 81.

Wash.—Thomas v. Adams, 24 P.2d 432, 174 Wash. 118.

53. Cal.—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 551.

Md.—Baltimore Transit Co. v. Young, 56 A.2d 140—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

54. Ark.—Northwestern Casualty & Surety Co. v. Rose, 46 S.W.2d 796, 185 Ark. 263.

Iowa.—Lane v. Varlamos, 239 N.W. 689, 213 Iowa 795.

Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md. 1.

Mich.—Hetler v. Holtrop, 281 N.W. 434, 285 Mich. 570.

Tex.—Texas Farm Products Co. v. Johnson, Civ.App., 190 S.W.2d 178.

55. Tex.—Younger Bros. v. Power, Civ.App., 118 S.W.2d 954, error dismissed.

56. Evidence held insufficient for jury

U.S.—Texas Co. v. Hood, C.C.A.Tex., 161 F.2d 618, certiorari denied 68 S.Ct. 206, 332 U.S. 829, 92 L.Ed. —.

Ill.—Sniogowski v. Reece, 61 N.E.2d 272, 326 Ill.App. 255.

Wis.—Holborn v. Coombs, 245 N.W. 673, 209 Wis. 556.

57. Ill.—Sniogowski v. Reece, 61 N.E.2d 272, 326 Ill.App. 255.

58. Cal.—Ritchey v. Watson, 268 P. 345, 204 Cal. 387.

Ill.—Orr v. Herzog, 64 N.E.2d 382, 327 Ill.App. 555—Gregory v. Merriam, 14 N.E.2d 268, 294 Ill.App. 483.

Iowa.—Bailey v. Fredericksburg Produce Ass'n, 295 N.W. 122, 229 Iowa 477—Anderson v. Christensen, 268 N.W. 527, 222 Iowa 177.

Md.—Davidson Transfer & Storage Co. v. State, for Use of Brown, 22 A.2d 582, 180 Md. 63.

Mass.—Iuff v. Mahlowitz, 5 N.E.2d 45, 296 Mass. 206.

Mich.—McDuffie v. Root, 1 N.W.2d 544, 300 Mich. 286—Braendle v. Drum, 236 N.W. 806, 254 Mich. 372.

Mo.—Lanlo v. Kansas City Public Service Co., 162 S.W.2d 862—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243—Nevins v. Solomon, 139 S.W.2d 1109, 235 Mo. App. 967, certiorari quashed State ex rel. Nevins v. Hughes, 149 S.W.2d 836, 347 Mo.App. 968.

Neb.—Rohy v. Auker, 32 N.W.2d 491, 149 Neb. 734—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636.

N.J.—Lewitt v. Vollman, 137 A. 403, 5 N.J. Misc. 581.

N.Y.—Strandski v. Sharkl, 31 N.Y.S.2d 276, 263 App.Div. 777, reargument denied 32 N.Y.S.2d 806, 263 App.Div. 907.

N.C.—Joyner v. Dall, 188 S.E. 209, 210 N.C. 463—Hobbs v. Mann, 155 S.E. 163, 199 N.C. 532.

Pa.—Harp v. Moore, Com.Pl., 62 Montg.Co. 215.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 506—Patillo v. Gambill, 124 S.W.2d 272, 22 Tenn.App. 486.

termine as a fact whether defendant was negligent in colliding with the vehicle which he was passing or attempting to pass,⁵⁹ or in forcing such vehicle⁶⁰ or a following vehicle⁶¹ to leave the road, or was negligent in colliding with a car approaching in the opposite direction.⁶² On conflicting evidence it is for the jury to determine whether defendant attempted to pass plaintiff's

car on the right in violation of the regulations⁶³ or whether the collision was caused by plaintiff's turning his car into defendant's, or defendant cutting too short in front of plaintiff's.⁶⁴

The evidence must be legally sufficient to justify submission to the jury of defendant's negligence or of some question incidental thereto.⁶⁵ Where the facts are undisputed and but one in-

Wash.—Fosdick v. Middendorf, 115 P.2d 679, 9 Wash 2d 616—Zurfluh v. Lewis County, 91 P.2d 1002, 199 Wash. 378—Stanhope v. Strang, 250 P. 351, 140 Wash. 693

Wis.—Maas v. W. R. Arthur & Co., 2 N.W.2d 238, 239 Wis. 581—Reichert v. Rex Accessories Co., 279 N. W. 645, 228 Wis. 425.

Care required in passing vehicles traveling in same direction see *supra* §§ 324-328.

Questions of law or fact:

Negligence:

In striking horse-drawn vehicle see *infra* subdivision f (6) (b) of this section

Of driver of car in front in turning suddenly across path of following vehicle see *supra* subdivision d (5) of this section

Running down vehicle in front see *supra* subdivision d (3) of this section

What is reasonably safe method, under circumstances, of passing vehicle moving in same direction is question of fact—Anzoni v. Gosse, 175 N.E. 57, 274 Mass. 522.

59. Ark.—Franklin v. Badinelli, 168 S.W.2d 397, 205 Ark. 265—Kittrell v. Wilkerson, 9 S.W.2d 788, 177 Ark. 1174.

Cal.—Uribe v. McCorkle, 146 P.2d 22, 63 Cal.App.2d 61—Toriyama v. Putnam, 25 P.2d 34, 131 Cal.App. 201.

Colo.—Forsythe v. McCarthy, 57 P. 2d 1, 98 Colo. 399

Iowa.—McCoy v. Cole, 249 N.W. 213, 216 Iowa 1320.

Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.

Ky.—Damron v. Greene, 86 S.W.2d 996, 260 Ky. 770—Grinstead v. Feinstein, 21 S.W.2d 806, 231 Ky. 502.

Md.—Standard Oil Co. of New Jersey v. Stern, 173 A. 205, 167 Md. 211—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.

Mass.—Jennings v. Bragdon, 194 N. E. 697, 289 Mass. 595.

Mich.—Murphy v. Sinen, 274 N.W. 790, 281 Mich. 274.

Miss.—Long v. Patterson, 22 So.2d 490, 198 Miss. 554.

Mo.—Laughren v. Heller, App., 285 S.W. 520.

N.J.—Baxter v. Public Service

Transp. Co., 143 A. 748, 6 N.J. Misc. 1099.

N.C.—Beaman v. Duncan, 46 S.E.2d 707, 228 N.C. 600—Hobbs v. Mann, 155 S.E. 163, 199 N.C. 532

Or.—Heinrich v. Booth, 73 P.2d 696, 158 Or. 16.

Pa.—Mulheirn v. Brown, 185 A. 304, 322 Pa. 171—Houlihan v. Turckheimer, 23 A.2d 352, 146 Pa.Super. 496—Kelly v. Crawford, 8 A.2d 449, 137 Pa.Super. 197—Doherty v. Siegfried, Com.Pl., 36 Berks Co. L.J. 24.

Wash.—Popoff v. Mott, 126 P.2d 597, 14 Wash 2d 1—Maddock v. International Motor Transit Co. of Washington, 297 P. 184, 161 Wash. 450. 42 C.J. p 1248 note 74

Passing at safe distance

Me.—Levesque v. Pelletier, 161 A. 198, 131 Me. 266.

Passing on bridge

Ala.—Nelson v. Belcher Lumber Co., 166 So. 808, 232 Ala. 116.

Collision with car turning left at intersection

Mo.—Disano v. Hall, App., 14 S.W. 2d 483.

N.Y.—Mendleson v. Van Rennselaer, 103 N.Y.S. 578, 118 App.Div. 516.

Speed

Minn.—Douglas v. Jacobson, 228 N. W. 347, 179 Minn. 86.

42 C.J. p 1248 note 74 [c].

60. Cal.—Toriyama v. Putnam, 25 P.2d 34, 134 Cal.App. 201.

Iowa.—Miller v. Lowe, 261 N.W. 822, 220 Iowa 105.

Mich.—Loosey v. Wetters, 270 N.W. 735, 278 Mich. 422.

Collision with telegraph pole

U.S.—Brown v. Walter, C.C.A.Vt., 62 F.2d 798.

61. Cal.—Munoz v. Kennedy, 293 P. 173, 109 Cal.App. 463.

62. U.S.—Herzig v. Swift & Co., C.C.A.N.Y., 154 F.2d 64—Old Dominion Stages v. Cates, C.C.A. Tenn., 65 F.2d 258, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592.

Ark.—Arkansas Motor Coaches v. Williams, 116 S.W.2d 585, 196 Ark. 48.

Conn.—Lawrence v. Abrams, 185 A. 414, 121 Conn. 480.

Ill.—Eldridge v. Boismenu, 49 N.E. 2d 321, 319 Ill.App. 383—Kellen-

berger v. Mitchell, 44 N.E.2d 73, 316 Ill.App. 112.

Iowa.—Echternacht v. Herny, 275 N. W. 576, 224 Iowa 317—McWilliams v. Beck, 262 N.W. 781, 230 Iowa 906—Miller v. Wood Bros. Thresher Co., 222 N.W. 551.

Kan.—Meneley, by Myers, v. Montgomery, 64 P.2d 550, 145 Kan. 109. Ky.—McFarland v. Bruening, 185 S. W.2d 247, 299 Ky. 267.

Mass.—Wall v. King, 182 N.E. 855, 280 Mass 577—Screw Mach. Products Corporation v. Union Light & Power Co., 159 N.E. 625, 262 Mass. 320.

Mich.—Patterson v. Jacobs, 286 N.W. 643, 289 Mich. 351.

Minn.—Paulson v. Fisk, 261 N.W. 182, 194 Minn. 507.

Mo.—Nowlin v. Kansas City Public Service Co., App., 58 S.W.2d 324—Bauer v. Fahr, App., 282 S.W. 150.

Neb.—Roby v. Auker, 32 N.W.2d 491, 149 Neb 734.

N.H.—Keck v. Hinkley, 6 A.2d 165, 90 N.H. 181.

N.J.—Wilkinson v. Walsh, 178 A. 721, 115 N.J.Law 243—Grier v. Scandura, 169 A. 674, 112 N.J.Law 152—Skiba v. Himeleski, 150 A. 334, 106 N.J.Law 597—Smith v. West Side Hardware Co., 186 A. 46, 14 N.J.Misc. 398—Lyon v. Fabricant, 169 A. 548, 12 N.J.Misc. 39, affirmed 172 A. 567, 113 N.J.Law 62.

N.C.—Wells v. Burton Lines, 45 S. E.2d 569, 228 N.C. 422—James v. Carolina Coach Co., 178 S.E. 607, 207 N.C. 742.

Ohio.—Glass v. Miller, App., 51 N.E. 2d 299.

Okl.—Oklahoma City v. Wilcoxson, 48 P.2d 1039, 173 Okl. 433—Gourley v. Jackson, 285 P. 84, 142 Okl. 74.

Wash.—Barcott v. Standing, 1 P.2d 213, 163 Wash. 357.

42 C.J. p 1248 note 75.

63. Mich.—Hanser v. Youngs, 180 N.W. 409, 212 Mich. 508.

64. Iowa.—Kuhn v. Kiose, 248 N.W. 230, 216 Iowa 36.

42 C.J. p 1248 note 78.

65. Evidence held insufficient for jury

Ky.—Couch's Adm'r v. Black, 190 S. W.2d 681, 301 Ky. 24.

Wis.—Hunter v. Sirianni Candy Co., 288 N.W. 766, 233 Wis. 130.

ference reasonably may be drawn therefrom, the negligence of defendant is a question of law for the court.⁶⁶ Where the charge of negligence is that defendant attempted to pass another motor vehicle at an intersection contrary to regulations, the question of whether or not the streets were intersecting at the place of the accident is a question of law.⁶⁷

(b) Going in Opposite Directions

The negligence of the defendant in passing another automobile going in the opposite direction is a question for the jury where the evidence is conflicting or different

inferences of fact may reasonably be drawn from the evidence.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant motorist in passing another automobile going in the opposite direction was guilty of negligence.⁶⁸ On such evidence it is for the jury or trial court to determine as a fact whether defendant was negligent in colliding with an automobile going in the opposite direction⁶⁹ or in forcing such automobile

Directed verdict held proper

Where undisputed proof showed that defendant sounded horn as he was about to pass plaintiff, who suddenly turned to left to enter driveway, directed verdict for defendant was required.—*Spice v. Kuzman*, 239 N.W. 497, 206 Wis. 293.

Evidence contrary to physical facts

(1) In general.—*Seawell v. Louisiana Coca-Cola Bottling Co.*, 133 So. 176, 15 La.App. 704.

(2) In action for injuries sustained when automobile in which plaintiff was riding overturned in ditch, evidence that defendant's automobile passed to right of automobile in which plaintiff was riding and struck right front portion thereof, causing it to turn completely around and overturn in ditch, raised no issue of fact for jury, where evidence was contrary to physical facts, which disclosed no sign of an impact sufficient to account for behavior of overturned automobile.—*Covnot v. Clayton*, 277 N.W. 122, 227 W. 144.

68. Ky.—*Ralston v. Dossey*, 157 S.W.2d 739, 289 Ky. 40.

67. Fla.—*Gosma v. Adams*, 135 So. 806, 102 Fla. 305, 78 A.L.R. 1193.

68. Mo.—*Gay v. Samples*, 57 S.W.2d 768, 227 Mo.App. 771.

N.J.—*Gall v. New York & New Brunswick Auto Express Co.*, 36 A.2d 403, 131 N.J.Law 346, reversed on other grounds 40 A.2d 643, 132 N.J.Law 466.

N.Y.—*Hart v. Ruduk*, 253 N.Y.S. 615, 233 App.Div. 453.

Care required in passing vehicles traveling in opposite directions see *supra* §§ 305-320.

Negligence of motor vehicle operator as question of law or fact in striking:

Approaching motor vehicle while passing other vehicle going in same direction see *supra* subdivision e (3) (a) of this section. Horse-drawn vehicle see *infra* subdivision f (6) (b) of this section.

Where driver looks but does not see approaching automobile, or, see-

ing one, erroneously misjudges its speed, distance, or course, or for some other reason assumes he could avoid injury to himself, question of negligence is generally one of fact.—*Betschart v. Steel*, 143 P.2d 81, 61 Cal.App.2d 517.

69. U.S.—*Melville v. State of Md. to Use of Morris*, C.C.A. Md., 155 F.2d 440—*Car & General Ins. Corporation v. Keal Driveway Co.*, C.C.A. Fla., 132 F.2d 834, certiorari denied *Keal Driveway Co. v. Car & General Ins. Corporation*, 63 S.Ct. 1330, 319 U.S. 766, 87 L.Ed. 1716—*American Employers' Ins. Co. v. McLean*, C.C.A. La., 127 F.2d 275—*Brinegar v. Green*, C.C.A. Iowa, 117 F.2d 316—*Elzig v. Gudwangen*, C.C.A. Minn., 91 F.2d 434—*Roberts v. White Star Bus Line*, C.C.A. Puerto Rico, 38 F.2d 1, certiorari denied *White Star Bus Line v. Roberts*, 50 S.Ct. 463, 281 U.S. 764, 74 L.Ed. 1172.

Ala.—*Carter v. Ne-Hi Bottling Co.*, 146 So. 821, 226 Ala. 321—*Brown v. Bush*, 124 So. 300, 220 Ala. 130. Ariz.—*Noel v. Ostile*, 22 P.2d 831, 42 Ariz. 113.

Ark.—*National Mut. Casualty Co. v. Blackford*, 141 S.W.2d 54, 200 Ark. 847—*Jewel Tea Co. v. McCrary*, 122 S.W.2d 531, 197 Ark. 294—*McCord v. Bauley*, 114 S.W.2d 840, 195 Ark. 862—*Routt v. Alexander*, 78 S.W.2d 828, 190 Ark. 324.

Cal.—*Anderson v. Freis*, 142 P.2d 330, 61 Cal.App.2d 159—*Morris v. Fortier*, 138 P.2d 368, 59 Cal.App.2d 132—*Temple v. De Mirjian*, 125 P.2d 544, 51 Cal.App.2d 559—*National Automobile Ins. Co. v. Cunningham*, 107 P.2d 643, 41 Cal.App.2d 828—*Arundel v. Turk*, 44 P.2d 883, 6 Cal.App.2d 162—*Levy v. Berner*, 293 P. 896, 110 Cal.App. 65—*Terry v. Peterson*, 275 P. 484, 97 Cal.App. 160.

Colo.—*Leonard v. Bauer*, 149 P.2d 376, 112 Colo. 247. Conn.—*Horvath v. Tontini*, 11 A.2d 846, 126 Conn. 462.

Fla.—*Orr v. Avon Florida Citrus*

Corporation, 177 So. 612, 130 Fla. 306.

Ga.—*Macon Busses v. Dashiell*, 35 S.E.2d 666, 73 Ga.App. 108—*Whitley v. Henry*, 16 S.E.2d 214, 65 Ga.App. 668—*Schiefer v. Durden*, 192 S.E. 388, 56 Ga.App. 187.

Idaho.—*O'Connor v. Meyer*, 154 P.2d 174, 66 Idaho 15—*Stallinger v. Johnson*, 139 P.2d 460, 65 Idaho 101—*Evans v. Davidson*, 77 P.2d 661, 58 Idaho 600—*Shaddy v. Dailey*, 76 P.2d 279, 68 Idaho 536.

Ill.—*Walters v. Checker Taxi Co.*, 60 N.E.2d 260, 325 Ill.App. 578—*Chapman v. Bruton, Inc.*, 60 N.E.2d 125, 325 Ill.App. 334—*West v. Porritt*, 48 N.E.2d 199, 318 Ill.App. 636—*Thompson v. Otis*, 20 N.E.2d 130, 299 Ill.App. 620—*Seybold v. Zimmerman*, 13 N.E.2d 675, 294 Ill.App. 138—*Fogelman v. Christoff*, 10 N.E.2d 364, 291 Ill.App. 622—*Lachenmyer v. Glotfelty*, 2 N.E.2d 180, 284 Ill.App. 397.

Ind.—*Buddenberg v. Morgan*, 38 N.E.2d 287, 110 Ind.App. 609—*Wahl Co. v. Compton*, 36 N.E.2d 942, 109 Ind.App. 631—*Midland Trail Bus Lines v. Martin*, 194 N.E. 862, 100 Ind.App. 206.

Iowa.—*Roushar v. Dixon*, 2 N.W.2d 660, 231 Iowa 933—*Pazen v. Des Moines Transp. Co.*, 272 N.W. 126, 223 Iowa 23—*McKinnon v. Guthrie*, 265 N.W. 620, 221 Iowa 400—*Hoover v. Haggard*, 260 N.W. 540, 219 Iowa 1232—*Young v. Jacobsen Bros.*, 258 N.W. 104, 219 Iowa 483—*Olson v. Tyner*, 257 N.W. 538, 219 Iowa 251—*Carlson v. Jacob E. Decker & Sons*, 253 N.W. 923, 218 Iowa 54—*Parrack v. McGaffey*, 251 N.W. 871, 217 Iowa 368—*Rogers v. Lagomarcino-Grupe Co.*, 248 N.W. 1, 215 Iowa 1270—*Sergeant v. Challis*, 238 N.W. 442, 213 Iowa 57—*Rudd v. Jackson*, 213 N.W. 428, 203 Iowa 661.

Kan.—*Hogan v. Santa Fe Trail Transp. Co.*, 85 P.2d 28, 148 Kan. 720, 120 A.L.R. 521—*Adams v. Casebolt*, 63 P.2d 927, 145 Kan. 3—*Leinbach v. Pickwick Greyhound Lines*, 10 P.2d 33, 135 Kan. 40.

- Ky.—Ligon v. Redding, 188 S.W.2d 483, 300 Ky. 329—Raidt v. Blount, 171 S.W.2d 233, 294 Ky. 172—Stark's Adm'r v. Herndon's Adm'r, 166 S.W.2d 828, 292 Ky. 469—Rutherford v. Smith, 145 S.W.2d 533, 284 Ky. 592—Appalachian Stave Co. v. Pickard, 86 S.W.2d 685, 260 Ky. 720—Consolidated Coach Corporation v. Bryant, 86 S.W.2d 88, 260 Ky. 452—Miracle v. Cavins, 72 S.W.2d 25, 254 Ky. 644—Berryman v. Worthington, 43 S.W.2d 5, 240 Ky. 756—Dulaney v. Sebastian's Adm'r, 39 S.W.2d 1000, 239 Ky. 577—Standard Oil Co. v. Brittain, 33 S.W.2d 625, 236 Ky. 625—Bradley v. Schmidt, 4 S.W.2d 703, 223 Ky. 784, 57 A.L.R. 1100.
- La—Lee v. Perrin, App., 192 So. 387.
- Me—Bumpus v. Lynn, 179 A. 664, 133 Me. 517.
- Md—Davidson Transfer & Storage Co v. State, for Use of Brown, 22 A.2d 582, 180 Md. 63—Armiger v. Baltimore Transit Co., 196 A. 111, 173 Md. 416—American Ity Express Co. v. Kraft, 140 A. 896, 134 Md. 516.
- Mass—Boutillier v. Wesinger, 78 N.E.2d 195, 322 Mass. 495—Hubbard v. Conti, 75 N.E.2d 639, 321 Mass. 743—Campbell v. Ashler, 70 N.E.2d 302, 320 Mass. 475—Cerez v. Webber, 63 N.E.2d 889, 318 Mass. 703—Isessey v. Salemm, 19 N.E.2d 75, 302 Mass. 188, 123 A.L.R. 1156—Herman v. Sladofsky, 17 N.E.2d 879, 301 Mass. 534—Conates v. Bates, 164 N.E. 419, 265 Mass. 444.
- Mich—Ruhv v. Buxton, 8 N.W.2d 913, 305 Mich. 64—Quick v. Western Michigan Transp. Co., 293 N.W. 696, 294 Mich. 402—Bowman v. Struble, 267 N.W. 627, 276 Mich. 311—Eissmeister v. Roadaway Transit Co., 266 N.W. 391, 275 Mich. 387—Soule v. Grimshaw, 253 N.W. 237, 266 Mich. 117—Van Dixon v. Central Motor Freight Co., 251 N.W. 361, 265 Mich. 81—Pavela v. Tryloff, 230 N.W. 912, 251 Mich. 110—McConnell v. Elliott, 218 N.W. 653, 242 Mich. 145.
- Minn—Kapla v. Lehti, 30 N.W.2d 685, 225 Minn. 325—Malmgren v. Foldesl, 3 N.W.2d 669, 212 Minn. 354—Hockenhull v. Strom Const. Co., 2 N.W.2d 430, 212 Minn. 71—Sankiewicz v. Speckel, 296 N.W. 909, 209 Minn. 528—Johnson v. Reinhard Bros. Co., 285 N.W. 536, 205 Minn. 212—Raymond v. Kaiser, 283 N.W. 119, 204 Minn. 220—Becker v. Northland Transp. Co., 274 N.W. 180, 200 Minn. 272, affirmed 275 N.W. 510, 200 Minn. 272—Keefe v. Keefe, 269 N.W. 105, 198 Minn. 147—Erickson v. Kuehn, 262 N.W. 56, 195 Minn. 184—Spates v. Gillespie, 252 N.W. 835, 191 Minn. 1—Romann v. Bender, 252 N.W. 80, 190 Minn. 419—Engholm v. Northland Transp. Co., 238 N.W. 795, 184 Minn. 349—Dux v. Ringdahl, 235 N.W. 383, 182 Minn. 611—Seitz v. Claybourne, 231 N.W. 714, 181 Minn. 4—Olson v. Byam, 224 N.W. 256, 176 Minn. 619—Knopp v. McDonald, 222 N.W. 680, 176 Minn. 83.
- Miss.—Harrington v. Gough, 145 So. 621, 164 Miss. 802—Teche Lines v. Pasavanti, 140 So. 677, 163 Miss. 93, followed in Teche Lines v. Heatherly, 140 So. 680.
- Mo.—Swain v. Anders, 163 S.W.2d 1045, 349 Mo. 963—Clarke v. Jackson, 116 S.W.2d 122, 342 Mo. 537—Stanton v. Jones, 59 S.W.2d 648, 332 Mo. 631—Swain v. Anders, 140 S.W.2d 730, 235 Mo. App. 125—Benoist v. Drivaway Co. of Missouri, App., 122 S.W.2d 86—Bach v. Ludwig, App., 109 S.W.2d 724—Grisham v. Freewald, 95 S.W.2d 349, 230 Mo. App. 1203, opinion quashed in part on other grounds State ex rel. Grisham v. Allen, 124 S.W.2d 1080, 344 Mo. 66, mandate conformed to Grisham v. Freewald, 130 S.W.2d 653—Conway v. Silver King Oil & Gas Co., App., 94 S.W.2d 942—Burrow v. St. Louis Public Service Co., App., 79 S.W.2d 478—King v. Friederich, App., 43 S.W.2d 840—Smith v. Weilbacher Truck Service Co., App., 35 S.W.2d 996—La Pierre v. Kenney, 19 S.W.2d 306, 225 Mo. App. 199.
- Neb—James v. Krebek, 7 N.W.2d 637, 142 Neb. 757—Jones v. Union Pac. R. Co., 2 N.W.2d 624, 141 Neb. 112, rehearing denied 4 N.W.2d 875, 141 Neb. 112—Anderson v. Byrd, 272 N.W. 572, 132 Neb. 588, opinion partially withdrawn on rehearing 275 N.W. 825, 133 Neb. 483.
- N.H.—Woodbridge v. Desrocher, 35 A.2d 802, 93 N.H. 87—Ross v. Burnham, 13 A.2d 733, 91 N.H. 80.
- N.J.—Irehodka v. Minton, 191 A. 786, 118 N.J. Law 147—Gross v. Panico, 180 A. 849, 115 N.J. Law 464—Cecomancino v. D'Onofrio, 168 A. 578, 111 N.J. Law 494—Aitken v. Gallagher, 162 A. 630, 109 N.J. Law 358—Parave v. Public Service Interstate Transp. Co., 160 A. 375, 109 N.J. Law 155—Shahinian v. Flanajian, 170 A. 610, 11 N.J. Misc. 918—Fast v. Pecan, 165 A. 281, 11 N.J. Misc. 253—Guthrodt v. Wherry, 151 A. 211, 8 N.J. Misc. 605—McClave v. Barnaba, 144 A. 190, 7 N.J. Misc. 112—Diemer v. Shepard, 140 A. 578, 6 N.J. Misc. 186.
- N.M.—Silva v. Waldie, 82 P.2d 282, 42 N.M. 514.
- N.Y.—Hartstein v. U. S. Trucking Corporation, 23 N.Y.S.2d 251, 260 App. Div. 643, reargument denied 25 N.Y.S.2d 398, 260 App. Div. 1006, and 25 N.Y.S.2d 400, 260 App. Div. 1006—Landy v. O'Brien, 9 N.Y.S.2d 225, 255 App. Div. 944—Pugliese v. Horman, 8 N.Y.S.2d 797, 255 App. Div. 932, reargument denied 11 N.Y.S.2d 542, 256 App. Div. 1042—Fekete v. H. L. & F. McBride, Inc., 281 N.Y.S. 25, 245 App. Div. 788—Glas v. Ahlers, 259 N.Y.S. 399, 236 App. Div. 379—Wallace v. D'Aprile, 222 N.Y.S. 740, 221 App. Div. 402.
- N.C.—Wells v. Burton Lines, 45 S.E.2d 569, 228 N.C. 422—Hobbs v. Queen City Coach Co., 34 S.E.2d 211, 225 N.C. 323—Jackson v. Browning, 29 S.E.2d 21, 224 N.C. 75.
- N.D.—Leonard v. North Dakota Co-Op. Wool Marketing Ass'n, 6 N.W.2d 576, 72 N.D. 310—Kertz v. Skjeveland, 217 N.W. 529, 56 N.D. 351.
- Ohio—Dietz v. Chandler, App., 56 N.E.2d 937—Thompson v. Kerr, App., 51 N.E.2d 742.
- Okl.—All Am. Bus Lines v. Saxon, 172 P.2d 424, 197 Okl. 395—Shalino v. Dolse Bros. Co., 49 P.2d 686, 174 Okl. 69—Red Ball Bus & Passenger Co. v. McCollum, 34 P.2d 239, 168 Okl. 269.
- Pa.—Di Giuseppe v. Hrivnak, 59 A.2d 164, 359 Pa. 408—Reiser v. Smith, 2 A.2d 753, 332 Pa. 389—Czarniecki v. Jesse C. Stewart Co., 200 A. 84, 331 Pa. 163—Amey v. Erb, 146 A. 141, 296 Pa. 561—Flowers v. Dolan, 38 A.2d 429, 155 Pa. Super. 378—Corse v. Ferguson, 180 A. 65, 118 Pa. Super. 606—Winters v. York Motor Express Co., 176 A. 812, 116 Pa. Super. 421—Brown v. Bahl, 170 A. 316, 111 Pa. Super. 598—Healey v. Robertson, 101 Pa. Super. 342—Brown v. Greggs, 101 Pa. Super. 131—Bernstein v. Smith, 86 Pa. Super. 366—Kay v. Molder, Com. Pl., 31 Del. Co. 335—Quinn v. York Motor Express Co., Com. Pl., 60 Montg. Co. 202—McElfresh v. O'Brien, Com. Pl., 18 Wash. Co. 114.
- R.I.—Bitgood v. Williams, 160 A. 919, 52 R.I. 341—Grello v. Curran, 157 A. 723—Maderios v. Blackman, 137 A. 693—Labonte v. Alvernaz, 132 A. 733.
- S.C.—Daniel v. Tower Trucking Co., 32 S.E.2d 5, 205 S.C. 333—Bowers v. Carolina Public Service Co., 145 S.E. 790, 148 S.C. 161.
- Tenn.—Huber v. Wilson, 126 S.W.2d 893, 23 Tenn. App. 109—Garland v. Mayhall, 68 S.W.2d 482, 17 Tenn. App. 449—Davis v. Farris, 1 Tenn. App. 144.
- Tex.—Texas Bus Lines v. Whatley, Civ. App., 210 S.W.2d 626, error refused, no reversible error—Airline Motor Coaches v. Fields, Civ. App., 180 S.W.2d 216, error refused—William Cameron Co. v. Downing, Civ. App., 147 S.W.2d 963—Spears Dairy v. Davis, Civ. App., 124 S.W.2d 159—Yellow Cab Co. v. Treadwell, Civ. App., 87 S.W.2d 276, error dismissed.
- Utah—Spencer v. Santa Fe Trail Transp. Co., 151 P.2d 461, 107 Utah 10.

Vt.—Fitch v. Bemis, 177 A. 193, 107 Vt. 165—Bunnell v. McGregor, 143 A. 643, 101 Vt. 379—Elwell v. Barrows Coal Co., 186 A. 20, 100 Vt. 179.

Va.—Royals v. Planters Mfg. Co., 30 S.E.2d 20, 182 Va. 694—Saunders v. Hall, 11 S.E.2d 592, 176 Va. 526—Abrams v. Winesburg, 182 S.E. 233, 165 Va. 241—Johnson v. Kellam, 175 S.E. 634, 162 Va. 757.

Wash.—Huttenball v. Montgomery, 60 P.2d 679, 187 Wash. 516—Karp v. Herder, 44 P.2d 808, 181 Wash. 583—Wilson v. Congdon, 37 P.2d 892, 179 Wash. 400—Stokes v. Magnolia Milling Co., 5 P.2d 339, 165 Wash. 311—Crowe v. O'Rourke, 262 P. 136, 146 Wash. 74—Collins v. Barmon, 260 P. 246, 145 Wash. 383.

Wis.—Lelsch v. Tigerton Lumber Co., 27 N.W.2d 367, 250 Wis. 463—Gospodar v. Milwaukee Auto. Ins. Co., 24 N.W.2d 676, 249 Wis. 332—Schulz v. General Casualty Co., 288 N.W. 803, 233 Wis. 118—Groh v. W. O. Krahn, Inc., 271 N.W. 374, 223 Wis. 662—Nimlos v. Bakke, 271 N.W. 33, 223 Wis. 473—Hein v. Huber, 252 N.W. 692, 214 Wis. 230—Rebholz v. Wettengel, 248 N.W. 109, 211 Wis. 285—Hefelev v. Rotter, 222 N.W. 220, 197 Wis. 300.

42 C.J. p 1248 note 80.

Circumstantial evidence

Where plaintiff has shown by his testimony, in action involving head-on automobile collision, the existence of a cause which might produce an accident, and that an accident of that particular type did occur, and there is an absence of showing of any other cause, plaintiff has made his case for the jury, even though his proof is solely by circumstantial evidence.—Younger Bros. v. Marino, Tex.Civ.App. 198 S.W.2d 109.

Automobile skidding into defendant's automobile

Conn.—Stapins v. Murphy, 183 A. 398, 121 Conn. 123.

N.C.—Taylor v. Rierson, 185 S.E. 627, 210 N.C. 185.

Pa.—Nark v. Horton Motor Lines, 1 A.2d 655, 331 Pa. 550—Stern v. Passaro, 190 A. 881, 326 Pa. 187—Helt v. Berman, 38 A.2d 386, 155 Pa.Super. 294—Fahringer v. Trembath, Com.Pl., 38 Luz.Leg Reg 226

Defendant's automobile skidding into plaintiff's automobile

Pa.—Laessig v. Cerro, 27 A.2d 731, 149 Pa.Super. 155.

Tenn.—Grizzard & Cuzzart v. O'Neill, 15 Tenn.App. 395.

Driving on wrong side of road

(1) Generally.

U.S.—Foster v. Denny Motor Transfer Co., C.C.A.Ill., 100 F.2d 658—Palmer v. Moren, D.C.Pa., 44 F. Supp. 704.

Ala.—Law v. Saks, 1 So.2d 28, 241 Ala. 37.

Ark.—Steed v. Wright, 18 S.W.2d 340, 179 Ark. 812.

Cal.—Smith v. Cantlay & Tanxola, 189 P.2d 542, 83 Cal.App.2d 689—Heslop v. Kinyoun, 136 P.2d 621, 58 Cal.App.2d 287—Arundel v. Turk, 60 P.2d 486, 16 Cal.App.2d 293.

Del.—Lynch v. Lynch, 195 A. 799, 9 W.W.Harr. 1.

Ga.—Sullivan v. Morris, 178 S.E. 324, 50 Ga App. 394.

Idaho.—O'Connor v. Meyer, 154 P.2d 174, 66 Idaho 15.

Ill.—Hopfinger v. O'Banion, 73 N.E. 2d 145, 331 Ill.App. 302—Davis v. Commercial Fuel & Service Co., 47 N.E.2d 506, 318 Ill App. 223—Helliwig v. Lomelino, 33 N.E.2d 174, 309 Ill.App 359—Beery v. Breed, 32 N.E.2d 675, 309 Ill App. 433—Powell v. Myers Sherman Co., 32 N.E. 2d 663, 309 Ill.App 12

Ind.—Bates Motor Transport Lines v. Mayer, 14 N.E.2d 91, 213 Ind. 664.

Iowa.—Coon v. Rieke, 6 N.W.2d 309, 232 Iowa 859—Ryan v. Amodeo, 249 N.W 656, 216 Iowa 752—Lane v. Varlamos, 239 N.W. 689, 213 Iowa 795.

Ky.—Black v. Bishop, 207 S.W.2d 22, 306 Ky 524—J. N. Youngblood Truck Lines v. Hatfield, 201 S.W. 2d 567, 304 Ky 600—Taylor v. Vaughan, 32 S.W.2d 724, 236 Ky. 102.

Mo.—Gresham v. Reed, App., 171 S W 2d 70—White v. Missouri Motors Distributing Co., 47 S.W.2d 245, 226 Mo App. 453—Gregory v. Jenkins, App, 43 S.W.2d 877

N.C.—Wallace v. Longest, 37 S.E.2d 112, 226 N.C. 161—Motley v. Standard Oil Co., 240 N.W. 206, 61 N. D 660.

Pa.—Davin v. Levin, 55 A.2d 364, 357 Pa. 554—Paley v. Trautman, 177 A 819, 317 Pa 589.

S.D.—Schumacher v. Stoberg, 7 N. W.2d 141, 69 S.D. 103

Tenn.—Colonial Baking Co. v. Acquino, 103 S.W.2d 613, 20 Tenn. App. 695—Jettion v. Polk, 68 S.W. 2d 127, 17 Tenn.App. 395.

Tex.—Willingham v. Kindy, Civ App., 203 S.W.2d 991—American General Ins. Co. v. Fort Worth Transit Co., Civ.App., 201 S.W.2d 869—Younger Bros. v. Marino, Civ.App., 198 S.W.2d 109—White v. Akers, Civ.App., 125 S.W.2d 388—Freeman v. Texas Bread Co., Civ.App., 111 S.W.2d 307—McClelland v. Mounger, Civ.App., 107 S.W.2d 901, error dismissed by agreement—Straus-Bodenheimer Co v. Marshall, Civ. App., 91 S.W.2d 865—Gibson v. Texas Co., Civ.App., 20 S.W.2d 349, error dismissed.

Wash.—Atkins v. Churchill, 194 P. 2d 364—Coerver v. Haab, 161 P. 2d 194, 23 Wash.2d 481, 161 A.L. R. 908—Keseleff v. Sunset Highway Motor Freight Co., 60 P.2d

720, 187 Wash. 642—Hayes v. Sutcliffe, 12 P.2d 1105, 168 Wash. 622—Stubbs v. Allen, 10 P.2d 983, 168 Wash. 156.

Wis.—Plesik v. Deuster, 11 N.W.2d 358, 243 Wis. 598—Cheves v. Miller, 217 N.W. 684, 195 Wis. 106. 42 C.J. p 1248 note 80 [c].

(2) Mere driving of automobile on wrong side of street does not make motorist negligent as matter of law. U.S.—Palmer v. Moren, D.C.Pa., 44 F.Supp. 704.

Iowa.—Christenson v. Northwestern Bell Telephone Co., 270 N.W. 394, 222 Iowa 808.

La.—Hagaman v. Bankers Indemnity Ins Co, App, 7 So.2d 390.

Wash.—Purdie v. Brunswick, 146 P. 2d 809, 20 Wash.2d 292.

Driving on or near bridge

(1) Generally.

Ala.—Duncan v. Robertson, 132 So 57, 24 Ala App. 157, reversed on other grounds 132 So. 58, 222 Ala. 131.

Ark.—Sturgis v. Hardcastle, 174 S W.2d 565, 206 Ark 240.

Cal.—Collins v. Graves, 61 P.2d 1198, 17 Cal.App.2d 288

Ga.—Ault v. Whittemore, 35 S.E.2d 526, 73 Ga App 10

Ill.—Helliwig v. Lomelino, 33 N.E.2d 174, 309 Ill App 369

Iowa.—Hawkins v. Burton, 281 N.W. 790, 225 Iowa 1138—Hawkins v. Burton, 281 N.W. 342, 225 Iowa 707.

Ky.—Silver Fleet Motor Express v. Casey, 155 S.W.2d 863, 288 Ky 233—Buck v. Kleinschmidt, 131 S W.2d 714, 279 Ky. 569—P'aducan Coca-Cola Bottling Co. v. Reeves, 88 S.W.2d 39, 261 Ky 539

Minn.—Mississippi Public Service Co. v. Scott, 174 So. 573, 178 Minn. 859.

Miss.—Sternberg Dredging Co. v. Screws, 166 So. 754, 175 Miss. 383.

Mo.—Johnessee v. Central States Oil Co., App., 200 S.W.2d 383—Purkett v. Steele Undertaking Co., App, 63 S.W.2d 509.

Neb.—Thomas v. Poulson, 30 N.W. 2d 59, 149 Neb. 44—Hook v. Kempf, 249 N.W. 89, 125 Neb. 79.

N.C.—Hoke v. Atlantic Greyhound Corp., 40 S.E.2d 345, 226 N.C. 692.

Okl.—Wray v. Garrett, 113 P.2d 367, 189 Okl. 28.

Pa.—Ludwig v. Ewell, 18 A.2d 75, 142 Pa.Super. 580.

Va.—Johnston v. Kincheloe, 180 S.E. 540, 164 Va. 370.

Wis.—Knutson v. Fenelon, 227 N.W. 857, 200 Wis. 261.

42 C.J. p 1248 note 80 [e].

(2) The question of negligence in driving on or through one-way bridge has been held to be one of fact for jury.

Ky.—Pope-Cawood Lumber & Supply Co. v. Cleet, 33 S.W.2d 860, 236 Ky. 366.

off the road.⁷⁰ Whether it is the duty of a motorist, traveling on the right side of the road, on seeing an automobile approaching on the wrong side of the road to stop in order to avoid a collision ordinarily cannot be determined as a mat-

ter of law but usually is a question of fact for the jury.⁷¹

On conflicting evidence or where different inferences reasonably may be drawn from the evidence, incidental or related questions also are for the jury or trial court,⁷² as, for example, wheth-

N.H.—Hoen v. Haines, 154 A. 129, 85 N.H. 36.

Okl.—Ward Way, Inc., v. Gunter, 296 P. 468, 147 Okl. 265.

(3) Evidence that there were two steel wheel treads through center of public bridge sixteen feet wide, entire floor of which was safe for travel, did not prove one-way drive as matter of law—Hook v. Kempf, 249 N.W. 89, 125 Neb. 79.

Driving through smoke or dust

Pa.—Hand v. Bailey, 78 Pa.Super. 207.

S.D.—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484.

Driving without lights

(1) Generally.

Ark.—Steed v. Wright, 18 S.W.2d 340, 179 Ark. 812.

Colo.—Weicker Transfer & Storage Co. v. Bedwell, 35 P.2d 1022, 95 Colo. 280.

42 C.J. p 1248 note 80 [h].

(2) Clearance lights on truck—

Clift v. Donagan, 186 So. 476, 237 Ala 304.

Collision on curve

US.—Evansville Container Corporation v. McDonald, CCA Tenn., 132 F.2d 80.

Fla.—Moore v. Dietrich, 183 So. 2, 133 Fla. 809.

Ill.—Kabb v. Lenox, 8 NE2d 375, 290 Ill.App. 604.

Ky.—Gayheart v. Caudill, 111 S.W.2d 391, 271 Ky. 1.

Mo.—Everhardt v. Garner, App., 100 S.W.2d 71.

NC.—Brown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626—Barnes v. Teer, 10 S.E.2d 614, 218 N.C. 122, rehearing granted and vacated on other grounds 15 S.E.2d 379, 219 N.C. 823.

Pa.—Shellenberger v. Reading Transp. Co., 154 A. 297, 303 Pa. 122—Pickering v. Snyder, 113 A. 375, 270 Pa. 139.

R.I.—Pullan v. Townshend, 170 A. 92, 54 R.I. 118.

Utah.—Morrison v. Perry, 140 P.2d 772, 104 Utah 151.

Va.—Bell v. Kenney, 23 S.E.2d 781, 181 Va. 24—Texas Co. v. Zeigler, 14 S.E.2d 704, 177 Va. 557.

Wash.—Wiseman v. Skagit County Dairymen's Ass'n, 6 P.2d 369, 166 Wash. 57—Phelan v. Jones, 4 P.2d 516, 164 Wash. 640.

W.Va.—Lacewell v. Lampkin, 13 S.E. 2d 583, 123 W.Va. 133.

Collision in narrow underpass

Ky.—Foley's Adm'r v. Witt, 172 S.W.2d 81, 294 Ky. 498.

Sideswiping

Ill.—Davis v. Commercial Fuel & Service Co., 47 NE2d 506, 318 Ill App 225.

Minn.—Jaenisch v. Vigen, 297 N.W. 29, 209 Minn. 543.

Mo.—Edwards v. Woods, 119 S.W.2d 359, 342 Mo. 1097—Stanton v. Jones, App., 19 S.W.2d 507.

Neb.—Robison v. Union Transfer Co., 4 N.W.2d 558, 141 Neb. 574.

N.J.—Toth v. Baksa, 155 A. 122, 9 N.J.Misc. 556.

Va.—Isenhour v. McGranighan, 17 S.E.2d 383, 178 Va. 365.

Turning or swerving to left

(1) Generally.

US.—Jarman v Philadelphia-Detroit Lines, C.C.A.N.C., 131 F.2d 728—Jones v. Thompson, C.C.A.Tex., 80 F.2d 456.

Ill.—Selman v. Midwest Haulers, 33 NE2d 140, 309 Ill App 154—Smith v. Carter, 23 NE2d 738, 302 Ill. App 235.

Ind.—Midland Trail Bus Lines v. Martin, 194 N.E. 862, 100 Ind App 206.

Ky.—Hilsenrad v. Bowling, 166 S.W.2d 847, 292 Ky 368—Gorman v. Berry, 158 S.W.2d 155, 289 Kv. 88.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. O'Neill, 200 A. 359, 175 Md 47.

Mont.—Adam v. Murphy, 164 P.2d 150, 118 Mont. 172.

Okl.—Caesar v. Phillips Petroleum Co., 104 P.2d 429, 187 Okl 559.

Pa.—Burzese v. Renner Valley Motor Coach Co., 34 A.2d 61, 348 Pa. 95.

R.I.—Adam v. United Electric Rys Co., 196 A. 251, 59 R.I. 460.

42 C.J. p 1248 note 80 [b].

(2) Motorists have right to cross to left of highway, and crossing to left in daylight in front of another car three hundred yards away is not negligence as matter of law if due signal is given.—Jones v. Thompson, C.C.A.Tex., 80 F.2d 456.

70. Ala.—McCaleb v. Reed, 144 So. 28, 225 Ala. 564.

Ky.—Hogge v. Anchor Motor Freight of Delaware, 126 S.W.2d 877, 277 Ky. 460.

Mich.—Savas v. Beals, 7 N.W.2d 231, 304 Mich. 84.

N.Y.—Hart v. Ruduk, 253 N.Y.S. 615, 233 App.Div. 453.

Or.—Gwin v. Crawford, 100 P.2d 1012, 164 Or. 215.

71. N.H.—Mooney v. Chappelaine, 11 A.2d 713, 90 N.H. 220.

Wash.—Johnson v. Burnham, 88 P.2d 833, 198 Wash. 500.

72. Colo.—American Ins. Co. v. Naylor, 87 P.2d 260, 103 Colo. 461.

Md.—Beall v. Ward, 149 A. 543, 158 Md 446.

Mich.—Quick v. Western Michigan Transp. Co., 293 N.W. 696, 294 Mich 402.

Mo.—Stanton v. Jones, 59 S.W.2d 648, 332 Mo. 631.

N.H.—Hoen v. Haines, 154 A. 129, 85 N.H. 36.

R.I.—Nitschke v. Silvia, 59 A.2d 537.

Vt.—Huge v. McGovern, 3 A.2d 543, 110 Vt. 166.

Intoxication of operator

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Mass.—Hughes v. Whiting, 176 N.E. 812, 276 Mass. 76.

Side of road on which collision occurred

US.—Elzig v. Gudwangen, C.C.A. Minn., 91 F.2d 434.

Iowa.—Hawkins v. Burton, 281 N.W. 790, 225 Iowa 1138—Clark v. Berry Seed Co., 280 N.W. 505, 225 Iowa 262.

Wis.—Anderson v. Eggert, 291 N.W. 365, 234 Wis. 348.

Speed

Ky.—Foley's Adm'r v. Witt, 172 S.W.2d 81, 294 Ky. 498—Ward v. Martin, 147 S.W.2d 1027, 285 Ky. 337.

Mo.—Swain v. Anders, 163 S.W.2d 1045, 349 Mo. 963.

Yielding one half of roadway

Colo.—Parrish v. Smith, 115 P.2d 647, 108 Colo 256.

Iowa.—In re Goretzka's Estate, 13 N.W.2d 432, 234 Iowa 1080—Hawkins v. Burton, 281 N.W. 342, 225 Iowa 707.

Defendant's statement made after accident that he did not see approaching automobile was for jury on question of defendant's negligence.—Cross v. Cohen, 9 N.Y.S.2d 43, 256 App.Div. 891, reargument denied 11 N.Y.S.2d 549, 256 App.Div. 1056, appeal denied.

Existence of marks on highway after collision, and significance of those marks, were questions for

er defendant was driving his car on the wrong or right side of the road, or beyond the center of the highway, at the time of the accident,⁷⁴ whether the vehicles actually collided,⁷⁴ whether defendant was driving without lights⁷⁵ or dimmed his lights,⁷⁶ whether defendant stopped his motor vehicle after the accident,⁷⁷ whether an emergency existed excusing defendant's failure to turn to the right,⁷⁸ or whether conditions existed making it impossible for defendant to turn to the right.⁷⁹

There must be some evidence of defendant's negligence in passing another automobile going in the opposite direction in order to warrant or require submission of his negligence to the jury, and in various cases the evidence has been held insufficient to justify submission of defendant's negligence or of some question incidental thereto.⁸⁰ Where the evidence is uncontradicted, and but one inference reasonably may be drawn there-

jury, even though evidence concerning marks was extremely confused and inferences to be drawn therefrom were highly problematical.—*Abbott v. Hayes*, 26 A.2d 842, 92 N.H. 126.

Whether lanterns were lighted, at barricade struck by defendant's automobile, just before collision with car coming from opposite direction, was for jury.—*Terry v. Peterson*, 275 P. 484, 97 Cal.App. 160.

Whether truck driver should not have stopped truck when discovering that driver of automobile was oblivious to danger was for jury.—*Beall v. Ward*, 149 A. 543, 158 Md. 646.

73. U.S.—*Paul v. Elliot*, C.C.A. Mont., 107 F.2d 872.

Ala.—*Armour & Co. v. Cartledge*, 176 So. 334, 234 Ala. 644.

Ark.—*Houck v. Marshall*, 132 S.W. 2d 181, 198 Ark. 938—*Featherston v. Jackson*, 36 S.W.2d 405, 183 Ark. 373.

Cal.—*Corcoran v. Ward*, 1 P.2d 455, 115 Cal.App. 180.

Conn.—*Stressman v. Vitiello*, 158 A. 879, 114 Conn. 370.

Fla.—*Stanley v. Powers*, 169 So. 861, 125 Fla. 322.

Ill.—*Rich v. Albrecht*, 21 NE 2d 633, 300 Ill.App. 493—*Rabb v. Lennox*, 8 NE.2d 375, 290 Ill.App. 604—*Melahn v. Mayhew*, 3 NE.2d 142, 285 Ill.App. 602.

Iowa.—*Ross Produce Co. v. Thompson*, 20 N.W.2d 57, 236 Iowa 863—*Carlson v. Jacob E. Decker & Sons*, 253 N.W. 923, 218 Iowa 64—*Carlson v. Jacob E. Decker & Sons*, 247 N.W. 296, 216 Iowa 581.

Ky.—*Bohn v. Sams*, 193 S.W.2d 459, 302 Ky. 63—*Ligon v. Hedding*, 188 S.W.2d 488, 300 Ky. 329—*Silver Fleet Motor Express v. Gilbert*, 165 S.W.2d 541, 291 Ky. 696—*Ward v. Martin*, 147 S.W.2d 1027, 285 Ky. 337—*Jones v. Sharp's Adm'r*, 139 S.W.2d 731, 282 Ky. 638, followed in *Jones v. Vance*, 139 S.W.2d 735, 282 Ky. 646—*Williams v. Coleman's Adm'r*, 115 S.W.2d 584, 273 Ky. 122—*Walden v. Adams*, 100 S.W.2d 827, 267 Ky. 8—*Adams v. Sexton*, 97 S.W.2d 602, 265 Ky. 722—*Horton v. Herndon*, 70 S.W.2d 975, 254 Ky. 86—*Trevillian v. Boswell*, 43 S.W.2d 715, 241 Ky.

237—*Wilkerson v. Sanderson*, 26 S.W.2d 1, 233 Ky. 493.

Me.—*Pelletier v. Morris*, 167 A. 863, 132 Me. 488—*Grant v. Dolley*, 163 A. 85, 131 Me. 500.

Md.—*Acme Poultry Corp. v. Melville*, 53 A.2d 1—*Cumberland & Westernport Transit Co. v. Metz*, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed *American Oil Co. v. Metz*, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Mass.—*Kerr v. Deveau*, 40 NE 2d 872, 311 Mass. 210—*Nicoli v. Berglund*, 200 N.E. 373, 293 Mass. 426.

Mich.—*Odell v. Powers*, 278 N.W. 819, 284 Mich. 201.

Minn.—*Tri-State Transfer Co. v. Nowotny*, 270 N.W. 684, 198 Minn. 537—*Prescott v. Swanson*, 267 N.W. 251, 197 Minn. 325.

Mo.—*Eisenbarth v. Powell Bros. Truck Lines*, 161 S.W.2d 263—*Fries v. Berberich*, App. 177 S.W. 2d 640—*Renoist v. Driveway Co. of Missouri*, App., 122 S.W.2d 86—*Nixon v. Hill*, 52 S.W.2d 208, 227 Mo. App. 312.

N.H.—*Woodman v. Peck*, 7 A.2d 251, 90 NH 292, 122 A.L.R. 1402.

N.J.—*Claypoole v. Motor Finance Corporation*, 15 A.2d 794, 125 N.J. Law 410.

N.Y.—*Engle v. Ferrier*, 78 N.Y.S.2d 591, 273 App.Div. 1041—*Rosenberg v. H. L. & F. McBride, Inc.*, 11 N.Y.S.2d 33, 256 App.Div. 494—*Lighthall v. Simon*, 290 N.Y.S. 276, 248 App.Div. 845.

N.C.—*Steelman v. Benfield*, 46 S.E. 2d 829, 228 N.C. 651—*Wyrick v. Ballard & Ballard Co.*, 29 S.E.2d 900, 224 N.C. 301—*Queen City Coach Co. v. Lee*, 11 S.E.2d 341, 218 N.C. 320—*Robinson v. Standard Transp. Co.*, 199 S.E. 725, 214 N.C. 489—*Hancock v. Wilson*, 189 S.E. 631, 211 N.C. 129.

Or.—*Meany v. Wright*, 46 P.2d 82, 150 Or. 470.

R.I.—*Gendron v. Stockley*, 34 A.2d 758, 69 R.I. 437.

Tex.—*Mercer v. Evans*, Civ.App., 173 S.W.2d 206—*McClelland v. Mounger*, Civ.App., 107 S.W.2d 901, error dismissed by agreement.

Va.—*Williams v. Greene*, 26 S.E.2d 89, 181 Va. 707—*Reid v. Boward*, 26 S.E.2d 27, 181 Va. 718—*Bris-*

tow v. Brauer, 7 S.E.2d 93, 175 Va. 118.

Wash.—*Hansen v. Coldwell*, 73 P.2d 351, 192 Wash. 167.

Wis.—*Leisch v. Tigerton Lumber Co.*, 27 N.W.2d 367, 250 Wis. 463—*Zastrow v. Schaumburger*, 245 N.W. 202, 210 Wis. 116—*Standard Accident Ins. Co. v. Runquist*, 244 N.W. 757, 209 Wis. 97.
42 C.J. p. 1249 note 82.

Whether it was impracticable to drive on right side of highway, was question for jury.—*O'Connor v. Meyer*, 154 P.2d 174, 66 Idaho 15.

Whether automobile struck by defendant before defendant struck automobile in which plaintiff was riding was driving to right of center of highway was for jury.—*Duncan v. Rhomberg*, 236 N.W. 638, 212 Iowa 389.

74. Conn.—*Grzys v. Connecticut Co.*, 198 A. 259, 123 Conn. 605.

75. Colo.—*Weicker Transfer & Storage Co. v. Bedwell*, 35 P.2d 1022, 95 Colo. 280.

Iowa.—*Carlson v. Jacob E. Decker & Sons*, 253 N.W. 923, 218 Iowa 54.

Mo.—*Eisenbarth v. Powell Bros. Truck Lines*, 161 S.W.2d 263.

Side lights

Wash.—*Sheddy v. Inland Motor Freight*, 63 P.2d 430, 189 Wash. 48.

76. Wash.—*Kesceff v. Sunset Highway Motor Freight Co.*, 60 P.2d 720, 187 Wash. 642.

77. Idaho.—*Shaddy v. Daley*, 76 P. 2d 279, 58 Idaho 536.

78. Ga.—*Olliff v. Howard*, 127 S.E. 821, 33 Ga.App. 778.

79. Iowa.—*Hamilton v. Young*, 171 N.W. 694, 185 Iowa 1160.

80. U.S.—*Doggett v. Peek*, C.C.A. Tex., 116 F.2d 273—*Evans v. Teche Lines*, C.C.A. Miss., 112 F.2d 933—*Winn v. Consolidated Coach Corporation*, C.C.A. Tenn., 65 F.2d 256, certiorari denied 54 S.Ct. 453, 291 U.S. 668, 78 L.Ed. 1059, rehearing denied 54 S.Ct. 557, 291 U.S. 651, 78 L.Ed. 1059—*Greyhound Lines v. Noller*, C.C.A. Ill., 60 F.2d 208—*Greyhound Lines v. Noller*, C.C.A. Ill., 66 F.2d 443.

Ariz.—*Dixon v. Alabam Freight Co.*, 112 P.2d 584, 57 Ariz. 173.

from, it is for the court to find as matter of law on what side of the road the accident occurred,⁸¹ the speed of the vehicles,⁸² which car struck the other,⁸³ and, where the facts justify it, that defendant was negligent.⁸⁴ Where the evidence is equally consistent with the existence or nonexistence of negligence on the part of defendant, the question should not be left to the jury.⁸⁵ Where the facts are undisputed and the only inference to be reasonably drawn therefrom is defendant's absence of negligence, the court is justified in giving a peremptory instruction for defendant.⁸⁶

(4) Crossing Intersections

On conflicting evidence, as where more than one in-

ference may be drawn from the evidence, it is a question for the jury to determine whether the defendant was guilty of negligence in approaching, entering, or passing through an intersection.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant was guilty of negligence in approaching, entering, or passing through an intersection.⁸⁷ On such evidence, it is for the jury, or for the trial court, in trials without a jury, to determine whether defendant was guilty of negligence in colliding with a vehicle approaching, or at, an intersection,⁸⁸ or in

Conn.—Mott v Hillman, 52 A.2d 861, 133 Conn 552—Kenyon v. Walter H. Goodrich & Co., 181 A. 390, 120 Conn 482

Ill.—Seybold v. Zimmerman, 13 N.E. 2d 675, 294 Ill.App 138.

Ind.—Pontiac-Chicago Motor Exp. Co. v. George Cassons & Son, 34 N.E.2d 171, 109 Ind App 248.

Iowa.—Welch v. Greenberg, 14 N.W. 2d 266, 235 Iowa 159—Tharp v. Rees, 277 N.W. 758, 234 Iowa 962—Rich v. Herry, 269 N.W. 489, 222 Iowa 465—Reimer v. Musel, 251 N.W. 863, 217 Iowa 377—Klaaren v. Shadley, 247 N.W. 801, 215 Iowa 1043.

Mich.—Miner v. Scholton, 231 N.W. 120, 250 Mich. 645.

Minn.—Foster v. Gamble-Robinson Co., 247 N.W. 801, 188 Minn. 552

Mo.—Schoen v. Plaza Exp. Co., 206 S.W.2d 536—Burrow v. St. Louis Public Service Co., 100 S.W.2d 269, 339 Mo. 1092—Borini v. Pevely Dairy Co., App., 183 S.W.2d 839.

Neb.—Ulrich v. Batchelder, 10 N.W. 2d 637, 143 Neb 697—Woodworth v. Johnston, 267 N.W. 243, 131 Neb. 113—Anderson v. Interstate Transit Lines, 262 N.W. 445, 129 Neb 612—Hessler v. Bellamy, 259 N.W. 514, 128 Neb. 571.

N.H.—Moulton v. Nesmith, 46 A.2d 133, 94 N.H. 23.

N.J.—Bettes v. Scott, 192 A. 433, 15 N.J.Misc. 487.

N.Y.—O'Byrne v. Meredith, 8 N.Y.S. 2d 732, 255 App.Div. 943—Green-span v. Dillingham, 26 N.Y.S.2d 699.

Ohio.—A. Macaluso Fruit Co. v. Commercial Motor Freight, App., 57 N.E.2d 692.

Pa.—Brewer v. Brodhead, 19 A.2d 117, 341 Pa. 384.

Tex.—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed.

Wash.—Dunsmoor v. North Coast Transp. Co., 281 P. 995, 154 Wash. 229, followed in 281 P. 996, 154 Wash. 700.

Wis.—Oelke v. Schneider, 26 N.W.2d

170, 250 Wis. 86—Clark v. Bolton, 246 N.W. 326, 210 Wis. 631.

Collision on curve

Ky.—Silver Fleet Motor Express v. Wilson, 178 S.W.2d 595, 296 Ky. 764.

W.Va.—Stewart v. Phillips, 22 S.E.2d 368, 124 W.Va. 744

Driving on wrong side of road

Va.—White v. Richmond Greyhound Lines, 163 S.E. 78, 158 Va. 462.

Driving through dust

Evidence that truck which had just passed defendant's truck raised so much dust that neither defendant nor deceased who was driving toward defendant could see each other until they were too close to avoid collision was insufficient to show negligence of defendant so as to justify submitting case to jury.—State, to Use of Balderston, v. Hopkins, 196 A. 91, 173 Md. 321

Where question is not in issue, it should not be submitted to jury—Gwin v Crawford, 100 P.2d 1012, 161 Or. 215.

81. Cal.—Wiley v. Young, 174 P. 316, 178 Cal 681.

Wis.—McGuigan v. Hiller Bros., 245 N.W. 97, 209 Wis. 402.

82. Cal.—Wiley v. Young, 174 P. 316, 178 Cal. 681.

83. Cal.—Wiley v. Young, supra.

84. U.S.—Hawthorne v. Eckerson Co., C.C.A.Vt., 77 F.2d 844

Ky.—Pickering v. Simpkins, 111 S.W. 2d 650, 271 Ky. 288—Thronton v. Phillips, 90 S.W.2d 347, 262 Ky. 346.

42 C.J. p 1249 note 88.

85. Ala.—Lessman v. West, 101 So. 515, 20 Ala.App. 289.

86. Ky.—Willis v. Harbell Coach Co., 47 S.W.2d 1030, 243 Ky. 262

87. Ill.—Little v. Gogotz, 58 N.E. 2d 336, 324 Ill.App. 516.

Ind.—Grevensuk v. Hubeny, 24 N.E.2d 924, 216 Ind. 379.

N.Y.—Williams v. Kemp, 42 N.Y.S. 2d 789, 266 App.Div. 891.

Pa.—Guarente v. Long, Com.Pl., 33 Del.Co. 124—Holt v. Parisor, Com. Pl., 10 Fay L.J. 31.

Va.—Jewel Tea Co. v. Phelps, 183 S.E. 433, 165 Va 596.

Wash.—Gavin v. Everton, 144 P.2d 735, 19 Wash 2d 785.

Care required at crossings or intersections see supra §§ 350-370.

When driver on private road approaches intersection, stops and looks in both directions for approaching traffic on public highway, acting as a reasonably prudent person exercising due care would act, he is not negligent as a matter of law if he attempts to enter the intersection under belief that he has time and opportunity to cross safely—Temple v. Ellington, 12 S.E.2d 826, 177 Va. 134.

88. U.S.—Atlantic Greyhound Corp. v. Hunt, C.C.A.N.C., 163 F.2d 117, certiorari denied 68 S.Ct. 154, 332 U.S. 815, 92 L Ed —Walkup v. Bardsley, C.C.A.Minn., 111 F.2d 789—Klas v. Yellow Cab Co., C.C. A.111, 106 F.2d 935—New York Telephone Co. v. Beckers, C.C.A.N.Y., 30 F.2d 578—Copley v. Stone, D.C.S.C., 75 F.Supp. 203—Mann v. Funk, D.C.Pa., 50 F.Supp. 305, affirmed, C.C.A., 141 F.2d 260.

Ala.—Brown Hauling Co. v. New-some, 2 So.2d 782, 241 Ala. 300—Moore v. Crut, 191 So. 252, 238 Ala 414—Allison Coal & Transfer Co. v. Davis, 129 So. 9, 221 Ala. 334—Centennial Ice Co. v. Mitchell, 112 So. 239, 215 Ala. 688.

Ark.—Lumpkin v. Shofner, 168 S.W. 2d 614, 205 Ark. 306—Loda v. Ralnes, 100 S.W.2d 973, 193 Ark. 513.

Cal.—Roller v. Daleys, Inc., 28 P.2d 345, 219 Cal. 542—Carpenter v. Gibson, 181 P.2d 953, 80 Cal.App. 2d 269—Adams v. Schmoker, 129 P.2d 961, 54 Cal.App.2d 719—Zwerlin v. Riverside Cement Co., 126 P. 2d 920, 52 Cal.App.2d 715—Bauer v. Davis, 111 P.2d 715, 43 Cal.App. 2d 764—Anderson v. Lang, 109 P.

2d 981, 42 Cal.App.2d 725—Bramble v. McEwan, 104 P.2d 1054, 40 Cal.App.2d 400—Lundgren v. Converse, 93 P.2d 819, 34 Cal.App.2d 445—Angelo v. Esau, 93 P.2d 203, 34 Cal.App.2d 130—Browne v. Fernandez, 36 P.2d 122, 140 Cal.App. 689—Muench v. Gerske, 34 P.2d 198, 139 Cal.App. 438—Lubenko v. San Joaquin Baking Co., 31 P.2d 1053, 138 Cal.App. 127—Kerner v. Peacock Dairies, 19 P.2d 283, 129 Cal.App. 686—Miller v. Schlimming, 18 P.2d 357, 129 Cal.App. 171—Flood v. Miura, 8 P.2d 552, 120 Cal.App. 467—Klenko v. Ryer, 4 P.2d 998, 118 Cal.App. 238—Ying v. Pickwick Stages System, 3 P.2d 597, 117 Cal.App. 312—Clark v. Wallman, 2 P.2d 562, 116 Cal.App. 278—Tyson v. Burton, 294 P. 750, 110 Cal.App. 428—Pope v. Wenisch, 293 P. 622, 109 Cal.App. 608—Deagle v. Shano, 291 P. 652, 108 Cal.App. 490—Grove v. Hodge Transp. System, 265 P. 354, 89 Cal.App. 663.

Colo.—Amos v. Remington Arms Co., 188 P.2d 896, 117 Colo. 399—Johns v. Shinall, 86 P.2d 605, 103 Colo. 381—Stocker v. Newcomb, 15 P.2d 975, 91 Colo. 479.

Conn.—Anderson v. Colucci, 175 A. 681, 119 Conn. 241—Bennett v. De Leonardo, 145 A. 61, 109 Conn. 602, followed in Shelton v. De Leonardo, 145 A. 63, 109 Conn. 608—Sutton v. Hauk, 142 A. 385, 108 Conn. 9.

D.C.—McWilliams v. Shepard, 127 F. 2d 18, 75 U.S.App.D.C. 334.

Fla.—Jones v. Stoddard, 189 So. 400, 138 Fla. 458—Orr v. Avon Florida Citrus Corporation, 177 So. 612, 130 Fla. 306.

Ga.—Sweet v. Awtrey, 28 S.E.2d 154, 70 Ga.App. 334.

Idaho—Prixe v. Craig, 288 P. 152, 49 Idaho 319—Faris v. Burroughs Adding Mach. Co., 282 P. 72, 48 Idaho 310.

Ill.—Nelson v. Nihan, 74 N.E.2d 549, 331 Ill.App. 610—La Belle v. Hillman, 71 N.E.2d 107, 330 Ill.App. 332—Ritter v. Nieman, 67 N.E.2d 417, 329 Ill.App. 163—Schaefer v. Then, 63 N.E.2d 624, 327 Ill.App. 206—Krawitz v. Levinstein, 52 N.E.2d 40, 320 Ill.App. 618—Hanson v. Trust Co. of Chicago, 38 N.E.2d 365, 312 Ill.App. 261, reversed on other grounds 43 N.E.2d 931, 380 Ill. 194—Partridge v. Enterprise Transfer Co., 30 N.E.2d 947, 307 Ill.App. 386—Hodges v. Humphreys, 30 N.E.2d 920, 307 Ill.App. 670—Cwiklinski v. Chaplinski, 30 N.E.2d 782, 307 Ill.App. 550—Partridge v. Enterprise Transfer Co., 25 N.E.2d 839, 303 Ill.App. 650—Mueth v. Jaska, 23 N.E.2d 805, 302 Ill.App. 289—Zimmer v. Hill, 20 N.E.2d 811, 300 Ill.App. 613—Katsinas v. Colgate-Palmolive Pet. Co., 20 N.E.2d 127, 299 Ill.App. 347

—McCarty v. O. H. Yates & Co., 14 N.E.2d 254, 294 Ill.App. 474—Coleman v. Hait, 13 N.E.2d 188, 293 Ill.App. 615—Shellabarger v. Nattier, 7 N.E.2d 365, 289 Ill.App. 473—Martinken v. Trans-American Freight Lines, 5 N.E.2d 601, 288 Ill.App. 617—Martin v. Starr, 255 Ill.App. 189—Darling & Co. v. Yellow Cab Co., 238 Ill.App. 326.

Ind.—Johnson v. Wilson, 5 N.E.2d 533, 211 Ind. 51—Superior Meat Products v. Holloway, 48 N.E.2d 83, 113 Ind.App. 320—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind.App. 610—McDonald v. Swanson, 1 N.E.2d 684, 103 Ind.App. 171—Lewin v. Moll, 186 N.E. 905, 98 Ind.App. 1—Dinnen v. Fries, 171 N.E. 665, 93 Ind.App. 190.

Iowa—Odegard v. Gregerson, 12 N.W.2d 559, 234 Iowa 325—Festotnik v. Palliet, 10 N.W.2d 99, 233 Iowa 1047—Davidson v. Vast, 10 N.W.2d 12, 233 Iowa 534—McIntyre v. O. B. West Co., 281 N.W. 353, 225 Iowa 739—Appleby v. Cass, 234 N.W. 477, 211 Iowa 1145—Lein v. John Morrell & Co., 224 N.W. 576, 207 Iowa 1271—Wambeam v. Hayes, 219 N.W. 813, 205 Iowa 1391—Shuck v. Keefe, 218 N.W. 31, 205 Iowa 365.

Kan.—Heiserman v. Alkman, 186 P. 2d 352, 163 Kan. 700—Revell v. Bennett, 176 P.2d 538, 162 Kan. 345—Chapman v. Bergholt, 86 P. 2d 513, 149 Kan. 172—Tilden v. Ash, 67 P.2d 614, 145 Kan. 909—Lindsley v. Bonar, 283 P. 921, 129 Kan. 441—Hamilton v. Harrison, 268 P. 119, 126 Kan. 188.

Ky.—Gartrell v. Harris' Coadm'rs, 187 S.W.2d 1019, 300 Ky. 82—Sandmann v. Sheehan, 131 S.W.2d 484, 279 Ky. 614—Bowman v. Ernst, 71 S.W.2d 1013, 254 Ky. 376—Haller's Pet Shop v. Pearlman, 69 S.W.2d 9, 253 Ky. 130—Kilbott's Guardian v. Bernauer, 58 S.W.2d 632, 248 Ky. 423—Louisville Taxicab & Transfer Co. v. Boughter, 36 S.W.2d 12, 237 Ky. 611—Mann's Ex'r v. Leyman Motor Co., 28 S.W.2d 956, 234 Ky. 639.

Me.—Faton v. Marcelle, 29 A.2d 162, 139 Me. 256—Collins v. Kelley, 179 A. 65, 133 Me. 410.

Md.—Yellow Cab Co. v. Henderson, 39 A.2d 546, 183 Md. 546—Carlin v. Worthington, 192 A. 356, 172 Md. 505—Blinder v. Monaghan, 188 A. 31, 171 Md. 77—Zeller v. Mayson, 179 A. 179, 168 Md. 663—State, for Use of Shipley, v. Lupton, 161 A. 693, 163 Md. 180—Sudbrook v. State, 138 A. 12, 153 Md. 194.

Mass.—Fallovalita v. Johnsyn, 67 N.E.2d 532, 317 Mass. 153—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394—Avery v. R. E.

Guerin Trucking Co., 24 N.E.2d 330, 304 Mass. 500—Bresnick v. Heath, 198 N.E. 175, 292 Mass. 293—Harlow v. Corcoran, 195 N.E. 108, 290 Mass. 289—Walsh v. Wilson, 183 N.E. 261, 281 Mass. 91—Keyes v. Checker Taxi Co., 176 N.E. 207, 275 Mass. 461—Stickel v. Cassassa, 167 N.E. 248, 268 Mass. 59.

Mich.—Leete v. Gould, 13 N.W.2d 844, 308 Mich. 345—Rhoades v. Finn, 284 N.W. 720, 288 Mich. 262—Crook v. Eckhardt, 275 N.W. 739, 281 Mich. 703—Weller v. Speet, 267 N.W. 758, 275 Mich. 655—Leitch v. Getz, 267 N.W. 581, 275 Mich. 645—Izzo v. Weiss, 259 N.W. 295, 270 Mich. 372—Scurlock v. Peglow, 249 N.W. 35, 263 Mich. 658—Kerns v. Lewis, 224 N.W. 647, 246 Mich. 423—Hale v. Rogers, 221 N.W. 282, 224 Mich. 69.

Minn.—Delyea v. Goossen, 32 N.W.2d 179, 226 Minn. 91—Sanders v. Gilbertson, 29 N.W.2d 357, 221 Minn. 546—Eichten v. Central Minn. Co-op. Power Ass'n of Redwood County, 28 N.W.2d 862, 224 Minn. 180—Leitner v. Pacific Gamble Robinson Co., 26 N.W.2d 228, 223 Minn. 260—Litman v. Walso, 1 N.W.2d 391, 211 Minn. 398—Johnson v. Farrell, 298 N.W. 256, 210 Minn. 351—Ost v. Ullring, 292 N.W. 207, 207 Minn. 500—Lee v. Osmondson, 289 N.W. 63, 206 Minn. 487—Ryan v. International Harvester Co. of America, 283 N.W. 129, 204 Minn. 177—Spencer v. Johnson, 281 N.W. 879, 203 Minn. 402—Bayers v. Bongfeldt, 277 N.W. 239, 201 Minn. 546—Timmerman v. March, 271 N.W. 697, 199 Minn. 376—Williams v. Russell, 265 N.W. 270, 196 Minn. 397—Montague v. Loose-Wiles Biscuit Co., 261 N.W. 188, 194 Minn. 546—Kidd v. McCue, 259 N.W. 546, 193 Minn. 617—McIlvaine v. Delaney, 252 N.W. 284, 190 Minn. 401—Krinke v. Gramer, 246 N.W. 376, 187 Minn. 595—Hansen v. Larson, 245 N.W. 835, 187 Minn. 389—Quinn v. Zimmer, 239 N.W. 902, 184 Minn. 589—Kieffer v. Sherwood, 238 N.W. 331, 184 Minn. 205—Baker v. Jordan, 223 N.W. 137, 176 Minn. 285—Sieg v. Wagner, 217 N.W. 493, 173 Minn. 439—Greene v. Freeman, 217 N.W. 485, 173 Minn. 622.

Miss.—Greer v. Pierce, 147 So. 303, 167 Miss. 65.

Mo.—Fisher v. Ozark Milk Service, 201 S.W.2d 305, 356 Mo. 95—Lowry v. Mohn, 195 S.W.2d 652—Jungeblut v. Maris, 172 S.W.2d 861, 351 Mo. 301—Griffith v. Delico Meats Products Co., 145 S.W.2d 431, 347 Mo. 28—Hange v. Umbright, 119 S.W.2d 382—Larsen v. Webb, 58 S.W.2d 967, 332 Mo. 370, 90 A.L.R. 67—Galentine v. Borglum, 150 S.W.2d 1088, 235 Mo.App. 1141—Heliums v. Randol, 40 S.W.2d 500, 225

- Mo.App.** 1092—*Moore v. Fitzpatrick*, App., 31 S.W.2d 590—*Roark v. Stone*, 30 S.W.2d 647, 224 Mo.App. 554—*Fischer v. Kansas City Public Service Co.*, App., 19 S.W.2d 500—*Benzel v. Anishanalin*, App., 297 S.W. 180.
- Neb.**—*Spaulding v. Howard*, 27 N.W. 2d 832, 148 Neb. 496—*Meyer v. Platte Val. Const. Co.*, 25 N.W.2d 412, 147 Neb. 860—*Howarter v. Olson*, 19 N.W.2d 346, 145 Neb. 507—*Crandall v. Ladd*, 7 N.W.2d 642, 142 Neb. 736—*DeBus v. Amen*, 5 N.W.2d 92, 142 Neb. 109—*Vanderlippe v. Midwest Studios*, 289 N.W. 341, 137 Neb. 289—*Andrews v. Clapper*, 274 N.W. 209, 133 Neb. 110—*Plotkin v. Checker Cab Co.*, 274 N.W. 198, 133 Neb. 1—*Serratore v. Miller*, 267 N.W. 159, 130 Neb. 908—*Parsons v. Berry*, 264 N.W. 742, 130 Neb. 284—*Woracek v. Schuehart*, 264 N.W. 670, 130 Neb. 260—*Moncrief v. Interstate Transit Lines*, 261 N.W. 163, 129 Neb. 168—*Litwiller v. Graff*, 246 N.W. 922, 124 Neb. 460—*Faulhaber v. Griswold*, 246 N.W. 727, 124 Neb. 357—*Combs v. Owens Motor Co.*, 235 N.W. 682, 121 Neb. 5.
- N.H.**—*Stanley v. Kelley*, 8 A.2d 740, 90 N.H. 210—*Dimock v. Lussier*, 163 A. 500, 86 N.H. 54—*Mudgett v. McDonald*, 161 A. 33, 85 N.H. 508.
- N.J.**—*Beck v. Fleet Carrier Corporation*, 190 A. 509, 117 N.J.Law 545—*Pollack v. New Jersey Bell Telephone Co.*, 181 A. 318, 116 N.J.Law 28—*Newhouse v. Phillips*, 166 A. 482, 110 N.J.Law 421—*German v. Harris*, 148 A. 619, 106 N.J.Law 521—*Purcell v. Pollock*, 143 A. 426, 105 N.J.Law 221—*Craig v. Morgenweck*, 194 A. 188, 15 N.J.Misc 637—*Preiss v. Public Service Co-ordinated Transport*, 166 A. 628, 11 N.J.Misc. 426—*Samuel v. Christiansen*, 158 A. 479, 10 N.J.Misc. 223—*Janda v. Caswell*, 158 A. 329, 10 N.J.Misc. 123—*Shotkin v. Arrow Sanitary Laundry*, 135 A. 379, 9 N.J.Misc. 662—*Newby v. Letts*, 152 A. 472, 9 N.J.Misc. 14—*Durgett v. Public Service Co-ordinated Transport*, 150 A. 557, 8 N.J.Misc. 457—*Abel v. Zeek Baking Co.*, 132 A. 245, 4 N.J.Misc. 213.
- N.Y.**—*Lee v. City Brewing Corporation*, 18 N.E.2d 628, 279 N.Y. 380—*Shuman v. Hall*, 158 N.E. 16, 246 N.Y. 51—*Morrison v. Lloyd*, 57 N.Y.S.2d 854, 269 App.Div. 948—*DuChesnel v. D'Alessandro*, 38 N.Y.S.2d 662, 265 App.Div. 982, appeal denied 41 N.Y.S.2d 224, 266 App. Div. 700—*O'Brien v. B. H. Transp. Co.*, 38 N.Y.S.2d 577, 265 App.Div. 982, appeal denied 41 N.Y.S.2d 222, 366 App.Div. 700, affirmed 54 N.E.2d 384, 292 N.Y. 540—*Stevens v. Fraboni*, 30 N.Y.S.2d 253, 262 App. Div. 1056—*Wasserman v. Congdon*, 12 N.Y.S.2d 132, 257 App.Div. 888—*Jahrstorfer v. Stillman*, 11 N.Y.S.2d 651, 256 App.Div. 1105—*Merkling v. Ford Motor Co.*, 296 N.Y.S. 393, 251 App.Div. 89—*Knickerbocker Laundry Co. v. Stanchi*, 288 N.Y.S. 592, 248 App.Div. 730—*Bailey v. Russo*, 287 N.Y.S. 908, 248 App. Div. 644—*Webber v. Graves*, 255 N.Y.S. 726, 234 App.Div. 579—*Plantz v. Greiner*, 248 N.Y.S. 740, 232 App. Div. 73—*Paige v. McCarthy*, 221 N.Y.S. 701, 220 App.Div. 509—*Haverly v. Fitch*, 221 N.Y.S. 69, 219 App. Div. 630—*Franklin v. Marsh*, 218 N.Y.S. 155, 218 App.Div. 220—*Humphrey v. Gawehn*, 40 N.Y.S.2d 347.
- N.C.**—*Niblock v. Blue Bird Taxi Co.*, 182 S.E. 330, 208 N.C. 737—*Gaffney v. Phelps*, 178 S.E. 231, 207 N.C. 553—*Hobbs v. Kirby*, 171 S.E. 94, 205 N.C. 238.
- N.D.**—*Ostmo v. Tennyson*, 296 N.W. 541, 70 N.D. 558.
- Ohio**—*Blackford v. Kaplan*, 20 N.E.2d 522, 135 Ohio St. 268—*Heidle v. Baldwin*, 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186—*Eversole v. Seelbach*, App., 73 N.E.2d 223—*Schaller v. Chapman*, App., 66 N.E.2d 266—*Stuchel v. Cleveland Ry. Co.*, App., 58 N.E.2d 430—*Stevens v. Lopley*, 189 N.E. 260, 46 Ohio App 445.
- Okl.**—*Phillips v. Ward*, 157 P.2d 450, 195 Okl. 315—*Binding-Stevens Seed Co. v. Petris*, 67 P.2d 956, 180 Okl. 95—*Sinclair Oil & Gas Co. v. Armour*, 45 P.2d 754, 172 Okl. 442—*Yellow Taxicab & Baggage Co. v. Pettyjohn*, 11 P.2d 487, 157 Okl. 232.
- Or.**—*Williams v. Bryson*, 40 P.2d 61, 149 Or. 413—*Cox v. Jones*, 5 P.2d 102, 138 Or. 327—*Willhite v. Freed*, 299 P. 691, 137 Or. 1—*McCartney v. Westbrook*, 286 P. 525, 132 Or. 488—*Nyhart v. Oregon Stages*, 268 P. 982, 126 Or. 105—*Lasene v. Syvanen*, 263 P. 59, 123 Or. 615.
- Pa.**—*Rowles v. Evanuk*, 38 A.2d 255, 350 Pa. 64—*Freedman v. Dalton*, 25 A.2d 175, 344 Pa. 212—*Finkelstein v. McClain*, 200 A. 596, 331 Pa. 198—*Reppert v. White Star Lines*, 186 A. 788, 323 Pa. 346, 106 A.L.R. 413—*Adams v. Gardiner*, 160 A. 589, 306 Pa. 576—*Hayes v. Shomaker*, 152 A. 827, 302 Pa. 72—*Campagna v. Lyles*, 148 A. 527, 298 Pa. 352—*Robinson v. Berger*, 144 A. 899, 295 Pa. 95—*Sobieralski v. Schwotzer*, 33 A.2d 277, 152 Pa.Super. 661—*Lochhead v. Nierenberg*, 18 A.2d 472, 143 Pa.Super. 507—*Brown v. Jones*, 10 A.2d 839, 138 Pa.Super. 350—*Hess v. Mumma*, 7 A.2d 72, 136 Pa.Super. 58—*Tenore v. McKinley*, 181 A. 325, 119 Pa.Super. 368—*Engstler v. Penn News Co.*, 175 A. 761, 115 Pa.Super. 343—*Wilt v. Slotkin*, 175 A. 756, 115 Pa. Super. 491—*Krasnoff v. Koopitman*, 175 A. 711, 115 Pa.Super. 475—*Van Ronk v. Holland Laundry*, 170 A. 470, 111 Pa.Super. 529—
- Goldenberg v. Philadelphia Rural Transit Co.**, 170 A. 360, 112 Pa. Super. 163—*Luft v. Da Costa*, 164 A. 137, 107 Pa.Super. 553—*Verbofsky v. Yellow Cab Co.*, 161 A. 744, 105 Pa.Super. 318—*Petres v. Alexy*, 157 A. 624, 104 Pa.Super. 93—*Holt v. Metropolitan Storage Co.*, 157 A. 373, 103 Pa.Super. 265—*Toyer v. Lipkin*, 100 Pa.Super. 369—*Hood v. Urban*, 93 Pa.Super. 4—*Ensell v. Atlantic Refining Co.*, 92 Pa.Super. 586—*Cortright v. American Ice Co.*, 89 Pa.Super. 373—*Speler v. Messersmith*, 85 Pa.Super. 233—*Short v. Trego*, Com.Pl., 33 Del. Co. 44—*Rymer v. Devon*, Com.Pl., 32 Del.Co. 271—*Phillips v. Aronimink Transp. Co.*, Com.Pl., 28 Del. Co. 467—*Weaver v. Scranton Bus Co.*, Com.Pl., 44 Lack.Jur. 233—*Warta v. Swarr*, Com.Pl., 48 Lanc. Rev. 94—*Goddard v. Armour & Co.*, Com.Pl., 14 Northumb.Leg.J. 66, reversed on other grounds 7 A.2d 79, 136 Pa.Super. 158.
- R.I.**—*Jurgiewicz v. Adams*, 43 A.2d 310, 71 R.I. 239—*Sullivan v. Caruso*, 29 A.2d 539, 68 R.I. 476—*Spaziano v. Raponi*, 13 A.2d 810, 65 R.I. 163—*McAllister v. Chase*, 13 A.2d 690, 65 R.I. 122—*Simpson v. Gautreau*, 5 A.2d 302, 62 R.I. 309—*Andrews v. Penna Charcoal Co.*, 179 A. 696, 55 R.I. 215—*Zannelle v. Pettine*, 155 A. 236, 51 R.I. 359—*Lippitt v. Surprenant*, 152 A. 792—*Cloutier v. Kelly*, 142 A. 226.
- S.C.**—*Bedford v. Armory Wholesale Grocery Co.*, 10 S.E.2d 330, 195 S.C. 150.
- Tenn.**—*Sutherland v. Keene*, App., 203 S.W.2d 917.
- Tex.**—*Hicks v. Brown*, Civ.App., 128 S.W.2d 884, modified on other grounds 151 S.W.2d 790, 136 Tex. 399.
- Utah**—*Martin v. Sheffield*, 189 P.2d 127.
- Vt.**—*Purinton v. Newton*, 49 A.2d 98, 114 Vt. 490—*Jasmin v. Parker*, 148 A. 874, 102 Vt. 405.
- Va.**—*Doss v. Rader*, 46 S.E.2d 434, 187 Va. 231—*Brown v. Wallace*, 35 S.E.2d 793, 184 Va. 570—*Temple v. Ellington*, 12 S.E.2d 826, 177 Va. 134—*Fruit Growers Express Co. v. Hulfish*, 3 S.E.2d 160, 173 Va. 27—*Brown v. Waltrip*, 189 S.E. 342, 167 Va. 293—*Garrett v. Hammark*, 173 S.E. 635, 162 Va. 42—*Scott v. Cunningham*, 171 S.E. 104, 161 Va. 367.
- Wash.**—*Gile v. Nielsen*, 145 P.2d 288, 20 Wash.2d 1—*Gavin v. Everton*, 144 P.2d 735, 19 Wash.2d 785—*Leer v. Cohen*, 116 P.2d 535, 10 Wash.2d 239—*Bowen v. Odland*, 93 P.2d 366, 200 Wash. 257—*Perren v. Press*, 81 P.2d 867, 196 Wash. 14—*Hamilton v. Cadwell*, 81 P.2d 815, 195 Wash. 683—*Mitchell v. Cadwell*, 62 P.2d 41, 168 Wash. 257—*Gaskill v. Amadon*, 38 P.2d 229,

179 Wash. 375—Hamilton v. Lesley, 25 P.2d 102, 174 Wash. 516—Eggert v. Schumacher, 22 P.2d 52, 173 Wash. 119—Newman v. Cogshall, 18 P.2d 850, 171 Wash. 609—Leach v. Erickson, 17 P.2d 859, 171 Wash. 236—Colvin v. Simonson, 16 P.2d 839, 170 Wash. 341—Pomikala v. Cartwright, 16 P.2d 204, 170 Wash. 192—Brum v. Hammermeister, 14 P.2d 700, 169 Wash. 659, opinion adhered to 18 P.2d 1119, 171 Wash. 702—Parton v. Barr, 10 P.2d 566, 168 Wash. 60—McClanahan v. Fisher, 290 P. 864, 158 Wash. 114—Hellenthal v. Edmonson, 290 P. 831, 158 Wash. 276—Garrett v. Byerly, 284 P. 343, 155 Wash. 351, 48 A.L.R. 254—Hirst v. Standard Oil Co. of California, 261 P. 405, 145 Wash. 597—Novotney v. Thompson, 257 P. 236, 144 Wash. 155.

Wis.—Reynolds v. Madison Bus Co., 26 N.W.2d 653, 250 Wis. 294—Tietz v. Blauer, 26 N.W.2d 551, 250 Wis. 174—Stelzner v. Boehme, 285 N.W. 776, 231 Wis. 332—Teas v. Eisenlohr, 253 N.W. 795, 215 Wis. 455. 42 C.J. p 1249 note 92.

Negligence in striking horse-drawn vehicles as question of law or fact see *infra* subdivision f (6) (b) of this section.

Trial by court without jury

Conn.—Caines v. Wofsey, 167 A. 733, 117 Conn. 671—Cammarotta v. Kling, 143 A. 881, 108 Conn. 602. R.I.—Flood v. United Electric Rys. Co., 166 A. 809.

Where there is substantial evidence of defendant's carelessness, cause is properly submitted to jury.—Lein v. John Morrell & Co., 224 N.W. 576, 207 Iowa 1271.

Negligence ordinarily is fact question for jury, or for trial court in actions tried without a jury.

Mass.—Gaines v. Ratnowsky, 41 N.E.2d 25, 331 Mass. 254—Shockett v. Akeson, 37 N.E.2d 1015, 310 Mass. 289—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584—Morton v. Dobson, 30 N.E.2d 331, 307 Mass. 394—Aromando v. Leach, 28 N.E.2d 534, 306 Mass. 286—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448—Bresnick v. Heath, 198 N.E. 175, 292 Mass. 293—Barrows v. Checker Taxi Co., 195 N.E. 112, 290 Mass. 231—Mahoney v. Norcross, 187 N.E. 227, 284 Mass. 153—Dodge v. Town Taxi, 183 N.E. 260, 281 Mass. 77—Walsh v. Wilson, 183 N.E. 261, 281 Mass. 78—Ferreira v. Zaccolanti, 183 N.E. 261, 281 Mass. 91—Keyes v. Checker Taxi Co., 176 N.E. 207, 275 Mass. 461—Bagdarian v. Nathanson, 169 N.E. 148, 269 Mass. 886—Bogert v. Thompson, 156 N.E. 884, 260 Mass. 206—Hamel v. Sweatt, 153 N.E. 12,

256 Mass. 581—Dillon v. Plimpton, 132 N.E. 415, 239 Mass. 538.

T-Intersection

Ark.—Holmes v. Lee, 184 S.W.2d 957, 208 Ark. 114.

Y-Intersection

Cal.—Muir v. Cheney Bros., 148 P. 2d 138, 64 Cal.App.2d 55.

U-turn at intersection

Okl.—Graves v. Harrington, 60 P.2d 622, 177 Okl. 448.

Collision during snowstorm

Minn.—Coffman v. Kummer, 228 N.W. 751, 179 Minn. 120.

Collision with snowplow

Ill.—Mower v. Williams, 78 N.E.2d 529, 334 Ill App 16.

Damage to garage resulting from collision

Wis.—Zindell v. Central Mut. Ins. Co. of Chicago, 269 N.W. 327, 222 Wis. 575, 107 A.L.R. 1116.

Control

Iowa.—Falt v. King, 32 N.W.2d 781. Ia.—Maio v. Fahs, 14 A.2d 105, 339 Pa. 180.

S.C.—Neese v. Toms, 12 S.E.2d 59, 196 S.C. 67.

Wis.—Wallace v. Papke, 229 N.W. 58, 201 Wis. 285.

42 C.J. p 1249 note 92 [a].

Speed

U.S.—Dillon v. Evansville Refining Co., C.C.A.Ind., 127 F.2d 13.

Cal.—Freeman v. Churchill, 183 P. 2d 4, 30 Cal.2d 453—Pollind v. Polich, 177 P.2d 63, 78 Cal.App.2d 87.

Ga.—Callaway v. Nicholas, 33 S.E. 2d 523, 72 Ga App 284.

Ill.—La Belle v. Hillsman, 71 N.E.2d 107, 330 Ill App. 332—Lomax v. Brooks, 43 N.E.2d 421, 315 Ill.App. 567.

Iowa.—Falt v. King, 32 N.W.2d 781.

Kan.—Hurla v. Capper Publications, 87 P.2d 552, 149 Kan. 369.

Me.—Fitts v. Marquis, 140 A. 909, 127 Me. 75.

Md.—Hess v. Loftus, 195 A. 556, 173 Md. 284.

Minn.—Mahowald v. Beckrich, 2 N.W.2d 569, 212 Minn 78—Odegard v. Connolly, 1 N.W.2d 137, 211 Minn. 342.

Neb.—Parks v. Metz, 299 N.W. 643, 140 Neb. 235.

N.M.—Williams v. Haas, 189 P.2d 632.

N.J.—Zauber v. Van Wagoner, 172 A. 730, 12 N.J.Misc. 473—Cottrell v. Champion, 145 A. 322, 7 N.J.Misc. 314.

N.Y.—Wagner v. Brooklyn Bus Corporation, 290 N.Y.S. 646, 248 App. Div. 911.

N.C.—Nichols v. Goldston, 46 S.E.2d 320, 228 N.C. 514—Stewart v. Yellow Cab Co., 42 S.E.2d 405, 227 N.C. 368.

Pa.—Maio v. Fahs, 14 A.2d 105, 339

Pa. 180—Bachman v. Reading Coach Co., 175 A. 747, 115 Pa. Super. 504.

Tenn.—Dulling v. Burnett, 124 S.W. 2d 294, 22 Tenn.App. 522.

Tex.—Polasek v. Gaines Bros., Civ. App. 185 S.W.2d 609, error refused.

42 C.J. p 1249 note 92 [b].

Driving without lights

Mo.—Burton v. Phillips, App., 7 S.W.2d 712.

Failure to stop

(1) Generally.

U.S.—Dillon v. Evansville Refining Co., C.C.A.Ind., 127 F.2d 13—Brennan v. Buddenhagen, D.C.Pa., 19 F. Supp. 815.

Ark.—Rexer v. Carter, 186 S.W.2d 147, 208 Ark. 342.

Cal.—Shufflette v. Walkup Drayage & Warehouse Co., 169 P.2d 996, 74 Cal.App.2d 903—Winger v. Elmore, 57 P.2d 1369, 14 Cal.App.2d 241.

Conn.—Fitzhugh v. Bushnell, 174 A. 80, 118 Conn. 677.

D.C.—Brophy v. Weschler, D.C., 36 F.Supp. 635.

Iowa.—Amelsburg v. Lunning, 14 N.W.2d 680, 234 Iowa 852.

Mass.—Prendergast v. Long, 184 N.E. 467, 282 Mass. 200.

Mich.—Valenti v. Mayer, 4 N.W.2d 5, 301 Mich. 551—McKelvey v. Hill, 242 N.W. 822, 259 Mich. 16.

Mo.—Miller v. Rollins, App., 102 S.W.2d 686—Egan v. Palmer, 293 S.W. 460, 221 Mo App 823.

Neb.—Riekes v. Schantz, 12 N.W.2d 766, 144 Neb 150.

N.Y.—Webber v. Graves, 255 N.Y.S. 726, 234 App Div. 579.

Pa.—Higgins v. Jones, 11 A.2d 158, 337 Pa 401—Boehm v. Heston, 189 A. 298, 325 Pa. 89—Roth v. Hurd, 13 A.2d 891, 140 Pa.Super. 401.

Tenn.—Atchley v. Sims, 128 S.W.2d 975, 23 Tenn App. 167.

Wash.—Gephart v. Stout, 118 P.2d 801, 11 Wash 2d 184—Fothergill v. Kalja, 48 P.2d 643, 183 Wash 112, adhered to 53 P.2d 1198, 183 Wash 112.

42 C.J. p 1249 note 92 [1].

(2) Proper place to stop to comply with duty of stopping on coming to intersection with right-of-way street or one where stop sign is posted may be question of fact.—Cole v. Sherrill, La.App., 70 So.2d 205.

(3) Failure of motorist traveling upon servient highway to stop in obedience to stop sign is not negligence as matter of law but only evidence thereof, which may be considered with other facts and circumstances shown by evidence in passing on the question of negligence.—Hill v. Lopez, 45 S.E.2d 539, 228 N.C. 433—Reeves v. Staley, 18 S.E.2d 239, 220 N.C. 573.

(4) Under statute requiring full stop at arterial highway, driver can-

not be held negligent as matter of law for failing to stop at particular point that will give him best view.—*Nielsen v. Richman*, C.C.A.S.D., 114 F.2d 343, certiorari denied *Richman v. Nielsen*, 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 458.

(5) Bus driver was not negligent as a matter of law because he disregarded stop sign and collided at intersection with motor vehicle where stop sign appeared on only one side of road, and there was a large black X across face of sign, and there was no showing that roads were state roads or by what authority stop sign had been placed there.—*Daniels v. Ramirez*, Tex Civ. App., 209 S.W.2d 972.

Failure to keep windshield clean and dry

Cal.—*Wilkerson v. Brown*, 190 P. 2d 958, 84 Cal App 2d 401.

Failure to keep lookout

(1) Generally.

Cal.—*Lenning v. Chiolo*, 147 P.2d 410, 63 Cal App 2d 511.

Ill.—*Lomax v. Brooks*, 43 N.E.2d 421, 315 Ill.App. 567—*Cwiklinski v. Chaplinski*, 30 N.E.2d 782, 307 Ill. App. 550.

Ind.—*Davis v. Dondanville*, 26 N.E. 2d 568, 107 Ind.App. 665.

Iowa.—*Lathrop v. Knight*, 297 N.W. 291, 230 Iowa 272—*Rich v. Herny*, 269 N.W. 489, 222 Iowa 465.

Md.—*Hess v. Loftus*, 195 A. 556, 173 Md. 274.

Mass.—*Morton v. Dobson*, 30 N.E.2d 231, 307 Mass. 394.

Mich.—*Scurlock v. Peglow*, 249 N.W. 35, 263 Mich. 658—*Swainston v. Kennedy*, 235 N.W. 240, 253 Mich. 518.

Minn.—*Mahowald v. Beckrich*, 2 N.W.2d 569, 212 Minn. 78.

Miss.—*Genola v. Ozburn*, 11 So.2d 910, 194 Miss. 235.

Neb.—*Parks v. Metz*, 299 N.W. 643, 140 Neb. 235—*Thrapp v. Meyers*, 209 N.W. 238, 114 Neb. 689, 47 A.L.R. 585.

N.H.—*Adams v. Landry*, 35 A.2d 510, 93 N.H. 74—*Bissonnette v. Cheverette*, 176 A. 285, 87 N.H. 211—*Gendron v. Glidden*, 148 A. 461, 84 N.H. 162.

N.M.—*Williams v. Haas*, 189 P.2d 632.

N.D.—*Zettle v. Lutovsky*, 7 N.W.2d 180, 72 N.D. 331.

Ohio.—*Ohio Oil Co. v. Liles*, 6 N.E. 2d 18, 54 Ohio App. 124.

Or.—*Van Zandt v. Goodman*, 179 P. 2d 724, 181 Or. 80.

Pa.—*Maio v. Fahs*, 14 A.2d 105, 339 Pa. 180—*Rhinehart v. Jordan*, 169 A. 151, 313 Pa. 197.

S.C.—*Neese v. Toms*, 12 S.E.2d 859, 196 S.C. 67.

Tenn.—*Duling v. Burnett*, 124 S.W. 2d 294, 22 Tenn.App. 522.

Wash.—*Fetterman v. Levitch*, 109 P.2d 1064, 7 Wash.2d 431.
42 C.J. p 1249 note 92 [c].

(2) Failure to look more than once.

Mo.—*Dauber v. Josephson*, 237 S.W. 149, 209 Mo.App. 531.

Wis.—*Trautmann v. Charles Schefft & Sons Co.*, 228 N.W. 741, 201 Wis. 113, followed in 228 N.W. 744, 201 Wis. 122.

Failure to give warning

(1) Generally.

Ill.—*Cwiklinski v. Chaplinski*, 30 N.E. 2d 782, 307 Ill.App. 550.

Mich.—*Sebastian v. Sherwood*, 259 N.W. 287, 270 Mich. 339.

Mo.—*Pogue v. Rosegrant*, 98 S.W. 2d 528—*Egan v. Palmer*, 293 S.W. 460, 221 Mo App. 823.

Mont.—*Black v. Martin*, 292 P. 577, 88 Mont. 256.

Pa.—*McNulty v. Joseph Horne Co.*, 148 A. 105, 298 Pa. 244.

Va.—*Virginia Electric & Power Co. v. Morgan's Adm'r*, 173 S.E. 373, 162 Va. 123.

Wis.—*Zutter v. O'Connell*, 229 N.W. 74, 200 Wis. 601.

42 C.J. p 1249 note 92 [d].

(2) Failure to sound horn on approach to intersection is not negligence as matter of law—*Short v. Powell*, 291 N.W. 406, 228 Iowa 333.

Failure to yield right of way

(1) Generally.

U.S.—*Dillon v. Evansville Refining Co.*, C.C.A.Ind., 127 F.2d 13.

Ariz.—*Lemke v. Gardner*, 179 P.2d 788, 65 Ariz. 303.

Cal.—*De Priest v. City of Glendale*, 169 P.2d 17, 74 Cal App 2d 464—*McSweeney v. East Bay Transit Co.*, 141 P.2d 787, 60 Cal App 2d 807—*Mason v. San Diego Electric Ry. Co.*, 133 P.2d 841, 57 Cal.App. 2d 17.

Ga.—*Callaway v. Nicholas*, 33 S.E.2d 523, 72 Ga App. 284—*Lanester v. Clark*, 189 S.E. 265, 54 Ga.App. 669.

Ill.—*Hamann v. Lawrence*, 188 N.E. 333, 354 Ill. 197—*Heldler Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co.*, 243 Ill.App. 89.

Iowa.—*Falt v. Krug*, 32 N.W.2d 781—*Davidson v. Vast*, 10 N.W.2d 12, 233 Iowa 534—*Wolfson v. Jewett Lumber Co.*, 227 N.W. 608, 210 Iowa 244, modified on other grounds 230 N.W. 336, 210 Iowa 244.

Me.—*Itts v. Marquis*, 140 A. 909, 127 Me. 75.

Md.—*Pegelow v. Johnson*, 9 A.2d 645, 177 Md. 345.

Minn.—*Jeddeloh v. Hockenhull*, 18 N.W.2d 582, 219 Minn. 541—*Kane v. Locke*, 12 N.W.2d 495, 216 Minn. 170—*Mahowald v. Beckrich*, 2 N.W.2d 569, 212 Minn. 78—*Blom v. Wilson*, 296 N.W. 502, 209 Minn. 419.

N.Y.—*Hoefner v. Siegler*, 238 N.Y.S. 303, 228 App.Div. 667.

Or.—*Luster v. North Coast Transp. Co.*, 275 P. 666, 128 Or. 650.

Pa.—*Van Tine v. Cornelius*, 50 A.2d 299, 355 Pa. 584—*Hostetler v. Kniseley*, 185 A. 300, 322 Pa. 248—*Schlossstein v. Bernstein*, 142 A. 324, 293 Pa. 245.

R.I.—*Simonelli v. Beswick*, 133 A. 435.

Tex.—*Polasek v. Gaines Bros., Civ. App.*, 185 S.W.2d 609, error refused.

Wash.—*Brewer v. Berner*, 131 P.2d 940, 15 Wash.2d 644—*Carlson v. Whelan*, 84 P.2d 1001, 197 Wash. 104—*Welkert v. Daniels*, 35 P.2d 22, 178 Wash. 416.

W.Va.—*Webb v. Batten*, 187 S.E. 325, 117 W.Va. 644.

Wis.—*Trautmann v. Charles Schefft & Sons Co.*, 228 N.W. 741, 201 Wis. 113, followed in 228 N.W. 744, 201 Wis. 122.

42 C.J. p 1249 note 92 [g].

(2) Statutory right of way rule regarding vehicles at intersections is a relative one, and whether it was violated depends on circumstances, and usually is fact question for jury.—*Mattfeld v. Nester*, 32 N.W.2d 291, 226 Minn. 106—*Jeddeloh v. Hockenhull*, 18 N.W.2d 582, 219 Minn. 541.

(3) Whether vehicle driver was justified by circumstances in attempting to cross path of another vehicle having right of way at street intersection is question for arbiter of facts, whether court or jury—*Coshun v. Mauseau*, 23 N.E.2d 656, 62 Ohio App. 249.

Wrong side of road

Iowa.—*Branch v. Des Moines Ry. Co.*, 243 N.W. 379, 214 Iowa 689.
N.M.—*Williams v. Haas*, 189 P.2d 632.

Pa.—*Boehm v. Heston*, 189 A. 298, 325 Pa. 89—*Rocks v. Bender*, 157 A. 705, 103 Pa Super. 546.

Va.—*Virginia Electric & Power Co. v. Morgan's Adm'r*, 173 S.E. 373, 162 Va. 123.

42 C.J. p 1249 note 92 [i].

Turning right

Mich.—*Wright v. Barron*, 28 N.W.2d 278, 318 Mich. 409.

N.J.—*Ja-kson v. Geiger*, 126 A. 438, 100 N.J.Law 330.

Or.—*Williams v. Bryson*, 40 P.2d 61, 149 Or. 413.

Tenn.—*Atlantic Ice & Coal Co. v. Cameron*, 94 S.W.2d 72, 19 Tenn. App. 675.

Turning left

U.S.—*Vearn v. Crane*, C.C.A.Ind., 114 F.2d 896—*Nielsen v. Richman*, C. C.A.S.D., 114 F.2d 343, certiorari denied *Richman v. Nielsen*, 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 458—*Atlantic Greyhound Corporation v. Lyon*, C.C.A.Va., 107 F.2d 157, certiorari denied 60 S.Ct. 592, 309 U.

causing a vehicle approaching, or at, an intersection to overturn or to leave the road.⁸⁹ The weight of the evidence and the credibility of the witnesses are for the jury.⁹⁰ The fact that a motorist has the right of way at an intersection does not warrant a holding as a matter of law that he was free from negligence in exercising his right;⁹¹ in the absence of unusual circumstan-

es the question whether defendant who had the right of way was negligent is a question of fact rather than of law.⁹²

On conflicting evidence or where more than one inference may reasonably be drawn from the evidence, incidental questions are also for the jury, or for the trial court in trials without a jury.⁹³

S. 667, 84 L.Ed. 1014—Liberty Baking Co. v. Kellum, C.C.A.Pa., 79 F.2d 931.

Ala.—Roberts v. McCall, 17 So.2d 159, 245 Ala. 359.

Cal.—McDevitt v. Rogers, 136 P.2d 323, 58 Cal.App.2d 307.

Conn.—Zint v. Wheeler, 169 A. 52, 117 Conn. 484.

Ill.—Benestad v. Vander Molen, 76 N.E.2d 351, 332 Ill.App. 660.

Iowa.—McDougal v. Bormann, 234 N.W. 807, 211 Iowa 950.

Ky.—Trimble v. Baker, 116 S.W.2d 968, 273 Ky. 434.

Mass.—Falk v. Carlton, 170 N.E. 61, 270 Mass. 213.

Mich.—Sebastian v. Sherwood, 259 N.W. 287, 270 Mich. 339—Garton v. Powers, 238 N.W. 373, 252 Mich. 442.

Minn.—Abraham v. Byman, 8 N.W. 2d 231, 214 Minn. 355—Odegard v. Connolly, 1 N.W.2d 137, 211 Minn. 342.

Mo.—Melber v. Yourtee, 203 S.W.2d 727—Long v. Mild, 149 S.W.2d 853, 347 Mo. 1002—Prichard v. Dubinsky, 89 S.W.2d 530, 338 Mo. 360.

Mont.—Marsh v. Ayres, 260 P. 702, 80 Mont. 401.

N.J.—Oliver v. Leonardo, 51 A.2d 129, 135 N.J.Law 210—Anderson v. Cassidy, 196 A. 653, 119 N.J.Law 331—Kidder v. Hoffman, 170 A. 607, 12 N.J.Misc. 186—Saunderson v. Applegate, 165 A. 127, 9 N.J. Misc. 556—Day v. Beyer, 139 A. 317, 5 N.J.Misc. 1069.

N.Y.—Shepard v. Peck, 5 N.Y.S.2d 865, 254 App.Div. 421.

N.D.—Fagerlund v. Jensen, 24 N.W. 2d 816, 74 N.D. 766.

Pa.—Simon v. Moens, 51 A.2d 737, 356 Pa. 361—Seckinger v. Economy Laundry, 3 A.2d 46, 133 Pa. Super. 414—Homesher v. Lynn, Com.Pl., 34 Del.Co. 84.

Wash.—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P. 2d 298, 200 Wash. 21.

Wis.—Hansen v. Storandt, 285 N.W. 370, 231 Wis. 63.

42 C.J. p 1249 note 92 [o].

Passing to left of center of intersection

(1) Generally.

N.Y.—Boylan v. Whitehouse, 242 N.Y.S. 11, 229 App.Div. 372.

Pa.—Wilson v. Consolidated Dressed Beef Co., 145 A. 81, 295 Pa. 168.

Tex.—Adams v. Siefferman, Civ.App., 197 S.W.2d 506.

Wis.—Manchuk v. Milwaukee Electric Ry. & Light Co., 294 N.W. 42, 235 Wis. 579.

42 C.J. p 1249 note 92 [j].

(2) Violation of statute requiring motorist to pass to right of center of intersection before making left turn is not negligence per se, but merely evidence of negligence for jury's consideration—Simon v. Nelson, 170 A. 796, 118 Conn. 154, applying Massachusetts law.

89. Cal.—Douglas v. Crabtree, 134 P.2d 912, 57 Cal.App.2d 568—Pattison v. Cavanagh, 63 P.2d 868, 18 Cal.App.2d 123, transfer denied, Sup., 64 P.2d 946, 18 Cal.App.2d 123.

Mo.—Bennett v. Cauble, App., 167 S.W.2d 959.

R.I.—Rayno v. Giannini, 136 A. 885

Colliding with curb and telephone pole

Ind.—Wagoner v. Rose, 193 N.E. 108, 100 Ind.App. 192

N.J.—Comar v. Kelly & McAlinden Co., 152 A. 471, 9 N.J.Misc. 8.

90. Conn.—Goodhue v. Ballard, 191 A. 101, 122 Conn. 542.

Ill.—Leech v. Newell, 56 N.E.2d 138, 323 Ill.App. 510

Ind.—Superior Meat Products v. Holway, 48 N.E.2d 83, 113 Ind.App. 320.

Mich.—Wright v. Barron, 28 N.W.2d 278, 318 Mich. 409.

N.Y.—Shea v. Judson, 28 N.E.2d 885, 283 N.Y. 393.

Pa.—Lieb v. Wawa Dairy Farms, 194 A. 758, 129 Pa.Super. 70.

Accuracy of recollection, if not credibility, of witnesses for defendants, was for jury where witnesses' testimony that after accident at intersection plaintiff had disconnected light bulb in his taxicab saying it had blinded him was denied by plaintiff, and evidence showed that plaintiff was talking to no one in particular at time of making alleged statement.—Little v. Rubin, 6 A.2d 683, 62 R.I. 438.

Discrepancy in plaintiff's testimony was for jury.—Matthews v. Cheatham, 188 S.E. 87, 210 N.C. 592.

91. Cal.—Deagle v. Shane, 291 P. 652, 108 Cal.App. 490.

92. U.S.—Walkup v. Bardsley, C.C. A.Minn., 111 F.2d 789.

Cal.—Bramble v. McEwan, 104 P.2d 1054, 40 Cal.App.2d 400.

Fla.—Toll v. Waters, 189 So. 398, 138 Fla. 349.

Md.—Yellow Cab Co. v. Lacy, 170 A. 190, 165 Md. 588.

Nev.—Botts v. Rushton, 172 P.2d 147, 63 Nev. 426.

N.J.—Bahr v. O-W Co., 140 A. 438, 6 N.J.Misc. 203.

N.Y.—Shea v. Judson, 28 N.E.2d 885, 283 N.Y. 393.

Pa.—Campagna v. Lyles, 148 A. 527, 298 Pa. 352.

Wonsuit was not required because defendant might have had right of way under statute where defendant's truck could have reached intersection only by violating speed laws.—Bahr v. O-W Co., 140 A. 438, 6 N.J. Misc. 203.

93. Cal.—Garland v. Hirsh, 169 P. 2d 405, 74 Cal.App.2d 629—De Priest v. City of Glendale, 169 P. 2d 17, 74 Cal.App.2d 464—Yack v. Tiffin, 158 P.2d 620, 69 Cal.App.2d 226.

Conn.—Fitzhugh v. Bushnell, 174 A. 80, 118 Conn. 677.

D.C.—Peake v. Ramsey, Mun.App., 43 A.2d 763.

Fla.—Orr v. Avon Florida Citrus Corporation, 177 So. 612, 130 Fla. 306

Ill.—Barker v. Monts, 70 N.E.2d 264, 330 Ill.App. 129.

La.—Huffman v. Harman, 133 So. 481, 16 La.App. 60

Me.—Libby v. Heikkinen, 32 A.2d 604, 140 Me. 23.

Minn.—Hogle v. City of Minneapolis, 258 N.W. 721, 193 Minn. 326.

Mo.—Long v. Binnicker, 63 S.W.2d 831, 228 Mo.App. 193.

N.H.—Judd v. Perkins, 138 A. 312, 83 N.H. 39.

Or.—McVay v. Byars, 138 P.2d 210, 171 Or. 449.

R.I.—Flood v. United Electric Rys. Co., 166 A. 809.

How accident happened

Mo.—Kroell v. Lutz, App., 210 S.W. 926.

Knowledge of "no left turn" sign at intersection

U.S.—Klas v. Yellow Cab Co., C.C. A.Ill., 106 F.2d 935.

Private road or public highway

Cal.—Laubscher v. Blake, 46 P.2d 836, 7 Cal.App.2d 376.

such as the exact location of the accident with respect to the street intersection,⁹⁴ which vehicle struck the other,⁹⁵ the location or position of the vehicles after the collision,⁹⁶ defendant's failure to give a timely warning or signal,⁹⁷ which vehicle crossed against the red light,⁹⁸ whether defendant entered the intersection against a red light,⁹⁹ the speed of the vehicles,¹ whether the brakes on defendant's vehicle were defective,² whether plaintiff was on the right side of the road,³ whether defendant was driving on the wrong side of the road,⁴ or whether it was possible for him to drive on the right side of the road,⁵ whether defendant drove on left of center of street before he drove into intersection,⁶ whether defendant stopped at the intersection,⁷ which of the two vehicles stopped before entering the intersection,⁸ and whether defendant kept a lookout.⁹

In addition, on conflicting evidence or where more than one inference may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine which driver had the right of way,¹⁰ whether defendant, having the right of way, was justified in exercising it,¹¹ whether defendant yielded the right of way,¹² whether the driver in approaching the intersection from the right in an unlawful manner had forfeited the right of way,¹³ the relative positions of plaintiff's and defendant's cars immediately preceding the collision, as bearing on the question who had the right of way,¹⁴ which vehicle first entered the intersection,¹⁵ or whether the vehicles entered the intersection at approximately the same time.¹⁶

There must be some evidence of defendant's negligence in the operation of his motor vehicle

Pa.—Jinks v. Currie, 188 A. 356, 324 Pa. 532.

Whether defendant's driver was stunned by collision was for jury—Little v. Rubin, 6 A.2d 683, 62 R.I. 438.

94. At or between intersections
Wash.—Horney v. Giering, 231 P. 958, 132 Wash. 555.

95. N.Y.—Armstrong v. Koller, 25 N.Y.S.2d 984, 261 App.Div. 1017.

96. Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.

Ill.—Goad v. Grissom, 57 N.E.2d 514, 324 Ill.App. 123.

Me.—Libby v. Heikkinen, 32 A.2d 604, 140 Me. 23.

97. Mo.—Bennett v. Cauble, App., 167 S.W.2d 959.

98. Ky.—Ernst v. Acy, 95 S.W.2d 574, 264 Ky. 777.

99. Ill.—Ambrose v. Doyle, 76 N.E.2d 802, 338 Ill.App. 161.

Ky.—Bryan v. Battoe, 160 S.W.2d 369, 290 Ky. 47.

1. Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.

Ill.—Goad v. Grissom, 57 N.E.2d 514, 324 Ill.App. 123.

R.I.—Flood v. United Electric Rys. Co., 166 A. 809.

Defendant's vehicle

Kan.—Steele v. Russell, 176 P.2d 251, 162 Kan. 271.

Wis.—Wappler v. Schenck, 190 N.W. 555, 178 Wis. 632.

2. Wash.—Cooney v. Tacoma Moving & Storage Co., 285 P. 667, 155 Wash. 628.

3. Ohio.—Seekatz v. Sparks, 10 N.E.2d 1007, 56 Ohio App. 397.

4. Iowa.—Carruthers v. Campbell, 192 N.W. 138, 195 Iowa 390, 28 A.L.R. 949.

5. Iowa.—Hamilton v. Young, 171 N.W. 694, 185 Iowa 1160.

6. Iowa.—Waldman v. Sanders Motor Co., 243 N.W. 555, 214 Iowa 1139.

7. Cal.—Thompson v. Dentman, 21 P.2d 1009, 131 Cal.App. 680.

Ill.—Goad v. Grissom, 57 N.E.2d 514, 324 Ill.App. 123.

Kan.—Steele v. Russell, 176 P.2d 251, 162 Kan. 271.

W.Va.—Hambrick v. Spalding, 179 S.E. 807, 116 W.Va. 235.

Wis.—Stelzner v. Boehme, 285 N.W. 776, 231 Wis. 332.

8. Ohio.—Smith v. Brane, App., 61 N.E.2d 908.

9. Mo.—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065—Bennett v. Cauble, App., 167 S.W.2d 959.

Neb.—Olson v. Lilley, 2 N.W.2d 15, 140 Neb. 779.

Tex.—Parker v. Bridgeport Mach. Co., Civ App., 91 S.W.2d 807.

10. Conn.—Alderman v. Kelly, 32 A.2d 66, 130 Conn. 98—Garofano v. Dworkin, 19 A.2d 421, 127 Conn. 648.

Idaho.—Paris v. Burroughs Adding Mach. Co., 282 P. 72, 48 Idaho 310.

Ill.—Darling & Co. v. Yellow Cab Co., 238 Ill.App. 326.

Iowa.—Falt v. Krug, 32 N.W.2d 781—Pestotnik v. Palliet, 10 N.W.2d 99, 233 Iowa 1047.

Ky.—Tate v. Shaver, 152 S.W.2d 259, 287 Ky. 29.

Md.—Askin v. Long, 6 A.2d 246, 176 Md. 545—Paolini v. Western Mill & Lumber Corporation, 166 A. 609, 165 Md. 45.

N.Y.—Mantello v. Sanborn Map Co., 39 N.Y.S.2d 399, 265 App.Div. 1014—Plantz v. Greiner, 248 N.Y.S. 740, 232 App.Div. 73—Southcombe v. Coyle, 8 N.Y.S.2d 557.

Ohio.—Danner v. Avery, 168 N.E. 52, 32 Ohio App. 301.

Okl.—McIntire v. Burns, 42 P.2d 143, 172 Okl. 152.

Or.—Stryker v. Hastie, 282 P. 1087, 131 Or. 282.

11. Or.—Stryker v. Hastie, supra.

12. Wash.—Carlson v. Whelan, 84 P.2d 1001, 197 Wash. 101.

13. Ind.—Kraning v. Bloxson, 5 N.E.2d 649, 103 Ind.App. 660, rehearing denied 9 N.E.2d 107, 103 Ind.App. 660.

Ohio.—Stevens v. Lepley, 189 N.E. 260, 46 Ohio App. 445.

14. Ill.—Sorletic v. Jeromell, 57 N.E.2d 896, 324 Ill.App. 233.

Iowa.—Shuck v. Keefe, 218 N.W. 31, 205 Iowa 365.

42 C.J. p. 1250 note 99.

15. Ark.—Payne v. Mosley, 162 S.W.2d 889, 204 Ark. 510.

Cal.—Pascoe v. Payne, 12 P.2d 1091, 124 Cal.App. 528—Demers v. Sutherland, 4 P.2d 187, 117 Cal.App. 489.

Iowa.—Simanek v. Rehel, 7 N.W.2d 792, 232 Iowa 1150—Hartman v. Red Ball Transp. Co., 233 N.W. 23, 211 Iowa 64.

Mass.—Brightman v. Blanchette, 80 N.E.2d 864, 307 Mass. 584.

Neb.—Olson v. Lilley, 2 N.W.2d 15, 140 Neb. 779.

Ohio.—Danner v. Avery, 168 N.E. 52, 32 Ohio App. 301.

Pa.—Sweet v. Rounds, 36 A.2d 815, 349 Pa. 152—Curry v. J. M. Willison & Sons, 152 A. 746, 301 Pa. 467.

16. Ark.—East v. Woodruff, 193 S.W.2d 664, 209 Ark. 1046.

Cal.—Andrews v. Tinkler, 18 P.2d 756, 125 Cal.App. 219.

Neb.—Spittler v. Callan, 255 N.W. 27, 127 Neb. 331.

Va.—Independent Cab Ass'n v. Barksdale, 15 S.E.2d 112, 177 Va. 687.

at or near the intersection before his negligence may be submitted to the jury, and in various cases the evidence has been held insufficient to require or warrant the submission of defendant's negligence, or of some question incidental thereto, to the jury.¹⁷ Where the evidence is not conflicting and reasonable minds can reach but one conclusion, defendant's negligence is a question of law for the court.¹⁸ Defendant will be held negligent as a matter of law where the evidence is uncontradicted and the fact of negligence is the only inference which can reasonably be drawn therefrom.¹⁹

(5) Towing and Being Towed

Whether the defendant was guilty of negligence while engaged in towing another automobile or vehicle or in driving an automobile which was being towed is a question for the jury where the evidence is conflicting or different inferences may reasonably be drawn from the evidence.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant was guilty of some negligent act while engaged in towing another automobile or vehicle,²⁰ or in driving a car which was itself being towed.²¹

17. Ill.—Schachtrup v. Hensel, 14 N.E.2d 897, 295 Ill.App. 303.

Iowa.—King v. Gold, 276 N.W. 774, 224 Iowa 890.

Ky.—Consolidated Coach Corporation v. Hopkins' Adm'r, 37 S.W.2d 1, 238 Ky. 136.

Md.—Finney v. Frevel, 37 A.2d 923, 183 Md. 355—Rinehart v. Rinsling, 26 A.2d 411, 180 Md 668.

Mich.—Donnelly v. Chulski, 265 N.W. 513, 275 Mich. 22.

Minn.—Laiti v. MacNaughtin, 271 N.W. 481, 199 Minn 167—McGerty v. Nortz, 254 N.W. 601, 191 Minn. 443.

Mo.—Gabelman v. Bolt, 80 S.W.2d 171, 336 Mo. 539—Bennett v. Cauble, App, 167 S.W.2d 959.

Okl.—Butts v. Collins, 12 P.2d 196, 158 Okl. 19.

Or.—Cameron v. Goree, 189 P.2d 596.

Pa.—Ranck v. Sauder, 193 A. 269, 327 Pa. 177—Kutz v. General Baking Co., 87 Pa.Super. 297.

Wash.—Jamieson v. Taylor, 95 P.2d 791, 1 Wash.2d 217.

Wis.—Manchuk v. Milwaukee Electric Ry. & Light Co., 294 N.W. 42, 235 Wis. 579—Geyer v. Milwaukee Electric Railway & Light Co., 284 N.W. 1, 230 Wis. 347.

Proof of happening of accident was insufficient to take case to jury on issue whether defendant was guilty of negligence in keeping lookout.—La Chance v. Stuart, 288 N.W. 262, 233 Wis. 246.

Defendant who traveled on his side of highway at legal speed which neither increased nor decreased was not as matter of law guilty of negligence with respect to collision with approaching pick-up truck which turned to the left at highway intersection.—Jamieson v. Taylor, 95 P.2d 791, 1 Wash.2d 217.

Evidence that defendant did not comply with stop sign erected at intersection within city did not raise jury issue as to whether defendant was negligent on such ground with respect to collision at intersection, where it was not shown that there

existed an ordinance declaring street a main artery of travel so as to make stop sign a lawful traffic regulation, notwithstanding stop sign had been there for years.—Epolito v. Epolito, 71 N.Y.S.2d 611, 189 Misc. 424.

Wonsuit held proper

Or.—Hessing v. Heints, 72 P.2d 44, 157 Or. 542.

Pa.—Otis v. Kolsky, 94 Pa.Super. 548—Boose v. Walker, 86 Pa.Super. 218—Weinberg v. Wilson & Co., Com.Pl., 37 Luz Leg Reg 385.

Wash.—Sather v. Blodgett, 13 P.2d 60, 169 Wash. 25.

Directed verdict for defendant

Miss.—McLean v. Mississippi Power Co., 186 So 314.

N.H.—Peterson v. Pappacostantis, 26 A.2d 677, 92 N.H. 146.

Ohio.—Central Transfer & Storage Co v. Frost, App., 36 N.E.2d 494.

Trial before court

In pedestrian's action against taxicab operator under allegation that negligent operation of taxicab at intersection caused collision with automobile and caused automobile to strike pedestrian, under evidence that automobile skidded to left side of street and struck taxicab, which had not gone beyond center line of street intersecting street on which it was being operated, trial court properly refused to consider statutory rule governing right of way at intersections.—Pimpore v. McNamara, 193 A. 513, 58 R.I. 515.

18. Cal.—Osgood v. City of San Diego, 62 P.2d 195, 17 Cal.App.2d 345.

19. Cal.—Osgood v. City of San Diego, supra.

Pa.—Chapman v. Weimar, 195 A. 473, 129 Pa.Super. 373.

Wis.—Neuser v. Thelen, 244 N.W. 801, 209 Wis. 262, followed in 244 N.W. 804, 209 Wis. 271.

42 C.J. p 1250 note 1.

Where motorist failed to give required signal of intention to turn left so that oncoming motorcyclist was not afforded reasonable oppor-

tunity to avoid collision, motorist was negligent as matter of law and trial court should have so instructed jury.—Leanna v. Goethe, 300 N.W. 490, 238 Wis. 616.

20. Ala.—Wilson & Co. v. King, 33 So.2d 351, 250 Ala. 90.

Mo.—Schupback v. Meshevsky, 300 S.W. 465.

Wash.—Blaker v. Rosaia, 5 P.2d 1019, 165 Wash 532

42 C.J. p 1250 note 3, p 1019 note 56 [b].

Care required in towing see supra §§ 339-341.

Defendant railroad towing automobile onto ferryboat

N.J.—American Grocery Co v. Delaware, L. & W. R. Co., 168 A. 631, 11 N.J.Misc. 820.

Tow chain breaking

Wis.—Scharine v. Huebsch, 234 N.W. 358, 203 Wis. 261.

Trailers

U.S.—Kroger Grocery & Baking Co. v. Reddin, C.C.A Mo., 128 F.2d 787.

Ark.—Veasey v. East Texas Motor Freight Lines, 205 S.W.2d 188, 212 Ark. 202—Coca-Cola Bottling Co of Southwest Arkansas v. Carter, 154 S.W.2d 824, 202 Ark. 1026.

Ill.—Franks v. Interline Freight Co., 7 N.E.2d 912, 290 Ill.App. 597—Moore v. Jansen & Schaefer, 265 Ill.App. 459.

Iowa.—McCarthy v. Mandery, 294 N.W. 583, 229 Iowa 372.

Ky.—Square Deal Cartage Co. v. Smith's Adm'r, 210 S.W.2d 340, 307 Ky. 135—Commercial Carriers v. Small, 126 S.W.2d 143, 277 Ky. 189.

N.J.—McKeag v. Franklin Contracting Co., 135 A. 773, 5 N.J.Misc. 130.

Okl.—Carter v. Pinkerton, 146 P.2d 842, 194 Okl. 34.

Wis.—Schleif v. Honeck, 24 N.W.2d 602, 249 Wis. 276.

21. Wash.—Lewis v. Bertero, 77 P.2d 786, 194 Wash. 186.

Wis.—Scharine v. Huebsch, 234 N.W. 358, 203 Wis. 261.

42 C.J. p 1250 note 4.

On such evidence it is for the jury, or for the trial court in actions tried without a jury, to determine whether the driver of an automobile was negligent when a pedestrian tripped over a tow rope or chain strung between the vehicles,²² or where an automobile struck a tow rope or cable stretched across the road,²³ or where the object being towed became detached.²⁴ On such evidence incidental questions are also for the jury, or for the trial court in actions tried without a jury,²⁵ such as whether there were lights on the vehicle.²⁶

There must be sufficient evidence of defendant's negligence while engaged in towing another vehicle or while being towed, and in various cases

the evidence has been held insufficient to warrant or require submission of defendant's negligence to the jury.²⁷

(6) Colliding with Vehicle Parked or at Rest

On conflicting evidence or where different inferences may reasonably be drawn from the evidence, it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was negligent in colliding with a vehicle parked or at rest.

Where the evidence is legally sufficient and is in conflict or different inferences may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in colliding with a motor vehicle²⁸ or was guilty of

Injury to plaintiff towing defendant's truck

Where plaintiff's sleigh, which had been hitched to defendant's stalled truck, was raised when plaintiff started horses so that plaintiff, who was standing on sleigh, was thrown to ground, whether defendant was negligent in having put truck in gear before truck started rolling was for jury.—*Johnson v. Hasslinger*, 270 N. W. 52, 223 Wis. 239.

22. Ala.—*Gulf Refining Co. v. McNeel*, 153 So. 231, 228 Ala. 302.

23. Ind.—*Pride v. Vonderscher*, 158 N.E. 250, 87 Ind. App. 368.

Mich.—*Vashaw v. Marquette Public Service Garage*, 284 N.W. 910, 288 Mich. 363.

24. R.I.—*Staples v. Spelman*, 165 A. 783, 53 R.I. 244.

25. Iowa.—*McCarthy v. Mandery*, 294 N.W. 583, 229 Iowa 372.

Mich.—*Vashaw v. Marquette Public Service Garage*, 284 N.W. 910, 288 Mich. 363.

Time of collision

Wash.—*Lewis v. Bertero*, 77 P.2d 786, 194 Wash. 186.

26. Taillight on truck towed

Wash.—*Lewis v. Bertero*, supra.

Truck and trailer

Ill.—*Williams v. Consumers Co.*, 185 N.E. 217, 352 Ill. 51.

Or.—*Kiddle v. Schnitzer*, 117 P.2d 983, 167 Or. 316.

Pa.—*Nevin Bus Line v. Paul R. Hostetter Co.*, 155 A. 872, 305 Pa. 72.

Wash.—*Bissell v. Seattle Vancouver Motor Freight*, 188 P.2d 390, 25 Wash.2d 68.

27. Injury to horseback rider by road grader

Ky.—*Myers v. Salyer*, 127 S.W.2d 158, 277 Ky. 696.

Injury to occupants of trailer

(1) In actions for injuries to occupant of trailer which broke away from towing automobile, evidence regarding fitness of trailer and repair

of angle irons, which had been broken and which connected trailer to automobile, was insufficient for trier of facts on question of negligence of automobilist.—*Cormier v. Bodkin*, 15 N.E.2d 457, 300 Mass. 357.

(2) In actions for injuries to occupants of a trailer which broke away from a towing automobile, evidence as to how and where occupants were injured was insufficient for trier of facts on question of liability of an oncoming motorist who hit trailer after it broke away.—*Cormier v. Bodkin*, supra.

28. Ala.—*Harrison v. Wright*, 111 So. 642, 215 Ala. 607.

Ark.—*Bail v. Hall*, 118 S.W.2d 668, 196 Ark. 491.

Cal.—*Graves v. Kern County Transp. Corporation*, 296 P. 902, 112 Cal. App. 261.

Colo.—*C. A. Jackson, Inc. v. Wilhelm*, 102 P.2d 731, 106 Colo. 140.

Conn.—*Curelo v. Goodwin*, 18 A.2d 360, 127 Conn. 483.—*Boileau v. Williams*, 185 A. 429, 121 Conn. 432.

Ga.—*Wilson v. Ray*, 13 S.E.2d 848, 64 Ga. App. 540.

Ill.—*Nielsen v. Pyles*, 54 N.E.2d 753, 322 Ill. App. 574.

Md.—*Brotman v. McNamara*, 29 A.2d 264, 181 Md. 224.—*Montgomery Bus Lines v. Diehl*, 148 A. 453, 158 Md. 233.

Mass.—*Le Blanc v. Pierce Motor Co.*, 30 N.E.2d 684, 307 Mass. 535.

Minn.—*Corridan v. Agranoff*, 297 N.W. 759, 210 Minn. 237.—*Farwell v. Stambaugh*, 281 N.W. 526, 203 Minn. 392.

Mo.—*Rockenstein v. Rogers*, 31 S.W.2d 792, 326 Mo. 468.—*Day v. Banks*, App., 102 S.W.2d 955, opinion quashed on other grounds State ex rel. Banks v. Hostetter, Sup., 128 S.W.2d 1022.—*Day v. Banks*, App., 102 S.W.2d 946, opinion quashed in part on other grounds State ex rel. Banks v. Hostetter, 125 S.W.2d 835, 344 Mo. 155.—*Stewart v. Jeffries*, 34 S.W.2d 560, 224 Mo. App. 1050—

Ligon v. Exhibitors' Film Delivery & Service Co., App., 22 S.W.2d 1058. Neb.—*Fulcher v. Ike*, 6 N.W.2d 610, 142 Neb. 418.

N.J.—*Mairias v. City Service Transit Co.*, 177 A. 440, 13 N.J. Misc. 221.—*Lischke v. Michaels*, 142 A. 552, 6 N.J. Misc. 704.

N.Y.—*Dority v. Townley*, 56 N.Y.S.2d 473.

Okl.—*Keen Bottling Co. v. Morgan*, 7 P.2d 147, 154 Okl. 167.

Pa.—*Moyer v. Snyder*, Com.Pl., 14 Northumb. Leg. J. 101.

S.D.—*Griebel v. Ruden*, 253 N.W. 447, 62 S.D. 469.

Tenn.—*Tevis v. Proctor & Gamble Distributing Co.*, 113 S.W.2d 64, 21 Tenn. App. 494.—*Redding v. Hatcher*, 14 Tenn. App. 561.

Utah.—*Trimble v. Union Pacific Stages*, 142 P.2d 674, 105 Utah 457.

Wash.—*Hardman v. Younkera*, 131 P.2d 177, 15 Wash.2d 483, 151 A.L.R. 868.—*Todd v. Alexander*, 294 P. 515, 160 Wash. 3.

W.Va.—*Lynch v. Alderton*, 20 S.E.2d 657, 124 W.Va. 446.

Negligence in parking or leaving vehicle unattended as question of law or fact see supra subdivision d (6) of this section.

Collision on bridge

N.J.—*Reilly v. Cohen*, 139 A. 238, 5 N.J. Misc. 991.

Defendant's vehicle pushed into plaintiff's car by streetcar

N.J.—*Schadel v. Honig*, 131 A. 624, 4 N.J. Misc. 56, affirmed 134 A. 919, 103 N.J. Law 203.

Defendant's vehicle sliding backward down hill

N.Y.—*Bonded Freightways v. Codington*, 22 N.Y.S.2d 365, 260 App. Div. 832.

Striking door of motor vehicle

U.S.—*Tyson-Long Co. v. Wolfe*, C.C. A.11, 81 F.2d 82.

N.J.—*Greenberg v. O'Brodsky*, 177 A. 131, 13 N.J. Misc. 184.

negligence in colliding with another vehicle²⁹ parked or at rest, or in causing another vehicle to strike plaintiff's parked vehicle.³⁰ On such evidence incidental questions also are for the jury or trial court.³¹

The evidence must be legally sufficient to justify submission to the jury of defendant's negligence.³² Where the evidence is undisputed and not more than one inference may reasonably be drawn, defendant's negligence in colliding with a parked vehicle is a question of law.³³

f. Conduct toward Particular Persons

- (1) Pedestrians
- (2) Persons working upon or in highway
- (3) Persons boarding or alighting from streetcar or other vehicle
- (4) Bicyclists
- (5) Motorcyclists
- (6) Drivers and occupants of other particular vehicles
- (7) Persons in charge of animals
- (8) Children
- (9) Persons under disability

N.Y.—Rague v. Staten Island Coach Co., 42 N.E.2d 488, 288 N.Y. 206.

Intoxication

Tex.—Peveto v. Smith, 133 S.W.2d 572, 134 Tex. 308.

Backing into parked vehicle

Mass.—Wilgoren v. Pelton, 164 N.E. 623, 266 Mass. 17.

Keeping lookout

Conn.—Boileau v. Williams, 185 A. 429, 121 Conn. 432.

N.D.—Jondahl v. Campbell, 238 N.W. 697, 61 N.D. 555.

Wash.—Chapin v. Stickel, 22 P.2d 290, 173 Wash. 174.

Slidding

N.Y.—Hurwitz v. City of New York, 14 N.Y.S.2d 354.

Wrong side of road

Iowa.—Russell v. Leschensky, 276 N.W. 608, 224 Iowa 334.

29. Unlighted cart standing at curb-ing

N.C.—Chadwick v. O'Bryan, 172 S.E. 190, 205 N.C. 844.

30. N.J.—Ross v. Nevin Bus Lines, 154 A. 198, 9 N.J.Misc. 412.

31. Whether vehicle being towed was disabled by locked rear wheel, so as to bring it within exception to statutory rule that no person shall park or leave any vehicle on pavement, was for jury.—Breau v. Soares, 64 P.2d 146, 18 Cal.App.2d 489.

32. Mo.—Freed v. Mason, App., 137 S.W.2d 673.

33. Ky.—Alford v. Bealrd, 192 S.W. 2d 180, 301 Ky. 512.

34. Okl.—Gideon v. Jones, 70 P.2d 814, 180 Okl. 621.

Pa.—Johnson v. French, 140 A. 133, 291 Pa. 437.

Care as to pedestrians in general see supra §§ 382-389.

Ordinarily question of fact

Cal.—Crooks v. Doeg, 40 P.2d 590, 4 Cal.App.2d 21—Maggart v. Bell, 2 P.2d 516, 116 Cal.App. 306.

Mass.—Simonson v. Angel, 152 N.E. 52, 256 Mass. 256.

Minn.—Saunders v. Yellow Cab Corporation of Minnesota, 233 N.W. 599, 182 Minn. 62.

Causing wire to fall

Where truck driver struck pole causing electric wire to fall across highway and motorist while rendering assistance to truck driver who was under the truck came in contact with the wire and suffered injuries, truck driver's negligence was for jury.—Butler v. Jersey Coast News Co., 160 A. 659, 109 N.J.Law 255.

Causing post to fall

Where contractor, who was erecting building, supported roof over alley by timber posts, and truck which was delivering lumber struck post, causing post to fall on pedestrian, in pedestrian's action for injuries, question of negligence of truck driver was for jury.—Tuveson v. J. M. Colman Co., 82 P.2d 579, 196 Wash. 286.

35. Ala.—Tillery v. Walker, 114 So. 137, 216 Ala. 676.

Ariz.—Pearson & Dickerson Contrac-

(10) Persons emerging from behind obstructions

(11) Guests or occupants of vehicle owned or operated by defendant

(1) Pedestrians

- (a) In general
- (b) Walking along highway
- (c) Crossing highway
- (d) Standing or sitting upon highway
- (e) On sidewalk

(a) In General

Where the evidence is in conflict or different inferences may reasonably be drawn from the evidence, it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to a pedestrian.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may reasonably be drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant in the operation of a motor vehicle was guilty of negligence in causing injury to a pedestrian,³⁴ as where the pedestrian is struck by defendant's motor vehicle,³⁵

tors v. Harrington, 137 P.2d 381, 60 Ariz. 354.

Ark.—Northwestern Casualty & Surety Co. v. Rose, 46 S.W.2d 796, 185 Ark. 263—Southwestern Bell Telephone Co. v. Roberts, 31 S.W. 2d 302, 182 Ark. 211.

Cal.—Barry v. Maddalena, 146 P.2d 974, 63 Cal.App.2d 302—McNear v. Pacific Greyhound Lines, 146 P.2d 34, 63 Cal.App.2d 11—Casalegno v. Leonard, 105 P.2d 125, 40 Cal.App. 2d 575—Wickman v. Lowenstein, 28 P.2d 681, 136 Cal.App. 279—Rapp v. Southern Service Co., 4 P.2d 195, 116 Cal.App. 699—Maggart v. Bell, 2 P.2d 516, 116 Cal.App. 306—Beall v. Erickson, 297 P. 960, 113 Cal. App. 36—Tucker v. City and County of San Francisco, 296 P. 101, 111 Cal.App. 720—Montanez v. Beard, 291 P. 896, 108 Cal.App. 585—Fentfield v. Pacific Gas Radiator Co., 265 P. 324, 89 Cal.App. 625—Milner v. Tolliver, 261 P. 1069, 87 Cal.App. 38—O'Farrell v. Andrus, 260 P. 957, 86 Cal.App. 474.

Colo.—Berkowitz v. Barry, 7 P.2d 405, 90 Colo. 170.

Conn.—Travis v. Balfour, 161 A. 521, 115 Conn. 711—Tomasko v. Raucci, 155 A. 64, 113 Conn. 274—Fagan v. Ohler, 153 A. 778, 112 Conn. 667.

D.C.—Chr. Heurich Brewing Co. v. McGavin, 16 F.2d 334, 56 App.D.C. 389.

Fla.—Motor Transit Co. v. Bethae, 173 So. 801, 127 Fla. 680—Rhodes v. Grund, 146 So. 558, 108 Fla. 323.

Ga.—Lockett v. Belcher Heating &

or where he is struck by another vehicle due to | defendant's negligent operation of a motor vehi-

- Plumbing Co., 138 S.E. 286, 36 Ga. App. 815.
- Idaho.—Gelst v. Moore, 70 P.2d 403, 58 Idaho 149—Wyland v. Twin Falls Canal Co., 285 P. 676, 48 Idaho 789.
- Ill.—Schmidt v. Anderson, 21 N.E.2d 825, 301 Ill.App. 28—Blumb v. Getz, 13 N.E.2d 1019, 294 Ill.App. 432—Nordman v. Carlson, 10 N.E.2d 53, 291 Ill.App. 438—Hoobler v. Voelpel, 246 Ill.App. 69—Housley v. Noblett, 234 Ill.App. 59.
- Ind.—Hill v. Boggs, 185 N.E. 300, 98 Ind.App. 506.
- Iowa.—Hayes v. Stunkard, 10 N.W.2d 19, 233 Iowa 582.
- Ky.—Honaker v. Crutchfield, 57 S.W. 2d 502, 247 Ky. 495—Wells v. King, 292 S.W. 777, 219 Ky 201—Williams v. Schmidt, 280 S.W. 494, 213 Ky. 122.
- Me.—Gerrish v. Ferris, 23 A.2d 891, 138 Me. 213—Dyer v. Ayoub, 187 A. 757, 134 Me. 502—King v. Wolf Grocery Co., 137 A. 62, 126 Me 202.
- Md.—Tri-State Poultry Co-op v. Carey, 57 A.2d 812—Thursby v. O'Rourke, 23 A.2d 656, 180 Md 223—Jones v. Wayman, 182 A. 417, 169 Md. 670—Epps v. Rainey, 181 A. 730, 169 Md. 701—Panitz v. Webb, 135 A. 406, 161 Md 639.
- Mass.—Mitchell v. Silverstein, 70 N. E.2d 306, 320 Mass. 524—Kelly v. Railway Express Agency, 52 N.E. 2d 411, 315 Mass. 301—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216—Snow v. Nickerson, 22 N.E.2d 593, 304 Mass. 63—Hall v. Shain, 197 N.E. 437, 291 Mass 506—Dryant v. Emerson, 197 N.E. 2, 291 Mass 227—Walsh v. Gillis, 176 N. E. 802, 276 Mass. 93—Mulroy v. Marinakis, 171 N.E. 670, 271 Mass 421—Moran v. Brodeur, 158 N.E. 349, 261 Mass. 120—Hicks v. H. B. Church Truck Service Co, 156 N.E. 254, 259 Mass. 272.
- Mich.—Malone v. Vining, 21 N.W.2d 144, 313 Mich. 315—Watkinson v. Reichle, 290 N.W. 877, 292 Mich 484—Tio v. Molter, 247 N.W. 772, 262 Mich. 655—Deyo v. Detroit Creamery Co., 241 N.W. 244, 257 Mich. 77.
- Minn.—Anderson v. Kelley, 265 N.W. 821, 196 Minn. 578—Horsman v. Bigelow, 239 N.W. 250, 184 Minn 514—Shotts v. Standard Oil Co. of Indiana, 232 N.W. 712, 181 Minn. 386, followed in 232 N.W. 714, 181 Minn. 391.
- Mo.—Glick v. Arink, 58 S.W.2d 714—Schuls v. Smercina, 1 S.W.2d 113, 318 Mo. 486—Robertson v. Scoggins, App., 73 S.W.2d 430—Shannon v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 580—Mebas v. Werkmeister, 299 S.W. 601, 221 Mo.App. 173.
- Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.
- Neb.—Tews v. Bamrick, 26 N.W.2d 499, 148 Neb. 59—Kuhlman v. Schacht, 265 N.W. 549, 130 Neb. 511.
- N.J.—Hyman v. Bierman, 31 A.2d 762, 130 N.J.Law 170—Hargrave v. Stockloss, 21 A.2d 820, 127 N.J. Law 262—Vander Pyle v. Alexander Hamilton Garage, 192 A 436, 118 N.J.Law 238—Hamilton v. Alt-house, 178 A. 792, 115 N.J.Law 248—Klein v. Frank, 160 A 411, 109 N.J.Law 221—Ziegler v. Bonine, 135 A. 77, 4 N.J.Misc. 1005.
- N.Y.—Zajac v. Rochester Soda Water Co., 20 N.Y.S.2d 531, 259 App. Div. 1055—Schelker v. Commercial Credit Corporation, 7 N.Y.S.2d 823, 255 App Div. 887—Valois v. Bodine, 291 N.Y.S. 377, 249 App Div. 671—Herbert v. W. H. Smith Paper Corporation, 276 N.Y.S. 820, 243 App Div. 260—Burger v. Fifth Ave. Coach Co., 225 N.Y.S. 627, 222 App Div. 187, reversed on other grounds 164 N.E. 592, 249 N.Y. 583—Lynch v. Pratt, 225 N.Y.S. 486, 222 App Div 179.
- N.C.—Knight v. Bryant, 198 S.E. 644, 214 N.C. 822—Lewis v. Hunter, 193 S.E. 814, 212 N.C. 504.
- Ohio.—Closs v. Bull, 22 N.E.2d 141, 60 Ohio App 513—Drehs v. Taxicabs of Cincinnati, 186 N.E. 832, 45 Ohio App 129.
- Pa.—Rooney v. Marczo, 172 A. 151, 315 Pa. 113—Morin v. Kredt, 164 A 799, 310 Pa. 90—Hoy v. Wolfgang, Com.Pl., 7 Sch.Reg 77.
- R.I.—Silvia v. Caizz, 7 A.2d 704, 63 R.I. 172.
- Tex.—Gulf Refining Co. v. Youngblood, Civ.App., 23 S.W.2d 522.
- Vt.—MacDonald v. Orton, 134 A. 599, 99 Vt. 425.
- Va.—Perkinson v. Persons, 178 S.E. 682, 164 Va. 172—Richardson v. Shank, 154 S.E. 542, 155 Va. 240.
- Wash.—Carmin v. Port of Seattle, 116 P.2d 338, 10 Wash.2d 139—Hadley v. Simpson, 115 P.2d 675, 9 Wash.2d 541—Cannon v. City Electric & Fixture Co., 290 P. 828, 158 Wash. 66—Barach v. Island Empire Telephone & Telegraph Co., 275 P. 713, 151 Wash. 279.
- W.Va.—Webb v. Harrison, 31 S.E.2d 686, 127 W.Va. 124—Attelli v. Laird, 146 S.E. 882, 106 W.Va. 717.
- Wis.—Berantsen v. Reutler & Dorsch, 210 N.W. 708, 191 Wis. 275—Stewart v. Olson, 206 N.W. 909, 188 Wis. 487, 44 A.L.R. 1292.
- 42 C.J. p 1250 note 6.
- At intersection**
(1) Generally.
Cal.—Young v. Tassop, 118 P.2d 371, 47 Cal.App.2d 557—Welch v. Wirsching, 16 P.2d 691, 127 Cal. App. 725—Wilson v. California Cab Co., 13 P.2d 758, 125 Cal.App. 383.
- Nicol v. Davis, 290 P. 114, 107 Cal.App. 26—Kietz v. MacAdam, 271 P. 1101, 94 Cal.App. 770.
- Colo.—Ross v. Sherman, 35 P.2d 1014, 95 Colo. 346.
- Conn.—Alston v. Consolidated Motor Lines, 173 A. 899, 118 Conn. 707.
- Ill.—Schneff v. Mirring, 69 N.E.2d 352, 329 Ill.App. 511—Dusatko v. Pletka, 67 N.E.2d 424, 329 Ill.App. 189—Bartels v. McGarvey, 63 N.E. 2d 617, 327 Ill.App. 206—Meltzer v. Shklowsky, 53 N.E.2d 272, 321 Ill. App. 400—Krause v. Dodge Bros. Corporation, 9 N.E.2d 262, 291 Ill. App. 604.
- Iowa.—Lorimer v. Hutchinson Ice Cream Co., 249 N.W. 220, 216 Iowa 384—Robertson v. Carligen, 234 N. W. 824, 211 Iowa 963.
- Kan.—Claggett v. Phillips Petroleum Co., 92 P.2d 52, 150 Kan 191—Dicks v. Wilson, 56 P.2d 1036, 143 Kan. 716—Shrout v. Bird, 296 P. 369, 132 Kan 617.
- Ky.—Robinson v. O'Keefe's Ex'x, 66 S.W.2d 37, 253 Ky. 256.
- Me.—Stone v. Roger, 154 A. 73, 130 Me. 512—Sturtevant v. Ouellette, 140 A. 368, 126 Me 558.
- Md.—Sugar v. Hafele, 17 A.2d 118, 179 Md 75—Universal Credit Co. v. Merryman, 195 A 689, 173 Md. 256.
- Mass.—Noves v. Whiting, 194 N.E. 93, 289 Mass. 270—Pease v. Lonsen, 190 N.E. 18, 286 Mass. 207—Clark v. C. E. Fay Co., 183 N.E. 423, 281 Mass. 240—Garland v. Freeman, 178 N.E. 732, 277 Mass. 520.
- Mich.—Werker v. McGrain, 24 N.W. 2d 111, 315 Mich. 287—Morrison v. Grass, 22 N.W.2d 82, 314 Mich. 87—Nord v. West Michigan Flooring Co., 214 N.W. 236, 238 Mich. 669.
- Minn.—Olson v. Evert, 28 N.W.2d 753, 224 Minn. 528—Kinnonen v. Adolphson, 216 N.W. 605, 173 Minn. 138—Rimmer v. Cohen, 215 N.W. 198, 172 Minn 134.
- Miss.—Woods v. Franklin, 118 So. 450, 151 Miss. 635—B. Kullman & Co. v. Samuels, 114 So. 807, 148 Miss 871.
- Neb.—Hammond v. Morris, 24 N.W. 2d 633, 147 Neb. 600—Halliday v. Raymond, 22 N.W.2d 614, 147 Neb 179—Lyons v. Joseph, 246 N.W. 859, 124 Neb. 412.
- N.J.—Brotman v. Doan, 143 A. 228, 105 N.J.Law 132—Stern v. Brabson, 155 A 128, 9 N.J.Misc. 558.
- N.Y.—Ringhoff v. Lincoln Service, 45 N.Y.S.2d 771, 267 App.Div. 824, reargument denied 47 N.Y.S.2d 132, 267 App Div. 871—Castro v. New York Rvs. Corporation, 231 N.Y.S. 649, 224 App.Div. 623.
- Pa.—Altzman v. Kelly, 9 A.2d 423, 336 Pa 481—Morin v. Kredt, 164 A. 799, 310 Pa. 90—McGurk v. Belmont, 146 A. 539, 297 Pa. 192—

cle.³⁶ The weight of the evidence and the credibility of the witnesses are for the jury.³⁷ On conflicting evidence or where more than one inference reasonably may be drawn from the evidence, incidental or related questions are also for the jury,³⁸ such as the question whether there was room for the automobile to pass between the pedestrian and the curb³⁹ and the time, place, and manner of the pedestrian's injury.⁴⁰

There must be legally sufficient evidence of defendant's negligence in striking a pedestrian, and in various cases the evidence has been held insufficient to require or warrant submission to the jury of defendant's negligence or of some question incidental thereto.⁴¹ Testimony that a driver failed to sound his horn, without proof of a necessity therefor, does not make a submissible case.⁴² It cannot be held, as a matter of law in every case,

that a motor vehicle driver is absolved from giving a signal on approaching a pedestrian on a highway on the theory that the pedestrian saw the vehicle immediately prior to the collision.⁴³

(b) Walking along Highway

The negligence of the defendant in the operation of a motor vehicle in causing injury to a pedestrian walking along the highway is a question for the jury on conflicting evidence or where more than one inference may be drawn from the evidence.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may reasonably be drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant in operating a motor vehicle was guilty of negligence in causing injury to a pedestrian walking along a highway,⁴⁴ as by striking him with his vehicle,⁴⁵ or

Lynch's Estate v. Letterman, Com. Pl., 29 Erie Co. 52.

Wash.—Kludas v. Inland-American Printing Co., 270 P. 429, 149 Wash. 180—*Lee v. H. E. Gleason Co.*, 262 P. 133, 146 Wash. 66—*Jurisch v. Puget Transp. Co.*, 258 P. 39, 144 Wash. 409—*Woodbury v. Illoquiam Water Co.*, 244 P. 565, 138 Wash. 254.

(2) Injury to pedestrian crossing street or highway see *infra* subdivision f (1) (c) of this section

In private driveway

Cal.—Sunseri v. Dime Taxi Corporation, 135 P.2d 654, 57 Cal App 2d 926—*Kapper v. Harris*, 52 P.2d 569, 10 Cal.App.2d 630.

Mass.—Milliman v. Coulter, 17 N.E. 2d 162, 301 Mass. 320.

Mo.—Steinmetz v. Saathoff, App., 84 S.W.2d 434.

In safety zone

Mich.—Collins v. Perry, 217 N.W. 32, 241 Mich. 361.

Pa.—Derricotte v. Ulitsky, 45 A.2d 5, 353 Pa. 309.

Negligence of instructor of driver of automobile

Md.—Opocello v. Meads, 135 A. 488, 152 Md. 29, 50 A.L.R. 1385.

Failure to give warning

Ga.—Ellrod v. Anchor Duck Mills, 179 S.E. 188, 50 Ga.App. 631.

Ill.—Williams v. Stearns, 256 Ill. App. 425.

Ind.—Fishman v. Eads, 168 N.E. 495, 90 Ind.App. 137.

N.J.—Pesant v. Kramer, 135 A. 75, 4 N.J.Misc. 982.

36. *Ark.—Coca Cola Bottling Co. v. McAnulty*, 50 S.W.2d 577, 185 Ark. 970.

37. *Conn.—Evans v. Dickinson*, 16 A.2d 582, 127 Conn. 297.

Ill.—Stivers v. Black & Co., 42 N.E. 2d 349, 315 Ill.App. 38.

Wash.—Carmin v. Port of Seattle, 116 P.2d 338, 10 Wash.2d 139.

38. *Ill.—Wolfram v. Bennehoff*, 56 N.E.2d 849, 321 Ill.App. 16.

Defective condition of brakes

Miss.—Woods v. Franklin, 118 So. 450, 151 Miss. 635.

39. *Ky.—Downing v. Baucom*, 287 S.W. 362, 216 Ky. 108.

40. *Mich.—Szabo v. Feiler*, 214 N.W. 128, 239 Mich. 380.

NH.—Jackson v. Smart, 5 A.2d 713, 90 N.H. 153.

41. *U.S.—Henriques v. Freisinger*, C.C.A.N.J., 63 F.2d 955.

D.C.—Mackall v. Washington Gas Light Co., 147 F.2d 149, 79 U.S. App.D.C. 308, certiorari denied 65 S.Ct. 1404, 325 U.S. 869, 89 L.Ed. 1988—*Reaver v. Walch*, 3 F.2d 204, 55 App.D.C. 159.

Fla.—Sansone v. Dunn Bus Service, 23 So.2d 384, 156 Fla. 393.

Ga.—Gray v. Jackson, 187 S.E. 229, 53 Ga.App. 658.

Ill.—La Prise v. Carr-Leasing, Inc., 62 N.E.2d 26, 326 Ill.App. 514.

Iowa.—McCormick v. Kennedy, 277 N.W. 576, 224 Iowa 983.

Ky.—Hatfield v. Sargent's Adm'x, 209 S.W.2d 306, 306 Ky. 782.

Mich.—Poundstone v. Niles Creamery, 292 N.W. 367, 293 Mich. 455.

—*Warwick v. Blackney*, 261 N.W. 310, 272 Mich. 231—*Bowmaster v. William H. De Free Co.*, 242 N.W. 744, 258 Mich. 538.

Minn.—Boyer v. Josephson, 240 N.W. 538, 185 Minn. 221.

Neb.—Leonard v. Trimble, 274 N.W. 593, 133 Neb. 254.

N.C.—Kornegay v. Williams, 22 S.E. 2d 228, 222 N.C. 751—*Mitchell v. Melts*, 18 S.E.2d 406, 220 N.C. 793.

—*Pack v. Auman*, 18 S.E.2d 247, 220 N.C. 704.

Okl.—White Line Cab & Baggage Co.

v. Waterman, 3 P.2d 839, 150 Okl. 277.

Pa.—Martin v. Marateck, 27 A.2d 42, 345 Pa. 103—*Hadhazi v. Zero Ice Corporation*, 194 A. 908, 327 Pa. 558—*Galvin v. Kreider*, 143 A. 110, 293 Pa. 395—*Wiser v. Parkway Baking Co.*, 137 A. 797, 290 Pa. 565.

Wash.—Sellman v. Hess, 130 P.2d 688, 15 Wash.2d 310.

Failure to give warning

Wash.—Ferguson v. City of Seattle, 176 P.2d 445, 27 Wash.2d 55.

Driving without headlights

Wash.—Ferguson v. City of Seattle, *supra*.

Failure to keep lookout

Wash.—Ferguson v. City of Seattle, *supra*.

42. *Ky.—Malcolm v. Nunn*, 10 S.W. 2d 817, 226 Ky. 275.

43. *Iowa.—Lawson v. Fordyce*, 12 N.W.2d 301, 234 Iowa 632—*Handlon v. Henshaw*, 221 N.W. 489, 206 Iowa 771.

44. *Wash.—Harry v. Pratt*, 285 P. 440, 155 Wash. 552.

45. *Ala.—Harbin v. Moore*, 175 So. 264, 234 Ala. 266—*Pittman v. Calhoun*, 172 So. 263, 233 Ala. 450—*Alabama Produce Co. v. Smith*, 141 So. 674, 224 Ala. 688.

Cal.—Gayton v. Pacific Fruit Express Co., 15 P.2d 217, 127 Cal. App. 50.

Ill.—McGee v. Henry, 39 N.E.2d 412, 313 Ill.App. 147.

Iowa.—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27—*Tissue v. Durin*, 246 N.W. 806, 216 Iowa 709.

Kan.—Moler v. Cox, 149 P.2d 611, 158 Kan. 589—*Burkholder v. Cosand*, 58 P.2d 53, 144 Kan. 143.

Mich.—Kemp v. Aldrich, 282 N.W. 833, 286 Mich. 591, reheard 286 N.W. 81, 286 Mich. 715—*Wilkins*

in causing another vehicle⁴⁶ or object⁴⁷ to strike him. On such evidence it is also for the jury, or for the trial court in actions tried without a jury, to determine incidental questions,⁴⁸ such as the place of the accident,⁴⁹ whether it was defendant's motor vehicle which struck the pedestrian,⁵⁰ the manner in which the accident occurred,⁵¹ and whether defendant kept a lookout.⁵²

There must be legally sufficient evidence of defendant's negligence to warrant or require submission to the jury, and in various cases the evidence has been held insufficient to justify submission of defendant's negligence or of some question incidental thereto.⁵³ Where the evidence is sufficient to support a verdict for the pedestrian, a motion for a directed verdict in favor of defendant will be overruled.⁵⁴

v. Bradford, 225 N.W. 609, 247 Mich. 157—Sudinski v. Krohn, 219 N.W. 665, 242 Mich. 497.

Minn.—Ralston v. Tomlinson, 292 N. W. 24, 207 Minn. 485—Raths v. Sherwood, 262 N.W. 563, 195 Minn. 225.

Mo.—Robertson v. Scoggins, App., 73 S.W.2d 430.

N.H.—Dorrien v. Sirois, 175 A. 236, 87 N.H. 144.

N.J.—Klein v. Frank, 160 A. 411, 109 N.J.Law 231—Mursky v. Brody, 181 A. 273, 13 N.J.Misc. 725.

N.Y.—Hayes v. Fairbanks, 9 N.Y.S. 2d 236, 255 App.Div. 913.

N.D.—Schlinker v. Jaszowski, 232 N.W. 897, 60 N.D. 136.

Pa.—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Jenkins v. Policy, 50 A.2d 32, 160 Pa.Super. 6.

R.I.—Bryan v. Green, 150 A. 498.

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Wash.—Brammer v. Lappenbusch, 30 P.2d 947, 176 Wash. 625.

Wis.—Panzer v. Hesse, 24 N.W.2d 613, 249 Wis. 340.

42 C.J. p 1250 note 9.

Pedestrian pushing lawn mower

Cal.—Blodget v. Preston, 5 P.2d 25, 118 Cal.App. 297.

Injured person pushing automobile

Cal.—Wright v. Ponitz, 112 P.2d 25, 44 Cal.App.2d 215.

Ill.—Short v. Chrisman, 53 N.E.2d 731, 322 Ill.App. 71.

N.J.—Chiesa v. Public Service Coordinated Transport, 24 A.2d 369, 128 N.J.Law 69.

Pedestrian struck by rear view mirror of truck

Ky.—Brown v. Gibbs, 172 S.W.2d 62, 294 Ky. 423.

Walking along shoulder of highway

Tenn.—Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 24 Tenn.App. 487.

Failure to give warning

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Going in same direction

(1) Generally.

U.S.—Arnold v. Owens, C.C.A.N.C., 78 F.2d 495.

Ala.—W & W Pickle & Canning Co. v. Baskin, 181 So. 765, 236 Ala. 168.

Conn.—Peterson v. Meehan, 163 A. 757, 116 Conn. 150—Waselik v. Ferrie Const. Co., 157 A. 642, 114 Conn. 85.

Ill.—Alden v. Coultrip, 275 Ill.App. 306.

Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649.

Iowa.—Tissue v. Durin, 246 N.W. 806, 216 Iowa 709.

Ky.—Cheatham v. Chahal, 192 S.W. 2d 812, 301 Ky. 616—Igo v. Smith, 138 S.W.2d 497, 282 Ky. 336—Tompson v. Day's Adm'x, 86 S.W. 2d 1027, 261 Ky. 40—Chaney v. Holliday's Adm'r, 31 S.W.2d 926, 235 Ky. 610.

Md.—Porter v. Greenbrier Quarry Co., 155 A. 428, 161 Md. 34.

Mass.—Byrne v. Dunn, 5 N.E.2d 10, 296 Mass. 184.

Mich.—Volav v. Williams, 241 N.W. 846, 258 Mich. 184.

Minn.—Boyer v. Josephson, 240 N. W. 538, 185 Minn. 221.

Neb.—Johnson v. Anoka-Butte Lumber Co., 5 N.W.2d 114, 141 Neb. 851.

N.H.—Dane v. MacGregor, 52 A.2d 290, 94 N.H. 294.

N.C.—Puckett v. Dyer, 167 S.E. 43, 203 N.C. 684.

Pa.—Matasowski v. Jacobson, 186 A. 227, 122 Pa.Super. 180.

R.I.—Geremia v. Yellow Cab Co. of Rhode Island, 144 A. 771.

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Va.—Herbert v. Stephenson, 35 S.E. 2d 753, 184 Va. 457.

Wis.—Leckwe v. Ritter, 241 N.W. 339, 207 Wis. 333.

42 C.J. p 1250 note 9 [b].

(2) Operator of motor vehicle equipped with proper headlights was not negligent as matter of law in not seeing pedestrian walking on road ahead until instant before striking him.—Schmelske v. Laubin, 145 A. 890, 109 Conn. 206.

Going in opposite direction

Ala.—Pittman v. Calhoun, 165 So. 391, 231 Ala. 460.

Ark.—Lion Oil Refining Co. v. Smith, 133 S.W.2d 895, 199 Ark. 397.

Cal.—Houser v. Bozwell, 182 P.2d 314, 80 Cal.App.2d 702—Powers v. Cherry, 109 P.2d 361, 42 Cal.App.2d 489.

Mich.—Janse v. Haywood, 259 N.W. 347, 270 Mich. 632.

N.D.—Bratvold v. Lalum, 282 N.W. 514, 68 N.D. 534.

Wash.—Keller v. Breneman, 279 P. 588, 153 Wash. 208, 67 A.L.R. 92.

Wis.—Rodaks v. Herr, 251 N.W. 453, 213 Wis. 310—Kuebler v. Klug, 210 N.W. 701, 191 Wis. 259.

42 C.J. p 1250 note 9 [c].

48. Md.—Holler v. Lowery, 200 A. 353, 175 Md. 149.

Automobilist's negligence in stopping without noticing near approach of motor vehicle behind or giving signal was for jury as regards pedestrian's injury caused by following motor vehicle—Harry v. Pratt, 285 P. 440, 155 Wash. 552.

47. Collision with horse

In pedestrian's action for injuries and property damage sustained when overtaking motor truck collided with horse, and threw it on pedestrian, who was leading it along left-hand side of road in nighttime, whether driver of motor truck was negligent in that he cut in on turn and came over onto left side of highway was for jury.—Sertle v. McCullough, 63 P.2d 884, 155 Or. 216.

48. Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649.

Iowa.—Hartman v. Lee, 272 N.W. 140, 223 Iowa 32.

49. N.Y.—MacLean v. Coyne, 12 N. Y.S.2d 391, 257 App.Div. 899.

50. N.J.—Kovacs v. Ford, 158 A. 473, 108 N.J.Law 379.

51. Conn.—Waselik v. Ferrie Const. Co., 157 A. 642, 114 Conn. 85.

52. Ill.—Alden v. Coultrip, 275 Ill. App. 306.

53. Iowa.—Armbruster v. Gray, 282 N.W. 342, 225 Iowa 1226.

Minn.—Markgraf v. McMillan, 267 N.W. 515, 197 Minn. 571.

Where pedestrian threw himself in front of truck while driver was proceeding at lawful rate of speed and keeping proper lookout, evidence of truck driver's negligence was insufficient for jury.—Arnold v. Wood, 3 S.E.2d 374, 173 Va. 18.

54. Tenn.—Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 24 Tenn.App. 487.

(c) Crossing Highway

On conflicting evidence or where different inferences may be reasonably drawn from the evidence, it is for the jury to determine whether the defendant in the operation of a motor vehicle was guilty of negligence in causing injury to a pedestrian crossing the highway.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be

reasonably drawn therefrom, it is a question for the jury, or for the trial court in actions tried without a jury, to determine whether defendant in operating a motor vehicle was guilty of negligence in causing injury to a pedestrian crossing the highway,⁵⁵ as where the pedestrian was struck by defendant's motor vehicle⁵⁶ or due to defendant's

55. Cal.—Henry v. Lingsweller, 253 P. 357, 81 Cal.App. 142.
Pa.—McCaffrey v. Schwartz, 132 A. 810, 285 Pa. 561.
56. U.S.—Boston Elevated Ry. v. Greaney, C.C.A. Mass., 68 F.2d 657—Hrabak v. Hummel, D.C.Pa., 55 F.Supp. 775, affirmed, C.C.A., 143 F.2d 594, certiorari denied 65 S.Ct. 57, 323 U.S. 724, 89 L.Ed. 582—Nettles v. Southwest Telephone Co., D.C.Ark., 26 F.Supp. 12, appeal dismissed, C.C.A., Nettles v. Southwest Telephone Co., 106 F.2d 1010.
- Ala.—Cooper v. Auman, 122 So. 351, 219 Ala. 336.
- Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381, 60 Ariz. 354.
- Ark.—Adams v. Browning, 115 S.W.2d 868, 195 Ark. 1040—Hutson Motor Co. v. Lake, 98 S.W.2d 947, 193 Ark. 200.
- Cal.—Douglas v. Hoff, 185 P.2d 607, 82 Cal.2d 82—Watkins v. Nutting, 110 P.2d 384, 17 Cal.2d 490—Edwards v. McCormick, 181 P.2d 58, 79 Cal.App.2d 800—O'Brien v. Schellberg, 140 P.2d 159, 59 Cal.App.2d 764—Wiswell v. Shimmers, 117 P.2d 677, 47 Cal.App.2d 156—Martin v. Vierra, 93 P.2d 261, 34 Cal.App.2d 86, approval withheld by supreme court 94 P.2d 567 34 Cal.App. 86, hearing denied 94 P.2d 567, 34 Cal.App.2d 86—Guillot v. Hagman, 86 P.2d 865, 30 Cal.App.2d 582—Collonan v. Rosellini, 68 P.2d 367, 21 Cal.App.2d 33—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App.2d 738—Bamber v. Belprez, 58 P.2d 1325, 15 Cal.App.2d 110—Borum v. Graham, 40 P.2d 866, 4 Cal.App.2d 331—Crooks v. Doeg, 40 P.2d 590, 4 Cal.App.2d 21—Cowgill v. Rasmussen, 37 P.2d 860, 2 Cal.App.2d 279—Augenthaler v. Pinkert, 32 P.2d 686, 138 Cal.App. 455—Coughman v. Harman, 26 P.2d 851, 135 Cal.App. 49—Thompson v. Dentman, 21 P.2d 1009, 131 Cal.App. 680—De Lannoy v. Grammatikos, 14 P.2d 542, 126 Cal.App. 79—Strasburger v. Prescott, 295 P. 357, 111 Cal.App. 104—Potter v. Driver, 275 P. 526, 97 Cal.App. 311—Ching Wing v. Kishi, 268 P. 483, 92 Cal.App. 495—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671.
- Colo.—Stahl v. Cooper, 188 P.2d 894, 117 Colo. 445—Wendelin v. Ross, 62 P.2d 1157, 99 Colo. 365—Publix Cab Co. v. Phillips, 58 P.2d 486, 98 Colo. 542.
- Conn.—Olson v. Genalski, 184 A. 876, 121 Conn. 340—Haskin v. Mulligan, 165 A. 351, 116 Conn. 716—Miceli v. Chappell, 150 A. 508, 111 Conn. 723.
- D.C.—American Ice Co. v. Moorehead, 66 F.2d 792, 62 App.D.C. 266.
- Fla.—Williams v. Sauls, 9 So.2d 369, 151 Fla. 270.
- Ga.—Peck v. Baker, 46 S.E.2d 751, 76 Ga.App. 588.
- Idaho—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.
- Ill.—Mazanec v. Prosser, 56 N.E.2d 489, 323 Ill.App. 652—Kawkes v. Richter Food Products, 49 N.E.2d 852, 320 Ill.App. 134—Stevens v. Black & Co., 42 N.E.2d 349, 315 Ill.App. 38—Knight v. Citizens Coach Co., 30 N.E.2d 180, 307 Ill.App. 251—Hoeffling v. Reynolds, 11 N.E.2d 20, 292 Ill.App. 637—Nugent v. Waters, 266 Ill.App. 377.
- Ind.—Stinebaugh v. Lucid, 7 N.E.2d 69, 103 Ind.App. 690—Davis v. U.S. Nat. Bank of Indiana Harbor at East Chicago, 186 N.E. 339, 98 Ind.App. 580.
- Iowa.—Scott v. McKelvey, 290 N.W. 729, 228 Iowa 264—Swan v. Dalley-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, supplemental opinion 281 N.W. 504, 225 Iowa 89—Orth v. Gregg, 250 N.W. 113, 217 Iowa 516—Altflisch v. Wessel, 225 N.W. 862, 208 Iowa 361.
- Kan.—Claggett v. Phillips Petroleum Co., 73 P.2d 1015, 146 Kan. 846.
- Ky.—Smith v. Goodwin, 165 S.W.2d 976, 292 Ky. 37—Nowak v. Joseph, 121 S.W.2d 939, 275 Ky. 470—Jefferson's Adm'x v. Baker, 22 S.W.2d 448, 232 Ky. 98.
- Me.—Tilley v. Johnson, 153 A. 180, 130 Me. 18—MacDonald v. Pratt, 152 A. 532, 129 Me. 434.
- Md.—Vizzini v. Dopkin, 6 A.2d 637, 176 Md. 639—Sheer v. Rathje, 197 A. 613, 174 Md. 79—Ebert Ice Cream Co. v. Eaton, 187 A. 865, 171 Md. 30—Weitzel v. List, 155 A. 425, 161 Md. 28—Coplan v. Warner, 149 A. 1, 158 Md. 463—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Rudiger, 134 A. 326, 151 Md. 226.
- Mass.—Connell v. Kelleher, 58 N.E.2d 645, 317 Mass. 413—Baczek v. Damian, 29 N.E.2d 682, 307 Mass. 167—Conrad v. Masman, 191 N.E. 765, 287 Mass. 229—Legg v. Bloom, 184 N.E. 832, 282 Mass. 303—Griffin v. Feeney, 181 N.E. 710, 279 Mass. 602—McSorley v. Risdon, 180 N.E. 145, 278 Mass. 415—Durling v. Lamontain, 178 N.E. 827, 277 Mass. 517—Regan v. Rosenmark, 172 N.E. 90, 272 Mass. 256—Tvrrell v. Caruso, 168 N.E. 924, 269 Mass. 379—Quinn v. Miller, 165 N.E. 872, 267 Mass. 84—Donovan v. Mutrie, 164 N.E. 377, 265 Mass. 472—Lekarczyk v. Dupre, 163 N.E. 642, 265 Mass. 33.
- Mich.—Brow v. Bozyk, 26 N.W.2d 586, 317 Mich. 31—Black v. Amba, 12 N.W.2d 381, 307 Mich. 644—Ehlers v. Barbeau, 289 N.W. 241, 291 Mich. 528—Lagassée v. Quick, 262 N.W. 915, 273 Mich. 295—Rither v. Jacks, 251 N.W. 541, 265 Mich. 481—Hinchey v. J. P. Burroughs & Son, 215 N.W. 346, 240 Mich. 273.
- Minn.—Hickok v. Margolis, 22 N.W.2d 850, 221 Minn. 480—Lowen v. Pates, 18 N.W.2d 455, 219 Minn. 566—Schendel v. Klein, 9 N.W.2d 342, 215 Minn. 73—Johnson v. McCune, 280 N.W. 177, 203 Minn. 128—Bird v. Johnson, 272 N.W. 168, 199 Minn. 252—Hoppe v. Peterson, 265 N.W. 338, 196 Minn. 538—Heikinen v. Cashen, 235 N.W. 879, 183 Minn. 146—Saunders v. Yellow Cab Corporation of Minnesota, 233 N.W. 599, 182 Minn. 62.
- Miss.—Somerville v. Keeler, 145 So. 721, 165 Miss. 244.
- Mo.—Ruby v. Clark, 208 S.W.2d 251—Pitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—Snowwhite v. Metropolitan Life Ins. Co., 127 S.W.2d 718, 344 Mo. 705—Robinson v. O'Shanzky, App., 96 S.W.2d 895—Polkowski v. St. Louis Public Service Co., 68 S.W.2d 884, 229 Mo.App. 24—Marks v. Hurst, App., 296 S.W. 249.
- Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.
- N.H.—Bourque v. Strusa, 25 A.2d 127, 92 N.H. 94—Smith v. Bailey, 23 A.2d 363, 91 N.H. 507—Gosselin v. Lemay, 153 A. 716, 85 N.H. 13—Chemikles v. J. M. Wilson Co., 162 A. 275, 84 N.H. 437.
- N.J.—Van Rensselaer v. Viorst, 57 A.2d 49, 136 N.J.Law 628—Gribbin v. Fox, 32 A.2d 853, 130 N.J.Law 357, affirmed 35 A.2d 719, 131 N.J.Law 187—Volpe v. Ferruzzi, 3 A.2d 892, 122 N.J.Law 57, affirmed 8 A.2d 580, 123 N.J.Law 328—McConachy v. Skalerow, 171 A. 817, 113 N.J.Law 17—Shrodes v. Ferguson, 168

- A. 847, 111 N.J.Law 812—Stern v. Stulz-Sickles Co., 162 A. 571, 109 N.J.Law 415—Rochford v. Stanke-wicz, 158 A. 386, 108 N.J.Law 265—Haines v. Baker, 153 A. 614, 108 N.J.Law 190—Cattania v. Fleckenstein, 143 A. 315, 105 N.J.Law 174—Bora v. Yellow Cab Co., 135 A. 889, 103 N.J.Law 377—Lowe v. Tegen, 185 A. 526, 14 N.J.Misc. 419—Grauss v. Alpert, 169 A. 847, 12 N.J.Misc. 67—Andresen v. Zimmer-man, 169 A. 638, 12 N.J.Misc. 87—Trussell v. Gibson, 166 A. 898, 11 N.J.Misc. 481—Zecourt v. Gray, Inc., 152 A. 182, 8 N.J.Misc. 845—Esterbrook v. Public Service Transp. Co., 141 A. 167, 6 N.J.Misc. 368—Cofone v. Gnassi, 136 A. 505, 5 N.J.Misc. 343—Dugan v. Public Service Transp. Co., 136 A. 195, 5 N.J.Misc. 245.
- N.Y.—Dranofsky v. Collins, 67 N.Y. S.2d 620, 271 App.Div. 932—Lam-bros v. Miller, 58 N.Y.S.2d 577, 269 App.Div. 1046—Powell v. Ames, 30 N.Y.S.2d 943, 263 App.Div. 765—Schaffer v. Gambetta, 24 N.Y.S.2d 674, 261 App.Div. 132, affirmed 40 N.E.2d 654, 287 N.Y. 796—Frey v. Green Bus Lines, 19 N.Y.S.2d 810, 259 App.Div. 891, reargument de-nied 21 N.Y.S.2d 389, 259 App.Div. 1029, appeal denied—Rabinowitz v. Solomon, 223 N.Y.S. 264, 221 App. Div. 366
- N.C.—Ward v. Bowles, 45 S.E.2d 354, 228 N.C. 273
- N.D.—Armstrong v. McDonald, 4 N.W.2d 191, 72 N.D. 28.
- Ohio.—Smith v. Zone Cabs, 21 N.E.2d 336, 135 Ohio St. 415—Horwitz v. Eurove, 193 N.E. 644, 129 Ohio St. 8, 96 A.L.R. 782—Seward v. Schmidt, App., 49 N.E.2d 696—Bohnenkamp v. Hibberd, 41 N.E.2d 259, 70 Ohio App. 278—Weaver v. Liberty Cabs, App., 33 N.E.2d 853.
- Okl.—Safeway Cab Service Co. v. Minor, 70 P.2d 76, 180 Okl. 448—Ward v. Livingston, 15 P.2d 137, 159 Okl. 264.
- Or.—Bracht v. Palace Laundry Co., 65 P.2d 1039, 156 Or. 151—Purdin v. Richardson, 34 P.2d 926, 148 Or. 68—Emmons v. Skaggs, 4 P.2d 1115, 138 Or. 70—Lott v. De Luxe Cab Co., 299 P. 303, 136 Or. 349—Davis v. Springer, 275 P. 600, 128 Or. 582.
- Pa.—Miller v. Harris, 36 A.2d 309, 349 Pa. 55—McClellan v. Fox, 177 A. 823, 318 Pa. 433—Goodall v. Hess, 173 A. 693, 315 Pa. 289—Masi v. Mangione, 167 A. 314, 311 Pa. 589—Grebe v. Kligerman, 164 A. 796, 310 Pa. 60—Robertson v. Jewel Tea Co., 163 A. 530, 309 Pa. 293—Johnston v. Cheynev, 146 A. 551, 297 Pa. 199—Kaminski v. Bradley, 182 A. 150, 129 Pa.Super. 297—Miller v. Carey, 177 A. 511, 117 Pa.Super. 218—Armstrong v. McGraw, 175 A. 279, 115 Pa.Super. 156—Henry v. Butler, 161 A. 556, 106 Pa.Super. 299—Vivino v. Nevi-us, 98 Pa.Super. 574—Flynn v. Moore, 88 Pa.Super. 361—Miller v. Hellman, Com.Pl., 51 York Leg. Rec. 169.
- R.I.—Connolly v. Seitman, 9 A.2d 866, 64 R.I. 29—Salerno v. Sheern, 3 A.2d 657, 62 R.I. 121—Keough v. Duggan, 196 A. 398, 59 R.I. 496—Walsh v. Carroll, 175 A. 832, 54 R.I. 497, reargument denied 176 A. 927—Young v. Thornley, 166 A. 690—Chabot v. Andre, 161 A. 128, 52 R.I. 399, motion denied 161 A. 496—Wilmarth v. Cray, 149 A. 612, 50 R.I. 496.
- S.C.—Fahian v. Rephan, 7 S.E.2d 223, 192 S.C. 483.
- Tenn.—Henry v. Sharp, 9 Tenn.App. 350—Dennis v. Isler, 8 Tenn.App. 1.
- Vt.—McKale v. Weeks, 55 A.2d 199.
- Va.—Betha v. Virginia Elec. & Pow-er Co., 33 S.E.2d 651, 183 Va. 873—Miller v. Jones, 6 S.E.2d 607, 174 Va. 336—McBride v. First Nat. Bank, 196 S.E. 589, 170 Va. 282.
- Wash.—Bobst v. Hardisty, 91 P.2d 567, 199 Wash. 304—Ahrens v. An-derson, 57 P.2d 410, 186 Wash. 182—Eaton v. Hewitt, 17 P.2d 906, 171 Wash. 260—Howard v. Igeland, 17 P.2d 848, 171 Wash. 323—Baker v. Rosina, 5 P.2d 1019, 165 Wash. 532—Stiles v. Corbett, 241 P. 294, 136 Wash. 670.
- W.Va.—Yuncke v. Welker, 36 S.E.2d 410, 128 W.Va. 299—Walker v. Bed-wine, 170 S.E. 908, 114 W.Va. 100.
- Wis.—Callahan v. Rando, 3 N.W.2d 688, 240 Wis. 417—Edwards v. Kohn, 241 N.W. 331, 207 Wis. 381.
- 42 C.J. p 1250 note 11.
- Crossing street after alighting from streetcar or motorbus see infra subdivision f (3) of this section.
- Driver's admission that he did not see pedestrian** until he struck him was sufficient to raise jury question with respect to driver's negligence—Shepherd v. Smith, 88 P.2d 601, 198 Wash. 395.
- Backing**
- Mich.—Dubeau v. Bordeaux, 289 N.W. 198, 291 Mich. 418.
- 42 C.J. p 1250 note 11 [7].
- Collision of automobiles at street in-tersection**
- Md.—Slime & Sons v. Hooper, 164 A. 548, 164 Md. 244.
- Mo.—Felber v. Union Electric Light & Power Co., 100 S.W.2d 494, 340 Mo. 201.
- Wash.—Young v. Smith, 7 P.2d 1, 166 Wash. 411.
- 42 C.J. p 1250 note 11 [p].
- Control**
- Cal.—Thompson v. Baldwin, 80 P.2d 198, 26 Cal.App.2d 703.
- Conn.—Schofield v. Spelke, 177 A. 134, 119 Conn. 699.
- Ky.—Heskamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky. 618.
- Mo.—Wright v. Kidwell, App., 14 S.W.2d 499.
- Pa.—Burton v. Morvay, 41 A.2d 865, 351 Pa. 620.
- 42 C.J. p 1250 note 11 [b].
- Crossing street in dimout**
- Cal.—Thompson v. Held, 183 P.2d 711, 81 Cal.App.2d 275—Levin v. Martin, 148 P.2d 717, 64 Cal.App.2d 326.
- Disregarding traffic signals**
- N.J.—Conway v. Pickering, 166 A. 76, 111 N.J.Law 15.
- 42 C.J. p 1250 note 11 [1].
- Driving without lights**
- Md.—Matthews v. L'ohlmeyer, 176 A. 479, 167 Md. 689.
- S.C.—Drag v. Ellis, 36 S.E.2d 73, 207 S.C. 416.
- Failure to keep lookout**
- (1) Generally.
- Cal.—Foti v. Morrissey, 134 P.2d 51, 57 Cal.App.2d 328—Thompson v. Baldwin, 80 P.2d 198, 26 Cal.App.2d 703—Welch v. Sink, 74 P.2d 832, 24 Cal.App.2d 231.
- Conn.—Rosen v. Goldstein, 24 A.2d 810, 128 Conn. 605—Marini v. Wynn, 20 A.2d 400, 128 Conn. 53—Keeling v. Neuss Floor Covering Co., 14 A.2d 83, 126 Conn. 716—Schofield v. Spelke, 177 A. 134, 119 Conn. 699.
- D.C.—Spund v. Myers, 90 F.2d 380, 67 App.D.C. 135.
- Iowa.—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 281 N.W. 504, 225 Iowa 89—O'Hara v. Chaplin, 233 N.W. 516, 211 Iowa 404.
- Ky.—Remmers' Ex'r v. Mayhugh, 197 S.W.2d 450, 303 Ky. 366.
- Minn.—Himmel v. Orlski, 21 N.W.2d 605, 221 Minn. 192.
- Mo.—Nickelson v. Cowan, App., 9 S.W.2d 534.
- N.H.—Carr v. Orrill, 166 A. 270, 86 N.H. 226—Clark v. Temple, 164 A. 763, 86 N.H. 170—George v. New England Dressed Meat & Wool Co., 164 A. 209, 86 N.H. 121.
- N.J.—Hyman v. Bierman, 31 A.2d 762, 130 N.J.Law 170.
- Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186.
- Pa.—Sciullo v. Scholz, 188 A. 121, 324 Pa. 268.
- R.I.—Sokoloski v. Breen, 7 A.2d 723, 63 R.I. 115.
- Wis.—Ford v. Werth, 221 N.W. 729, 197 Wis. 211.
- 42 C.J. p 1250 note 11 [d].
- (3) Driver's failure to see pedes-trian slowly crossing street could not be held not negligence as mat-ter of law—Virginia Electric & Pow-er Co. v. Evich, 146 S.E. 265, 152 Va. 236.
- (3) Distraction of driver's atten-tion did not, as matter of law, re-lieve driver of duty arising from peril of pedestrian in front of bus.—Virginia Electric & Power Co. v. Evich, supra.
- (4) Operation of automobile in such relative position and proximity to other automobiles that motorist's

negligence he was struck by another vehicle.⁵⁷ | On conflicting evidence or where different in-

view of a crosswalk at intersection ahead of him and of pedestrians thereon is for a time obscured is not necessarily negligence as a matter of law.—*Ross v. Johnson*, 155 P.2d 486, 22 Wash.2d 275.

Failure to give warning

(1) Generally.

Ariz.—*City of Phoenix v. Mullen*, 174 P.2d 422, 65 Ariz. 83.

Cal.—*Cooper v. Smith*, 289 P. 614, 209 Cal. 562—*Varner v. Skor*, 67 P.2d 123, 20 Cal.App.2d 232.

Iowa.—*Lawlor v. Gaylord*, 10 N.W.2d 531, 233 Iowa 834.

Ky.—*Heskamp v. Bradshaw's Adm'r*, 172 S.W.2d 447, 294 Ky. 618—*Short Way Lines v. Sutton's Adm'r*, 164 S.W.2d 809, 291 Ky. 541—*Pryor's Adm'r v. Otter*, 105 S.W.2d 564, 268 Ky. 603—*Trainor's Adm'r v. Keller*, 79 S.W.2d 232, 257 Ky. 840—*Smith v. Ferguson*, 76 S.W.2d 606, 256 Ky. 545.

Mass.—*Arnold v. Colbert*, 173 N.E. 423, 273 Mass. 161—*Pawloski v. Hess*, 149 N.E. 122, 253 Mass. 478, affirmed *Hess v. Pawloski*, 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091.

Mich.—*Walker v. McGraw*, 271 N.W. 570, 279 Mich. 97.

Mo.—*Seithel v. St. Louis Dairy Co.*, 300 S.W. 280—*Bullmore v. Beeler*, App., 33 S.W.2d 161—*Cox v. Reynolds*, App., 18 S.W.2d 575—*Wright v. Kidwell*, App., 14 S.W.2d 499—*Loughlin v. Marr-Bridger Grocer Co.*, App., 10 S.W.2d 75—*Nickelson v. Cowan*, App., 9 S.W.2d 534.

N.H.—*Simoneau v. General Ice Cream Corporation*, 154 A. 634, 85 N.H. 57.

N.J.—*Handler v. Schandelmeyer*, 178 A. 85, 13 N.J.Misc. 315—*Ackley v. Hannawacker*, 171 A. 138, 12 N.J. Misc. 223.

Ohio.—*Richards v. Cleveland Jewish Orphan Home*, 154 N.E. 61, 22 Ohio App. 475.

Or.—*Dixon v. Raven Dairy*, 75 P.2d 347, 158 Or. 186—*Krieger v. Doolittle*, 18 P.2d 1041, 142 Or. 122.

Pa.—*Scullo v. Scholz*, 188 A. 121, 324 Pa. 268.

Tex.—*England v. Pitts*, Civ.App., 56 S.W.2d 493, error dismissed.

Wash.—*Durham v. Crist*, 38 P.2d 1054, 180 Wash. 213.
42 C.J. p 1250 note 11 [e].

(2) Negligence of a motorist in not sounding horn before striking pedestrian crossing street between intersections was for jury, since it could not be ruled as matter of law that motorist was excused from so signaling because of lack of time after seeing the pedestrian or because sound of brakes gave sufficient warning.—*Isor v. Brigham*, 17 A.2d 236, 111 Vt. 438.

Failure to stop

Cal.—*Weich v. Sink*, 74 P.2d 832, 24 Cal.App. 231.

42 C.J. p 1250 note 11 [j].

Injury by motorcycle

D.C.—*Boaze v. Windridge & Handy*, 102 F.2d 628, 70 App.D.C. 24.

N.D.—*Nichols v. Kluver*, 237 N.W. 640, 61 N.D. 42.

Injury to pushcart operator

Pa.—*Joannides v. Norris*, 23 A.2d 53, 146 Pa Super. 488.

Pedestrian falling on crossing

Mass.—*Neverett v. Patch*, 4 N.E.2d 304, 295 Mass. 454.

Mich.—*Soberg v. Sanders*, 220 N.W. 781, 243 Mich. 429.

Right of way

(1) Generally.

Ariz.—*City of Phoenix v. Mullen*, 174 P.2d 422, 65 Ariz. 83.

Ill.—*Moran v. Gatz*, 62 N.E.2d 443, 390 Ill. 478.

Ind.—*Red Cab v. White*, 12 N.E.2d 356, 213 Ind. 269.

N.J.—*Jackson v. Weyl*, 140 A. 422, 104 N.J. Law 306—*Byrne v. Butterworth*, 136 A. 708, 5 N.J.Misc. 425, affirmed 138 A. 918, 104 N.J. Law 164.

N.Y.—*Group v. Szenher*, 20 N.Y.S.2d 803, 260 App.Div. 308, affirmed 31 N.E.2d 508, 284 N.Y. 741—*Skoller v. Short*, 35 N.Y.S.2d 68.

Or.—*Dixon v. Raven Dairy*, 75 P.2d 347, 158 Or. 186.

Wash.—*Gable v. Field*, 66 P.2d 356, 189 Wash. 526—*Durham v. Crist*, 38 P.2d 1054, 180 Wash. 213.
42 C.J. p 1250 note 11 [f].

(2) If pedestrian who was struck by truck while crossing city street was on crosswalk when accident occurred, truck driver was negligent as matter of law in failing to yield right of way, but rule was otherwise, if she was not on crosswalk—*Smith v. Superior & Duluth Transfer Co.*, 10 N.W.2d 153, 243 Wis. 292, rehearing denied 11 N.W.2d 96, 243 Wis. 292.

(3) Fact that statute gave motorist right of way over pedestrian at time and place of accident was not conclusive on question whether trial court properly overruled motorist's motions for nonsuit and directed verdict.—*Keys v. Griffith*, 55 P.2d 15, 153 Or. 190.

Speed

U.S.—*Aboud v. Turner*, C.C.A.Pa., 72 F.2d 880.

Cal.—*Cooper v. Smith*, 289 P. 614, 209 Cal. 562—*Hoppe v. Bradshaw*, 108 P.2d 947, 42 Cal.App.2d 334.

Conn.—*Seofield v. Spelke*, 177 A. 134, 119 Conn. 699.

Ky.—*Smith v. Ferguson*, 76 S.W.2d 606, 256 Ky. 545.

Md.—*Edwards v. State*, for Use of Guy, 170 A. 761, 166 Md. 217.

Mass.—*Pawloski v. Hess*, 149 N.E. 122, 253 Mass. 478, affirmed *Hess v.*

Pawloski, 47 S.Ct. 632, 274 U.S. 352, 71 L.Ed. 1091.

Minn.—*Smith v. Barry*, 17 N.W.2d 324, 219 Minn. 182.

N.C.—*Templeton v. Kelley*, 2 S.E.2d 696, 215 N.C. 577.

Or.—*Krieger v. Doolittle*, 18 P.2d 1041, 142 Or. 122.

42 C.J. p 1250 note 11 [c].

Turning

(1) Generally.

U.S.—*Suburban Transit Corp. v. Malone*, C.C.A.S.C., 156 F.2d 422.

Mass.—*Reed v. Union St. Ry. Co.*, 71 N.E.2d 114, 320 Mass. 706.

Mo.—*O'Shea v. Pattison-McGrath Dental Supplies*, 180 S.W.2d 19, 352 Mo. 855—*Dickinson v. Abernathy Furniture Co.*, 96 S.W.2d 1086, 231 Mo.App. 303.

N.H.—*Nicholaides v. Wallace*, 169 A. 874, 86 N.H. 465.

N.J.—*Strutko v. Mann*, 11 A.2d 31, 124 N.J. Law 183.

Ohio.—*Focht v. Justis*, 77 N.E.2d 506, 81 Ohio App. 297.

Okl.—*Connelly v. Loub*, 38 P.2d 555, 169 Okl. 627.

Or.—*Lott v. De Luxe Cab Co.*, 299 P. 803, 136 Or. 349.

R.I.—*Sokoloski v. Breen*, 7 A.2d 723, 63 R.I. 115—*Cilfoil v. Fishbein*, 5 A.2d 232, 62 R.I. 277.

S.C.—*Holcombe v. W. N. Watson Supply Co.*, 171 S.E. 604, 171 S.C. 110.

42 C.J. p 1250 note 11 [h].

(2) U-turn.—*Maloney v. Moore*, 292 N.W. 356, 293 Mich. 428.

Wrong side of road

Cal.—*Varner v. Skov*, 67 P.2d 123, 20 Cal.App.2d 232.

Iowa.—*Handlon v. Henshaw*, 221 N.W. 489, 206 Iowa 771.

Ky.—*Davidson v. Ratliffe*, 126 S.W.2d 827, 277 Ky. 371.

Md.—*Fisher v. Finan*, 163 A. 828, 163 Md. 418—*Lusk v. Lambert*, 163 A. 188, 163 Md. 335.

Mich.—*Holmes v. Merson*, 280 N.W. 139, 285 Mich. 136—*Rentz v. Anhut*, 279 N.W. 891, 284 Mich. 695—*Dreyfus v. Daranco*, 234 N.W. 587, 253 Mich. 235.

Minn.—*Smith v. Barry*, 17 N.W.2d 324, 219 Minn. 182.

W.Va.—*Otte v. Miller*, 24 S.E.2d 90, 125 W.Va. 317.

42 C.J. p 1250 note 11 [g].

57. Conn.—*Foote v. E. P. Broderick Haulage Co.*, 195 A. 191, 123 Conn. 296.

Ga.—*American Bakeries Co. v. Johnson*, 200 S.E. 485, 59 Ga.App. 150.

N.Y.—*Olsen v. Jacklowitz*, 11 N.Y. S.2d 601, 256 App.Div. 1107, appeal denied.

Pa.—*Smith v. Yellow Cab Co.*, 132 A. 124, 285 Pa. 229.

Va.—*Holland v. Edelblute*, 20 S.E.2d 506, 179 Va. 685.

ferences reasonably may be drawn from the evidence, related questions are also for the jury, or for the trial court in actions tried without a jury,⁵⁸ such as whether defendant kept a proper lookout,⁵⁹ whether defendant gave the pedestrian a warning,⁶⁰ whether defendant could have warned the pedestrian,⁶¹ whether the pedestrian would have avoided injury had a warning been sounded,⁶² whether the sounding of the horn was a necessary, reasonable warning,⁶³ whether the pedestrian was crossing the road at the regular crossing,⁶⁴ at what point on the crosswalk or street the pedestrian was struck,⁶⁵ whether defendant saw the pedestrian in time to avoid the accident,⁶⁶ whether the pedestrian was struck by, or walked into the side

of, the motor vehicle,⁶⁷ and the position of the automobile at a particular time.⁶⁸ In addition, it is for the jury or trial court to determine whether the pedestrian or motorist had the right of way,⁶⁹ whether the traffic light showed green for the pedestrian or for the motorist,⁷⁰ and whether the pedestrian started to cross before the light changed in favor of defendant.⁷¹

There must be legally sufficient evidence of defendant's negligence to warrant or require submission to the jury, and in various cases the evidence has been held insufficient to justify submission of defendant's negligence or of some question incidental thereto.⁷² Where the evidence is

Pedestrian placed by defendant in position of peril

Mo.—Lee v. City Ice Co., App., 64 S.W.2d 736—Phillips v. Yellow Cab Co., 36 S.W.2d 419, 225 Mo App 1172.

Negligence of driver of parked car

Where motorist making left-hand turn at intersection was required to proceed near center of street to avoid taxicab parked double near intersection, and struck pedestrian passing in rear of taxicab, negligence of driver of improperly parked taxicab was for jury.—Baker v. Royal Blue Cab & Blue Line Sightseeing Co., 300 P. 167, 163 Wash 95.

58. Conn.—Barbieri v. Pandiscio, 163 A 469, 116 Conn. 48.

Ill.—Mazer v. Consumers Co., 13 N.E.2d 862, 294 Ill.App. 609.

Ind.—Dullin v. Long, 54 N.E.2d 652, 115 Ind.App. 94.

N.H.—Gosselin v. Lomay, 153 A. 716, 85 N.H. 13.

Pa.—Van Zyl v. Neltch, 176 A. 31, 116 Pa.Super. 68, modified on other grounds 176 A. 543, 116 Pa.Super. 68.

59. Iowa.—Minks v. Stenberg, 250 N.W. 883, 217 Iowa 119.

Ky.—Wildor v. Cadle, 13 S.W.2d 497, 227 Ky. 486.

Whether chauffeur might have seen plaintiff by proper lookout or was prevented by defect in lighting system of car, was for jury—Hanna v. Royce, 249 P. 173, 119 Or. 450.

60. Ky.—Chappell v. Doepel, 192 S.W.2d 809, 301 Ky. 622—Wildor v. Cadle, 13 S.W.2d 497, 227 Ky. 486.

Ohio.—Richards v. Cleveland Jewish Orphan Home, 154 N.E. 61, 22 Ohio App. 475.

61. Iowa.—O'Hara v. Chaplin, 233 N.W. 516, 211 Iowa 404.

62. Ky.—Jefferson's Adm'x v. Baker, 22 S.W.2d 448, 232 Ky. 98.

Mo.—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed. State ex rel. St. Louis Public

Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

63. N.D.—Hauken v. Coman, 268 N.W. 430, 66 N.D. 633.

64. Md.—Consolidated Gas, etc., Co v Rudiger, 134 A. 326, 151 Md. 226. Wis.—Smith v. Superior & Duluth Transfer Co., 10 N.W.2d 153, 243 Wis. 292, rehearing denied 11 N.W.2d 95, 243 Wis. 292.

65. Wash.—Johnston v. Elmore, 251 P. 558, 141 Wash. 293. 42 C.J. p 1252 note 14.

66. N.J.—Heckman v. Cohen, 100 A. 695, 90 N.J. Law 322.

Wash.—Johnston v. Elmore, 251 P. 558, 141 Wash. 293.

67. Iowa.—Robertson v. Carligen, 234 N.W. 824, 211 Iowa 963.

N.Y.—Frey v. Green Bus Lines, 19 N.Y.S.2d 810, 259 App.Div. 891, reargument denied 21 N.Y.S.2d 389, 259 App.Div. 1029, appeal denied.

Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186.

Pa.—Atkinson v. Coskey, 47 A.2d 156, 354 Pa. 297.

Wash.—Williams v. Brockman, 193 P.2d 863.

68. After the accident

Wash.—Mosso v. E. H. Stanton Co., 134 P. 941, 75 Wash. 220, L.R.A. 1916A 913.

69. Or.—Manning v. Hellock, 295 P. 207, 135 Or. 262.

70. Md.—Wintrobe v. Hart, 13 A.2d 365, 178 Md. 289.

Mo.—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26.

71. Pa.—Ferguson v. Charis, 170 A. 131, 314 Pa. 164.

72. Cal.—La Branch v. Scott, 185 P.2d 823, 82 Cal App.2d 1.

Conn.—Kligerman v. Rosenstein, 23 A.2d 925, 128 Conn. 455.

Kan.—Allen v. Pearce Dental Supply Co., 88 P.2d 1057, 149 Kan. 549.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Rudiger, 134 A. 326, 151 Md. 226.

Mo.—Raw v. Maddox, 93 S.W.2d 282, 230 Mo App 515.

N.J.—Church v. Diffany, 11 A.2d 55, 124 N.J. Law 100.

N.C.—Mitchell v. Melts, 18 S.E.2d 406, 220 N.C. 793—Bailey v. McKay, 152 S.E. 893, 198 N.C. 638.

Wash.—Turner v. Good, 8 P.2d 414, 167 Wash. 27.

Wis.—De Goey v. Hermesen, 288 N.W. 770, 233 Wis. 69.

Pedestrian crossing intersection against traffic signal

Md.—Weissman v. Hockamp, 188 A. 923, 171 Md. 197, dissenting opinion 189 A. 813, 171 Md. 197.

Pedestrian slipping in pool of oil

In action for injuries sustained by plaintiff who slipped and fell in pool of oil which resulted from collision of automobiles, where there was no evidence to show manner in which collision occurred or that collision was result of negligence of either driver, judgment of nonsuit was proper.—Cowen v. Katz, 197 A. 516, 130 Pa.Super. 337.

Pedestrian suddenly turning back

Evidence that pedestrian had started across street at intersection and suddenly turned back when progress was temporarily blocked by traffic and was struck by automobile that had received direction from traffic officer to proceed was insufficient to take question of negligence of motorist to jury.—Stafford v. Jones, 198 N.E. 745, 292 Mass. 489.

Lights on vehicle

Where several witnesses testified that lights of automobile were burning before automobile struck pedestrian, pedestrian's testimony that he saw no lights on automobile until after he was struck did not require submission to jury whether lights were burning before collision.—Besser v. Hill, 271 N.W. 921, 224 Wis. 211.

Nonsuit

N.J.—Wisniewski v. Weinstock, 50 A.2d 894, 135 N.J. Law 204—Wisniewski v. Weinstock, 31 A.2d 401,

uncontradicted and no inference of negligence on the part of defendant can reasonably be made therefrom, it has been held that defendant is not negligent as matter of law.⁷³ Where the evidence shows plaintiff's contributory negligence as a matter of law, it has been held to be error to submit defendant's negligence to the jury.⁷⁴ The failure of a driver to sound his horn on approaching an intersecting street, as required by ordinance, should not be submitted to the jury where the ordinance was not in evidence.⁷⁵ The fact that a pedestrian is crossing a street at a place other than a crosswalk when he is struck by a motorist does not as a matter of law acquit the motorist of a charge of negligence.⁷⁶

(d) Standing or Sitting upon Highway

Where the evidence is conflicting or different infer-

ences may reasonably be drawn from the evidence, it is for the jury to determine whether the defendant was guilty of negligence in the operation of a motor vehicle in causing injury to a pedestrian standing or sitting on the highway.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant in the operation of a motor vehicle was guilty of negligence in causing injury to a pedestrian standing or sitting on the highway,⁷⁷ as where the pedestrian was struck by defendant's motor vehicle⁷⁸ or he was struck by another vehicle as a result of defendant's negligent operation of a motor vehicle.⁷⁹ On such evidence incidental questions are also for the jury, or for the trial court in actions tried

180 N.J.Law 58, affirmed 50 A.2d 894, 135 N.J.Law 202.

73. Iowa.—Sheridan v. Limbrecht, 218 N.W. 278, 205 Iowa 573.

Kan.—Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 163 Kan 611.

Mo.—Goodson v. Schwandt, 300 S.W. 795, 318 Mo 666.

N.J.—Newman v. Katz, 169 A. 647, 112 N.J.Law 49.

N.C.—Tysinger v. Coble Dairy Products, 36 S.E.2d 246, 225 N.C. 717. 42 C.J. p 1252 note 16.

74. Cal.—Hoppe v. Bradshaw, 108 P.2d 947, 42 Cal.App.2d 334.

Mo.—Woods v. Moore, App., 48 S.W.2d 202.

Contributory negligence as question of law or fact see *infra* § 527.

75. Mo.—Althage v. People's Motorbus Co. of St. Louis, 8 S.W.2d 924, 320 Mo. 598.

76. Cal.—Douglas v. Hoff, 185 P.2d 607, 82 Cal.App.2d 82.

77. N.J.—Williams v. Harriott, 180 A. 851, 115 N.J.Law 497—Molnar v. Hildebrecht Ice Cream Co., 164 A 300, 110 N.J.Law 246.

Causing object to strike pedestrian

Negligence of truck driver striking sagging wire and pulling broken pole against plaintiff coach driver standing in street, who, after colliding with pole, was attempting to warn truck driver of low wire, was for jury.—Kennedy v. E. H. Scott Transp. Co., C.C.A.N.Y., 60 F.2d 717.

Automobile throwing slag into plaintiff's eye

Miss.—Wheat v. Teche Lines, 179 So. 553, 181 Miss. 408.

Injuries resulting from igniting or explosion of gasoline

N.J.—Molnar v. Hildebrecht Ice Cream Co., 164 A. 300, 110 N.J.Law 246.

Pa.—Dunmire v. Fitzgerald, 37 A.2d 596, 349 Pa. 511.

78. U.S.—Yellow Cab Co. of Philadelphia v. Kelly, C.C.A.Pa., 62 F.2d 1032—Walls v. Ellington, C.C. A Tenn., 31 F.2d 285

Cal.—Anthony v. Hobbie, App., 193 P.2d 718

Ga.—Aristocrat Dairy Products Co v. George, 34 S.E.2d 107, 72 Ga. App 494

Ill.—Kirman v. Hutchinson, 254 Ill. App 469

Me.—Huntton v. Wiley, 49 A.2d 910—Hill v. Finnemore, 172 A. 826, 132 Me. 459.

Md.—Geschwendt v. Yoe, 198 A. 720, 174 Md. 374.

Mass.—Da Silvia v. Dalton, 76 N.E. 2d 8.

Mich.—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128—Breen v. Thole, 229 N.W. 498, 249 Mich. 666

Minn.—Corridan v. Agranoff, 297 N.W. 759, 210 Minn. 237.

Mo.—Duckworth v. Dent, App., 135 S.W.2d 28, reversed on other grounds 142 S.W.2d 85, 346 Mo 518

—Robertson v. Scoggins, App., 73 S.W.2d 430—Zeller v. Wolff-Wilson Drug Co., App., 51 S.W.2d 881.

N.J.—Williams v. Hershfield Agency, 176 A. 574, 13 N.J.Misc. 134

N.C.—Baker v. Perrott, 46 S.E.2d 461, 228 N.C. 558

N.D.—Hutchinson v. Kinzley, 262 N.W. 251, 98 A.L.R. 1307, 66 N.D. 25.

Utah.—Nelson v. Lott, 17 P.2d 272, 81 Utah 265.

Va.—Gregory v. Daniel, 4 S.E.2d 786, 173 Va. 442.

Wash.—Carmin v. Port of Seattle, 116 P.2d 338, 10 Wash.2d 139.

W.Va.—Webb v. Harrison, 31 S.E.2d 686, 127 W.Va. 124.

42 C.J. p 1252 note 17.

Plaintiff cranking automobile

Ill.—Blachek v. City Ice & Fuel Co., 35 N.E.2d 416, 311 Ill.App. 1.

Plaintiff standing at rear of car

U.S.—Burdick v. Powell Bros Truck Lines, C.C.A.Ill., 124 F.2d 634.

Minn.—Anderson v. Johnson, 294 N.W. 224, 208 Minn 373.

Ohio.—Eisenmann v. Tester, 191 N.E. 839, 47 Ohio App 275.

Pa.—Greiner v. Turby, Com.Pl., 61 Dauph Co 85.

W.Va.—Webb v. Harrison, 31 S.E.2d 686, 127 W.Va. 124.

Backing

U.S.—Levin v. Joseph E Seagram & Sons, C.C.A.Ill., 158 F.2d 55, certiorari denied Joseph E Seagram & Sons v. Levin, 67 S.Ct. 971, 330 U.S. 835, 91 L.Ed 1282.

Or.—Sears v. Goldsmith, 298 P. 219, 136 Or. 151.

Passing standing vehicle

Cal.—Catton v. Kerns, 32 P.2d 153, 138 Cal App. 374.

Mo.—Robertson v. Scoggins, App., 73 S.W.2d 430.

42 C.J. p 1252 note 17 [e].

Failure to give warning

Utah.—Nelson v. Lott, 17 P.2d 272, 81 Utah 265.

79. Mo.—Ritz v. Cousins Lumber Co., 59 S.W.2d 1072, 227 Mo.App. 1167.

Ohio.—Ward v. Koors, App., 33 N.E. 2d 669.

Person standing in ditch

Where bus driver, turning on highway at night, permitted bus to remain across road with interior lights turned off, and without giving warning to approaching motorist, who, in attempting to avoid collision, struck plaintiff standing in ditch, whether bus driver was negligent was for jury.—Lashley v. Dawson, 160 A. 738, 162 Md. 549.

Causing automobile following to strike pedestrian

Mo.—Ritz v. Cousins Lumber Co., 59 S.W.2d 1072, 227 Mo.App. 1167.

without a jury,⁸⁰ such as whether defendant's automobile was under control,⁸¹ whether it was driven at an excessive speed,⁸² and how and where the accident occurred.⁸³

There must be legally sufficient evidence of defendant's negligence to warrant or require submission to the jury, and in various cases the evidence has been held insufficient to justify submission.⁸⁴

(c) On Sidewalk

On conflicting evidence or where more than one inference may be drawn from the evidence, it is for the jury to determine whether the defendant in the operation of a motor vehicle was guilty of negligence in causing injuries to a pedestrian on the sidewalk.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury, or for the trial court in actions tried without a

jury, whether defendant in the operation of a motor vehicle was guilty of negligence in causing injuries to a pedestrian on the sidewalk,⁸⁵ as where the pedestrian was struck by defendant's motor vehicle⁸⁶ or he was struck by another vehicle as a result of defendant's negligent operation of a motor vehicle.⁸⁷ On such evidence incidental questions are also for the jury or for the trial court in actions tried without a jury,⁸⁸ such as the pedestrian's position on the sidewalk at the time of the accident.⁸⁹

There must be legally sufficient evidence of defendant's negligence to warrant or require submission to the jury, and in various cases the evidence has been held insufficient to justify submission of defendant's negligence or of some question incidental thereto.⁹⁰

(2) Persons Working upon or in Highway

On conflicting evidence or where more than one infer-

80. Ky.—McElrath v. Barnett, 120 S.W.2d 216, 274 Ky. 771.
Md.—Potterall v. Hilleary, 13 A.2d 358, 178 Md. 335.

81. Ill.—Kirman v. Hutchinson, 251 Ill.App. 469.

82. Ill.—Kirman v. Hutchinson, supra.

83. Ky.—Smith v. Dunning, 132 S.W.2d 781, 275 Ky. 733.

84. U.S.—Proel v. Nugent, C.C.A.N.H., 97 F.2d 353.

Iowa—Reid v. Brooke, 266 N.W. 477, 221 Iowa 808—Carstensen v. Thomsen, 245 N.W. 731, 215 Iowa 427.

Pa.—Griswold v. Drumbheller, Com.Pl., 60 Montg.Co. 147.

85. U.S.—Griffith-Consumers Co. v. Rollings, C.C.A.Va., 79 F.2d 452.
Or.—Hansen v. Bedell Co., 285 P. 823, 132 Or. 332.

Causing canopy to fall on pedestrian

Cal.—Holahan v. McGrew, 295 P. 1059, 111 Cal.App. 443.

86. Cal.—Linberg v. Stango, 297 P. 9, 211 Cal. 771, 75 A.L.R. 555—Wiley v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal.App. 221—Briggs v. Jess Mead, Inc., 270 P. 263, 93 Cal.App. 666—Smith v. Hollander, 259 P. 958, 85 Cal.App. 535—Smith v. Hollander, App., 257 P. 577.

Mass.—White v. Checker Taxi Co., 187 N.E. 49, 284 Mass. 73.

Pa.—Crago v. Sickman, 165 A. 841, 310 Pa. 546—Hunter v. Pope, 137 A. 731, 289 Pa. 560—Henderson v. Horner, 135 A. 203, 287 Pa. 298.

R.I.—Lutz v. Ingram, 190 A. 439, 57 R.I. 428.

Va.—U-Run-It Co. v. Merryman, 153 S.E. 661, 154 Va. 467.
42 C.J. p. 1252 note 19.

Standing on sidewalk at bus stop
R.I.—Peters v. United Electric Rys. Co., 189 A. 901, 57 R.I. 311.

Standing near curb
Ohio—Ittegel v. Oakwood St. Ry. Co., App., 42 N.E.2d 676.
Pa.—Ross v. Ruffle, 164 A. 913, 310 Pa. 176.

Standing on edge of subway vent
N.Y.—Muller v. Houchel, 282 N.Y. S. 649, 246 App.Div. 547.

Person on grass plat between curb and sidewalk
U.S.—Steele v. Commercial Milling Co., C.C.A.Mich., 50 F.2d 1037, 84 A.L.R. 278.

Person seated on sidewalk near garage doors
Ky.—Blackburn v. Cornette, 295 S.W. 1046, 220 Ky. 758.

Person struck by door of automobile
Me.—Young v. Potter, 174 A. 387, 133 Me. 104.

Pa.—Young v. Yellow Cab Co., 180 A. 63, 118 Pa.Super. 495.

W.Va.—Harmon v. Midland Trail Transit Co., 148 S.E. 379, 107 W.Va. 390.

Backing
Ky.—Guyan Chevrolet Co. v. Dillow, 95 S.W.2d 796, 264 Ky. 812.

Mass.—Thomas v. Spinney, 39 N.E.2d 753, 310 Mass. 749.

N.J.—Kapner v. Strauss, 166 A. 113, 11 N.J.Misc. 373.

Pa.—Giannone v. Reale, 3 A.2d 331, 333 Pa. 21—Itzkovich v. Royal Electrottype Co., 100 Pa.Super. 310.

S.C.—Cobb v. Southern Public Utilities Co., 187 S.E. 363, 181 S.C. 310.

Failure to give warning

Cal.—Smith v. Hollander, 259 P. 958, 85 Cal.App. 535.

42 C.J. p. 1252 note 19 [d].

Result of collision between two automobiles

Cal.—Chandler v. Benafel, 39 P.2d 890, 3 Cal.App.2d 368.

N.J.—Ceram v. Zimmerman, 148 A. 154, 8 N.J.Misc. 24.

Okl.—Newell v. Musgrove, 264 P. 156, 129 Okl. 207.

Pa.—Hegarty v. Berger, 155 A. 484, 304 Pa. 221.

42 C.J. p. 1252 note 19 [e].

Result of collision between motorcycle and automobile

Ill.—Brumit v. Wasson, 33 N.E.2d 740, 310 Ill.App. 264.

Result of collision between automobile and street car

Cal.—Alberts v. Lytle, 37 P.2d 705, 1 Cal.App.2d 682.

87. Ill.—Minnis v. Friend, 196 N.E. 191, 360 Ill. 328.

Iowa—Remer v. Takin Bros. Freight Lines, 289 N.W. 477, 227 Iowa 903.

Ky.—Field v. Collins, 98 S.W.2d 45, 266 Ky. 67—Field v. Collins, 92 S.W.2d 793, 263 Ky. 474.

N.Y.—Robinson v. City of New York, 44 N.Y.S.2d 939, 266 App.Div. 1024.
Or.—Hansen v. Bedell Co., 285 P. 823, 132 Or. 332.

88. Pa.—Hunter v. Pope, 137 A. 731, 289 Pa. 560.

89. Pa.—Hunter v. Pope, supra.

90. Mass.—Kane v. Metropolitan Coal Co., 174 N.E. 266, 274 Mass. 63.

Backing out of garage across sidewalk

Colo.—McMillan v. Keck, 260 P. 1079, 82 Colo. 434.

ence may be drawn from the evidence, it is for the jury to determine whether the defendant in the operation of a motor vehicle was guilty of negligence in causing injuries to persons working on the highway, including police and traffic officers.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury, or for the trial court in actions tried without

a jury, whether defendant in the operation of a motor vehicle was guilty of negligence in causing injuries to persons working on or in the highway,⁹¹ as where such persons were struck by defendant's motor vehicle.⁹² On such evidence incidental or related questions are also for the jury or trial court,⁹³ as, for example, whether plaintiff was

91. Cal.—Scott v. Sheedy, 102 P.2d 575, 39 Cal.App.2d 96.

Mo.—Smith v. Sledhoff, 209 S.W.2d 233.

Pa.—Jenkins v. Fady, 144 A. 429, 294 Pa. 490.

Care as to persons working in or on highway see supra § 391.

Spinning wheels throwing stones against worker's head

Ala.—Railway Express Agency v. Brown, 141 So. 726, 25 Ala.App. 121.

Striking ladder causing injury to roofer

Pa.—Caulton v. Eyre & Co., 199 A. 136, 330 Pa. 385.

92. U.S.—Sprinkle v. Davis, C.C.A. Va., 111 F.2d 925, 128 A.L.R. 1101.

Ala.—Cooper v. Agee, 132 So. 173, 222 Ala. 334.

Cal.—Henshaw v. Belyea, 31 P.2d 348, 220 Cal. 458.

Conn.—Maio v. Rooney, 194 A. 721, 123 Conn. 683—Pfaff v. H. T. Smith Express Co., 181 A. 621, 120 Conn. 553—Viretto v. Tricarico, 165 A. 345, 116 Conn. 718.

Iowa—Youngman v. Sloan, 281 N.W. 130, 225 Iowa 558—Vass v. Martin, 226 N.W. 920, 209 Iowa 870.

Kan.—Hill v. Southern Kansas Stage Lines Co., 53 P.2d 923, 143 Kan. 44.

Mass.—Ferrairs v. Hewes, 16 N.E.2d 674, 301 Mass. 116.

Minn.—Peterson v. Norris, 258 N.W. 729, 193 Minn. 400—Shearer v. Puente, 208 N.W. 182, 166 Minn. 425.

N.H.—Colby v. Avery, 40 A.2d 841, 93 N.H. 250.

Pa.—Susser v. Wiley, 39 A.2d 616, 350 Pa. 427—Wenhold v. O'Dea, 12 A.2d 115, 338 Pa. 33—Marcheskie v. Thompson, Com.Pl., 13 Northumb.Leg.J. 319.

R.I.—Ball v. Webster, 13 A.2d 278, 65 R.I. 34.

Tenn.—Ledford v. Southeastern Motor Truck Lines, App., 200 S.W.2d 981—Havron v. Page, 157 S.W.2d 856, 25 Tenn.App. 367.

Wis.—General Accident Fire & Life Assur. Corporation v. Henneman, 240 N.W. 803, 207 Wis. 464.

42 C.J. p 1252 note 22.

Bridge tender or ticket collector

U.S.—Sutton v. Public Service Interstate Transp. Co., C.C.A.N.Y., 157 F.2d 947, certiorari denied Public Service Interstate Transp. Co.

v. Sutton, 67 S.Ct. 870, 330 U.S. 828, 91 L.Ed. 1277.

Ill.—Koch v. Barker, 41 N.E.2d 329, 314 Ill.App. 378.

N.J.—Byer v. H. R. Ritter Trucking Co., 35 A.2d 633, 131 N.J.Law 199.

Flagman or watchman at crossing

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

Ohio.—Tamplin v. Pennsylvania R. Co., App., 51 N.E.2d 736

Wis.—Crook v. Broche, 252 N.W. 565, 214 Wis. 245.

Person painting divisor line in center of highway

Pa.—Birnesser v. McGath, 52 A.2d 188, 356 Pa. 375.

Person removing spare tire from rear

Mich.—Patt v. Dilley, 263 N.W. 749, 273 Mich. 601.

Person repairing motor vehicle

U.S.—Ryan-Richards, Inc. v. Whitesides, C.C.A.Okla., 96 F.2d 826.

Cal.—White v. Davis, 284 P. 1086, 103 Cal.App. 531.

Ga.—Tatum v. Crowell, 174 S.E. 258, 49 Ga.App. 27, conforming to answers 174 S.E. 140, 178 Ga. 679

—Tatum v. Crowell, 163 S.E. 228, 44 Ga.App. 853

Mo.—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379.

N.J.—Renson v. Brady, 185 A. 343, 5 N.J.Misc. 13.

N.D.—Harmon v. Haas, 241 N.W. 70, 61 N.D. 772, 80 A.L.R. 1131.

Okla.—Wisdom v. Bernhard, 40 P.2d 679, 170 Okl. 385

Tex.—Carson v. Amberson, Civ.App., 148 S.W.2d 972, error dismissed, judgment correct.

Wash.—Davis v. North Coast Transp. Co., 295 P. 921, 160 Wash. 576.

Person unloading truck

N.Y.—Friedman v. Raisin & Levine, 282 N.Y.S. 640, 246 App.Div. 545.

S.C.—Powell v. Drake, 18 S.E.2d 745, 199 S.C. 212.

Highway not open to public use

In action by member of highway crew for injuries sustained when he was struck by truck driven by defendant on highway which had not been open to public use, question of defendant's negligence was for jury. —Lind v. Eddy, 6 N.W.2d 427, 232 Iowa 1228, 146 A.L.R. 695.

Backing

Ark.—D. F. Jones Const. Co. v. Mize, 146 S.W.2d 709, 201 Ark. 702—

Blakemore v. Stevens, 67 S.W.2d 733, 188 Ark. 755.

Conn.—Distefano v. Universal Trucking Co., 164 A. 492, 116 Conn. 249.

Iowa.—Wamser v. Bostian, 298 N.W. 860, 230 Iowa 792—Rebmann v. Heesch, 288 N.W. 695, 227 Iowa 566—Huston v. Lindsay, 276 N.W. 201, 224 Iowa 281.

Ky.—Berry v. Irwin, 295 S.W. 1020, 220 Ky. 708.

N.Y.—Armieri v. Mertens, 282 N.Y.S. 714.

Pa.—Peters v. Schroeder, 138 A. 755, 290 Pa. 217.

Wis.—Czarnetzky v. Booth, 246 N.W. 574, 210 Wis. 536.

Control

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

Failure to give warning

Mo.—Woods v. Moore, App., 48 S.W. 2d 202.

Neb.—Thomison v. Buehler, 25 N.W. 2d 391, 147 Neb. 811.

W.Va.—Tilley v. Cole, 13 S.E.2d 153, 123 W.Va. 28.

Failure to keep lookout

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

Ohio.—Tamplin v. Pennsylvania R. Co., App., 51 N.E.2d 736.

W.Va.—Tilley v. Cole, 13 S.E.2d 153, 123 W.Va. 28.

Wis.—Crook v. Broche, 252 N.W. 565, 214 Wis. 245.

42 C.J. p 1252 note 22 [c].

Failure to stop

Tenn.—Ledford v. Southeastern Motor Truck Lines, 200 S.W.2d 981.

42 C.J. p 1252 note 22 [b].

Speed

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

W.Va.—Tilley v. Cole, 13 S.E.2d 153, 123 W.Va. 28.

42 C.J. p 1252 note 22 [a].

Result of collision between two automobiles

Pa.—Lonasco v. Veill, 45 A.2d 417, 158 Pa.Super. 456.

Result of collision between automobile and railroad engine

Ohio.—Tamplin v. Pennsylvania R. Co., App., 51 N.E.2d 736.

Wash.—McAbee v. French, 274 P. 713, 150 Wash. 646.

93. Cal.—White v. Davis, 284 P. 1086, 103 Cal.App. 531.

Ohio.—Tamplin v. Pennsylvania R. Co., App., 51 N.E.2d 736.

struck by defendant.⁹⁴ The credibility of the witnesses is for the jury.⁹⁵

The evidence must be legally sufficient to warrant or require submission to the jury, and in various cases the evidence has been held insufficient to justify the submission to the jury of defendant's negligence or of some question incidental thereto.⁹⁶

Police or traffic officer. Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury or for the trial court in actions tried without a jury, whether defendant was guilty of negligence in causing injury to a police or traffic officer,⁹⁷ as where such officer was struck by defendant's motor vehicle.⁹⁸ On such evidence related questions also are for the jury or trial court,⁹⁹ such as how fast defendant was going,¹ whether he gave a warning of his approach to the street crossing,² and his position on the street before the collision.³

(3) Persons Boarding or Alighting from Streetcar or Other Vehicle

(a) In general

(b) Streetcar

(a) In General

On conflicting evidence or where different inferences may reasonably be drawn from the evidence it is for the jury to determine whether the defendant in the operation of a motor vehicle was guilty of negligence in causing injury to a person boarding or alighting from a vehicle, such as a motorbus.

Where the evidence is legally sufficient and is in conflict or more than one inference may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant in the operation of a motor vehicle was negligent in causing injury to a person boarding or alighting from a vehicle,⁴ as where such person was struck by defendant's motor vehicle⁵ while entering⁶ or alighting from⁷ a vehicle. On such evidence, incidental questions also are for the jury or trial court,⁸ such as the question whether defendant failed to give a warning or signal.⁹ The evidence must be legally sufficient to warrant or require submission to the jury of defendant's negligence or of some question incidental thereto.¹⁰

Motorbus. On conflicting evidence, the question whether defendant was guilty of negligence in causing injury to a person boarding or alighting from a motorbus,¹¹ as where such person was

94. N.Y.—Markowitz v. Landeman, 150 N.Y.S. 345, 164 App.Div. 679.
Wis.—Crook v. Broche, 252 N.W. 565, 214 Wis. 245.

95. Mo.—Dempsey v. Horton, 84 S.W.2d 621, 337 Mo. 379.

96. Mass.—Emeneau v. Doyle, 184 N.E. 720, 282 Mass. 250.

Minn.—Bakken v. Lewis, 26 N.W.2d 478, 223 Minn. 329.

Mo.—Smith v. Siedhoff, 209 S.W.2d 233.

Neb.—Corkle v. Fenton, 288 N.W. 55, 137 Neb. 54.

Bridge painter

Cal.—Montgomery v. Globe Grain & Milling Co., 293 P. 856, 109 Cal. App. 695.

97. Mass.—Mathews v. Carr, 171 N.E. 660, 271 Mass. 362.

98. Ill.—Cooney v. Hughes, 34 N.E.2d 566, 310 Ill.App. 371.

Ky.—Louisville Ry. Co. v. Offutt's Adm'x, 55 S.W.2d 391, 246 Ky. 508.

N.J.—Rusk v. Jeffries, 164 A. 313, 110 N.J.Law 307—Hughes v. English, 152 A. 473, 9 N.J.Misc. 28.

Pa.—Seret v. Carbley, 39 A.2d 607, 350 Pa. 434.

42 C.J. p 1252 note 24.

Near scene of automobile collision

Cal.—Leader v. Atkinson, 121 P.2d 759, 49 Cal.App.2d 265.

School janitor acting as traffic officer

Pa.—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515.

99. N.J.—Desmond v. Basch, 108 A. 362, 94 N.J.Law 52.

1. N.J.—Desmond v. Basch, *supra*.

2. N.J.—Desmond v. Basch, *supra*.

3. N.J.—Desmond v. Basch, *supra*.

4. Iowa.—Hanson v. Manning, 239 N.W. 793, 213 Iowa 625.

Md.—Mahan v. State, to Use of Carr, 191 A. 575, 172 Md. 373.

Care as to persons boarding or alighting from street car or other vehicle see *supra* § 392.

Motorist stopping to render assistance

Iowa.—Lukin v. Marvel, 259 N.W. 782, 219 Iowa 773.

5. Iowa.—Hanson v. Manning, 239 N.W. 793, 213 Iowa 625.

Milk wagon driver on step of wagon

Pa.—Hayes v. Axelrod, 3 A.2d 346, 332 Pa. 518.

6. Ill.—Bellchambers v. Ebeling, 13 N.E.2d 804, 294 Ill.App. 247.

Iowa.—Hanson v. Manning, 239 N.W. 793, 213 Iowa 625.

Ohio.—Smith v. Hoskins, 17 N.E.2d 955, 59 Ohio App. 298.

Tenn.—Ezell v. Post Sign Co., App., 205 S.W.2d 13.

Entering towing automobile

Wash.—Discargar v. City of Seattle, 171 P.2d 205, 25 Wash.2d 306.

Entering unlighted automobile

Minn.—Erickson v. Morrow, 287 N.W. 628, 206 Minn. 58.

Passenger entering taxicab

Pa.—Fetterolf v. Yellow Cab Co., 11 A.2d 516, 139 Pa.Super. 463.

Backing

Me.—Pabody v. Sweet, 152 A. 312, 129 Me. 375.

7. U.S.—Virginia Motor Express v. Jimenez, CCA Va., 76 F.2d 694.

Cal.—Ketchum v. Pattee, 98 P.2d 1051, 37 Cal.App.2d 122.

Minn.—Judge v. Endriss, 284 N.W. 788, 204 Minn. 589.

Pa.—Sprague v. Zeck, 194 A. 904, 327 Pa. 592.

Passenger alighting from taxicab

N.J.—Ihen v. Meyers, 155 A. 480, 9 N.J.Misc. 676.

8. Lights deceiving motorist

Whether lights of repair truck parked on wrong side behind car stopped for repairs deceived motorist striking one stepping into stopped automobile was for jury.—Hanson v. Manning, 239 N.W. 793, 213 Iowa 625.

9. Iowa.—Hanson v. Manning, *supra*.

10. Fla.—Sharpe v. Aqua Systems, 13 So.2d 903, 153 Fla. 154.

11. Ohio.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284.

struck by defendant's motor vehicle¹² while he was crossing the street after alighting from the bus,¹³ is one of fact. There must be legally sufficient evidence to warrant or require submission to the jury of defendant's negligence or of some question incidental thereto.¹⁴

(b) Streetcar

On conflicting evidence or where more than one inference may be drawn from the evidence it is for the jury to determine whether the defendant in the operation of a motor vehicle was guilty of negligence in causing injuries to persons moving to or from a streetcar.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury, or for the trial court in actions tried without a jury, to determine whether defendant in the operation of a motor vehicle was guilty of negligence

in causing injuries to persons moving to or from a streetcar,¹⁵ as where such persons were struck by defendant's motor vehicle.¹⁶ The weight of the evidence and the credibility of the witnesses are for the jury.¹⁷ On such evidence incidental questions are also for the jury or trial court,¹⁸ such as whether defendant violated the statute requiring automobiles to stop behind a car which stops to discharge or take on passengers,¹⁹ or whether the streetcar had stopped when defendant started to pass it.²⁰

There must be legally sufficient evidence to require or warrant submission to the jury, and in various cases the evidence has been held insufficient to justify the submission of defendant's negligence or of some question incidental thereto.²¹

Crossing street after alighting. On conflicting

12. Miss.—Ross v. West, 30 So.2d 310.

N.H.—Manor v. Gagnon, 32 A.2d 688, 92 N.H. 435.

Backing from driveway into street

Cal.—Coats v. Hathorn, 8 P.2d 1038, 121 Cal.App. 257.

13. Me.—Haskell v. Herbert, 48 A.2d 637.

Miss.—Ross v. West, 30 So.2d 310
Ohio.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284.

Pa.—Weibel v. Ferguson, 19 A.2d 357, 342 Pa. 113.

Child alighting from school bus

Ala.—International Harvester Co. v. Williams, 133 So. 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595.

Conn.—Lange v. Hoyt, 159 A. 575, 114 Conn. 590, 82 A.L.R. 486.

Pa.—Fedorovich v. Glenn, 9 A.2d 358, 337 Pa. 60.

S.C.—Fisher v. J. H. Sheridan Co., 189 S.E. 356, 182 S.C. 316, 108 A.L.R. 981.

Wash.—Machenheimer v. Falknor, 255 P. 1031, 144 Wash. 27.

14. Fla.—Sharpe v. Aqua Systems, 13 So.2d 903, 153 Fla. 154.

15. Ky.—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.

Care as to persons boarding or alighting from streetcars see supra § 392.

16. Cal.—Malachowski v. Varro, 244 P. 936, 76 Cal.App. 207.

D.C.—Yellow Cab Co. of D. C. v. Griffith, Mun.App., 40 A.2d 340.

Mo.—Welp v. Bogy, 8 S.W.2d 599, 320 Mo. 672—Vitale v. Blando, App., 52 S.W.2d 24, certiorari quashed State ex rel. Blando v. Hald, Sup., 60 S.W.2d 38.

Pa.—Cervinka v. Horlacher Delivery Service, 165 A. 857, 310 Pa. 504.

Utah.—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.

42 C.J. p 1253 note 29.

Where any substantial evidence tends to support complaint against motorist striking pedestrian waiting for streetcar, case is for jury—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912.

Interurban car

Mich.—Petrusha v. Korinek, 213 N.W. 188, 237 Mich. 583.

Passing streetcar going in same direction

Cal.—Morgan v. Los Angeles Rock & Gravel Corporation, 287 P. 152, 105 Cal.App. 224.

42 C.J. p 1253 note 29 [a].

Passing streetcar going in opposite direction

Mass.—Hepburn v. Walters, 160 N.E. 783, 263 Mass. 139.

Pa.—Smith v. Wistar, 194 A. 486, 327 Pa. 419.

42 C.J. p 1253 note 29 [b].

Alighting from streetcar

U.S.—Wawin Coal Co. v. Orr, C.C.A. Minn., 33 F.2d 27.

Cal.—Dinsmore v. California Highway Indemnity Exchange, 1 P.2d 431, 213 Cal. 107—Gonnermann v. Roberts, 248 P. 749, 78 Cal.App. 378.

Ill.—Dennehy v. W. A. Wood Co., 2 N.E.2d 586, 285 Ill.App. 598.

Mass.—Hepburn v. Walters, 160 N.E. 783, 263 Mass. 139.

Mo.—Hampe v. Versen, 32 S.W.2d 793, 224 Mo.App. 1144.

Crossing street to board streetcar

(1) Generally.

Ill.—Langford v. Smith, 51 N.E.2d 789, 320 Ill.App. 684—Fischer v. Kluck, 15 N.E.2d 346, 295 Ill.App. 621.

Ky.—Shatz v. Raiser, 158 S.W.2d 627, 289 Ky. 297.

Md.—Summers v. Brown, 183 A. 246, 170 Md. 695.

Mass.—Shepherd v. Nirenstein, 172 N.E. 917, 273 Mass. 7—Simonsen v. Angel, 152 N.E. 52, 256 Mass. 256.

Mont.—Hill v. Haller, 90 P.2d 977, 108 Mont. 251.

N.J.—Poole v. Twentieth Century Operating Co., 1 A.2d 389, 121 N.J. Law 244.

Wash.—Johnston v. Elmore, 251 P. 558, 141 Wash. 293.

(2) Coming around front of street car to board it—Sillik v. Hoeck, 178 A. 852, 168 Md. 639.

(3) Injury by motorcycle.—Hoelker v. American Press, 296 S.W. 1008, 317 Mo. 64.

Failure to keep lookout

Utah.—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.

Failure to stop

Motor truck driver failing to stop the required number of feet behind streetcar, stopping for passengers, was not negligent as matter of law.—Morss v. Murphy Transfer & Storage Co., 211 N.W. 950, 170 Minn. 1.

17. Mont.—Hill v. Haller, 90 P.2d 977, 108 Mont. 251.

18. Whether automobilist passed streetcar's rear gates before striking one seeking to board it was for jury.—Pierce v. Sanden, C.C.A.Minn., 29 F.2d 87.

19. Minn.—Morss v. Murphy Transfer & Storage Co., 211 N.W. 950, 170 Minn. 1.

20. Mo.—Baumker v. Dunsworth, App., 7 S.W.2d 417.

21. Mass.—McGrimley v. Jameson, 8 N.E.2d 752, 297 Mass. 280.

Directed verdict for defendant

D.C.—Adams v. Capital Transit Co., 154 F.2d 859, 81 U.S.App.D.C. 78.

evidence it is a question for the jury whether defendant was guilty of negligence in striking a person who was crossing the street after alighting from a streetcar.²²

(4) Bicyclists

Where the evidence is in conflict or different inferences reasonably may be drawn therefrom, it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to a bicyclist.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant was guilty of negligence in causing injury to a bicyclist,²³ as where the bicyclist was struck by defendant's motor vehicle.²⁴ The weight of the evidence is for the

22. U.S.—Long Transp. Co. v. Domurat, C.C.A.Ill., 93 F.2d 23.

Cal.—McGarry v. Coyle, 7 P.2d 312, 120 Cal.App. 182—Cassinelli v. Bennen, 294 P. 748, 110 Cal.App. 722—Morgan v. Los Angeles Rock & Gravel Corporation, 287 P. 152, 105 Cal.App. 224—Wagnitz v. Scharetz, 265 P. 318, 89 Cal.App. 511.

Ill.—Panella v. Weil-McLain Co., 67 N.E.2d 699, 329 Ill.App. 240—Krolczyk v. Heritage Coal Co., 4 N.E.2d 801, 267 Ill.App. 619.

Mass.—Wilcox v. Sides, 165 N.E. 871, 267 Mass. 70—Skelley v. Kane, 159 N.E. 439, 262 Mass. 136.

Neb.—Sgroi v. Yellow Cab & Baggage Co., 247 N.W. 355, 124 Neb. 525.

Pa.—Smith v. Wistar, 191 A. 486, 327 Pa. 419—Kirk v. McKnight, 167 A. 36, 311 Pa. 483—Parznik v. Central Abattoir Co., 131 A. 372, 284 Pa. 393—Zoeller v. Smallstig, 179 A. 755, 118 Pa.Super. 265.

Wash.—Tobin v. Goodwin, 290 P. 215, 157 Wash. 658—Rettan v. Crooks, 279 P. 97, 153 Wash. 75.

Wis.—West v. Johnson, 233 N.W. 94, 202 Wis. 416.

42 C.J. p 1253 note 81.

Going around back end of car to cross

Ill.—Mulligan v. Andel, 245 Ill.App. 132.

23. U.S.—Railway Exp. Agency v. DiFonzo, C.C.A.Mass., 165 F.2d 957.
Cal.—Fietz v. Hubbard, 138 P.2d 315, 59 Cal.App.2d 124.

Mich.—Alt v. Konkle, 211 N.W. 661, 237 Mich. 264.

Care required as to bicyclists see supra § 380.

Causing collision with other vehicle

Whether driver of truck following two minor girls riding on bicycle was guilty of following bicycle closer than was reasonable and prudent in violation of statute, so as to be liable for injuries sustained by girls when girl operating bicycle through fear of impending collision swerved to left and collided with side of another truck which was moving in adjoining traffic lane and attempting to pass truck following the bicycle, was for jury.—Southwestern Freight Lines v. Floyd, 119 P.2d 120, 58 Ariz. 349.

Colliding with open door of parked automobile

Mass.—Hedman v. Morse, 180 N.E. 240, 278 Mass. 437.

24. U.S.—Johnson v. Railway Express Agency, C.C.A.Ill., 131 F.2d 1009.

Ala.—Francis v. Imperial Sanitary Laundry & Dry Cleaning Co., 2 So. 2d 388, 241 Ala. 327.

Ark.—Collett v. Loews, 158 S.W.2d 658, 203 Ark. 756.

Cal.—La Fleur v. Hernandez, 191 P. 2d 95, 84 Cal.App.2d 569—Cartmill v. Arden Farms Co., 189 P.2d 739, 83 Cal.App.2d 787—Hart v. Irvine, 117 P.2d 11, 46 Cal.App.2d 805—Tracey v. L. A. Paving Co., 41 P.2d 912, 4 Cal.App.2d 700.

Fla.—Gessinger v. Kaster, 176 So. 812, 129 Fla. 610.

Ill.—Kavanaugh v. Parret, 34 N.E.2d 868, 310 Ill.App. 429, reversed on other grounds 40 N.E.2d 500, 379 Ill. 273—Rielly v. Hamilton, 2 N.E. 2d 578, 285 Ill.App. 596.

Ind.—Gulley v. Hamm, 73 N.E.2d 188, 117 Ind.App. 593.

Iowa.—Westman v. Bingham, 300 N.W. 525, 230 Iowa 1298.

Ky.—Cumberland Bus Co. v. Helton, 13 S.W.2d 753, 227 Ky. 587.

Md.—Miles v. State, for Use of Wistling, 198 A. 724, 174 Md. 292—Wickman v. Bohle, 196 A. 326, 173 Md. 691.

Mass.—Phillips v. Larson, 80 N.E.2d 7, 323 Mass. 87—Reardon v. Marston, 38 N.E.2d 644, 310 Mass. 461.

Mich.—Stockfish v. Fox, 267 N.W. 754, 275 Mich. 630.

Minn.—Carlson v. Sanitary Farm Dairies, 273 N.W. 665, 200 Minn. 177—Campbell v. Sargent, 243 N.W. 142, 186 Minn. 293—Dentinger v. Uleberg, 213 N.W. 377, 171 Minn. 81.

Miss.—City of Meridian v. Beeman, 166 So. 757, 175 Miss. 527.

Neb.—Wiegand v. Lincoln Traction Co., 236 N.W. 188, 121 Neb. 130.

N.H.—Gagnon v. Krikorian, 31 A.2d 49, 92 N.H. 344.

N.J.—Hammersma v. Smith, 165 A. 555, 110 N.J.Law 523.

N.Y.—Taylor v. Yukowicz, 77 N.Y.S. 2d 620, 272 App.Div. 915.

N.C.—Cowper v. Brown, 44 S.E.2d 878, 228 N.C. 213—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.

Ohio.—Brannon v. Bowers, App., 65 N.E.2d 676—Martin v. Hooffstetter, App., 42 N.E.2d 556.

Or.—Kalafate v. De Cook, 18 P.2d 593, 141 Or. 576.

Pa.—Hickerson v. Daskam, 169 A. 769, 313 Pa. 379.

R.I.—Kopinos v. Sommer's Transfer Co., 170 A. 490, 54 R.I. 132.

Tenn.—Hall v. Nash, 198 S.W.2d 649, 184 Tenn. 312—C. D. Kenny Co. v. Williams, 1 Tenn.App. 134.

Va.—Scott v. Crawford, 2 S.E.2d 301, 172 Va. 517.

Wash.—Sebern v. Northwest Cities Gas Co., 10 P.2d 210, 167 Wash. 600—Sigol v. Kaplan, 266 P. 154, 147 Wash. 269.

W.Va.—Felder v. Service Cab Co., 11 S.E.2d 115, 123 W.Va. 522.

Wis.—Straub v. Schadeberg, 10 N.W. 2d 146, 243 Wis. 257, 147 A.L.R. 476.

42 C.J. p 1253 note 33.

Inferences to be drawn from condition of automobile and bicycle after collision casting doubt on testimony of bicyclist suing motorist for injuries were for jury—Rizzo v. Ahern, 179 N.E. 244, 278 Mass. 5.

Struck by one vehicle and run over by another

Ill.—Osinski v. Benson, 56 N.E.2d 665, 323 Ill.App. 562.

Pa.—Mosely v. Connor, 177 A. 817, 318 Pa. 17.

Wash.—Sebern v. Northwest Cities Gas Co., 10 P.2d 210, 167 Wash. 600.

At street intersection

U.S.—Roundtree v. Post, C.C.A.La., 134 F.2d 310.

Mass.—Phillips v. Larson, 80 N.E.2d 7, 323 Mass. 87.

Minn.—Carlson v. F. A. Martocchio Co., 229 N.W. 341, 179 Minn. 332.

N.C.—Wooten v. Smith, 200 S.E. 921, 215 N.C. 48.

Or.—Davis v. Lavenik, 165 P.2d 277, 178 Or. 90.

S.C.—Murray v. Martin, 199 S.E. 301, 188 S.C. 334.

42 C.J. p 1253 note 33 [f].

Backing

(1) Generally.

Cal.—Hauskins v. Buck Co., 298 P. 137, 113 Cal.App. 176.

N.H.—Halley v. Brown, 24 A.2d 267, 92 N.H. 1.

jury.²⁵ On conflicting evidence or where different inferences reasonably may be drawn, incidental questions also are for the jury or trial court,²⁶ as, for example, whether defendant struck the bicyclist,²⁷ the point of actual contact between plaintiff's bicycle and defendant's automobile,²⁸ whether defendant's motor vehicle was being operated on the wrong side of the road,²⁹ whether defendant saw or might have seen plaintiff in time to have avoided the accident,³⁰ and whether defendant's car made certain skid marks on the street to which the witness testified.³¹

The evidence must be legally sufficient to warrant or require submission to the jury of the question of defendant's negligence to the jury, or the submission of some question incidental thereto.³² On the other hand, where there is any negligence proved on the part of defendant, or if there are any facts in the case from which negligence of de-

fendant may be legitimately inferred, or if the proofs on the question of contributory negligence are doubtful, motions for nonsuit and directed verdict are properly denied.³³

(5) Motorcyclists

The negligence of the defendant in the operation of a motor vehicle in causing injury to a motorcyclist is a question for the jury where the evidence is conflicting or different inferences reasonably may be drawn from the evidence.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to a motorcyclist,³⁴ as where injury resulted from a collision between defendant's motor vehicle and the motorcyclist.³⁵ The weight of the evidence

N.C.—Wall v. Bain, 23 S.E.2d 330, 222 N.C. 375.

(2) Whether truck driver was negligent in backing truck after boy on bicycle collided therewith, thereby causing further injuries to him, was fact question for jury in his action for damages.—Glassman v. Keller, 9 N.E.2d 589, 291 Ill.App. 262.

Control

Wis.—Trautmann v. Charles Schefft & Sons Co., 228 N.W. 741, 201 Wis. 113.—Trautmann v. Charles Schefft & Sons Co., 228 N.W. 744, 201 Wis. 122.

Failure to give warning

Ala.—Francis v. Imperial Sanitary Laundry & Dry Cleaning Co., 2 So. 2d 388, 241 Ala. 327.

Conn.—Atkinson v. Molstein, 191 A. 344, 122 Conn. 611.

Mass.—Cloutatre v. Lees, 75 N.E.2d 242, 321 Mass. 679.—Hinckley v. Capital Motor Transp. Co., 72 N.E.2d 419, 321 Mass. 174.—Rizzo v. Ahern, 179 N.E. 244, 278 Mass. 5.

Mo.—Nash v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 570.

Keeping lookout

Iowa.—Peterson v. Bonnes, 299 N.W. 895, 230 Iowa 986.

Mass.—Hinckley v. Capital Motor Transp. Co., 72 N.E.2d 419, 321 Mass. 174.—Rizzo v. Ahern, 179 N.E. 244, 278 Mass. 5.

Tex.—Esparza v. City of El Paso, Civ.App., 296 S.W. 979.

Va.—Scott v. Crawford, 2 S.E.2d 301, 172 Va. 517.

42 C.J. p 1253 note 33 [b].

Speed

U.S.—Dugan v. Fry, C.C.A.N.J., 34 F.2d 723.

Ill.—Kavanaugh v. Parret, 34 N.E.2d 868, 310 Ill.App. 429, reversed on other grounds 40 N.E.2d 500, 379

Ill. 273.—Linehan v. Morton, 221 Ill.App. 70.

Turning

U.S.—Johnson v. Railway Express Agency, C.C.A.Ill., 131 F.2d 1009 Mass.—I'odwapinska v. Teixeira, 178 N.E. 830, 277 Mass. 366

Mich.—Crookshank v. Henry Vroom & Son, 270 N.W. 181, 277 Mich. 672. Mo.—Taylor v. Sesler, App., 113 S.W. 2d 812.

N.J.—O'Donnell v. Laggren Bros. Co., 168 A. 460, 111 N.J.Law 319.

S.C.—Lineberger v. City of Greenville, 182 S.E. 101, 178 S.C. 47. 42 C.J. p 1253 note 33 [c].

Negligence in passing bicyclist

Wis.—Straub v. Schadeberg, 10 N.W. 2d 146, 243 Wis. 257, 147 A.L.R. 476.

25. Mich.—Saums v. Parfet, 258 N.W. 235, 270 Mich. 165.

26. Ill.—Glassman v. Keller, 9 N.E. 2d 589, 291 Ill.App. 262

Iowa.—Montanick v. McMillin, 280 N.W. 608, 225 Iowa 442.

Mo.—Koebel v. Tieman Coal & Material Co., 85 S.W.2d 519, 337 Mo. 561.

N.H.—Gagnon v. Krikorian, 31 A.2d 49, 92 N.H. 344

Intoxication of defendant

Wash.—Burget v. Saginaw Logging Co., 85 P.2d 271, 197 Wash. 318

27. Mo.—Koebel v. Tieman Coal & Material Co., 85 S.W.2d 519, 337 Mo. 561.—Irgang v. Tieman Coal & Material Co., App., 46 S.W.2d 919.

28. Wash.—Hiscock v. Phinney, 142 P. 461, 81 Wash. 117, Ann.Cas. 1916E 1044.

29. Wis.—Czerniakowski v. National Ice & Coal Co., 31 N.W.2d 156, 252 Wis. 112.

30. Ala.—Tennessee Mill, etc., Co. v. Giles, 99 So. 84, 211 Ala. 44

Tex.—Alamo Iron Works v. Prado, Civ.App., 220 S.W. 282.

31. Wash.—Hiscock v. Phinney, 142 P. 461, 81 Wash. 117, Ann.Cas. 1916E 1041.

32. Cal.—Martine v. Ingalls, 264 P. 484, 203 Cal. 403.

Ill.—Buffa v. Blank, 6 N.E.2d 250, 288 Ill.App. 628

Ky.—Stacey v. Stoner, 86 S.W.2d 1006, 260 Ky 848.

Mass.—Phillips v. Larson, 80 N.E.2d 7, 323 Mass. 87.

Minn.—McCormick v. Johnson Pure Milk Co., 229 N.W. 881, 179 Minn. 578.

Mo.—Bumgarner v. Ekstrum, 67 S.W.2d 520, 228 Mo.App. 424.

Wis.—Brockman v. Wisconsin Power & Light Co., 222 N.W. 239, 197 Wis. 374.

42 C.J. p 1253 note 33 [1].

Nonsuit

N.C.—Swainey v. Great Atlantic & Pacific Tea Co., 162 S.E. 557, 202 N.C. 272.

Pa.—Hebron v. Merchants' Delivery, Com.Pl., 13 Northumb Leg.J. 242.

Directed verdict for defendant

Cal.—Keller v. Markley, 122 P.2d 614, 50 Cal.App.2d 155.

33. N.J.—Hammersma v. Smith, 165 A. 555, 110 N.J.Law 523.

34. Mass.—Kzcowski v. Johnowicz, 192 N.E. 6, 287 Mass. 441.

35. U.S.—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226.

Cal.—Carver v. Donin, 50 P.2d 833, 9 Cal.App.2d 631.

Ill.—DeMay v. Brew, 46 N.E.2d 138, 317 Ill.App. 183.—Reilly v. Peterson Furniture Co., 40 N.E.2d 780, 314 Ill.App. 46.

and the credibility of the witnesses are for the jury.³⁶ On conflicting evidence or where different inferences reasonably may be drawn, incidental questions also are for the jury or trial court,³⁷ as, for example, how, when, and where the accident took place.³⁸

The evidence must be legally sufficient to require or warrant submission to the jury, and in various cases the evidence has been held insufficient to

justify submission to the jury of the question of defendant's negligence or of some question incidental thereto.³⁹ Defendant will be held negligent as a matter of law where the evidence is undisputed and his negligence is the only inference which can reasonably be drawn therefrom.⁴⁰

(6) Drivers and Occupants of Other Particular Vehicles

(a) In general

Kan.—Washburn v. Martin, 278 P. 712, 128 Kan. 505.

Me.—Gustin v. Asskov, 151 A. 443, 129 Me. 494.

Minn.—Viken v. Dickson, 214 N.W. 471, 172 Minn. 1.

Mo.—Vanausdall v. Schorr, App., 168 S.W.2d 110.

N.J.—Yates v. Madigan, 171 A. 679, 112 N.J.Law 443, affirmed 176 A. 362, 114 N.J.Law 258—Vanto v. Juneman, 166 A. 85, 111 N.J.Law 18—Bode v. Bresssem, 155 A. 124, 9 N.J.Misc. 585—Julich v. T. A. Gillespie Co., 146 A. 785, 7 N.J.Misc. 630.

N.Y.—Boles v. Jump, 5 N.Y.S.2d 73, 254 App.Div. 772, reargument denied 6 N.Y.S.2d 348, 254 App.Div. 882.

Pa.—Magri v. McCurdy, 177 A. 349, 117 Pa.Super. 32.

R.I.—Nichols v. Wood, 136 A. 845.

Wash.—Curtis v. Perry, 18 P.2d 840, 171 Wash. 542—Anderson v. Kinnear, 141 P. 1151, 80 Wash. 638.

Wis.—Steidl v. Caltebe, 254 N.W. 524, 215 Wis. 582.

42 C.J. p 1253 note 39.

At street or highway intersection

US.—Hill Transp. Co. v. Everett, C. C.A.N.H., 145 F.2d 746.

Cal.—Ederer v. Shanzer, 25 P.2d 38, 134 Cal.App. 137—Landers v. Crescent Creamery Co., 5 P.2d 934, 118 Cal.App. 707—Grove v. Hodge Transp. System, 265 P. 354, 89 Cal. App. 663.

Fla.—Panama City Transit Co. v. Du Vernoy, 33 So.2d 48—Turner v. Modern Beauty Supply Co., 10 So. 2d 488, 152 Fla. 3.

Ind.—Young v. Mader, 14 N.E.2d 329, 105 Ind.App. 532—Dinnen v. Fries, 171 N.E. 665, 93 Ind.App. 190.

Ky.—Saxton v. Tucker, 134 S.W.2d 590, 280 Ky. 777.

Md.—Pegelow v. Johnson, 9 A.2d 645, 177 Md. 345.

Mass.—Payson v. Checker Taxi Co., 159 N.E. 449, 262 Mass. 22.

Mont.—Marsh v. Ayres, 260 P. 702, 80 Mont. 401.

N.H.—Bruce v. Capitol Motor Transp. Co., 183 A. 265, 87 N.H. 462.

N.J.—Paul v. Flannery, 26 A.2d 553, 128 N.J.Law 438—Baca v. Public Service Coordinated Transport, 24 A.2d 177, 128 N.J.Law 8—Corcione v. Zingerman, 166 A. 506, 111 N.J.

Law 75—Day v. Beyer, 139 A. 317, 5 N.J.Misc. 1069.

Pa.—Jackson v. Curry, 177 A. 346, 117 Pa.Super. 63.

Wash.—Byrne v. Stanford, 292 P. 1014, 159 Wash. 271.

42 C.J. p 1253 note 39 [a].

Failure to give warning or signal

U.S.—Stolte v. Larkin, C.C.A.Minn., 110 F.2d 226.

Mich.—White v. Vandevelde, 279 N. W. 899, 284 Mich. 669—Lauth v. Woodruff, 251 N.W. 344, 265 Mich. 34.

Mo.—Phillips v. Henson, 30 S.W.2d 1065, 326 Mo. 282.

Keeping lookout

(1) Generally

Cal.—Prato v. Snyder, 55 P.2d 255, 12 Cal.App.2d 88.

Iowa.—Fischer v. Steinhauer, 10 N. W.2d 649, 233 Iowa 777.

(2) Case may go to jury solely on defendant's failure to keep a lookout—Fischer v. Steinhauer, supra.

Speed

U.S.—Stolte v. Larkin, C.C.A.Minn., 110 F.2d 226.

Stopping

U.S.—Copley v. Stone, D.C.S.C., 75 F. Supp. 203.

Ill.—Karraker v. Smith, 77 N.E.2d 421, 333 Ill.App. 266.

Md.—Greyhound Cab v. Sewell, 190 A. 814, 172 Md. 699.

Turning

(1) Generally.

Cal.—Wixon v. Ralsch Improvement Co., 266 P. 964, 91 Cal.App. 129.

Fla.—Panama City Transit Co. v. Du Vernoy, 33 So.2d 48.

Iowa.—Thomas v. Charter, 278 N.W. 920, 224 Iowa 1278.

Mass.—Kzowski v. Johnowicz, 192 N.E. 6, 287 Mass. 441.

Mich.—White v. Vandevelde, 279 N. W. 899, 284 Mich. 669—Lauth v. Woodruff, 251 N.W. 344, 265 Mich. 34.

Mo.—Phillips v. Henson, 30 S.W.2d 1065, 326 Mo. 282.

N.C.—Mason v. Johnston, 1 S.E.2d 379, 215 N.C. 95.

Or.—Hawn v. W. J. Jones & Son, 284 P. 194, 131 Or. 660.

Wash.—Byrne v. Stanford, 292 P. 1014, 159 Wash. 271.

Wis.—Gauthier v. Carbonneau, 277 N.W. 135, 226 Wis. 527.

42 C.J. p 1253 note 39 [b].

(2) Making of left turn by motorist into private driveway from traffic lane immediately to right of and next to center of highway as required by statute did not as matter of law indicate that motorist exercised ordinary care in making turn, with respect to motorist's liability for injuries sustained in collision with approaching motorcyclist.—Gauthier v. Carbonneau, supra.

Wrong side of road

Ark.—Lewis v. Shackelford, 157 S. W.2d 509, 203 Ark 500

Iowa.—Coolley v. Killingsworth, 228 N.W. 880, 209 Iowa 646.

Ky.—Abell v. Whitehead, 99 S.W.2d 770, 266 Ky. 764.

Yielding right of way

Fla.—Panama City Transit Co. v. Du Vernoy, 33 So.2d 48.

Minn.—Merritt v. Stuve, 9 N.W.2d 329, 215 Minn. 44.

Motor scooter

Ill.—Luner v. Gelles, 42 N.E.2d 313, 314 Ill.App. 659.

33. Mich.—White v. Vandevelde, 279 N.W. 899, 284 Mich. 669.

37. Party having green light

Md.—Cogswell v. Frazier, 39 A.2d 815, 183 Md 654.

Use of hand signal by driver

N.C.—Mason v. Johnston, 1 S.E.2d 379, 215 N.C. 95.

Where time of collision was in doubt, jury was required to determine whether headlights were required to be lighted, and whether they were lighted—Fouch v. Werner, 279 P. 183, 99 Cal.App. 557.

38. Mich.—White v. Huffmaster, 32 N.W.2d 447, 321 Mich. 225.

Mo.—Hopkins v. Sweeney Auto. School Co., App., 196 S.W. 772.

39. Ill.—Sandberg v. Williams, 39 N. E.2d 395, 313 Ill.App. 149—Parks v. Gott, 12 N.E.2d 925, 293 Ill App. 640.

Or.—Frame v. Arrow Towing Service, 64 P.2d 1312, 155 Or. 522.

Directed verdict for defendant

Ohio.—Wade v. Schneider, 26 N.E.2d 290, 63 Ohio App. 24.

40. Wis.—Leanna v. Goethe, 300 N. W. 490, 238 Wis. 616.

- (b) Horse-drawn vehicles
- (c) Vehicles used in saving life or property or enforcing law
- (d) Railroad cars or streetcars

(a) In General

The negligence of the defendant in the operation of a motor vehicle in causing injury to an occupant or guest of another motor vehicle is a question to be determined by the jury where the evidence is conflicting or different inferences reasonably may be drawn from the evidence.

Where the evidence is legally sufficient and is conflicting or different inferences of fact reasonably may be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to a guest or occupant of another motor vehicle⁴¹ by colliding with such motor vehicle.⁴² On such evidence incidental questions also are for the jury or trial court,⁴³ as, for ex-

ample, whether defendant was driving on the wrong side of the road.⁴⁴

(b) Horse-Drawn Vehicles

Where the evidence is conflicting or different inferences may be drawn therefrom, whether the defendant was guilty of negligence in colliding with a horse-drawn vehicle is a question of fact.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may be reasonably drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant in the operation of a motor vehicle was guilty of negligence in causing damage to a horse-drawn vehicle or injury to the driver or occupant thereof,⁴⁵ as by colliding with such vehicle.⁴⁶ The weight of the evidence is for the jury.⁴⁷ Where the evidence is conflicting or different inferences reasonably may be drawn, incidental questions also are

41. Ark.—Coca Cola Bottling Co. of Blytheville v. Doud, 76 S.W.2d 87, 189 Ark. 986.

Cal.—Bauer v. Davis, 111 P.2d 715, 43 Cal App 2d 764.

Md.—Montgomery Bus Lines v. Diehl, 148 A. 453, 158 Md. 233.

Minn.—Farwell v. Stambaugh, 281 N.W. 526, 203 Minn. 392.

N.Y.—Massar v. Bell, 16 N.Y.S.2d 727, 258 App.Div. 924, reargument denied 17 N.Y.S.2d 1000, 258 App. Div. 966.

Occupant struck by protruding arm of mirror

U.S.—Countryman v. Coogler, C.C.A. Ga., 157 F.2d 503.

42. Cal.—Bauer v. Davis, 111 P.2d 715, 43 Cal App 2d 764.

Ky.—Haller's Pot Shop v. Pearlman, 69 S.W.2d 9, 253 Ky. 130.

Wis.—Rehholz v. Wettengel, 248 N.W. 109, 211 Wis. 285.

42 C.J. p 1256 note 78.

Motorcycle guest

Ind.—Young v. Mader, 14 N.E.2d 329, 105 Ind App. 532.

Mass.—Curley v. Mahan, 193 N.E. 34, 288 Mass. 369.

N.J.—Yates v. Madigan, 171 A. 679, 112 N.J.Law 443, affirmed 176 A. 362, 114 N.J.Law 258.

N.Y.—Boles v. Jump, 5 N.Y.S.2d 73, 254 App.Div. 772, reargument denied 6 N.Y.S.2d 348, 254 App.Div. 882.

N.C.—Mason v. Johnston, 1 S.E.2d 379, 215 N.C. 95.

Collision at intersection

Minn.—Kemerer v. Kemerer, 269 N.W. 832, 198 Minn. 316.

Wash.—Gavin v. Everton, 144 P.2d 735, 19 Wash 2d 785.

42 C.J. p 1256 note 78 [b].

Keeping lookout

Wis.—Suschnick v. Underwriters

Casualty Co., 248 N.W. 477, 211 Wis 474, followed in Cater v Underwriters Casualty Co., 248 N.W. 481, 211 Wis 484, and Hoenisch v Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 483.

43. Wis.—Suschnick v. Underwriters Casualty Co., supra

44. Wis.—Suschnick v. Underwriters Casualty Co., supra

45. Ky.—Roederer's Adm'x v. Gray, 69 S.W.2d 998, 253 Ky 669

Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, Civ App, 299 S.W. 665, reversed on other grounds, Com. App, 7 S.W.2d 521.

42 C.J. p 1253 note 44.

Frightening horses or mules

Ark.—C. M. Ferguson & Son v. White, 121 S.W.2d 894, 197 Ark 183—McAfee v. Nooner, 80 S.W.2d 55, 190 Ark. 659.

Iowa.—Ruchanan v. Hurd Creamery Co., 246 N.W. 41, 215 Iowa 415

Mass.—Avery v. Forand, 200 N.E. 926, 294 Mass. 232.

Mo.—Proffitt v. Farmers' Produce Exchange Co-op. Ass'n, No. 277, App., 64 S.W.2d 746—Grantham v. Turner, App., 52 S.W.2d 223.

N.H.—Gonet v. Portsmouth Power Co., 147 A. 896, 84 N.H. 554.

42 C.J. p 1253 note 44.

46. Ala.—Foster v. Byrd, 180 So. 125, 28 Ala App. 168.

Ark.—Layes v. Harris, 63 S.W.2d 971, 187 Ark. 1107—Duckworth v. Stephens, 30 S.W.2d 840, 182 Ark 161.

Ky.—Roederer's Adm'x v. Gray, 69 S.W.2d 998, 253 Ky. 669.

Pa.—Petrosky v. Danovitz, 86 Pa.Super. 22—Kemner v. Steckel, 85 Pa. Super. 454.

42 C.J. p 1253 note 44.

Negligence of driver of wagon in injuring motorist as question of fact see *infra* § 569.

Sleigh

Vt.—Crossman v. Perkins, 141 A. 594, 101 Vt 94

Passing team going in same direction

U.S.—Thompson v. Bell, C.C.A Mich., 129 F.2d 211.

Ala.—Corbie v. Poore, 198 So 268, 29 Ala App. 487, certiorari denied 198 So 272, 240 Ala 207.

Ark.—Acco Transp Co v. Smith, 178 S.W.2d 1011, 207 Ark 70

Ky.—Roederer's Adm'x v. Gray, 69 S.W.2d 998, 253 Ky. 669

Mo.—Devine v. Barton, App, 22 S.W. 2d 877.

R.I.—Rutkovich v. Cialella, 135 A. 401.

S.D.—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.

Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

42 C.J. p 1253 note 44 [a].

Passing team going in opposite direction

Ky.—McCulloch's Adm'r v. Abell's Adm'r, 115 S.W.2d 386, 272 Ky. 756.

Mass.—Chandler v. Matheson Co., 95 N.E. 103, 208 Mass. 569.

Mich.—Gates v. Pfeiffer Brewing Co., 265 N.W. 783, 275 Mich. 81.

S.D.—Morton v. Hoischer, 243 N.W. 89, 60 S.D. 50.

42 C.J. p 1253 note 44 [b].

Keeping lookout

Ark.—Duckworth v. Stephens, 30 S.W.2d 840, 182 Ark. 161.

47. Tenn.—Collins v. Desmond, 1 Tenn.App. 54.

for the jury,⁴⁸ as, for example, whether the operator of the automobile observed the precautions required by statute under such circumstances,⁴⁹ whether the accident occurred in the daytime or nighttime,⁵⁰ whether plaintiff's wagon was struck by defendant's automobile from the rear or side,⁵¹ and whether plaintiff gave defendant warning of his approach and sufficient space to pass.⁵²

The evidence must be legally sufficient to justify submission to the jury of defendant's negligence or of some question incidental thereto.⁵³

(c) Vehicles Used in Saving Life or Property or Enforcing Law

On conflicting evidence or where different inferences reasonably may be drawn, it is for the jury to determine whether the defendant in the operation of a motor vehicle, was negligent in causing damage or injury to a vehicle used in saving life or property or in enforcing the law or to the driver or occupant thereof.

Where the evidence is legally sufficient and is conflicting or different inferences reasonably may be drawn therefrom, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing damage or injury to a vehicle used in saving life or property or in enforcing the law or to the driver or occupant thereof.⁵⁴ Thus on such evi-

dence it is for the jury or trial court to determine whether defendant was negligent in colliding with an ambulance,⁵⁵ fire truck or vehicle,⁵⁶ or police car,⁵⁷ or in causing such vehicles to swerve causing injury to the occupants⁵⁸ or a third person.⁵⁹ On such evidence incidental questions also are for the jury or trial court⁶⁰ as, for example, whether the driver of the automobile heard the warning siren or bell.⁶¹

(d) Railroad Cars or Streetcars

Whether the defendant, in the operation of a motor vehicle, was guilty of negligence in causing damage to a railroad car or streetcar or injury to an occupant thereof is a jury question where the evidence is conflicting or different inferences reasonably may be drawn from the evidence.

Where the evidence is legally sufficient and is in conflict or different inferences reasonably may be drawn therefrom, it is for the jury, or the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing damage to a streetcar or injury to an occupant thereof.⁶² On such evidence it is for the jury or trial court to determine whether defendant was negligent in colliding with a streetcar and injuring an employee of the streetcar company or passenger therein,⁶³ or in causing another vehicle to col-

48. Wash.—*Ross v. Rose*, 186 P. 892, 109 Wash. 273.

49. Wash.—*Ross v. Rose*, supra.

50. Ala.—*Poster v. Byrd*, 180 So 125, 28 Ala App. 168.

51. Wis.—*Komfar v. Millard*, 100 N.W. 835, 179 Wis. 79.

52. Tenn.—*Allen v. Davie*, 6 Tenn. Civ.App. 630.

53. Mass.—*Boyd v. Mills*, 179 N.E. 594, 278 Mass. 132.

42 C.J. p 1253 note 44 [g].

54. Pa.—*Grimes v. Yellow Cab Co.*, 25 A.2d 294, 344 Pa. 298.

Negligence of driver of vehicle used in saving life or property, etc., as question of law or fact see subdivision j of this section.

55. W.Va.—*Vaughan v. Oates*, 37 S. E.2d 479, 128 W.Va. 554.

56. Okl.—*Padgett v. McKissick*, 280 P. 409, 138 Okl. 63.

Pa.—*Grimes v. Yellow Cab Co.*, 25 A.2d 294, 344 Pa. 298.

42 C.J. p 1254 note 50.

Collision between two vehicles of fire department

N.Y.—*Miller v. City of Albany*, 287 N.Y.S. 889, 158 Misc. 720, affirmed 286 N.Y.S. 326, 247 App.Div. 848.

57. Cal.—*City of Sacramento v.*

Hunger, 249 P. 223, 79 Cal.App. 234.

Evidence held insufficient

To go to jury, in action arising from collision with motorcycle policeman—*U. S. Fidelity & Guaranty Co. v. Continental Baking Co.*, 190 A. 768, 172 Md. 24.

58. Ambulance

N.Y.—*Dickerson v. Daniels & Kennedy*, 8 N.Y.S.2d 293, 255 App.Div. 990, reargument denied 10 N.Y.S.2d 213, 256 App.Div. 827.

59. Fire truck

Wash.—*Hadley v. Arms*, 241 P. 26, 136 Wash. 632.

60. Cal.—*City of Sacramento v. Hunger*, 249 P. 223, 79 Cal.App. 234.

Knowledge of official nature of vehicle

Defendant was entitled to hearing on whether defendant's driver knew, or reasonably should have known, car with which he collided was official police car.—*Rommel v. American Stores Co.*, 157 A. 493, 103 Pa. Super. 384.

61. Damage to police automobile

Cal.—*City of Sacramento v. Hunger*, 249 P. 223, 79 Cal.App. 234.

62. N.J.—*Byron v. Public Service*

Coordinated Transport, 5 A.2d 483, 122 N.J. Law 451.

Care as to street cars or persons thereon see supra § 406

63. Ill.—*Turner v. Cummings*, 48 N. E.2d 964, 319 Ill.App. 225.

Md.—*Harner v. Russell*, 45 A.2d 273, 185 Md. 519.

Mass.—*Freedman v. Eastern Massachusetts St. Ry. Co.*, 12 N.E.2d 739, 299 Mass. 246.

Mo.—*Dodson v. Gate City Oil Co.*, 88 S.W.2d 866, 338 Mo. 183—*Lochmoeller v. Kiel*, App. 137 S.W.2d 625—*Wendel v. City Ice Co. of Kansas City*, 22 S.W.2d 215, 224 Mo.App. 152.

N.J.—*O'Neill v. Allied Freight Distributors*, 172 A. 543, 12 N.J.Misc. 464.

Ohio—*Fredrick v. Cleveland Builders' Supply & Brick Co.*, 171 N.E. 118, 34 Ohio App. 402.

Pa.—*Appenzeller v. Philadelphia Rapid Transit Co.*, 163 A. 387, 107 Pa.Super. 319—*Wallin v. Katz*, 86 Pa.Super. 581.

Tex.—*Glazer v. Wheeler*, 130 S.W.2d 353, reversed on other grounds *Wheeler v. Glazer*, 153 S.W.2d 449, 137 Tex. 341, 140 A.L.R. 1301.

42 C.J. p 1254 note 53.

At intersection

Ala.—*J. C. Byram & Co. v. Bryan*, 140 So. 768, 224 Ala. 466.

lide with a streetcar causing injury,⁶⁴ or whether defendant was negligent in causing damage to a railroad car or injury to an employee or occupant thereof⁶⁵ by colliding with such car.⁶⁶ On such evidence incidental questions also are for the jury or trial court.⁶⁷

The evidence must be legally sufficient to require or warrant submission to the jury and in various cases the evidence has been held insufficient to justify submission to the jury of defendant's negligence or of some question incidental thereto.⁶⁸ Where the evidence is undisputed and not more than one inference reasonably may be drawn from the evidence, defendant's negligence is a question of law;⁶⁹ where the only inference from undisputed facts shows that defendant was not negligent, the court may so declare as a matter of law.⁷⁰

(7) Persons in Charge of Animals

On conflicting evidence or where different inferences may reasonably be drawn from the evidence it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to persons in charge of animals.

Where the evidence is legally sufficient and is conflicting or different inferences may reasonably be drawn from the evidence, it is for the jury or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to persons in charge of animals,⁷¹ as by striking such persons⁷² or in striking the animal which in turn strikes the person in charge.⁷³

(8) Children

On conflicting evidence or where different inferences may reasonably be drawn therefrom, it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to a child.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the jury, or for the trial court in actions tried without a jury, whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to a child⁷⁴ upon the street or high-

Cal.—Singer v. Bruns, 212 P. 955, 80 Cal.App. 414.

On bridge

Pa.—Petri v. Pittsburgh Rys. Co., 195 A. 107, 328 Pa. 396.

Backing into streetcar

Ga.—Tarker v. Lee Baking Co., 167 S.E. 747, 46 Ga.App. 470.

R.I.—Maher v. Concannon, 185 A. 907, 56 R.I. 395.

Cutting or passing in front of streetcar

Mo.—Graber v. Wells, App., 7 S.W.2d 719.

R.I.—Healey v. Ward Baking Co., 144 A. 443, 49 R.I. 498.

Left turn into driveway across track Wis.—McCauley v. Balsley, 8 N.W. 2d 299, 242 Wis. 528.

Striking rear of streetcar about to stop

Minn.—Jannette v. M. F. Patterson Dental Supply Co., 258 N.W. 31, 193 Minn. 153.

64. Cal.—Souza v. Underwriters' Fire Patrol of San Francisco, 2 P.2d 200, 116 Cal.App. 13.

65. Causing employee to jump from motor hand car

Where decedent jumped from motor hand car to avoid peril of collision and was struck by defendant's automobile, which failed to stop before crossing tracks, defendant's negligence was for jury.—Hilkirk v. Hughes, 157 A. 915, 103 Pa.Super. 73.

66. U.S.—Interstate Motor Lines v.

Great Western Ry. Co., C.C.A.Colo., 161 F.2d 968

Mich.—Grand Trunk Western R. Co. v. Lovejoy, 7 N.W.2d 212, 304 Mich. 35.

Brakeman on step of coal car

Iowa—Taylor v. Kral, 29 N.W.2d 241, 238 Iowa 1018.

Collision with motorcar or speeder

Ind.—Copp v. Harmon, 168 N.E. 701, 90 Ind.App. 348.

Wash.—Petersen v. Ingersoll-Rand Co., 78 P.2d 1083, 194 Wash. 584.

67. N.J.—Byron v. Public Service Co-ordinated Transport, 5 A.2d 483, 122 N.J.Law 451.

68. N.Y.—Lehman v. Brooklyn & Queens Transit Corporation, 30 N.Y.S.2d 716

Pa.—Goldberg v. Susan, 87 Pa.Super. 81.

Proof of happening of accident is not, alone, sufficient.—Jackson v. Capital Transit Co., D.C.Mun.App., 38 A.2d 108, affirmed 149 F.2d 839, 80 U.S.App.D.C. 162, 161 A.L.R. 1110, certiorari denied 66 S.Ct. 143, 326 U.S. 762, 90 L.Ed. 459.

69. Conn.—Podziewski v. Gaumont, 198 A. 569, 124 Conn. 157.

70. Conn.—Podziewski v. Gaumont, supra.

71. Frightened animal injuring person in charge

Iowa.—Lawson v. Fordyce, 13 N.W. 2d 301, 234 Iowa 632.

72. Tex.—Whitson v. Nickols, Com. App., 12 S.W.2d 556.

42 C.J. p. 1254 note 57.

Person riding horse or mule

(1) Generally

U.S.—Norfolk Southern Bus Corporation v. Lask, C.C.A.Va., 43 F.2d 45.

Ala.—Ritter v. Gibson, 116 So. 153, 217 Ala. 304.

Ky.—Rose v. Edmonds, 111 S.W.2d 427, 271 Ky. 36

Md.—E. F. Enoch Co. v. Johnson, 37 A.2d 901, 183 Md. 326.

Neb.—Spangler v. Brown, 289 N.W. 839, 137 Neb. 510.

(2) In action by rider of horse for injuries received when struck by motor vehicle as vehicle was passing another vehicle parked on left-hand side of highway, motorist was not negligent as matter of law because he was driving on left side of highway, since he had right in passing parked vehicle to drive on left-hand side of traveled portion of highway provided he exercised reasonable care.—Rosen v. Beh, 262 N.W. 291, 273 Mich. 487.

73. Or.—Sertie v. McCullough, 63 P. 2d 884, 155 Or. 216.

74. Ala.—McWhorter Transfer Co. v. Peek, 167 So. 291, 232 Ala. 143—Jewel Tea Co. v. Sklivis, 165 So. 824, 231 Ala. 590—Sinclair v. Taylor, 173 So. 878, 27 Ala.App. 418.

Ariz.—Bruno v. Grande, 251 P. 550, 31 Ariz. 206.

Ill.—Schliermeier v. Hoeffken, 33 N. E.2d 147, 309 Ill.App. 260.

way.⁷⁵ On such evidence it is for the jury or trial court to determine whether defendant was negligent in striking a child upon the street or highway,⁷⁶ as in instances or under particular circum-

Ky.—Cunningham v. Sublett's Adm'r, 208 S.W.2d 509, 306 Ky. 701.

Mass.—D'Ambrosia v. Brest, 19 N.E.2d 53, 302 Mass. 316.

Neb.—Tews v. Bamrick, 26 N.W.2d 499, 148 Neb. 59.

N.J.—Riotto v. Gorman's Express, 196 A. 677, 16 N.J. Misc. 74.

N.Y.—Verni v. Johnson, 68 N.E.2d 431, 295 N.Y. 436—Puleo v. National Transp. Co., 48 N.Y.S.2d 867, 268 App. Div. 790—Szablewski v. Michael, 28 N.Y.S.2d 163, 262 App. Div. 801.

Care required as to children see supra § 396.

Child on grass plot adjoining road
Minn.—Harkness v. Zube, 235 N.W. 281, 182 Minn. 594

N.Y.—Charamella v. Orr, 214 N.Y.S. 713, 216 App. Div. 247.

Tenn.—Potter v. Golden Rule Grocery Co., 84 S.W.2d 364, 169 Tenn. 240.

Child on school playground
Cal.—Smith v. Harker, 191 P.2d 25, 84 Cal. App. 2d 361

Child playing in school yard
Mass.—Tenney v. Reed, 159 N.E. 913, 262 Mass. 335

Child playing on lawn of city park
Cal.—Lotta v. City of Oakland, 154 P.2d 25, 67 Cal. App. 2d 411.

75. Ala.—Birmingham Ice & Cold Storage Co. v. Alley, 25 So.2d 37, 247 Ala. 503

Mass.—Capano v. Melchionno, 7 N.E.2d 593, 297 Mass. 1.

Pa.—Baran v. Kalczyński, 198 A. 40, 330 Pa. 52.

Wash.—Taber v. Bauer, 21 P.2d 1028, 173 Wash. 96.

Child falling off running board
Ky.—Thomas' Guardian v. Bowman Watts Co., 92 S.W.2d 762, 263 Ky. 527.

Child on, or alighting from, school bus

Wash.—Embody v. Cox, 289 P. 44, 157 Wash. 464—Machenheimer v. Falknor, 255 P. 1031, 144 Wash. 27.

Negligence in parking

(1) In general.

Ind.—Tabor v. Continental Baking Co., 38 N.E.2d 257, 110 Ind. App. 633.

Mass.—Milbury v. Turner Center System, 174 N.E. 471, 274 Mass. 358, 73 A.L.R. 1070.

(2) Driver's negligence in leaving truck in no-parking zone near pedestrian crossing was sufficient for jury.—Taber v. Bauer, 21 P.2d 1028, 173 Wash. 96.

(3) Where child, after getting ice from ice truck, which was double parked in residential district, ran

from behind truck and was struck by automobile, whether double parking of truck was negligence was for jury.—McKay v. Hedger, 34 P.2d 221, 139 Cal. App. 266.

Sled hooked to defendant's automobile

In action by boy who had been riding on sled hooked to rear of defendant's automobile to recover for injuries sustained in collision with approaching automobile when sled swung to left as boy released his hold on defendant's automobile, whether defendant was negligent in driving at speed of twenty or twenty-five miles an hour on uneven and icy city street, with knowledge of conditions, was for jury.—Samuelson v. Sherrill, 280 N.W. 596, 255 Iowa 421.

Truck obstructing sidewalk

Question whether truck driver obstructing sidewalk exercised care in failing to ascertain approach of child and warn it of dangers from approaching traffic in circling truck was for jury.—Denison Coal & Supply Co. v. Bartelheim, 171 N.E. 835, 122 Ohio St. 374.

76. U.S.—Moser v. Hand, C.C.A. Miss., 81 F.2d 522—Gajda v. Relek McJunkin Dairy Co., C.C.A. Ohio, 18 F.2d 279

Ala.—W. F. Covington Planter Co. v. Roberson, 194 So. 171, 239 Ala. 70—Downey v. Johnson, 19 So.2d 85, 31 Ala. App. 514

Ark.—Self v. Kirkpatrick, 110 S.W.2d 13, 194 Ark. 1014—Morel v. Lee, 33 S.W.2d 1110, 182 Ark. 985—Murphy v. Clayton, 15 S.W.2d 391, 179 Ark. 225.

Cal.—Zulim v. Van Ness, 38 P.2d 820, 3 Cal. App. 2d 82—Moore v. Bishop, 297 P. 580, 113 Cal. App. 25—Seperman v. Lyon Fire Proof Storage Co., 275 P. 980, 97 Cal. App. 654.

Conn.—Baldwin v. Robertson, 172 A. 859, 118 Conn. 431.

Idaho.—Bennett v. Deaton, 68 P.2d 895, 67 Idaho 752.

Ill.—Coit v. Ormerod, 60 N.E.2d 779, 326 Ill. App. 35—Oliver v. Kelley, 21 N.E.2d 649, 300 Ill. App. 487—Bailey v. Kyle, 3 N.E.2d 173, 285 Ill. App. 599.

Ind.—Pfisterer v. Key, 33 N.E.2d 830, 218 Ind. 521.

Iowa.—Paschka v. Carsten, 3 N.W.2d 542, 231 Iowa 1185—McMahon v. Rauch, 298 N.W. 908, 230 Iowa 674—Johnson v. Selindh, 285 N.W. 622, 221 Iowa 378—Riddle v. Frankl, 247 N.W. 493, 215 Iowa 1083—Orris v. Tolerton & Warfield Co., 207 N.W. 365, 201 Iowa 1344.

Ky.—Ballback's Adm'r v. Boland-Maloney Lumber Co., 208 S.W.2d 940,

306 Ky. 647—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666—Porter v. Music, 67 S.W.2d 958, 252 Ky. 582—McGeough v. Lewis, 53 S.W.2d 544, 245 Ky. 363—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554—Fenton Dry Cleaning & Dyeing Co. v. Hamilton, 11 S.W.2d 409, 226 Ky. 680—Corlew's Adm'r v. Young, 287 S.W. 706, 216 Ky. 237.

Mo.—Mahan v. State, to Use of Carr, 191 A. 575, 172 Md. 373.

Mass.—Lockling v. Wiswell, 61 N.E.2d 15, 318 Mass. 160—De Francisco v. Heath, 28 N.E.2d 995, 306 Mass. 527—Birch v. Strout, 20 N.E.2d 429, 303 Mass. 28—Schneider v. De Christopher, 16 N.E.2d 857, 301 Mass. 241—Stacy v. Dorchester Awning Co., 195 N.E. 350, 290 Mass. 356—De Furla v. Mooney, 182 N.E. 828, 280 Mass. 447—Roberge v. Pollette, 158 N.E. 824, 261 Mass. 438

Mich.—Morris v. Radley, 11 N.W.2d 291, 306 Mich. 689—Micks v. Norton, 239 N.W. 512, 256 Mich. 308.

Minn.—Allerdyce v. Martin, 298 N.W. 363, 210 Minn. 366.

Mo.—Elsen v. Smither, 293 S.W. 135—McCollum v. Shubert, App., 185 S.W.2d 48—Gillis v. Singer, App., 86 S.W.2d 352—Cervillo v. Manhattan Oil Co., 49 S.W.2d 183, 226 Mo. App. 1090—Willis v. Applebaum, App., 26 S.W.2d 823.

N.H.—Howe v. Amoskeag Mfg. Co., 174 A. 776, 87 N.H. 122—George v. New England Dressed Meat & Wool Co., 164 A. 209, 86 N.H. 121.

N.J.—Sakos v. Byers, 169 A. 705, 112 N.J. Law 256—Allen v. Tatum, 167 A. 668, 11 N.J. Misc. 666.

N.Y.—Razauckas v. New York Dugan Bros., 33 N.Y.S.2d 411, 263 App. Div. 1002, affirmed 43 N.E.2d 722, 289 N.Y. 592—Donnelly v. Silversmith, 23 N.Y.S.2d 247, 260 App. Div. 934—Schal v. Davidson, 278 N.Y.S. 20, 243 App. Div. 798—Touris v. Fairmont Creamery Co., 240 N.Y.S. 225, 228 App. Div. 569—Winant v. City of New York, 67 N.Y.S.2d 662, affirmed 67 N.Y.S.2d 485, 271 App. Div. 833.

N.C.—Henson v. Wilson, 85 S.E.2d 245, 225 N.C. 417.

Pa.—Dugan v. McGara's Inc., 25 A.2d 718, 344 Pa. 460—Derr v. Rich, 200 A. 599, 331 Pa. 502—Fabel v. Hazlett, 43 A.2d 373, 157 Pa. Super. 416—Mackovitch v. Becker, 93 Pa. Super. 514—Gilroy v. Berretta, Com. Pl., 38 Luz. Leg. Reg. 41—Neidlinger v. Haines, Com. Pl., 5 Sch. Reg. 51.

R.I.—Bourre v. Texas Co., 154 A. 82, 51 R.I. 254.

S.C.—Crawford v. Simons-Mayrant Co., 139 S.E. 788, 141 S.C. 333.

Tenn.—Walkup v. Covington, 73 S.W. 2d 718, 18 Tenn.App. 117.

Tex.—Dr. Pepper Bottling Co. v. Rainboldt, Civ.App., 40 S.W.2d 827, error dismissed.

Utah.—Van Cleave v. Lynch, 166 P. 2d 244, 109 Utah 149.

Vt.—MacDonald v. Orton, 134 A. 599, 99 Vt. 425.

Wash.—Sasse v. Hale Morton Taxi & Auto Co., 246 P. 940, 139 Wash. 859.

Wis.—Hanson v. Halvorson, 19 N.W. 2d 882, 247 Wis. 434—Plautz v. Kubasta, 295 N.W. 667, 237 Wis. 198.

42 C.J. p 1255 note 60.

At intersection

Iowa.—Stutzman v. Younkerman, 216 N.W. 627, 204 Iowa 1162.

Mass.—Ponticelli v. Cataldo, 152 N.E. 81, 255 Mass. 473.

Mich.—Severson v. Family Creamery Co., 256 N.W. 348, 268 Mich. 348.

Miss.—Gulf Refining Co. v. Miller, 116 So. 295, 150 Miss. 68.

Mo.—Erxleben v. Kaster, App., 21 S. W.2d 195.

N.J.—Smiley v. Reid Ice Cream Corporation, 135 A. 504, 5 N.J. Misc. 82.

N.Y.—Rockcastle v. Malley, 290 N. Y.S. 444, 248 App Div 943.

N.C.—Kelly v. Hunsucker, 189 S.E. 664, 211 N.C. 153—Davidson v. Western Union Telegraph Co., 178 S.E. 603, 207 N.C. 790.

R.I.—Bourre v. Texas Co., 142 A. 621, 49 R.I. 364.

Child crossing street, highway, or alley

(1) Generally.

Ala.—Conner v. Foregger, 7 So.2d 856, 242 Ala. 275—Hampton v. Roberson, 163 So. 644, 231 Ala. 55.

Ark.—Sauve v. Ingram, 143 S.W.2d 541, 200 Ark. 1181—Self v. Kirkpatrick, 110 S.W.2d 13, 194 Ark. 1014—Lockhart v. Ross, 87 S.W. 2d 73, 191 Ark. 743—Gates v. Plummer, 291 S.W. 816, 173 Ark. 27.

Cal.—Nightingale v. Birnbaum, 52 P. 2d 955, 11 Cal.App.2d 34—Holden v. Patten-Blinn Lumber Co., 45 P.2d 1037, 7 Cal.App.2d 220—Jones v. Davies, 24 P.2d 364, 133 Cal.App. 389—De Nardi v. Palanca, 8 P.2d 220, 120 Cal.App. 371—Scott v. Shaw, 1 P.2d 531, 115 Cal.App. 400—Galwey v. Pacific Auto Stages, 273 P. 866, 96 Cal App. 169.

Conn.—Di Leo v. Dolinsky, 27 A.2d 126, 129 Conn. 203.

D.C.—Steger v. Cameron, 109 F.2d 347, 71 App.D.C. 202.

Idaho.—Stearns v. Graves, 111 P.2d 882, 42 Idaho 312—Byington v. Horton, 102 P.2d 652, 61 Idaho 389—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.

Ill.—Lagerstrom v. Jago, 44 N.E.2d 830, 316 Ill.App. 156—Hansen v. Spahr, 16 N.E.2d 942, 296 Ill.App.

647—Lupton v. Bonser, 6 N.E.2d 261, 288 Ill.App. 634.

Iowa.—McMahon v. Rauch, 293 N.W. 908, 230 Iowa 674—Flickinger v. Phillips, 267 N.W. 101, 221 Iowa 837—Darr v. Porte, 263 N.W. 240, 220 Iowa 751.

La.—Jones, for Use and Benefit of Jones v. Nugent, App., 166 So. 193.

Md.—Henkelmann v. Metropolitan Life Ins. Co., 26 A.2d 418, 180 Md. 591.

Mass.—Bouley v. Miller, 77 N.E.2d 397, 322 Mass. 369—Mazzaferro v. Dupuis, 75 N.E.2d 503, 321 Mass. 718—Ferris v. Turner, 70 N.E.2d 715, 320 Mass. 555—McGovern v. Thomas, 59 N.E.2d 718, 317 Mass. 740—Mroczek v. Craig, 44 N.E.2d 644, 312 Mass. 236—Cadman v. White, 5 N.E.2d 19, 296 Mass. 117—Rondeau v. Kay, 184 N.E. 926, 282 Mass. 452—Dursa v. Hamilton, 182 N.E. 844, 280 Mass. 482—Jean v. Nester, 158 N.E. 893, 261 Mass. 442.

Mich.—Dedo v. Skinner, 296 N.W. 265, 296 Mich. 209—Cronberger v. Crampton, 241 N.W. 891, 258 Mich. 238—Bade v. Nies, 214 N.W. 170, 239 Mich. 37.

Minn.—Luther v. Dornack, 229 N.W. 784, 179 Minn. 528.

Miss.—McDonald v. Moore, 131 So. 824, 159 Miss. 326.

Mo.—Willis v. Applebaum, App., 26 S.W.2d 823.

Mont.—Johnson v. Herring, 300 P. 535, 89 Mont. 420.

Neb.—Kauffman v. Fundaburg, 242 N.W. 658, 123 Neb. 340.

N.H.—Martineau v. Waldman, 36 A. 2d 627, 93 N.H. 117.

N.J.—Rizlo v. Public Service Electric & Gas Co., 23 A.2d 585, 128 N.J. Law 60—Yohannan v. Benisch, 135 A. 876, 103 N.J. Law 462—Minarsik v. Blank, 132 A. 251, 102 N.J. Law 231—Bothly v. Ott, 143 A. 546, 6 N.J. Misc. 1011.

N.Y.—Millo v. Railway Motor Trucking Co., 15 N.Y.S.2d 73, 257 App. Div. 640—Mere v. Hull, 290 N.Y.S. 239, 248 App Div. 935.

N.C.—Sparks v. Willis, 44 S.E.2d 313, 228 N.C. 25—Yukley v. Kearns, 25 S.E.2d 602, 223 N.C. 196—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.

Okl.—Hale-Halsell Co. v. Webb, 89 P.2d 273, 184 Okl. 589.

Pa.—Di Domenico v. Fluck, 176 A. 210, 317 Pa. 385—Johnson v. Abbott's Alderney Dairies, 145 A. 605, 295 Pa. 548—Frank v. Cohen, 135 A. 624, 288 Pa. 221—Pesola v. Tremayne, 165 A. 661, 108 Pa.Super. 535.

R.I.—Bourre v. Texas Co., 154 A. 86, 51 R.I. 234—Willett v. Slocum, 131 A. 545, 47 R.I. 136.

Tenn.—Cummins v. Woody, 152 S. W.2d 246, 177 Tenn. 636—Carney v. Cook, 13 S.W.2d 322, 158 Tenn. 333.

Tex.—Dr. Pepper Bottling Co. v.

Rainboldt, Civ.App., 66 S.W.2d 496, reversed on other grounds Schroeder v. Rainboldt, 97 S.W.2d 679, 128 Tex. 269.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1—Green v. Higbee, 244 P. 906, 66 Utah 539.

Wash.—Carlson v. Ahl, 98 P.2d 1081, 2 Wash.3d 545.

W.Va.—Black v. Peerless Elite Laundry Co., 169 S.E. 447, 113 W.Va. 828.

(2) Crossing on roller skates.—Elchinger v. Krouse, 144 A. 638, 105 N.J.Law 402.

(3) Striking school child at time when school children were crossing street.—Chapman v. Dillard, 174 S. E. 657, 162 Va. 389.

(4) Boarding or alighting from bus or street car.

Conn.—Lange v. Hoyt, 159 A. 575, 114 Conn. 590, 82 A.L.R. 486.

N.J.—Horowitz v. Schanerman, 187 A. 346, 117 N.J.Law 314.

Pa.—Fedorovich v. Glenn, 9 A.2d 358, 337 Pa. 60—Juchniewicz v. Hawthorne, 44 A.2d 301, 158 Pa.Super. 146—Zoeller v. Smallstig, 179 A. 755, 118 Pa.Super 265.

Wash.—Rettig v. Coca-Cola Bottling Co., 156 P.2d 914, 22 Wash.2d 572—Kellum v. Rounds, 81 P.2d 783, 195 Wash. 518.

(5) Truck driver had no right, as matter of law, to assume that boy alighting from school truck would or would not step or run suddenly across road—International Harvester Co. v. Williams, 133 So. 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595

Child darting into street or highway

Ky.—Lehman v. Patterson, 162 S. W.2d 897, 298 Ky. 360.

N.Y.—Allison v. Hathorn, 287 N.Y.S. 903, 248 App.Div. 642.

Child emerging from behind vehicle

Minn.—Victor v. Costello, 279 N.W. 743, 203 Minn. 41.

Neb.—Rundall v. Grace, 272 N.W. 398, 132 Neb. 490.

N.H.—Lapolicie v. Austin, 157 A. 73, 85 N.H. 244.

Pa.—Haas v. Wesley, 14 A.2d 179, 140 Pa.Super 453.

S.D.—Alendal v. Madsen, 275 N.W. 352, 65 S.D. 502.

Wash.—Romano v. Short Line Stage Co., 253 P. 657, 142 Wash. 419.

Child in vicinity of schoolhouse

N.J.—Scott-Huntington v. Pearson, 168 A. 259, 11 N.J.Misc. 642.

Pa.—Urbanick v. Croneweth Dairy Co., 35 A.2d 83, 154 Pa.Super. 44.

Child jumping off side of streetcar

Pa.—Bianco v. Scott Bros., 175 A. 721, 115 Pa.Super. 482.

Backing

(1) Generally.

Cal.—Parra v. Cleaver, 294 P. 6, 110 Cal.App. 168.

Mich.—Sadlowski v. Meeron, 215 N. W. 422, 240 Mich. 308, opinion adhered to 220 N.W. 680, 243 Mich. 602.

N.J.—Webster v. Wickham, 135 A. 781, 5 N.J.Misc. 186.

Ohio.—City Ice & Fuel Co. v. Center, 6 N.E.2d 580, 54 Ohio App. 116.

Vt.—Callahan v. Disorda, 16 A.2d 179, 111 Vt. 331.

42 C.J. p 1255 note 60 [d].

(2) Child struck after getting off rear of backing truck.—Brown v. Murray, 39 N.E.2d 83, 313 Ill.App. 144.

(3) Fact that driver and wife looked while backing vehicle, without seeing boy, did not establish freedom from negligence as matter of law.—McManus v. Arnold Taxi Corporation, 255 P. 755, 82 Cal.App. 215.

Control

Cal.—Scott v. Shaw, 1 P.2d 531, 115 Cal.App. 400.

Conn.—Di Leo v. Dolinsky, 27 A.2d 126, 129 Conn. 203.

Ky.—Lundy v. Brown's Adm'r, 205 S.W.2d 498, 305 Ky. 721.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.—Vansant v. Holbrook's Adm'r, 146 S.W.2d 337, 285 Ky. 88.

Neb.—Crecelius v. Gamble-Skogmo, Inc., 13 N.W.2d 627, 144 Neb. 394.

Pa.—McNamara v. Kehr, Com.Pl., 42 Lack Jur 205.

Tenn.—Carney v. Cook, 13 S.W.2d 322, 158 Tenn. 333.

42 C.J. p 1255 note 60 [b].

Speed

Cal.—Harrison v. Gamatero, 125 P. 2d 904, 52 Cal.App.2d 178.

Conn.—Di Leo v. Dolinsky, 27 A.2d 126, 129 Conn. 203.

Ga.—Smith v. Kleinberg, 174 S.E. 731, 49 Ga.App. 194.

Ky.—Brown McClain Transfer Co. v. Major's Adm'r, 65 S.W.2d 992, 251 Ky. 741.

Mass.—Rondeau v. Kay, 181 N.E. 926, 282 Mass. 452.—Linnane v. Millman, 159 N.E. 523, 261 Mass. 491.

N.J.—Mancino v. Urbaniak, 200 A. 483, 120 N.J.Law 424.

N.Y.—Byrd v. City of New York, 35 N.Y.S.2d 209, 264 App.Div. 255.

N.C.—Caulder v. Kivett Motor Sales, 20 S.E.2d 338, 221 N.C. 437.

Ohio.—Rothe v. Dworkin, App., 70 N.E.2d 146.

Tenn.—Cummins v. Woody, 152 S.W. 2d 246, 177 Tenn. 636.

42 C.J. p 1255 note 60 [a].

Turning

(1) In general.—Williams v. Holbrook, 103 N.E. 633, 216 Mass. 239.—42 C.J. p 1255 note 60 [c].

(2) Evidence that driver turned right and struck child crossing high-

way, when left turn would have avoided accident, did not establish negligence as matter of law.—Garmoe v. Colthurst, 246 N.W. 767, 215 Iowa 729.

Failure to apply brakes

Cal.—De Nardi v. Palanca, § P.2d 220, 120 Cal.App. 371.

Failure to give warning

Ala.—Patrick v. Mitchell, 6 So.2d 889, 242 Ala. 414.—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359.

Conn.—Lane v. Ludeman, 38 A.2d 178, 131 Conn. 112.

Ill.—Marino v. Nacovosky, 78 N.E.2d 662, 334 Ill.App. 105.—Edmiston v. Hampton, 42 N.E.2d 963, 315 Ill. App 305.

Ky.—Ballback's Adm'r v. Boland-Maloney Lumber Co., 208 S.W.2d 940, 306 Ky. 647.—Lundy v. Brown's Adm'r, 205 S.W.2d 498, 305 Ky. 721.—Vansant v. Holbrook's Adm'r, 146 S.W.2d 337, 285 Ky. 88.

Mass.—Leonard v. Fowle, 152 N.E. 210, 255 Mass 531.

Mich.—Ackerman v. Advance Petroleum Transport, 7 N.W.2d 235, 304 Mich. 96.—Zylstra v. Graham, 221 N.W. 318, 244 Mich. 319, opinion adhered to 224 N.W. 343, 246 Mich. 91.

Mo.—Gillis v. Singer, App., 86 S.W.2d 352.—Cervillo v. Manhattan Oil Co., 49 S.W.2d 183, 226 Mo.App. 1090.

Mont.—Pierce v. Safeway Stores, 20 P.2d 253, 93 Mont 560.

Neb.—Kaufman v. Pundaburg, 242 N.W. 658, 123 Neb. 340.

N.Y.—Byrd v. City of New York, 35 N.Y.S.2d 209, 264 App.Div. 255.—Lo Vaglio v. Kahn, 1 N.Y.S.2d 322, 253 App.Div. 824.—Shulman v. Roseth Corporation, 238 N.Y.S. 575, 227 App.Div. 577.

N.C.—Caulder v. Kivett Motor Sales, 20 S.E.2d 338, 221 N.C. 437.—Moore v. Powell, 172 S.E. 327, 205 N.C. 636.

Ohio.—Wilkeson v. Erskine & Son, 61 N.E.2d 201, 145 Ohio St. 218.—Rothe v. Dworkin, App., 70 N.E.2d 146.

Pa.—Lucas v. Bushko, 171 A. 460, 314 Pa. 310.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

Wis.—Ituka v. Zierer, 218 N.W. 358, 195 Wis. 285.

42 C.J. p 1255 note 60 [g].

Failure to keep lookout

(1) Generally.

Ala.—Peoples v. Seamon, 31 So.2d 88, 219 Ala. 284.

Ark.—Derry v. Grimes, 148 S.W.2d 676, 202 Ark. 20.—Lockhart v. Ross, 87 S.W.2d 73, 191 Ark. 743.

Cal.—Waterbury v. Elysian Spring Water Co., 33 P.2d 1048, 139 Cal. App. 355.—Scott v. Shaw, 1 P.2d 531, 115 Cal.App.400.

Conn.—Di Leo v. Dolinsky, 27 A.2d 126, 129 Conn. 203.

Ga.—Smith v. Kleinberg, 174 S.E. 731, 49 Ga.App. 194.

Iowa.—McMahon v. Rauch, 298 N.W. 908, 230 Iowa 674.—Lenth v. Schug, 281 N.W. 510, 226 Iowa 1, reheard 287 N.W. 596, 226 Iowa 1.

Ky.—Kentucky-Virginia Stages v. Tackett, 182 S.W.2d 226, 298 Ky. 78.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.—Vansant v. Holbrook's Adm'r, 146 S.W.2d 337, 285 Ky. 88.—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554.

Md.—Mahan v. State, to Use of Carr. 191 A. 575, 172 Md 373.

Mass.—Falzone v. Burgoyne, 58 N.E. 2d 751, 317 Mass. 493.

Mich.—Dedo v. Skinner, 296 N.W. 265, 296 Mich. 299.

Minn.—Forseth v. Duluth-Superior Transit Co., 278 N.W. 904, 202 Minn. 447.

Mo.—Gillis v. Singer, App., 86 S.W. 2d 352.—Willis v. Applebaum, App., 26 S.W.2d 823.

Neb.—Crecelius v. Gamble-Skogmo, Inc., 13 N.W.2d 627, 144 Neb. 394.—Kaufman v. Pundaburg, 242 N.W. 658, 123 Neb 310.

N.Y.—Lo Vaglio v. Kahn, 1 N.Y.S.2d 322, 253 App.Div. 824.

Ohio.—Rothe v. Dworkin, App., 70 N.E.2d 146.

Pa.—Reader v. May-Stern & Co., 7 A.2d 379, 136 Pa.Super. 359.—P'esola v. Tremayne, 165 A. 661, 108 Pa. Super. 535.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

Va.—Wash v. Holland, 183 S.E. 236, 166 Va. 45.

42 C.J. p 1255 note 60 [f].

(2) Whether driver of vehicle should have seen child in time to have avoided collision with child was for jurv.—Van Cleave v. Lynch, 166 P.2d 244, 109 Utah 149.

(3) In action for death of boy, struck by automobile while crossing highway from left to right of automobile, driver thereof did not admit his negligence as matter of law by testifying that he was not observing terrain to left of highway, probably could have seen deceased before he reached pavement had witness looked at adjoining property, and could have stopped automobile in time to avoid accident had he seen deceased approaching highway sooner than when witness was about fifty feet from deceased, in view of conflicting evidence.—Carlson v. Ahl, 98 P.2d 1081, 2 Wash 2d 545.

Wrong side of road

U.S.—Dugan v. Fry, C.C.A.N.J., 34 F. 2d 723.

La.—Jones, for Use and Benefit of Jones v. Nugent, App, 166 So 193.

Pa.—Rosenfeld v. Stauffer, 182 A. 714, 121 Pa.Super. 103.

42 C.J. p 1255 note 60 [j].

stances where the child was playing thereon,⁷⁷ or whether defendant was guilty of negligence in striking a child on the sidewalk⁷⁸ or in a driveway⁷⁹ or sitting on the curb.⁸⁰ The weight of the evidence and the credibility of the witnesses are for the jury.⁸¹ On conflicting evidence or where different inferences may reasonably be drawn therefrom, incidental questions also are for

the jury,⁸² as, for example, the manner in which the accident occurred,⁸³ whether defendant's automobile struck plaintiff,⁸⁴ whether defendant's motor vehicle struck the child or the child ran into the vehicle,⁸⁵ whether the child, when struck, was crossing the street at an intersection or between intersections,⁸⁶ whether the intersection at which defendant struck the child was a blind cor-

77. Child on coaster wagon

Iowa.—Kallansrud v. Libbey, 13 N. W.2d 684, 234 Iowa 700.

Child on scooter

N.Y.—Tamburrino v. Sterrick Delivery Corporation, 271 N.Y.S. 765, 241 App.Div. 221.

R.I.—Bouthillier v. United Electric Rys. Co., 193 A. 618, 58 R.I. 419.

Child on sled

Conn.—Szivos v. Leonard, 155 A. 637, 113 Conn. 522—Oginskas v. Fredsal, 143 A. 888, 108 Conn. 505.

Ill.—Popadowski v. Bergaman, 26 N. E.2d 722, 304 Ill.App. 422.

Iowa.—McDowell v. Interstate Oil Co., 237 N.W. 456, 212 Iowa 1314.

Mass.—Wright v. Carlson, 45 N.E.2d 840, 312 Mass. 584.

N.H.—Cleveland v. Reashy, 33 A.2d 554, 92 NH 518—Crook v. Parkhurst, 197 A. 827, 89 N.H. 280.

N.J.—Mellen v. Public Service Interstate Transp. Co., 166 A. 216, 110 N.J.Law 557—Reeves v. Prosser, 162 A. 729, 109 N.J.Law 485—Paretto v. Mitchell, 167 A. 29, 11 N.J. Misc. 563, affirmed 170 A. 615, 112 N.J.Law 384.

N.Y.—Jordan v. Smyk, 29 N.Y.S.2d 62, 262 App.Div. 414, reversed on other grounds 41 N.E.2d 930, 288 N.Y. 525—Stahl v. Olstein, 282 N. Y.S. 626, 246 App.Div. 542.

Pa.—Smith v. Pachter, 25 A.2d 343, 344 Pa. 363—Derrickson v. Tomlinson, 192 A. 673, 326 Pa. 560—Fisher v. Duquesne Brewing Co. of Pittsburgh, 187 A. 90, 123 Pa.Super. 208—Morris v. Kauffman, 182 A. 758, 120 Pa.Super. 515.

Vt.—Vitale v. Smith Auto Sales Co., 144 A. 380, 101 Vt. 477.

Child on tricycle

N.J.—Long v. Yellow Cab Co. of Camden, 29 A.2d 887, 129 N.J.Law 560.

Pa.—Lucas v. Bushko, 171 A. 460, 314 Pa. 310—Glover v. Struble, 48 A. 2d 50, 159 Pa.Super. 305.

Children engaged in snowball battle
W.Va.—Vance v. Logan Williamson Bus Co., 46 S.E.2d 783.

Children playing ball

(1) Generally.—Greene v. Frenzel Bros. Co., 18 N.E.2d 719, 298 Ill.App. 622.

(2) Retrieving ball from street or road.

Mass.—Di Rienzo v. Goldfarb, 153 N. E. 784, 257 Mass. 272.

N.J.—Scott-Huntington v. Pearson, 168 A. 259, 11 N.J.Misc. 642.

Roller skating

Ky.—Bryson v. Raum's Adm'r, 47 S. W.2d 927, 243 Ky. 121.

N.C.—Leach v. Varley, 189 S.E. 636, 211 N.C. 207.

Wash.—Crook v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.

78. Cal.—Wilcox v. Epstein, 151 P. 2d 156, 65 Cal.App.2d 581.

Ill.—Schwanz v. Sangamo Electric Co., 13 N.E.2d 1007, 294 Ill.App. 395.

Mass.—Cairney v. Cook, 165 N.E. 406, 266 Mass. 279.

Pa.—Hahn v. Anderson, 192 A. 489, 326 Pa. 463.

Backing

(1) Generally.

SC—Carroll v. Lumpkin, 143 S.E. 648, 146 S.C. 178.

Wash.—Freeman v. Arctic Grocery Co., 279 P. 100, 153 Wash. 10.

(2) Evidence of negligence in backing truck to curb in such manner that toy wagon propelled by child along sidewalk was struck was sufficient for jury.—G. W. Woo v. Lo Chew, 16 P.2d 1001, 128 Cal.App. 235.

(3) Evidence that seven-year-old child was playing on sidewalk, kneeling with her feet dangling over curb into street for distance of one and one-half feet, and that driver of motor vehicle, which had been parked nearby, struck child while backing vehicle toward her, presented question for jury as to whether operator had used proper vigilance.—Frascello v. Baer, 24 N.E.2d 653, 304 Mass. 643.

Result of collision of two automobiles

Del.—Hiddle v. Haldas Bros., 190 A. 588, 8 W.W.Harr. 210.

N.J.—Schifano v. Kaiser, 41 A.2d 206, 132 N.J.Law 499.

Ohio.—Bluebird Baking Co. v. McCarthy, App., 36 N.E.2d 801.

One foot on curb

Mich.—Blasdel v. Wooley, 226 N.W. 852, 248 Mich. 204.

Tex.—Beaumont-Port Arthur Bus Line v. Williford, Civ.App., 100 S. W.2d 432, error dismissed.

79. Cal.—Langham v. Norlander, 137 P.2d 29, 158 Cal.App.2d 543.

Ky.—Meeks Motor Freight v. Ham's Adm'r, 193 S.W.2d 745, 302 Ky. 71.

Tenn.—Stephens v. Clayton, 124 S. W.2d 33, 22 Tenn.App. 449.

Child on driveway inside school grounds

Ill.—Teece v. Bieber, 56 N.E.2d 665, 323 Ill.App. 647.

Backing of automobile into driveway
Mich.—Roach v. Petrequin, 208 N.W. 695, 234 Mich. 551.

80. Minn.—Marcum v. Clover Leaf Creamery Co., 30 N.W.2d 24, 225 Minn. 139.

N.Y.—Shaughnessy v. Hart, 48 N.Y. S.2d 491, 268 App.Div. 809.

81. Iowa.—Paschka v. Carsten, 3 N. W.2d 542, 231 Iowa 1185.

Md.—Henkelmann v. Metropolitan Life Ins. Co., 26 A.2d 418, 180 Md. 591.

82. Ill.—Wyma v. De Fay Wonder Cleaners, 77 N.E.2d 353, 333 Ill. App. 330—Radatz v. Tribune Co., 12 N.E.2d 224, 293 Ill.App. 315.

Ky.—Whitehead v. Stith, 131 S.W.2d 455, 279 Ky. 556—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554.

N.Y.—Schuvart v. Werner, 50 N.E.2d 533, 291 N.Y. 32.

Pa.—Hoban v. Conroy, 32 A.2d 769, 347 Pa. 487—Curley v. Edwin A. Smith & Sons, 31 A.2d 113, 346 Pa. 489—Johnson v. Abbott's Alderney Dairies, 145 A. 605, 295 Pa. 548—Haas v. Wesley, 14 A.2d 179, 140 Pa.Super. 453.

Wash.—Taber v. Bauer, 21 P.2d 1028, 173 Wash. 96.

Priority of entry into intersection

Iowa.—Kallansrud v. Libbey, 13 N. W.2d 684, 234 Iowa 700.

Whether vehicle struck boy on sidewalk or whether he darted from behind telegraph pole into roadway was for jury.—Bonvenuto v. Aisenberg, 154 N.E. 757, 258 Mass. 213.

83. N.Y.—Winant v. City of New York, 67 N.Y.S.2d 662, affirmed 67 N.Y.S.2d 485, 271 App.Div. 883.

84. N.Y.—Bohringer v. Campbell, 137 N.Y.S. 241, 154 App.Div. 879.

85. Utah.—Van Cleave v. Lynch, 166 P.2d 244, 109 Utah 149.

86. Md.—York Ice Machinery Corporation v. Sachs, 173 A. 240, 167 Md. 113.

ner,⁸⁷ whether defendant was driving on the wrong side of the road,⁸⁸ whether the view of defendant was obstructed,⁸⁹ whether defendant gave a timely warning,⁹⁰ or whether or not defendant knew or ought to have known the immature age of the child injured and his lack of responsibility.⁹¹

The evidence must be legally sufficient to require or warrant submission to the jury, and in various cases the evidence has been held insufficient to justify submission of the question to the jury of defendant's negligence or of some ques-

tion incidental thereto.⁹² Where the evidence is undisputed and but one inference may reasonably be drawn therefrom, the negligence of defendant, or questions incidental thereto, are questions of law;⁹³ where the evidence is uncontradicted and no inference of negligence on the part of defendant may reasonably be made therefrom, the court may declare as a matter of law that defendant was not negligent.⁹⁴ In order to justify a directed verdict for defendant the evidence must admit of no inference of negligence of defendant.⁹⁵ Where

87. Cal.—Mize v. Duffy, 288 P. 798, 106 Cal.App. 15.

88. Minn.—Dickey v. Haes, 262 N.W. 869, 195 Minn. 292.

89. Ala.—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359.
N.J.—Sembler v. Scott, 32 A.2d 79, 130 N.J.Law 184.

Wis.—Plautz v. Kubasta, 295 N.W. 667, 237 Wis. 198.

90. Iowa.—Noland v. Kyar, 292 N.W. 810, 228 Iowa 1006.

Ky.—McCray v. Earls, 101 S.W.2d 192, 267 Ky. 89.

91. Colo.—Kent v. Treworgy, 125 P. 128, 22 Colo App 441.

92. Fla.—Ehrens v. Miami Transit Co., 20 So.2d 261, 155 Fla. 394, followed in 20 So.2d 263, 155 Fla. 399.
Ill.—Pastore v. Sasso, 46 N.E.2d 857, 317 Ill.App. 538.

Iowa.—Westenburg v. Johnson, 264 N.W. 18, 221 Iowa 134—Chipokas v. Peterson, 260 N.W. 37, 219 Iowa 1072.

Mass.—Woods v. De Mont, 77 N.E.2d 220, 322 Mass. 233.

Mich.—Benedict v. Rinna, 241 N.W. 200, 257 Mich. 349.

Minn.—O'Neil v. Cochrane, 238 N.W. 632, 184 Minn. 354.

N.H.—Coleman v. Stacy, 13 A.2d 466, 91 N.H. 60—Greallish v. Odell, 193 A. 219, 89 N.H. 130—Miller v. Daniels, 166 A. 30, 86 N.H. 193.

N.J.—Aronica v. Giordano, 153 A. 700, 9 N.J.Misc. 324.

N.C.—Mills v. Moore, 12 S.E.2d 661, 219 N.C. 25—Fox v. Barlow, 173 S.E. 43, 206 N.C. 46—Ham v. Greensboro Ice & Fuel Co., 169 S.E. 180, 204 N.C. 614—Kennedy v. Lookadoo, 166 S.E. 752, 203 N.C. 650.

Okl.—Dollard v. Union Transp. Co., 269 P. 253, 132 Okl. 53.

Pa.—Martin v. Rotunno, 167 A. 33, 311 Pa. 487—Bradley v. Rhodes, 188 A. 564, 124 Pa.Super. 161—Rosovich v. Parkway Baking Co., 163 A. 915, 107 Pa.Super. 493—Lowder v. Bausman, Com.Pl., 55 Dauph.Co. 118—Ridley v. Pucci, Com.Pl., 89 Pittsb.Leg.J. 292.

Wash.—Haydon v. Bay City Fuel Co., 9 P.2d 98, 167 Wash. 212.

Wis.—Lazewski v. Delsell, 24 N.W.

2d 879, 249 Wis. 491—Hanson v. Weber, 291 N.W. 800, 234 Wis. 593. 42 C.J. p 1255 note 60 [J].

Boy jumping from moving truck

Mass.—Costa v. Shade, 183 N.E. 175, 281 Mass 200.

Child darting out from behind automobile

Iowa.—Chipokas v. Peterson, 260 N.W. 37, 219 Iowa 1072—Howk v. Anderson, 253 N.W. 32, 218 Iowa 358.

Ky.—Louisville Taxicab & Transfer Co. v. Warren, 205 S.W.2d 695, 305 Ky. 861.

Mich.—Zebell v. Buck, 248 N.W. 559, 263 Mich 93.

Pa.—O'Farrell v. Milgram, 46 A.2d 165, 353 Pa. 468.

Child playing in street

Md.—Slaysman v. Gerst, 150 A. 728, 159 Md 292.

Pa.—Fisher v. Amsterdam, 137 A. 797, 290 Pa. 1.

Crossing street on scooter

Mass.—Maffoli v. George L. Griffin & Son, 194 N.E. 726, 289 Mass. 458.

Backing

(1) Generally.

Mich.—In re Miller's Estate, 2 N.W. 2d 888, 300 Mich 703.

N.C.—Rountree v. Fountain, 166 S.E. 329, 203 N.C. 381.

(2) Fact that motor truck being backed away from its parked position on wrong side of street struck and injured child was not sufficient evidence for jury on question of actionable negligence of truck driver.—Dallas v. Diegal, 41 A.2d 161, 184 Md 372.

Negligence in not sounding horn was insufficient for jury, where warning would have been useless when motorist saw boy suddenly start across street.—Howk v. Anderson, 253 N.W. 32, 218 Iowa 358.

Demurrer to evidence

N.C.—Proctor v. Carter Fabrics Corp., 40 S.E.2d 472, 227 N.C. 698.

Nonsuit

(1) Generally.—Harrington v. Greidanus, 160 A. 652, 10 N.J.Misc. 710.

(2) Where undisputed proof showed that child ran from sidewalk

into right rear wheel of truck and was killed, nonsuit at close of plaintiff's evidence was properly entered.—Ondrusek v. Zahn, 52 A.2d 461, 356 Pa. 537.

Directed verdict for defendant

Ark.—Lowe v. Ivy, 164 S.W.2d 429, 204 Ark. 623.

D.C.—Boyd v. Ottenberg, 114 F.2d 20, 72 App D.C. 277.

Iowa.—Kessler v. Robbins, 245 N.W. 284, 215 Iowa 327.

Mass.—West v. City of Medford, 151 N.E. 295, 255 Mass. 266.

N.J.—Drachenberg v. M. & M. Trucking & Forwarding Co., 156 A. 21, 9 N.J.Misc. 895, affirmed 162 A. 405, 109 N.J.Law 548.

Pa.—Negri v. Lehr, Com.Pl., 35 Berks Co. 217.

93. U.S.—Blodgett v. Pinkerton Tobacco Co., C.C.A.Mich., 79 F.2d 945.
Iowa.—McDowell v. Interstate Oil Co., 224 N.W. 58, 208 Iowa 641, rehearing denied and opinion corrected 225 N.W. 855.

N.Y.—Kyff v. Grand Central Wicker Shop, 261 N.Y.S. 548, 237 App.Div. 539.

Physical fact rule

Evidence that truck moved twelve to fourteen feet, and child was found just behind front wheel, did not create conflict under physical fact rule.—Williams v. Cohn, 206 N.W. 823, 201 Iowa 1121.

94. Iowa.—McDowell v. Interstate Oil Co., 224 N.W. 58, 208 Iowa 641, rehearing denied and opinion corrected 225 N.W. 855.

La.—Dipino v. Joe Gulino & Son, App., 154 So. 772.

N.Y.—Kyff v. Grand Central Wicker Shop, 261 N.Y.S. 548, 237 App.Div. 539.

42 C.J. p 1256 note 65.

Where great weight of evidence was to effect that motorist was not negligent, as respects injuries to child, verdict was properly directed for motorist.—Stover v. Stovall, 137 So. 249, 103 Fla. 284.

95. Md.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md. 151.

the evidence is reasonably sufficient to support a verdict for plaintiff, a directed verdict for defendant is improper.⁹⁶ A motorist is not negligent as a matter of law in releasing the brakes after striking a child where his purpose is to avoid further injury to the child.⁹⁷

(9) Persons under Disability

The question of the defendant's negligence in the operation of a motor vehicle in causing injury to a person under disability is for the jury on conflicting evidence or where different inferences may reasonably be drawn from the evidence.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing injury to persons under disability⁹⁸ by striking such persons⁹⁹ upon the street or highway.¹ On such evidence incidental questions also are for the jury or the trial court,² as, for example, whether plaintiff was actually struck by defendant's automobile.³ The evidence must be legally sufficient to require or warrant submission to the jury of defendant's negligence or of some question incidental thereto.⁴

(10) Persons Emerging from behind Obstructions

Where the evidence is conflicting, whether the de-

fendant was guilty of negligence in causing injury to a person emerging from behind an obstruction is a question of fact.

Where the evidence is legally sufficient and is conflicting or where different inferences may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was negligent in causing injury to a person emerging from behind an obstruction.⁵ On such evidence incidental questions also are for the jury or trial court.⁶

(11) Guests or Occupants of Vehicle Owned or Operated by Defendant

Where the evidence is conflicting or more than one inference may reasonably be drawn from the evidence, it is for the jury to determine whether the defendant, in the operation of his motor vehicle, was guilty of such acts or omissions, such as negligence or gross negligence, as will impose liability for injuries to a guest or occupant of the motor vehicle.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of his motor vehicle, was, with respect to guests or occupants of his vehicle, guilty of such acts or omissions as will impose liability.⁷ On such evidence it is for the jury or the trial court to determine whether defendant was guilty of negligence,⁸ and, likewise, if such questions

96. Cal.—Hunt v. Los Angeles Ry. Corporation, 294 P. 745, 110 Cal. App. 456.

97. Ariz.—Broderick v. Coppinger, 14 P.2d 714, 40 Ariz. 524.

98. Pa.—Adams v. Armour & Co., 16 A.2d 142, 142 Pa. Super. 280.

Care as to persons under disability see supra §§ 394, 395.

In action by wife against husband for injuries allegedly caused when husband grabbed steering wheel of automobile while wife was driving, causing automobile to leave highway, defense of unconsciousness of husband was for jury.—Jernigan v. Jernigan, 175 S.E. 713, 207 N.C. 851.

99. Cal.—Benton v. Douglas, 187 P. 2d 469, 82 Cal.App.2d 784.
42 C.J. p 1256 note 67.

1. Or.—Curry v. Gibson, 285 P. 242, 132 Or. 283.
42 C.J. p 1256 note 67.

Blind pedestrian at street intersection

Or.—Curry v. Gibson, 285 P. 242, 132 Or. 283.

Deaf pedestrian crossing street

Pa.—Adams v. Armour & Co., 16 A.2d 142, 142 Pa. Super. 280.

Intoxicated pedestrian

Cal.—Benton v. Douglas, 187 P.2d 469, 82 Cal. App. 2d 784.

Person injured in previous collision

Ill.—Itisch v. Consumers Petroleum Co., 53 N.E.2d 286, 321 Ill. App. 438.
Mo.—Benson v. Smith, App., 38 S.W. 2d 743.

N.C.—West v. Collins Baking Co., 181 S.E. 551, 208 N.C. 526.

Pa.—Neubert v. Siegel, 3 A.2d 778, 333 Pa. 90.

Person lying upon highway at night
U.S.—Kriesak v. Crowe, C.C.A.Pa., 131 F.2d 1023.

2. Mass.—Bagley v. Kimball, 167 N. E. 661, 268 Mass. 440.

3. Mass.—Bagley v. Kimball, supra.

4. Person lying in street at night
N.Y.—Guardino v. Terminal Cab Corporation, 3 N.E.2d 862, 272 N.Y. 446.

5. Emerging from behind streetcar
Tenn.—Union Transfer Co. v. Finch, 64 S.W.2d 222, 16 Tenn. App. 293.

Stepping from behind parked car

(1) Evidence held sufficient to go to jury.—Breen v. Thole, 229 N.W. 498, 249 Mich. 666.

(2) Evidence held insufficient to go to jury.—Rowe v. Cooney, 14 A.2d 76, 339 Pa. 105—McAttee v. Highland Coffee Co., 139 A. 585, 291 Pa. 32.

6. Tenn.—Union Transfer Co. v. Finch, 64 S.W.2d 222, 16 Tenn. App. 293.

7. U.S.—Conway v. O'Brien, Vt., 61 S.Ct. 634, 312 U.S. 492, 85 L.Ed. 969.

Ala.—Jewel Tea Co. v. Sklivas, 165 So. 824, 231 Ala. 590.

Ohio.—Tighe v. Diamond, 80 N.E.2d 122, 149 Ohio St. 520.

8. U.S.—Boyle v. Ward, C.C.A.Pa., 125 F.2d 672—Pryor v. Strawn, C. C.A.Neb., 73 F.2d 595—Hewlett v. Schadel, C.C.A.Va., 68 F.2d 502, 91 A.L.R. 743—De Soto Motor Corporation v. Vann, C.C.A.N.M., 66 F.2d 753—Higgins v. Ledo, C.C.A.N.H., 66 F.2d 265—Palmer v. Moren, D. C.Pa., 44 F.Supp. 704.

Ala.—Jewel Tea Co. v. Sklivas, 165 So. 824, 231 Ala. 590—Berry v. Dannelly, 145 So. 663, 228 Ala. 151—McQueen v. Jones, 145 So. 440, 226 Ala. 4.

Ariz.—Brownell v. Freedman, 6 P.2d 1115, 39 Ariz. 385—Bruno v. Grande, 251 P. 550, 31 Ariz. 206.

Ark.—Arkansas Valley Co-op. Rural Electric Co. v. Elkins, 141 S.W.2d 538, 200 Ark. 883—Southern Kansas Stage Lines Co. v. Ruff, 101 S.W.2d 968, 193 Ark. 684—Hammond v. Hamby, 87 S.W.2d 1000, 191 Ark. 780.

Cal.—Christiana v. Rattaro, 184 P.2d 682, 81 Cal.App.2d 597—Carey v. City of Oakland, 112 P.2d 714, 44 Cal.App.2d 503—Yates v. J. H. Krumlind & Co., 71 P.2d 298, 22 Cal.App.2d 387—Boysen v. Porter, 52 P.2d 582, 10 Cal.App.2d 431—Deagle v. Shane, 291 P. 652, 108 Cal.App. 490—Crooks v. White, 290 P. 497, 107 Cal.App. 304—Morris v. Morris, 258 P. 616, 84 Cal.App. 599.

Conn.—Baum v. Atkinson, 3 A.2d 365, 125 Conn. 72—Szabados v. Chatlos, 177 A. 719, 119 Conn. 537. Fla.—Carver v. Chase, 174 So. 408; 128 Fla. 287.

Ga.—Tallman v. Green, 41 S.E.2d 339, 74 Ga.App. 731—McDaniel v. Richards, 13 S.E.2d 710, 64 Ga.App. 612—Grahil v. McMath, 200 S.E. 342, 59 Ga.App. 247.

Ill.—Burns v. Storchak, 73 N.E.2d 168, 331 Ill.App. 347—Thompson v. Otis, 20 N.E.2d 130, 299 Ill.App. 620—Canavan v. Canavan, 271 Ill.App. 558—Walsh v. Moore, 244 Ill.App. 458.

Ind.—Lee Bros. v. Jones, 54 N.E.2d 108, 114 Ind.App. 688—Fuller v. Thrun, 31 N.E.2d 670, 109 Ind.App. 407.

Iowa.—Wells v. Wildin, 277 N.W. 308, 224 Iowa 913, 115 A.L.R. 169.

Ky.—Wathen v. Mackey, 187 S.W.2d 1000, 300 Ky. 115—Meriweather's Adm'x v. Pickering, 116 S.W.2d 670, 273 Ky. 367—Haller's Pet Shop v. Pearlman, 69 S.W.2d 9, 253 Ky. 130.

Me.—Howe v. Houde, 15 A.2d 740, 137 Me. 119—Stewart v. Jewett, 166 A. 54, 132 Me. 71.

Md.—Warner v. Markoe, 189 A. 260, 171 Md. 351—Fillings v. Diehlman, 177 A. 400, 168 Md. 306—Bauer v. Calic, 171 A. 713, 166 Md. 387.

Mass.—Forra v. Hume, 194 N.E. 301, 289 Mass. 266—Bartoszewicz v. Farashian, 187 N.E. 544, 284 Mass. 200—Chooljian v. Nahigian, 173 N.E. 511, 273 Mass. 396—Labatte v. Lavallee, 155 N.E. 433, 258 Mass. 527—Jackson v. Queen, 154 N.E. 78, 257 Mass. 515.

Mich.—Crook v. Eckhardt, 275 N.W. 739, 281 Mich. 703—Cardinal v. Reinecke, 273 N.W. 330, 280 Mich. 15, rehearing denied 274 N.W. 379, 280 Mich. 15—Cosgrove v. Thomas, 241 N.W. 168, 257 Mich. 376.

Minn.—Winans v. Sinanovski, 2 N.W. 2d 127, 211 Minn. 606—Anderson v. Johnson, 294 N.W. 224, 208 Minn. 373—Hinman v. Gould, 286 N.W. 364, 205 Minn. 377—Shuster v. Vecchi, 279 N.W. 841, 203 Minn. 76—McKeown v. Argetsinger, 279 N.W. 402, 202 Minn. 595, 116 A.L.R. 398—Jude v. Jude, 271 N.W. 478,

199 Minn. 217—Draxten v. Brown, 267 N.W. 498, 197 Minn. 511—Wells v. Weed, 267 N.W. 379, 197 Minn. 464—Farnham v. Pepper, 258 N.W. 293, 193 Minn. 222—Sandberg v. Dinger, 243 N.W. 385, 186 Minn. 369—Mahan v. McCool, 239 N.W. 914, 185 Minn. 94—Fink v. Baer, 230 N.W. 888, 180 Minn. 433—Coleman v. Clement's Chevrolet Co., 219 N.W. 92, 174 Minn. 277.

Miss.—Harper v. Wilson, 140 So. 693, 163 Miss. 199—Weyen v. Weyen, 139 So. 608, 165 Miss. 257, modified on other grounds and suggestion of error overruled 139 So. 856, 165 Miss. 257.

Mo.—Tabler v. Perry, 85 S.W.2d 471, 337 Mo. 154—McCombs v. Ellsberry, 85 S.W.2d 135, 337 Mo. 491—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065—Chappee v. Gus V. Brecht Butchers' Supply Co., 30 S.W.2d 35—Bobos v. Krey Packing Co., 296 S.W. 157, 317 Mo. 108—Stewart v. Steinoff, App., 119 S.W.2d 76—Cable v. Johnson, App., 63 S.W.2d 433—Myers v. Hauser, App., 61 S.W.2d 214.

Mont.—Harrington v. H. D. Lee Mercantile Co., 33 P.2d 553, 97 Mont. 40—Marinkovich v. Tierney, 17 P.2d 93, 93 Mont. 72.

Neb.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636—Hamblen v. Steckley, 27 N.W.2d 178, 148 Neb. 283—Latwiller v. Graff, 246 N.W. 922, 121 Neb. 460—Glick v. Poska, 239 N.W. 626, 122 Neb. 102.

N.H.—Jewett v. Holt, 37 A.2d 13, 93 N.H. 163—Woodbridge v. Desrocher, 35 A.2d 802, 93 N.H. 87—Calley v. Boston & Maine R. R., 33 A.2d 227, 92 N.H. 455—Davison v. Davison, 29 A.2d 131, 92 N.H. 245—Smith v. Babb, 22 A.2d 330, 91 N.H. 472—Sullivan v. Sullivan, 18 A.2d 828, 91 N.H. 341—Weiss v. Wasserman, 15 A.2d 861, 91 N.H. 164—Mooney v. Chapdelaine, 11 A.2d 713, 90 N.H. 415—Himmel v. Finkelstein, 4 A.2d 657, 90 N.H. 78—Buffum v. Buffum, 195 A. 679, 89 N.H. 210—McCourt v. Travers, 175 A. 865, 87 N.H. 185—Mason v. Andrews, 167 A. 156, 86 N.H. 277—Tetreault v. Gould, 138 A. 544, 83 N.H. 99.

N.J.—Berkowitz v. Fishman, 49 A.2d 494, 134 N.J.Law 592—Loeb v. Gurtman, 32 A.2d 836, 130 N.J.Law 360, affirmed 35 A.2d 894, 131 N.J.Law 227—Dobrow v. Hertz, 15 A.2d 749, 125 N.J.Law 347—Loughney v. Thomas, 187 A. 329, 117 N.J.Law 169—Smith v. Kirby, 178 A. 739, 115 N.J.Law 225—Zochowski v. Zukowski, 176 A. 364, 114 N.J.Law 437—Devine v. Heinrich, 162 A. 523, 109 N.J.Law 378—Doryk v. Perth Amboy Bottling Co., 139 A. 419, 104 N.J.Law 87—Southard v. Wilson, 183 A. 202, 14 N.J.Misc. 171—Brunner v. Smith, 172 A. 732, 12 N.J.Misc. 482—Crawn v.

Yanavok, 169 A. 282, 11 N.J.Misc. 859—Baron v. Baron, 167 A. 675, 11 N.J.Misc. 663—Brenson v. Scott, 157 A. 550, 9 N.J.Misc. 1320—Saunders v. Applegate, 155 A. 127, 9 N.J.Misc. 555—Hennig v. Booth, 132 A. 294, 4 N.J.Misc. 150—Posner v. Nutkis, 137 A. 716, 5 N.J.Misc. 593.

N.Y.—Clarkson v. Smith, 161 N.E. 184, 247 N.Y. 564—Malkowski v. Diasparra, 59 N.Y.S.2d 417, 270 App.Div. 768—DuChessi v. D'Alessandro, 38 N.Y.S.2d 662, 265 App. Div. 982, appeal denied 41 N.Y.S.2d 224, 266 App.Div. 700, motion denied 48 N.E.2d 713, 290 N.Y. 930—Buono v. Stewart Motor Trucks, 26 N.Y.S.2d 986, 261 App.Div. 1095—Massar v. Bell, 16 N.Y.S.2d 727, 258 App.Div. 924, reargument denied 17 N.Y.S.2d 1000, 258 App.Div. 966—Landy v. O'Brien, 9 N.Y.S.2d 225, 255 App.Div. 944—O'Brien v. Tilden, 240 N.Y.S. 355, 228 App. Div. 503—Faipe v. McCarthy, 221 N.Y.S. 701, 220 App.Div. 509—Haverly v. Fitch, 221 N.Y.S. 69, 219 App.Div. 630.

N.C.—Hoke v. Atlantic Greyhound Corp., 40 S.E.2d 345, 226 N.C. 602—Taylor v. Herson, 185 S.E. 627, 210 N.C. 185—Waller v. Hlpp, 179 S.E. 428, 208 N.C. 117—Gaffney v. Phelps, 178 S.E. 231, 207 N.C. 553.

Ohio.—Weller v. Worstall, 196 N.E. 637, 129 Ohio St. 596—Pasku v. Friedman Transfer & Const. Co., App., 78 N.E.2d 182—Morgan v. Hunsicker, App., 60 N.E.2d 509—Collins v. McClure, App., 49 N.E.2d 181, affirmed 56 N.E.2d 171, 143 Ohio St. 569—Leesman v. Moser, App., 32 N.E.2d 448—King v. Cipriani, App., 32 N.E.2d 446.

Okl.—Ironside v. Ironside, 108 P.2d 157, 188 Okl. 267, 134 A.L.R. 621. Or.—Lawrence v. Troy, 289 P. 491, 133 Or. 196.

Pa.—Ravis v. Shehulskie, 14 A.2d 70, 339 Pa. 161—Becker v. Saylor, 177 A. 804, 317 Pa. 573—Luderer v. Moore, 169 A. 106, 313 Pa. 71—Gordish v. Stefflinia, 163 A. 533, 309 Pa. 283—Kiler v. Filer, 152 A. 667, 301 Pa. 461—Moquin v. Mervine, 146 A. 443, 297 Pa. 79—Davis v. American Ice Co., 131 A. 720, 285 Pa. 177—Masters v. Philadelphia Transp. Co., 50 A.2d 532, 160 Pa. Super. 178—Hopshire v. Yesenosky, 43 A.2d 351, 157 Pa. Super. 545—Morgan v. Peters, 24 A.2d 444, 148 Pa. Super. 88—Wilt v. Slotkin, 175 A. 756, 115 Pa. Super. 491—Lazor v. Banas, 174 A. 817, 114 Pa. Super. 425—Oestreich v. Zilbman, 169 A. 14, 110 Pa. Super. 457—Jones v. Rogers, 165 A. 509, 108 Pa. Super. 517—Lloyd v. Noakes, 96 Pa. Super. 164—Palumbo v. Campo, 85 Pa. Super. 440—Clayton v. McAlpin, 32 Pa. Dist. & Co. 464—Schulkind v. Dropkin, Com.Pl., 5 Sch.Reg. 193.

S.D.—Knutsen v. Dilger, 253 N.W. 459, 62 S.D. 474.

Tenn.—Johnson v. Maury County Trust Co., 15 Tenn.App. 326—Baskin & Cole v. Whitson, 8 Tenn.App. 578.

Tex.—Giannukes v. Sfiris, 81 S.W.2d 999, 125 Tex. 354.

Vt.—Russell v. Pilger, 37 A.2d 403, 113 Vt. 537.

Va.—Bloxem v. McCoy, 17 S.E.2d 401, 178 Va. 343—Holladay v. Colt, 177 S.E. 862, 163 Va. 866—Poole v. Kelley, 173 S.E. 537, 162 Va. 279—Garrett v. Hammack, 173 S.E. 535, 162 Va. 42—Balse v. Hollifield, 164 S.E. 657, 158 Va. 498—Boggs v. Plybon, 160 S.E. 77, 157 Va. 30—Glass v. Huddleson, 154 S.E. 506, 155 Va. 143.

Wash.—Helland v. Arland, 126 P.2d 594, 14 Wash.2d 32—Forman v. Shields, 48 P.2d 599, 183 Wash. 333—Kowalski v. Swanson, 34 P.2d 454, 178 Wash. 231—Dahl v. Moore, 14 P.2d 28, 169 Wash. 443—Dahl v. Moore, 297 P. 218, 161 Wash. 503—Emboddy v. Cox, 289 P. 44, 157 Wash. 464—Machenheimer v. Falknor, 255 P. 1031, 144 Wash. 27.

W.Va.—Stone v. Rudolph, 32 S.E.2d 742, 127 W.Va. 335.

Wis.—Tracy v. Malmstadt, 296 N.W. 87, 236 Wis. 642—Jensen v. Jensen, 279 N.W. 628, 228 Wis. 77—Nimlos v. Bakke, 271 N.W. 33, 223 Wis. 473—Brothers v. Berg, 254 N.W. 384, 214 Wis. 661—Loizzo v. Conforti, 240 N.W. 790, 207 Wis. 129—Ponietowski v. Harres, 228 N.W. 126, 200 Wis. 504—Kurz v. Kuhn, 223 N.W. 412, 198 Wis. 172.

42 C.J. p 1256 note 68.

Care required as to persons in or on vehicle see *supra* §§ 397-404.

Imputed negligence as question of law or fact see the C.J.S. title Negligence § 261, also 45 C.J. p 1314 note 82 et seq.

Ordinarily question for jury

S.C.—Crapse v. Southern Ry. Co., 21 S.E.2d 737, 201 S.C. 176.

W.Va.—Darling v. Browning, 200 S.E. 737, 120 W.Va. 666.

Employee boarding moving truck

S.C.—Polly v. Walton, 179 S.E. 667, 176 S.C. 72.

Guest thrown to floor of automobile
Cal.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1.

Occupant of motorcycle

N.H.—Tetreault v. Gould, 138 A. 544, 83 N.H. 99.

Occupant of vehicle being towed

Pa.—Hollup v. United News Co., 176 A. 51, 115 Pa.Super. 585.

Person on running board

Ky.—R. B. Tyler Co. v. Kirby's Adm'r, 293 S.W. 155, 219 Ky. 389.
Mass.—Terlizzi v. Marsh, 154 N.E. 754, 258 Mass. 156.

Mich.—Bump v. Bellingar, 18 N.W.2d 814, 311 Mich. 254.

N.H.—Vandell v. Sanders, 155 A. 193, 85 N.H. 143, 80 A.L.R. 556.

Pa.—Di Giuseppe v. Hrivnak, 59 A. 2d 164, 359 Pa. 408.

Automobile overturning

Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336—Baker v. Elebash, 124 So. 739, 220 Ala. 198.

D.C.—Paxson v. Davis, 65 F.2d 492, 62 App.D.C. 146, certiorari denied 54 S.Ct. 61, two cases, 290 U.S. 643, 78 L.Ed. 558.

Ga.—Ragdale v. Love, 178 S.E. 755, 50 Ga.App. 900.

Kan.—Bryant v. Marshall, 10 P.2d 868, 135 Kan. 348.

Mich.—Emery v. Ford, 207 N.W. 856, 234 Mich. 11.

Minn.—Dahlstrom v. Hurtig, 295 N.W. 508, 209 Minn. 72—Caulfield v. McGivern, 265 N.W. 24, 196 Minn. 339—Burgess v. Crafts, 238 N.W. 798, 184 Minn. 384.

Mo.—Crupe v. Spicuzza, App. 86 S.W.2d 347.

Neb.—Glick v. Paska, 239 N.W. 626, 122 Neb. 102.

N.J.—Spill v. Stoeckert, 15 A.2d 773, 125 N.J.Law 382—Journey v. Zawish, 167 A. 7, 11 N.J.Misc. 482—Briggs v. Leibler, 156 A. 283, 9 N.J.Misc. 983.

N.C.—Etheridge v. Etheridge, 24 S.E. 2d 477, 222 N.C. 516.

Ohio.—Hughes v. Hanselman, 185 N.E. 852, 44 Ohio App. 516—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207.

Okl.—Townsend v. Cotten, 68 P.2d 790, 180 Okl. 128.

Pa.—Sudol v. Gorga, 31 A.2d 119, 346 Pa. 463—Schwartz v. Jaffe, 188 A. 295, 324 Pa. 324—Curry v. Rigles, 153 A. 325, 302 Pa. 156.

S.D.—Hall v. Hall, 158 N.W. 491, 63 S.D. 343—Knutsen v. Dilger, 253 N.W. 459, 62 S.D. 474.

Tenn.—Granert v. Bauer, 67 S.W.2d 748, 17 Tenn.App. 370.

Wash.—Lloyd v. Mowery, 290 P. 710, 158 Wash. 341.

Wis.—Monsos v. Euler, 256 N.W. 630, 216 Wis. 133—Harter v. Dickman, 245 N.W. 157, 209 Wis. 283—Helms v. Bluhm, 228 N.W. 599, 200 Wis. 321—Grandhagen v. Grandhagen, 225 N.W. 935, 199 Wis. 315.

Blowout

US—Ingerick v. Mess, C.C.A.N.Y., 63 F.2d 233.

Ga.—Ragdale v. Love, 178 S.E. 755, 50 Ga.App. 900.

Ill.—Barnett v. Levy, 213 Ill.App. 129.

Iowa.—Band v. Reinke, 288 N.W. 629, 227 Iowa 458.

Minn.—Anderson v. Anderson, 248 N.W. 35, 188 Minn. 602.

Mo.—Crupe v. Spicuzza, App. 86 S.W.2d 347.

Ohio.—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207.

S.D.—Grant v. Matson, 3 N.W.2d 118, 68 S.D. 402.

Collision with animal

Ala.—Clark v. Farmer, 159 So. 47, 229 Ala. 596.

Mo.—Yerger v. Smith, 89 S.W.2d 66, 338 Mo. 140.

S.D.—Russell v. Crow, 245 N.W. 249, 60 S.D. 230.

Collision with pole or tree

(1) Generally.

Ky.—Schechter v. Hann, 205 S.W.2d 690, 305 Ky. 794.

Md.—Newman v. Stocker, 157 A. 761, 161 Md. 552.

Minn.—Schultz v. Rosner, 296 N.W. 532, 209 Minn. 462.

Mo.—Holmes v. McNeil, 203 S.W.2d 665, 356 Mo. 763.

N.H.—Lagasse v. Laporte, 58 A.2d 312.

N.J.—La Bell v. Quasdorf, 177 A. 77, 13 N.J.Misc. 183—Loneragan v. Meuter Bros., 157 A. 120, 9 N.J. Misc. 1168.

N.Y.—Traub v. Blum, 31 N.Y.S.2d 735, 263 App.Div. 92—Da Quila v. De Quila, 24 N.Y.S.2d 896, 261 App. Div. 832.

N.C.—Baird v. Baird, 28 S.E.2d 225, 223 N.C. 730.

Ohio.—Sack v. A. R. Nunn & Son, 194 N.E. 1, 129 Ohio St. 128—Zwick v. Zwick, 163 N.E. 917, 29 Ohio App. 522, petition dismissed 166 N.E. 202, 119 Ohio St. 644.

Okl.—McGillvray v. Spaulding, 75 P. 2d 430, 181 Okl. 570.

Or.—Johnson v. Ladd, 24 P.2d 17, 144 Or. 268.

Pa.—Eisenhower v. Hall's Motor Transit Co., 40 A.2d 458, 351 Pa. 200—Nelson v. Duquesne Light Co., 12 A.2d 299, 338 Pa. 37, 128 A.L.R. 1257—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398—Swalin v. Pisalski, 194 A. 749, 129 Pa.Super. 51—Smallberger v. Carroll, 176 A. 867, 116 Pa.Super. 429—Adams v. Gefsky, 161 A. 598, 106 Pa.Super. 401—Bernosky v. Greff, Com.Pl., 9 Sch.Reg. 225, reversed on other grounds 38 A.2d 35, 350 Pa. 59.

R.I.—Garabedian v. Dizjin, 191 A. 257, 58 R.I. 74.

S.D.—Zeigler v. Ryan, 271 N.W. 767, 65 S.D. 110.

Tenn.—Lea v. Gentry, 78 S.W.2d 170, 167 Tenn. 664.

Wis.—Jansen v. Herkert, 23 N.W.2d 503, 249 Wis. 124—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400.

(2) Automobile driver was not negligent as matter of law in turning to his right, at reasonable speed, and striking tree, to avert collision with oncoming car whose headlights blinded him.—Parenteau v. Parenteau, 153 A. 872, 51 R.I. 263.

Collision with streetcar

Mo.—Potashnick v. Pearline, 43 S.W. 2d 790.

Crossing railroad

Cal.—Krause v. Rarity, 293 P. 62, 210 Cal. 644, 77 A.L.R. 1327.

Ky.—Mossbarger's Adm'x v. Louisville & N. R. Co., 130 S.W.2d 54, 279 Ky. 178.

Mich.—Balcer v. Pere Marquette Ry. Co., 254 N.W. 198, 266 Mich. 538.

N.J.—Palumbo v. Pennsylvania R. Co., 159 A. 322, 10 N.J.Misc. 204.

Pa.—Hilton v. Blose, 147 A. 100, 297 Pa. 458.

42 C.J. p 1256 note 68 [k].

Parking

N.J.—Daly v. Singac Auto Supply Co., 135 A. 868, 103 N.J.Law 416.

S.C.—Pardue v. Pardue, 166 S.E. 101, 167 S.C. 129.

Passing automobile going in same direction

Ala.—McDermott v. Sibert, 119 So. 681, 218 Ala. 670.

Cal.—Day v. Pickwick Stages System, 25 P.2d 16, 134 Cal.App. 92.

Ga.—Poole v. Yawn, 163 S.E. 316, 45 Ga.App. 58.

Minn.—Dehen v. Berning, 270 N.W. 602, 198 Minn. 522.

Mo.—Mackler v. Barnert, App., 49 S.W.2d 244.

N.J.—Hochreutener v. Pfenninger, 174 A. 513, 113 N.J.Law 317.

N.C.—Fields v. Brown, 172 S.E. 179, 205 N.C. 543.

Pa.—Bingler v. Hopper, 7 A.2d 351, 336 Pa. 58—Wilson v. Walker, 169 A. 141, 313 Pa. 69—Ebey v. Schwartz, 158 A. 291, 104 Pa Super 181.

Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.

42 C.J. p 1256 note 68 [h].

Bounding curve

Ala.—Baker v. Rainer, 124 So. 737, 220 Ala. 207.

Ark.—Blackburn v. Turner, 61 S.W. 2d 453, 187 Ark. 662.

Me.—Chaisson v. Williams, 156 A. 154, 130 Me. 341.

Md.—Stark v. Gripp, 133 A. 338, 150 Md. 655.

W.Va.—Lacewell v. Lampkin, 13 S.E. 2d 583, 123 W.Va. 138.

Shutting door on guest's hand

Mo.—Mundinger v. Sewell, App., 40 S.W.2d 530.

Pa.—Iaquinto v. Notarfrancesco, 195 A. 169, 129 Pa.Super. 121.

Control

(1) Generally.

Ill.—Johnson v. Coey, 86 N.E. 678, 237 Ill. 88, 21 L.R.A.N.S., 81.

La.—Levy v. Indemnity Ins. Co. of North America, App., 8 So.2d 774.

Mich.—Eskovitz v. Berger, 268 N.W. 883, 276 Mich. 536.

Me.—Holmes v. McNeil, 203 S.W.2d 665, 356 Mo. 763.

N.H.—Prokey v. Hamm, 23 A.2d 327, 91 N.H. 513.

N.Y.—Lorenz v. Conners, 218 N.Y.S. 121, 218 App.Div. 199.

Ohio.—Sack v. A. R. Nunn & Son, 194 N.E. 1, 129 Ohio St. 128—Col-

lins v. McClure, 26 N.E.2d 780, 63 Ohio App. 312—Hughes v. Hanselman, 185 N.E. 852, 44 Ohio App. 516—Zwick v. Zwick, 163 N.E. 917, 29 Ohio App. 522, petition dismissed 166 N.E. 202, 119 Ohio St. 644.

Or.—Goebel v. Vaught, 269 P. 491, 126 Or. 332.

Pa.—Schwartz v. Jaffe, 188 A. 295, 324 Pa. 324—O'Brien v. Gray, 182 A. 746, 121 Pa.Super. 27—Smallberger v. Carroll, 176 A. 867, 116 Pa.Super. 429.

S.D.—Zeigler v. Ryan, 271 N.W. 767, 65 S.D. 110.

Vt.—Gould v. Gould, 6 A.2d 24, 110 Vt. 324.

Wis.—Pierner v. Mann, 25 N.W.2d 83, 249 Wis. 469—Hutzler v. McDonnell, 2 N.W.2d 207, 239 Wis. 568—Webster v. Krembs, 282 N.W. 564, 230 Wis. 252—Lang v. Baumann, 251 N.W. 461, 213 Wis. 258—Hensel v. Hensel Yellow Cab Co., 245 N.W. 159, 209 Wis. 489—Harter v. Dickman, 245 N.W. 157, 209 Wis. 283.

(2) Skidding.

N.C.—Daniel v. East Tennessee Packing Co., 3 S.E.2d 282, 215 N.C. 762—Butner v. Whitlow, 161 S.E. 389, 201 N.C. 749.

Okl.—Hartman v. Dunn, 95 P.2d 897, 186 Okl. 9.

Pa.—Luderer v. Moore, 169 A. 106, 313 Pa. 71—Klein v. Weissberg, 174 A. 636, 114 Pa.Super. 569.

Failure to sound warning

Mo.—Gertken v. Winklemann, App., 95 S.W.2d 816.

Failure to stop

N.C.—Boone v. Matheny, 29 S.E.2d 687, 224 N.C. 250.

Ohio.—Allen v. Leavick, 182 N.E. 139, 43 Ohio App. 100.

Tenn.—Waller v. Morgan, 133 S.W. 2d 614, 23 Tenn.App. 355.

Keeping lookout

(1) Generally.

Conn.—Bushnell v. Bushnell, 131 A. 432, 103 Conn. 583, 44 A.L.R. 785.

Iowa.—Wells v. Wildin, 277 N.W. 308, 224 Iowa 913, 115 A.L.R. 169.

Minn.—Novotny v. Bouley, 27 N.W. 2d 813, 223 Minn. 592.

Mo.—Kaley v. Huntley, 63 S.W.2d 21.

N.H.—Davison v. Davison, 29 A.2d 131, 92 N.H. 245.

N.J.—Linzmayr v. Phair, 156 A. 918, 9 N.J.Misc. 1154.

Or.—Callander v. Brown, 178 P.2d 922, 181 Or. 279.

Pa.—Little v. Straw, 192 A. 894, 326 Pa. 577—Reese v. Herr, 4 A.2d 195, 134 Pa.Super. 34—Swalina v. Pisalski, 194 A. 749, 129 Pa.Super. 51—Smallberger v. Carroll, 176 A. 867, 116 Pa.Super. 429.

Tenn.—Shook v. Simmons, 137 S.W. 2d 332, 23 Tenn.App. 685—Waller v. Morgan, 133 S.W.2d 614, 23 Tenn.App. 355.

Vt.—Landry v. Hubert, 137 A. 97, 100 Vt. 268.

Wis.—Koepeke v. Miller, 4 N.W.2d 870, 241 Wis. 501—Hutzler v. McDonnell, 2 N.W.2d 207, 239 Wis. 568—Zoellner v. Kaiser, 296 N.W. 611, 237 Wis. 299—Tracy v. Malmstadt, 296 N.W. 87, 236 Wis. 642—Cherney v. Simonis, 265 N.W. 203, 220 Wis. 339, followed in 265 N.W. 206, 220 Wis. 346—Madden v. Peart, 229 N.W. 57, 201 Wis. 269.

(2) Falling asleep.

Conn.—Bushnell v. Bushnell, 131 A. 432, 103 Conn. 583, 44 A.L.R. 785.

Miss.—Gower v. Strain, 145 So. 244, 169 Miss. 344.

Tenn.—Lea v. Gentry, 73 S.W.2d 170, 167 Tenn. 664—Rice-Stix Dry Goods Co. v. Self, 101 S.W.2d 132, 20 Tenn.App. 498.

Va.—Lee v. Moore, 191 S.E. 589, 168 Va. 278.

Turning

Neb.—Glick v. Poska, 239 N.W. 626, 122 Neb. 102.

Pa.—Lawrence v. Winterbottom, 181 A. 852, 120 Pa.Super. 292.

W.Va.—Shrimplin v. Simmons Auto Co., 9 S.E.2d 49, 122 W.Va. 248.

Wis.—Dach v. General Casualty Co., 4 N.W.2d 170, 241 Wis. 34—Cherney v. Simonis, 265 N.W. 203, 220 Wis. 339.

42 C.J. p 1256 note 68 [d].

Speed

Ala.—Baker v. Elebash, 124 So. 739, 220 Ala. 198.

Ark.—Burnett v. Seventh St. Produce Co., 47 S.W.2d 38, 185 Ark. 367.

Cal.—Kruzie v. Sanders, 143 P.2d 704, 23 Cal.2d 237—Knox v. Pryor, 51 P.2d 106, 10 Cal.App.2d 76—Dodds v. Gifford, 16 P.2d 279, 127 Cal. App. 629—Trutner v. Knight, 257 P. 447, 83 Cal.App. 655, followed in 257 P. 451, first case, 83 Cal.App. 797.

Colo.—Carlson v. Millisack, 261 P. 657, 82 Colo. 491.

Conn.—Bree v. Lamb, 178 A. 919, 120 Conn. 1—Anderson v. Colucci, 163 A. 610, 116 Conn. 67.

D.C.—Paxson v. Davis, 65 F.2d 492, 62 App.D.C. 146, certiorari denied 54 S.Ct. 61, two cases, 290 U.S. 643, 78 L.Ed. 558.

Ga.—Ragsdale v. Love, 178 S.E. 755, 50 Ga.App. 900.

Ill.—Seiffe v. Seiffe, 267 Ill.App. 23.

Iowa.—Futter v. Hout, 281 N.W. 286, 225 Iowa 723.

Ky.—Newton v. Wetherby's Adm'x, 153 S.W.2d 947, 287 Ky. 400.

Me.—Barker v. Perry, 2 A.2d 625, 136 Me. 510.

Md.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.

Minn.—Kordiak v. Holmgren, 80 N.W.2d 16, 225 Minn. 134—Kemerer v. Kemerer, 269 N.W. 832, 198 Minn. 316—Caulfield v. McGivern, 265 N.W. 24, 196 Minn. 339—Truso v. Ehnert, 225 N.W. 98, 177 Minn.

are in issue, gross negligence,⁹ and, according to | the decisions on the question, gross and wanton

- 349—*Tegels v. Tegels*, 225 N.W. 85, 177 Minn. 222.
- Miss.—*Cowart v. Lewis*, 117 So. 531, 151 Miss. 221, 61 A.L.R. 1229.
- Mo.—*Annin v. Jackson*, 100 S.W.2d 872, 340 Mo. 331—*Bennette v. Hader*, 87 S.W.2d 413, 337 Mo.App. 977, 101 A.L.R. 1190—*Boyce v. Donnellan*, 168 S.W.2d 120, 237 Mo.App. 63—*Bach v. Ludwig*, App., 109 S.W.2d 724—*Miller v. Rollins*, App., 102 S.W.2d 686—*Crupe v. Spicuzza*, App., 86 S.W.2d 347.
- Neb.—*Musman v. Steele*, 253 N.W. 347, 126 Neb. 353.
- N.H.—*Murphy v. Winter*, 173 A. 793, 87 N.H. 481.
- N.J.—*La Bell v. Quasdorf*, 177 A. 77, 13 N.J.Misc. 183.
- N.C.—*Stewart v. Stewart*, 19 S.E.2d 242, 221 N.C. 147—*Groome v. Davis*, 2 S.E.2d 771, 215 N.C. 510—*York v. York*, 194 S.E. 486, 212 N.C. 695—*Waller v. Hipp*, 179 S.E. 428, 208 N.C. 117.
- N.D.—*Bolton v. Wells*, 225 N.W. 791, 58 N.D. 286.
- Ohio.—*Delk v. Young*, App., 35 N.E. 2d 969.
- Or.—*Navarra v. Jones*, 169 P.2d 584, 178 Or. 683.
- Pa.—*Schnitzer v. Philadelphia Transp. Co.*, 47 A.2d 709, 354 Pa. 576—*Kirr v. Suwak*, 9 A.2d 735, 336 Pa. 561—*Curry v. Riggles*, 153 A. 325, 302 Pa. 156—*Devereaux v. Caidin*, 193 A. 372, 127 Pa.Super. 595.
- S.D.—*McMahon v. De Kraay*, 16 N.W. 2d 308, 70 S.D. 180.
- Vt.—*Landry v. Hubert*, 137 A. 97, 100 Vt. 268.
- Va.—*Poole v. Kelley*, 173 S.E. 537, 162 Va. 279.
- W.Va.—*Reall v. Deiriggi*, 34 S.E.2d 253, 127 W.Va. 662—*Boyce v. Black*, 15 S.E.2d 588, 123 W.Va. 234—*Malcolm v. American Service Co.*, 191 S.E. 527, 118 W.Va. 637.
- Wis.—*Culver v. Webb*, 12 N.W.2d 731, 244 Wis. 478—*Lang v. Baumann*, 251 N.W. 461, 213 Wis. 258—*Mad-den v. Peart*, 229 N.W. 57, 201 Wis. 259.
- 42 C.J. p 1256 note 68 [b].
- Wrong side of road**
- Idaho.—*McCoy v. Krenkel*, 17 P.2d 547, 52 Idaho 626.
- Ky.—*Horton v. Herndon*, 70 S.W.2d 975, 254 Ky. 86.
- Miss.—*Cox v. Dempsey*, 171 So. 788, 177 Miss. 678.
9. U.S.—*Conway v. O'Brien*, Vt., 61 S.Ct. 634, 312 U.S. 492, 85 L.Ed. 969—*Copp v. Van Hise*, C.C.A.Mont., 119 F.2d 691.
- Cal.—*Cooper v. Kellogg*, 42 P.2d 59, 2 Cal.2d 504—*Goodwin v. Goodwin*, 43 P.2d 332, 5 Cal.App.2d 644—*Johnson v. Johnson*, 31 P.2d 237, 187 Cal.App. 701—*Smith v. Wagner*, 30 P.2d 1020, 137 Cal.App. 556—*Tomlinson v. Keramidjian*, 24 P. 2d 559, 133 Cal.App. 418—*Walters v. Du Four*, 22 P.2d 259, 132 Cal. App. 72, hearing denied 23 P.2d 1020, 132 Cal.App. 72—*Simpson v. Steinhoff*, 21 P.2d 960, 131 Cal.App. 660—*Gardiner v. Hogue*, 20 P.2d 957, 131 Cal.App. 254—*Hagen v. Metzger*, 20 P.2d 117, 130 Cal.App. 497—*Dahl v. Spotts*, 16 P.2d 774, 128 Cal.App. 133—*Anderson v. Ott*, 15 P.2d 526, 127 Cal.App. 122.
- D.C.—*McCoy v. Moore*, 140 F.2d 699, 78 U.S.App.D.C. 346, applying Virginia law—*Childs v. Radzevich*, 139 F.2d 374, 78 U.S.App.D.C. 235, applying Virginia law.
- Ga.—*Barbre v. Scott*, 43 S.E.2d 760, 75 Ga.App. 524—*Moore v. Shirley*, 21 S.E.2d 925, 68 Ga.App. 38—*Dawson Motor Co. v. Petty*, 186 S.E. 877, 53 Ga.App. 746.
- Idaho.—*Carson v. Talbot*, 129 P.2d 901, 94 Idaho 198, applying Nevada law—*Owen v. Taylor*, 114 P.2d 258, 62 Idaho 408.
- Ill.—*Kechn v. Braubach*, 30 N.E.2d 156, 307 Ill.App. 339, applying South Dakota law.
- Me.—*Glazer v. Grob*, 3 A.2d 895, 136 Me. 123, applying Massachusetts law.
- Mass.—*Hastings v. Flaherty*, 73 N.E.2d 601, 321 Mass. 368—*Pilgrim v. MacGibbon*, 47 N.E.2d 299, 313 Mass. 290, applying Nova Scotia law—*Smith v. Murphy*, 46 N.E.2d 401, 313 Mass. 401—*Hanlon v. Westberg*, 29 N.E.2d 194, 302 Mass. 603—*Lyons v. Todina*, 29 N.E.2d 6, 306 Mass. 592—*Haggerty v. Sullivan*, 17 N.E.2d 154, 301 Mass. 302—*Kilmain v. D'Urbano*, 16 N.E.2d 659, 301 Mass. 131—*Blackman v. Coffin*, 15 N.E.2d 469, 300 Mass. 432—*Icarello v. Rodakis*, 11 N.E.2d 470, 299 Mass. 33—*Collette v. Mosqu*, 4 N.E.2d 336, 295 Mass. 576—*Jones v. Melvin*, 199 N.E. 392, 293 Mass. 9—*Swistak v. Paradise*, 192 N.E. 920, 288 Mass. 377—*Gionet v. Shepardon*, 178 N.E. 649, 277 Mass. 308—*Bruce v. Johnson*, 178 N.E. 518, 277 Mass. 273—*Gardner v. Renton*, 168 N.E. 802, 269 Mass. 246—*Manning v. Simpson*, 159 N.E. 440, 261 Mass. 494.
- Mich.—*Rogers v. Merritt*, 12 N.W.2d 422, 307 Mich. 459—*Greimel v. Fischer*, 8 N.W.2d 906, 305 Mich. 45—*Murner v. Thorpe*, 279 N.W. 849, 284 Mich. 331.
- Mont.—*Baatz v. Noble*, 69 P.2d 579, 105 Mont. 59.
- Neb.—*Komma v. Kreifels*, 14 N.W.2d 591, 144 Neb. 745—*Thompson v. Edler*, 292 N.W. 236, 138 Neb. 179—*Larson v. Storm*, 289 N.W. 792, 137 Neb. 420—*Kovar v. Beckius*, 275 N.W. 670, 133 Neb. 487—*Covey v. Anderson*, 266 N.W. 595, 130 Neb. 702—*Rogers v. Brown*, 260 N.W. 794, 129 Neb. 9—*Howard v. Gerjev-ic*, 260 N.W. 273, 128 Neb. 795.
- N.H.—*Corrigan v. Clark*, 36 A.2d 631, 93 N.H. 137—*LaPlante v. Rous-seau*, 18 A.2d 777, 91 N.H. 330, ap-plying Georgia law.
- N.J.—*Crothers v. Caroselli*, 16 A.2d 341, 135 N.J.Law 403, applying Florida law, affirmed 20 A.2d 77, 126 N.J.Law 590—*Oliver v. Kantor*, 6 A.2d 205, 122 N.J.Law 528, af-firmed 10 A.2d 732, 124 N.J.Law 181—*Garris v. Kline*, 197 A. 63, 119 N.J.Law 435, applying Virginia law—*Siegel v. Saunders*, 181 A. 48, 115 N.J.Law 539, applying Virginia law.
- N.D.—*Stockfeld v. Sayre*, 283 N.W. 788, 69 N.D. 42—*Rubbelke v. Jacob-son*, 268 N.W. 675, 66 N.D. 720.
- Ohio.—*Herrell v. Hickok*, 197 N.E. 241, 49 Ohio App. 437, applying Michigan law.
- Or.—*Willoughby v. Driscoll*, 120 P.2d 768, 168 Or. 187, affirmed 121 P.2d 917, 168 Or. 187—*Herzog v. Mittlo-man*, 65 P.2d 384, 155 Or. 624, 109 A.L.R. 662—*Storm v. Thompson*, 64 P.2d 1309, 155 Or. 686—*Monner v. Starker*, 31 P.2d 1109, 147 Or. 118—*Younger v. Gallagher*, 26 P.2d 783, 145 Or. 63—*Hartley v. Berg*, 25 P.2d 932, 145 Or. 44—*Cockerham v. Potts*, 20 P.2d 423, 143 Or. 80—*Storia v. Spokane, Portland & Seat-tle Transp. Co.*, 298 P. 1065, 136 Or. 315.
- Vt.—*Huestis v. Lapham's Estate*, 32 A.2d 115, 113 Vt. 191—*Barrows v. Powell*, 29 A.2d 708, 113 Vt. 109, followed in 29 A.2d 712, 113 Vt. 117—*Kerin v. Coates*, 28 A.2d 382, 112 Vt. 466—*Farren v. McMahon*, 1 A. 2d 726, 110 Vt. 55—*Powers v. Lack-ey*, 1 A.2d 693, 109 Vt. 505—*Hall v. Royce*, 192 A. 193, 109 Vt. 99—*Senecal v. Bleau*, 189 A. 139, 108 Vt. 486—*Rich v. Hall*, 181 A. 113, 107 Vt. 455.
- Va.—*Mountjoy v. Burton*, 40 S.E.2d 803, 185 Va. 936—*Chappell v. White*, 29 S.E.2d 858, 182 Va. 625—*Lipscomb v. O'Brien*, 25 S.E.2d 261, 181 Va. 471—*Jones v. Pasco*, 18 S.E.2d 258, 179 Va. 7, 138 A.L.R. 1385—*Brown v. Branch*, 9 S.E.2d 285, 175 Va. 382—*Yorke v. Cottle*, 4 S.E.2d 372, 173 Va. 372—*Thornhill v. Thornhill*, 2 S.E.2d 318, 172 Va. 553—*Watson v. Coles*, 195 S.E. 506, 170 Va. 141—*Wright v. Swain*, 191 S.E. 611, 168 Va. 315—*Drumwright v. Walker*, 189 S.E. 310, 167 Va. 307—*Gale v. Wilber*, 175 S.E. 739, 163 Va. 211—*Thomas v. Snow*, 174 S.E. 837, 162 Va. 654.
- Wash.—*Nenezich v. Ellich*, 49 P.2d 33, 183 Wash. 657—*Te Selle v. Terpetra*, 38 P.2d 379, 180 Wash. 73—*Meath v. Northern Pac. Ry. Co.*, 36 P.2d 533, 179 Wash. 177—*Devereaux v. Blanchard*, 26 P.2d 82, 174 Wash. 673—*Cullen v. Kim-*

bro, 16 P.2d 445, 170 Wash. 314—Carpenter v. Thomas, 3 P.2d 1001, 164 Wash. 583—Trunk v. Wilkes, 297 P. 1091, 162 Wash. 114—Gough v. Smalley, 294 P. 1007, 160 Wash. 193—Wold v. Gardner, 294 P. 574, 159 Wash. 665—Welch v. Ausetth, 287 P. 899, 156 Wash. 652.
W.Va.—Grim v. Moore, 3 S.E.2d 448, 121 W.Va. 299, applying Virginia law.

Ordinarily fact question

Cal.—Meighan v. Baker, 6 P.2d 1015, 119 Cal.App. 582.
Conn.—Slobodnjak v. Coyne, 165 A. 681, 116 Conn. 545.
Idaho—Carson v. Talbot, 129 P.2d 901, 64 Idaho 198.
Neb.—Komma v. Kreifels, 14 N.W.2d 591, 144 Neb. 745—Johnk v. Scanlon, 285 N.W. 488, 136 Neb. 187.
Va.—Millard v. Cohen, 46 S.E.2d 2, 187 Va. 44—Hill v. Bradley, 43 S.E.2d 29, 186 Va. 394—Masters v. Card, 42 S.E.2d 203, 186 Va. 261—Smith v. Turner, 16 S.E.2d 370, 178 Va. 172, 136 A.L.R. 1251.

Same rule applies as in ordinary negligence cases, that if different minds might reasonably reach different conclusions, question is for jury.—Granflaten v. Rohde, 283 N.W. 153, 66 S.D. 335.

Automobile overturning

Mont.—Blinn v. Hatton, 114 P.2d 518, 112 Mont. 219.
Va.—Chappell v. White, 29 S.E.2d 858, 182 Va. 625.
Wash.—Gough v. Smalley, 294 P. 1007, 160 Wash. 193.

Collision with parked car

U.S.—Miller v. Erickson, C.C.A.Vt., 76 F.2d 598.
Neb.—Hendren v. Hill, 267 N.W. 340, 131 Neb. 163.

Collision with telephone pole or tree

Cal.—Abbott v. Cavalli, 300 P. 67, 114 Cal.App. 379.
Ga.—Barbre v. Scott, 43 S.E.2d 760, 75 Ga.App. 524.
Idaho—Curtis v. Curtis, 70 P.2d 369, 58 Idaho 76.
Mass.—Cini v. Romeo, 195 N.E. 732, 290 Mass. 532—Dzura v. Phillips, 175 N.E. 629, 275 Mass. 283—Logan v. Reardon, 174 N.E. 264, 274 Mass. 83—Kirby v. Keating, 171 N.E. 671, 271 Mass. 390—Blood v. Adams, 169 N.E. 412, 269 Mass. 480.
Mont.—Doheny v. Coverdale, 68 P.2d 142, 104 Mont. 534.
Wash.—Pickering v. Stearns, 46 P.2d 394, 182 Wash. 234.

Collision with traffic signal light

Ca.—West v. Rosenberg, 160 S.E. 808, 44 Ga.App. 211.

Collision with vehicle approaching from opposite direction

Mass.—Campbell v. Costin, 199 N.E. 736, 293 Mass. 225—Powers v. Comerford, 186 N.E. 585, 283 Mass. 589—Schusterman v. Rosen, 183 N.E. 414, 280 Mass. 582.

Wash.—Devereaux v. Blanchard, 36 P.2d 82, 174 Wash. 673.

Passing vehicle on curve

Cal.—Ohlson v. Frazier, 39 P.2d 429, 2 Cal.App.2d 708.

Failure to warn guest of latent defect

Neb.—In re O'Byrne's Estate, 277 N.W. 74, 133 Neb. 750.

Failure to inform driver of defective brakes

Wash.—Trunk v. Wilkes, 297 P. 1091, 162 Wash. 114.

Keeping lookout

(1) Generally.

Ga.—Crandall v. Sammons, 7 S.E.2d 575, 62 Ga.App. 1.
Mass.—Granger v. Lovely, 19 N.E.2d 798, 302 Mass. 504—McGaffigan v. Kennedy, 18 N.E.2d 344, 302 Mass. 12—Koufman v. Feinberg, 10 N.E.2d 91, 298 Mass. 270.

(2) Driving without eyeglasses habitually used.—Barbre v. Scott, 43 S.E.2d 760, 75 Ga.App. 524.

(3) Falling asleep or closing eyes. Idaho—Manion v. Waybright, 86 P.2d 181, 59 Idaho 643.

Mass.—Carvalho v. Oliveria, 25 N.E.2d 764, 305 Mass. 304—Blood v. Adams, 169 N.E. 412, 269 Mass. 480.
Minn.—Hardgrove v. Bade, 252 N.W. 334, 190 Minn. 523.

Or.—Smith v. Williams, 178 P.2d 710, 180 Or. 626, 173 A.L.R. 1220.

Vt.—Steele v. Lackey, 177 A. 309, 107 Vt. 192.

Va.—Lipscomb v. O'Brien, 25 S.E.2d 261, 181 Va. 471—Jones v. Pasco, 18 S.E.2d 258, 179 Va. 7, 138 A.L.R. 1385.

Speed

(1) Generally.

Cal.—Rees v. Chase, 38 P.2d 819, 3 Cal.App.2d 127—Stoneburner v. Theodoratos, App., 30 P.2d 1001, reheard 31 P.2d 1042—Meighan v. Baker, 6 P.2d 1015, 119 Cal.App. 582.

Conn.—Slobodnjak v. Coyne, 165 A. 681, 116 Conn. 545.

Ga.—Barbre v. Scott, 43 S.E.2d 760, 75 Ga.App. 524—Jones v. Jones, 195 S.E. 311, 57 Ga.App. 349—Floyd v. Williams, 188 S.E. 467, 54 Ga.App. 557.

Mass.—Connor v. Mason, 28 N.E.2d 1004, 306 Mass. 553.

Mont.—Westergard v. Peterson, 159 P.2d 518, 117 Mont. 550—Nangle v. Northern Pac. Ry. Co., 32 P.2d 11, 96 Mont. 512.

Neb.—Landrum v. Roddy, 12 N.W.2d 82, 143 Neb. 934, 149 A.L.R. 1041—Larson v. Storm, 289 N.W. 792, 137 Neb. 420—Sterns v. Hellerich, 264 N.W. 677, 130 Neb. 251—Sheehy v. Abboud, 253 N.W. 683, 126 Neb. 554—Swengil v. Martin, 252 N.W. 207, 125 Neb. 745—Gilbert v. Bryant, 251 N.W. 823, 125 Neb. 731—Morris v. Erskine, 248 N.W. 96, 124 Neb. 754.

N.D.—Jacobs v. Nelson, 268 N.W. 873, 67 N.D. 27.

Or.—Melcher v. Adams, 146 P.2d 354, 174 Or. 75.

Vt.—Hunter v. Preston, 166 A. 17, 105 Vt. 327.

Va.—Masters v. Card, 42 S.E.2d 203, 186 Va. 261—Worcester v. McClurkin, 5 S.E.2d 509, 174 Va. 221—Thornhill v. Thornhill, 2 S.E.2d 318, 172 Va. 553.

Wash.—Meath v. Northern Pac. Ry. Co., 36 P.2d 533, 179 Wash. 177—Dye v. City of Seattle, 24 P.2d 67, 173 Wash. 515—Zelinsky v. Howe, 1 P.2d 294, 163 Wash. 277.

(2) Fact that automobile was operated at from sixty to seventy miles an hour would have important bearing in connection with other facts on question whether operator was guilty of willful, wanton, reckless, or grossly negligent conduct, but it could not be ruled as matter of law that that fact alone constituted such conduct of either kind or prima facie evidence of such conduct.—Kohutynski v. Kohutynski, 5 N.E.2d 345, 296 Mass. 74.

Under statute

(1) Some statutes expressly provide that question of gross negligence or willful or wanton misconduct "shall in all cases be solely for the jury"—Erlachstein v. Roney, 20 So.2d 254, 155 Fla. 333—Wharton v. Day, 10 So.2d 417, 151 Fla. 772—Winthrop v. Carinhas, 195 So. 399, 142 Fla. 588.

(2) Provision does not constitute unconstitutional attempt on part of legislature to exercise judicial power, since such provision does not prevent courts from passing on legal sufficiency of evidence, but is merely surplusage and adds nothing to power of jury that jury did not already possess.—Cormier v. Williams, 4 So.2d 525, 148 Fla. 201.

(3) It is within province of court to determine whether or not facts alleged, if proved, would constitute gross negligence—Koger v. Hollahan, 198 So. 685, 144 Fla. 779, 131 A.L.R. 886.

(4) Evidence that automobile was driven on well-lighted bridge at speed of about thirty miles per hour, that driver was familiar with bridge, that lighted signs reading "slow" and "15 miles per hour" were visible, that lights of approaching automobile blinded driver, and that automobile collided with iron guard at end of safety island on which was burning red light, did not as matter of law establish either gross negligence or willful and wanton misconduct of driver, under automobile guest statute requiring submission of such issues to jury.—Winthrop v. Carinhas, supra.

negligence,¹⁰ an intentional wrong,¹¹ intoxication,¹² heedlessness or reckless disregard of the rights of others,¹³ reckless operation of the motor ve-

hicle,¹⁴ willfulness and wantonness,¹⁵ willful misconduct,¹⁶ and, likewise, according to decisions on

10. Neb.—McCown v. Schram, 289 N.W. 890, 137 Neb. 498, applying Kansas law.

11. Ind.—Coconower v. Stoddard, 182 N.E. 466, 96 Ind.App. 287.

12. Cal.—Kropin v. Huston, 179 P. 2d 575, 79 Cal.App.2d 332—McMahon v. Schindler, 102 P.2d 378, 38 Cal.App.2d 642—Erickson v. Vogt, 80 P.2d 533, 27 Cal.App.2d 77.

Or.—Willoughby v. Driscoll, 120 P. 2d 768, 168 Or. 187, affirmed 121 P. 2d 917, 168 Or. 187.

13. Conn.—Gilmartin v. D. & N. Transp. Co., 193 A. 726, 123 Conn. 127, 113 A.L.R. 1322—Riordan v. Gouin, 175 A. 686, 119 Conn. 235—Doody v. Rogers, 164 A. 641, 116 Conn. 713—Upson v. General Baking Co., 156 A. 858, 113 Conn. 787—Grasso v. Frattolillo, 149 A. 838, 111 Conn. 209.

Idaho.—Hughes v. Hudelson, 169 P. 2d 712, 67 Idaho 10—Manion v. Waybright, 86 P.2d 181, 59 Idaho 643—Curtis v. Curtis, 70 P.2d 369, 58 Idaho 76.

Ind.—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65—Kettner v. Jay, 26 N.E.2d 546, 107 Ind.App. 643—Jay v. Holman, 20 N.E.2d 656, 106 Ind.App. 413—Blair v. May, 19 N.E.2d 490, 106 Ind.App. 599—Sheets v. Stalcup, 13 N.E.2d 346, 105 Ind.App. 66—Hettmansperger v. Hettmansperger, 5 N.E.2d 685, 103 Ind.App. 632—Kraning v. Taggart, 1 N.E.2d 689, 103 Ind.App. 62—Hoepfner v. Saltzgaber, 200 N.E. 458, 102 Ind.App. 458—Armstrong v. Binzer, 199 N.E. 863, 102 Ind.App. 497—Coconower v. Stoddard, 182 N.E. 466, 96 Ind.App. 287.

N.Y.—Metcalfe v. Reynolds, 275 N.Y. S. 303, 242 App.Div. 406, applying Connecticut law, reversed on other grounds 195 N.E. 681, 267 N.Y. 52, reargument denied 198 N.E. 372, 268 N.Y. 495.

N.C.—Harper v. Harper, 34 S.E.2d 185, 225 N.C. 260, applying South Carolina law.

S.C.—Cummings v. Tweed, 10 S.E.2d 322, 195 S.C. 173—Spurlin v. Colprovia Products Co., 194 S.E. 332, 185 S.C. 449—Fulghum v. Bleakley, 181 S.E. 30, 177 S.C. 286.

Tex.—Kirkpatrick v. Neal, Civ.App., 153 S.W.2d 519, error refused—Justiss v. Naquin, Civ.App., 137 S.W.2d 73, error dismissed, judgment correct—Napier v. Mooneyham, Civ.App., 94 S.W.2d 564, error dismissed—Munves v. Buckley, Civ.App., 70 S.W.2d 605, error dismissed.

W.Va.—White v. Hall, 188 S.E. 768, 118 W.Va. 85, applying Indiana law.

Ordinarily fact question

Conn.—Potez v. Williams, 155 A. 211, 113 Conn. 278.

Guest driving at owner's request

Ind.—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65.

Failure to give signal in turning

Conn.—Rose v. Heisler, 174 A. 66, 118 Conn. 632.

Falling asleep

N.C.—Harper v. Harper, 34 S.E.2d 185, 225 N.C. 260.

Speed

Conn.—Williams v. Smith, 181 A. 622, 120 Conn. 521—Riordan v. Gouin, 175 A. 686, 119 Conn. 235—Lionetti v. Coppola, 161 A. 797, 115 Conn. 499.

Ind.—Armstrong v. Binzer, 199 N.E. 863, 102 Ind.App. 497.

S.C.—Peak v. Fripp, 11 S.E.2d 383, 195 S.C. 324—Cummings v. Tweed, 10 S.E.2d 322, 195 S.C. 173.

14. Iowa.—Skalla v. Daeges, 16 N.W.2d 638, 234 Iowa 1260—Maland v. Tesdall, 5 N.W.2d 327, 232 Iowa 959—Fraser v. Brannigan, 293 N.W. 50, 228 Iowa 572—Allbaugh v. Ashby, 284 N.W. 816, 226 Iowa 574—Reed v. Pape, 284 N.W. 106, 226 Iowa 170—Clausen v. Johnson's Estate, 278 N.W. 297, 224 Iowa 990—Popham v. Case, 271 N.W. 226, 223 Iowa 52—Wright v. Mahaffa, 270 N.W. 402, 222 Iowa 872—Siesseger v. Puth, 248 N.W. 352, 216 Iowa 916—Johnson v. McVicker, 247 N.W. 488, 216 Iowa 654—White v. McVicker, 246 N.W. 385, 216 Iowa 90—Siesseger v. Puth, 239 N.W. 46, 213 Iowa 164—Cerny v. Secor, 234 N.W. 193, 211 Iowa 1232.

Minn.—Brandoy v. Bromeland, 225 N.W. 163, 177 Minn. 298, applying Iowa law.

Mo.—Hall v. Wilkerson, App., 84 S.W.2d 1063, applying Iowa law.

Neb.—Bailey v. Bryant, 257 N.W. 241, 127 Neb. 843, applying Iowa law.

Whether evidence presents jury question depends on conclusions to be drawn from all facts and surroundings shown in record—Clausen v. Johnson's Estate, 278 N.W. 297, 224 Iowa 990

Control and speed

(1) Generally.—Skalla v. Daeges, 16 N.W.2d 638, 234 Iowa 1260—Crowell v. Demo, 1 N.W.2d 93, 231 Iowa 228—McKlveen v. Townley, 299 N.W. 25, 230 Iowa 688—Fraser v. Brannigan, 293 N.W. 50, 228 Iowa 572—Mescher v. Brogan, 272 N.W. 645, 223 Iowa 573—White v. McVicker, 259 N.W. 465, 219 Iowa 834—White v. Center, 254 N.W. 90, 218 Iowa

1027—Siesseger v. Puth, 248 N.W. 352, 216 Iowa 916.

(2) Whether guest's injuries from driving into ditch to avoid collision were caused by host's failure to have automobile under such control that it could be stopped within assured clear distance ahead was for jury.—Schuster v. Gillispie, 251 N.W. 735, 217 Iowa 386.

(3) Speed, coupled with limited visibility, congested traffic, or slippery road surface, may be sufficient to warrant submission of question to jury.—Mescher v. Brogan, supra.

Defective brakes

Driving automobile with defective brakes is not recklessness as matter of law.—Fleming v. Thornton, 251 N.W. 158, 217 Iowa 183.

Keeping lookout

Iowa.—White v. Center, 254 N.W. 90, 218 Iowa 1027.

Wrong side of road

Iowa.—McKlveen v. Townley, 299 N.W. 25, 230 Iowa 688.

15. U.S.—Willingham v. Panick, C. C.A.Okl., 161 F.2d 614—Robins v. Pitcairn, C.C.A.Ill., 124 F.2d 734.

Ala.—Dean v. Adams, 30 So.2d 903, 249 Ala. 319—Birmingham Ice & Cold Storage Co. v. McFarling, 200 So. 110, 240 Ala. 479.

Mass.—Baines v. Collins, 38 N.E.2d 626, 310 Mass. 523, 138 A.L.R. 1123.

N.J.—Iacono v. D'Angelo, 142 A. 46, 104 N.J.Law 506, 58 A.L.R. 614.

N.C.—Nettles v. Rea, 156 S.E. 159, 200 N.C. 44.

42 C.J. p 1256 note 75.

Speed

Ala.—Couch v. Hutcherson, 8 So.2d 580, 243 Ala. 47, 141 A.L.R. 697—Dickson v. Dinsmore, 122 So. 437, 219 Ala. 353.

Ill.—Chase v. Tomlin, 33 N.E.2d 754, 309 Ill.App. 648.

16. Cal.—De Loss v. Lewis, 177 P. 2d 589, 78 Cal.App.2d 223—Hastings v. Serleto, 143 P.2d 956, 61 Cal.App.2d 672—Collins v. Nelson, 61 P.2d 479, 16 Cal.App.2d 535—Frank v. Myers, 60 P.2d 144, 16 Cal.App.2d 16—Medberry v. Olco-vich, 59 P.2d 551, 15 Cal.App.2d 263, hearing denied 60 P.2d 281, 15 Cal.App.2d 263—Walker v. Bacon, 23 P.2d 520, 132 Cal.App. 625.

If there was any evidence, together with inferences reasonably drawn therefrom, which would support finding that host was guilty of willful misconduct, motions for nonsuit or directed verdict were properly denied.—Francesconi v. Belluomini, 83 P.2d 298, 28 Cal.App.2d 701.

question, willful and wanton misconduct,¹⁷ willful and wanton disregard of the rights of others,¹⁸ and negligence consisting of a willful and wanton disregard of the rights of others.¹⁹ The credibility of the witnesses and the weight of the evi-

dence are for the jury, or the trial court in actions tried without a jury.²⁰

On conflicting evidence, incidental questions of fact are also for the jury,²¹ as, for example, the

Falling asleep

Evidence that motorist after having once temporarily dozed off continued to drive and thereby took risk of falling asleep again presented question for jury as to whether motorist was guilty of willful misconduct, so as to authorize guest to recover for injuries sustained in collision with parked automobile—*Pennix v. Winton*, 148 P.2d 940, 61 Cal App.2d 781, hearing denied 146 P.2d 561, 61 Cal.App.2d 761.

Motion for directed verdict

In order to defeat defendant's motion for directed verdict, guest is required merely to offer competent evidence of such substantial nature that it might reasonably be inferred therefrom that driver was guilty of willful misconduct—*Collins v. Nelson*, 61 P.2d 479, 16 Cal App 2d 535—*Giminez v. Rissen*, 55 P.2d 292, modified on other grounds 56 P.2d 299, 12 Cal App.2d 152.

At railroad crossing

Cal.—*Hoffart v. Southern Pac. Co.*, 92 P.2d 436, 33 Cal.App.2d 591.

Speed

Cal.—*Allen v. Robinson*, App., 193 P. 2d 498—*Van Fleet v. Heyler*, 125 P.2d 586, 51 Cal App 2d 719—*Marchi v. Viroue*, 108 P.2d 469, 42 Cal.App.2d 124—*Francesconi v. Belluomini*, 83 P.2d 298, 28 Cal App. 2d 701—*Wright v. Sellers*, 78 P.2d 209, 25 Cal App 2d 603—*Rhoads v. Studley*, 59 P.2d 1082, 15 Cal App. 2d 726—*Giminez v. Rissen*, 55 P.2d 292, 12 Cal.App.2d 152, modified on other grounds 56 P.2d 299, 12 Cal. App.2d 152—*Gieselmann v. Uhlman*, 45 P.2d 819, 7 Cal App 2d 409—*Norton v. Puter*, 32 P.2d 172, 138 Cal. App. 253.

17. U.S.—*Storck v. Northwestern Nat. Casualty Co.*, C.C.A.Wis., 115 F.2d 889, applying Illinois law.

Ill.—*Winson v. Fischer*, 77 N.E.2d 48, 333 Ill.App. 222—*Busch v. Oilphant*, 75 N.E.2d 387, 332 Ill.App. 426—*Harper v. Malandrone*, 48 N.E.2d 789, 319 Ill.App. 247, applying Ohio law—*Hanlon v. Lindberg*, 48 N.E.2d 735, 319 Ill.App. 1—*Hohimer v. Fricke*, 46 N.E.2d 169, 317 Ill.App. 372—*Trust Co. of Chicago v. Ancateau*, 46 N.E.2d 125, 317 Ill. App. 186—*Lawson v. Fisk*, 45 N.E. 2d 707, 316 Ill.App. 591—*Hepler v. Morris*, 41 N.E.2d 345, 314 Ill.App. 376—*Dossett v. Anderson*, 41 N.E. 2d 313, 314 Ill.App. 376—*McMahon v. Duncan*, 41 N.E.2d 301, 314 Ill. App. 235—*Ives v. Otis*, 32 N.E.2d 359, 308 Ill.App. 675—*Rohrer v.*

Denton, 28 N.E.2d 572, 306 Ill.App. 317—*Holdoway v. Choisser*, 27 N.E.2d 228, 305 Ill.App. 20—*Harned v. Tippet*, 23 N.E.2d 931, 302 Ill. App. 258—*Kijowski v. Times Pub. Corporation*, 18 N.E.2d 754, 298 Ill. App. 236, affirmed 23 N.E.2d 703, 372 Ill. 311—*Foley v. Mitty*, 15 N.E.2d 915, 296 Ill.App. 636—*Burke v. Molloy*, 14 N.E.2d 279, 294 Ill. App. 442—*Rembke v. Bleser*, 6 N.E.2d 900, 289 Ill.App. 136—*Murphy v. King*, 1 N.E.2d 268, 284 Ill.App. 74—*Foale v. Linsky*, 279 Ill.App. 58.

Iowa.—*Greiner v. Hicks*, 300 N.W. 727, 231 Iowa 141, applying Illinois law.

Mo.—*Hargis v. Denny*, App., 117 S. W.2d 368, applying Illinois law—*McCarty v. Bishop*, 102 S.W.2d 126, 231 Mo App. 604, applying Illinois law.

Mich.—*Rogers v. Merritt*, 12 N.W.2d 422, 307 Mich 459—*Greimel v. Fischer*, 8 N.W.2d 906, 305 Mich. 45—*Rattner v. Lieber*, 293 N.W. 712, 294 Mich. 447—*Malicote v. De Bondt*, 275 N.W. 664, 281 Mich 650—*Lucas v. Lindner*, 269 N.W. 611, 276 Mich 704—*Schneider v. Draper*, 267 N.W. 831, 276 Mich. 259—*McLone v. Bean*, 248 N.W. 566, 263 Mich 113.

Ohio.—*Tighe v. Diamond*, 80 N.E.2d 122, 149 Ohio St. 520—*Kennard v. Palmer*, 53 N.E.2d 908, 143 Ohio St. 1—*Jenkins v. Sharp*, 42 N.E.2d 755, 140 Ohio St. 80—*Akers v. Stirn*, 25 N.E.2d 286, 136 Ohio St. 245—*Angel v. Constable*, App., 57 N.E.2d 86—*Major v. Liggett*, 50 N.E.2d 795, 72 Ohio App 71—*Kirk v. Birkenbach*, App., 32 N.E.2d 76—*Herrrell v. Hickok*, 197 N.E. 241, 49 Ohio App. 347, applying Michigan law.

18. Ark.—*McAllister v. Calhoun*, 205 S.W.2d 40, 212 Ark. 17.

Okl.—*Barall Food Stores v. Bennett*, 153 P.2d 106, 194 Okl. 508.

Ordinarily fact question

Ark.—*McAllister v. Calhoun*, 205 S. W.2d 40, 212 Ark. 17.

19. Colo.—*Edelen v. Simpson*, 144 P. 2d 986, 112 Colo. 1—*Dwinelle v. Union Pac. R. Co.*, 92 P.2d 741, 104 Colo. 545—*Millington v. Hiedloff*, 45 P.2d 937, 96 Colo. 581.

20. Cal.—*Candini v. Hiatt*, 50 P.2d 843, 9 Cal App.2d 679.

Colo.—*United Broth. of Carpenters and Joiners of America, Local Union No. 55, v. Salter*, 167 P.2d 954, 114 Colo. 513.

Conn.—*Kalamian v. Kalamian*, 139 A. 635, 107 Conn. 86.

Mass.—*Haines v. Chereskie*, 16 N.E. 2d 680, 301 Mass. 112.

Mich.—*Murner v. Thorpe*, 279 N.W. 849, 284 Mich. 331.

Minn.—*Grengs v. Erickson*, 29 N.W. 2d 881, 225 Minn. 153.

Neb.—*McCown v. Schram*, 298 N.W. 681, 139 Neb. 738.

N.H.—*Davison v. Davison*, 29 A.2d 131, 92 N.H. 245—*Kelly v. Simoultis*, 4 A.2d 868, 90 N.H. 87.

S.D.—*Russell v. Crow*, 245 N.W. 249, 60 S.D. 230.

Tex.—*Munves v. Buckley*, Civ.App., 70 S.W.2d 605, error dismissed.

Va.—*Thornhill v. Thornhill*, 2 S.E. 2d 318, 172 Va. 553.

21. Cal.—*Humphreys v. San Francisco Area Council, Boy Scouts of America*, 139 P.2d 941, 22 Cal.2d 436—*Angelo v. Esau*, 93 P.2d 205, 34 Cal App.2d 130.

Conn.—*Bree v. Lamb*, 178 A. 919, 120 Conn 1.

Iowa.—*Futter v. Hout*, 281 N.W. 286, 225 Iowa 723—*Cerny v. Secor*, 234 N.W. 193, 211 Iowa 1232.

Ky.—*Ice Delivery Co. v. Thomas*, 160 S.W.2d 605, 290 Ky. 230—*Schilling v. Heringer*, 67 S.W.2d 979, 252 Ky. 624.

Mich.—*Wolfe v. Marks*, 269 N.W. 125, 277 Mich. 154.

Mo.—*Tabler v. Perry*, 85 S.W.2d 471, 337 Mo 154—*Munding v. Sewell*, App., 40 S.W.2d 530.

N.J.—*Linzmayr v. Phair*, 156 A. 918, 9 N.J. Misc. 1154—*Kraus v. Fisher*, 156 A. 315, 9 N.J. Misc. 1053.

N.Y.—*Hartstein v. U. S. Trucking Corporation*, 23 N.Y.S.2d 251, 260 App.Div. 643, reargument denied 25 N.Y.S.2d 398, 260 App.Div. 1006, and 25 N.Y.S.2d 400, 260 App.Div. 1006.

Okl.—*Sears, Roebuck & Co. v. Robinson*, 80 P.2d 938, 183 Okl. 253.

Pa.—*Hollup v. United News Co.*, 176 A 51, 115 Pa Super. 585.

Vt.—*Campbell v. Campbell*, 162 A. 379, 104 Vt. 468, 85 A.L.R. 626.

Wash.—*Potter v. Juarez*, 66 P.2d 290, 189 Wash. 476.

Wis.—*Jensen v. Jensen*, 279 N.W. 628, 228 Wis. 77.

Existence of common or joint enterprise as question of law or fact see the C.J.S. title Negligence § 261, also 45 C.J. p 1314 notes 85-88.

Law of another state

Jury could find under evidence that laws of another state governing the action permitted recovery for

place of the accident, whether at or between intersections,²² who was driving the motor vehicle,²³ the party having the right of way,²⁴ which of two cars was actually driven against the other,²⁵ whether defendant observed the law of the road,²⁶ the speed of defendant's automobile,²⁷ the relative speed of two cars,²⁸ whether plaintiff had protested defendant's rate of speed,²⁹ whether defendant knew that the injured person was riding on the running board,³⁰ whether defendant's car or the car with which it collided was on the wrong

side of the road,³¹ whether it was dark at the time of the accident,³² whether defendant was driving without lights,³³ and whether defendant was blinded by the lights of an approaching car.³⁴

In addition, on such evidence it is for the jury, or trial court, to determine the status of the occupant of the motor vehicle,³⁵ such as a guest,³⁶ invitee,³⁷ or trespasser,³⁸ whether defendant was conscious of the peril in which a trespasser was placed a sufficient time before the accident to have pre-

automobile driver's simple negligence toward invitee.—*Askowith v. Massell*, 156 N.E. 875, 260 Mass. 202.

22. Wash.—*Singer v. Martin*, 164 P. 1105, 96 Wash. 231.

23. U.S.—*De Soto Motor Corporation v. Vann*, C.C.A.N.M., 66 F.2d 753.

24. Cal.—*Johnson v. Johnson*, 31 P. 2d 237, 137 Cal.App. 701.

25. Tenn.—*Chickasaw Wood Products Co. v. Lane*, 125 S.W.2d 164, 22 Tenn.App. 596.

Wash.—*Singer v. Martin*, 164 P. 1105, 96 Wash. 231.

26. Mass.—*Gallagher v. Wheeler*, 198 N.E. 891, 292 Mass. 547.

27. R.I.—*Parenteau v. Parenteau*, 153 A. 872, 51 R.I. 263.

Whether defendant exceeded speed limit was for jury.

Colo.—*Carlson v. Millisack*, 261 P. 657, 82 Colo. 491.

Wis.—*Demochitz v. Wells*, 253 N.W. 790, 214 Wis. 599.

28. Wash.—*Singer v. Martin*, 164 P. 1105, 96 Wash. 231.

29. Tenn.—*Croson v. Marsh*, 12 Tenn.App. 33.

30. Mass.—*Sheehan v. Goriansky*, 56 N.E.2d 883, 317 Mass. 10.

31. Cal.—*Offerdahl v. Motor Transit Co.*, 252 P. 773, 8 Cal.App. 667.

32. Mass.—*Lyons v. Todina*, 29 N.E. 2d 6, 306 Mass. 592.

33. Mass.—*Lyons v. Todina*, supra.

34. Idaho.—*McCoy v. Krengel*, 17 P. 2d 547, 52 Idaho 626.

35. Cal.—*Humphreys v. San Francisco Area Council, Boy Scouts of America*, 139 P.2d 941, 22 Cal.2d 436—*Darling v. Dreamland Bedding & Upholstering Co.*, 112 P.2d 338, 44 Cal.App.2d 253.

Mass.—*Foley v. McDonald*, 185 N.E. 926, 283 Mass. 96.

N.C.—*Dark v. Johnson*, 36 S.E.2d 237, 225 N.C. 651.

Ordinarily fact question

Tenn.—*Richards v. Parks*, 93 S.W. 2d 639, 19 Tenn.App. 615.

36. Ala.—*Baker v. Elebash*, 124 So. 789, 220 Ala. 198.

Cal.—*Carey v. City of Oakland*, 112 P.2d 714, 44 Cal.App.2d 503.

Conn.—*Bree v. Lamb*, 178 A. 919, 120 Conn. 1—*Szabados v. Chatlos*, 177 A. 719, 119 Conn. 537—*Powner*, 175 A. 470, 119 Conn. 188, 95 A.L.R. 1177—*Russell v. Farlee*, 163 A. 404, 115 Conn. 687.

Ill.—*Lasley v. Crawford*, 228 Ill.App. 590.

Iowa.—*Doherty v. Edwards*, 290 N.W. 672, 227 Iowa 1264—*Porter v. Decker*, 270 N.W. 897, 222 Iowa 1109—*Knutson v. Lurie*, 251 N.W. 147, 217 Iowa 192.

Mass.—*Streeter v. Locke*, 4 N.E.2d 297, 295 Mass. 533—*Chooljian v. Nahigian*, 173 N.E. 511, 273 Mass. 396.

Mich.—*Anderson v. Conterio*, 5 N.W. 2d 572, 303 Mich. 75—*Shpakow v. Brown*, 2 N.W.2d 812, 300 Mich. 678.

Neb.—*Van Auker v. Steckley's Hybrid Seed Corn Co.*, 8 N.W.2d 451, 143 Neb. 24—*Svitak v. Sun Indemnity Co.*, 285 N.W. 604, 136 Neb. 303—*Tolliver v. Rostin*, 232 N.W. 616, 120 Neb. 363.

N.C.—*Dark v. Johnson*, 36 S.E.2d 237, 225 N.C. 651—*Harper v. Harper*, 34 S.E.2d 185, 225 N.C. 260.

Or.—*Luebke v. Hawthorne*, 192 P.2d 990—*Smith v. Pacific Truck Express*, 100 P.2d 474, 164 Or. 318—*Albrecht v. Safeway Stores*, 80 P. 2d 62, 159 Or. 331.

S.D.—*McMahon v. De Kraay*, 16 N.W.2d 308, 70 S.D. 180.

Wash.—*Keisel v. Bredick*, 74 P.2d 473, 192 Wash. 665.

Business invitee or guest

Mass.—*Epstein v. Simco Trading Co.*, 8 N.E.2d 767, 297 Mass. 282.

Passenger for hire or guest

Ala.—*Blair v. Greene*, 22 So.2d 834, 247 Ala. 104.

Cal.—*Haney v. Takakura*, 37 P.2d 170, 2 Cal.App.2d 1, amended on other grounds 38 P.2d 160, 2 Cal. App.2d 1.

Ill.—*Leonard v. Stone*, 45 N.E.2d 620, 381 Ill. 343.

N.C.—*Clodfelter v. Wells*, 195 S.E. 11, 212 N.C. 823.

Ohio.—*May v. Szwed*, 39 N.E.2d 630, 68 Ohio App. 459.

Vt.—*Shappy v. McGarry*, 174 A. 856, 106 Vt. 466.

Servant or guest

Conn.—*Krui v. Smith*, 144 A. 304, 108 Conn. 628.

Iowa.—*Knutson v. Lurie*, 251 N.W. 147, 217 Iowa 192.

Kan.—*Hartman v. Orcutt*, 33 P.2d 133, 139 Kan. 785.

37. Mo.—*Nolan v. Joplin Transfer & Storage Co.*, App., 203 S.W.2d 740 N.J.—*Cowan v. Kaminow*, 26 A.2d 258, 128 N.J.Law 398—*Tarburton v. Hagemann*, 187 A. 749, 117 N.J.Law 294—*Vande Polder v. Van Beveren*, 162 A. 546, 109 N.J.Law 524—*Devine v. Heinrich*, 162 A. 523, 109 N.J.Law 378—*Cafaro v. Cafaro*, 184 A. 779, 14 N.J. Misc. 331, reversed on other grounds 191 A. 472, 118 N.J.Law 123.

Business invitee

Pa.—*Gillen v. Perlow*, 59 A.2d 153, 359 Pa. 341.

Licensee or invitee

N.J.—*Rottinger v. Friedhof*, 56 A.2d 571, 136 N.J.Law 422, affirmed 62 A.2d 683—*Hudson v. Gas Consumers' Ass'n*, 8 A.2d 337, 123 N.J.Law 252—*Augustine v. Haas*, 1 A.2d 387, 121 N.J.Law 58—*Myers v. Sauer*, 187 A. 135, 117 N.J.Law 144—*Yanowitz v. Pinkham*, 168 A. 770, 111 N.J.Law 448—*Timannus v. De Witt*, 160 A. 490, 109 N.J.Law 168—*Doryk v. Perth Amboy Bottling Co.*, 139 A. 419, 104 N.J.Law 87—*Gruda v. Karbowski*, 139 A. 893, 6 N.J. Misc. 49.

N.Y.—*Traub v. Blum*, 31 N.Y.S.2d 735, 263 App.Div. 92.

Or.—*Rice v. City of Portland*, 17 P. 2d 552, 141 Or. 205.

Whether defendant's act in slowing down constituted invitation for person to board motor vehicle was for jury.—*Hernandez v. Murphy*, 115 P.2d 565, 46 Cal.App.2d 201.

38. Ill.—*Brown v. Murray*, 39 N.E. 2d 83, 313 Ill.App. 144.

Invitee or trespasser

Ky.—*Meriweather's Adm'r v. Pickering*, 116 S.W.2d 670, 273 Ky. 367.

Pa.—*Eisenhower v. Hall's Motor Transit Co.*, 40 A.2d 458, 351 Pa. 200—*McFadden v. Pennzoil Co.*, 9 A.2d 412, 336 Pa. 301.

vented the injury,³⁹ whether a person was being carried in the motor vehicle against his wishes,⁴⁰ whether either defendant or his guest or both of them were intoxicated at the time of the accident,⁴¹ whether the guest knew of defendant's intoxication,⁴² and whether defendant went to sleep because he was intoxicated.⁴³

The evidence must be legally sufficient to require or warrant submission to the jury, and in various cases the evidence has been held insufficient to justify submission to the jury the question of defendant's negligence,⁴⁴ gross negligence or gross and wanton negligence,⁴⁵ of intentional in-

39. U.S.—*Willingham v. Panick*, C. C.A. Okl., 161 F.2d 614.

40. Ga.—*Blanchard v. Ogletree*, 152 S.E. 116, 41 Ga.App. 4.

41. Ga.—*Powell v. Berry*, 89 S.E. 753, 145 Ga. 696, L.R.A.1917A 306. Ky.—*Sutherland v. Davis*, 151 S.W. 2d 1021, 286 Ky. 743—*Mahin's Adm'r v. McClellan*, 131 S.W.2d 478, 279 Ky. 595.

Tex.—*Scott v. Gardner*, 156 S.W.2d 513, 137 Tex. 628, 141 A.L.R. 50.

42. Cal.—*Kroplin v. Huston*, 179 P. 2d 575, 79 Cal.App.2d 332.

Ky.—*Sutherland v. Davis*, 151 S.W. 2d 1021, 286 Ky. 743—*Mahin's Adm'r v. McClellan*, 131 S.W.2d 478, 279 Ky. 595.

43. Or.—*Willoughby v. Driscoll*, 120 P.2d 768, 168 Or. 187, affirmed 121 P.2d 917, 168 Or. 187.

44. U.S.—*Cherry Lake Farms v. Taylor*, C.C.A.Fla., 98 F.2d 571—*Liggett & Myers Tobacco Co v. De Parcq*, C.C.A.Minn., 66 F.2d 678.

Cal.—*Curry v. Williams*, 293 P. 623, 109 Cal.App. 649—*Keller v. Cushman*, 285 P. 399, 104 Cal.App. 186.

Conn.—*Sigel v. Gordon*, 167 A. 719, 117 Conn. 271—*Silver v. Silver*, 143 A. 240, 108 Conn. 371, 65 A.L.R. 943, affirmed 50 S.Ct. 67, 280 U.S. 117, 74 L.Ed. 221, 65 A.L.R. 939.

Ind.—*Frymier v. Butler*, 39 N.E.2d 809, 110 Ind.App. 531.

Kan.—*Marts v. Wilt*, 53 P.2d 869, 143 Kan. 235.

Ky.—*Spivey's Adm'r v. Hackworth*, 200 S.W.2d 131, 304 Ky. 141.

Md.—*Minch v. Hilkowitz*, 161 A. 164, 162 Md. 649.

Minn.—*Landru v. Stensrud*, 17 N.W. 2d 322, 219 Minn. 227—*Cosgrove v. McGonagle*, 264 N.W. 134, 196 Minn. 6—*Peterson v. Fulton*, 256 N.W. 901, 192 Minn. 360—*Johnson v. Bosch*, 227 N.W. 181, 178 Minn. 363.

Mont.—*Hornbeck v. Richards*, 257 P. 1025, 80 Mont. 27.

N.H.—*Loughlin v. Johnson*, 195 A. 685, 89 N.H. 191.

N.J.—*Rottinger v. Friedhof*, 66 A. 2d 571, 136 N.J.Law 422, affirmed 62 A.2d 683—*Glacken v. Bergman*, 187 A. 535, 117 N.J.Law 306—*Hammond v. Wacker*, 154 A. 735, 107 N.J.Law 438—*Shutz v. May*, 177 A. 95, 13 N.J.Misc. 186.

N.Y.—*Martin v. Donahue*, 46 N.E.2d 346, 289 N.Y. 722—*Lahr v. Tirrill*, 8 N.E.2d 298, 274 N.Y. 112, reargument denied 10 N.E.2d 575, 274 N.Y. 611—*Thies v. Reich Bros.*, 286 N.Y.S. 943, 247 App.Div. 900, affirmed *Thies v. Reich Bros. Long Island Motor Freight*, 7 N.E.2d 688, 273 N.Y. 552.

N.C.—*Whitehurst v. Williams*, 11 S.E.2d 139, 218 N.C. 390—*Clodfelter v. Wells*, 195 S.E. 11, 212 N.C. 823—*Casey v. Bellamy*, 175 S.E. 718, 207 N.C. 850—*Cory v. Cory*, 170 S.E. 629, 205 N.C. 205—*Tuttle v. Bell*, 165 S.E. 333, 203 N.C. 154.

Okla.—*Mathers v. Younger*, 58 P.2d 857, 177 Okl. 294.

Pa.—*Lithgow v. Lithgow*, 5 A.2d 573, 334 Pa. 262.

S.D.—*Miller v. Stevens*, 256 N.W. 152, 63 S.D. 10.

Tenn.—*Roddy Mfg Co v. Dixon*, 105 S.W.2d 513, 21 Tenn.App. 81.

Vt.—*Johnson v. Burke*, 183 A. 495, 108 Vt. 164.

Va.—*Sutton v. Bland*, 184 S.E. 231, 166 Va. 132.

Wash.—*Cartwright v. Boyce*, 8 P.2d 968, 167 Wash. 175—*Nougulier v. Morgan*, 250 P. 954, 141 Wash. 144.

Proof of accident and injury is not sufficient to warrant submission.

—*Lithgow v. Lithgow*, 5 A.2d 573, 334 Pa. 262.

Control
Loss of control of automobile by driver is not, under all circumstances, sufficient evidence of negligence to take case to jury—*Springs v. Doll*, 148 S.E. 251, 197 N.C. 240.

Sudden illness
Evidence that automobile guest was injured in accident resulting from driver's sudden illness and fainting was insufficient to take to jury issue of driver's negligence—*Cohen v. Petty*, 65 F.2d 820, 62 App.D.C. 187, followed in 65 F.2d 822, 62 App.D.C. 189.

Person riding in trailer
N.C.—*Hill v. Winslow*, 8 S.E.2d 249, 217 N.C. 794.

45. Cal.—*Cobb v. Lawrence*, 129 P. 2d 462, 54 Cal.App.2d 630, applying Florida law—*Simpson v. Steinhoff*, 21 P.2d 960, 131 Cal.App. 660.

Kan.—*Schwartzman*, 188 P.2d 971, 164 Kan. 241—*Vogrin v. Bigger*, 154 P.2d 111, 159 Kan. 271—*Anderson v. Anderson*, 50 P.2d 995, 142 Kan. 463.

Mass.—*Streeter v. Locke*, 4 N.E.2d 297, 295 Mass. 533—*Caverno v.*

Houghton, 1 N.E.2d 4, 294 Mass. 110—*Roiko v. Aijala*, 199 N.E. 484, 293 Mass. 149—*Lefebvre v. Howell*, 192 N.E. 491, 288 Mass. 253—*Perkins v. Gardner*, 191 N.E. 350, 287 Mass. 114—*Bertera v. Cuneo*, 173 N.E. 427, 273 Mass. 181—*Bertelli v. Tronconi*, 162 N.E. 307, 264 Mass. 235.

Mich.—*Butine v. Stevens*, 29 N.W.2d 325, 319 Mich. 176—*Rowe v. Vander Kolk*, 270 N.W. 788, 278 Mich. 564—*Boos v. Sauer*, 253 N.W. 278, 266 Mich. 230—*Findlay v. Davis*, 248 N.W. 588, 263 Mich. 179—*Mater v. Becraft*, 246 N.W. 191, 261 Mich. 477.

Minn.—*Thorsness v. Woltman*, 269 N.W. 637, 198 Minn. 270, applying South Dakota law.

Mo.—*Stevens v. Walker*, 125 S.W.2d 920, 233 Mo.App. 636, applying Kansas law.

Mont.—*Cowden v. Crippen*, 53 P.2d 98, 101 Mont. 187.

Neb.—*Gohlinghorst v. Ruess*, 20 N.W.2d 381, 146 Neb. 470—*James v. Krebek*, 7 N.W.2d 637, 142 Neb. 757—*Mierendorf v. Saalfeld*, 295 N.W. 901, 138 Neb. 876—*Clarke v. Weatherly*, 270 N.W. 316, 131 Neb. 816—*Woodworth v. Johnston*, 267 N.W. 243, 131 Neb. 113—*Bellik v. Warsocki*, 253 N.W. 689, 126 Neb. 560.

N.H.—*Lee v. Chamberlain*, 148 A. 466, 84 N.H. 182.

N.C.—*Farfour v. Fahad*, 199 S.E. 521, 214 N.C. 281, applying Virginia law—*Wright v. Pettus*, 184 S.E. 494, 209 N.C. 732, applying Virginia law.

Or.—*Navarra v. Jones*, 169 P.2d 584, 178 Or. 863.

S.D.—*Granflaten v. Rohde*, 283 N.W. 153, 66 S.D. 335.

Tex.—*Mitchell v. Gooch*, Civ.App., 210 S.W.2d 834—*Thomas v. Southern Lumber Co.*, Civ.App., 181 S.W.2d 111—*Linn v. Nored*, Civ.App., 133 S.W.2d 234, error dismissed, judgment correct.

Vt.—*Kelley v. Anthony*, 8 A.2d 641, 110 Vt. 490—*Garvey v. Michaud*, 184 A. 712, 108 Vt. 226—*Anderson v. Olson*, 169 A. 781, 106 Vt. 70—*Franzoni v. Ravenna*, 163 A. 564, 105 Vt. 64.

Va.—*Woodrum v. Holland*, 40 S.E. 2d 169, 185 Va. 690—*Daub v. Weaver*, 178 S.E. 794, 164 Va. 96.

Wash.—*Connolly v. Derby*, 9 P.2d 93, 167 Wash. 286—*MacDonald v. Balletti*, 4 P.2d 506, 164 Wash. 695—

jury,⁴⁶ heedlessness or reckless disregard of the rights of others,⁴⁷ reckless operation of the motor vehicle,⁴⁸ willfulness or wantonness,⁴⁹ willful misconduct,⁵⁰ willful and wanton misconduct,⁵¹ and negligence consisting of a willful and wanton dis-

regard for the rights of others.⁵²

Where the evidence is uncontradicted and but one inference reasonably may be drawn therefrom, it is a question of law for the court as to defend-

Blood v. Austin, 270 P. 183, 149 Wash. 41.

Proof of ordinary negligence is insufficient.

U.S.—Turner v. Buchanan, C.C.A. Mich., 94 F.2d 723.

Neb.—Johnk v. Scanlon, 285 N.W. 488, 136 Neb. 187.

Or.—Callander v. Brown, 178 P.2d 922, 181 Or. 279—Rauch v. Stecklein, 20 P.2d 387, 142 Or. 286.

Motion to strike out all of guest's evidence is proper if there is no evidence in record tending to prove host was guilty of gross negligence.—Thornhill v. Thornhill, 2 S.E.2d 318, 172 Va. 553.

46. Wash.—Carufel v. Davis, 61 P. 2d 1005, 188 Wash. 156.

47. Conn.—Sarver v. Morrow, 183 A. 739, 121 Conn. 697—Shiels v. Audette, 174 A. 323, 119 Conn. 75, 94 A.L.R. 1206.

Or.—Navarra v. Jones, 169 P.2d 584, 178 Or. 863.

Tenn.—Fly v. Swink, 69 S.W.2d 903, 17 Tenn.App. 627, applying Texas law.

Tex.—Rowan v. Allen, 134 S.W.2d 1022, 134 Tex. 215—Mayer v. Johnson, Civ.App., 148 S.W.2d 454, error dismissed, judgment correct—Linn v. Nored, Civ.App., 133 S.W.2d 234, error dismissed, judgment correct—Glassman v. Feldman, Civ.App., 106 S.W.2d 721—Aycock v. Green, Civ.App., 94 S.W.2d 894, error dismissed.

Proof of ordinary negligence is insufficient.—Glassman v. Feldman, Tex.Civ.App., 106 S.W.2d 721.

48. U.S.—Russell v. Turner, C.C.A. Iowa, 148 F.2d 562.

Iowa.—Olson v. Hodges, 19 N.W.2d 676, 236 Iowa 612—Long v. Pearce, 10 N.W.2d 50, 233 Iowa 1025—Tomasek v. Lynch, 10 N.W.2d 3, 233 Iowa 662—Harvey v. Clark, 6 N.W.2d 144, 232 Iowa 729, 143 A.L.R. 1141—Popham v. Case, 271 N.W. 226, 223 Iowa 52—Wright v. What Cheer Clay Products Co., 267 N.W. 92, 221 Iowa 1292—Bowermaster v. Universal Producing Co., 266 N.W. 503, 221 Iowa 831—Wilson v. Oxborrow, 264 N.W. 1, 220 Iowa 1135—Hansen v. Dall, 263 N.W. 530, 220 Iowa 817—Wien v. Hayes, 261 N.W. 531, 220 Iowa 166—Petersen v. Detwiller, 255 N.W. 529, 218 Iowa 418—Thompson v. Farrand, 251 N.W. 44, 217 Iowa 160—Welch v. Minkel, 246 N.W. 775, 215 Iowa 848—White v. McVicker, 246 N.W. 335, 216 Iowa 80

—Phillips v. Briggs, 245 N.W. 720, 215 Iowa 461—Koch v. Roehrig, 244 N.W. 677, 215 Iowa 43—Levinson v. Hagerman, 244 N.W. 307, 214 Iowa 1296—Wilde v. Griffel, 243 N.W. 159, 214 Iowa 1177—Neessen v. Armstrong, 239 N.W. 56, 213 Iowa 378.

Proof of ordinary negligence is insufficient.—Thuente v. Hart Motors, 15 N.W.2d 622, 234 Iowa 1291

Speed

(1) Generally.—Vandell v. Roewe, 6 N.W.2d 295, 232 Iowa 896—Scott v. Hansen, 289 N.W. 710, 228 Iowa 37—Newville v. Weller, 251 N.W. 21, 217 Iowa 1144.

(2) Proof of high rate of speed alone could not make case for jury as to whether driver was guilty of recklessness; there must be other material facts and circumstances combined with speed before there is an issue for jury on question of recklessness.

U.S.—Russell v. Turner, D.C.Iowa, 56 F.Supp. 455, affirmed, C.C.A., 148 F.2d 562.

Iowa.—Mayer v. Sheetz, 273 N.W. 138, 223 Iowa 582—Mescher v. Brogan, 272 N.W. 645, 223 Iowa 573

Driver's response to guest's protest

Proof that automobile driver made such response to protest of occupant as to manner of his driving as to indicate indifference or flippancy would not of itself authorize submission of issue of recklessness.—Russell v. Turner, D.C.Iowa, 56 F.Supp. 455, affirmed, C.C.A., 148 F.2d 562.

Falling asleep

Evidence indicating only that driver fell asleep while driving at fifty miles an hour did not make jury question on existence of recklessness.—Paulson v. Hanson, 285 N.W. 189, 226 Iowa 588.

Wrong side of road

Iowa.—Vandell v. Roewe, 6 N.W.2d 295, 232 Iowa 896—Martin v. Mommyer, 300 N.W. 310, 230 Iowa 1158.

49. Ala.—Smith v. Roland, 10 So. 2d 367, 243 Ala. 400—Chapman v. Nelson, 200 So. 763, 241 Ala. 21—Mi-Lady Cleaners v. McDaniel, 179 So. 908, 235 Ala. 469, 116 A.L.R. 639.

Ark.—Splawn v. Wright, 128 S.W. 2d 248, 198 Ark. 197—Froman v. J. R. Kelley Stave & Heading Co., 120 S.W.2d 164, 196 Ark. 808.

Del.—Law v. Gallegher, 197 A. 479, 9 W.W.Harr. 189.

Miss.—Covington v. Carley, 19 So.2d 817, 197 Miss. 535, applying Alabama law.

Mo.—Autry v. Sanders, 169 S.W.2d 944, 350 Mo. 1131, applying Arkansas law.

Driving truck without nut fastening steering wheel to steering post where wheel was apparently firmly attached did not present jury question of willful or wanton act, as respects liability for death of trespasser.—Albers v. Shell Co. of California, 286 P. 752, 104 Cal.App. 733.

50. Cal.—Phillips v. Harper, 140 P. 2d 686, 60 Cal.App.2d 298—Katz v. Kuppin, 112 P.2d 681, 44 Cal.App.2d 406—Horn v. Volko, 57 P.2d 175, 13 Cal.App.2d 582.

51. U.S.—Cusack v. Longaker, C.C.A.N.Y., 95 F.2d 304—Turner v. Buchanan, C.C.A.Mich., 94 F.2d 723

Cal.—Cobb v. Lawrence, 129 P.2d 462, 54 Cal.App.2d 630, applying Florida law.

Ill.—Bartolucci v. Falletti, 46 N.E.2d 980, 382 Ill. 168—Nelson v. Armistead, 63 N.E.2d 648, 327 Ill.App. 184—Belcher v. Citizens Coach Co., 57 N.E.2d 659, 324 Ill.App. 226—Metropolitan Trust Co. v. Lequatte, 4 N.E.2d 239, 286 Ill.App. 617.

Ind.—Berker v. Strater, 72 N.E.2d 580, 117 Ind.App. 504—Swinney v. Roler, 47 N.E.2d 846, 113 Ind.App. 367.

Mich.—Butine v. Stevens, 29 N.W.2d 325, 319 Mich. 176—Rowe v. Vander Kolk, 270 N.W. 788, 278 Mich. 564—Turney v. Meyer, 253 N.W. 226, 266 Mich. 87—Findlay v. Davis, 248 N.W. 588, 263 Mich. 179.

Mo.—Hargis v. Denny, App., 117 S.W.2d 368, applying Illinois law.

Ohio.—May v. Szwed, 39 N.E.2d 630, 68 Ohio App. 459.

S.D.—Granflaten v. Rohde, 283 N.W. 153, 66 S.D. 335—Melby v. Anderson, 266 N.W. 135, 64 S.D. 249.

Proof of ordinary negligence is insufficient.—Turner v. Buchanan, C.C.A.Mich., 94 F.2d 723.

If there is no evidence indicating willful and wanton conduct in operation of automobile by host, court may pass on question of willful and wanton conduct.—Lawson v. Flisk, 45 N.E.2d 707, 316 Ill.App. 591.

52. Colo.—Millington v. Hiedloff, 45 P.2d 937, 96 Colo. 581.

Okl.—Kile v. Kile, 63 P.2d 753, 178 Okl. 576, applying Colorado law.

ant's negligence,⁵³ gross negligence,⁵⁴ or reckless operation of his motor vehicle.⁵⁵ Where from the undisputed evidence no inference of negligence on the part of defendant reasonably can be drawn, the court may declare as a matter of law that defendant was not negligent;⁵⁶ and under like circumstances the court may declare as a matter of law that defendant was not guilty of gross negligence,⁵⁷ gross and wanton negligence,⁵⁸ or willful and wanton misconduct.⁵⁹

The court may declare defendant negligent as a matter of law and direct a verdict for plaintiff where on undisputed evidence his negligence as the proximate cause of the injury is the only possible inference and there is no evidence showing that plaintiff was guilty of contributory negligence;⁶⁰ and under like circumstances the court may declare defendant guilty of gross negligence and

direct a verdict for plaintiff.⁶¹ It has been held that defendant is not entitled to a directed verdict on the strength of the guest's testimony which, if true, would establish that defendant was not negligent, where the testimony of the guest is contradicted.⁶² Whether the evidence is sufficient to justify a finding of gross negligence is for the court.⁶³ The fact that a person has been drinking intoxicating liquor and thereafter drives his car in a negligent manner does not show as a matter of law that he was driving while under the influence of intoxicating liquor.⁶⁴

Where the evidence is uncontradicted and reasonable minds can reach but one conclusion, incidental questions are for the court as a matter of law,⁶⁵ as, for example, the status of the occupant of the motor vehicle,⁶⁶ whether a guest,⁶⁷ or wheth-

53. Ky.—Reibert v. Thompson, 194 S.W.2d 974, 302 Ky. 688.
Md.—Dashiell v. Moore, 11 A.2d 640, 177 Md. 657.
Neb.—Kelly v. Gagnon, 236 N.W. 160, 121 Neb. 113.
54. Cal.—Cobb v. Lawrence, 129 P.2d 462, 54 Cal.App.2d 630, applying Florida law.
Mont.—Blinn v. Hatton, 114 P.2d 518, 112 Mont. 219.
Neb.—Lemon v. Hoffmark, 272 N.W. 214, 132 Neb. 421—Thurston v. Carrigan, 256 N.W. 39, 127 Neb. 625.
N.D.—Jacobs v. Nelson, 268 N.W. 873, 67 N.D. 27.
S.D.—Grandtaten v. Rohde, 283 N.W. 153, 66 S.D. 335.
Va.—Millard v. Cohen, 46 S.E.2d 2, 187 Va. 44—Hill v. Bradley, 43 S.E.2d 29, 186 Va. 394—Smith v. Turner, 16 S.E.2d 370, 178 Va. 172, 136 A.L.R. 1251.

Where evidence is resolved most favorably toward existence of gross negligence and a fixed state of facts thus obtained, question whether such facts will sustain finding of existence of gross negligence is question of law.—Brown v. Mulready, 300 N.W. 421, 14 Neb. 500—Gummere v. Mudd, 297 N.W. 622, 139 Neb. 370—Mierendorf v. Saalfeld, 295 N.W. 901, 138 Neb. 876—Johnk v. Scanlon, 285 N.W. 488, 186 Neb. 187—Gosnell v. Montgomery, 277 N.W. 429, 133 Neb. 871.

When question arises on defendant's motion for directed verdict, test is whether defendant's conduct in given situation was such that it can reasonably be inferred that it was result of an indifference to his duty to his guest or an utter forgetfulness of guest's safety.—Ellison v. Colby, 8 A.2d 637, 110 Vt. 431.

55. Iowa.—Mescher v. Brogan, 273

- N.W. 645, 223 Iowa 573—Siessinger v. Puth, 239 N.W. 46, 213 Iowa 164.
56. Ky.—Reibert v. Thompson, 194 S.W.2d 974, 302 Ky. 688.
Mass.—Concannon v. Cohen, 67 N.E.2d 663, 319 Mass. 728.
Miss.—Whatley v. Boolas, 177 So. 1, 180 Miss. 372.
Neb.—Kelly v. Gagnon, 236 N.W. 160, 121 Neb. 113.
Pa.—Moore v. Meyer & Power Co., 31 A.2d 721, 347 Pa. 152.
Tenn.—Everett v. Evans, App., 207 S.W.2d 350.
57. Mass.—Baines v. Collins, 38 N.E.2d 626, 310 Mass. 523, 138 A.L.R. 1123.
Neb.—Komma v. Kreifels, 14 N.W.2d 591, 144 Neb. 745—Fairman v. Cook, 8 N.W.2d 315, 142 Neb. 893—James v. Krebek, 7 N.W.2d 637, 142 Neb. 757.

Verdict should be directed for motorist only where court can clearly say that negligence falls to approach level of negligence in very high degree under circumstances and in all other cases it must be left to jury to determine whether negligence amounts to gross negligence or to mere ordinary negligence.—Thompson v. Edler, 292 N.W. 236, 138 Neb. 179.

58. Kan.—Vogrin v. Bigger, 154 P.2d 111, 159 Kan. 271.
59. Ill.—Bartolucci v. Falletti, 41 N.E.2d 777, 314 Ill.App. 551, affirmed 46 N.E.2d 980, 382 Ill. 168.
Ohio.—Ackerman v. Steimer, App., 59 N.E.2d 950.
60. Ill.—Richardson v. Moore, 254 Ill.App. 511.
Ky.—Robinson v. Higgins, 174 S.W.2d 637, 295 Ky. 446—Droppelman v. Willingham, 169 S.W.2d 811, 293 Ky. 614—Hollis v. Bourne, 167 S.W.2d 50, 292 Ky. 678—Ralston v.

- Dossey, 157 S.W.2d 739, 289 Ky. 40.
Md.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.
N.J.—Hendler v. Meadows, 180 A.399, 13 N.J. Misc. 684, affirmed Zipkin v. Hendler, 182 A. 843, 116 N.J. Law 137, and 183 A. 214, 116 N.J. Law 176.

61. On auditor's findings

Auditor's findings that motorist, with knowledge that automobile was defective, drove at high speed on wet road and on rainy night, refused to slacken speed, and approached an S-curve at about fifty miles per hour, that automobile jumped curbstone, knocking it out of place, struck tree, and tipped over, and evidence as to position of curbstone before accident, authorized direction of general verdict for guest, as establishing gross negligence.—Savin v. Block, 9 N.E.2d 536, 297 Mass. 487.

62. D.C.—Alamo v. Del Rosario, 98 F.2d 328, 69 App.D.C. 47.
63. Va.—Lennon v. Smith, 2 S.E.2d 340, 173 Va. 322.
64. Cal.—Erickson v. Vogt, 80 P.2d 533, 27 Cal.App.2d 77—Tracy v. Brecht, 39 P.2d 498, 3 Cal.App.2d 105—Tomlinson v. Kiramidjian, 24 P.2d 559, 133 Cal.App. 418.
65. Tenn.—Richards v. Parks, 93 S.W.2d 639, 19 Tenn.App. 615.
66. Tenn.—Richards v. Parks, supra.
67. Neb.—Van Auker v. Steckley's Hybrid Seed Corn Co., 8 N.W.2d 451, 143 Neb. 24.

Evidence held insufficient for jury

- (1) Generally.
Iowa.—Wells v. Wildin, 277 N.W. 308, 224 Iowa 913, 115 A.L.R. 169

er the occupant of the vehicle is an invitee,⁶⁸ or a passenger for hire.⁶⁹

g. Injuries to Persons or Property Not upon Highway

On conflicting evidence or where different inferences reasonably may be drawn from the evidence, it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was guilty of negligence in causing injuries or damage to persons or property not on the highway.

Where the evidence is legally sufficient and is conflicting or more than one inference reasonably may be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence in causing injuries or damage to a person who is not on the highway⁷⁰ or to prop-

—Thompson v. Farrand, 251 N.W. 44, 217 Iowa 160.

Wash.—White v. Stanley, 18 P.2d 457, 169 Wash. 342.

(2) Mere proof that guest in back seat of automobile shortly before accident had requested that she be let out was insufficient to go to jury on question of termination of host and guest relation where there was no evidence or inference from evidence that request was loud enough for host to hear or that he had refused to comply with request.—Taylor v. Taug, 136 P.2d 176, 17 Wash. 2d 533.

68. Licensee or invitee

N.J.—Augustine v. Haas, 1 A.2d 387, 121 N.J.Law 58.

Evidence held insufficient for jury
N.J.—Cowan v. Kaminow, 26 A.2d 258, 128 N.J.Law 398.

69. Evidence held insufficient for jury

Ga.—White v. Boyd, 198 S.E. 81, 58 Ga.App. 219.

70. U.S.—Eldridge v. McGeorge, C. C.A.Ark., 99 F.2d 835.

Ark.—Powell Bros. Truck Lines v. Barnett, 121 S.W.2d 116, 196 Ark. 1082.

Cal.—Jordan v. Guerra, 144 P.2d 349, 23 Cal.2d 469—Lotta v. City of Oakland, 154 P.2d 25, 67 Cal.App. 2d 411—Clarke v. Volpa Bros., 124 P.2d 377, 51 Cal.App.2d 173—Sills v. Forbes, 91 P.2d 246, 33 Cal.App. 2d 219—Oswald v. H. G. Chaffee Warehouse Co., 84 P.2d 164, 29 Cal. App.2d 233—Ferrario v. Conyes, 64 P.2d 975, 19 Cal.App.2d 58.

D.C.—Eades v. Capital Materials Co., 121 F.2d 72, 73 App.D.C. 361.

Ill.—Teece v. Bieber, 56 N.E.2d 665, 323 Ill.App. 647—Schiermeier v. Hoeffken, 33 N.E.2d 147, 309 Ill. App. 250—Palnter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill.App. 557.

Iowa.—Kaffenberger v. Holle, 22 N.W.2d 804, 287 Iowa 542—Laudner v. James, 266 N.W. 15, 221 Iowa 863.

Kan.—Smith v. Bassett, 152 P.2d 794, 159 Kan. 128—Hohmann v. Jones, 72 P.2d 971, 146 Kan. 578.

Mass.—Whitehouse v. Cities Service Oil Co., 52 N.E.2d 414, 315 Mass.

108—Tenney v. Reed, 159 N.E. 913, 262 Mass. 335.

Minn.—Roadman v. C. E. Johnson Motor Sales, 297 N.W. 166, 210 Minn. 59—Goodspeed v. Gallagher, 279 N.W. 265, 202 Minn. 660.

Mo.—Osby v. Tarlton, 85 S.W.2d 27, 336 Mo. 1240—Forsythe v. Railway Express Agency, App. 125 S.W.2d 539—Powell v. Brosnahan, 115 S.W.2d 140, 232 Mo. App. 1161, opinion quashed on other grounds State ex rel. Brosnahan v. Shain, 126 S.W.2d 1193, 344 Mo. 404—Wilks v. Gilliam, App. 80 S.W.2d 702—Miller v. W. F. Callahan Const. Co., App., 46 S.W.2d 918.

Neb.—Thomas v. Fundum, 283 N.W. 839, 135 Neb. 728.

N.J.—Kerner v. Zerr, 135 A. 866, 103 N.J.Law 424.

N.D.—Ziegler v. Ford Motor Co., 272 N.W. 743, 67 N.D. 286.

Pa.—Gerhart v. East Coast Coach Co., 166 A. 564, 310 Pa. 535.

Va.—West v. L. Bromm Baking Co., 186 S.E. 291, 166 Va. 530.

Wis.—Patterson v. Edgerton Sand & Gravel Co., 277 N.W. 636, 227 Wis. 11.

Negligence of motorist in injuring pedestrian on sidewalk as question of law or fact see supra subdivision f (1) (e) of this section.

Accident on private driveway

Cal.—Langham v. Norlander, 137 P. 2d 29, 158 Cal.App.2d 543.

Ky.—Meeks Motor Freight v. Ham's Adm'r, 193 S.W.2d 745, 302 Ky. 71.

Md.—Feldser v. Beeman, 4 A.2d 750, 176 Md. 377, 123 A.L.R. 786.

Mass.—D'Ambrosia v. Brest, 19 N.E. 2d 53, 302 Mass. 316.

N.Y.—Szablewski v. Michael, 28 N.Y.S.2d 163, 262 App.Div. 801.

Tenn.—Stephens v. Clayton, 124 S.W. 2d 33, 22 Tenn.App. 449.

Wis.—Hartzheim v. Smith, 298 N.W. 196, 238 Wis. 55.

Accident occurring at filling or service station

(1) Generally.

Ark.—Daniels v. Allen, 178 S.W.2d 853, 206 Ark. 1155.

D.C.—Radio Cab v. Houser, 128 F.2d 604, 76 U.S.App.D.C. 35.

S.C.—Benedict v. Marks Shows, 182 S.E. 299, 178 S.C. 169.

(2) Injury to filling or service station operator or attendant.

R.I.—Turner v. Maxon, 165 A. 372, 53 R.I. 164.

Tex.—Kuller v. Texas Park Lot, Civ. App. 133 S.W.2d 605.

W.Va.—Sewell v. Lawson, 177 S.E. 293, 115 W.Va. 527.

Detached wheel striking person

(1) On porch of home.—Albert F. Goetze, Inc. v. Johnson, 164 A. 236, 164 Md. 201.

(2) Seated on lawn—Facteau v. Gould, 37 N.E.2d 124, 310 Mass. 105.

Injury to employee in garage

D.C.—Chapman v. Coates, 119 F.2d 441, 73 App.D.C. 270.

N.Y.—Loesing v. T. I. McCormack Trucking Co., 1 N.Y.S.2d 13, 253 App.Div. 759.

Injury to stevedore by lumber carrier

Cal.—Burke v. John E. Marshall, Inc., 108 P.2d 738, 42 Cal.App.2d 195.

Operator of newsstand on sidewalk

Pa.—Clark v. Philadelphia Transp. Co., 41 A.2d 282, 156 Pa.Super. 623.

Person loading truck

Iowa.—Johnston v. Johnson, 279 N.W. 139, 225 Iowa 77, 118 A.L.R. 233.

Pa.—Gyarmati v. Linde Air Products Co., 157 A. 485, 305 Pa. 188.

Person on lawn of home

Mass.—Facteau v. Gould, 37 N.E.2d 124, 310 Mass. 105.

Pa.—Fuller v. Palazzolo, 197 A. 225, 329 Pa. 93.

Person standing near scale in coal yard

Md.—State, to Use of State Accident Fund, v. Carroll-Howard Supply Co., 37 A.2d 330, 183 Md. 293.

N.J.—Groen v. George Fangmann, Inc., 30 A.2d 29, 129 N.J.Law 411, affirmed 33 A.2d 891, 130 N.J.Law 557.

Person working on platform

(1) Generally.—Turnipseed v. Hoffman, 144 P.2d 797, 23 Cal.2d 632.

(2) Moving truck as injured person stepped from platform onto truck.—Moody v. Dillon Co., 43 S.E. 2d 201, 210 S.C. 458.

Person working on scaffold

(1) Generally.—School Dist. of City of Ionia, for Use and Benefit

erty which is not on the highway.⁷¹ The weight of the evidence is for the jury.⁷² On conflicting evidence or where different inferences may be drawn, incidental questions also are for the jury or trial court.⁷³

The evidence must be legally sufficient to warrant or require submission to the jury, and in various cases the evidence has been held insufficient to justify submission to the jury of defendant's negligence or of some question incidental thereto.⁷⁴ Where the evidence is undisputed and not more than one inference reasonably may be drawn therefrom, defendant's negligence is a question of law.⁷⁵ The court may declare defendant not negligent as a matter of law where from the

undisputed evidence it can only be reasonably inferred that defendant was free from negligence.⁷⁶

h. Injuries to Animals

On conflicting evidence or where different inferences reasonably may be drawn from the evidence, it is for the jury to determine whether the defendant, in the operation of a motor vehicle, was guilty of negligence resulting in injuries to animals belonging to the plaintiff.

Where the evidence is legally sufficient and is conflicting or different inferences of fact reasonably may be drawn from the evidence, it is for the jury, or the trial court in actions tried without a jury, to determine whether defendant, in the operation of a motor vehicle, was guilty of negligence resulting in injuries to animals belonging to plaintiff.⁷⁷ On such evidence incidental ques-

of Employers' Liability Assur. Corporation v. Dadd, 13 N.W.2d 268, 308 Mich. 220.

(2) Scaffolding suspended from bridge across street.—Athas v. Fort Pitt Brewing Co., 188 A. 113, 324 Pa. 313.

Striking painter's ladder in driveway causing fall

N.J.—Sohn v. Katz, 167 A. 864, 11 N.J.Misc. 688, reversed on other grounds 169 A. 838, 112 N.J.Law 106, 90 A.L.R. 880.

Striking person seated on park bench
N.J.—Wasserman v. Schnoll, 28 A.2d 883, 129 N.J.Law 224, affirmed Wasserman v. Schwartz, 31 A.2d 820, 130 N.J.Law 176.

Vehicle moving out of garage

Mont.—McCulloch v. Horton, 56 P.2d 1341, 102 Mont. 135—Mellon v. Kelly, 41 P.2d 49, 99 Mont. 10.

Keeping lookout

Cal.—Smith v. Harger, 191 P.2d 25, 84 Cal.App.2d 361.

Va.—Beard v. Bryant, 26 S.E.2d 61, 181 Va. 739.

Wis.—Patterson v. Edgerton Sand & Gravel Co., 277 N.W. 636, 227 Wis. 11.

71. Md.—Singer Transfer Co. v. Buck Glass Co., 181 A. 672, 169 Md. 358.

Okl.—Butts v. Anthia, 73 P.2d 843, 181 Okl. 276.

Pa.—Cuntan v. Shirks Motor Exp. Corp., Com Pl., 28 West Co. L.J. 125.

Damage to cooling machine at filling station

Ill.—Fry v. Butterfield, 41 N.E.2d 131, 314 Ill.App. 202.

Damage to house or contents

(1) Generally.—Gangi v. Adley Express Co., 63 N.E.2d 897, 318 Mass. 762.

(2) Result of collision of two automobiles.—Christensen v. Scoggin, 41 N.E.2d 122, 314 Ill.App. 208.

(3) Damage to personalty in dwelling caused by driving automobile into dwelling.—Riger v. Jacobs, Mo. App., 167 S.W.2d 937.

Road sweeper blowing dust, etc., on store merchandise

N.C.—Miller v. Jones, 32 S.E.2d 594, 224 N.C. 783.

Truck crashing into store window

N.J.—Hanrahan v. Elizabeth-Union-Hillside-Irvington Line, 167 A. 676, 11 N.J.Misc. 665.

72. Cal.—Foster v. Pestana, 177 P.2d 54, 77 Cal.App.2d 885.

73. Cal.—Foster v. Pestana, supra. D.C.—Chapman v. Coules, 119 F.2d 441, 73 App. D.C. 270.

Ill.—Painter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill. App. 557.

Plaintiff as invitee or volunteer

Whether plaintiff, run down by defendant's automobile which was being backed out of garage because building across alley was on fire, was invitee or volunteer in seeking to assist in starting automobile, was for jury.—Hatcher v. Cantrell, 65 S.W.2d 247, 16 Tenn.App. 544.

Whether wheel of moving truck became detached because of negligence in making repairs in owner's repair shop or because of latent defect for which owner would not be responsible was for jury.—Albert F. Goetze, Inc., v. Johnson, 164 A. 236, 164 Md. 201.

74. Ala.—Erwin Mfg. Co. v. Croft, 133 So. 717, 222 Ala. 680.

Mo.—Beck v. Moll, App., 102 S.W.2d 671.

Neb.—Blanton v. Michael, Swanson & Brady Produce Co., 295 N.W. 883, 138 Neb. 883.

Okl.—McKee v. Bowlin, 87 P.2d 1079, 184 Okl. 486.

Tenn.—City of Knoxville v. Orr, 79 S.W.2d 613, 18 Tenn.App. 514.

Damage to house

R.I.—Randall v. Holmes, 81 A.2d 17, 69 R.I. 41.

75. Iowa.—Hatfield v. White Line Motor Freight Co., 272 N.W. 99, 223 Iowa 7.

76. Cal.—Edelson v. Higgins, 111 P.2d 668, 43 Cal.App.2d 759.

Iowa.—Hatfield v. White Line Motor Freight Co., 272 N.W. 99, 223 Iowa 7.

Tex.—West v. Johnson, Civ.App., 129 S.W.2d 811, error refused.

77. Ala.—Robertson v. Bowman, 154 So. 127, 26 Ala.App. 115.

Ark.—Favre v. Medlock, 208 S.W.2d 439, 212 Ark. 911.

Ill.—De Buck v. Gadde, 49 N.E.2d 789, 319 Ill.App. 609.

Ky.—Consolidated Couch Corporation v. Sphar, 10 S.W.2d 482, 226 Ky. 30.

N.Y.—Allen v. Stewart, 74 N.Y.S.2d 91, 190 Misc. 223.

N.D.—Schulkey v. Brown, 230 N.W. 6, 59 N.D. 345.

S.C.—Turner v. Elrod, 148 S.E. 701, 151 S.C. 131.

Tenn.—Carter v. Fritts, 2 Tenn.App. 410—Stacy v. Keller, 1 Tenn.App. 80.

Wis.—Ott v. Tschantz, 300 N.W. 766, 239 Wis. 47.

42 C.J. p. 1256 note 80.

Care required as to animals see supra §§ 407-421.

Dog.

(1) Extent to which motorist may rely on dog's intelligence and agility to avoid injury by automobile is question for triers of fact.—Jones v. Craddock, 187 S.E. 558, 210 N.C. 429—42 C.J. p. 1063 note 50 [a].

(2) In action against motorist for negligently killing dog, question of negligence was for jury where testimony of plaintiff was that dog stood in street near curb of wide and unobstructed street free from traffic, and that motorist without swerving

tions also are for the jury or trial court,⁷⁸ as, for example, whether the road on which the animal was injured was a public road.⁷⁹ The evidence must be legally sufficient to require or warrant submission to the jury of the question of defendant's negligence or of some question incidental thereto.⁸⁰

I. Injuries Resulting from Articles Projecting, Falling, or Thrown from Vehicle

The negligence of the defendant ordinarily is a question for the jury where injury results from articles projecting or falling from his motor vehicle.

The negligence of defendant ordinarily is a question for the jury, or for the trial court in actions tried without a jury, where injury is caused by articles projecting⁸¹ or falling⁸² from his motor vehicle. On conflicting evidence or where different inferences reasonably may be drawn, incidental questions also are for the jury or trial court,⁸³ as, for example, whether at the time of

the accident there were lights burning on the article projecting.⁸⁴ The evidence must be legally sufficient to justify submission to the jury of defendant's negligence or of some question incidental thereto.⁸⁵

J. Injuries Caused by Vehicles Used in Saving Life or Property or Enforcing Law

On conflicting evidence or where different inferences reasonably may be drawn from the evidence, it is for the jury to determine whether the driver of a motor vehicle used in saving life or property or in enforcing the law was guilty of negligence in the operation of the vehicle.

Where the evidence is legally sufficient and is conflicting or where different inferences reasonably may be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether the driver of a motor vehicle used in saving life or property or in enforcing the law was guilty of negligence in the operation of the vehicle.⁸⁶ On such evi-

or slackening speed ran over dog, although plaintiff called to motorist to stop.—*Jones v. Craddock*, *supra*.

78. Miss.—*Walker v. Dickerson*, 184 So. 438, 183 Miss. 642.

79. Ala.—*Smith v. Clemmons*, 112 So. 442, 216 Ala. 52.

80. Me.—*Adams v. Richardson*, 182 A. 11, 134 Me. 109.

Horse suddenly jumping in front of automobile

Colo.—*Rivers v. Pierce*, 103 P.2d 690, 106 Colo. 236.

Counterclaim for injuries by animals

Owner of truck and trailer which were damaged when they ran into saddle horses which were standing unattended at night on highway could not recover on counterclaim in action for injuries to animals struck by truck and trailer for the damage from owner of horses, where owner of horses proved that he had placed the horses in a sound enclosure four and one-half feet in height, that a clear break was found in enclosure and that the horses were not jumpers, and no evidence was given from which any inference of carelessness could be drawn.—*Allen v. Stewart*, 74 N.Y.S.2d 91, 190 Misc. 223.

81. Mich.—*Hetler v. Holtrop*, 281 N. W. 434, 285 Mich. 570.

Okl.—*Ice v. Gardner*, 83 P.2d 378, 183 Okl. 496.

Articles projecting, falling or thrown from vehicle generally see *supra* § 348.

Absence of lights

Ark.—*Hobbs-Western Co. v. Carmical*, 91 S.W.2d 605, 192 Ark. 59.

N.J.—*Sokiera v. H. A. Jaeger, Inc.*,

169 A. 347, 12 N.J. Misc. 17, affirmed 171 A. 786, 112 N.J. Law 500

Animals in truck injured by projecting timber

Ga.—*Payne v. Cobb*, 9 S.E.2d 852, 62 Ga.App. 767.

Injury to motorist or occupant

(1) Cross ties loaded across truck.—*Hobbs-Western Co. v. Carmical*, 91 S.W.2d 605, 192 Ark. 59

(2) Electric light pole on truck.—*Weinman v. Puget Sound Power & Light Co.*, 26 P.2d 395, 175 Wash. 73.

(3) Girder on truck.—*Miller v. Lyons*, 252 P. 330, 200 Cal. 232.

(4) Logs projecting over highway.—*Brewer v. Moye*, 157 S.E. 871, 200 N.C. 589.

Injury to pedestrian

(1) Jack protruding from underneath parked automobile.—*Koib v. Isenberg*, 28 A.2d 729, 150 Pa.Super. 482.

(2) Ladder on truck.—*Dryfoos v. Scavenger Service Corporation*, C.C.A. Ill., 115 F.2d 637.

(3) Lever or bar protruding from side of truck.—*Cummins v. Woody*, 152 S.W.2d 246, 177 Tenn. 636.

(4) Projecting pole.—*Southeastern Telephone Co. v. Payne*, 69 S.W.2d 358, 253 Ky. 245.

(5) Steam shovel projecting over side of truck trailer.—*Sokiera v. H. A. Jaeger, Inc.*, 169 A. 347, 12 N.J. Misc. 17, affirmed 171 A. 786, 112 N.J. Law 500.

82. Tex.—*Platt v. Big Four Ice & Cold Storage Co.*, Civ.App., 47 S.W.2d 870, reversed on other grounds *Baughn v. Platt*, 72 S.W.2d 580, 123 Tex. 486.

Injury to pedestrian

(1) Lumber falling from defendant's truck.—*Bray v. Boston Lumber & Builders' Corporation*, 172 S.E. 296, 161 Va. 686

(2) Wheel from dolly catapulted from defendant's passing truck.—*White v. Pinney*, 108 P.2d 249, 99 Utah 484.

Injury to person employed

(1) Falling of concrete tank off truck.—*McKay v. Pacific Building Materials Co.*, 68 P.2d 127, 156 Or. 578.

(2) Falling of pipe being loaded.—*Lepri v. Levy*, 51 N.E.2d 959, 315 Mass 105.

(3) Workman struck by wheel from defendants' passing truck.—*D'Amico v. Congusta*, 167 P.2d 157, 24 Wash.2d 674.

83. Cal.—*O'Neal v. Kelly Pipe Co.*, 173 P.2d 685, 76 Cal.App.2d 577.

84. Cal.—*O'Neal v. Kelly Pipe Co.*, *supra*.

85. Evidence held insufficient for jury

Wash.—*Knight v. Trogdon Truck Co.*, 71 P.2d 1003, 191 Wash. 646—*Schmidt v. Kenworthy Grain & Milling Co.*, 297 P. 171, 161 Wash. 458.

86. Cal.—*Stone v. City and County of San Francisco*, 80 P.2d 175, 27 Cal.App.2d 34—*Falasco v. Hulen*, 44 P.2d 469, 6 Cal.App.2d 224.

Ky.—*O'Neill & Hearne v. Bray's Adm'x*, 90 S.W.2d 353, 262 Ky. 377.

Mo.—*Nance v. Lansdell*, App., 73 S.W.2d 346.

Care required of vehicles having special privileges see *supra* §§ 371-377.

dence it is for the jury or trial court to determine whether there has been negligent operation of an ambulance,⁸⁷ fire truck or vehicle,⁸⁸ or a police car.⁸⁹ Incidental questions also are for the jury or trial court on conflicting evidence or where different inferences reasonably may be drawn from the evidence,⁹⁰ as, for example, whether the driver was responding to an emergency call,⁹¹ whether the siren was sounded,⁹² and whether the right of way had been forfeited.⁹³

The evidence must be legally sufficient to justify submission to the jury of the question of defendant's negligence or of some question incidental thereto.⁹⁴

k. Liability for Acts of Third Person

- (1) In general
- (2) Servant or agent
- (3) Scope of employment

Negligence of motorist in injuring driver of vehicle used in saving life or property, etc., as question of law or fact see *supra* subdivision f (6) (c) of this section

87. Ark.—Healy & Roth v. Balmat, 74 S.W.2d 242, 189 Ark. 442.
Mo.—Nance v. Lansdell, App., 73 S.W.2d 346.

Collision with other vehicle

(1) Generally.—Deer v. Strauf, 296 N.W. 68, 236 Wis. 597.

(2) With parked automobile.—O'Neil & Hearne v. Bray's Adm'x, 90 S.W.2d 353, 262 Ky. 377.

Whether speed of private ambulance which skidded into automobile parked along highway was reasonable, considering condition of road, density of traffic, and many parked cars on both sides of road, or whether it constituted negligence, was for jury.—O'Neil & Hearne v. Bray's Adm'x, *supra*.

88. Collision with other vehicle

(1) Generally.
Cal.—Raynor v. City of Arcata, 77 P.2d 1054, 11 Cal.2d 113—Isaacs v. City and County of San Francisco, 167 P.2d 221, 73 Cal.App.2d 621.

Fla.—City of Miami v. Thigpen, 11 So.2d 300, 151 Fla. 800.

Ill.—Groot v. City of Chicago, 53 N.E.2d 245, 321 Ill.App. 502.

Minn.—Travis v. Collett, 17 N.W.2d 68, 218 Minn. 592.

R.I.—Doherty v. Oakland Beach Volunteer Fire Co., 40 A.2d 737, 70 R.I. 446.

Vt.—Reid v. Abbiati, 32 A.2d 133, 113 Vt. 233.

(2) With parked automobile.
Pa.—Schu v. City of Pittsburgh, 19 A.2d 409, 341 Pa. 324.

Wash.—Hadley v. Arms & Scott, 241 P. 26, 136 Wash. 632.

Collision with motorcycle

N.J.—Bode v. Bresse, 155 A. 124, 9 N.J.Misc. 585

89. Cal.—Reed v. City of San Diego, 177 P.2d 21, 77 Cal.App.2d 860
Pa.—Mashinsky v. City of Philadelphia, Com. Pl., 30 Mun.L.R. 177.

Collision with other vehicle

Cal.—Stone v. City and County of San Francisco, 80 P.2d 175, 27 Cal.App.2d 34—Hopping v. Redwood City, 58 P.2d 379, 14 Cal.App.2d 360.

Ill.—Styhlo v. McNeil, 45 N.E.2d 1011, 317 Ill.App. 316

Causing plaintiff to strike pole

N.H.—American Motorists Ins. Co. v. Rush, 190 A. 432, 88 N.H. 383

Causing another vehicle to strike plaintiff's vehicle

Or.—Hornshuh v. Alldredge, 41 P.2d 423, 149 Or. 419.

Injury to bicyclist

Miss.—City of Meridian v. Beeman, 166 So. 757, 175 Miss. 527.

Injury to pedestrian

(1) Crossing street.

Cal.—Von Arx v. City of Burlingame, 60 P.2d 305, 16 Cal.App.2d 29.

Pa.—Mashinsky v. City of Philadelphia, 3 A.2d 790, 333 Pa. 97—Cavey, to Use of Butz, v. City of Bethlehem, 1 A.2d 653, 331 Pa. 556—Logan, to Use of Butz, v. City of Bethlehem, 187 A. 389, 324 Pa. 7.

(2) On sidewalk as result of collision between police car and private automobile.—Robinson v. City of New York, 44 N.Y.S.2d 939, 266 App.Div. 1024.

90. Cal.—Reed v. City of San Diego, 177 P.2d 21, 77 Cal.App.2d 860.

Good faith

Where chief of city fire guard proceeding in automobile to city hall

- (4) Independent contractor
- (5) Members of owner's family
- (6) User with owner's consent
- (7) Liability of occupant of vehicle driven by another

(1) In General

On conflicting evidence or where different inferences reasonably may be drawn from the evidence, it is for the jury to determine questions of fact with respect to whether defendant is liable for injuries resulting from the operation of a motor vehicle by a third person.

Where the evidence is legally sufficient and is conflicting or more than one inference reasonably may be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine questions of fact with respect to whether defendant is liable for injuries resulting from the operation of a motor vehicle by a third person.⁹⁵ On such evidence it is for the jury or trial court to determine as a question

in response to signal indicating probability of air raid entered street intersection against red traffic light without being able to ascertain whether traffic was approaching from his right and collided with another automobile killing driver, whether chief was in good faith attempting to comply with superior officer's order to report at headquarters as quickly as possible and hence was entitled to statutory immunity from liability for driver's death was for jury.—Jankowski v. Welch, 52 A.2d 771, 135 N.J.Law 437.

91. Cal.—Coltman v. City of Beverly Hills, 105 P.2d 153, 40 Cal.App.2d 570—Hopping v. Redwood City, 58 P.2d 379, 14 Cal.App.2d 360
Pa.—Mashinsky v. City of Philadelphia, 3 A.2d 790, 333 Pa. 97—Mashinsky v. City of Philadelphia, Com. Pl., 30 Mun.L.R. 177.

92. Cal.—Mastro v. City of San Diego, 62 P.2d 407, 17 Cal.App.2d 331—Fallasco v. Hulen, 44 P.2d 469, 6 Cal.App.2d 224.

Negative testimony of motorist and of witness that they heard no siren sufficed to make question whether warning was sounded, for jury, where fire chief testified that he sounded siren continuously.—Raynor v. City of Arcata, 77 P.2d 1054, 11 Cal.2d 113.

93. Whether defendant ambulance operators forfeited right of way at intersection by their unlawful speed was for jury under evidence.—Echols v. Vinson, 124 So. 510, 220 Ala. 229.

94. Evidence held insufficient for jury

Md.—Baltimore Transit Co. v. Young, 56 A.2d 140.

95. Ark.—D. F. Jones Const. Co. v. Mize, 146 S.W.2d 709, 201 Ark. 702.

of fact the relationship existing between the owner of the vehicle and the person operating it at the time of the accident,⁹⁶ whether at the time of the accident defendant was in control of the vehicle or its operator,⁹⁷ whether defendant owner riding in the vehicle participated in the management or driving of the vehicle,⁹⁸ or whether defendant and the operator of the vehicle were engaged in a joint enterprise,⁹⁹ and whether at the time of the accident the operator was acting in pursuance of the joint enterprise.¹

The evidence must be legally sufficient to warrant or require submission to the jury, and in various cases the evidence has been held insufficient to charge defendant with responsibility for injury resulting from the operation of a motor vehicle by a third person.² Where the evidence is undisputed and but one inference reasonably may

be drawn therefrom, the question of defendant's liability for injury resulting from the operation of the vehicle by a third person is a question of law for the court.³ Where the presumption, flowing from proof of ownership of the motor vehicle involved, that the owner was in possession and control is rebutted by uncontradicted evidence, the question of the owner's liability generally is a question of law for the court,⁴ although in some cases the question has been held to be one of fact for the jury.⁵

(2) Servant or Agent

Where the evidence is conflicting or where different inferences reasonably may be drawn from the evidence, it is for the jury to determine whether the person operating the motor vehicle causing the injury was the defendant's servant or agent.

Where the evidence is legally sufficient and is

Cal.—Di Vita v. Martinelli, 11 P.2d 423, 123 Cal.App. 392.

Mass.—Malloy v. Newman, 37 N.E.2d 1001, 310 Mass. 269—Marsan v. Beraldi, 157 N.E. 347, 260 Mass. 225.

N.H.—Ricard v. Pollard Auto Co., 169 A. 876, 86 N.H. 433.

N.Y.—Jackson v. Brown & Kleinh. 7 N.E.2d 265, 273 N.Y. 365—Phelps v. Sexton, 200 N.E. 51, 269 N.Y. 673—Grant v. Knepper, 156 N.E. 650, 245 N.Y. 158.

Ohio.—Gradison Const. Co. v. Braun, 180 N.E. 274, 41 Ohio App. 389.

Tex.—Roadway Express v. Gaston, Civ.App., 91 S.W.2d 883, error dismissed.

Liability of owner of motor vehicle for acts of third persons see supra § 432 et seq

In order to make jury case, plaintiff was required to show that operator, at time of accident, was either under control of company with respect to his physical conduct or subject to right of company to control such conduct in relation to use of automobile—Pfelfer v. United Bakers Supply Co., Mo.App., 160 S.W.2d 795.

Operation of owner's vehicle by garageman

N.Y.—Houlihan v. Selengut, 31 N.Y. S.2d 560, 263 App.Div. 811.

Operation by prospective buyer

Ky.—Wilhelmi v. Berns, 119 S.W.2d 625, 274 Ky. 618.

Me.—Beaudoin v. W. F. Mahaney, Inc., 159 A. 567, 131 Me. 118.

Liability of parent

Wash.—Robinson v. Ebert, 39 P.2d 992, 180 Wash. 387.

Lease of motor vehicle

(1) Automobile owner was not liable, as matter of law, for damages caused by automobile in hands

of lessee.—Connors v. Houma Packing Co., 125 So. 294, 12 La.App. 167

(2) Whether defendant had leased bus in collision with which plaintiff motorist received injuries to corporation of which defendant was president, and whether such lease was in effect on date of accident and relieved defendant from liability from operation of bus, was for jury—Pieri v. Harris, 181 A. 855, 120 Pa. Super. 36.

96. Ga.—Trawick v. Chambliss, 156 S.E. 268, 42 Ga. App. 333.

Ind.—Jay v. Holman, 20 N.E.2d 656, 106 Ind. App. 413

97. U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

Md.—Dippel v. Julliano, 137 A. 514, 152 Md. 699.

Mass.—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225.

N.Y.—Herman v. Western Union Telegraph Co., 246 N.Y.S. 609, 231 App.Div. 298

Or.—McKay v. Pacific Building Materials Co., 68 P.2d 127, 156 Or. 578.

Tex.—McCarthy v. Fifty-Fifty Auto Livery, Civ.App., 16 S.W.2d 349.

98. Okl.—Fixico v. Ellis, 46 P.2d 519, 173 Okl. 5.

99. Ala.—Peoples v. Seamon, 31 So. 2d 88, 249 Ala. 284.

Mo.—Anderson v. Northrop, 96 S.W.2d 521, 230 Mo. App. 1225.

Ohio.—Leonard v. Glenn Cartage Co., App., 75 N.E.2d 813.

Tex.—Seinsheimer v. Burkhardt, Civ. App., 93 S.W.2d 1231, modified on other grounds 122 S.W.2d 1063, 132 Tex. 336.

1. Ohio.—Leonard v. Glenn Cartage Co., App., 75 N.E.2d 813.

Making repairs

Where plaintiff sought to hold transportation company liable for negligent operation of truck on

ground that truck owner and transportation company were engaged in a joint venture in pursuance of which owner was operating truck at time of accident and truck owner testified that he was driving truck home to make repairs, whether such repairs were reasonably necessary to be made at that time to further any purpose of alleged joint venture was question for jury—Leonard v. Glenn Cartage Co., supra

2. Cal.—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal. App. 587—Hathaway v. Mathews, 258 P. 712, 85 Cal. App. 31.

Mass.—Hinds v. Bowen, 167 N.E. 332, 268 Mass. 55.

N.J.—Lacombe v. Cudahy Packing Co., 137 A. 538, 103 N.J. Law 651.

N.Y.—Dunne v. Contenti, 4 N.Y.S.2d 148, 167 Misc. 925, affirmed 9 N.Y. S.2d 248, 256 App.Div. 833.

3. Tex.—Thomas v. Southern Lumber Co., Civ.App., 181 S.W.2d 111.

Joint enterprise

Ohio.—Fredrick v. Cleveland Builders' Supply & Brick Co., 171 N.E. 118, 34 Ohio App. 402.

4. D.C.—Curry v. Stevenson, 26 F. 2d 534, 58 App.D.C. 162.

N.J.—Le Strange v. Krivit, 158 A. 117, 10 N.J. Misc. 146.

Presumption of control see supra § 509.

Directed verdict for owner

D.C.—Curry v. Stevenson, 26 F.2d 534, 58 App.D.C. 162.

N.J.—Kirrer v. Bromberg, 173 A. 498, 113 N.J. Law 98—Januzzi v. Public Service Interstate Transp. Co., 163 A. 31, 10 N.J. Misc. 1205—Dooley v. Saunders U-Drive Co., 162 A. 556, 109 N.J. Law 295.

5. N.Y.—Kessler v. Philadelphia Rural Transit Co., 263 N.Y.S. 265, 238 App.Div. 146.

conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury, or for the trial court in actions tried without a jury, whether the person, whose alleged

negligent act was declared to have caused the injury, was defendant's servant or agent at the time of the injury.⁶ The weight of the evidence is

6. U.S.—Waggaman v. General Finance Co. of Philadelphia, C.C.A. Pa., 116 F.2d 254.
 Ala.—Peoples v. Seamon, 31 So.2d 88, 249 Ala. 284—Patrick v. Mitchell, 6 So.2d 889, 242 Ala. 414—Slaughter v. Murphy, 194 So. 649, 239 Ala. 260—W. F. Covington Planter Co. v. Roberson, 194 So. 171, 239 Ala. 70—Grimes v. Fulmer, 180 So. 321, 235 Ala. 645, followed in 180 So. 323, 235 Ala. 664, and 183 So. 924, 28 Ala. App. 630—International Harvester Co. v. Williams, 133 So. 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595—Tullis v. Blue, 114 So. 185, 216 Ala. 577—Deaton Truck Line v. Tillman, 80 So.2d 584, 33 Ala. App. 143—Southeastern Const. Co. v. Robbins, 27 So.2d 703, 32 Ala. App. 535, followed in 27 So.2d 708, and 27 So.2d 709, three cases, 248 Ala. 371, 372, certiorari denied 27 So.2d 705, 248 Ala. 367—William E. Harden, Inc. v. Harden, 197 So. 94, 29 Ala. App. 411.
 Ariz.—Maynard v. Hall, 143 P.2d 884, 61 Ariz. 32, 150 A.L.R. 618.
 Ark.—D. F. Jones Const. Co. v. Mize, 146 S.W.2d 709, 201 Ark. 702—Union Securities Co. v. Taylor, 48 S.W.2d 1100, 185 Ark. 737—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912.
 Cal.—Martin v. Miqueu, 98 P.2d 816, 37 Cal. App.2d 133—Fechtner v. Costa, 61 P.2d 473, 16 Cal. App.2d 691—Everett v. Howard Buck Co., 59 P.2d 506, 15 Cal. App.2d 544—Knight v. Gosselin, 12 P.2d 454, 124 Cal. App. 290—Perry v. A. Paladini, Inc., 264 P. 580, 89 Cal. App. 275—Hathaway v. Mathews, 258 P. 712, 85 Cal. App. 31.
 Colo.—Boulderado Motors v. Peterson, 66 P.2d 1269, 100 Colo. 238.
 D.C.—Simmons v. Brooks, 72 F.2d 86, 63 App.D.C. 293.
 Fla.—Wolfe v. City of Miami, 137 So. 892, 103 Fla. 774.
 Ga.—Jackson v. Service Laundry Co., 134 S.E. 832, 35 Ga. App. 760.
 Idaho—Maier v. Mindoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.
 Ill.—Curtis v. Kaderbek, 53 N.E.2d 277, 321 Ill. App. 471—Kelley v. Miles, 16 N.E.2d 931, 296 Ill. App. 650—Dennehy v. W. A. Wood Co., 2 N.E.2d 586, 285 Ill. App. 598—Gillis v. Jurzyzna, 1 N.E.2d 763, 284 Ill. App. 174—Onyschuk v. A. Vincent Sons Co., 277 Ill. App. 414—Spies v. Sussman, 264 Ill. App. 528.
 Ind.—Kettner v. Jay, 26 N.E.2d 546, 107 Ind. App. 643—Pennsylvania Ice & Coal Co. v. Ellischer, 31 N.E.2d

436, 106 Ind. App. 613—Standard Oil Co. of Indiana v. Thomas, 13 N.E. 2d 336, 105 Ind. App. 610—Fairway Coffee Co. v. Selch, 183 N.E. 323, 98 Ind. App. 136.
 Ky.—Webb v. Dixie-Ohio Express Co., 165 S.W.2d 539, 291 Ky. 692—Sympson Bros. Coal Co. v. Coomes, 58 S.W.2d 594, 248 Ky. 324—Bowen v. Gradison Const. Co., 6 S.W. 2d 481, 224 Ky. 427.
 La.—Bollinger v. Williams Bros., App., 134 So. 356.
 Md.—Dorman v. Koontz, 165 A. 461, 164 Md. 535—Vacek v. State, 142 A. 491, 155 Md. 400.
 Mass.—Kelly v. Railway Express Agency, 52 N.E.2d 411, 315 Mass. 301—Du Bois v. Powdrell, 171 N.E. 474, 271 Mass. 391—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225.
 Mich.—Greene v. Richer, 270 N.W. 194, 278 Mich. 1.
 Minn.—Coleman v. Clement's Chevrolet Co., 219 N.W. 92, 174 Minn. 277.
 Miss.—Merchants Co. v. Tracy, 166 So. 340, 173 Miss. 49.
 Mo.—Smith v. Fine, 175 S.W.2d 761, 351 Mo. 1179—Herrington v. Hoey, 139 S.W.2d 477, 345 Mo. 1108—Margulls v. National Enameling & Stamping Co., 23 S.W.2d 1019, 324 Mo. 420—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo. App. 210—Shannon v. Unsell, App., 50 S.W.2d 1059.
 Neb.—Mackechnie v. Lyders, 279 N.W. 328, 134 Neb. 682.
 N.J.—Warsley v. Britan, 174 A. 743, 114 N.J. Law 36—Smith v. Kirby, 172 A. 41, 113 N.J. Law 10—Benvenuti v. Angersbach, 168 A. 434, 111 N.J. Law 291—Brown v. Laeseff, 168 A. 294, 111 N.J. Law 235—Vande Polder v. Van Beveren, 162 A. 546, 109 N.J. Law 524—Meicke v. Silk City News Co., 150 A. 391, 106 N.J. Law 513.
 N.C.—Donivant v. Swaim, 47 S.E.2d 707, 229 N.C. 114—Toler v. Savage, 37 S.E.2d 485, 226 N.C. 208—Frank v. McIntosh, 199 S.E. 615, 214 N.C. 465—Joyner v. Dail, 188 S.E. 209, 210 N.C. 663—Misenheimer v. Hayman, 143 S.E. 1, 195 N.C. 613.
 N.D.—Leonard v. North Dakota Co-op. Wool Marketing Ass'n, 6 N.W. 2d 576, 72 N.D. 310—Bentley v. Oldetyme Distillers, 289 N.W. 92, 69 N.D. 587.
 Ohio.—Goldberg v. Jordan, 196 N.E. 775, 130 Ohio St. 1—Leonard v. Kreider, 190 N.E. 634, 128 Ohio St. 267—Williams v. Middendorf, App., 32 N.E.2d 436—Allen v. Leavick, 182 N.E. 139, 43 Ohio App. 100—Alloy Cast Steel Co. v. Arthur, 179

N.E. 743, 40 Ohio App. 503—Ford v. Papcke, 158 N.E. 558, 26 Ohio App. 225.
 Okl.—Ottinger v. Morris, 104 P.2d 254, 187 Okl. 517—Hagler v. Breeze, 35 P.2d 892, 169 Okl. 37.
 Or.—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 375—Lehl v. Hull, 53 P.2d 48, 152 Or. 470, rehearing denied 54 P.2d 290, 152 Or. 470—Miller v. Service and Sales, 38 P.2d 995, 149 Or. 11, 96 A.L.R. 628—Purdin v. Richardson, 34 P.2d 926, 148 Or. 68—Davis v. Underdahl, 13 P.2d 362, 140 Or. 242.
 Pa.—Coates v. Commercial Credit Co., 165 A. 377, 310 Pa. 330—Eckert v. Merchants' Shipbuilding Corporation, 124 A. 477, 280 Pa. 340—Morris v. Ward, 24 A.2d 775, 148 Pa. Super. 28, reversed on other grounds 26 A.2d 926, 345 Pa. 226—Wade v. Cleavenger, 34 Pa. Dist. & Co. 297, 86 Pittsb. Leg. J. 627—West v. Morgan, Com. Pl., 52 Dauph. Co. 361, affirmed 27 A.2d 46, 345 Pa. 61—Benkert v. Buehler, Com. Pl., 58 Montg. Co. 416.
 R.I.—Goff v. Craft's, Inc., 20 A.2d 520, 67 R.I. 11, reargument denied 21 A.2d 10, 67 R.I. 11—Stanford v. Pannello, 133 A. 441.
 S.C.—Watson v. Kennedy, 186 S.E. 549, 180 S.C. 513—Holcombe v. W. N. Watson Supply Co., 171 S.E. 604, 171 S.C. 110—Chantry v. Pettit Motor Co., 152 S.E. 753, 156 S.C. 1.
 Tex.—Hankin v. Nash-Texas Co., 105 S.W.2d 195, 129 Tex. 396—Kuykendall v. Vaden, Civ. App., 187 S.W.2d 143—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204—Buckley v. Gulf Refining Co., 123 S.W.2d 970, error dismissed, judgment correct—Ramirez v. Salinas, Civ. App., 90 S.W.2d 891, error dismissed 117 S.W.2d 56, 131 Tex. 537—Guinn v. Imperial Sugar Co., Civ. App., 44 S.W.2d 409, error dismissed—Universal Transp. Co. v. Ramos, Civ. App., 37 S.W.2d 238, error dismissed—Miller v. Diamond, Civ. App., 25 S.W.2d 659, reversed on other grounds Commercial Standard Ins. Co. v. Miller, Com. App., 48 S.W.2d 618—Robert Oil Corporation v. Garrett, Civ. App., 22 S.W.2d 508, affirmed, Com. App., 37 S.W.2d 135.
 Utah.—Fox v. Lavender, 56 P.2d 1049, 89 Utah 115, 109 A.L.R. 105.
 Vt.—Pappilio's Adm'x v. Prairie, 164 A. 537, 105 Vt. 193.
 Va.—Hoover v. J. P. Neff & Son, 31 S.E.2d 265, 183 Va. 56—Gable v. Bingle, 15 S.E.2d 33, 177 Va. 611.
 W.Va.—Weisman v. Petros, 19 S.E.2d 594, 124 W.Va. 180.

for the jury.⁷ Where the evidence leaves the court in doubt as to whether the operator of the motor vehicle was defendant's servant or agent, the question should be submitted to the jury.⁸ On conflicting evidence or where different inferences reasonably may be drawn, incidental questions also are for the jury or trial court.⁹

The evidence must be legally sufficient to warrant or require submission to the jury,¹⁰ and in various cases the evidence has been held insufficient to justify submission to the jury of the issue whether the person operating the motor vehicle at the time of the accident was defendant's servant or agent.¹¹ Where the evidence is uncontradicted and but one

Wis.—Patterson v. Phillips, 256 N. W. 524, 216 Wis. 165—Gehloff v. De Marce, 234 N.W. 717, 204 Wis. 464—Borger v. McKeith, 224 N.W. 102, 198 Wis. 315.

42 C.J. p 1257 note 86, p 1258 note 99, p 1259 note 2.

Relationship of master and servant as question of law or fact generally see Master and Servant § 617 a (2).

Although evidence is undisputed, question is for jury where different inferences reasonably may be drawn from evidence.—Larkins v. Utah Copper Co., 127 P.2d 354, 169 Or. 499.

Mixed question of law and fact Cal.—Washko v. Stewart, 47 P.2d 144, 20 Cal App.2d 347.

Bailee or servant

R.I.—Massart v. Narragansett Electric Co., 171 A. 238, 54 R.I. 154.

Special employment

Fla.—Postal Telegraph & Cable Co. v. Doyle, 167 So. 358, 123 Fla. 695, affirmed 175 So. 515, 128 Fla. 707. Pa.—Rosen v. Diesinger, 158 A. 561, 306 Pa. 13.

42 C.J. p 1257 note 86 [d].

Ambulance drivers

Ala.—Jefferson County Burial Soc. v. Cotton, 133 So. 256, 222 Ala. 578. Or.—Fleming v. Ambulance Co., 64 P.2d 519, 155 Or. 351.

Tex.—Robertson v. Holden, Civ.App., 297 S.W. 327, reversed on other grounds Robertson & Mueller v. Holden, Com App., 1 S.W.2d 570.

Fellow servant

(1) In automobile negligence action, evidence presented question for jury whether plaintiff and driver of automobile in which he was riding were fellow servants engaged in same employ and in course of such employment at time of the accident.—Malachowski v. Edward Smith Packing Co., 74 N.Y.S.2d 552, 272 App.Div. 1099.

(2) Where action is brought by another employee of defendant riding in defendant's car with chauffeur, question of defendant's liability in such action, depending on whether relation between chauffeur and other employee was that of vice principal or fellow servant, is question of fact for jury.—McCall v. B. Nugent Bros. Dry Goods Co., Mo., 236 S.W. 324—42 C.J. p 1258 note 96.

Insurance agent

Ohio.—Amstutz v. Prudential Ins. Co. of America, 26 N.E.2d 454, 136 Ohio St. 404.

Purchaser from defendant

Whether truck driver purchasing truck on installments from defendant was defendant's servant within scope of employment while driving home after work was question for jury.—Linton v. St. Louis Lightning Rod Co., Mo.App., 285 S.W. 183.

Postal employee or servant of terminal company

D.C.—Washington Terminal Co. v. Martin, App.D.C., 167 F.2d 762.

Salesmen

(1) Generally.—Craig v. Morgenweck, 194 A. 188, 15 N.J.Misc. 637—42 C.J. p 1258 note 99 [l].

(2) Automobile salesman Ariz.—Consolidated Motors v Ketcham, 66 P.2d 246, 49 Ariz. 295.

N.J.—Cooper v. Endress Motors, 8 A. 2d 382, 123 N.J.Law 290.

Tex.—Walter Irvin, Inc. v. Vogel, Civ.App., 158 S.W.2d 93, error refused.

Wash.—McMullen v. Warren Motor Co., 25 P.2d 99, 174 Wash. 454.

Taxicab drivers

Ind.—McDonald v. Swanson, 1 N.E. 2d 684, 103 Ind App 171.

Md.—Association of Independent Taxi Operators v. Kern, 13 A.2d 374, 178 Md. 252, 131 A.L.R. 792.

Mo.—Chastain v. Winton, 152 S.W.2d 165, 347 Mo. 1211.

Effect of defendant's name on vehicle

Ala.—Duke v. Williams, 32 So 2d 362 —Dorch Baking Co. v. Schoel, 194 So. 807, 239 Ala 266.

Ga.—Minter v. Kent, 8 S.E.2d 109, 62 Ga.App. 265.

N.C.—Daniel v. East Tennessee Packing Co., 3 S.E.2d 282, 215 N.C. 762.

Ohio.—Steffens v. Continental Freight Forwarders Co., 35 N.E.2d 734, 66 Ohio App. 534.

Okl.—P. & S. Taxi & Baggage Co. v. Cameron, 80 P.2d 618, 183 Okl. 226.

Tex.—Richmond v. Champagne's Bakery, Civ.App., 149 S.W.2d 304, error dismissed, judgment correct —Gibson v. Gillette Motor Transport, 138 S.W.2d 293, error refused. 42 C.J. p 1257 note 86 [a].

7. Wis.—Borger v. McKeith, 224 N. W. 102, 198 Wis. 315.

8. Idaho.—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792—Willi v. Schae-

fer Hitchcock Co., 25 P.2d 167, 53 Idaho 367.

9. Mich.—Hazard v. Great Central Transport Corporation, 258 N.W. 210, 270 Mich. 60.

Nature of business of defendant

Whether business which employed truck driver was independent business or was merely branch of defendant's business, so as to make truck driver an agent of defendant, was for jury.—Glazer v. Woodward, Tex Civ.App., 127 S.W.2d 938, error dismissed, judgment correct.

10. Mere scintilla of evidence is insufficient

Cal.—Hathaway v. Siskiyou Union High School Dist., 151 P.2d 861, 66 Cal.App.2d 103.

N.C.—Smith v. Mariakakis, 36 S.E.2d 651, 266 N.C. 100.

11. U.S.—P. F. Collier & Son Co. v. Hartfell, C.C.A Minn., 72 F.2d 625.

Ala.—Reed v. McCracken, 170 So. 765, 233 Ala. 175—The Praetorians v. Nelson, 147 So. 685, 25 Ala App. 418.

Cal.—Newman v. Steuernagel, 40 P. 2d 925, 4 Cal.App.2d 185—Strasburger v. Prescott, 295 P. 357, 111 Cal.App. 104.

Ind.—Bojrab v. B & B Sand & Gravel Co., 156 N.E. 519, 86 Ind.App. 556.

Md.—Forbastein v. General Tire Co., 175 A. 445, 167 Md. 686—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.

Mass.—Kwindias v. Kneel, 158 N.E. 335, 261 Mass. 91.

Mo.—Ross v. St. Louis Dairy Co., 98 S.W.2d 717, 339 Mo. 982—Sweet v. Brozman, App., 198 S.W.2d 531—Pfeifer v. United Bakers Supply Co., App., 160 S.W.2d 795—Tourkakis v. Billman, App., 71 S.W.2d 1084—Igo v. Alford, 69 S.W.2d 317, 228 Mo.App. 457—Griffey v. Koehler, App., 50 S.W.2d 693—Shannon v. Del-Home Light Co., App., 43 S. W.2d 872.

N.H.—Ricard v. Pollard Auto Co., 169 A. 876, 86 N.H. 433.

N.C.—Smith v. Mariakakis, 36 S.E.2d 651, 226 N.C. 100.

Okl.—Fairmont Creamery Co. of Lawton v. Carsten, 55 P.2d 757, 175 Okl. 592—Nellan Co. v. Miller, 52 P.2d 783, 175 Okl. 104.

Or.—Stillinger v. Asbury Transp. Co. of Oregon, 24 P.2d 1021, 144 Or. 255.

Tex.—National Cash Register Co. v. Rider, Com.App., 24 S.W.2d 28—

inference reasonably may be drawn therefrom it is a question of law for the court whether the person operating the motor vehicle causing the injury was defendant's servant or agent,¹² where on undisputed evidence the only reasonable inference is that such person is not defendant's servant or agent at the time of the accident the court may so declare as a matter of law.¹³ It is usually a question of law for the court where the contract claimed to have established the relation is in writing.¹⁴

Effect of presumptions. The presumption of the

agency of the operator of the motor vehicle causing the injury arising from proof of defendant's ownership of the vehicle, considered supra § 509, has been held sufficient, in the absence of rebutting evidence, to make a prima facie case for the jury.¹⁵ Where the evidence in rebuttal of the presumption of agency of the operator flowing from proof of defendant's ownership of the motor vehicle is contradicted, or different inferences reasonably may be drawn from the evidence, the issue of agency is for the jury;¹⁶ but where the evidence rebutting the presumption of agency is undisputed

Boydston v. Jones, Civ.App., 177 S.W.2d 303—Lewis v. J. P. Word Transfer Co., Civ.App., 119 S.W.2d 106, error refused—Moore v. Roberts, Civ.App., 93 S.W.2d 236, error refused—English v. Mills, Civ. App., 299 S.W. 342.

Va.—Monumental Motor Tours v. Eaton, 35 S.E.2d 105, 184 Va. 311.

Wash.—MacDonald v. Gillio, 44 P.2d 783, 181 Wash. 673.

Wis.—Schulz v. General Casualty Co., 288 N.W. 803, 233 Wis. 118—Kruse v. Weigand, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, Smith v. Weigand, 235 N.W. 431, 204 Wis. 207, Smith v. Weigand, 235 N.W. 431 (two cases), 204 Wis. 208 and Woodard v. Weigand, 235 N.W. 432, 204 Wis. 209.

High school principal and students

In action for death caused by automobile, evidence that high school principal permitted three minor students to be absent from school, that he gave them voucher on student body funds for gasoline which the students were to use on automobile trip to advertise carnival sponsored by civic organizations to raise funds to purchase high school band uniforms, and that he gave them letter to principals of other high schools, was insufficient for jury on issue of existence of relationship of principal and agent between principal and students—Hathaway v. Sinkiyoun Union High School Dist., 151 P.2d 861, 68 Cal.App.2d 103.

Partnership

(1) Partner's statements in deposition were insufficient to take to jury question whether automobile driver was engaged in partnership business at time of accident.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

(2) Where liability for personal injuries and property damage resulting from collision between plaintiffs' automobile and truck driven by another was predicated on partnership of truck driver's alleged employers, and proof showed ownership of tract of land by defendants but that only one of them was engaged in remov-

ing timber from land for his own exclusive profit and had alone employed truck driver, direction of verdict for person having no interest in profits was proper, since facts showed that there existed no partnership.—Garrett v. Roy Sturgis Lumber Co., 146 S.W.2d 701, 201 Ark. 752

Requesting postponement on ground of surprise

In action for injuries sustained in collision with automobile, direction of verdict for owner of automobile because of failure to show driver's agency where plaintiff objected because of surprise was not error, where plaintiff did not request postponement.—Forbstein v. General Tire Co., 175 A. 445, 167 Md. 686.

12. Mo.—Pesot v. Yanda, 126 S.W.2d 240, 344 Mo. 338.

Tex.—Sturdevant v. Hooper, Civ. App., 101 S.W.2d 379, error dismissed.

Vt.—Luce v. Chandler, 195 A. 246, 109 Vt. 275.

42 C.J. p 1258 note 88 [a].

13. Ala.—Cruse-Crawford Mfg. Co. v. Rucker, 123 So. 897, 220 Ala. 101.

Conn.—Gazdik v. Gates Body Co., 139 A. 506, 107 Conn. 171.

Ga.—Stenger v. Mitchell, 28 S.E.2d 885, 70 Ga. App. 563.

Ky.—Wheeldon v. Regenhardt Const. Co., 145 S.W.2d 527, 284 Ky. 603.

Md.—Forbstein v. General Tire Co., 175 A. 445, 167 Md. 686.

Mo.—Oliver v. Morgan, 73 S.W.2d 993.

Neb.—Snyder v. Russell, 1 N.W.2d 125, 140 Neb. 616.

Tex.—Daily v. Sugarland Industries, Civ.App., 124 S.W.2d 199, reversed on other grounds Sugarland Industries v. Daily, 143 S.W.2d 931, 135 Tex. 532.

Va.—Barnes v. Mabry, 42 S.E.2d 304, 186 Va. 243.

42 C.J. p 1258 notes 88 [b], 92 [a].

14. Iowa.—Page v. Koss Const. Co., 245 N.W. 208, 215 Iowa 1388.

15. Mo.—Brucker v. Gambaro, 9 S.W.2d 918—McCarter v. Burger, App., 6 S.W.2d 979—Edwards v.

Rubin, 2 S.W.2d 205, 221 Mo.App. 246.

Defendant's name on vehicle

D.C.—Simon v. City Cab Co., 78 F.2d 506, 64 App.D.C. 364, certiorari denied 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455

Pa.—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Readshaw v. Montgomery, 169 A. 135, 313 Pa. 206—Talarico v. Baker Office Furniture Co., 149 A. 883, 298 Pa. 211.

Tex.—Mrs. Baird's Bakery v. Davis, Civ.App., 54 S.W.2d 1031.

16. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.

Ala.—Scott v. Birmingham Elec. Co., 33 So.2d 344—Craft v. Koonce, 187 So. 730, 237 Ala. 552—Tullis v. Blue, 114 So. 185, 216 Ala. 577—William E. Harden, Inc., v. Harden, 197 So. 94, 29 Ala.App. 411.

Cal.—Montanya v. Brown, 88 P.2d 745, 31 Cal.App.2d 642.

D.C.—Simmons v. Brooks, 72 F.2d 86, 63 App.D.C. 293.

Idaho.—Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 267.

Md.—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.

N.J.—Simmons v. Wiley M. E. Church, 170 A. 237, 112 N.J.Law 129—Conway v. Pickering, 166 A. 76, 111 N.J.Law 15—Hart v. Brunsanahan, 137 A. 845, 5 N.J.Misc. 469. Or.—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 373—Brown v. Fields, 83 P.2d 144, 160 Or. 23.

S.C.—Watson v. Kennedy, 186 S.E. 549, 180 S.C. 543.

Wash.—Davis v. Browne, 147 P.2d 263, 20 Wash.2d 219—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.

W.Va.—Weismantle v. Petros, 19 S.E.2d 594, 124 W.Va. 180.

In order to justify directed verdict for defendant shown prima facie owner of car injuring plaintiff, it was necessary that defendant's evidence overcome probative force of inference justified by ownership.—Borger v. McKeith, 224 N.W. 102, 198 Wis. 315.

and but one inference reasonably may be drawn therefrom, it is generally a question of law for the court.¹⁷ In some jurisdictions, however, the presumption or inference of agency as drawn from proof of ownership of the vehicle is sufficient to warrant submission to the jury although the evidence in rebuttal is uncontradicted.¹⁸

Under some statutes providing that proof that

at the time of the accident the motor vehicle was registered in the name of defendant as owner constitutes prima facie evidence that the motor vehicle was then being operated by, and under the control of, a person for whose conduct defendant is legally responsible, and that absence of such responsibility is an affirmative defense to be set up in the answer and proved by defendant, submis-

17. U.S.—*De Bord v. Proctor & Gamble Distributing Co.*, D.C.Ga., 58 F.Supp. 157, affirmed, C.C.A., 146 F.2d 54.

Ala.—*Scott v. Birmingham Elec. Co.*, 33 So.2d 344—*Cox v. Roberts*, 27 So. 2d 617, 248 Ala. 372—*Craft v. Koonce*, 187 So. 730, 237 Ala. 552—*Walker v. Stephens*, 127 So. 668, 221 Ala. 18—*Tullis v. Blue*, 114 So. 185, 216 Ala. 577—*Freeman v. Southern Life & Health Ins. Co.*, 98 So. 461, 210 Ala. 459—*Bruner v. Eubanks*, 33 So.2d 374, 33 Ala. App. 266, certiorari denied 33 So.2d 376, 250 Ala. 100—*United Wholesale Grocery Co. v. Minge Floral Co.*, 142 So. 586, 25 Ala. App. 153, certiorari denied 142 So. 587, 225 Ala. 160.

D.C.—*Simmons v. Brooks*, 72 F.2d 86, 63 App.D.C. 293

Idaho.—*Willi v. Schaefer Hitchcock Co.*, 25 P.2d 167, 53 Idaho 367—*Magee v. Hargrove Motor Co.*, 296 P. 774, 50 Idaho 442.

Md.—*Taylor v. Weslev Freeman, Inc.*, 47 A.2d 500—*National Trucking & Storage v. Durkin*, 39 A.2d 687, 183 Md. 584—*Phipps v. Milligan*, 199 A. 498, 174 Md. 438—*Pennsylvania R. Co. v. Lord*, 151 A. 400, 159 Md. 518—*Myers v. Shipley*, 116 A. 645, 140 Md. 380, 20 A.L.R. 1460.

Mich.—*Wehling v. Linder*, 226 N.W. 880, 248 Mich. 241.

Mo.—*Mulanix v. Reeves*, App., 112 S.W.2d 100, 233 Mo.App. 143, certiorari quashed State ex rel. and to Use of Reeves v. Shain, 122 S.W.2d 885, 343 Mo. 550 and explaining *McGurter v. Burger*, App., 6 S.W.2d 979—*Frohoff v. Adams*, App., 108 S.W.2d 615.

N.J.—*Ianzuzzi v. Public Service Interstate Transp. Co.*, 163 A. 31, 10 N.J.Misc. 1205.

S.C.—*Watson v. Kennedy*, 186 S.E. 549, 180 S.C. 543.

Tex.—*Alfano v. International Harvester Co. of America, Civ.App.*, 121 S.W.2d 466, error dismissed.

Prospective purchaser of motor vehicle

In action by occupant of automobile against dealer for injuries sustained in collision between automobile in which occupant was riding and dealer's automobile which was being driven by a prospective purchaser with dealer's permission, where pleadings and proof estab-

lished that status between dealer and prospective purchaser was that of bailor and bailee, proof that dealer owned automobile was insufficient evidence for jury on issue of agency between dealer and prospective purchaser.—*Brown v. Fields*, 83 P.2d 144, 160 Or. 23.

Only in exceptional cases can a court say as a matter of law that an inference or presumption that the driver of a motor vehicle belonging to another is the other's servant has been overcome by force and effect of other evidence.—*Ellenberger v. Fremont Land Co.*, 107 P.2d 837, 165 Or. 375.

Defendant's name on vehicle

D.C.—*Simon v. City Cab Co.*, 78 F.2d 506, 64 App.D.C. 364, certiorari denied 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455

Mo.—*Arnold v. Haskins*, 147 S.W.2d 469, 347 Mo. 320

Fact that rebuttal evidence was introduced by defendants was immaterial with respect to whether plaintiff was entitled to have his prima facie case submitted to jury.—*Mulanix v. Reeves*, 112 S.W.2d 100, 233 Mo.App. 143, certiorari quashed State ex rel. and to Use of Reeves v. Shain, 122 S.W.2d 885, 343 Mo. 550

18. Cal.—*Kanananaka v. Badalamente*, 6 P.2d 338, 119 Cal.App. 231—*Perry v. A. Paladini, Inc.*, 264 P. 580, 89 Cal.App. 275.

Pa.—*Dugan v. McGara's, Inc.*, 25 A. 2d 718, 344 Pa. 460.

Where presumption is rebutted by plaintiff's own uncontradictory evidence, it disappears and a nonsuit is proper.—*Dugan v. McGara's, Inc.*, 25 A.2d 718, 344 Pa. 460.

Defendant's name on vehicle

(1) Presence of defendant's name on a commercial vehicle raises presumption that vehicle is owned by defendant and that the operator is defendant's servant acting within scope of his employment, and this presumption is sufficient to take case to jury, even though defendant produces uncontradicted evidence that the operator was not his employee or that he did not own the vehicle.

U.S.—*Young v. Wilky Carrier Corporation*, D.C.Pa., 54 F.Supp. 912, affirmed, C.C.A., 150 F.2d 784, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Pa.—*Kunkel v. Vogt*, 47 A.2d 195, 354 Pa. 279—*Sweeney v. City of Pittsburgh*, 34 A.2d 67, 348 Pa. 80—*Sefton v. Valley Dairy Co.*, 28 A.2d 313, 345 Pa. 324—*McFadden v. Pennzoll Co.*, 9 A.2d 412, 336 Pa. 301—*Talarico v. Baker Office Furniture Co.*, 149 A. 883, 298 Pa. 211—*Murphy v. Wolverine Express*, 38 A.2d 511, 155 Pa.Super. 125.

(2) Case will not be submitted to jury where plaintiff himself shows that vehicle did not belong to defendant or was not being used in his business or where defendant, in the testimony produced, can point to evidence of "indisputable physical conditions" or "facts" or where he can show in the evidence some indisputable basis for "mathematical tests" which demonstratively overcome the presumption in plaintiff's favor, or where, in addition to the uncontradicted oral evidence on the side of defendant showing no liability, there is admittedly genuine or unattacked documentary evidence which relieves defendant from the possibility of liability.—*Readshaw v. Montgomery*, 169 A. 135, 313 Pa. 206—*Talarico v. Baker Office Furniture Co.*, 149 A. 883, 298 Pa. 211—*Harlig v. American Ice Co.*, 137 A. 867, 290 Pa. 21.

(3) Fact that truck striking plaintiff was operated after business away from warehouse was not physical condition or basis for mathematical test overcoming presumed operation by defendant.—*Talarico v. Baker Office Furniture Co.*, 149 A. 883, 298 Pa. 211.

(4) Blank showing delivery of desk by driver of truck striking plaintiff after business hours was insufficient documentary evidence to relieve owner from possible liability.—*Talarico v. Baker Office Furniture Co.*, supra.

Vehicle bearing defendant's license plates

(1) Generally.—*Walker v. Hornbeck*, Pa.Com.Pl., 45 Lack.Jur. 257.

(2) Dealer's license plates.—*Frew v. Barto*, 26 A.2d 905, 345 Pa. 217—*Morgan v. Heinel Motors*, 197 A. 920, 329 Pa. 360—*Conley v. Mervis*, 188 A. 350, 324 Pa. 577, 108 A.L.R. 160—*Coates v. Commercial Credit Co.*, 165 A. 377, 310 Pa. 330—*Alfandre v. Bream*, 7 A.2d 502, 135 Pa.Super. 538.

sion to the jury in most instances is required to determine the question whether the prima facie evidence resulting from proof of registration has been overcome and whether the affirmative defense has been made out so as to rebut the otherwise conclusive effect of the prima facie case.¹⁹ It is rarely that it can be ruled as a matter of law that an affirmative defense has been made out or that a prima facie case has been overcome.²⁰ Nevertheless in some instances the issue has been withdrawn from the jury.²¹

(3) Scope of Employment

On conflicting evidence or where different inferences

reasonably may be drawn from the evidence, it is for the jury to determine whether the defendant's servant or agent driving the motor vehicle causing the injury was, at the time of the accident, acting within the scope of his employment.

Where the evidence is legally sufficient and is conflicting or different inferences reasonably may be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant's servant or agent driving the motor vehicle causing the injury was, at the time of the accident, acting within the scope of his employment.²² The weight of the evidence and the credibility of the witnesses are

19. Mass.—Le Blanc v. Pierce Motor Co., 30 N.E.2d 684, 307 Mass. 535—Legarry v. Flinn Motor Sales, 23 N.E.2d 1011, 304 Mass. 446—Boyas v. Raymond, 20 N.E.2d 411, 302 Mass. 519—Greenburg v. Gorvine, 181 N.E. 128, 279 Mass. 339—Ferreira v. Franco, 173 N.E. 529, 273 Mass. 272—Hau v. Le Grand, 168 N.E. 180, 268 Mass. 582—Thomes v. Meyer Store, 168 N.E. 178, 268 Mass. 587
R.I.—Gemma v. Rotondo, 5 A.2d 297, 62 R.I. 293, 122 A.L.R. 223—Hill v. Cabral, 2 A.2d 482, 62 R.I. 11, 121 A.L.R. 1072, explaining Hartley v. Johnson, 175 A. 653, 54 R.I. 477.
Tenn.—Fulmer v. Jennings, 148 S.W.2d 39, 24 Tenn. App. 635—Green v. Powell, 124 S.W.2d 269, 22 Tenn. App. 481.

20. Mass.—Wilson v. Grace, 173 N.E. 524, 273 Mass. 146—Hau v. Le Grand, 168 N.E. 180, 268 Mass. 582—Thomes v. Meyer Store, 168 N.E. 178, 268 Mass. 587.

21. Tenn.—Gouldener v. Brittain, 114 S.W.2d 783, 173 Tenn. 32—Wright v. Bridges, 65 S.W.2d 265, 16 Tenn. App. 576—Woody v. Ball, 5 Tenn. App. 300.

22. U.S.—Baker Driveaway Co. v. Clark, C.C.A.W.Va., 162 F.2d 181—Coe v. Itley, C.C.A.Fla., 160 F.2d 538—Sugg v. Hendrix, C.C.A.Miss., 153 F.2d 240—R. J. Reynolds Tobacco Co. v. Newby, C.C.A.Idaho, 145 F.2d 768—Hill Transp. Co. v. Everett, C.C.A.N.H., 145 F.2d 746—Montgomery v. Hutchins, C.C.A.Cal., 118 F.2d 661—Crockett v. U.S., C.C.A.W.Va., 116 F.2d 646, certiorari denied 62 S.Ct. 57, 314 U.S. 619, 86 L.Ed. 498—Crockett v. McElroy, C.C.A.W.Va., 116 F.2d 646, certiorari denied 62 S.Ct. 57, 314 U.S. 619, 86 L.Ed. 498—Waggaman v. General Finance Co. of Philadelphia, C.C.A.Pa., 116 F.2d 254—Phoenix Blue Diamond Express v. Mendez, C.C.A.Ariz., 103 F.2d 66, certiorari denied 60 S.Ct. 79, 308 U.S. 566, 84 L.Ed. 475—Thomas v. Slavens, C.C.A.Mo., 78 F.2d 144—Silent Automatic Sales Corporation

v. Stayton, C.C.A.Mo., 45 F.2d 471—Hubbard v. Lock Joint Pipe Co., D.C.Mo., 70 F.Supp. 589.

Ala.—Blair v. Greene, 22 So.2d 834, 247 Ala. 104—Patrick v. Mitchell, 6 So.2d 889, 242 Ala. 44—Slaughter v. Murphy, 194 So. 649, 239 Ala. 260—Chandler v. Owens, 179 So. 256, 235 Ala. 356—Nelson v. Belcher Lumber Co., 166 So. 808, 232 Ala. 116—Jefferson County Burial Soc. v. Cotton, 133 So. 256, 222 Ala. 578—Blackmon v. Starling, 130 So. 782, 222 Ala. 87—Deaton Truck Line v. Tillman, 30 So.2d 584, 33 Ala.App. 143—Corsbie v. Poore, 198 So. 268, 29 Ala.App. 487, certiorari denied 198 So. 272, 240 Ala. 207—William E. Harden, Inc. v. Harden, 197 So. 94, 29 Ala.App. 411.

Ariz.—Keen v. Clarkson, 108 P.2d 573, 56 Ariz. 437—Brooks v. Neer, 47 P.2d 452, 46 Ariz. 144—Hatchimonji v. Homes, 3 P.2d 271, 38 Ariz. 535.

Ark.—Brundrett v. Hargrove, 161 S.W.2d 762, 204 Ark. 258—Lewis v. Shackleford, 157 S.W.2d 509, 203 Ark. 500—Railway Express Agency v. Gee, 125 S.W.2d 802, 197 Ark. 925—Arkansas Baking Co. v. Wyman, 47 S.W.2d 45, 185 Ark. 310—Boehmer v. Short, 43 S.W.2d 541, 184 Ark. 672—Southwestern Bell Telephone Co. v. Roberts, 31 S.W.2d 302, 182 Ark. 211—Duckworth v. Stephens, 30 S.W.2d 840, 182 Ark. 161.

Cal.—Westberg v. Willde, 94 P.2d 590, 14 Cal.2d 360—Poncino v. Reid-Murdoch & Co., 298 P. 818, 212 Cal. 325—Waack v. Maxwell Hardware Co., 292 P. 966, 210 Cal. 636—Gardner v. Marshall, 132 P.2d 833, 56 Cal.App.2d 62—Day v. General Petroleum Corporation, 89 P.2d 718, 32 Cal.App.2d 220—Martinelli v. Stabnau, 52 P.2d 956, 11 Cal.App.2d 38—Vitelli v. Minutoli, 4 P.2d 818, 118 Cal.App. 120—Barty v. Collins, 292 P. 979, 109 Cal.App. 94—Mand v. Rose, 274 P. 392, 96 Cal.App. 564—Wagnitz v. Scharetg, 265 P. 318, 89 Cal.App. 511—Kruise v. White Bros., 253 P. 178, 81 Cal. App. 86—Dillon v. Prudential Ins.

Co. of America, 242 P. 736, 75 Cal. App. 266.

Colo.—Boulderado Motors v. Peterson, 66 P.2d 1269, 100 Colo. 238.

Conn.—Branchini v. Florio, 175 A. 670, 119 Conn. 212—Rinaldi v. Kurtz, 166 A. 916, 117 Conn. 165—Garriepy v. Ballou & Nagle, 157 A. 535, 114 Conn. 46—Ackerson v. Erwin M. Jennings Co., 140 A. 760, 107 Conn. 393, 56 A.L.R. 1127—De Nezzo v. General Baking Co., 138 A. 127, 106 Conn. 396.

Fla.—Orr v. Avon Florida Citrus Corporation, 177 So. 612, 130 Fla. 306.

Ga.—Henry v. Hoeh, 47 S.E.2d 159, 76 Ga.App. 819—Lee v. Queen, 46 S.E.2d 509, 76 Ga.App. 513—Abelman v. Ormond, 187 S.E. 393, 53 Ga.App. 753—McGhee v. Kingman & Everett, 176 S.E. 55, 49 Ga.App. 767—Atlanta Coach Co. v. Curtis, 157 S.E. 314, 42 Ga.App. 639.

Ill.—Kavale v. Morton Salt Co., 160 N.E. 752, 329 Ill. 445—Hogan v. City of Chicago, 49 N.E.2d 861, 319 Ill.App. 531—Itelly v. Peterson Furniture Co., 40 N.E.2d 780, 314 Ill.App. 46—Flood v. Bitzer, 40 N.E.2d 557, 313 Ill.App. 359—Webb v. Willett Co., 33 N.E.2d 636, 309 Ill. App. 504—Webb v. Willett Co., 26 N.E.2d 132, 304 Ill.App. 260—Tarka v. Pratt, 257 Ill.App. 403.

Ind.—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind. App. 610—Estes v. Anderson Oil Co., 176 N.E. 560, 93 Ind.App. 365.

Iowa.—Hoblit v. Schnepf, 296 N.W. 210, 229 Iowa 1085—Ege v. Born, 236 N.W. 75, 212 Iowa 1138—Orris v. Tolbert & Warfield Co., 207 N.W. 365, 201 Iowa 1344.

Kan.—Husum v. Poehler, 242 P. 449, 120 Kan. 119.

Ky.—Falender v. Hankins, 177 S.W. 2d 382, 296 Ky. 396—Webb v. Dixie-Ohio Express Co., 165 S.W.2d 539, 291 Ky. 692—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8—Huber & Huber Motor Express v. Martin's Adm'r, 96 S.W.2d 595, 265 Ky. 228—Keys v. Nash's Adm'x, 94 S.W.2d 1006, 264 Ky. 398—Ashland Coca Cola Bottling Co.

- v. Ellison, 66 S.W.2d 52, 252 Ky. 172—Bowen v. Gradison Const. Co., 6 S.W.2d 481, 224 Ky. 427—Saunders' Ex'rs v. Armour & Co., 295 S.W. 1014, 220 Ky. 719.
- Md.—O'Dell v. Barrett, 163 A. 191, 163 Md. 342—Nattans v. Cotton, 133 A. 270, 150 Md. 466.
- Mass.—Kelly v. Railway Express Agency, 52 N.E.2d 411, 315 Mass. 301—Kramer v. Massachusetts Gas & Electric Light Supply Co., 11 N.E.2d 497, 298 Mass. 457—Cardoza v. Isherwood, 154 N.E. 859, 258 Mass. 165—Puccia v. Sevigne, 154 N.E. 765, 258 Mass. 234.
- Mich.—Long v. McKay, 295 N.W. 239, 295 Mich. 494—Rabaut v. Venable, 280 N.W. 129, 285 Mich. 111—Greene v. Richer, 270 N.W. 194, 278 Mich. 1—Ogland v. Detroit Edison Co., 246 N.W. 503, 261 Mich. 583—Gorman v. Jaffa, 227 N.W. 775, 248 Mich. 557—Emery v. Ford, 207 N.W. 856, 234 Mich. 11.
- Minn.—Bayerkohl v. Clara City Farmers' Elevator Co., 248 N.W. 294, 189 Minn. 22.
- Miss.—Delta Cotton Oil Co. v. Elliott, 172 So. 737, 179 Miss. 200, suggestion of error overruled 174 So. 550, 179 Miss. 200—Merchants Co. v. Tracy, 166 So. 340, 175 Miss. 49.
- Mo.—Berry v. Emery, Bird, Thayer Dry Goods Co., 211 S.W.2d 35—Smith v. Fine, 175 S.W.2d 761, 351 Mo. 1179—Corder v. Morgan Roofing Co., 166 S.W.2d 455, 350 Mo. 382—Herrington v. Hoey, 139 S.W.2d 477, 345 Mo. 1108—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630—King v. Rleth, 108 S.W.2d 1, 341 Mo. 467—Byrnes v. Poplar Bluff Printing Co., 74 S.W.2d 20—Mauzy v. J. D. Carson Co., App., 189 S.W.2d 829—Barr v. Hawe, App., 166 S.W.2d 244—Wilhelm v. R. S. Buchanan Co., App., 131 S.W.2d 905—Garrison v. R. S. Buchanan Co., App., 131 S.W.2d 905—Wilhelm v. R. S. Buchanan Co., App., 131 S.W.2d 894—Steinmetz v. Saathoff, App., 84 S.W.2d 437—Nagle v. Alberter, App., 53 S.W.2d 289—Jacobson v. Baffa, App., 282 S.W. 161.
- Mont.—Webster v. Mountain States Telephone & Telegraph Co., 89 P.2d 602, 108 Mont. 188.
- Neb.—Dafoe v. Grantski, 9 N.W.2d 488, 143 Neb. 344.
- N.H.—Ramsdell v. John B. Varick Co., 170 A. 12, 86 N.H. 457.
- N.J.—Amari v. Katz, 31 A.2d 759, 130 N.J.Law 99—Mullica v. Claps, 27 A.2d 882, 128 N.J.Law 592—Coopersmith v. Kalt, 196 A. 649, 119 N.J.Law 474—Efstatthopoulos v. Federal Tea Co., 196 A. 470, 119 N.J.Law 408—Vander Pyle v. Alexander Hamilton Garage, 192 A. 436, 118 N.J.Law 238—Nichols v. Grunstein, 144 A. 593, 105 N.J.Law 363—Thomas v. Devine, 140 A. 324, 104 N.J.Law 361—Cleaves v. Yeskel, 138 A. 393, 102 N.J.Law 621—Sapienza v. Dobrasky, 158 A. 116, 10 N.J.Misc. 168—McKeag v. Franklin Contracting Co., 135 A. 773, 5 N.J.Misc. 130.
- N.Y.—Schultze v. McGuire, 150 N.E. 516, 241 N.Y. 460—Malachowski v. Edward Smith Packing Co., 74 N.Y.S.2d 552, 272 App.Div. 1099—Crellin v. Van Duzer, 55 N.Y.S.2d 590, 269 App.Div. 806, followed in 56 N.Y.S.2d 403, 269 App.Div. 807—Hartstein v. U. S. Trucking Corporation, 23 N.Y.S.2d 251, 260 App. Div. 643, reargument denied 25 N.Y.S.2d 398, 260 App.Div. 1006, and 25 N.Y.S.2d 400, 260 App. Div. 1006—Shauntz v. Schwegler Bros., 20 N.Y.S.2d 198, 259 App.Div. 446—Christie v. B. F. Vineburg, Inc., 19 N.Y.S.2d 252, 259 App. Div. 342—Lynch v. Pratt, 225 N.Y.S. 486, 222 App. Div. 179.
- N.C.—Parrott v. Kantor, 6 S.E.2d 40, 216 N.C. 584—Daniel v. East Tennessee Packing Co., 3 S.E.2d 282, 215 N.C. 762—Robinson v. Standard Transp. Co., 199 S.E. 725, 214 N.C. 489—Barrow v. Keel, 196 S.E. 366, 213 N.C. 373—Joyner v. Dail, 188 S.E. 209, 210 N.C. 663—Miller v. Wood, 187 S.E. 765, 210 N.C. 520—Dickerson v. Reynolds, 172 S.E. 402, 205 N.C. 770—Puckett v. Dyer, 167 S.E. 43, 203 N.C. 684—Jeffrey v. Osage Mfg. Co., 150 S.E. 503, 197 N.C. 724, followed in Lewis v. Basketeria Stores, 161 S.E. 924, 201 N.C. 849.
- N.D.—Carlson v. Hoff, 230 N.W. 294, 59 N.D. 393—Hedine v. Meyer, 224 N.W. 906, 57 N.D. 908—Clark v. Feldman, 224 N.W. 167, 57 N.D. 741.
- Ohio—Goldberg v. Jordan, 196 N.E. 775, 130 Ohio St. 1—Pray v. Meier, 40 N.E.2d 850, 69 Ohio App. 141, dissenting opinion 43 N.E.2d 318, 69 Ohio App. 141—Williams v. Midendorf, App., 32 N.E.2d 436—Smith v. Hoskins, 17 N.E.2d 955, 59 Ohio App. 298.
- Okl.—Brayton v. Carter, 163 P.2d 960, 196 Okl. 125—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36—Small v. Shull, 124 P.2d 381, 190 Okl. 418—Modern Motors v. Elkins, 113 P.2d 969, 189 Okl. 134—Champlin Refining Co. v. Crisp, 86 P.2d 784, 184 Okl. 248—Phillips Petroleum Co. v. Ward, 74 P.2d 614, 181 Okl. 462—Motor Inn Co. v. Revard, 299 P. 880, 149 Okl. 198.
- Or.—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 375—Johnson v. Steele, 59 P.2d 237, 154 Or. 137—Wilson v. Steel Tank & Pipe Co. of Oregon, 52 P.2d 1120, 152 Or. 386.
- Pa.—Davis v. Tredwell, 32 A.2d 411, 347 Pa. 341—Frew v. Barto, 26 A.2d 905, 345 Pa. 217—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Cusick v. Hutchison, 177 A. 749, 318 Pa. 316—Griffith v. V. A. Simrell & Son Co., 155 A. 299, 304 Pa. 165—Dregier v. Kramer, 140 A. 532, 292 Pa. 9—Morris v. Ward, 24 A.2d 775, 148 Pa.Super. 28, reversed on other grounds 26 A.2d 926, 345 Pa. 226—Alfandre v. Bream, 7 A.2d 502, 135 Pa.Super. 538—Hoch v. Martin, 188 A. 602, 124 Pa.Super. 445—Krajnik v. Monongahela Valley Bus Co., 99 Pa.Super. 120—Vivino v. Nevius, 98 Pa.Super. 574.
- R.I.—Kulbabsky v. New England Transp. Co., 38 A.2d 152, 70 R.I. 220—Goff v. Craft's Inc., 20 A.2d 520, 67 R.I. 11, reargument denied 21 A.2d 10, 67 R.I. 11—W. P. Hamblin, Inc. v. Cherrick, 136 A. 245.
- S.C.—Stevens v. Moore, 46 S.E.2d 73, 211 S.C. 498—Adams v. South Carolina Power Co., 21 S.E.2d 17, 200 S.C. 438—Fabian v. Rephan, 7 S.E.2d 223, 192 S.C. 483—Lowie v. Dixie Stores, 174 S.E. 394, 172 S.C. 468—Chantry v. Pettit Motor Co., 152 S.E. 753, 156 S.C. 1.
- Tenn.—Fulmer v. Jennings, 148 S.W.2d 39, 24 Tenn.App. 635—Green v. Powell, 124 S.W.2d 269, 22 Tenn. App. 481.
- Tex.—Gammill v. Mullins, Civ.App., 188 S.W.2d 986, error dismissed—Kuykendall v. Vaden, Civ.App., 187 S.W.2d 143—McIver v. Gloria, Civ. App., 163 S.W.2d 890, affirmed 169 S.W.2d 710, 140 Tex. 566—Richmond v. Champagne's Bakery, Civ. App., 119 S.W.2d 304, error dismissed, judgment correct—Gibson v. Gillette Motor Transport, Civ. App., 138 S.W.2d 293, error refused—Thames v. Culwell Packing Co., Civ. App., 114 S.W.2d 664—Gregg v. De Shong, Civ.App., 107 S.W.2d 893, error dismissed—Universal Transp. Co. v. Ramos, Civ.App., 37 S.W.2d 238, error dismissed—Guitar v. Wheeler, Civ.App., 36 S.W.2d 325, error dismissed—Miller v. Diamond, Civ.App., 25 S.W.2d 659, reversed on other grounds Commercial Standard Ins. Co. v. Miller, Com.App., 48 S.W.2d 618—Texas Co. v. Blackstock, Civ.App., 21 S.W.2d 13, error dismissed—Homan v. Borman, Civ.App., 19 S.W.2d 438—Friend-Rowe Motor Co. v. Ricci, Civ.App., 293 S.W. 851—Reid Auto Co. v. Gersczya, Civ.App., 144 S.W. 688.
- Va.—Sydnor & Hundley v. Bonifant, 164 S.E. 403, 158 Va. 703.
- Wash.—Rice v. Garl, 98 P.2d 301, 2 Wash.2d 403—Forsberg v. Tevis, 71 P.2d 358, 191 Wash. 355—Templin v. Doan, 59 P.2d 1110, 187 Wash. 68—Steiner v. Royal Blue Cab Co., 20 P.2d 39, 172 Wash. 396—Stam v. Johnson, 17 P.2d 4, 170 Wash. 534, adhered to 23 P.2d 1118, 173 Wash. 700—Barach v. Island Empire Telephone & Telegraph Co., 275 P. 713, 151 Wash. 279—Kludas v. Inland-American Printing Co., 270 P. 429, 149 Wash. 180.
- Wis.—Kowalsky v. Whipkey, 2 N.W.2d 704, 240 Wis. 59—Anderson v. Seelow, 271 N.W. 844, 224 Wis. 230,

followed in *Neyers v. Seelow*, 271 N.W. 846, 224 Wis. 236.
42 C.J. p 1257 note 87, p 1258 note 99, p 1259 note 3.

Scope of employment:

Generally see *supra* § 437.

As question of law or fact generally see *Master and Servant* § 617 a (3).

Ordinarily jury question

Pa.—*Mitchell v. Ellmaker*, 4 A.2d 592, 134 Pa.Super. 583.

R.I.—*Hartley v. Johnson*, 175 A. 653, 54 R.I. 477.

Tenn.—*Baskin & Cole v. Whitson*, 8 Tenn.App. 578.

Mixed question of law and fact

N.J.—*Bunevich v. Public Service Ry. Co.*, 147 A. 375, 7 N.J.Misc. 823.

Where there is some evidence that master's automobile was being used with his consent by his servant, in order that the servant might better prosecute and further his master's business, question whether servant, at time of accident, was acting within scope of employment, is for jury.—*Wilson v. Deegan's Adm'r*, 139 S.W.2d 58, 282 Ky. 547.

Advertising manager

Cal.—*Naudack v. Canini*, 85 P.2d 510, 29 Cal.App.2d 687.

Minn.—*Shotts v. Standard Oil Co. of Indiana*, 232 N.W. 712, 181 Minn 386, followed in *Shotts v. Standard Oil Co. of Indiana*, 232 N.W. 714, 181 Minn. 391.

Bookkeeper

Ala.—*Koonce v. Craft*, 174 So. 478, 234 Ala. 278.

Driver of fire truck

N.Y.—*Nardone v. Milton Fire Dist.*, 27 N.Y.S.2d 489, 261 App.Div. 717, affirmed 42 N.E.2d 746, 288 N.Y. 654.

Employees of insurance company

(1) Divisional manager of insurance company.—*American Ins. Co. v. Naylor*, 87 P.2d 260, 103 Colo. 461.

(2) Insurance solicitor or collector.

Ala.—*Luquire Ins. Co. v. McCalla*, 13 So.2d 865, 244 Ala. 479.

Cal.—*Richards v. Metropolitan Life Ins. Co.*, 120 P.2d 650, 19 Cal.2d 236, prior opinion 113 P.2d 703.

Mo.—*Chiles v. Metropolitan Life Ins. Co.*, 91 S.W.2d 164, 230 Mo.App. 350.

N.Y.—*Cooke v. Drigant*, 45 N.E.2d 815, 289 N.Y. 313, followed in *Brown v. John Hancock Mut. Life Ins. Co.*, 47 N.E.2d 432, 289 N.Y. 821.

N.C.—*Pinnix v. Griffin*, 12 S.E.2d 667, 219 N.C. 35.

Ohio.—*Amstutz v. Prudential Ins. Co. of America*, 26 N.E.2d 454, 136 Ohio St. 404—*Miller v. Metropolitan Life Ins. Co.*, 16 N.E.2d 447, 134 Ohio St. 289.

(3) Supervisor of agents.—*Steele v. Barnwell*, Mo.App., 167 S.W.2d 468.

General field manager

Ala.—*Luquire Funeral Homes Ins. Co. v. Turner*, 178 So. 536, 235 Ala. 305.

Labor union's business agent

Colo.—*United Broth. of Carpenters and Joiners of America, Local Union No. 55, v. Salter*, 167 P.2d 954, 114 Colo. 513.

Newspaper district manager

Cal.—*Huddy v. Chronicle Pub. Co.*, 103 P.2d 421, superseding 94 P.2d 56, 15 Cal.2d 554.

Police officer

N.Y.—*Green v. City of New York*, 16 N.Y.S.2d 836, 173 Misc. 1.

Salesmen

(1) Generally.

Cal.—*Dollnar v. Pedone*, 146 P.2d 237, 63 Cal.App.2d 169—*Tsirlis v. Standard Oil Co. of California*, 90 P.2d 128, 32 Cal.App.2d 469.

Ga.—*Mitchem v. Shoarman Concrete Pipe Co.*, 165 S.E. 889, 45 Ga.App. 809, followed in *Teichmiller v. Steele*, 167 S.E. 911, 46 Ga.App. 468.

Idaho.—*Manion v. Waybright*, 86 P.2d 181, 59 Idaho 643.

Ind.—*Great American Tea Co. v. Van Buren*, 33 N.E.2d 580, 218 Ind. 462.

Iowa.—*Heintz v. Iowa Packing Co.*, 268 N.W. 607, 222 Iowa 517.

Minn.—*Vogel v. Nash-Finch Co.*, 265 N.W. 350, 196 Minn 509—*Marcel v. Cudahy Packing Co.*, 243 N.W. 265, 186 Minn. 336.

Mo.—*O'Shea v. Pattison-McGrath Dental Supplies*, 180 S.W.2d 19, 352 Mo. 855—*Borgstede v. Waldbauer*, 88 S.W.2d 373, 337 Mo. 1205.

Neb.—*Peterson v. Brinn & Jensen Co.*, 280 N.W. 171, 134 Neb. 909—*La Fleur v. Poesch*, 252 N.W. 902, 126 Neb. 263.

N.J.—*Sanford v. Charles H. Totty Co.*, 164 A. 458, 110 N.J.Law 262—*Craig v. Morgenweck*, 194 A. 188, 15 N.J.Misc. 637.

N.Y.—*Gulov v. Krasne*, 42 N.Y.S.2d 20, 266 App.Div. 302, affirmed 55 N.E.2d 372, 292 N.Y. 602—*Heald v. Jewel Tea Co.*, 4 N.Y.S.2d 40, 254 App.Div. 712, appeal denied 6 N.Y.S.2d 1023, 255 App.Div. 727, affirmed 19 N.E.2d 921, 280 N.Y. 513—*Schwindt v. Thompson*, 291 N.Y.S. 81, 249 App.Div. 639.

Okl.—*Modern Motors v. Elkins*, 113 P.2d 969, 189 Okl. 134.

Or.—*Fogelsoy v. Jarman*, 121 P.2d 924, 168 Or. 177.

Pa.—*Kadlecik v. L. N. Renault & Sons*, 40 A.2d 866, 156 Pa.Super. 586.

Tenn.—*Ely v. Rice Bros.*, 167 S.W.2d 355, 26 Tenn.App. 19.

W.Va.—*Shahan v. Jones*, 177 S.E. 774, 115 W.Va. 749.

42 C.J. p 1258 note 99 [7].

(2) Automobile salesman.

Ark.—*Ball v. Hall*, 118 S.W.2d 668, 196 Ark. 491.

Cal.—*Everett v. Howard Buick Co.*, 59 P.2d 506, 15 Cal.App.2d 544.

Colo.—*General Foods Sales Co. v. Smith*, 97 P.2d 429, 105 Colo. 305.

Ga.—*Nichols v. G. L. Hight Motor Co.*, 10 S.E.2d 439, 63 Ga.App. 155—*Dawson Motor Co. v. Petty*, 186 S.E. 877, 53 Ga.App. 746.

Ill.—*Becker v. Brummel*, 48 N.E.2d 419, 319 Ill.App. 499.

Ky.—*Wilhelmi v. Berns*, 119 S.W.2d 625, 274 Ky. 618.

Mass.—*Foley v. McDonald*, 185 N.E. 926, 283 Mass. 96.

Minn.—*Ranthum v. Ferguson*, 277 N.W. 547, 202 Minn. 209—*Lausche v. Denison-Harding Chevrolet Co.*, 243 N.W. 52, 185 Minn. 635.

Mo.—*Waters v. Hays*, App., 130 S.W.2d 220.

Ohio.—*E. S. Gahagen Co. v. Smith*, 194 N.E. 26, 48 Ohio App. 290.

Pa.—*Gozdonovic v. Pleasant Hills Realty Co.*, 53 A.2d 73—*Welsh v. Feyka*, 179 A. 810, 119 Pa.Super. 44—*Prezel v. Spencer*, 99 Pa.Super. 404.

Tenn.—*Wright v. Bridges*, 65 S.W.2d 265, 16 Tenn.App. 576.

Tex.—*Walter Irvin, Inc. v. Vogel*, Civ App., 158 S.W.2d 93, error refused.

Wash.—*Smith v. Eldridge Motors*, 90 P.2d 257, 199 Wash. 10, opinion adhered to 93 P.2d 1120, 199 Wash. 10.

W.Va.—*Meyn v. Dulaney-Miller Auto Co.*, 191 S.E. 558, 118 W.Va. 545.

(3) Real estate salesman.—*King v. Emerson*, 238 P. 1099, 110 Cal.App. 414, adopted 294 P. 768, 110 Cal.App. 414.

(4) Vacuum cleaner salesman.—*Mattan v. Hoover Co.*, 166 S.W.2d 557, 350 Mo. 506.

Taxicab driver

Ky.—*Kelly v. Marcum*, 114 S.W.2d 1102, 272 Ky. 609.

Ohio.—*Schenck v. Co-op. Cab Co.*, App., 60 N.E.2d 796.

Tex.—*Broadus v. Long*, 138 S.W.2d 1057, 135 Tex. 353.

Telegraph messenger

Mo.—*Snyder v. Western Union Telegraph Co.*, App., 277 S.W. 362.

N.C.—*Davidson v. Western Union Telegraph Co.*, 178 S.E. 603, 207 N.C. 790.

Visiting nurse

N.J.—*Demerest v. Guild*, 176 A. 558, 114 N.J.Law 472.

Going to dinner

Ky.—*Wilson v. Deegan's Adm'r*, 139 S.W.2d 58, 282 Ky. 547—*Potter's Adm'r v. Mansard Garage & Service Station*, 38 S.W.2d 233, 238 Ky. 439.

Mo.—*Yerger v. Smith*, 89 S.W.2d 66, 338 Mo. 140.

Okl.—*P. & S. Taxi & Baggage Co. v. Cameron*, 80 P.2d 618, 183 Okl. 226.

Wash.—*Carmin v. Port of Seattle*, 116 P.2d 338, 10 Wash.2d 139—

for the jury.²³ Where it is doubtful whether a servant was acting within the scope of his authority, the question should be submitted to the jury.²⁴ Where it appears that the driver of defendant's automobile had taken the car for a double purpose, one of which was a purpose of his own and the other a purpose connected with defendant's business, the question as to which purpose was the dominant or principal purpose of the trip is a question of fact for the jury.²⁵

On conflicting evidence or where different inferences reasonably may be drawn, incidental questions also are for the jury or trial court,²⁶ as, for

example, whether defendant's salesman was assigned to the route on which the accident occurred,²⁷ whether the servant had the authority, expressed or implied, to engage another servant,²⁸ whether defendant's servant was authorized to carry passengers or guests,²⁹ whether defendant prohibited his servant from carrying passengers or guests,³⁰ and whether defendant waived his rule forbidding his servant to carry passengers or guests.³¹

The evidence must be legally sufficient to require or warrant submission to the jury of the issue of scope of employment,³² and in various cases the

Murray v. Kauffman Buick Co., 85 P.2d 1061, 197 Wash. 469.
42 C.J. p 1257 note 87 [f]. p 1259 note 3 [e].

Joy riding
Ill.—*Keller v. Maxwell*, 256 Ill.App. 19.
N.C.—*Lertz v. Hughes Bros.*, 181 S. E. 342, 208 N.C. 490.
42 C.J. p 1257 note 87 [h].

Parking vehicle

(1) Act of salesman in parking his automobile along highway was not such an act as would take him outside of his employment as matter of law, nor is it such an act as might not have been reasonably expected of traveling salesman driving long distances on his employer's business and to which therefore master's assent may be fairly assumed.—*Dollinar v. Pedone*, 146 P.2d 237, 63 Cal. App.2d 169.

(2) Where salesman parked his automobile on wrong side of highway at night to assist third persons in distress, court could not hold as matter of law that, because act of mercy itself was not within scope of his employment, act of parking was also outside employment, and question whether in so parking automobile and assisting third persons salesman was acting within his employment, so as to make employer liable for injuries resulting when salesman's automobile was struck, was for jury.—*Dollinar v. Pedone*, supra.

Returning from dance

Miss.—*Primos v. Gulfport Laundry & Cleaning Co.*, 128 So. 507, 157 Miss 770.

23. Cal.—*Westberg v. Wilde*, 94 P. 2d 590, 14 Cal.2d 360.
Mo.—*Rainwater v. Wallace*, 174 S.W. 2d 835, 351 Mo. 1044.
Tex.—*Kifuri v. Lira*, Civ.App., 73 S. W.2d 891.

Weight of driver's declarations after accident that he had just been to bank to make a deposit for employer and was on his way back to employer was for jury.—*Gardner v.*

Marshall, 132 P.2d 833, 56 Cal.App.2d 62.

24. Idaho—*Manion v. Waybright*, 86 P.2d 181, 59 Idaho 643.
Miss.—*Bourgeois v. Mississippi School Supply Co.*, 155 So. 209, 170 Miss. 310.—*Southern Bell Telephone & Telegraph Co. v. Quick*, 149 So. 107, 167 Miss. 438.
S.C.—*Stevens v. Moore*, 46 S.E.2d 73, 211 S.C. 498.

25. Wis.—*Eckel v. Richter*, 211 N.W. 158, 191 Wis. 409

26. U.S.—*De Parcq v. Liggett & Myers Tobacco Co.*, C.C.A.Minn., 81 F. 2d 777, certiorari denied *Liggett & Myers Tobacco v. De Parcq*, 56 S. Ct. 947, 298 U.S. 680, 80 L.Ed. 1400
Ala.—*Clift v. Donegan*, 186 So. 476, 237 Ala. 304.—*Chandler v. Owens*, 179 So. 256, 235 Ala. 356.—*Nelson v. Belcher Lumber Co.*, 166 So. 808, 232 Ala. 116.

Ga.—*McGhee v. Kingman & Everett*, 176 S.E. 55, 49 Ga.App. 767.
Mo.—*Cotton v. Ship-By-Truck Co.*, 85 S.W.2d 80, 337 Mo. 270.

N.J.—*Craig v. Morgenweck*, 194 A. 188, 15 N.J. Misc. 637.
Okla.—*City of Ardmore v. Hill*, 293 P. 554, 146 Okl. 200

Destination of servant at time of accident

Ill.—*Alden v. Coultrip*, 275 Ill.App. 306.

Use of servant's automobile

Iowa.—*Heintz v. Iowa Packing Co.*, 268 N.W. 607, 222 Iowa 517.

27. Iowa.—*Heintz v. Iowa Packing Co.*, supra.

28. Ala.—*Harris v. Boll*, 176 So. 469, 234 Ala. 679.
Cal.—*Dyer v. McCorkle*, 260 P. 965, 208 Cal. 216.
Minn.—*Ballman v. Brinker*, 1 N.W.2d 365, 211 Minn. 322.

Authority to employ assistance in emergency

Minn.—*Brown v. Murphy Transfer & Storage Co.*, 251 N.W. 5, 190 Minn. 81.

Abrogation of rule prohibiting hiring Whether rule forbidding drivers to

hire helpers was abrogated by employer's acquiescence in driver's custom to hire helpers was for jury.—*Fullmer v. Scott-Powell Dairies*, 166 A. 129, 111 N.J. Law 44.

29. U.S.—*De Parcq v. Liggett & Myers Tobacco Co.*, C.C.A.Minn., 81 F. 2d 777, certiorari denied *Liggett & Myers Tobacco v. De Parcq*, 56 S. Ct. 947, 298 U.S. 680, 80 L.Ed. 1400.
Idaho—*Manion v. Waybright*, 86 P. 2d 181, 59 Idaho 643.

Ind.—*Lewis v. Young*, 180 N.E. 692, 95 Ind.App. 152

Mich.—*Nord v. West Michigan Flooring Co.*, 214 N.W. 236, 238 Mich. 669.

Minn.—*Holmes v. Lilygren Motor Co.*, 275 N.W. 416, 201 Minn. 44.

N.H.—*Burns v. Cote*, 161 A. 771, 86 N.H. 167.

N.J.—*Lawwonsky v. Joffe*, 101 N.J. Law 521, 129 A. 142, 40 A.L.R. 1335

N.C.—*Dark v. Johnson*, 36 S.E.2d 237, 225 N.C. 651.—*Boone v. Matheny*, 29 S.E.2d 687, 224 N.C. 350.—*Cole v. Johnson Motor Co.*, 9 S.E.2d 425, 217 N.C. 756.

Or.—*Albrecht v. Safeway Stores*, 80 P.2d 62, 159 Or. 331.

42 C.J. p 1257 note 87 [e]—p 1259 note 3 [d].

In ambulance

Cal.—*Carey v. City of Oakland*, 112 P.2d 714, 44 Cal.App.2d 503.

Whether occupant was trespasser in defendant's truck or whether driver had implied authority to invite occupant to ride was for jury.—*McFadden v. Pennzoll Co.*, 9 A.2d 412, 336 Pa. 301.

30. N.Y.—*Hartstein v. U. S. Trucking Corporation*, 23 N.Y.S.2d 251, 260 App.Div. 643, reargument denied 25 N.Y.S.2d 398, 260 App.Div. 1006, and 25 N.Y.S.2d 400, 260 App. Div. 1006.

31. U.S.—*De Parcq v. Liggett & Myers Tobacco Co.*, C.C.A.Minn., 81 F. 2d 777, certiorari denied *Liggett & Myers Tobacco v. De Parcq*, 56 S. Ct. 947, 298 U.S. 680, 80 L.Ed. 1400.

32. **More than scintilla** of evidence is required.—*Smith v. Mariakakis*, 36 S.E.2d 651, 226 N.C. 100.

evidence has been held insufficient to justify submission to the jury of the issue whether defendant's servant or agent was acting within the scope of his employment at the time of the accident³³ or of questions incidental thereto.³⁴ Where the evidence is undisputed and but one inference reasonably may be drawn therefrom, it is a question of

law for the court whether defendant's servant or agent was acting within the scope of his employment;³⁵ where on undisputed evidence the only reasonable inference is that the servant or agent was not acting within the scope of his employment at the time of the accident the court may so declare as a matter of law.³⁶

Evidence raising only surmise that employee, at time of collision, was acting within scope of employment was insufficient.—Pyle v. Phillips, Tex.Civ.App., 164 S.W.2d 569.

33. U.S.—Martin v. Burgess, C.C.A. Ala., 82 F.2d 321—Angro v. Standard Oil Co. of California, C.C.A. Hawaii, 66 F.2d 929.

Ala.—Gulf Refining Co. v. McNeel, 153 So. 231, 228 Ala. 302—St. Louis-San Francisco Ry. Co. v. Robins, 123 So. 12, 219 Ala. 627.

Ark.—Fooks v. Williams, 168 S.W.2d 193, 205 Ark. 119.

Cal.—Helm v. Bagley, 298 P. 826, 113 Cal.App. 602.

Ill.—Canavan v. Canavan, 271 Ill.App. 558.

Ind.—Sears v. Moran, 59 N.E.2d 566, 223 Ind. 179.

Ky.—Hendricks v. Sphire, 138 S.W.2d 984, 282 Ky. 497—Henry v. McHargue, 83 S.W.2d 38, 259 Ky. 695.

Me.—Leek v. Cohen, 38 A.2d 460, 141 Me. 18.

Md.—Wagner v. Page, 20 A.2d 164, 179 Md. 465—Lusk v. Lambert, 163 A. 188, 163 Md. 335.

Mass.—Broitman v. Silver, 169 N.E. 501, 270 Mass. 24.

Mo.—Klotsch v. P. F. Collier & Son Corporation, 159 S.W.2d 589, 319 Mo. 40—Collins v. Leahy, 146 S.W.2d 609, 347 Mo. 133—Snowwhite v. Metropolitan Life Ins. Co., 127 S.W.2d 718, 344 Mo. 705—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129—Halsey v. Metz, App., 93 S.W.2d 41.

Mont.—Wilcox v. Smith, 62 P.2d 237, 103 Mont. 182.

Neb.—Shaffer v. Thull, 25 N.W.2d 755, 147 Neb. 947.

N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

N.J.—Muckin v. Hubbs, 26 A.2d 286, 128 N.J.Law 395—Van Genderen v. Paterson Wimsett Thrift Co., 24 A.2d 223, 128 N.J.Law 41—Alexander v. Marech, 183 A. 459, 116 N.J.Law 246—Alexander v. Marech, 178 A. 278, 13 N.J.Misc. 425, affirmed 183 A. 459, 116 N.J.Law 246—Audino v. Hantman, 166 A. 698, 11 N.J. Misc. 478.

N.M.—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.

N.Y.—Schwartz v. Lawrence, 212 N.Y.S. 494, 214 App.Div. 559.

N.C.—Smith v. Mariakakis, 36 S.E.2d 651, 226 N.C. 100.

Ohio.—Arthurs v. Citizens' Coal Co.,

App. 47 N.E.2d 654—Bond Stores v. Miller, 197 N.E. 369, 49 Ohio App. 470—Metropolitan Concrete Co. v. Vitale, 188 N.E. 10, 46 Ohio App. 140—Manfroy v. Craig-Curtiss Co., 176 N.E. 230, 39 Ohio App. 91.

Or.—Summerville v. Gillespie, 179 P.2d 719—Bunch v. Standard Oil Co. of California, 23 P.2d 328, 144 Or. 1.

Pa.—Kunkel v. Vogt, 47 A.2d 195, 354 Pa. 279—Double v. Myers, 157 A. 610, 305 Pa. 266.

Tenn.—Cunningham v. Union Chevrolet Co., 147 S.W.2d 746, 177 Tenn. 214, rehearing denied 148 S.W.2d 633, 177 Tenn. 214.

Tex.—Waybourne v. Plains Chevrolet Co., Civ App., 125 S.W.2d 344—Lewis v. J. P. Word Transfer Co., Civ.App., 119 S.W.2d 106, error refused—Hudson v. Ernest Allen Motor Co., Civ App., 115 S.W.2d 1167, error dismissed—Magnolia Petroleum Co. v. Winkler, Civ App., 40 S.W.2d 831—Langford v. El Paso Baking Co., Civ App., 1 S.W.2d 476, error dismissed.

Vt.—Ronan v. J. G. Turnbull Co., 131 A. 788, 99 Vt. 280.

Va.—Buchanan v. Wilson, 165 S.E. 422, 159 Va. 49—Crowell v. Duncan, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425.

W.Va.—Smith v. Abbott, 145 S.E. 596, 106 W.Va. 119.

42 C.J. p 1259 note 3 [g].

Injury occurring on Sunday

Or.—Bunch v. Standard Oil Co. of California, 23 P.2d 328, 144 Or. 1.

Pa.—Readshaw v. Montgomery, 169 A. 135, 313 Pa. 206.

34. U.S.—Liggett & Myers Tobacco Co. v. De Parcq, C.C.A.Minn., 66 F.2d 678.

Authority of servant to carry others on vehicle

(1) Generally.

Mass.—Bruce v. Hanks, 178 N.E. 728, 277 Mass. 268—Broitman v. Silver, 169 N.E. 501, 270 Mass. 24.

N.J.—Kluber v. Pferdeort, 194 A. 154, 15 N.J.Misc. 651, affirmed 199 A. 26, 120 N.J.Law 190.

(2) Waiver of rule forbidding carriage of others.—Liggett & Myers Tobacco Co. v. De Parcq, C.C.A.Minn., 66 F.2d 678.

(3) Person on vehicle as helper or extra driver.—East Coast Freight Lines v. Mayor and City Council of Baltimore, N.J., 58 A.2d 290.

35. U.S.—Mid-Continent Pipe Line Co. v. Whiteley, C.C.A.Okl., 116 F.2d 871—Kuerner v. National Cash Register Co., D.C.Ky., 43 F. Supp. 62.

Ariz.—Brooks v. Neer, 47 P.2d 452, 46 Ariz. 144.

Cal.—Martinelli v. Stabnau, 52 P.2d 956, 11 Cal.App.2d 38—Bourne v. Northern Counties Title Ins. Co., 40 P.2d 583, 4 Cal.App.2d 69.

N.J.—Coopersmith v. Kalt, 196 A. 649, 119 N.J.Law 474—Billow v. Kaplan, 164 A. 694, 11 N.J.Misc. 108.

N.D.—Matt v. Nomland, 288 N.W. 558, 69 N.D. 552—Erickson v. Foley, 262 N.W. 177, 65 N.D. 737.

Tex.—Humble Oil & Refining Co. v. Ooley, Civ App., 46 S.W.2d 1038, error dismissed.

36. Ala.—Cruse-Crawford Mfg. Co. v. Rucker, 123 So. 897, 220 Ala. 101—Southern Ry. Co. v. Carlton, 118 So. 458, 218 Ala. 265.

Ariz.—Otero v. Soto, 267 P. 947, 34 Ariz. 87.

Conn.—Eldredge v. Geer, 163 A. 761, 116 Conn. 116.

Ga.—Stenger v. Mitchell, 28 S.E.2d 885, 70 Ga App. 563—Nichols v. G. L. Hight Motor Co., 15 S.E.2d 805, 65 Ga App. 397—Eason v. Joy Floral Co., 130 S.E. 352, 34 Ga App. 501.

Ill.—Nelson v. Stutz Chicago Factory Branch, 173 N.E. 394, 341 Ill. 387—Lohr v. H. Barkmann Cartage Co., 167 N.E. 35, 335 Ill. 335—Paulsen v. Cochfield, 278 Ill App. 596—Burster v. National Refining Co., 274 Ill. App. 104.

Ky.—R. L. Jeffries Truck Line v. Brown, 197 S.W.2d 904, 303 Ky. 405—Sharp v. Faulkner, 166 S.W.2d 62, 292 Ky. 179—Wheeldon v. Regenhart Const. Co., 145 S.W.2d 527, 284 Ky. 603—Spencer's Adm'r v. Fisel, 71 S.W.2d 955, 254 Ky. 503—Corbin Fruit Co. v. Decker, 68 S.W.2d 434, 252 Ky. 766.

Md.—Wells v. Hecht Bros. & Co., 142 A. 258, 155 Md. 618—Nattans v. Cotton, 133 A. 270, 150 Md. 466.

Mich.—Morrow v. Trathen, 284 N.W. 687, 288 Mich. 172.

Minn.—Lund v. Olson, 237 N.W. 188, 183 Minn. 515.

Miss.—Brown v. Bond, 1 So.2d 794, 190 Miss. 774—Brand v. Tinnin, 200 So. 588, 190 Miss. 412.

Mo.—Snowwhite v. Metropolitan Life Ins. Co., 127 S.W.2d 718, 344 Mo. 705.

Mont.—Gagnon v. Jones, 62 P.2d 683, 103 Mont. 365.

Deviation from course of employment. Whether there has been a deviation so material or substantial as to constitute a complete departure usually is a question of fact,³⁷ but where the conclusion to be drawn from the nature and extent of the deviation is not doubtful, the question is one of law.³⁸

Where deviation from the course of his employment by the servant is slight and not unusual, the court may, as a matter of law, find that the servant was still executing his master's business.³⁹ On the other hand, if the deviation is very marked

and unusual the court may determine that the servant was not on the master's business.⁴⁰ Cases falling between these extremes will be regarded as involving a question of fact for the determination of the jury;⁴¹ where the deviation is uncertain in extent and degree, or where the surrounding facts and circumstances leave room for legitimate inferences as to whether or not, notwithstanding the deviation, the servant may still be engaged in the master's business within the scope of his general employment, the question is for the jury, or for the trial court in actions tried without a jury.⁴² Where there has been a deviation or de-

N.J.—Blackman v. Atlantic City & S. R. Co., 19 A.2d 807, 126 N.J.Law 458—Coopersmith v. Kalt, 196 A. 649, 119 N.J.Law 474—Kirrer v. Bromberg, 172 A. 498, 113 N.J.Law 98—Okin v. Essex Sales Co., 135 A. 821, 103 N.J.Law 217, affirmed 138 A. 922, 104 N.J.Law 181—Katz v. Essex Sales Co., 135 A. 821, 103 N.J.Law 217, affirmed 138 A. 921, 104 N.J.Law 174.

N.Y.—Ringhoff v. Lincoln Service, 45 N.Y.S.2d 771, 267 App Div. 824, reargument denied 47 N.Y.S.2d 132, 267 App Div. 871.

N.C.—Riddle v. Whisnant, 16 S.E.2d 698, 220 N.C. 131.

Okl.—Foster v. Colonial Stores, 74 P.2d 114, 181 Okl. 414—Heard v. McDonald, 43 P.2d 1026, 172 Okl. 180—De Camp v. Comerford, 272 P. 475, 134 Okl. 145.

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114—Bunnell v. Parelus, 87 P.2d 230, 160 Or. 673—Brown v. Fields, 83 P.2d 144, 160 Or. 23—Kantola v. Lovell Auto Co., 72 P.2d 61, 157 Or. 531.

R.I.—Haining v. Turner Centre System, 149 A. 376, 50 R.I. 481—Anderson v. Miller, 142 A. 616.

Tenn.—Home Stores v. Parker, 166 S.W.2d 619, 179 Tenn. 372—Stewart v. Hoffmeister, 65 S.W.2d 220, 16 Tenn.App. 495.

Tex.—Renfro v. Elam, Civ.App., 117 S.W.2d 133, error refused—Houston News Co. v. Shavers, Civ.App., 64 S.W.2d 384, error refused—Texas News Co. v. Lake, Civ.App., 58 S.W.2d 1044, error dismissed.

Va.—Master Auto Service Corporation v. Bowden, 19 S.E.2d 679, 179 Va. 507.

42 C.J. p 1258 note 88 [c]—p 1259 note 4 [a].

37. Cal.—Dollnar v. Pedone, 146 P.2d 237, 63 Cal.App.2d 169—Gayton v. Pacific Fruit Express Co., 15 P.2d 217, 127 Cal.App. 50.

Conn.—Heckson v. W. W. Walker Co., 149 A. 400, 110 Conn. 604, 68 A.L.R. 1044.

38. Ga.—Causcy v. Swift & Co., 10 S.E.2d 238, 62 Ga.App. 893.

Ill.—Boehmer v. Norton, 65 N.E.2d

212, 328 Ill.App. 17—McCarthy v. Rorrison, 283 Ill.App. 129.

Mo.—Klotsch v. P. F. Collier & Son Corporation, 159 S.W.2d 589, 349 Mo. 40.

39. Cal.—Dollnar v. Pedone, 146 P.2d 237, 63 Cal.App.2d 169—Wagnitz v. Scharetg, 265 P. 318, 89 Cal.App. 511.

Ill.—Kovell v. North Roseland Motor Sales, 275 Ill.App. 566.

Neb.—Dafoe v. Grantski, 9 N.W.2d 488, 143 Neb. 341.

S.C.—Stevens v. Moore, 46 S.E.2d 73, 211 S.C. 498.

40. Cal.—Wagnitz v. Scharetg, 265 P. 318, 89 Cal.App. 511.

Fla.—Western Union Telegraph Co. v. Michel, 163 So. 86, 120 Fla. 511.

Ill.—Kovell v. North Roseland Motor Sales, 275 Ill.App. 566.

Md.—National Trucking & Storage v. Durkin, 39 A.2d 687, 183 Md. 584.

Neb.—Dafoe v. Grantski, 9 N.W.2d 488, 143 Neb. 344.

S.C.—Stevens v. Moore, 46 S.E.2d 73, 211 S.C. 498.

41. Cal.—Wagnitz v. Scharetg, 265 P. 318, 89 Cal.App. 511.

Ill.—Kovell v. North Roseland Motor Sales, 275 Ill.App. 566.

Neb.—Dafoe v. Grantski, 9 N.W.2d 488, 143 Neb. 344.

S.C.—Stevens v. Moore, 46 S.E.2d 73, 211 S.C. 498.

42. U.S.—Baker Driveaway Co. v. Clark, C.C.A.W.Va., 162 F.2d 181.

Ark.—Rex Oil Corporation v. Crank, 38 S.W.2d 1093, 183 Ark. 819.

Cahill v. Bradford, 287 S.W. 595, 172 Ark. 69.

Cal.—Gayton v. Pacific Fruit Express Co., 15 P.2d 217, 127 Cal.App. 50.

Ga.—Atlanta Laundries v. Goldberg, 30 S.E.2d 349, 71 Ga.App. 130.

Parker v. Smith, 18 S.E.2d 559, 66 Ga.App. 567.

Ill.—Tobin v. Consolidated Freight Co., 79 N.E.2d 636, 334 Ill.App. 394.

—Stix, Baer & Fuller Co. v. Woesthaus Motor Co., 1 N.E.2d 796, 284 Ill.App. 301—Gillis v. Jurzyna, 1 N.E.2d 763, 284 Ill.App. 174.

Kovell v. North Roseland Motor Sales, 275 Ill.App. 566.

Ky.—Dennes v. Jefferson Meat Mar-

ket, 14 S.W.2d 408, 228 Ky. 164.

Md.—National Trucking & Storage v. Durkin, 39 A.2d 687, 183 Md. 584.

Mich.—Phillips v. Fotheringham, 269 N.W. 600, 277 Mich. 566.

Mo.—Klotsch v. P. F. Collier & Son Corporation, 159 S.W.2d 589, 349 Mo. 40—Chastain v. Winton, 152 S.W.2d 165, 347 Mo. 1211—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo.App. 210—Cable v. Johnson, App., 63 S.W.2d 433.

Mont.—Meinecke v. Intermountain Transp. Co., 55 P.2d 680, 101 Mont. 315.

Neb.—Dafoe v. Grantski, 9 N.W.2d 488, 143 Neb. 344.

N.J.—Wasserman v. Schnoll, 28 A.2d 883, 129 N.J.Law 224, affirmed Wasserman v. Schwartz, 31 A.2d 820, 130 N.J.Law 176—Arrington v. White, 19 A.2d 627, 126 N.J.Law 551—Celdonio v. A. Z. Motors Co., 2 A.2d 877, 121 N.J.Law 377—Trojan v. Brennan, 187 A. 138, 117 N.J.Law 110—Bedell v. Mandel, 155 A. 383, 108 N.J.Law 22—Dunne v. Hely, 140 A. 327, 104 N.J.Law 81.

N.C.—Parrott v. Kantor, 6 S.E.2d 40, 216 N.C. 584.

N.D.—Kohlman v. Hvland, 210 N.W. 643, 54 N.D. 710, 50 A.L.R. 1137.

Ohio.—Edwards v. Benedict, 70 N.E.2d 471, 79 Ohio App. 134.

Okl.—Modern Motors v. Elkins, 113 P.2d 969, 189 Okl. 134.

Pa.—Marsh v. Mertz, Com.Pl., 32 Luz.Leg Reg. 97.

S.C.—Carroll v. Beard-Laney, Inc., 35 S.E.2d 425, 207 S.C. 339.

Tex.—English Freight Co. v. Preston, Civ.App., 203 S.W.2d 657—Gammill v. Mullins, Civ.App., 188 S.W.2d 986, error dismissed.

42 C.J. p 1257 note 87 [d]—p 1259 note 8 [c].

Stopping for meals

Ariz.—Cox v. Enloe, 70 P.2d 331, 50 Ariz. 201.

Cal.—Loper v. Morrison, 145 P.2d 1, 23 Cal.2d 600—Cain v. Marquez, 88 P.2d 200, 31 Cal.App.2d 430.

Ga.—Causcy v. Swift & Co., 196 S.E.2d 228, 57 Ga.App. 604.

parture from the master's business and the scope of the servant's employment, and where such personal purpose and benefit have been fully accomplished and the servant is in the process of returning to the sphere of his master's business, the question as to whether he was acting within the scope of his employment at the time of the injury is a question for the jury.⁴³

Effect of presumptions. The presumption that defendant's servant or agent was acting in the scope of his employment arising from proof that the motor vehicle was owned by defendant and was being operated by one of his servants or agents at the time of the accident, considered supra § 511 (6) d, is sufficient to take the issue of scope of employment to the jury,⁴⁴ although it has

been held that evidence that the driver of a motor vehicle was in the general employ of defendant at the time of the accident and that defendant owned the vehicle is not sufficient, in the absence of other evidence, to carry to the jury the issue whether the driver was acting within the scope of his employment.⁴⁵

Where the evidence in rebuttal of the presumption is itself contradicted, or different inferences reasonably may be drawn from the evidence, the question is for the jury, or for the trial court in actions tried without a jury;⁴⁶ but where the rebuttal evidence is undisputed and but one inference reasonably may be drawn therefrom it is generally a question of law for the court.⁴⁷ In some jurisdictions, however, the presumption or infer-

Ill.—Moran v. Borden Co., 33 N.E.2d 166, 309 Ill.App. 391

Md.—McDowell, Pyle & Co v. Magazine Service, 164 A. 148, 164 Md. 170.

Mass.—Thomes v. Meyer Store, 168 N.E. 178, 268 Mass. 587

Miss.—Southern Bell Telephone & Telegraph Co v. Quick, 149 So. 107, 167 Miss. 438.

Taking injured person to hospital
N.J.—Axford v. Purity Bakeries Corporation, 178 A. 788, 115 N.J.Law 166—Axford v. Purity Bakeries Corporation, 172 A. 383, 112 N.J.Law 594.

Truck driver's deviation of one-half mile from his authorized route was not as matter of law complete departure from scope of employment—Hickson v. W. W. Walker Co., 149 A. 400, 110 Conn. 604, 68 A.L.R. 1044.

43. U.S.—Baker Driveway Co. v. Clark, C.C.A.W.Va., 162 F.2d 181.

Ala.—Mobile Pure Milk Co. v. Coleman, 161 So. 826, 26 Ala.App. 402, certiorari denied 161 So. 829, 230 Ala. 432.

Me.—Pearl v. Cumberland Sand & Gravel Co., 31 A.2d 413, 139 Me. 411.

Mo.—Martin v. Bulgin, App., 111 S.W.2d 963.

Utah.—Carter v. Bessey, 93 P.2d 490, 97 Utah 427.

44. Mo.—Kaufman v. Baden Ice Cream Mfrs., App., 7 S.W.2d 298.

Or.—Foster v. Farra, 243 P. 778, 117 Or. 286.

42 C.J. p 1258 note 91.

Defendant's name on vehicle

Presumption that driver of taxicab is acting within scope of employment of company whose name appears on cab, if standing alone, makes prima facie case, and, if uncontradicted, presents issue for jury.—Simon v. City Cab Co., 78 F.2d 506, 64 App.D.C. 364, certiorari denied 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 456.

45. Mass.—Washburn v. R. F. Owens Co., 147 N.E. 564, 252 Mass. 47.

46. U.S.—Standard Coffee Co. v. Trippet, C.C.A.Tex., 108 F.2d 161—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514

Ala.—Craft v. Koonce, 187 So. 730, 237 Ala. 552—William E. Harden, Inc., v. Harden, 197 So. 94, 29 Ala.App. 411.

Ark.—Ford & Son Sanitary Co. v. Ransom, 210 S.W.2d 508—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912—Mullins v. Ritchie Grocer Co., 35 S.W.2d 1010, 183 Ark. 218

Idaho.—Manion v. Waybright, 86 P.2d 181, 59 Idaho 643.

Ky.—Sharp v. Faulkner, 166 S.W.2d 62, 292 Ky. 179—Rawlings v. Clay Motor Co., 154 S.W.2d 711, 287 Ky. 604—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841.

La.—Brown v. Indemnity Ins. Co. of North America, App., 178 So. 768

Neb.—Berggren v. Hannan, Odell & Van Brunt, Inc., 215 N.W. 556, 116 Neb. 18.

N.J.—Trojan v. Brennan, 187 A. 138, 117 N.J.Law 110—Fullmer v. Scott-Powell Dairies, 166 A. 129, 111 N.J.Law 44—Crowell v. Padolsky, 120 A. 23, 98 N.J.Law 552.

Ohio.—Reichard v. Red Cab Co., 16 Ohio Supp. 3.

Okl.—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36—Claxton v. Page, 124 P.2d 977, 190 Okl. 442.

Tex.—Poe Motor Co. v. Martin, Civ. App., 201 S.W.2d 102.

Wash.—Davis v. Browne, 147 P.2d 263, 20 Wash.2d 219—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.

Ordinarily jury question

Or.—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 375.

Where controverting testimony is that of disinterested witnesses, case is for jury where such testimony itself is controverted and impeached, or if it is not free from inherent improbabilities or it is not so clear and convincing that but one conclusion could be drawn from it.—Ehason v. Geil, 132 P.2d 158, 114 Mont. 97.

Essentials for directed verdict

(1) In order to warrant directed verdict for employer who admitted ownership of truck, presumption that driver was acting within scope of employment at time of collision must have been overcome by uncontradicted proof to contrary.—Fullmer v. Scott-Powell Dairies, 166 A. 129, 111 N.J.Law 44.

(2) Defendant, offering proof to contrary, was not entitled to directed verdict, unless such proof was uncontradicted in all material respects, free from inherent improbabilities, and so clear and convincing that but one conclusion could be drawn from its consideration—Claxton v. Page, 124 P.2d 977, 190 Okl. 422.

Consideration on demurrer of facts raising presumption

Although presumption that driver was acting in scope of employment at time of accident arising from proof of ownership of automobile by defendant and that driver was in defendant's general employ may be overcome on appearance in evidence of facts themselves, evidence which gave rise to such presumption remains in the case for consideration of trial court on demurrer.—State ex rel. Waters v. Hostetter, 126 S.W.2d 1164, 344 Mo. 443, mandate of Supreme Court conformed to Waters v. Hays, App., 130 S.W.2d 220.

47. U.S.—Standard Accident Ins. Co. v. Rivet, C.C.A.La., 89 F.2d 74.

Ala.—Craft v. Koonce, 187 So. 730, 237 Ala. 552—Grimes v. Fulmer, 180 So. 321, 235 Ala. 645, followed in 180 So. 323, 235 Ala. 664, and

ence that a servant or agent was acting within the scope of his employment arising from proof of ownership of the vehicle and operation by the agent or servant is not destroyed or overcome as a matter of law because it is contradicted by defendant's evidence, but the issue remains one of fact for the determination of the jury,⁴⁸ for the reason that, as sole judges of the weight of the evidence and credibility of the witnesses, the jury are not bound to accept such testimony as true, but may, if not convinced thereby, reject any portion or the whole thereof;⁴⁹ and it has been held that the case is for the jury where the evidence controverting the presumption comes from interested witnesses.⁵⁰

(4) Independent Contractor

On conflicting evidence or where different inferences may reasonably be drawn from the evidence, it is for the jury to determine whether the operator of a motor vehicle was employed by the defendant or was an independent contractor.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the jury, or for the trial court in actions tried without a jury, whether the person operating the motor vehicle was employed by defendant or was an independent contractor.⁵¹ On such evidence it is for the jury or trial court to determine whether

183 So. 924, 28 Ala.App. 630—Mobile Pure Milk Co. v. Coleman, 161 So. 829, 230 Ala. 432, denying certiorari 161 So. 826, 26 Ala.App. 403—Walker v. Stephens, 127 So. 668, 221 Ala. 18—McCormack Bros. Motor Car Co. v. Holland, 118 So. 387, 218 Ala. 200—Freeman v. Southern Life & Health Ins. Co., 98 So. 461, 210 Ala. 459—Bruner v. Eubanks, 33 So.2d 374, 33 Ala. App. 266, certiorari denied 33 So. 2d 376—United Wholesale Grocery Co. v. Minge Floral Co., 142 So. 586, 25 Ala.App. 153, certiorari denied 142 So. 587, 225 Ala. 160.
 Ariz.—Silva v. Traver, 162 P.2d 615, 63 Ariz. 364—Flores v. Tucson Gas, Electric Light & Power Co., 97 P. 2d 206, 54 Ariz. 460—Otero v. Soto, 267 P. 947, 34 Ariz. 87.
 Ark.—Ford & Son Sanitary Co. v. Ransom, 210 S.W.2d 508—Casteel v. Yantis-Harper Tire Co., 39 SW 2d 306, 183 Ark. 912—Mullins v. Ritchie Grocer Co., 35 S.W.2d 1010, 183 Ark. 218.
 Idaho.—Manion v. Waybright, 86 P. 2d 181, 59 Idaho 643.
 Ind.—Frick v. Bickel, 54 N.E.2d 436, 115 Ind.App. 114, motion denied 57 N.E.2d 62, 222 Ind. 610.
 Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841.
 Md.—National Trucking & Storage v. Durkin, 39 A.2d 687, 183 Md. 584—Wells v. Hecht Bros. & Co., 142 A. 258, 155 Md. 618—Nattans v. Cotton, 133 A. 270, 150 Md. 466—International Co. v. Clark, 127 A. 647, 147 Md. 34.
 Neb.—Wise v. Grainger Bros. Co., 246 N.W. 733, 124 Neb. 391—Ebers v. Whitmore, 241 N.W. 126, 122 Neb. 653.
 N.J.—Goglia v. Janssen Dairy Co., 184 A. 814, 116 N.J.Law 396.
 Okl.—Norton v. Harmon, 183 P.2d 206, 192 Okl. 86—Claxton v. Page, 124 P.2d 977, 190 Okl. 422.
 Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520—Pyle v. Phillips, Civ.App. 164 S.W.2d 569—Alfano v. Interna-

tional Harvester Co. of America, Civ.App., 121 S.W.2d 466, error dismissed.
 Wash.—Carlson v. Wolski, 147 P.2d 291, 20 Wash.2d 323—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28—Feldtman v. Rusak, 251 P. 572, 141 Wash. 287.
 42 C.J. p 1258 note 92.

Undisputed evidence of driver's deviation from scope of employment overcomes inference arising from evidence of employer's ownership of vehicle and general employment of driver that he was acting within scope of his employment at time of collision, and there is nothing to submit to jury, whether evidence of such deviation is introduced during plaintiff's or defendant's case—Reichard v. Red Cab Co., 16 Ohio Supp. 3.

Evidence on cross-examination

Plaintiff's uncontroverted evidence, brought out on cross-examination rebutting presumption of minor son's agency to drive father's automobile, was subject to demurrer to the evidence—Carder v. Martin, 250 P. 906, 120 Okl. 178.

Only in exceptional cases can court say as matter of law that inference or presumption that driver of motor vehicle belonging to another is other's servant, and that vehicle is being used for other's purposes, has been overcome by force and effect of other evidence—Ellenberger v. Fremont Land Co., 107 P.2d 837, 165 Or. 375.

Additional evidence in aid of presumption

If there is no evidence for plaintiff except bare minimum required to support presumption that driver of automobile involved in accident was acting in scope of employment arising from proof of ownership of automobile by defendant and that driver was in defendant's general employ, if such presumption is destroyed underlying evidence alone will not be enough to make prima facie case for jury, but if there is other evidence,

it may aid that required to raise presumption—State ex rel Waters v. Hostetter, 126 S.W.2d 1164, 344 Mo. 443, mandate of Supreme Court conformed to Waters v. Hays, App., 130 S.W.2d 220.

Defendant's name on vehicle

Mo.—Arnold v. Haskins, 147 S.W.2d 469, 347 Mo. 320.

48. U.S.—Caros v. Johnston, D.C. Pa., 51 F.Supp. 75.

Cal.—Westberg v. Willde, 91 P.2d 590, 14 Cal.2d 360—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal. App.2d 477—Bushnell v. Yoshika Tashiro, 2 P.2d 550, 115 Cal.App. 563.

N.Y.—Schultze v. McGuire, 150 N.E. 516, 241 N.Y. 460—Glasgow v. Weldt, 218 N.Y.S. 115, 218 App.Div. 749—Freeman v. Hyman, 159 N.Y.S. 774, 95 Misc. 591—Frankel v. Chappal, 165 N.Y.S. 441.

Pa.—Dugan v. McGara's, Inc., 25 A. 2d 718, 344 Pa. 460.

Vehicle bearing dealer's license

Pa.—Frew v. Barto, 26 A.2d 905, 345 Pa. 217—Conley v. Mervis, 188 A. 350, 324 Pa. 577, 108 A.L.R. 160.

49. Cal.—Bushnell v. Yoshika Tashiro, 2 P.2d 550, 115 Cal.App. 563.

50. Mont.—Ellason v. Geil, 132 P.2d 158, 114 Mont. 97.

Wash.—Smith v. Eldridge Motors, 90 P.2d 257, 199 Wash. 10, opinion adhered to 93 P.2d 1120, 199 Wash. 10—Steiner v. Royal Blue Cab Co., 20 P.2d 39, 172 Wash. 396—Stam v. Johnson, 17 P.2d 4, 170 Wash. 534, adhered to 23 P.2d 1118, 173 Wash. 700—Vernarelli v. Sweikert, 213 P. 482, 123 Wash. 694.

Interested witnesses

Defendant automobile owner's employees, although not parties to action, were interested witnesses within rule.—Steiner v. Royal Blue Cab Co., 20 P.2d 39, 172 Wash. 396.

51. Cal.—Lowmiller v. Monroe, Lyon & Miller, 281 P. 433, 101 Cal.App. 147, followed in Colclough v. Monroe, Lyon & Miller, 281 P. 434, 101 Cal.App. 791, and rehearing denied

the operator of the motor vehicle was an independent contractor or an employee of defendant where the vehicle was owned by defendant⁵² or where it was owned or furnished by the operator or a third person.⁵³ In instances where liability may be imposed for the acts of an independent con-

Lowmiller v. Monroe, Lyon & Miller, 282 P. 537, 101 Cal.App. 147—Dillon v. Prudential Ins. Co. of America, 242 P. 736, 75 Cal.App. 266.

Idaho.—Joslin v. Idaho Times Pub. Co., 91 P.2d 386, 60 Idaho 235.

Ill.—Shannon v. Nightingale, 151 N. E. 573, 321 Ill. 168.

Mo.—Knudsen v. Kansas City Public Service Co., App., 141 S.W.2d 252.

N.J.—Scarano v. Lindale, 3 A.2d 633, 121 N.J.Law 549.

Okl.—Ottinger v. Morris, 104 P.2d 254, 187 Okl. 517.

Or.—McKav v. Pacific Building Materials Co., 68 P.2d 127, 156 Or. 578—Roemhild v. Home Ins. Co., 278 P. 87, 130 Or. 50.

Tex.—Commercial Credit Co. v. Groseclose, Civ App., 66 S.W.2d 709, error dismissed—Dr Pepper Bottling Co. v. Rainholdt, Civ App., 40 S.W.2d 827, error dismissed. 42 C.J. p 1259 note 5

Ordinarily jury question

Cal.—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 36 Cal App 2d 700

Mixed question of law and fact for jury

N.C.—Harris v. Carter, 41 S.E.2d 764, 227 N.C. 262.

Attorney employed by insurance company for investigation

Cal.—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 36 Cal App 2d 700.

Collectors

U.S.—Waggaman v. General Finance Co. of Philadelphia, C.C.A.Pa., 116 F.2d 254.

Tenn.—Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 24 Tenn. App. 487.

Insurance solicitor

Tenn.—Morrison v. National Life & Accident Ins. Co., 162 S.W.2d 497, 179 Tenn. 18.

Newspaper carrier

Idaho.—Joslin v. Idaho Times Pub. Co., 91 P.2d 386, 60 Idaho 235.

Mo.—Semper v. American Press, 273 S.W. 186, 217 Mo.App. 55.

Person assisting in removing truck from street

N.J.—Molnar v. Hildebrecht Ice Cream Co., 164 A. 300, 110 N.J. Law 246.

Road grader operator

N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.

Salesmen

Cal.—Everett v. Howard Buick Co., 59 P.2d 506, 15 Cal App.2d 544.

Iowa.—Heintz v. Iowa Packing Co., 268 N.W. 607, 222 Iowa 517.

N.Y.—Gutov v. Krasne, 42 N.Y.S.2d 20, 266 App Div. 302, affirmed 55 N.E.2d 372, 292 N.Y. 602.

Okl.—Modern Motors v. Elkins, 113 P.2d 969, 189 Okl. 134.

Tenn.—Ely v. Rice Bros., 167 S.W.2d 355, 26 Tenn.App. 19.

Tex.—Walter v. Irvin, Inc., v. Vogel, Civ.App., 158 S.W.2d 93, error refused.

Wash.—Cullen v. Kimbro, 16 P.2d 445, 170 Wash. 314.

Truckers

U.S.—Ryan-Richards, Inc., v. Whitesides, C.C.A. Okl., 96 F.2d 826

Ark.—Ozan Lumber Co. v. Tidwell, 198 S.W.2d 182, 210 Ark. 942—Warren v. Hale, 158 S.W.2d 51, 203 Ark. 608—Hobbs-Western Co. v. Carmical, 91 S.W.2d 605, 192 Ark. 59.

Conn.—Tierney v. Correia, 180 A. 282, 120 Conn. 140.

Iowa.—Sanford v. Goodridge, 13 N.W. 2d 40, 234 Iowa 1036

Miss.—Wilkins v. Coggin, 152 So. 871, 169 Miss. 442

Mo.—Cameron v. Howerton, 174 S.W.2d 206—Chase v. American Press Brick Co., App., 31 S.W.2d 246—Renfro v. Cental Coal & Coke Co., 19 S.W.2d 766, 223 Mo App 1219.

Tenn.—Greer v. McKee, 13 Tenn App. 625.

52. Ark.—Boone v Massey, 205 S.W.2d 454, 212 Ark 280.

Or.—Fleming v. Ambulance Co., 62 P.2d 1331, 155 Or 351, rehearing denied 61 P.2d 519, 155 Or 351

Wash.—Smith v. Ludwig, 132 P.2d 735, 16 Wash 2d 155.

42 C.J. p 1259 note 5.

Liability of owner of motor vehicle for acts of independent contractor see supra § 438.

Garage man or his employee

Mo.—Andres v. Cox, 23 S.W.2d 1066, 223 Mo App. 1139

R.I.—Conant, for Use and Benefit of Indemnity Ins. Co of North America, v. Giddings, 13 A.2d 517, 65 R.I. 79.

42 C.J. p 1259 note 5 [a].

Person employed to repair automobile

Mo.—Matlocks v. Emerson Drug Co., App., 33 S.W.2d 142.

Salesman

Ga.—Nichols v. G. L. Hight Motor Co., 10 S.E.2d 439, 63 Ga.App. 155.

42 C.J. p 1259 note 5 [c].

53. Ark.—Ellis & Lewis v. Warner, 20 S.W.2d 320, 180 Ark. 53.

Conn.—Tierney v. Correia, 180 A. 282, 120 Conn. 140.

Ky.—Vansant v. Holbrook's Adm'r, 146 S.W.2d 337, 285 Ky. 88.

Mich.—Hazard v. Great Central Transport Corporation, 258 N.W. 210, 270 Mich. 60.

Mo.—Mattan v. Hoover Co., 166 S.W.2d 557, 350 Mo 506.

Wash.—Carlson v. P. F. Collier & Son Corporation, 67 P.2d 842, 190 Wash. 301.

Liability of master or principal of operator see supra §§ 450-454.

Insurance district agent

Tenn.—Knight v. Hawkins, 173 S.W.2d 163, 26 Tenn.App. 448.

Mechanic employed to install weather stripping

Minn.—Robertson v. Olson, 232 N.W. 43, 181 Minn 240.

Newspaper carriers

Cal.—Burlingham v. Gray, 137 P.2d 9, 22 Cal 2d 87—Robinson v. George, 105 P.2d 914, 16 Cal.2d 238.

Mo.—Hoelker v. American Press, 296 S.W. 1008, 317 Mo 64

Operator of wrecker automobile

Ind.—Jones v. Bergman, 15 N.E.2d 740, 105 Ind App. 429.

Real estate broker

N.Y.—Shinbaum v. Murphy, 41 N.E.2d 85, 287 N.Y. 529.

Rental agency manager

Mo.—Wendt v. Holbrook-Blackwelder Real Estate Trust Co., App., 299 S.W. 66.

Salesmen

(1) Generally.

Ill.—Friesser v. Reynolds & Reynolds Co., 33 NE 2d 635, 309 Ill. App 577—Katsinas v. Colgate-Palmolive Peet Co., 20 N.E.2d 127, 299 Ill App. 347.

Ind.—Van Drake v. Thomas, 38 N.E.2d 878, 110 Ind App 586.

S.C.—Rosamond v. Lucas Kidd Motor Co., 189 S.E. 641, 182 S.C. 331.

(2) Automobile salesman—George v. Chaplin, 279 P. 485, 99 Cal.App. 709

(3) Radio salesman—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189.

(4) Vacuum cleaner salesman.—Mattan v. Hoover Co., 166 S.W.2d 557, 350 Mo. 506.

Truckers

U.S.—Eldridge v. McGeorge, C.C.A. Ark., 99 F.2d 835.

Ark.—Ellis & Lewis v. Warner, 20 S.W.2d 320, 180 Ark 53.

Md.—Maryland Casualty Co. v. Sause, 57 A.2d 801.

Mich.—Lewis v. Summers, 294 N.W. 82, 295 Mich. 20.

N.Y.—Hennessy v. Walker, 17 N.E.2d 782, 279 N.Y. 94, 119 A.L.R. 1029.

N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271.

Ohio.—Snodgrass v. Cleveland Co-op. Coal Co., 167 N.E. 493, 31 Ohio App. 470.

tractor, the liability of defendant for such acts is a question to be submitted to the jury where the evidence is conflicting or where different inferences may reasonably be drawn from the evidence.⁵⁴

The evidence must be legally sufficient to justify submission to the jury, and in various cases the evidence has been held insufficient to take to the jury the question whether the operator of a motor vehicle was an independent contractor,⁵⁵ or whether the relationship of employer and employee existed,⁵⁶ or whether the driver of a towing car was the employee of the owner of the car being towed,⁵⁷ or whether the work delegated to the contractor was hazardous,⁵⁸ or whether there was negligence in the selection of the contractor.⁵⁹ Where there is no conflict in the evidence, and the evidence as a whole reasonably is susceptible of but a single inference, it is a question of law whether the relationship is that of employer and employee or independent contractor;⁶⁰ where from the uncontradicted evidence the only reasonable inference is

that the operator was an independent contractor, the court will so declare as a matter of law.⁶¹

Where the contract of hiring is not in writing and can be shown only by parol evidence, the determination of its terms is for the jury,⁶² but, where the contract is in writing, the question whether the relationship of employer and independent contractor exists ordinarily is a question of law to be determined by the terms of the contract itself.⁶³

(5) Members of Owner's Family

On conflicting evidence or where different inferences may reasonably be drawn from the evidence, it is for the jury to determine whether the member of the defendant's family who negligently operated the defendant's motor vehicle was acting with his consent or permission.

Where the evidence is legally sufficient and is conflicting, it is a question for the jury, or for the trial court in actions tried without a jury, whether the member of defendant's family who negligently drove defendant's car resulting in injuries to another was doing so with permission from him,⁶⁴

S.D.—*Biggins v. Wagner*, 245 N.W. 385, 60 SD 581, 85 A.L.R. 776.

Tex.—*Dave Lehr, Inc., v. Brown*, Civ. App., 58 S.W.2d 886, reversed on other grounds 91 S.W.2d 693, 127 Tex. 236.—*Dr. Pepper Bottling Co. v. Rainholdt*, Civ. App., 40 S.W.2d 827, error dismissed.

Wis.—*Mann v. Reliable Transit Co.*, 259 N.W. 415, 217 Wis. 465.

54. Mass.—*Barry v. Keeler*, 76 N.E. 2d 158, 322 Mass. 114.

Nondelegable work

Where child was killed by motor-truck during excavating work, and nature of work involved backing of heavy dump trucks across public sidewalk, question of fact was presented whether duty or care imposed on landowner in performance of such work was nondelegable on independent contractor which performed the work and whether owner met standard of care thus required so as to make owner liable.—*Katapodis v. La Salle Trucking Corporation*, 56 N.E. 2d 562, 293 N.Y. 229.

55. Ky.—*Sympson Bros. Coal Co. v. Coomes*, 58 S.W.2d 594, 248 Ky. 324.

Mo.—*Linton v. St. Louis Lightning Rod Co.*, App., 285 S.W. 183.

53. Mo.—*Galentine v. Borglum*, 150 S.W.2d 1088, 235 Mo.App. 1141.

Mont.—*Harrington v. H. D. Lee Mercantile Co.*, 33 P.2d 553, 97 Mont. 40.

57. Cal.—*Walton v. Donohue*, 233 P. 76, 70 Cal.App. 309.

58. Tex.—*Moore v. Roberts*, Civ. App., 93 S.W.2d 236, error refused.

59. Tex.—*Moore v. Roberts*, *supra*.

60. Ga.—*McGhee v. Kingman & Everett*, 176 S.E. 55, 49 Ga.App. 767. Ill.—*Ryan v. Associates Inv. Co. of Illinois*, 18 N.E.2d 47, 297 Ill.App. 541.

Ind.—*Brechbiel v. Hentgen*, 8 N.E.2d 1007, 103 Ind.App. 481.

Mo.—*Cholet v. Phillips Petroleum Co.*, App., 71 S.W.2d 799.

N.C.—*Harris v. Carter*, 41 S.E.2d 764, 227 N.C. 262.

Tenn.—*National Cash Register Co. v. Leach*, 3 Tenn.App. 411.

Tex.—*Schroeder v. Rainholdt*, 97 S.W.2d 679, 128 Tex. 269.—*Alexander Film Co. v. Williams*, Civ.App., 102 S.W.2d 514.

Wis.—*Kruse v. Weigand*, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, *Smith v. Weigand*, 235 N.W. 431, 204 Wis. 207, *Smith v. Weigand*, 235 N.W. 431, two cases, 204 Wis. 208, and *Woodard v. Weigand*, 235 N.W. 432, 204 Wis. 209.

42 C.J. p 1260 note 8.

61. Cal.—*Crouch v. Gilmore Oil Co.*, 54 P.2d 709, 5 Cal.2d 330.

Mo.—*Barnes v. Real Silk Hosiery Mills*, 108 S.W.2d 58, 341 Mo. 563.

N.Y.—*Bralce v. Saunders*, 30 N.Y.S. 2d 223, 262 App.Div. 968, reargument denied 31 N.Y.S.2d 302, 263 App.Div. 724.

Okl.—*Ellis & Lewis v. Trimble*, 57 P. 2d 244, 177 Okl. 5.

Garage employee

U.S.—*Stanolind Oil & Gas Co. v. Trosclair*, C.C.A.La., 166 F.2d 229, certiorari denied *Trosclair v. Stan-*

olind Oil & Gas Co., 68 S.Ct. 1086, 334 U.S. 820, 92 L.Ed. —.

Salesman

U.S.—*Howard W. Luff Co. v. Capece*, C.C.A. Ohio, 61 F.2d 635.

62. Ill.—*Katsinas v. Colgate-Palmolive Peet Co.*, 20 N.E.2d 127, 299 Ill.App. 347.

63. Okl.—*Ottinger v. Morris*, 104 P. 2d 254, 187 Okl. 517.

64. Ala.—*Paschall v. Sharp*, 110 So. 387, 215 Ala. 304.

Ill.—*Toms v. Ketterer*, 237 Ill.App. 135.

N.Y.—*Taylor v. Yukowic*, 77 N.Y.S. 2d 620, 273 App.Div. 915, motion denied 80 N.E.2d 459, 297 N.Y. 1041.

—*White v. Westlake*, 30 N.Y.S.2d 245, 262 App.Div. 1055.—*Pezzulla v. Kovach*, 12 N.Y.S.2d 494, 257 App. Div. 894.

N.C.—*White v. McCabe*, 180 S.E. 704, 208 N.C. 301.

Wis.—*Le Sage v. Le Sage*, 271 N.W. 369, 224 Wis. 57.—*Zeidler v. Goelzer*, 211 N.W. 140, 191 Wis. 378.

Liability of owner for acts of members of family see *supra* §§ 432–434.

Negligence in intrusting operation of vehicle to incompetent driver as question of law or fact see *infra* subdivision 1 (2) of this section.

Daughter

Mich.—*Cebulak v. Lewis*, 32 N.W. 2d 21, 320 Mich. 710.

Wash.—*Williams v. Dickson*, 8 P.2d 1087, 167 Wash. 229.

Son

Iowa.—*Bridges v. Welzien*, 300 N.W. 659, 231 Iowa 6.—*McCann v. Down-*

expressed⁶⁵ or implied,⁶⁶ or whether in the operation of the vehicle a member of defendant's family was his agent or servant,⁶⁷ and, if so, whether he was acting within the scope of his authority.⁶⁸ On conflicting evidence or where different inferences may reasonably be drawn from the evidence, incidental questions also are for the jury or trial court,⁶⁹ as, for example, whether the operator of the vehicle was a member of defendant's family,⁷⁰ whether the car is a family car,⁷¹

and whether at the time of the accident it was being used as a family car,⁷² and the nature and scope of the driver's authority.⁷³

The evidence must be legally sufficient to justify submission to the jury, and in various cases the evidence has been held insufficient to warrant or require submission to the jury of the question whether a member of defendant's family was his agent,⁷⁴ whether defendant consented to the use of the motor vehicle,⁷⁵ whether the vehicle was

ey, 290 N.W. 690, 227 Iowa 1277—Allbaugh v. Ashby, 284 N.W. 816, 226 Iowa 574—Enfield v. Butler, 264 N.W. 546, 221 Iowa 615—Lange v. Bedell, 212 N.W. 354, 203 Iowa 1194.

Neb.—Jennings v. Campbell, 6 N.W. 2d 376, 142 Neb 354.

N.J.—Farley v. Philadelphia Inquirer, 152 A 450, 9 N.J. Misc. 17—Gustin v. Calandriello, 144 A. 312, 7 N.J. Misc. 114

N.C.—Watts v. Lefler, 130 S.E. 630, 190 N.C. 722

Or.—Gossett v. Van Egmond, 155 P. 2d 304, 176 Or. 134—Steele v. Hemmers, 40 P.2d 1022, 149 Or. 351—McCallister v. Farra, 243 P. 785, 117 Or. 278—Foster v. Farra, 243 P. 778, 117 Or. 286.

R.I.—Hill v. Cabral, 18 A.2d 145, 66 R.I. 145—Guerin v. Mongeon, 143 A. 674, 49 R.I. 414.

Wife

Idaho—Abbs v. Redmond, 132 P.2d 1044, 64 Idaho 369

Mo.—Hampe v. Versen, 32 S.W.2d 793, 224 Mo. App. 1144.

Wash.—Hart v. Hogan, 24 P.2d 99, 173 Wash. 598

Community property

Ariz.—Chapman v. Salazar, 11 P.2d 613, 40 Ariz. 215.

Wash.—Moffitt v. Krueger, 120 P.2d 512, 11 Wash.2d 658.

65. N.D.—Harmon v. Haas, 241 N.W. 70, 61 N.D. 772, 80 A.L.R. 1131 42 C.J. p 1260 note 10.

Son

N.J.—Rickel v. Stockman, 168 A. 467, 111 N.J. Law 294.

Or.—McCallister v. Farra, 243 P. 785, 117 Or. 278.

R.I.—Emond v. Fallon, 186 A. 15, 56 R.I. 419.

Wife

Ill.—Whipkey v. Ashbaugh, 267 Ill. App. 452.

66. Ga.—Ficklen v. Heichelheim, 176 S.E. 540, 49 Ga. App. 777.

R.I.—Emond v. Fallon, 186 A. 15, 56 R.I. 419.

Wis.—Le Sage v. Le Sage, 271 N.W. 369, 224 Wis. 57.

42 C.J. p 1260 note 11.

Daughter

N.D.—Harmon v. Haas, 241 N.W. 70, 61 N.D. 772, 80 A.L.R. 1131.

Son

Conn.—O'Dea v. Amodeo, 170 A. 486, 118 Conn. 58.

N.C.—Grier v. Woodside, 158 S.E. 491, 200 N.C. 759.

Or.—Steele v. Hemmers, 40 P.2d 1022, 149 Or. 381

Grandson

Wash.—Carlson v. Wolski, 147 P.2d 291, 20 Wash.2d 323.

67. S.C.—Hewitt v. Fleming, 173 S.E. 808, 172 S.C. 266.

Daughter

Cal.—Henry v. Lingsweller, 253 P. 357, 81 Cal. App. 142

Mo.—Kaley v. Huntley, 63 S.W.2d 21, 333 Mo. 771.

N.J.—Minnagh v. Falato, 164 A. 393, 110 N.J. Law 266

Utah.—Mehv v. Child, 61 P.2d 624, 90 Utah 348.

Son

Ala.—Gray v. Meadows, 136 So. 876, 24 Ala. App. 487.

Ga.—Gahl v. McMath, 200 S.E. 342, 59 Ga. App. 247.

Mass.—Popkin v. Goldman, 165 N.E. 655, 266 Mass. 531.

Mo.—Murphy v. Loeffler, 39 S.W.2d 550, 327 Mo. 1244—Jovce v. Biring, 43 S.W.2d 845, 226 Mo. App. 162—

Benson v. Smith, App., 38 S.W.2d 743—Mebas v. Werkmeister, 299 S.W. 601, 221 Mo. App. 173

N.J.—Jones v. Jaczko, 153 A. 513, 107 N.J. Law 355—Farley v. Philadelphia Inquirer, 152 A. 450, 9 N.J. Misc. 17—Benson v. Lippman, 147 A. 645, 7 N.J. Misc. 1001—Patterson v. Calandriello, 135 A. 91, 4 N.J. Misc. 989.

Ohio.—Pierce v. Bisesi, App., 38 N.E.2d 208—Willey v. Shinn, 181 N.E. 549, 42 Ohio App. 33

Pa.—Hildock v. Grosso, Com.Pl. 1 Fay.L.J. 96, 157, appeal quashed 5 A.2d 565, 334 Pa. 222.

R.I.—Hill v. Cabral, 18 A.2d 145, 66 R.I. 145—Emond v. Fallon, 186 A. 15, 56 R.I. 419

Va.—Green v. Smith, 151 S.E. 282, 153 Va. 675.

Ohio.—Pierce v. Bisesi, App., 38 N.E.2d 208—Willey v. Shinn, 181 N.E. 549, 42 Ohio App. 33

Pa.—Hildock v. Grosso, Com.Pl. 1 Fay.L.J. 96, 157, appeal quashed 5 A.2d 565, 334 Pa. 222.

R.I.—Hill v. Cabral, 18 A.2d 145, 66 R.I. 145—Emond v. Fallon, 186 A. 15, 56 R.I. 419

Va.—Green v. Smith, 151 S.E. 282, 153 Va. 675.

Ohio.—Pierce v. Bisesi, App., 38 N.E.2d 208—Willey v. Shinn, 181 N.E. 549, 42 Ohio App. 33

Pa.—Hildock v. Grosso, Com.Pl. 1 Fay.L.J. 96, 157, appeal quashed 5 A.2d 565, 334 Pa. 222.

R.I.—Hill v. Cabral, 18 A.2d 145, 66 R.I. 145—Emond v. Fallon, 186 A. 15, 56 R.I. 419

Va.—Green v. Smith, 151 S.E. 282, 153 Va. 675.

Ohio.—Pierce v. Bisesi, App., 38 N.E.2d 208—Willey v. Shinn, 181 N.E. 549, 42 Ohio App. 33

Pa.—Hildock v. Grosso, Com.Pl. 1 Fay.L.J. 96, 157, appeal quashed 5 A.2d 565, 334 Pa. 222.

Mo.—Malone v. Small, App., 291 S.W. 163.

N.J.—Willett v. Heyer, 140 A. 411, 104 N.J. Law 391.

68. Ill.—Kovell v. North Roseland Motor Sales, 275 Ill. App. 566.

Mo.—Foster v. Campbell, 196 S.W.2d 147, 355 Mo. 349—Mebas v. Werkmeister, 299 S.W. 601, 221 Mo. App. 173.

Pa.—Lambert v. Polen, 30 A.2d 115, 346 Pa. 352.

42 C.J. p 1260 note 12.

69. Wash.—Robinson v. Ebert, 39 P.2d 992, 180 Wash. 387

Defendant's consent as absolute or qualified

R.I.—Carle v. Comeau, 149 A. 18, 50 R.I. 459

70. N.C.—McGee v. Crawford, 171 S.E. 326, 205 N.C. 318

Niece of defendant's wife

S.C.—Hewitt v. Fleming, 173 S.E. 808, 172 S.C. 266.

71. Ky.—Barr v. Searcy, 133 S.W.2d 714, 280 Ky. 535

N.C.—Morris v. Johnson, 199 S.E. 390, 214 N.C. 402—Matthews v. Heatham, 188 S.E. 87, 210 N.C. 592.

S.C.—Hewitt v. Fleming, 173 S.E. 808, 172 S.C. 266

Wash.—Allison v. Bartelt, 209 P. 868, 121 Wash. 418

72. Ky.—Barr v. Searcy, 133 S.W.2d 714, 280 Ky. 535.

73. Iowa.—Collinson v. Cutter, 170 N.W. 420, 186 Iowa 276.

42 C.J. p 1261 note 14.

74. Wis.—Pupke v. Haerle, 207 N.W. 261, 189 Wis. 156.

Daughter

Kan.—Watkins v. Clark, 176 P. 131, 103 Kan. 629.

Son

Mo.—Lajole v. Rossi, 37 S.W.2d 684, 225 Mo. App. 651.

Wife

Ohio.—Fulk v. Lorenzoni, 17 N.E.2d 952, 59 Ohio App. 287.

75. Iowa.—Hunter v. Irwin, 263 N.W. 34, 220 Iowa 693.

Me.—Stevens v. Frost, 32 A.2d 164, 140 Me. 1.

Tex.—Way v. Guest, Civ. App., 272 S.W. 217.

being used for a family purpose at the time of the accident,⁷⁶ and whether the family member was acting within the scope of employment for defendant.⁷⁷ The liability of the owner for the negligent driving of some member of his family is a matter of law for the court where the evidence on the issue of agency is clear and uncontradicted.⁷⁸ In an action brought under the family purpose doctrine, a nonsuit is properly granted where the evidence fails to establish that the operator of the vehicle was a member of defendant's family at the time of the accident.⁷⁹

The presumption of permissive use by a member of his family arising from defendant's ownership of the car or from the fact that it was being driven by a member of defendant's family is overcome by uncontradicted evidence that the driver had taken the car for his own purposes and without the permission of defendant so that no question of fact remains.⁸⁰ However, it has also been held that the fact that defendant's testimony that the vehicle was used without his consent is uncontradicted does not necessarily preclude recovery,⁸¹ and, where under statute registration of the vehicle in defendant's name as owner is prima facie evidence of defendant's consent, it is ordinarily for the jury to determine the question of consent on all the evidence produced, including what is made

prima facie evidence by statute.⁸²

In jurisdictions where the family purpose doctrine does not apply, a peremptory instruction for defendant should be granted where there is no evidence that the member of the family operating the vehicle was a servant or agent of defendant or that defendant otherwise was guilty of negligence.⁸³

(6) User with Owner's Consent

- (a) In general
- (b) Hired or lent motor vehicle

(a) In General

On conflicting evidence or where different inferences may reasonably be drawn from the evidence, it is for the jury to determine whether the motor vehicle which caused the injury was being operated with the owner's consent.

Whether the motor vehicle which caused the injury complained of was being operated with the consent of the owner thereof may be a question of law or of fact.⁸⁴ Where the evidence is legally sufficient and is conflicting, or different inferences may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether the person using defendant's motor vehicle, and charged with negligent driving resulting in plaintiff's injuries, had taken the vehicle with defendant's consent.⁸⁵

Wash.—Hager v. Lenzi, 278 P. 673, 152 Wash. 611.

76. Wash.—Schnebley v. Bryson, 290 P. 849, 158 Wash. 250.

77. Tex.—Whiteman v. Harris, Civ. App., 123 S.W.2d 699, error refused.

Wis.—Geffert v. Kayser, 192 N.W. 26, 179 Wis. 571.

78. Ark.—Lowe v. Ivy, 164 S.W.2d 429, 204 Ark. 623.

Ky.—Ralston v. Dossey, 157 S.W.2d 739, 289 Ky. 40.

Mo.—Mulanix v. Reeves, 112 S.W.2d 100, 233 Mo.App. 143, certiorari quashed State ex rel. and to Use of Reeves v. Shain, 122 S.W.2d 885, 343 Mo. 550.

Okl.—Campbell v. Kirkpatrick, 249 P. 508, 120 Okl. 57.

42 C.J. p 1261 note 15.

79. Ga.—Wolfson v. Rainey, 180 S. E. 913, 51 Ga.App. 493.

80. Cal.—Sanfilippo v. Lesser, 210 P. 44, 59 Cal.App. 86.

Ill.—Miller v. McHale, 263 Ill.App. 471.

Mich.—Christiansen v. Hilber, 276 N. W. 495, 282 Mich. 403.

Okl.—Gallagher v. Holcomb, 44 P.2d 44, 172 Okl. 1—St. John v. Ivers, 255 P. 706, 124 Okl. 215.

81. Or.—Steele v. Hemmers, 40 P. 2d 1022, 149 Or. 381.

82. R.I.—Hill v. Cabral, 2 A 2d 482, 62 R.I. 11, 121 A.L.R. 1072.

83. Miss.—Dement v. Summer, 165 So. 791, 175 Miss. 290.

84. Minn.—Koski v. Mucilli, 277 N. W. 229, 201 Minn. 549.

N.Y.—Katz v. Wolff & Reinheimer, 221 N.Y.S. 476, 129 Misc. 384.

Ordinarily jury question

Cal.—Hobbs v. Transport Motor Co., 141 P.2d 738, 23 Cal.2d 773.

Mich.—Wingett v. Moore, 13 N.W.2d 244, 308 Mich. 158.

Consent must be determined like any other fact—Truman v. United Products Corporation, 14 N.W.2d 120, 217 Minn. 155.

85. Ala.—Daniel v. Jones, 200 So. 551, 240 Ala. 545, followed in Daniel v. Carter, 200 So. 554, 240 Ala. 549 and Daniel v. Matthews, 200 So. 554, 240 Ala. 549—W. F. Covington Planter Co. v. Roberson, 194 So. 171, 239 Ala. 70—Drennen Motor Car Co. v. Webb, 147 So. 143, 226 Ala. 353.

Cal.—Burgess v. Cahill, 158 P.2d 393, 26 Cal.2d 320, 159 A.L.R. 1304—Krum v. Malloy, 137 P.2d 18, 22 Cal.2d 132—Blank v. Coffin, 126 P.

2d 868, 20 Cal.2d 457—Nash v. Wright, 186 P.2d 686, 82 Cal.App. 2d 467—Boland v. Gosser, 43 P.2d 559, 5 Cal.App.2d 700.

Conn.—Ackerson v. Erwin M. Jennings Co., 140 A. 760, 107 Conn. 393, 56 A.L.R. 1127.

Fla.—City Grocery Co. v. Cothron, 157 So. 891, 117 Fla. 322.

Iowa—Olinger v. Tiefenthaler, 285 N.W. 137, 226 Iowa 847—Greene v. Lagerquist, 252 N.W. 94, 217 Iowa 718—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27—Wolfson v. Jewett Lumber Co., 227 N.W. 608, 210 Iowa 244, modified on other grounds 230 N.W. 336, 210 Iowa 244.

Mich.—Wingett v. Moore, 13 N.W.2d 244, 308 Mich. 158—Reitenga v. Kalamazoo Creamery Co., 284 N.W. 683, 288 Mich. 161—Barnum v. Berk, 239 N.W. 329, 256 Mich. 363—Lidtka v. Wagner, 235 N.W. 189, 253 Mich. 379—Scott v. Wallace, 230 N.W. 946, 251 Mich. 28—Kerns v. Lewis, 227 N.W. 727, 249 Mich. 27.

Minn.—Neeson v. Murphy, 277 N.W. 916, 203 Minn. 234.

Miss.—Slaughter v. Holsomback, 147 So. 318, 166 Miss. 643.

N.J.—Grinditch v. Olsson, 189 A. 480, 5 N.J.Misc. 1064.

The weight of the evidence is for the jury.⁸⁶

The question is one of law for the court where the evidence is uncontradicted and no inference can reasonably be made therefrom that defendant gave such consent,⁸⁷ or where there is not sufficient evidence of a consent, express or implied, having been given.⁸⁸

Effect of presumptions. Under the presumption, flowing from proof of defendant's ownership of the motor vehicle involved, that it was being operated at the time of the accident with defendant's consent, as considered supra § 511 (6) b, proof that defendant owned the motor vehicle involved and with no evidence on behalf of defendant, a plaintiff who has otherwise established liability is

entitled to a directed verdict.⁸⁹ Where the evidence in rebuttal of the presumption is contradicted, or different inferences may reasonably be drawn from the evidence, the issue of consent is for the jury, or for the trial court in actions tried without a jury;⁹⁰ but, where the rebuttal evidence is uncontradicted and but one inference may reasonably be drawn therefrom, the question generally is one of law for the court.⁹¹ In some jurisdictions, however, it has been held that the issue of the owner's consent is for the jury notwithstanding the evidence in rebuttal is uncontradicted,⁹² although in such jurisdictions there are also cases in which the courts have decided the issue as a matter of law.⁹³

N.Y.—*Jackson v. Brown & Kleinhenz*, 7 N.E.2d 265, 273 N.Y. 365—*Piwowski v. Cornwell*, 7 N.E.2d 111, 273 N.Y. 226—*Zuckerman v. Par-ton*, 184 N.E. 49, 260 N.Y. 446—*Jorgensen v. Jaeger*, 177 N.E. 410, 257 N.Y. 171—*Taylor v. Yukoweic*, 77 N.Y.S.2d 620, 273 App.Div. 915, motion denied 80 N.E.2d 459, 297 N.Y. 1041—*Rasbach v. Cassidy*, 33 N.Y.S.2d 762, 263 App.Div. 1047—*Fink v. Brzezinski*, 28 N.Y.S.2d 74, 262 App.Div. 810—*Deyo v. Belotte*, 27 N.Y.S.2d 1, 261 App.Div. 1119, reargument denied 29 N.Y.S.2d 910, 262 App.Div. 921, appeal denied 36 N.E.2d 917, 286 N.Y. 731—*Vinehore v. Ward*, 20 N.Y.S.2d 451, 259 App.Div. 1019, affirmed 35 N.E.2d 477, 285 N.Y. 823—*Christie v. B. F. Vineburg, Inc.*, 19 N.Y.S.2d 252, 259 App.Div. 342—*Mitchell v. Gilmour*, 9 N.Y.S.2d 45, 256 App.Div. 893, appeal denied 20 N.E.2d 397, 280 N.Y. 853—*Woodland v. Cote*, 299 N.Y.S. 742, 252 App.Div. 254.

Ohio—*Miller v. Metropolitan Life Ins. Co.*, 16 N.E.2d 417, 131 Ohio St. 289.

R.I.—*Deming v. Vendetti*, 53 A.2d 498—*Baker v. Rhode Island Ice Co.*, 50 A.2d 618, 72 R.I. 262—*Radoccia v. Goodrich Oil Co.*, 6 A.2d 746, 63 R.I. 58—*Kernan v. Webb*, 148 A. 186, 50 R.I. 394.

Wis.—*Christiansen v. Schenkenberg*, 236 N.W. 109, 204 Wis. 323.

Member of defendant's family see supra subdivision k (5) of this section.

Authority of employee

Whether employee under exceptional circumstances has authority to drive employer's automobile or authorize subordinate employee to use automobile belonging to himself in employer's business, although ordinarily without authority to do either, may present fact question for jury.—*Radoccia v. Goodrich Oil Co.*, 6 A.2d 746, 63 R.I. 58.

Owner of used car lot

In action against owner of used car lot for injuries sustained by prospective customer struck by automobile which had been started by another prospective customer, whether other prospective customer had permission to start automobile was jury question—*Stebel v. Shapiro*, 137 P.2d 56, 58 Cal.App.2d 509.

Prospective purchaser

Iowa—*Tigue Sales Co. v. Reliance Motor Co.*, 221 N.W. 514, 207 Iowa 567.

Minn.—*Koski v. Mucilli*, 277 N.W. 229, 201 Minn. 549.

N.Y.—*Goes v. Gifford Sales & Service*, 40 N.Y.S.2d 912, 265 App.Div. 796, affirmed 52 N.E.2d 959, 291 N.Y. 744.

86. N.Y.—*St. Andrassy v. Mooney*, 186 N.E. 867, 262 N.Y. 368.

87. Minn.—*Truman v. United Products Corporation*, 14 N.W.2d 120, 217 Minn. 155.

Neb.—*Philleo v. Hefnider*, 2 N.W.2d 31, 140 Neb. 808.

N.J.—*Emmmer v. Kline*, 139 A. 899, 6 N.J.Misc. 56.

N.C.—*Swicegood v. Swift & Co.*, 193 S.E. 277, 212 N.C. 396.

42 C.J. p. 1261 note 21.

88. Ga.—*Pearce, Young, Angel Co. v. Ward*, 33 S.E.2d 39, 72 Ga.App. 89—*Quinn v. Neal*, 91 S.E. 786, 19 Ga.App. 484.

Neb.—*Witthauer v. Paxton-Mitchell Co.*, 19 N.W.2d 865, 146 Neb. 436.

N.Y.—*Kohler v. Eich*, 24 N.Y.S.2d 404, 260 App.Div. 1056, affirmed 35 N.E.2d 938, 286 N.Y. 597.

Ohio—*Metropolitan Life Ins. Co. v. Huff*, 191 N.E. 761, 128 Ohio St. 469.

Tenn.—*East Tennessee & Western North Carolina Motor Transp. Co. v. Brooks*, 121 S.W.2d 559, 173 Tenn. 542.

89. Or.—*Miller v. Service and Sales*, 38 P.2d 995, 149 Or. 11, 96 A.L.R. 628.

Under Financial Responsibility Act

D.C.—*Hiscox v. Jackson*, 127 F.2d 160, 75 U.S.App.D.C. 293.

90. N.Y.—*Christie v. B. F. Vineburg, Inc.*, 19 N.Y.S.2d 252, 259 App.Div. 342.

Under Financial Responsibility Act

D.C.—*Hiscox v. Jackson*, 127 F.2d 160, 75 U.S.App.D.C. 293—*Rice v. Simmons*, Mun.App., 53 A.2d 587—*Gasque v. Saidman*, Mun.App., 44 A.2d 537.

To justify directed verdict for defendant very strong, compelling evidence on behalf of defendant is required, evidence is required which destroys all inferences and presumptions supporting plaintiff and which raises no doubts against defendant—*Hiscox v. Jackson*, 127 F.2d 160, 75 U.S.App.D.C. 293.

91. Iowa—*Mitchell v. Automobile Underwriters of Des Moines*, 281 N.W. 832, 225 Iowa 906.

Mich.—*Morrow v. Trathen*, 284 N.W. 687, 288 Mich. 172.

Under Financial Responsibility Act

D.C.—*Rice v. Simmons*, Mun.App., 53 A.2d 587—*Gasque v. Saidman*, Mun.App., 44 A.2d 537.

When fact of deviation from authorized use is established, issue is one of law for court.—*Senator Club Co. v. Rothberg*, D.C.Mun.App., 42 A.2d 245.

92. U.S.—*Pariso v. Towse*, C.C.A.N.Y., 45 F.2d 962.

N.Y.—*Piwowski v. Cornwell*, 7 N.E.2d 111, 273 N.Y. 226—*Glasgow v. Weldt*, 218 N.Y.S. 115, 218 App.Div. 749.

Ordinarily jury question

N.Y.—*Crawford v. Nilan*, 35 N.Y.S.2d 33, 264 App.Div. 46, reversed on other grounds 46 N.E.2d 512, 289 N.Y. 444.

93. N.Y.—*St. Andrassy v. Mooney*, 186 N.E. 867, 262 N.Y. 368—*Wilson v. Harrington*, 56 N.Y.S.2d 157,

(b) Hired or Lent Motor Vehicle

Where the evidence is conflicting or different inferences may reasonably be drawn therefrom, it is for the jury to determine whether the control of the operator of a hired or loaned motor vehicle was retained by the owner or surrendered to the hirer or borrower.

Where the evidence is legally sufficient and is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the jury, or for the trial court in actions tried without a jury, in the case of the negligent driving of a hired or loaned motor vehicle, whether the control of the driver was retained by the owner or surrendered to the hirer or borrower of the vehicle.⁹⁴ The mere fact that the vehicle with the chauffeur is loaned does not as a matter of law make the chauffeur the servant of the borrower.⁹⁵

Where the evidence is uncontradicted and the inference to be made therefrom is clear, the question who has such control is for the court,⁹⁶ and, where the presumption of control in the owner following the proof of his ownership is overcome by uncontradicted evidence that the driver had bor-

rowed the car from the owner and was using it in his own business, the owner in an action against him is entitled to a directed verdict in his favor.⁹⁷

(7) Liability of Occupant of Vehicle Driven by Another

The liability of an occupant for injuries occasioned by the operator of the motor vehicle is a question for the jury on conflicting evidence or where different inferences may reasonably be drawn from the evidence.

Where the evidence is legally sufficient and is conflicting or where different inferences may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine the liability of an occupant of a motor vehicle for injuries occasioned by the operator of the vehicle.⁹⁸ The right of an occupant to control the driver can be inferred as a matter of law only when a relationship has been established in which it is conclusively presumed to exist by the law of agency.⁹⁹ On conflicting evidence or where different inferences may reasonably be drawn from the evidence, it is for the jury or trial court to determine whether

- 269 App.Div. 891, affirmed 65 N.E. 2d 101, 295 N.Y. 667.
94. Ariz.—Lee Moor Contracting Co. v. Blanton, 65 P.2d 35, 49 Ariz. 130.
- Cal.—Peters v. United Studios, 277 P. 156, 98 Cal.App. 373—Thiburne v. Burton, 261 P. 334, 86 Cal.App. 627.
- Colo.—Drake v. Hodges, 161 P.2d 338, 114 Colo. 10.
- Conn.—Tierney v. Correia, 193 A. 201, 123 Conn. 146.
- Ga.—Albert v. Hudson, 176 S.E. 659, 49 Ga.App. 636—Atlanta Coach Co. v. Curtis, 157 S.E. 344, 42 Ga.App. 639.
- Md.—Rauer v. Calic, 171 A. 713, 166 Md. 387—Dippel v. Julliano, 137 A. 514, 152 Md. 699—Brawner v. Hooper, 135 A. 420, 151 Md. 579.
- Mass.—Garfield v. Smith, 59 N.E.2d 287, 317 Mass. 674, certiorari denied 65 S.Ct. 1568, 325 U.S. 879, 89 L.Ed. 1995, and D. W. Lines v. Ward, 65 S.Ct. 1569, 325 U.S. 879, 89 L.Ed. 1995—Epstein v. Simco Trading Co., 8 N.E.2d 767, 297 Mass. 282—Goyette v. P. J. Kennedy & Co., 178 N.E. 528, 277 Mass. 283.
- Mich.—Hazard v. Great Central Transport Corporation, 258 N.W. 210, 270 Mich. 60.
- Minn.—Modrinich v. Loyal Order of Moose, No. 1117, of Virginia, 227 N.W. 207, 178 Minn. 382.
- Mo.—Roman v. Hendricks, App., 80 S.W.2d 907.
- N.H.—Bacus v. Sterling Exp. Co., 51 A.2d 479, 94 N.H. 270—Bacus v. Lexington Shoe Co., 43 A.2d 155, 93 N.H. 428.
- N.J.—Younkers v. Ocean County, 33 A.2d 898, 130 N.J.Law 607—Winter v. North Jersey Bus Co., 135 A. 473, 5 N.J.Misc. 42.
- N.Y.—Elliott v. Flushing Sand & Stone Co., 75 N.Y.S.2d 333, 273 App. Div. 782—Rashall v. Morra, 294 N.Y.S. 630, 250 App.Div. 474—Van Wagenen v. Adams, 280 N.Y.S. 103, 244 App.Div. 878.
- N.C.—Leonard v. Tatum & Dalton Transfer Co., 12 S.E.2d 729, 218 N.C. 667.
- Pa.—Kissell v. Motor Age Transit Lines, 53 A.2d 593, 357 Pa. 204—Kimble v. Wilson, 42 A.2d 526, 352 Pa. 275.
- S.C.—Brownlee v. Charleston Motor Express Co., 200 S.E. 819, 189 S.C. 201.
- Tenn.—Dedman v. Dedman, 291 S.W. 449, 155 Tenn. 241—White v. White, 9 Tenn.App. 654.
- Tex.—Krausse v. Decker, Civ.App., 57 S.W.2d 1124, error dismissed.
- Vt.—Pappillo's Adm'x v. Prairie, 164 A. 537, 105 Vt. 193.
- W.Va.—Hicks v. Southern Ohio Quarries Co., 182 S.E. 874, 116 W.Va. 748.
- 42 C.J. p 1261 note 25.
- Liability for negligent driving of loaned cars see supra §§ 439, 442.
- Liability to third persons of liveryman renting motor vehicle see infra §§ 768, 769.
- Mixed question of law and fact
- Ill.—Connelly v. Schutte, 79 N.E.2d 79, 334 Ill.App. 227.
- Where loan agreement is vague, question is for jury.—Krausse v. Decker, Tex.Civ.App., 57 S.W.2d 1124, error dismissed.
- Hiring for funeral
- Kan.—Moseman v. L. M. Penwell Undertaking Co., 100 P.2d 669, 151 Kan. 610.
- Minn.—Antonelly v. Adam, 221 N.W. 716, 175 Minn. 438.
- Ohio.—Sack v. A. R. Nunn & Son, 194 N.E. 1, 129 Ohio St. 128.
- Pa.—Dunmire v. Fitzgerald, 37 A.2d 596, 349 Pa. 511—Lang v. Hanlon, 153 A. 143, 302 Pa. 173.
95. Tex.—Krausse v. Decker, Civ. App., 57 S.W.2d 1124, error dismissed.
96. Fla.—Ryder v. Plumley, 189 So. 422, 138 Fla. 378.
- Ky.—Bowen v. Gradison Const. Co., 6 S.W.2d 481, 224 Ky. 427.
97. Ill.—Martin v. Turek, 227 Ill. App. 379.
98. Ill.—Kinney v. O'Flaherty, 56 N.E.2d 473, 323 Ill.App. 579.
- Me.—Jenkins v. Case, 131 A. 573, 125 Me. 508.
- Mo.—Haynie v. Jones, 127 S.W.2d 105, 233 Mo.App. 948.
- Wis.—Hahn v. Smith, 254 N.W. 750, 215 Wis. 277.
- Liability of occupant of vehicle driven by another generally see supra § 444.
99. Wash.—Poutre v. Saunders, 143 P.2d 554, 19 Wash.2d 561.

there existed a joint enterprise between the driver and the occupant of the motor vehicle.¹

The evidence must be legally sufficient to justify submission to the jury of an occupant's liability for the acts of the operator.²

I. Competency of Operator; Intoxication

- (1) In general
- (2) Intrusting operation of vehicle to incompetent driver

(1) In General

The competency of the defendant to operate a motor vehicle at the time of the accident is a question for the jury on conflicting evidence or where different inferences may reasonably be drawn from the evidence.

On conflicting evidence or where more than one inference may reasonably be drawn from the evidence, it is for the jury, or for the trial court in actions tried without a jury, to determine whether defendant was competent to operate the motor vehicle at the time of the accident.³

Falling asleep. Where defendant falls asleep

while operating a motor vehicle, his negligence in so doing ordinarily is a question for the jury.⁴

Intoxication. Proof that at the time of the accident defendant was intoxicated or under the influence of intoxicating liquor ordinarily is to be considered by the jury as evidence bearing on defendant's negligence in the operation of the motor vehicle,⁵ although it has been held that a violation of a statute making it unlawful to operate a vehicle while under the influence of, or affected by the use of, intoxicating liquor constitutes negligence as a matter of law.⁶ On conflicting evidence or where different inferences may reasonably be drawn therefrom, it is for the jury or trial court to determine whether defendant was intoxicated or under the influence of intoxicating liquor.⁷ The weight of the testimony of a witness as to the operator's intoxication is for the jury.⁸

The evidence must be legally sufficient to warrant or require submission to the jury of the issue of intoxication of defendant at the time of the accident.⁹

1. Idaho—Griffin v. Clark, 42 P.2d 297, 55 Idaho 364.

Neb.—Ahlsstedt v. Smith, 264 N.W. 889, 130 Neb. 372.

2. Where defendant was merely accompanying driver of truck which collided with automobile, and had no control over truck, no case was made for jury.—Grimes v. Richfield Oil Co. of California, 289 P. 245, 106 Cal App. 416.

Fact that wife was driving husband's automobile with husband present beside her was insufficient to take case to jury against husband on issue of joint enterprise or imputed negligence, requiring directed verdict for husband, where pleadings based husband's liability solely on joint enterprise theory.—Miller v. Shaw, 187 N.E. 130, 45 Ohio App. 303.

3. Pa.—Lloyd v. Noakes, 96 Pa. Super. 164.

Competency or experience of driver generally see supra §§ 264, 265.

Consciousness

(1) In action against driver and against owner of automobile for injuries sustained in accident occurring when automobile was driven across wide state highway on wrong side of road, whether driver became unconscious presented question of fact.—Rasbach v. Cassidy, 33 N.Y.S. 2d 762, 263 App.Div. 1047.

(2) In action for injuries sustained by occupant of automobile which left highway and collided with tree when driver was taken with cough-

ing spell, evidence that driver was conscious during time when saving action should have been taken was for jury.—Lagasse v. Laporte, N.H., 58 A.2d 312.

Physical condition

(1) In general.—Freas v. Campbell, Pa. Com.Pl., 48 Lanc.Rev. 464.

(2) Fact that person has some physical defect in itself will not fix liability as a matter of law in automobile accident case, but it may be properly considered as any other fact in determining negligence, and question is one for jury.—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533.

(3) It is not negligence as matter of law for crippled person to operate automobile on public highway.—Gudakunst v. McDonald, 13 Ohio Supp. 25.

Defective eyesight

(1) Generally.—Lesage v. Largey Lumber Co., 43 P.2d 896, 99 Mont. 372.

(2) Failure to wear eyeglasses.—Steen v. Hunt, 11 N.W.2d 690, 234 Iowa 38.

4. Del.—Diamond State Tel. Co. v. Hunter, 21 A.2d 286, 2 Terry 336.

Neb.—Sutton v. Inland Const. Co., 14 N.W.2d 387, 144 Neb. 721.

N.C.—Baird v. Baird, 28 S.E.2d 225, 223 N.C. 730.

Va.—Lee v. Moore, 191 S.E. 589, 168 Va. 278.

Sleeping motorist damaging telephone pole

Del.—Diamond State Tel. Co. v. Hunter, 21 A.2d 286, 2 Terry 336.

5. Ark.—Allen v. Ross, 138 S.W.2d 409, 200 Ark. 104.

Ill.—Styblo v. McNeil, 45 N.E.2d 1011, 317 Ill. App. 316.

Ind.—Buddenberg v. Morgan, 38 N.E.2d 287, 110 Ind.App. 609.

Mass.—Sheriff v. Gillow, 67 N.E.2d 754, 320 Mass. 46.

Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881.

6. Wash.—Lubliner v. Ruge, supra.

7. Cal.—Tomlinson v. Kiramidjian, 24 P.2d 559, 133 Cal. App. 415—Meads v. Deener, 17 P.2d 198, 128 Cal. App. 328.

Ill.—Granlie v. Valha, 37 N.E.2d 931, 312 Ill. App. 181.

Va.—Yorke v. Mason, 4 S.E.2d 375, 173 Va. 379—Yorke v. Cottle, 4 S.E.2d 372, 173 Va. 372.

Cause of alcoholic breath

Whether alcoholic breath of driver of defendant's automobile was caused by something stronger than three brandied peaches which he testified he ate prior to the accident was for jury.—Purcell v. Goldberg, 93 P.2d 578, 34 Cal. App.2d 344.

8. Ind.—Buddenberg v. Morgan, 38 N.E.2d 287, 110 Ind.App. 609.

9. Evidence held insufficient for jury

Wash.—Schalow v. Oakley, 139 P.2d 296, 18 Wash.2d 347.

In absence of evidence that there was odor of liquor on defendant's

(2) Intrusting Operation of Vehicle to Incompetent Driver

The negligence of an owner of a motor vehicle in intrusting its operation to an incompetent driver ordinarily is a question of fact.

It is generally a question of fact for the jury, or for the trial court in actions tried without a jury, whether the owner of a motor vehicle was negligent in intrusting the operation of the vehicle to the person who was driving it.¹⁰ The weight of the evidence is for the jury.¹¹ On conflicting evidence or where different inferences may reasonably be drawn, it is for the jury or trial court to determine whether the driver was an incompetent operator,¹² whether defendant had knowledge of

his incompetency or inexperience,¹³ and whether defendant consented to the use of the motor vehicle.¹⁴ Where an owner knows that a driver has no operator's license, that knowledge is sufficient to put him on inquiry as to his competency, and it is for the jury to determine under the circumstances whether the owner was negligent in permitting him to drive his vehicle.¹⁵

In order to warrant submission to the jury of defendant's negligence in intrusting a vehicle to an incompetent driver, there must be evidence of probative value tending to show negligence, or from which natural inferences of such negligence may be drawn.¹⁶

breath or about his automobile or person, and where his conduct and appearance were not such as would warrant drawing inference that he was under influence of liquor, and where it did not appear that he was noticeably drunk before accident, trial court properly withdrew issue of defendant's intoxication from jury.—*Schalow v. Oakley*, *supra*.

10. U.S.—*Murray v. Pasotex Pipe Line Co.*, C.C.A.Tex., 161 F.2d 5—*R. J. Reynolds Tobacco Co. v. Newby*, C.C.A.Idaho, 153 F.2d 819.
- Cal.—*Knight v. Gosselin*, 12 P.2d 454, 124 Cal.App. 290—*Corpus Juris* cited in *Owens v. Carmichael's U-Drive Autos*, 2 P.2d 580, 581, 116 Cal.App. 348.
- Md.—*Rounds v. Phillips*, 177 A. 174, 168 Md. 120—*Dorman v. Koonitz*, 165 A. 461, 164 Md. 535.
- Mass.—*Le Blanc v. Pierce Motor Co.*, 30 N.E.2d 684, 307 Mass. 535—*Gordon v. Bedard*, 164 N.E. 374, 265 Mass. 408.
- Mich.—*Tanis v. Eding*, 264 N.W. 375, 274 Mich. 288.
- Miss.—*Slaughter v. Holsomback*, 147 So. 318, 166 Miss. 643—*Herrman v. Maley*, 132 So. 541, 159 Miss. 538.
- N.J.—*Hala v. Worthington*, 31 A. 2d 844, 130 N.J.Law 162.
- N.C.—*Taylor v. Caudle*, 185 S.E. 446, 210 N.C. 60.
- Ohio.—*Buckingham v. Gilbert*, 163 N.E. 306, 29 Ohio App. 216.
- Or.—*Gossett v. Van Egmond*, 155 P. 2d 304, 176 Or. 134—*Guedon v. Rooney*, 87 P.2d 209, 160 Or. 621, 120 A.L.R. 1298.
- S.D.—*Rock v. Sellers*, 285 N.W. 437, 66 S.D. 450.
- Tex.—*Worsham-Buick Co. v. Isaacs*, Civ.App., 58 S.W.2d 288, reversed on other grounds 87 S.W.2d 252, 126 Tex. 546.
- Utah.—*Reid v. Owens*, 69 P.2d 265, 92 Utah 432.
- Wash.—*Forman v. Shields*, 48 P.2d 699, 183 Wash. 333.
- 42 C.J. p 1261 note 80.
- Liability resulting from intrusting

motor vehicle to incompetent driver see *supra* § 431.

Intoxicated passenger in taxicab

In action against taxicab company by automobile driver and passenger in automobile for damages sustained in collision with taxicab which was being driven by taxicab passenger, whether taxicab driver was negligent in putting intoxicated taxicab passenger in front seat of cab and leaving cab to answer telephone with motor turned off but with ignition key in the lock of taxicab, which taxicab passenger drove off in taxicab driver's absence and without taxicab driver's permission, was question for jury—*Pfaehler v. Ten Cent Taxi Co.*, 18 S.E.2d 331, 198 S.C. 476.

Operation without owner's consent

Owner was not liable as a matter of law for wrongful act of unlicensed driver to whom owner's son, without owner's knowledge and contrary to express instructions, had lent car.—*Voorhes v. Tide Water Oil Sales Corporation*, 264 N.Y.S. 743, 240 App. Div. 710, followed in *Cook v. Tide Water Oil Sales Corporation*, 264 N.Y.S. 1005, 240 App. Div. 702.

Employee permitting incompetent substitute to drive

Miss.—*Slaughter v. Holsomback*, 147 So. 318, 166 Miss. 643.

N.Y.—*Grant v. Knepper*, 156 N.E. 650, 245 N.Y. 158, 54 A.L.R. 845.

11. U.S.—*R. J. Reynolds Tobacco Co. v. Newby*, C.C.A.Idaho, 153 F. 2d 819.

12. Mich.—*Tanis v. Eding*, 273 N.W. 761, 280 Mich. 440.

Ohio.—*Edwards v. Benedict*, 70 N.E. 2d 471, 79 Ohio App. 134.

Whether operator was intoxicated was for jury on conflicting testimony.—*Dorman v. Koonitz*, 165 A. 461, 164 Md. 535.

13. Ark.—*Chaney v. Duncan*, 110 S.W.2d 21, 194 Ark. 1076.

Cal.—*Shiffette v. Walkup Drayage*

& Warehouse Co., 169 P.2d 996, 74 Cal.App.2d 903.

Ga.—*Ficklen v. Heichelheim*, 176 S.E. 540, 49 Ga.App. 777.

Mich.—*Tanis v. Eding*, 273 N.W. 761, 280 Mich. 440.

Miss.—*Anderson v. Daniel*, 101 So. 498, 136 Miss. 456.

N.J.—*Hala v. Worthington*, 31 A.2d 844, 130 N.J.Law 162.

42 C.J. p 1261 note 31.

14. Or.—*Gossett v. Van Egmond*, 155 P.2d 304, 176 Or. 134.

15. Cal.—*Shiffette v. Walkup Drayage & Warehouse Co.*, 169 P.2d 996, 74 Cal.App.2d 903—*Owens v. Carmichael's U-Drive Autos*, 2 P.2d 580, 116 Cal.App. 348.

Operator possessing temporary license

Ohio.—*Edwards v. Benedict*, 70 N.E. 2d 471, 79 Ohio App. 134.

16. Okl.—*Downtown Chevrolet Co. v. Lehman*, 129 P.2d 678, 191 Okl. 319.

Evidence held insufficient for jury

(1) Incompetency of driver.

Iowa.—*Helming v. People's Nat. Bank of Waukon*, 220 N.W. 45, 206 Iowa 1213.

Ky.—*Wilhelmi v. Berns*, 119 S.W.2d 625, 274 Ky. 618.

N.C.—*Cook v. Stedman*, 186 S.E. 317, 210 N.C. 345.

Ohio.—*Ward v. Koors*, App., 33 N.E. 2d 669.

Tex.—*Mundy v. Pirie-Slaughter Motor Co.*, Civ.App., 202 S.W.2d 331, reversed on other grounds, Sup., 206 S.W.2d 587.

(2) Knowledge of incompetency of driver.

Ky.—*Sanders v. Lakes*, 109 S.W.2d 36, 270 Ky. 98—*Brady v. B. & B. Ice Co.*, 45 S.W.2d 1061, 242 Ky. 138.

Ohio.—*Williamson v. Eclipse Motor Lines*, 62 N.E.2d 339, 145 Ohio St. 467, 168 A.L.R. 1356.

Okl.—*Anderson v. Eaton*, 68 P.2d 858, 180 Okl. 243.

Intrusting operation to person under age. Proof that defendant intrusted the operation of a motor vehicle to a person who because of his age was prohibited by statute from operating a motor vehicle is at least sufficient to carry the case to the jury on the question of defendant's negligence;¹⁷ and according to some authorities, if the age of the driver and the consent of defendant are established by uncontradicted evidence, the liability of defendant under the statute attaches as matter of law.¹⁸ The violation of an ordinance making it unlawful for the owner of a motor vehicle to permit a person under a specified age to operate such vehicle constitutes negligence as a matter of law.¹⁹ It is generally a question for the jury whether a person under the statutory age was allowed by defendant to drive the car.²⁰

§ 527. — Contributory Negligence

- a. In general
- b. Operators of motor vehicles
- c. Guests or occupants
- d. Motorcyclists
- e. Bicyclists
- f. Drivers or occupants of horse-drawn vehicles

Tex.—Clem Lumber Co. v. Fisher, Civ.App., 84 S.W.2d 282, error dismissed.

Wash.—Jones v. Harris, 210 P. 22, 122 Wash. 69.

(3) Failure to keep proper lookout to prevent employees from using automobiles or in failing to keep such automobiles locked—Mundy v. Pirie-Slaughter Motor Co., Tex.Civ. App., 202 S.W.2d 331, reversed on other grounds, Sup., 206 S.W.2d 587.

17. Mo.—Daily v. Maxwell, 133 S.W. 351, 152 Mo App. 415.

Wash.—Atkins v. Churchill, 194 P. 2d 364—Smith v. Nealey, 298 P. 345, 162 Wash. 160.

Negligence in intrusting operation of motor vehicle to person under age see supra § 431.

Leaving loaded gun in automobile

Whether father was negligent in placing and leaving loaded gun in rear seat of automobile intrusted to thirteen-year-old son was for jury.—Smith v. Nealey, supra.

18. Ala.—Paschall v. Sharp, 110 So. 387, 215 Ala. 304.

Pa.—Laubach v. Colley, 129 A. 83, 283 Pa. 366.

19. Ohio.—Wery v. Seff, 25 N.E.2d 692, 136 Ohio St. 307.

20. Ala.—Paschall v. Sharp, 110 So. 387, 215 Ala. 304.

Whether employer "furnished" his minor employee, under eighteen

years old, with automobile driven by such employee at time of accident resulting in injuries to one riding therein as driver's invitee, within meaning of statute declaring persons furnishing motor vehicles to such minors liable for damages caused by minors' negligent operation thereof, was for jury in actions by invitee and his father for damages.—Strout v. Polakewich, 27 A.2d 911, 139 Me. 134.

21. U.S.—Smith v. Town of Orangetown, C.C.A.N.Y., 150 F.2d 782, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462—Sampson v. Channell, D.C.Mass., 27 F.Supp. 213, first case, affirmed, C.C.A., Channell v. Sampson, 108 F.2d 315, vacated on other grounds Sampson v. Channell, 110 F.2d 754, 128 A.L.R. 394, certiorari denied Channell v. Sampson, 60 S.Ct. 1099, 310 U.S. 650, 84 L.Ed. 1415.

Cal.—Ketchum v. Pattee, 98 P.2d 1051, 37 Cal.App.2d 122—Rignell v. Font, 266 P. 588, 90 Cal.App. 730.

Fla.—Baggett v. Davis, 169 So. 372, 124 Fla. 701.

Ga.—Bell v. Lewis, 38 S.E.2d 686, 74 Ga.App. 26.

Ill.—Connolly v. Schutte, 79 N.E.2d 79, 334 Ill.App. 227—Anderson v. Krancic, 66 N.E.2d 316, 328 Ill. App. 364.

Ind.—Clevenger v. Kern, 197 N.E. 731, 100 Ind.App. 581.

g. Persons on horseback

h. Persons owning or in charge of animals

i. Pedestrians

j. Persons working in or upon highway

k. Persons boarding or alighting from streetcar, bus, or other vehicle

l. Persons under disability

a. In General

Whether a person injured by a motor vehicle was guilty of such contributory negligence as to preclude him from recovering therefor is, on conflicting evidence, a question of fact for the jury or other trier of facts.

In accordance with the rules relating to questions of law and fact generally, and as applied to the issue of contributory negligence in actions for negligence in general, considered in the C.J.S. title Negligence §§ 254-263, also 45 C.J. p 1299 note 3—p 1316 note 8, the question whether a person injured by a motor vehicle was guilty of such contributory negligence as to preclude him from recovering therefor is a question of fact for the jury or other trier of fact where the evidence thereon is conflicting;²¹ and of law for the court where the evidence is uncontradicted, and such that only one inference,

Iowa.—Vass v. Martin, 226 N.W. 920, 209 Iowa 870.

Kan.—Atherton v. Goodwin, 180 P.2d 296, 163 Kan. 22.

Ky.—Pickering v. Simpkins, 111 S.W. 2d 650, 271 Ky. 288.

Mich.—Clark v. Lawrence Baking Co., 215 N.W. 337, 240 Mich. 352.

Mo.—Edwards v. Bell, App., 103 S.W. 2d 315, hearing denied 123 S.W.2d 83, 343 Mo. 824.

N.J.—Johnson v. Johansen, 174 A. 722, 113 N.J.Law 417

N.Y.—Merritt v. Newman, 46 N.Y.S. 2d 34, 267 App.Div. 855, appeal denied 49 N.Y.S.2d 270, 267 App.Div. 1034—King v. Latham, 290 N.Y.S. 381, 248 App.Div. 933—Estes v. Slater, 289 N.Y.S. 485, 248 App. Div. 805—Van Wagenen v. Adams, 280 N.Y.S. 102, 244 App.Div. 878.

N.C.—Jernigan v. Jernigan, 175 S.E. 713, 207 N.C. 851.

Pa.—Reiter v. Andrews, 38 A.2d 508, 155 Pa.Super. 449—Snyder v. Coleman, Com.Pl., 26 Erie Co. 234.

Tenn.—Palmer v. Dehn, App., 198 S.W.2d 827—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn.App. 379—Williamson v. Howell, 13 Tenn.App. 506—Goebel v. Fleming, 13 Tenn. App. 473.

Tex.—Schumacher Co. v. Shooter, 124 S.W.2d 857, 132 Tex. 560.

Va.—Kelly v. Schneller, 139 S.E. 275, 148 Va. 573.

42 C.J. p 1261 note 38.

either of the existence or absence of contributory negligence on the part of plaintiff, can reasonably be drawn therefrom.²² So also, the question of contributory negligence may not be submitted to the jury where no evidence on the issue is introduced.²³

Questions of fact which are incidental to the determination of the contributory negligence of one injured by a motor vehicle have also been held, on conflicting evidence, to be for the jury, as the triers of the facts, to decide.²⁴

Questions of law and fact relating to whether

plaintiff's negligence was the proximate cause of the accident are considered *supra* § 522.

Persons or property not on highway. The general rule has been applied in determining the contributory negligence of plaintiff with respect to injuries to persons or property not on the highway,²⁵ as where the accident occurs on a private driveway or private property²⁶ or in or around a garage or service station or in connection with the repair or maintenance of the vehicle.²⁷ Whether, in connection with such accident, plaintiff assumed the risk by standing in or occupying a dangerous position is also a question of fact,²⁸ as is the question of con-

What constitutes contributory negligence of persons injured by motor vehicles see *supra* §§ 457-461.

Plaintiff held not negligent as matter of law

N.J.—Molnar v. Hildebrecht Ice Cream Co., 164 A. 300, 110 N.J. Law 246.

Pa.—La Posta v. Himmer, 55 A.2d 751, 358 Pa. 69.

Evidence held sufficient to go to jury
Mich.—Story v. Page, 273 N.W. 384, 280 Mich. 34.

Pa.—Huey v. Blue Ridge Transp. Co., Com.Pl., 24 Wash. Co. 147, affirmed 39 A.2d 602, 350 Pa. 488.

Tenn.—Goebel v. Fleming, 13 Tenn. App. 473.

Plaintiff struck by rock thrown by wheel

Iowa.—Kaffenberger v. Holle, 22 N. W.2d 804, 237 Iowa 542.

Denial of motion for nonsuit held proper

N.J.—Spence v. Maier, 59 A.2d 609, 137 N.J. Law 284, affirmed 61 A.2d 590.

22. Conn.—Lutzen v. Henry Jenkins Transp. Co., 54 A.2d 267, 133 Conn. 669.

42 C.J. p 1262 note 39.

Directed verdict held warranted

Mich.—Ruby v. Buxton, 8 N.W.2d 913, 305 Mich. 64.

Neb.—Ritter v. Hering, 280 N.W. 231, 135 Neb. 1.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618.

23. N.H.—Fontaine v. Charas, 181 A. 417, 87 N.H. 424.

24. Ill.—Painter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill. App. 557.

Pa.—Vuchovich v. King, Com.Pl., 9 Fay.L.J. 170.

25. U.S.—Law v. Railway Express Agency, C.C.A. Mass., 111 F.2d 427—Eldridge v. McGeorge, C.C.A. Ark., 99 F.2d 835.

Ark.—Powell Bros. Truck Lines v. Barnett, 121 S.W.2d 116, 196 Ark. 1082.

Cal.—Scott v. Gallot, 138 P.2d 685, 59 Cal.App.2d 421—Burke v. John E.

Marshall, Inc., 108 P.2d 738, 42 Cal. App.2d 195—Oswald v. H. G. Chaffee Warehouse Co., 84 P.2d 164, 29 Cal.App.2d 233.

Ill.—Painter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill. App. 557.

Iowa.—Johnston v. Johnson, 279 N. W. 139, 225 Iowa 77, 118 A.L.R. 233

Md.—State, to Use of State Accident Fund, v. Carroll-Howard Supply Co., 37 A.2d 330, 183 Md. 293.

Mass.—Whitehouse v. Cities Service Oil Co., 52 N.E.2d 414, 315 Mass. 108.

Mich.—Reedy v. Goodin, 281 N.W. 377, 285 Mich. 614.

Mo.—Wilks v. Gilliam, App., 80 S.W. 2d 702.

Neb.—Thomas v. Fundum, 283 N.W. 839, 135 Neb. 728.

N.J.—Groen v. George Fangmann, Inc., 33 A.2d 891, 130 N.J. Law 557—Sohn v. Katz, 167 A. 864, 11 N.J. Misc. 688, reversed on other grounds 169 A. 838, 112 N.J. Law 106, 90 A.L.R. 880

N.Y.—Carney v. Buyea, 65 N.Y.S.2d 902, 271 App.Div. 338, appeal denied 68 N.Y.S.2d 446, 271 App.Div. 949.

N.D.—Ziegler v. Ford Motor Co., 272 N.W. 743, 67 N.D. 286.

Pa.—Athas v. Fort Pitt Brewing Co., 188 A. 113, 324 Pa. 313—Gerhart v. East Coast Coach Co., 166 A. 564, 310 Pa. 535.

S.C.—Moody v. Dillon Co., 43 S.E.2d 201, 210 S.C. 458.

Wis.—Czarnetzky v. Booth, 246 N.W. 574, 210 Wis. 536—McGuire v. Doyle, 224 N.W. 481, 198 Wis. 503.

Conduct held not negligent as matter of law

Cal.—Pollard v. Foster, 129 P.2d 448, 54 Cal.App.2d 502—Gay v. Cadwalader-Gibson Co., 93 P.2d 1051, 34 Cal.App.2d 566.

Mont.—McCulloch v. Horton, 74 P.2d 1, 105 Mont. 531, 114 A.L.R. 823.

Door slammed on plaintiff's hand

N.J.—Brody v. Goldman, 186 A. 571, 117 N.J. Law 97.

28. N.J.—Nass v. Harris, 189 A. 626, 117 N.J. Law 427.

27. R.I.—Turner v. Maxon, 165 A. 372, 53 R.I. 164.

Tenn.—Hatcher v. Cantrell, 65 S.W. 2d 247, 16 Tenn. App. 544.

Wis.—Patterson v. Edgerton Sand & Gravel Co., 277 N.W. 636, 227 Wis. 11

Damage to gasoline pump

(1) In filling station owner's action for damages to gasoline pump struck by motorist, whether owner, who had spread coal ashes over icy driveway, had used reasonable care or was chargeable with contributory negligence was for the jury.—Standard Oil Co. of New York v. Flint, 183 A. 336, 108 Vt. 157.

(2) Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury, in an action for damages brought by the owner of a garage who maintained a stationary gasoline pump on the sidewalk opposite his garage in violation of an ordinance, against an owner of an automobile who negligently ran into it, whether such pump constituted an obstruction on the sidewalk.—Schindler v. Kappler, 133 N.E. 519, 77 Ind. App. 385.

Car on jack or lift or hoist

Kan.—Tritle v. Phillips Petroleum Co., 37 P.2d 996, 140 Kan. 671.

Minn.—Gould v. Miller, 271 N.W. 332, 199 Minn. 141.

N.J.—Barlow v. Sterr, 166 A. 708, 11 N.J. Misc. 453, affirmed 169 A. 692, 112 N.J. Law 86

Or.—Millan v. Kik, 181 P.2d 128, 181 Or. 270.

W.Va.—Sewell v. Lawson, 177 S.E. 293, 115 W.Va. 527.

Conduct held not negligence as matter of law

Mass.—Burnett v. Conner, 13 N.E.2d 417, 299 Mass. 604.

Evidence held sufficient to go to jury
Okla.—Bowring v. Penco Bus Lines, 162 P.2d 525, 196 Okl. 1.

28. N.J.—Groen v. George Fangmann, Inc., 33 A.2d 891, 130 N.J. Law 557.

tributory negligence where plaintiff was in a noisy place where it would be difficult to hear the sound of an approaching motor vehicle.²⁹

Occupants or operators of railroad cars or street-cars. Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the jury, as the trier of the facts, whether an employee of a streetcar or railroad company, who was injured in a collision with an automobile, was guilty of contributory negligence.³⁰ The rule also applies to a passenger in a vehicle of such company.³¹ So also, plaintiff's contributory negligence is a question of fact for the jury, on conflicting evidence, in an action by a railroad company against a motorist for damages sustained by the railroad in a collision with the motor vehicle.³²

Conduct held not assumption of risk as matter of law

Mass.—Burnett v. Conner, 13 N.E.2d 417, 299 Mass. 604.

29. D.C.—Eades v. Capital Materials Co., 121 F.2d 72, 73 App.D.C. 361.
Va.—Beard v. Bryant, 26 S.E.2d 61, 181 Va. 739.

30. Ill.—McManaman v. Johns-Manville Products Corp., 72 N.E.2d 741, 331 Ill.App. 178, affirmed 81 N.E.2d 137, 400 Ill. 423.

Iowa.—Taylor v. Kral, 29 N.W.2d 241, 238 Iowa 1018.

Tex.—J. Lee Vilbig & Co. v. Lucas, Civ.App., 23 S.W.2d 516, error dismissed
42 C.J. p 1266 note 90.

Contributory negligence of occupants or operators of railroad cars or street cars see supra § 483.

Conduct held not negligence as matter of law

Pa.—Noukes v. Lattavo, 37 A.2d 711, 349 Pa. 463.

Tex.—Gillette Motor Transport Co. v. Whitfield, Civ.App., 186 S.W.2d 90, refused for want of merit.

Failure to signal stop or slow down

Tex.—Gillette Motor Transp. Co. v. Whitfield, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571—Gillette Motor Transport Co. v. Whitfield, Civ.App., 186 S.W.2d 90, refused for want of merit.

Failure to yield right of way

Kan.—Waugh v. Kansas City Public Service Co., 143 P.2d 788, 157 Kan. 690.

Railroad employee on hand or motor car

(1) In general.

Ind.—Copp v. Harmon, 168 N.E. 701, 90 Ind.App. 348.

Mo.—Trussell v. Waight, App., 285 S.W. 114.

(2) The failure of an employee riding a speeder or motor car to maintain a continuous lookout was

held not to constitute contributory negligence as a matter of law.—Petersen v. Ingersoll-Rand Co., 78 P.2d 1083, 194 Wash. 584.

31. Ill.—Pierson v. Lyon, 90 N.E. 693, 243 Ill. 370.
42 C.J. p 1266 note 90.

Part of body protruding from street car

(1) Elbow.—Byron v. Public Service Coordinated Transport, 5 A.2d 483, 122 N.J.Law 451.

(2) Head.—Murphy v. St. Claire Brewing Co., 107 P.2d 273, 41 Cal. App.2d 535.

32. Mich.—Grand Trunk Western R. Co. v. Lovejoy, 7 N.W.2d 212, 304 Mich. 35.

Speed of train

Ohio.—New York Cent. R. Co. v. Sentinel, 8 N.E.2d 149, 54 Ohio App. 488.

Failure to install and maintain warning signal

U.S.—Interstate Motor Lines v. Great Western Ry. Co., C.C.A.Colo., 161 F.2d 968.

Failure to give signal at crossing

Ark.—Missouri Pac. R. Co. v. Dawson, 168 S.W.2d 1105, 205 Ark. 404.

33. Ala.—Rochelle v. Lide, 180 So. 257, 235 Ala. 596—Gramling v. Davis, 25 So.2d 393, 32 Ala App. 298.

Ariz.—Haas v. Morrow, 97 P.2d 204, 54 Ariz. 455.

Ark.—Van Bibber v. Strong, 160 S.W.2d 861, 203 Ark. 1090.

Cal.—Shannon v. Thomas, 134 P.2d 522, 57 Cal.App.2d 187—Bennett v. Chandler, 126 P.2d 173, 52 Cal.App.2d 255—Betzold v. Rossi Floral Co., 23 P.2d 839, 133 Cal.App. 236—Hupp v. Griffith Co., 15 P.2d 211, 127 Cal.App. 63—Ruperto v. Thomas, 298 P. 851, 113 Cal.App. 523.

Conn.—Mentzer v. Ziron, 174 A. 260, 118 Conn. 704—Klauber v. Crowe & Co., 138 A. 433, 106 Conn. 732.

b. Operators of Motor Vehicles

- (1) In general
- (2) Specific conduct
- (3) Particular situations

(1) In General

Where the evidence is conflicting or subject to more than one inference, it is a question of fact whether the driver of a motor vehicle was guilty of contributory negligence.

Where the evidence is conflicting, or reasonably subject to more than one inference, the question whether the driver of a motor vehicle is guilty of such contributory negligence as to bar his recovery for injuries received in collision with another motor vehicle is a question of fact for the jury or other trier of fact.³³ However, the question is one for

Fla.—Baggett v. Davis, 169 So. 372, 124 Fla. 701.

Ill.—Bergstrom v. Lind, 78 N.E.2d 114, 333 Ill.App. 656—Howard v. Ind, 50 N.E.2d 769, 320 Ill.App. 338—Whipkey v. Ashbaugh, 267 Ill. App. 452.

Ind.—Keltner v. Patton, 185 N.E. 270, 204 Ind. 550

Iowa.—Gillespie v. Gentosi, 294 N.W. 586, 229 Iowa 356.

Kan.—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 164 Kan. 376—Meneley, by Myers, v. Montgomery, 64 P.2d 550, 145 Kan. 109—Cross v. Chicago, R. I. & P. R. Co., 242 P. 469, 120 Kan. 58.

Ky.—Danville Cab Co. v. Hendren, 201 S.W.2d 561, 304 Ky 528—Wilhelmi v. Berns, 119 S.W.2d 625, 274 Ky. 618.

La.—Bryan v. Magnolia Gas Co., 127 So 124, 13 La.App. 52

Me.—Gold v. Portland Lumber Corporation, 16 A.2d 111, 137 Me. 143.

Mass.—Prout v. Mystic Motor Transp. Co., 58 N.E.2d 121, 317 Mass. 349—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 207—Woolner v. Perry, 163 N.E. 750, 265 Mass. 74—Sutherland v. Feinberg, 158 N.E. 783, 261 Mass. 394—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225.

Mich.—Spillman v. Welmaster, 265 N.W. 787, 275 Mich. 93.

Minn.—Pearson v. Northland Transp. Co., 239 N.W. 602, 184 Minn. 560.

N.H.—Holt v. Grimard, 51 A.2d 149, 94 N.H. 255.

N.J.—Cristofaro v. Brenfleck, 184 A. 619, 116 N.J.Law 357—Sweeney v. Lally, 172 A. 336, 12 N.J.Misc. 441—Fox v. McCullough-Gentile Trucking Co., 149 A. 826, 8 N.J.Misc. 282—Fitzhugh v. Petruzzo, 137 A. 817, 5 N.J.Misc. 669.

N.M.—Williams v. Haas, 189 P.2d 832.

the court where, but only where, the evidence is uncontradicted and such that only one inference can reasonably be drawn from it.³⁴ So also, the question of contributory negligence of a motorist may not be submitted to the jury where the issue is not presented by the pleadings and evidence.³⁵

These rules have been applied in determining whether a plaintiff, who was injured by a motor vehicle, exercised ordinary care in the operation of his vehicle under the circumstances,³⁶ such as whether he was guilty of contributory negligence in

N.Y.—*Steinberg v. Socony-Vacuum Oil Co.*, 66 N.Y.S.2d 471, 271 App. Div. 882, appeal denied 67 N.Y.S. 2d 711, 271 App. Div. 928—*Macri v. Dalen*, 65 N.Y.S.2d 675, 271 App. Div. 831—*Crellin v. Van Duzer*, 55 N.Y.S.2d 590, 269 App. Div. 806, followed in 56 N.Y.S.2d 403, 269 App. Div. 807—*Wood v. Pergament*, 46 N.Y.S.2d 433, 267 App. Div. 875—*Goes v. Gifford Sales & Service*, 40 N.Y.S.2d 912, 265 App. Div. 796, affirmed 52 N.E.2d 959, 291 N.Y. 744—*Bodin v. Bishop, McCormick & Bishop*, 296 N.Y.S. 304, 251 App. Div. 303.

N.C.—*Sisson v. Royster*, 45 S.E.2d 351, 228 N.C. 298—*Phillips v. Nes-smith*, 37 S.E.2d 178, 226 N.C. 173.

N.D.—*Trihub v. City of Minot*, 23 N.W.2d 752, 74 N.D. 582.

Ohio.—*Manchester v. Starr Transfer Co.*, App., 67 N.E.2d 133—*Mostov v. Unkefer*, 157 N.E. 714, 24 Ohio App. 420.

Okl.—*Wagner v. McKernan*, 177 P.2d 511, 198 Okl. 425—*Adair v. Moore*, 83 P.2d 813, 183 Okl. 563.

Pa.—*Drake v. Emhoff*, 21 A.2d 492, 145 Pa. Super. 498—*Ford v. Rein-oehl*, 182 A. 120, 120 Pa. Super. 285—*West v. Morgan*, Com.Pl., 52 Dauph Co. 361, affirmed 27 A.2d 46, 345 Pa. 61—*Wright v. Moyer*, Com. Pl., 32 Del Co. 79—*Graham v. Lee*, Com.Pl., 23 Erie Co. 353—*Kiska v. Keller*, Com.Pl., 19 Leh.Co.L.J. 54—*Feichtthaler v. French*, Com.Pl., 59 Montg.Co. 146.

S.D.—*Wolff v. Stenger*, 239 N.W. 181, 59 S.D. 231.

Tex.—*Walker v. Houston Electric Co.*, Civ.App., 155 S.W.2d 973, error refused.

Vt.—*Bisler v. Wilder*, 182 A. 204, 108 Vt. 37—*Fitch v. Bemis*, 177 A. 193, 107 Vt. 165.

Va.—*Walton v. Light*, 26 S.E.2d 29, 181 Va. 609.

W.Va.—*Vaughan v. Oates*, 37 S.E.2d 479, 128 W.Va. 554.

Wis.—*Kane v. Loyd's Am. Line*, 19 N.W.2d 296, 247 Wis. 145.

42 C.J. p 1262 note 40.

Plaintiff held not negligent as matter of law

Cal.—*Harrison v. Harter*, 18 P.2d 436, 129 Cal.App. 22—*Graves v. Kern County Transp. Corporation*, 296 P. 902, 112 Cal.App. 261.

Fla.—*Pollak v. Mason*, 200 So. 95, 145 Fla. 688.

Iowa.—*Kadlec v. Al. Johnson Const. Co.*, 252 N.W. 103, 217 Iowa 299.

Minn.—*Walker v. Stecher*, 17 N.W.2d 317, 219 Minn. 152—*Elchhorn v.*

Lundin, 216 N.W. 537, 172 Minn. 591.

Tex.—*Grammier-Dismukes Co. v. Payton*, Civ.App., 22 S.W.2d 544, error dismissed.

Wash.—*Sodden v. Reinhardt*, 106 P. 2d 574, 5 Wash.2d 689—*Pozar v. Blankenship*, 282 P. 52, 154 Wash. 261.

Wyo.—*Loney v. Laramie Auto Co.*, 255 P. 350, 36 Wyo. 339, 53 A.L.R. 73.

Evidence held sufficient to go to jury

Ala.—*Crotwell v. Cowan*, 184 So. 195, 236 Ala. 578.

Ark.—*Searcy Wholesale Grocer Co. v. Baltz*, 192 S.W.2d 111, 209 Ark. 620.

Cal.—*Tanaka v. Graneli*, 290 P. 515, 107 Cal.App. 547.

Ill.—*Hann v. Brooks*, 73 N.E.2d 624, 331 Ill.App. 535.

N.H.—*Kardasinski v. Koford*, 190 A. 702, 88 N.H. 444, 111 A.L.R. 1017.

Effect of auditor's finding

In action for injuries and damage in automobile collision, auditor's finding that plaintiff was not chargeable with contributory negligence was itself sufficient to carry that issue to jury.—*Zawacki v. Finn*, 29 N.E.2d 730, 307 Mass. 86.

Driving with arm or elbow out of window

(1) Whether or not plaintiff was negligent because of driving with his arm or elbow hanging out of the window was a question of fact.

Ark.—*Baker v. Boone*, 177 S.W.2d 756, 206 Ark. 823.

Ga.—*Minter v. Kent*, 8 S.E.2d 109, 62 Ga. App. 265.

(2) Such conduct was not negligence as a matter of law.—*Hobbs-Western Co. v. Carmical*, 91 S.W.2d 605, 192 Ark. 59.

Running out of gas

Wash.—*Chapin v. Stickel*, 22 P.2d 290, 173 Wash. 174.

Blinded by setting sun

Cal.—*Medeiros v. Soares*, 61 P.2d 501, 17 Cal.App.2d 176.

Fact that trailer was wider than permitted by statute was held not under the circumstances to render plaintiff riding thereon chargeable with contributory negligence as a matter of law.—*Van Wormer v. Kramer Bros. Freight Lines*, 278 N.W. 770, 284 Mich. 76.

34. Ark.—*England v. White*, 155 S. W.2d 576, 202 Ark. 1155.

Cal.—*Osgood v. City of San Diego*, 62 P.2d 195, 17 Cal.App.2d 345.

Ill.—*Anderson v. Krancic*, 66 N.E.2d 316, 328 Ill.App. 364—*Reidel v. Camp*, 37 N.E.2d 579, 311 Ill.App. 656—*McCarty v. O. H. Yates & Co.*, 14 N.E.2d 254, 294 Ill.App. 474.

Kan.—*Goodloe v. Jo-Mar Dairies Co.*, 185 P.2d 158, 163 Kan. 611.

Md.—*Mitchell v. Dowdy*, 42 A.2d 717, 184 Md. 634—*McDowell, Pyle & Co. v. Magazine Service*, 164 A. 148, 164 Md. 170.

N.J.—*Shappell v. Apex Express*, 37 A. 2d 849, 131 N.J.Law 583.

N.D.—*Trihub v. City of Minot*, 23 N. W.2d 753, 74 N.D. 582.

Tex.—*Blakesley v. Kircher*, Com. App., 41 S.W.2d 53—*Standard Paving Co. v. Webb*, Civ.App., 118 S. W.2d 456.

Wash.—*Fosdick v. Middendorf*, 115 P.2d 679, 9 Wash.2d 616—*Leach v. Erickson*, 17 P.2d 859, 171 Wash. 236.

Wis.—*Obenberger v. Interstate Oil Co.*, 248 N.W. 97, 211 Wis. 245.

Directed verdict for defendant held proper

Cal.—*Dungey v. Pacific Electric Ry. Co.*, 117 P.2d 375, 47 Cal.App.2d 94.

Presumption of due care

Presumption that plaintiff's decedent, while operating jeep which collided with defendants' truck, was exercising requisite degree of care for his own safety and that he was obedient to such provisions of law or universal custom as required him to drive on right-hand side of road was a species of indirect evidence which would prevail in control of deliberations of trial judge sitting without jury unless it was overcome by satisfactory evidence, but, on direct evidence of eyewitness being introduced to establish as fact conduct on decedent's part at variance with the presumption, there was created a conflict in evidence, and determination as to whether such direct evidence overcame presumption was peculiarly within province of trial court.—*Siegehl v. York*, 191 P.2d 50, 84 Cal.App.2d 383.

35. Okl.—*Young v. Egger*, 141 P.2d 1007, 193 Okl. 172.

36. Ark.—*Kirby v. Swift & Co.*, 134 S.W.2d 865, 199 Ark. 442.

Ill.—*Anderson v. Krancic*, 66 N.E.2d 316, 328 Ill.App. 364.

Iowa.—*Fortman v. McBride*, 263 N. W. 345, 220 Iowa 1003.

Me.—*Pearl v. Cumberland Sand & Gravel Co.*, 31 A.2d 413, 139 Me. 411.

that the driver's seat of his vehicle was overcrowded³⁷ or in that he drove with one hand.³⁸

Various incidental questions relating to the contributory negligence of the operator of a motor vehicle which have been held, on conflicting evidence, to be questions of fact for the trier of facts,³⁹ such as whether plaintiff or another was driving the vehicle which he occupied when he was injured,⁴⁰ or whether plaintiff's memory was destroyed by the accident so as to invoke the presumption of due care.⁴¹

Competency or experience of driver. It is for the trier of the facts to determine, on conflicting evidence, whether plaintiff was guilty of contributory negligence because of his inexperience or incompetency as an operator of a motor vehicle,⁴² or because of his failure to have an operator's license,⁴³ or whether he was under the influence of intoxicating liquors at the time of the accident, and the effect thereof,⁴⁴ or whether a motorist otherwise un-

der a disability was guilty of contributory negligence.⁴⁵

Equipment and condition of motor vehicle. Whether plaintiff was guilty of contributory negligence with respect to the condition and equipment of the vehicle is, on conflicting evidence, a question of fact.⁴⁶ So, it is a question of fact on conflicting evidence whether plaintiff's vehicle had or displayed proper and adequate lights,⁴⁷ and whether the absence of proper and adequate lights under the circumstances constituted contributory negligence.⁴⁸ However, where the evidence is uncontradicted and the inference to be made therefrom is clear it must be determined by the court, as a matter of law, that plaintiff was⁴⁹ or was not⁵⁰ guilty of contributory negligence in this respect.

(2) Specific Conduct

- (a) Speed
- (b) Parking
- (c) Conduct in other respects

Mass.—*Minnehan v. Hiland*, 180 N.E. 295, 278 Mass. 518.

N.Y.—*Wood v. Pergament*, 46 N.Y.S. 2d 433, 267 App. Div. 875.

Pa.—*Stewart v. Crawford*, Com.Pl., 55 Montg. Co. 164.

Evidence held sufficient to go to jury

Ill.—*Walters v. Ind.*, 48 N.E.2d 791, 319 Ill.App. 162.

37. Ga.—*Bell v. Lewis*, 38 S.E.2d 686, 74 Ga. App. 26.

Ohio—*Rogers v. French Bros.-Bauer Co.*, 166 N.E. 427, 31 Ohio App. 77.

Vt.—*Rule v. Johnson*, 162 A. 383, 104 Vt. 486.

33. U.S.—*Petroleum Carrier Corp. v. Snyder*, C.C.A. Ga., 161 F.2d 323.

Held not negligence as matter of law
U.S.—*Petroleum Carrier Corp. v. Snyder*, supra.

39. Pa.—*Feichthaler v. French*, Com.Pl., 59 Montg. Co. 146.

40. Cal.—*Bennett v. Chandler*, 126 P.2d 173, 52 Cal.App.2d 255.

41. Iowa.—*Prewitt v. Rutherford*, 30 N.W.2d 141, 238 Iowa 1321.

42. Cal.—*Riley v. Berkeley Motors*, 36 P.2d 398, 1 Cal.App.2d 217—*Powder v. Crown Stage Co.*, 256 P. 457, 82 Cal.App. 660.

Minn.—*Blom v. McNeal*, 272 N.W. 599, 199 Minn. 506.

43. Mass.—*Gaines v. Ratnowsky*, 41 N.E.2d 25, 311 Mass. 254—*Price v. Pearson*, 16 N.E.2d 855, 301 Mass. 260.

44. Ala.—*Mobile City Lines v. Alexander*, 30 So.2d 4, 249 Ala. 107.

Ark.—*Mills v. Silbernagel & Co.*, 164 S.W.2d 893, 204 Ark. 734.

Colo.—*Barsch v. Hammond*, 135 P.2d 519, 110 Colo. 441.

Ky.—*Whitney v. Penick*, 136 S.W.2d 570, 281 Ky. 474.

Okl.—*Western States Grocery Co. v. Mirt*, 123 P.2d 266, 190 Okl. 299.

Or.—*Hanson v. Schrick*, 85 P.2d 355, 160 Or. 397.

45. Kan.—*Atkinson v. Cardinal Stage Lines Co.*, 80 P.2d 1073, 148 Kan. 244.

Deaf-mute motorist

In action against bus company by motorist, who was a deaf-mute, for damages sustained in collision between his automobile and defendant's bus as the bus passed around the automobile, motorist was not guilty of contributory negligence as a matter of law under the evidence—*Atkinson v. Cardinal Stage Lines Co.*, supra.

46. Cal.—*Shannon v. Thomas*, 134 P.2d 522, 57 Cal.App.2d 187.

42 C.J. p 1262 note 42.

Care required as to equipment and condition of vehicle in general see supra §§ 260-263.

Defective brakes

(1) Whether plaintiff was guilty of contributory negligence in that his brakes were defective was held to be a question of fact.

Mich.—*Pulford v. Mouw*, 272 N.W. 713, 279 Mich. 376.

Wis.—*Wachowiak v. Spaight*, 241 N.W. 346, 207 Wis. 323.

(2) Evidence was held not to show that plaintiff was guilty of contributory negligence as a matter of law—*Brickell v. Boston & M. Transp. Co.*, 36 A.2d 622, 93 N.H. 140.

Mirror

Absence of mirror on automobile

was held not as matter of law to preclude recovery for collision.—*Harr v. Whitney*, 156 N.E. 863, 260 Mass. 193.

47. Cal.—*Hine v. Leppard*, 43 P.2d 595, 5 Cal.App.2d 154.

Ill.—*Walters v. Ind.*, 48 N.E.2d 791, 319 Ill.App. 162 *Skamenca v. Reeser*, 13 N.E.2d 668, 294 Ill.App. 216.

Mass.—*Price v. Pearson*, 16 N.E.2d 855, 305 Mass. 260.

Or.—*Kiddle v. Schnitzer*, 117 P.2d 983, 167 Or. 316.

48. Ala.—*Bahakel v. Great Southern Trucking Co.*, 31 So.2d 75, 249 Ala. 363.

N.D.—*Newton v. Gretter*, 236 N.W. 234, 60 N.D. 635.

Or.—*Schrunck v. Hawkins*, 289 P. 1073, 133 Or. 160.

42 C.J. p 1262 note 42 [c].

49. Ill.—*Skamenca v. Reeser*, 13 N.E.2d 668, 294 Ill.App. 216.

Lights

Ill.—*Skamenca v. Reeser*, supra.

50. Ind.—*American Carloading Corporation v. Voight*, 21 N.E.2d 453, 107 Ind.App. 267.

Lights

An automobile driver, blinded by lights of automobile approaching from opposite direction over viaduct, was not chargeable with contributory negligence as matter of law in failing to see unlighted truck, backing down viaduct incline, in time to avoid collision therewith, even though headlights of his automobile did not illuminate highway for over one hundred feet on night of accident—*American Carloading Corporation v. Voight*, supra.

(a) Speed

Where the evidence is conflicting or subject to differing inferences, it is a question of fact for the trier of the facts whether plaintiff was guilty of contributory negligence with respect to the speed at which he was driving his car.

Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question of fact for the trier of the facts, usually the jury, whether plaintiff was guilty

of contributory negligence with respect to the speed at which he was driving his car,⁵¹ in that he was driving at a rate of speed so that he could not stop within the assured clear distance ahead.⁵²

Accordingly, it has been held to be a question for the jury whether plaintiff was guilty of contributory negligence with respect to the speed at which he drove his vehicle at, or approaching, or while

51. U.S.—Imperial Tobacco Co., Limited, of Great Britain and Ireland v. Lambe, C.C.A.N.C., 77 F.2d 90.

Cal.—Hetherington v. Cressley Transp. Co., 191 P.2d 463, 84 Cal. App.2d 722—Tuderios v. Hertz Drivurself Stations, 160 P.2d 554, 70 Cal.App.2d 192—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765—Bauer v. Davis, 111 P.2d 715, 43 Cal.App.2d 764—McLellan v. Coca-Cola, 24 P.2d 200, 133 Cal.App. 9—Kellner v. Witte, 23 P.2d 1045, 133 Cal.App. 231—Harrington v. Fred-di, 23 P.2d 525, 133 Cal.App. 96—Munoz v. Kennedy, 293 P. 173, 109 Cal.App. 463.

Idaho—Nelson v. Inland Motor Freight Co., 92 P.2d 790, 60 Idaho 443.

Ill.—Sniegowski v. Reece, 61 N.E.2d 272, 326 Ill.App. 255—Mortvedt v. Western Austin Co., 50 N.E.2d 764, 320 Ill.App. 337—Wallace v. Yellow Cab Co., 238 Ill.App. 283.

Iowa.—Knaus Truck Lines v. Commercial Freight Lines, 29 N.W.2d 204, 238 Iowa 1356—Anderson v. Kist, 294 N.W. 726, 229 Iowa 462—Glover v. Vernon, 285 N.W. 652, 226 Iowa 1059—Berridge v. Pray, 210 N.W. 916, 202 Iowa 663.

Kan.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278—Watson v. Travelers Mut. Casualty Co., 73 P.2d 64, 146 Kan. 623.

Ky.—Foley's Adm'r v. Witt, 172 S.W. 2d 81, 294 Ky. 498—Raidt v. Blount, 171 S.W.2d 233, 294 Ky. 172—Ward v. Martin, 147 S.W.2d 1027, 285 Ky. 337.

Mass.—Bresnahan v. Proman, 43 N.E.2d 336, 312 Mass. 97—Herman v. Sladofsky, 17 N.E.2d 879, 301 Mass. 534—Murray v. Indursky, 165 N.E. 91, 266 Mass. 220.

Mich.—Seymour v. Carr, 11 N.W.2d 344, 307 Mich. 109—Kolehmainen v. E. E. Mills Trucking Co., 3 N.W. 2d 298, 301 Mich. 340—Meehl v. Barr Transfer Co., 296 N.W. 844, 296 Mich. 697.

Miss.—Sternberg Dredging Co. v. Screws, 166 So. 754, 175 Miss. 383

Mo.—Jungeblut v. Maris, 172 S.W.2d 861, 351 Mo. 301—Brinkley v. United Biscuit Co. of America, 164 S.W.2d 325, 349 Mo. 1227—Crawshaw v. Mable, App., 52 S.W.2d 1029.

Neb.—Callahan v. Prewitt, 10 N.W.2d 705, 143 Neb. 787, vacated on other grounds 13 N.W.2d 660, 143 Neb. 793.

N.H.—Holt v. Grimard, 51 A.2d 149, 94 N.H. 342—Spear v. Penna, 27 A. 2d 92, 92 N.H. 190.

N.C.—Smith v. Carolina Coach Co., 199 S.E. 90, 214 N.C. 314.

Ohio.—Sidle v. Baker, 3 N.E.2d 537, 52 Ohio App. 89.

Or.—Kiddle v. Schnitzer, 114 P.2d 109, 167 Or. 316, opinion adhered to 117 P.2d 983, 167 Or. 316—Burnett v. Weinstein, 59 P.2d 258, 154 Or. 308.

Pa.—Reidinger v. Lewis Jones, Inc., 45 A.2d 3, 353 Pa. 298—Hostetler v. Knisley, 185 A. 300, 322 Pa. 248 R.I.—Gendron v. Stockley, 34 A.2d 758, 69 R.I. 437—McAllister v. Chase, 13 A.2d 690, 65 R.I. 122—Adam v. United Electric Rys. Co., 196 A. 251, 59 R.I. 460.

Tex.—Ranne v. Jackson, Civ.App., 125 S.W.2d 407—Pure Foods Products v. Gibson, Civ.App., 118 S.W. 2d 925, error dismissed—Coleman v. West, Civ.App., 116 S.W.2d 870—White v. Beaumont Implement Co., Civ.App., 21 S.W.2d 559.

Vt.—Cobb v. Olsen, 56 A.2d 471.

Va.—Wright v. Perry, 184 S.E. 206, 166 Va. 222.

Wash.—Green v. Floe, 183 P.2d 771, 28 Wash.2d 630—Gaches v. Daw, 10 P.2d 1111, 168 Wash. 162.

42 C.J. p 1263 note 48 [a].

Care as to speed see supra §§ 290–299.

Speed held not negligence as matter of law

Iowa—Coon v. Rieke, 6 N.W.2d 309, 232 Iowa 859.

Mich.—Rathburn v. Riedel, 289 N.W. 285, 291 Mich. 652.

Va.—Noland v. Fowler, 18 S.E.2d 251, 179 Va. 19.

Wyo.—Merback v. Blanchard, 105 P. 2d 272, 56 Wyo. 152, rehearing denied 109 P.2d 49, 56 Wyo. 286.

Estimated speeds and distances

Contributory negligence as matter of law should be determined with extreme caution if based on estimates of speed, distance, and time, especially where estimates are made by occupants of moving vehicles.—Ranum v. Swenson, 19 N.W.2d 327, 220 Minn. 170.

52. U.S.—Williams v. Powers, C.C. A Ohio, 135 F.2d 153.

Ariz.—Campbell v. English, 110 P.2d 219, 56 Ariz. 549.

Ill.—Moyer v. Vaughan's Seed Store, 242 Ill.App. 308.

Iowa.—Anderson v. Kist, 294 N.W. 726, 229 Iowa 462—Yance v. Hoskins, 281 N.W. 489, 225 Iowa 1108, 118 A.L.R. 1186—Jordan v. Schantz, 264 N.W. 259, 220 Iowa 1251.

Mich.—Park v. Gaudio, 281 N.W. 565, 286 Mich. 133

Mo.—Sirounian v. Terminal R. Ass'n of St. Louis, 160 S.W.2d 451, 236 Mo.App. 938.

Speed held not negligence as matter of law

(1) The rule that a motorist driving so as to prevent stopping within time to avoid an obstruction within the range of his vision is negligent as a matter of law does not apply where an object which the driver has no reason to expect appears suddenly immediately in front of his automobile.

Iowa.—Blowers v. Waterloo, Cedar Falls & Northern Ry. Co., 6 N.W.2d 134, superseded on other grounds 8 N.W.2d 751, 233 Iowa 258—Central States Electric Co. v. McVay, 5 N.W.2d 817, 232 Iowa 469.

Mich.—Bard v. Baker, 278 N.W. 88, 283 Mich. 337.

Ohio.—Pressing v. Roadway Express, 42 N.E.2d 720, 69 Ohio App. 1.

(2) So, under various circumstances, the fact that a motorist was unable to stop within the assured clear distance ahead of the automobile has been held not to constitute contributory negligence as a matter of law.

Colo.—Sprague v. Herbel, 6 P.2d 930, 90 Colo. 134.

Iowa.—Johnston v. Calvin, 5 N.W.2d 840, 232 Iowa 531—Caudle v. Zenor, 251 N.W. 69, 217 Iowa 77.

Mich.—Vashaw v. Marquette Public Service Garage, 284 N.W. 910, 288 Mich. 363.

Okl.—Taylor v. Ray, 56 P.2d 376, 177 Okl. 18.

Pa.—Long v. Pennsylvania Truck Lines, 5 A.2d 224, 335 Pa. 236—Boor v. Schreiber, 33 A.2d 648, 152 Pa.Super. 458.

crossing, intersections,⁵³ at night,⁵⁴ around a curve,⁵⁵ while making a turn,⁵⁶ while passing a vehicle going in the same direction,⁵⁷ while passing a vehicle going in the opposite direction,⁵⁸ while passing parked vehicles,⁵⁹ in close proximity to the

preceding car,⁶⁰ where plaintiff had the right of way,⁶¹ and under various other special conditions.⁶²

It is also for the jury to determine, on conflicting evidence, at what rate of speed plaintiff was

53. D.C.—Brophy v. Weschler, D.C., 36 F.Supp. 635.
 Ala.—Ray v. Brannan, 72 So. 16, 196 Ala. 113.
 Cal.—Huffines v. Standard Brands of California, 90 P.2d 599, 32 Cal.App. 2d 634—Mioia v. Newhouse, 37 P.2d 1043, 2 Cal.App.2d 380—Lubenko v. San Joaquin Baking Co., 31 P.2d 1053, 138 Cal.App. 127.
 Idaho.—Stallinger v. Johnson, 139 P. 2d 460, 65 Idaho 101.
 Ill.—Groot v. City of Chicago, 53 N. E.2d 245, 321 Ill.App. 502—Krawitz v. Levinstein, 52 N.E.2d 60, 320 Ill.App. 618—Leahy v. Morris, 6 N. E.2d 914, 289 Ill.App. 99.
 Iowa.—Davidson v. Vast, 10 N.W.2d 12, 233 Iowa 534—Stein v. Sharpe, 295 N.W. 155, 229 Iowa 812—Short v. Powell, 291 N.W. 406, 228 Iowa 333—Bletzer v. Wilson, 276 N.W. 836, 224 Iowa 884.
 Kan.—Brunson v. Shell Petroleum Corporation, 19 P.2d 455, 137 Kan. 133.
 Mich.—Rathburn v. Riedel, 289 N.W. 285, 291 Mich. 652.
 Minn.—Mattfeld v. Nester, 32 N.W.2d 291, 226 Minn. 106—Norling v. Stempf, 293 N.W. 250, 208 Minn. 143—Bayers v. Bongfeldt, 277 N. W. 239, 201 Minn. 546.
 Mo.—Stelmach v. Saul, App., 50 S. W.2d 721.
 N.H.—Doyle v. Telegraph Pub. Co., 35 A.2d 394, 93 N.H. 61.
 N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.
 N.Y.—Armstrong v. Koller, 25 N.Y. S.2d 984, 261 App.Div. 1017.
 Or.—Carlson v. Homestead Bakery, 18 P.2d 244, 141 Or. 323—Davis v. Underdahl, 13 P.2d 362, 140 Or. 242.
 Pa.—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248—McNulty v. Joseph Horne Co., 148 A. 105, 298 Pa. 244—Craig v. Gottlieb, 55 A.2d 573, 161 Pa.Super. 526—Kries v. Kraftsow, 40 A.2d 122, 156 Pa.Super. 296—Sobieralski v. Schwotzer, 33 A.2d 277, 152 Pa.Super. 661—Hummel v. Quaker City Cabs, 182 A. 658, 120 Pa.Super. 527—Freeman v. MacDonald, Com.Pl., 31 Del. Co. 165.
 R.I.—Higginbotham v. Young, 193 A. 626, 59 R.I. 1—McWright v. Providence Telephone Co., 131 A. 841, 47 R.I. 196.
 Wash.—Weikert v. Daniels, 35 P.2d 22, 178 Wash. 614—Parton v. Barr, 10 P.2d 566, 168 Wash. 60—Day v. Polley, 266 P. 169, 147 Wash. 419.
 Wis.—Svenson v. Vondrak, 227 N.W. 240, 200 Wis. 312.
 Utah.—Martin v. Sheffield, 189 P.2d 127.
Speed held not negligence as matter of law
 Kan.—Revell v. Bennett, 176 P.2d 538, 162 Kan. 345.
 Minn.—Jeddeloh v. Hockenhull, 18 N. W.2d 582, 219 Minn. 541.
 Wash.—Carlson v. Whelan, 84 P.2d 1001, 197 Wash. 104.
 54. Cal.—Doane v. Smith, 147 P.2d 650, 63 Cal.App.2d 691.
 N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200.
 N.Y.—Lonstein v. Onondaga Freight Corporation, 38 N.Y.S.2d 698, 265 App.Div. 978, affirmed 49 N.E.2d 1005, 290 N.Y. 735.
 Tex.—Gulf Brewing Co. v. Goodwin, Civ.App., 135 S.W.2d 812, error dismissed, judgment correct.
Driving with dim lights
 Mich.—Meyer v. Weimaster, 270 N. W. 715, 278 Mich. 370.
Held not excessive as matter of law
 Mass.—Jacobs v. Moniz, 192 N.E. 515, 288 Mass. 102.
 55. Cal.—Langensand v. Obert, 18 P. 2d 725, 129 Cal.App. 214.
 Ky.—Patton v. Gannett, 177 S.W.2d 888, 296 Ky. 533.
 Mo.—Everhardt v. Garner, App., 100 S.W.2d 71.
 56. Iowa.—Banghart v. Meredith, 294 N.W. 918, 229 Iowa 608.
 Tex.—Larson v. Whitten, Civ.App., 111 S.W.2d 736, error dismissed.
 57. Iowa.—Berridge v. Pray, 210 N. W. 916, 202 Iowa 663.
 Mo.—Proctor v. Jacob Ruppert, 159 S.W.2d 328, 236 Mo.App. 684.
 58. Mo.—Stack v. General Baking Co., 223 S.W. 89, 283 Mo. 396.
 59. Ky.—Miles v. Southeastern Motor Truck Lines, 173 S.W.2d 990, 295 Ky. 156.
 60. N.C.—Killough v. Williams, 29 S.E.2d 697, 224 N.C. 254.
 Wash.—Johnson v. Watson, 120 P.2d 515, 11 Wash.2d 690.
 61. Iowa.—Davidson v. Vast, 10 N. W.2d 12, 233 Iowa 534.
 Me.—Eaton v. Marcelle, 29 A.2d 162, 139 Me. 256.
 62. Pa.—Balzer v. Reith, 54 A.2d 64, 161 Pa.Super. 187.
 Wis.—Mann v. Reliable Transit Co., 259 N.W. 415, 217 Wis. 465.
Obscured vision generally
 Del.—De Pace v. O'Neal, Super., 54 A.2d 855.
 Idaho.—Hamilton v. Carpenter, 290 P. 724, 49 Idaho 629.
 Mo.—Windsor v. McKee, App., 22 S. W.2d 65.
 Or.—Murphy v. Hawthorne, 244 P. 79, 117 Or. 319, 44 A.L.R. 1397.
Fog or thick weather
 Conn.—Schuster v. Johnson, 145 A. 29, 108 Conn. 704.
 Ill.—Moffitt v. O. L. D. Forwarding Co., 73 N.E.2d 164, 331 Ill.App. 278.
 Iowa.—Caudle v. Zenor, 251 N.W. 69, 217 Iowa 77.
 Ohio.—Reserve Trucking Co. v. Fairchild, 191 N.E. 745, 128 Ohio St. 519.
 Mass.—Langill v. First Nat. Stores, 11 N.E.2d 593, 298 Mass. 559—Renaud v. New England Transp. Co., 189 N.E. 789, 286 Mass. 39.
 N.C.—Cummins v. Southern Fruit Co., 36 S.E.2d 11, 225 N.C. 625.
 Tex.—Pope v. Clary, Civ.App., 161 S.W.2d 828, error refused.
Blinding lights
 U.S.—Budd v. John B. Southee, Inc., C.C.A.N.Y., 85 F.2d 513.
 Ala.—McBride v. Baggett Transp. Co., 35 So.2d 101, 250 Ala. 488.
 Ky.—McLellan v. Threlkeld, 129 S. W.2d 977, 279 Ky. 114—Commonwealth v. Daniel, 98 S.W.2d 897, 266 Ky. 285.
 Md.—Miles v. Webb, 159 A. 782, 162 Md. 269.
 Mo.—Powell v. Schofield, 15 S.W.2d 876, 223 Mo.App. 1041.
 Or.—Alt v. Krebs, 88 P.2d 804, 161 Or. 256.
 Pa.—Schildnecht v. Follmer Trucking Co., 199 A. 220, 330 Pa. 550—Adams v. Fields, 162 A. 177, 308 Pa. 301.
Blind intersection
 Iowa.—Sanford v. Goodridge, 13 N.W. 2d 40, 234 Iowa 1036.
Slippery pavement
 U.S.—Swinger v. Firman Equipment Corporation, C.C.A.Ill., 94 F.2d 269.
 Mich.—Hautala v. Cochran, 286 N.W. 663, 289 Mich. 409.
 N.H.—La Perle v. Swanson, 24 A.2d 269, 92 N.H. 5.
 N.C.—Glosson v. Trollinger, 40 S.E. 2d 606, 227 N.C. 84—Brown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626.
 Pa.—Kelso v. Hunter, Com.Pl., 60 Montg.Co. 198.
 Vt.—Page v. McGovern, 3 A.2d 543, 110 Vt. 166.
Road under construction
 Wyo.—Jackson v. W. A. Norris, Inc., 93 P.2d 498, 54 Wyo. 403.
Police driving through traffic light
 Pa.—Long v. Schumacher, 20 A.2d 765, 342 Pa. 356.

driving,⁶³ whether he was driving at a rate in excess of the speed limit set by law,⁶⁴ and whether such violation of the speed limit constituted contributory negligence under the circumstances.⁶⁵

However, where the evidence is undisputed and not subject to differing inferences, it is for the court to determine as a matter of law that plaintiff either was,⁶⁶ or was not,⁶⁷ guilty of contributory negligence with respect to the speed at which he was driving. Moreover, where the question of plaintiff's speed is not placed in issue by the pleadings or the evidence, such question should not be submitted to the jury.⁶⁸

(b) Parking

Whether plaintiff was guilty of contributory negligence in parking his vehicle where and in the manner in which he did is, on conflicting evidence, a question for the trier of facts.

Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question of fact for the jury or other trier of fact whether plaintiff was guilty of contributory negligence in parking or stopping his vehicle where and in the manner in which he did,⁶⁹ as where the vehicle was parked or stopped on the traveled part of the highway,⁷⁰ or where the vehi-

63. Cal.—Smith v. Schwartz, 96 P. 2d 816, 35 Cal.App.2d 659—Fox v. Ravera, 9 P.2d 590, 122 Cal.App. 35.

Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.

Iowa.—Hartman v. Red Ball Transp. Co., 233 N.W. 23, 211 Iowa 64.

Ky.—Fry & Kain v. Keen, 59 S.W.2d 3, 248 Ky. 548.

Me.—Libby v. Heikkinen, 32 A.2d 604, 140 Me. 23.

Mich.—Hale v. Rogers, 221 N.W. 282, 244 Mich. 69—Scott v. Dow, 127 N.W. 712, 162 Mich. 636.

Or.—Davis v. Underdahl, 13 P.2d 362, 140 Or. 242.

Wis.—Helgöe v. Bade, 229 N.W. 541, 201 Wis. 193.

64. U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.

Ala.—McCaleb v. Reed, 144 So. 28, 225 Ala. 564.

Ill.—Goad v. Grissom, 57 N.E.2d 514, 324 Ill.App. 123.

Kan.—Fisher v. Central Surety & Insurance Corporation, 86 P.2d 583, 149 Kan. 38.

N.Y.—Bookhout v. Hays, 298 N.Y.S. 829, 252 App.Div. 815.

Pa.—Bulzer v. Reith, 54 A.2d 64, 161 Pa.Super. 187.

Tenn.—Sutherland v. Keene, App., 203 S.W.2d 917—Walters v. Staton, 111 S.W.2d 381, 21 Tenn.App. 401.

Tex.—Gonzales v. Orsak, Civ.App., 205 S.W.2d 793.

Wash.—Hirst v. Standard Oil Co. of California, 261 P. 405, 145 Wash. 597.

42 C.J. p 1263 note 48 [e].

65. U.S.—Cram v. Eveloff, C.C.A. Minn., 127 F.2d 486.

Ala.—Brown Hauling Co. v. Newsome, 2 So.2d 782, 241 Ala. 300.

Cal.—Wilkerson v. Brown, 190 P.2d 958, 84 Cal.App.2d 401—Bender v. Perry, 99 P.2d 819, 37 Cal.App.2d 206.

Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 807.

Mass.—Ferreira v. Zaccolanti, 183 N.E. 261, 281 Mass. 91.

Mich.—Zelts v. Mara, 287 N.W. 418, 290 Mich. 161.

Minn.—Duffey v. Curtis, 258 N.W. 744, 193 Minn. 358.

Tex.—Allen v. Denk, Civ.App., 87 S.W.2d 303.

Speed held not negligence as matter of law

Ariz.—Alabam Freight Lines v. Phoenix Bakery, 166 P.2d 816, 64 Ariz. 101.

Cal.—McSweeney v. East Bay Transit Co., 141 P.2d 787, 60 Cal.App.2d 807.

Minn.—Tully v. Flour City Coal & Oil Co., 253 N.W. 22, 191 Minn. 84.

N.C.—Crone v. Fisher, 27 S.E.2d 642, 223 N.C. 635.

66. Neb.—Redwelski v. Omaha & Council Bluffs Street Ry. Co., 290 N.W. 904, 137 Neb. 681—Roth v. Blomquist, 220 N.W. 572, 117 Neb. 444, 58 A.L.R. 1473.

N.C.—McKinnon v. Howard Motor Lines, 44 S.E.2d 735, 228 N.C. 132—Atkins v. White Transp. Co., 32 S.E.2d 209, 224 N.C. 688.

Particular instances

(1) Inability to stop within assured clear distance.

Iowa.—Ellis v. Bruce, 252 N.W. 101, 217 Iowa 258.

Mich.—Janks v. Ulen Contracting Corporation, 16 N.W.2d 132, 309 Mich. 712.

Pa.—Milliken v. United Laundries, 161 A. 873, 105 Pa.Super. 286.

(2) Motorist's violation of statutory speed limit—Obenberger v. Interstate Oil Co., 248 N.W. 97, 211 Wis. 245.

67. U.S.—Cain v. Bowlby, C.C.A.N.M., 114 F.2d 519, certiorari denied 61 S.Ct. 319, 311 U.S. 710, 85 L.Ed. 462.

68. Wis.—J. W. Cartage Co. v. Laufenberg, 28 N.W.2d 925, 251 Wis. 301.

69. Ala.—Harrison v. Wright, 111 So. 642, 215 Ala. 607.

Cal.—Borror v. Berry, 125 P.2d 537, 51 Cal.App.2d 552—Graves v. Kern County Transp. Corporation, 296 P. 902, 112 Cal.App. 261.

Iowa.—Lukin v. Marvel, 259 N.W. 782, 219 Iowa 773.

Minn.—Spates v. Gillespie, 252 N.W. 835, 191 Minn. 1.

Mo.—Rockenstein v. Rogers, 31 S.W.2d 792, 326 Mo. 468.

N.H.—Cedergren v. Hadaway, 18 A.2d 380, 91 N.H. 270.

N.Y.—Bonded Freightways v. Codington, 22 N.Y.S.2d 365, 260 App. Div. 832.

Pa.—Moyer v. Snyder, Com.Pl., 14 Northumb.Leg.J. 101.

Wash.—McAbee v. French, 274 P. 713, 150 Wash. 646.

Wis.—Lembke v. Farmers Mut. Automobile Ins. Co., 11 N.W.2d 169, 243 Wis. 531, rehearing denied 12 N.W.2d 18, 243 Wis. 531.

Care required in parking or leaving car unattended see supra §§ 329-338.

Plaintiff held not negligent as matter of law

Pa.—Magasiny v. T. M. Smithian Trucking Co., 163 A. 314, 107 Pa. Super. 84.

Car rolling down hill

(1) In general.—Hickerson v. Daskam, 169 A. 769, 313 Pa. 379.

(2) Evidence did not establish as matter of law that deceased was negligent so as to bar recovery for her death as a result of being run over by defendants' automobile, which she had driven at request of one of owners and which rolled backward after being parked on a grade.—McCoy v. Courtney, 172 P.2d 596, 25 Wash.2d 956.

Parking on left of highway

Ark.—Bean v. Coffee, 277 S.W. 522, 169 Ark. 1052.

70. Colo.—Conner v. Sullivan, 272 P. 623, 84 Colo. 572.

Iowa.—Russell v. Leschensky, 276 N.W. 608, 224 Iowa 334.

Minn.—Corridan v. Agranoff, 297 N.W. 759, 210 Minn. 237.

Neb.—Anderson v. Robbins Incubator Co., 8 N.W.2d 446, 143 Neb. 40.

N.J.—Kellam v. Akers Motor Lines, 42 A.2d 261, 183 N.J.Law 1.

S.D.—Griebel v. Ruden, 249 N.W. 810, 61 S.D. 507, reheard 253 N.W. 447, 62 S.D. 469.

cle was parked or stopped partly on the traveled part,⁷¹ in violation of regulations;⁷² or where the material in the vehicle projected over the highway;⁷³ or where the vehicle was parked on the side or shoulder of the road,⁷⁴ or was parked without proper lights or with the lights obscured,⁷⁵ or without fuses, flares, or other appropriate warning signals,⁷⁶ as required by statute.⁷⁷ Whether plaintiff was guilty of contributory negligence in opening the door of a parked car when another car is passing is also a question of fact for the trier of facts.⁷⁸

Various incidental questions of fact relating to

parking have been held to be for the jury to decide where the evidence is conflicting,⁷⁹ such as whether plaintiff's vehicle was parked on the traveled or paved portion of the highway,⁸⁰ and whether he had lights on the rear of the parked car.⁸¹ Even though plaintiff parked his car at a place where no parking was allowed under the regulations, the question whether such violation is justified under the circumstances of the case is for the jury.⁸²

Where, however, the evidence is uncontradicted and not reasonably subject to differing inferences,

V.Va.—*Lynch v. Alderton*, 20 S.E.2d 657, 124 W.Va. 446.

Held not negligence as matter of law
Pa.—*Houlihan v. Turkheimer*, 23 A.2d 352, 146 Pa.Super. 496—*Purol, Inc. v. Great Eastern System*, 197 A. 543, 130 Pa.Super. 341.

Vt.—*Nicholson v. Twin State Fruit Corporation*, 29 A.2d 819, 113 Vt. 59.

Vehicles double-parked

Mass.—*Thibault v. Nicholas Zeo, Inc.*, 17 N.E.2d 687, 301 Mass. 478.

71. Ark.—*Ozan Lumber Co. v. Tidwell*, 198 S.W.2d 182, 210 Ark. 912.
Cal.—*Hilbert v. Olney*, 61 P.2d 941, 17 Cal.App.2d 135—*Giorgetti v. Wollaston*, 257 P. 109, 83 Cal.App. 358.

Ill.—*Buckels v. Arcole Const. Co.*, 7 N.E.2d 618, 289 Ill.App. 626.

Iowa.—*Knaus Truck Lines v. Commercial Freight Lines*, 29 N.W.2d 204, 238 Iowa 1356.

Or.—*Hornshuh v. Alldredge*, 41 P.2d 423, 149 Or. 419.

Pa.—*Kelly v. Carpenter*, Com.Pl., 32 Del.Co. 277—*Brittan v. Milanovich*, Com.Pl., 24 Wash.Co. 156.

Wash.—*Crubbs v. Grayson*, 5 P.2d 1033, 165 Wash. 548.

Held not negligence as matter of law
Colo.—*Dillon v. Sterling Rendering Works*, 106 P.2d 358, 106 Colo. 407.
Mich.—*Marth v. Lambert*, 287 N.W. 916, 290 Mich. 557.

Tex.—*Clowe & Cowan v. Morgan*, Civ.App., 153 S.W.2d 863, error refused.

72. Ala.—*Cooper v. Agee*, 132 So. 173, 222 Ala. 334.

Neb.—*Anderson v. Robbins Incubator Co.*, 8 N.W.2d 446, 143 Neb. 40.

Tex.—*Tarry Warehouse & Storage Co. v. Duvall*, 115 S.W.2d 401, 131 Tex. 466.

Held not negligence as matter of law
(1) In general.

U.S.—*Valanda v. Baum & Reissman*, D.C.Pa., 31 F.Supp. 71, reversed on other grounds, C.C.A., 113 F.2d 188.

Iowa.—*Hayungs v. Falk*, 27 N.W.2d 15, 238 Iowa 285.

Mo.—*Day v. Banks*, App., 102 S.W.2d 946, opinion quashed in part on other grounds State ex rel. Banks v.

Hostetter, 125 S.W.2d 835, 344 Mo. 155.

(2) Generally, a violation of statute prohibiting the parking of an automobile on the pavement constitutes negligence as a matter of law, but a technical violation of the law may occur under circumstances which justify or excuse it, or raise an issue of fact for the jury as to whether the act complained of under the attendant circumstances constituted contributory negligence.—*Gulf States Utilities Co. v. Selman*, Tex. Civ.App., 137 S.W.2d 122, error dismissed, judgment correct.

73. Minn.—*Hack v. Johnson*, 275 N.W. 381, 201 Minn. 9.

74. Cal.—*Ketchum v. Pattee*, 98 P.2d 1051, 37 Cal.App.2d 122.

Conn.—*Nirenstein v. Sachs*, 167 A. 822, 117 Conn. 343.

Fla.—*Allen v. Hooper*, 171 So. 513, 126 Fla. 458.

Iowa.—*Goodlove v. Logan*, 261 N.W. 496, 219 Iowa 1380.

Minn.—*Lund v. Springsteel*, 246 N.W. 116, 187 Minn. 577.

Tex.—*Jackey v. Moffett*, Civ.App., 172 S.W.2d 715.

75. Conn.—*Curcio v. Goodwin*, 18 A.2d 360, 127 Conn. 483.

Minn.—*Latourrelle v. Horan*, 4 N.W.2d 343, 212 Minn. 520—*Erickson v. Morrow*, 287 N.W. 628, 206 Minn. 58.

Neb.—*Anderson v. Robbins Incubator Co.*, 8 N.W.2d 446, 143 Neb. 40.
N.J.—*Donohue v. Habich*, 187 A. 360, 14 N.J. Misc. 785.

Pa.—*Fingeret v. Mann*, 178 A. 674, 319 Pa. 262.

Vt.—*Milligan v. Clogston*, 138 A. 739, 100 Vt. 455.

76. Iowa.—*Knaus Truck Lines v. Commercial Freight Lines*, 29 N.W.2d 204, 238 Iowa 1356.

Held not negligence as matter of law
Mere failure to place flares or appropriate warning signals as required by statute when trailer or semitrailer is disabled on roadway at night does not constitute contributory negligence as matter of law un-

der all circumstances.—*Caperton v. Mast*, Cal.App., 192 P.2d 467.

77. Iowa.—*Hayungs v. Falk*, 27 N.W.2d 15, 238 Iowa 285.

Held not negligence as matter of law
Iowa.—*Hayungs v. Falk*, supra.

78. U.S.—*Tyson-Long Co. v. Wolfe*, C.C.A. III, 81 F.2d 82.

N.J.—*Greenberg v. O'Hrodsky*, 177 A. 131, 13 N.J. Misc. 184.

N.Y.—*Rugue v. Staten Island Coach Co.*, 42 N.E.2d 488, 288 N.Y. 206—*Dority v. Townley*, 56 N.Y.S.2d 473—*Pearlman v. Misner*, 36 N.Y.S.2d 646.

79. Minn.—*Latourrelle v. Horan*, 4 N.W.2d 343, 212 Minn. 520.

80. Ala.—*Cooper v. Agee*, 132 So. 173, 222 Ala. 334.

Conn.—*Nichols v. Williams*, 16 A.2d 605, 117 Conn. 347.

Minn.—*Latourrelle v. Horan*, 4 N.W.2d 343, 212 Minn. 520.

Or.—*Martin v. Oregon Stages*, 277 P. 291, 129 Or. 435.

81. Or.—*Martin v. Oregon Stages*, supra.

82. Cal.—*Smith v. Pacific Greyhound Corporation*, 35 P.2d 169, 139 Cal.App. 696—*Brunetto v. Spediacchi*, 12 P.2d 151, 124 Cal.App. 252.

Tex.—*Gulf States Utilities Co. v. Selman*, Civ.App., 137 S.W.2d 122, error dismissed, judgment correct.
42 C.J. p 1263 note 67.

Parking on highway with flat tire

Where motorist parked his automobile as far off traveled roadway as would have been possible without driving along on that side of the highway with a punctured tire or without crossing to other side of highway where there was a wider space available off traveled roadway, whether the circumstances justified motorist's failure to remove the automobile from the highway within meaning of statute providing that no person shall park an automobile on a highway when it is practical to park the vehicle off the roadway was for jury.—*Kline v. Johannesen*, 24 N.W.2d 595, 249 Wis. 316.

it is a question of law for the court to decide whether plaintiff was guilty of contributory negligence in the parking of his vehicle.⁸³

(c) Conduct in Other Respects

Where the evidence is conflicting, it is a question of fact for the trier of facts whether plaintiff was guilty of contributory negligence in driving a vehicle with respect to control, lookout, signals, turning, backing, stopping, or failure to stop, and position upon the highway.

In accordance with the rules stated *supra* subdivision a of this section, where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury whether plaintiff was guilty of contributory negligence with respect to the control of his car,⁸⁴ as where the vehicle plaintiff was driving skidded.⁸⁵

Lookout. Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury whether plaintiff was guilty of contributory negligence in failing to keep a lookout,⁸⁶ or a proper or reasonably careful lookout,⁸⁷ or in failing to keep a lookout to the rear for approaching vehicles,⁸⁸ or in failing to see an object or vehicle in the road in time to stop;⁸⁹ and it is for the jury to determine the degree of care required in maintaining a lookout, and whether a constant lookout was required.⁹⁰ Where the evidence is uncontradicted and not reasonably subject to varying inferences, it is for the court to decide as a matter of law that plaintiff was,⁹¹ or was not,⁹² guilty of contributory negligence.

83. Pa.—*Perlman v. Arrow Carrier Corp.*, Com.Pl., 38 Luz Leg.Reg. 297.

84. Ark.—*Kirby v. Swift & Co.*, 134 S.W.2d 865, 199 Ark. 442.

Cal.—*Donahue v. Mazzoli*, 80 P.2d 743, 27 Cal.App.2d 102.

Conn.—*Shanley v. Connecticut Co.*, 6 A.2d 363, 125 Conn. 472.

Iowa.—*Yancey v. Hoskins*, 281 N.W. 489, 225 Iowa 1108, 118 A.L.R. 1186.

Neb.—*Miers v. McMaken*, 22 N.W.2d 422, 147 Neb. 133.

Tex.—*Western Development Corporation v. Simmons*, Civ App., 124 S.W.2d 414, error refused.

Wis.—*Stylow v. Milwaukee Electric Railway & Transport Co.*, 5 N.W.2d 750, 241 Wis. 211.

42 C.J. p 1263 note 46.

Plaintiff held not negligent as matter of law

Iowa.—*Simanek v. Behel*, 7 N.W.2d 792, 232 Iowa 1150.

La.—*Dodge v. Bituminous Cas. Corp.*, App., 33 So.2d 95—*Cole v. Burgess*, App., 31 So.2d 450.

Wyo.—*Merback v. Blanchard*, 105 P.2d 272, 56 Wyo. 152, rehearing denied 109 P.2d 49, 56 Wyo. 286.

At intersection

Iowa.—*Schwickerath v. Maas*, 297 N.W. 248, 230 Iowa 329—*Hinrichs v. Mengel*, 293 N.W. 452, 228 Iowa 1124.

R.I.—*McWright v. Providence Telephone Co.*, 131 A. 841, 47 R.I. 196.

Va.—*Doss v. Rader*, 46 S.E.2d 434, 187 Va. 231.

Passing vehicle going in opposite direction

Iowa.—*Olson v. Tyner*, 257 N.W. 538, 219 Iowa 251.

Wis.—*Lelsch v. Tigerton Lumber Co.*, 27 N.W.2d 367, 250 Wis. 463.

Driving at less than statutory speed

Fact that motorist at time of accident was driving at considerably less than statutory speed did not render him free from contributory negligence as matter of law, since statu-

tory permissive speed on highway is subordinate to imperative command of statute requiring driver to keep automobile under control.—*Osgood v. City of San Diego*, 62 P.2d 195, 17 Cal.App.2d 345.

85. Ala.—*Luquire Ins. Co. v. McCalla*, 13 So.2d 865, 244 Ala. 479.

Mich.—*Stankrauff v. De Voe*, 275 N.W. 723, 281 Mich. 660.

Minn.—*Raymond v. Kaiser*, 283 N.W. 119, 204 Minn. 220—*Dohm v. R. N. Cardezo & Bro.*, 206 N.W. 377, 165 Minn. 193.

N.H.—*Mack v. Hoyt*, 55 A.2d 891, 94 N.H. 492.

S.C.—*Montgomery v. National Conveyor & Trucking Co.*, 195 S.E. 247, 186 S.C. 167.

Vt.—*Reid v. Abbiati*, 32 A.2d 133, 113 Vt. 233

Wis.—*Hurt v. Meunier*, 32 N.W.2d 241, 252 Wis. 581.

Held not negligence as matter of law
Iowa.—*Uhlenhopp v. Steege*, 7 N.W.2d 195, 233 Iowa 368.

Minn.—*Shockman v. Union Transfer Co.*, 19 N.W.2d 812, 220 Minn. 334.

Ohio.—*Hangen v. Hadfield*, 22 N.E.2d 419, 61 Ohio App. 93, affirmed 20 N.E.2d 715, 135 Ohio St. 281.

Pa.—*Rasener v. Atlantic Refining Co.*, 181 A. 456, 119 Pa.Super. 395.

Vt.—*Nicholson v. Twin State Fruit Corporation*, 29 A.2d 819, 113 Vt. 59.

86. Cal.—*Nederveld v. Bohlander Trucking Co.*, 126 P.2d 657, 52 Cal. App.2d 539—*Bauer v. Davis*, 111 P.2d 715, 43 Cal.App.2d 764.

42 C.J. p 1263 note 52.

Care required in keeping lookout see *supra* §§ 284-287.

Smoke obscuring motorist's vision of highway demands exercise of high degree of care but it is not negligence as matter of law to drive through the smoke.—*French v. Christner*, 143 P.2d 674, 173 Or. 158.

87. Iowa.—*Baldwin v. Rusbult*, 263 N.W. 279, 220 Iowa 725.

N.C.—*Williams v. Frederickson Motor Express Lines*, 151 S.E. 197, 198 N.C. 193.

Wis.—*Colby Cheese Box Co. v. Dailendorfer*, 251 N.W. 447, 213 Wis. 331.

88. Ala.—*Birmingham Electric Co. v. Baker*, 122 So. 316, 219 Ala. 324.

Held not negligence as matter of law
Ala.—*Birmingham Electric Co. v. Baker*, *supra*.

89. Ind.—*Cushman Motor Delivery Co. v. McCabe*, 36 N.E.2d 769, 219 Ind. 156.

Tex.—*Lone Star Gas Co. v. Fouché*, Civ App., 190 S.W.2d 501, refused for want of merit.

Held not negligence as matter of law
Ark.—*Rose v. Greb*, 112 S.W.2d 961, 195 Ark. 532.

Kan.—*Hayden v. Jack Cooper Transport Co.*, 5 P.2d 837, 134 Kan. 172.

90. Ind.—*Northwestern Transit v. Wagner*, 61 N.E.2d 591, 223 Ind. 447.

91. S.D.—*Anderson v. Huntwork*, 284 N.W. 775, 66 S.D. 411.

Determination of insufficiency of evidence

In order to invoke the principle that plaintiff's testimony that he looked but did not see defendant's approaching automobile is insufficient to take the case to the jury, on ground that automobile was in plain view, it must appear as an uncontrovertible fact that automobile was within plaintiff's range of vision at time he claimed to have looked.—*Schwartz v. Eitel*, C.C.A.Wis., 132 F.2d 760.

92. Iowa.—*Kadlec v. Al. Johnson Const. Co.*, 252 N.W. 103, 217 Iowa 239.

42 C.J. p 1263 note 53.

It has been held that, where plaintiff fails to look for approaching vehicles, the question of contributory negligence is usually for the court,⁹³ but, where plaintiff looks, but does not see a vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason does not recognize the danger, the question of his contributory negligence is generally one for the jury, or the court, where sitting without a jury.⁹⁴

Signals. Where the evidence is conflicting or subject to differing inferences, it is a question of fact for the trier of the facts whether plaintiff was guilty of contributory negligence in failing to give traffic signals or warnings as required by regulations;⁹⁵ and, on conflicting evidence, it is a question for the jury whether plaintiff gave warning on approaching defendant's car.⁹⁶

Turning. Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question of fact whether plaintiff was guilty of contributory negligence in turning his car⁹⁷ at a point other than an intersection.⁹⁸

Backing. In accordance with the rules stated su-

pra subdivision a of this section, where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question of fact for the jury or court sitting without a jury whether plaintiff was guilty of contributory negligence in backing his car.⁹⁹

Stopping or failure to stop. Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury whether plaintiff was guilty of contributory negligence in failing to stop his car in time to avoid the collision,¹ or to stop it, as where he failed to stop or to stop in time where his vision was obscured by the blinding lights of approaching vehicles.² Where it is impossible to say that plaintiff's negligence in stopping his automobile without signal, in violation of statute, was not the contributing cause of the collision, a verdict may properly be directed for defendant, notwithstanding his negligent speed.³

Position on highway. It is ordinarily a question of fact whether plaintiff was guilty of contributory negligence in driving on the wrong side of the highway,⁴ or the wrong lane on the highway.⁵

93. Cal.—Armstrong v. Studer, 37 P. 2d 475, 2 Cal App 2d 166

94. Cal.—Armstrong v. Studer, supra.

95. Conn.—Bracken v. Curtiss, 145 A 23, 109 Conn 573.

Care required as to signals or warnings of approach see supra § 288

Held not negligence as matter of law N.Y.—Mayo v. Sherwood, 13 N.Y.S.2d 899.

96. Vt.—Lee v. Donnelly, 113 A. 542, 95 Vt. 121.

97. Ariz.—McIver v. Allen, 262 P. 5, 33 Ariz. 28.

Cal.—Washam v. Peerless Automatic Staple Mach. Co., 113 P.2d 724, 45 Cal.App.2d 174.

N.H.—Boston v. B. & M. Super Service, 20 A.2d 633, 245 N.H. 392.

42 C.J. p 1263 note 57.

Care as to turning see supra § 303.

For court sitting without jury Conn.—Caines v. Wofsey, 167 A. 733, 117 Conn. 671.

Turn held not negligence as matter of law

Me.—Tibbetts v. Harbach, 198 A. 610, 135 Me. 397.

Wash.—Fosdick v. Middendorf, 115 P.2d 679, 9 Wash.2d 616.

Position on highway during turn Pa.—Hayes v. Shomaker, 152 A. 827, 302 Pa. 72.

Wash.—Fosdick v. Middendorf, 115 P. 2d 679, 9 Wash.2d 616.

58. Ariz.—McIver v. Allen, 262 P. 5, 33 Ariz. 28

Wash.—Onkels v. Stogsdill, 275 P. 692, 151 Wash. 194.

99. N.J.—Smith v. Montclair Brown & White Cab Co., 139 A. 904, 6 N.J. Misc. 57

Pa.—Schade v. Detar, 157 A. 21, 102 Pa. Super. 418.

Wash.—Devlin v. Spokane United Rys., 48 P.2d 252, 183 Wash. 342, opinion adhered to 53 P.2d 1198, 183 Wash. 342

42 C.J. p 1263 note 61.

Care as to backing see supra § 302.

From diagonal parking position

Ark.—J. Foster & Co. v. Wooldridge, 134 S.W.2d 526, 199 Ark. 551.

Backing out of garage without looking

Tenn.—Frye v. Elkins, 122 S.W.2d 827, 22 Tenn.App. 317.

1. Ohio—Spreng v. Flaherty, 177 N.E. 528, 40 Ohio App. 21.

Okl.—Whitworth v. Riley, 269 P. 350, 132 Okl. 72, 59 A.L.R. 584.

Tex.—Bigelow v. Rupp, Civ.App., 192 S.W.2d 791, refused no reversible error.

Va.—Body, Fender & Brake Corporation v. Matter, 200 S.E. 589, 172 Va. 26.

Wash.—Gaches v. Daw, 10 P.2d 1111, 168 Wash. 162.

Wyo.—Merback v. Blanchard, 105 P.

2d 272, 56 Wyo. 152, rehearing denied 109 P.2d 49, 56 Wyo. 286.

42 C.J. p 1263 note 63.

Care as to stopping see supra § 301.

Entering street from driveway

Minn.—Schnore v. Baldwin, 14 N.W. 2d 447, 217 Minn. 394

2. Ala.—McBride v. Baggett Transp. Co., 35 So.2d 101, 250 Ala. 488

Kan.—Drennan v. Pennsylvania Cas. Co., 176 P.2d 522, 162 Kan. 286.

Mo.—Weaver v. Stephens, App., 78 S.W.2d 903—Snyder v. Murray, 17 S.W.2d 639, 223 Mo. App. 671, followed in 17 S.W.2d 646.

Or.—Alt v. Krebs, 88 P.2d 804, 161 Or. 256.

Pa.—Poffilo v. Aaron, 43 A.2d 370, 157 Pa. Super. 513

Held not negligence as matter of law

Wash.—O'Neil v. Gruhn, 85 P.2d 1061, 197 Wash. 557.

3. Iowa—Clark v. Wenthers, 159 N.W. 585, 178 Iowa 97.

4. Ill.—Sniogowski v. Reece, 61 N.E. 2d 272, 326 Ill.App. 255

N.H.—Greenie v. Nashua Buick Co., 158 A. 817, 85 N.H. 316.

N.C.—Phillips v. Nessmith, 37 S.E.2d 178, 226 N.C. 173.

Held not negligence as matter of law

Wash.—Geer v. Gellerman, 4 P.2d 641, 165 Wash. 10.

5. N.J.—Claypoole v. Motor Finance Corporation, 15 A.2d 794, 125 N.J. Law 440.

(3) Particular Situations

- (a) Vehicles traveling in same direction
- (b) Vehicles traveling in opposite directions
- (c) Vehicles on intersecting paths
- (d) Passing parked vehicles
- (e) Acts in emergencies

(a) Vehicles Traveling in Same Direction

- aa. Plaintiff following or passing other vehicle
- bb. Plaintiff being followed or passed
- aa. Plaintiff Following or Passing Other Vehicle

It is a question of fact for the trier of facts, on conflicting evidence, whether the plaintiff was guilty of contributory negligence in following or passing or attempting to pass a vehicle traveling in the same direction.

Where the evidence is conflicting, or different inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of the facts whether plaintiff, operating a vehicle, was guilty of contributory negligence in following a vehicle traveling in the same direction.⁶ Accordingly it has been held to be a question of fact whether plaintiff was chargeable with contributory negligence in colliding with the car ahead where the car ahead suddenly swerved across plaintiff's path,⁷ made a left turn⁸ without signal,⁹ or made a right turn,¹⁰ or where the preceding vehicle slowed down¹¹ or suddenly stopped.¹² So also it is generally a question of fact whether plaintiff was guilty of contributory negligence where he followed the preceding vehicle too closely when it stopped,¹³ where his view of the preceding vehicle was ob-

Held not negligence as matter of law
Cal.—Green v. Podigo, 170 P.2d 999, 75 Cal.App.2d 300.

6. U.S.—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718—Morris v. Sells-Floto Circus, C.C.A.N.C., 65 F.2d 782.

Ark.—Saliba v. Allison, 96 S.W.2d 443, 192 Ark. 1021.

Cal.—Elford v. Hiltabrand, 146 P.2d 510, 63 Cal.App.2d 65—Scaletta v. Silva, 126 P.2d 898, 52 Cal.App.2d 730.

Ill.—Jenisek v. Riggs, 50 N.E.2d 121, 320 Ill.App. 158—Bryant v. Taylor, 40 N.E.2d 545, 313 Ill.App. 650—Starr v. Rossin, 23 N.E.2d 740, 302 Ill.App. 325—Wedig v. Kroger (Grocery & Baking Co., 282 Ill.App. 370.

Kan.—Barzen v. Kepler, 266 P. 69, 125 Kan. 648.

Mich.—McGrath v. Hargraves, 17 N.W.2d 733, 310 Mich. 510.

Mo.—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518.

N.J.—Clayton v. Vallaster, 194 A. 167, 118 N.J.Law 568.

N.C.—Murphy v. Asheville-Knoxville Coach Co., 156 S.E. 550, 200 N.C. 92.

Pa.—Cupples v. Yearick, 99 Pa.Super. 269.

Wash.—Bues v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600.

Conduct held not negligence as matter of law

Ga.—Bach v. Bragg Bros. & Blackwell, 186 S.E. 711, 53 Ga.App. 574.

Mass.—Baker v. Hemingway Bros. Interstate Trucking Co., 12 N.E.2d 95, 299 Mass. 76.

Wash.—Watkins v. Interstate Coach Co., 259 P. 393, 145 Wash. 221.

Failure to see other vehicle

Wash.—Cunningham v. Dilla, 145 P.2d 273, 19 Wash.2d 845.

Heavy fog

Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Failure to anticipate obstruction of highway

Or.—French v. Christner, 143 P.2d 674, 173 Or. 158

7. U.S.—Cardell v. Tennessee Electric Power Co., C.C.A.Ga., 79 F.2d 934.

Neb.—Howter v. Olson, 19 N.W.2d 346, 115 Neb. 507.

N.C.—Killough v. Williams, 29 S.E.2d 697, 224 N.C. 254—Stevens v. Rostan, 145 S.E. 555, 196 N.C. 314.

Held not negligence as matter of law

Cal.—De Arman v. Connelly, 25 P.2d 24, 134 Cal.App. 173.

8. Iowa.—McManus v. Emmetsburg Farmers' Co-op (Creamery Co., 259 N.W. 921, 219 Iowa 860.

N.H.—Cutler v. Young, 6 A.2d 162, 90 N.H. 203.

Tex.—Charbonneau v. Hupaylo, Civ. App., 100 S.W.2d 745.

9. Minn.—Martin v. Johnson, 284 N.W. 433, 204 Minn. 556.

10. N.J.—Maloney v. Carey, 9 A.2d 791, 123 N.J.Law 501

Wash.—Johnson v. Watson, 120 P.2d 515, 11 Wash.2d 690—Trudeau v. Snohomish Auto Freight Co., 96 P.2d 599, 1 Wash.2d 574—Weinman v. Puget Sound Power & Light Co., 26 P.2d 395, 175 Wash. 73.

11. Or.—Kiddle v. Schnitzer, 114 P.2d 109, 167 Or. 316, opinion adhered to 117 P.2d 983, 167 Or. 316.

12. Cal.—Hawkinson v. Scholz, 57 P.2d 945, 13 Cal.App.2d 687.

Colo.—Denver Tramway Corporation v. Burke, 28 P.2d 253, 94 Colo. 25.

Conn.—Shanley v. Connecticut Co., 6 A.2d 363, 125 Conn. 472.

Iowa.—Harrington v. Fortman, 8 N.W.2d 713, 233 Iowa 92.

Minn.—Peterson v. Doll, 238 N.W. 324, 184 Minn. 213.

N.Y.—Miller v. Ferroni, 291 N.Y.S. 977, 249 App.Div. 763.

Tex.—Le Master v. Fort Worth Transit Co., 160 S.W.2d 224, 138 Tex. 512.

Held not negligence as matter of law

Mo.—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518.

N.Y.—Harnik v. Astoria Mahogany Co., 215 N.Y.S. 219, 127 Misc. 41.

Change of traffic light to "caution"

Cal.—Kibler v. Stone, 67 P.2d 106, 20 Cal.App.2d 377.

13. U.S.—Cram v. Ekeloff, C.C.A. Minn., 127 F.2d 486.

Iowa.—Anderson v. Strack, 17 N.W.2d 719, 236 Iowa 1.

N.C.—Smith v. Carolina Coach Co., 199 S.E. 90, 214 N.C. 314.

Wash.—Nelson v. Brownfield, 153 P.2d 877, 21 Wash.2d 898.

Negligence as matter of law

(1) It is not negligence as matter of law for automobile driver to follow another automobile within thirty-five to forty-eight feet—Starr v. Rossin, 23 N.E.2d 740, 302 Ill.App. 325.

(2) Maintenance by motorist of space of only two or three car lengths between motorist's automobile and truck ahead, with which truck motorist collided when truck suddenly stopped and both of which had slowed down from speed of twenty-five miles per hour, was held not contributory negligence as matter of law, in absence of evidence as to distance in which motorist could have stopped.—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718.

Effect of statute forbidding close following

Statute providing that motorist shall not follow another vehicle more closely than is reasonable and prudent could not convert determination whether conduct of motorist, who ran into rear of truck, was reasonable.

scured,¹⁴ where he continued to follow the preceding vehicle after observing that it was negligently operated,¹⁵ or that he failed to have or use proper lights.¹⁶

Similarly, where the evidence is conflicting, it is a question of fact for the trier of facts whether plaintiff was guilty of contributory negligence in an accident occurring when he passed or attempted to pass a car in front of him,¹⁷ as in attempting to pass a vehicle which is being driven left of the center of the highway,¹⁸ or which makes a left turn,¹⁹

or swerves to the left,²⁰ or is bearing to the left;²¹ or in attempting to pass defendant's vehicle at an intersection²² in violation of traffic regulations;²³ or passing without sounding his horn,²⁴ or without sounding the horn at the proper time;²⁵ or in passing or attempting to pass on the right of the preceding vehicle;²⁶ or attempting to pass without sufficient clearance;²⁷ or attempting to pass after discovering difficulty and making a prior unsuccessful attempt to pass.²⁸

and prudent into question of law rather than one of fact—*Martini v. Johnson*, 284 N.W. 433, 204 Minn 556.

14. U.S.—*Central Surety & Insurance Corporation v. Murphy*, C.C.A. Kan., 103 F.2d 117—*Morris v. Sells-Floto Circus*, C.C.A.N.C., 65 F.2d 782.

Iowa.—*Kisling v. Thierman*, 243 N.W. 552, 214 Iowa 911.

N.Y.—*Johnson v. City of Amsterdam*, 282 N.Y.S. 417, 245 App.Div. 894.

Pa.—*Kinsey v. Dixon*, 174 A. 585, 114 Pa.Super. 244.

Tenn.—*Main St. Transfer & Storage Co. v. Smith*, 63 S.W.2d 665, 166 Tenn. 482.

Held not negligence as matter of law
Mass.—*McGaffee v. P. B. Mutrie Motor Transp.*, 42 N.E.2d 811, 311 Mass. 730.

15. Fla.—*Gaynon v. Statum*, 10 So. 2d 432, 151 Fla. 793.

16. Iowa.—*Kimmel v. Mitchell*, 249 N.W. 151, 216 Iowa 366.

Held not negligence as matter of law
Mass.—*Baker v. Hemingway Bros. Interstate Trucking Co.*, 12 N.E.2d 95, 299 Mass. 76.

17. Minn.—*Brown v. Raymond Bros. Motor Transp.*, 243 N.W. 112, 186 Minn. 321—*Ball v. Gessner*, 240 N.W. 100, 185 Minn. 105.

Care required in passing vehicles traveling in same direction see *supra* §§ 321-328.

Held not negligence as matter of law
(1) In general—*Marx v. Leverkuhn*, Tex.Civ.App., 73 S.W.2d 949, error dismissed.

(2) Driver who, in attempting to pass truck, collided with piping projecting therefrom above rays of his headlights was not guilty of contributory negligence as matter of law.—*Deardorf v. Shell Petroleum Co.*, 12 P.2d 1103, 136 Kan. 95.

(3) Evidence in action for death of automobile driver in collision with another automobile was insufficient to warrant conclusion as matter of law that decedent was justified in continuing in middle lane of highway after starting to pass truck ahead of him; and statutory pre-

sumption that man takes ordinary care of his own concerns created, at most, conflict in evidence on question whether automobile driver, killed in collision with another automobile in middle lane of highway, saw latter automobile in left lane when he first started to pass truck ahead of him, and court, sitting without jury, was not bound to resolve conflict in favor of such presumption.—*Isham v. Trimble*, 43 P.2d 581, 5 Cal.App.2d 648.

18. Ky.—*Dixie Ice Cream Co. v. Ravenna Grocery Co.*, 206 S.W.2d 824, 306 Ky. 182.

Held not negligence as matter of law
U.S.—*Warlich v. Miller*, D.C.Pa., 73 F.Supp. 593.

19. U.S.—*Warlich v. Miller*, *supra*.
Ark.—*Coca Cola Bottling Co. of Blytheville v. Doud*, 76 S.W.2d 87, 189 Ark. 986.

Colo.—*Forsythe v. McCarthy*, 57 P.2d 1, 98 Colo. 399.

Conn.—*Tappin v. Rider Dairy Co.*, 178 A. 428, 119 Conn. 591.

Mich.—*Michigan Fire & Marine Ins. Co. v. Pretty Lake Vacation Camp*, 25 N.W.2d 166, 316 Mich. 197—*Jacoby v. Schafsnitz*, 259 N.W. 322, 270 Mich. 515.

Mo.—*Nann v. Payne*, 159 S.W.2d 602, 349 Mo. 89—*Shannon v. Unsell*, App., 50 S.W.2d 1059.

S.C.—*Dobson v. Henrietta Mills*, 197 S.E. 313, 187 S.C. 281.

Vt.—*Sulham v. Bernasconi*, 170 A. 913, 106 Vt. 192.

Wis.—*Scipior v. Shea*, 31 N.W.2d 199, 252 Wis. 185.

Held not negligence as matter of law

Mass.—*Beach v. Minkley*, 19 N.E.2d 20, 302 Mass. 228.

Left-hand U-turn

Ill.—*Gorman v. Piszynski*, 21 N.E.2d 909, 301 Ill.App. 597.

20. U.S.—*Gary v. Consolidated Forwarding Co.*, C.C.A.Wis., 115 F.2d 632.

Ill.—*Grimm v. Dunn*, 21 N.E.2d 331, 300 Ill.App. 609.

Mass.—*Wood v. Sabins*, 194 N.E. 94, 289 Mass. 299.

21. U.S.—*Warlich v. Miller*, C.C.A. Pa., 141 F.2d 168.

22. Ala.—*Alabama Power Co. v. Buck*, 35 So.2d 355.

Ill.—*Pfle v. Owens*, 73 N.E.2d 445, 331 Ill.App. 390.

Mass.—*Clay v. Pope & Cottle Co.*, 172 N.E. 580, 273 Mass. 40.

23. U.S.—*Tarhet v. Thorp*, D.C.Pa., 34 F.Supp. 238, affirmed, C.C.A., 117 F.2d 495.

Pa.—*O'Farrell v. Mawson*, 182 A. 538, 320 Pa. 316.

24. Ala.—*Ruffin Coal & Transfer Co. v. Rich*, 108 So. 596, 214 Ala. 633.

Mo.—*Jones v. Southwest Pump & Machinery Co.*, 60 S.W.2d 751, 227 Mo.App. 990.

Okl.—*Indian Territory Illuminating Oil Co. v. Johnson*, 58 P.2d 888, 177 Okl. 288.

Vt.—*Cobb v. Olsen*, 56 A.2d 471.

25. Cal.—*Moore v. Miller*, 125 P.2d 576, 51 Cal.App.2d 674—*Ingram v. City of Delano*, 88 P.2d 232, 31 Cal.App.2d 451.

Held not negligence as matter of law

U.S.—*Wesley v. English*, C.C.A.Fla., 71 F.2d 392.

26. Ill.—*Lehman v. Hannah*, 30 N.E.2d 84, 307 Ill.App. 244.

Md.—*Mitchell v. Dowdy*, 42 A.2d 717, 184 Md. 634.

Okl.—*Padgett v. McKissick*, 280 P. 409, 138 Okl. 63.

Pa.—*Liebert v. Freihofer Baking Co.*, 97 Pa.Super. 467.

Wash.—*Cater's Motor Freight System v. Ranniger*, 58 P.2d 1030, 186 Wash. 525.

Preceding vehicle signaling left turn
Tenn.—*Chattanooga Ice Delivery Co. v. George F. Burnett Co.*, 147 S.W.2d 750, 24 Tenn.App. 535.

On sharp right-hand curve

Fla.—*Bugna v. Taylor*, 154 So. 831, 114 Fla. 723.

27. Mass.—*Seymour v. Dunville*, 164 N.E. 79, 265 Mass. 78.

28. Ky.—*Dixie-Ohio Exp. Co. v. Webb*, 184 S.W.2d 361, 299 Ky. 201.

Various incidental questions involved in determining plaintiff's contributory negligence in following or passing other vehicles have been held, on conflicting evidence, to be questions of fact,²⁹ including questions such as whether plaintiff was attempting to overtake defendant,³⁰ whether he was able to go around the vehicle in front of him,³¹ whether plaintiff saw or should have seen the preceding vehicle in time to avoid the collision,³² whether the circumstances were such as to require plaintiff to exercise great care, rather than ordinary care,³³ and the distance between plaintiff's vehicle and the vehicle in front of him.³⁴

Where the evidence is uncontradicted and not reasonably subject to differing inferences of fact, whether plaintiff, who ran into the vehicle ahead of him, was guilty of contributory negligence is a question to be decided by the court as a matter of law.³⁵

bb. Plaintiff Being Followed or Passed

It is a question for the trier of facts, on conflicting

evidence, whether the plaintiff was guilty of contributory negligence in an accident when his vehicle was struck from the rear or while it was being overtaken by a vehicle going in the same direction.

Where the evidence is conflicting, or different inferences of fact may reasonably be drawn therefrom, it is a question of fact whether plaintiff was guilty of contributory negligence when the vehicle he was driving was struck from the rear,³⁶ as where he was struck while making a right turn³⁷ without giving a signal³⁸ or while making a left turn³⁹ without giving a signal,⁴⁰ or while making a U-turn,⁴¹ or where plaintiff slowed down⁴² or stopped suddenly⁴³ without giving a warning signal.⁴⁴

Similarly, where the evidence is conflicting on different inferences of fact may reasonably be drawn therefrom, it is a question of fact whether plaintiff was guilty of contributory negligence in the accident resulting from defendant's passing him going in the same direction;⁴⁵ and the rule has been applied in determining whether plaintiff was

29. Cal.—Munoz v. Kennedy, 293 P. 173, 109 Cal.App. 463.

30. Fla.—Gosma v. Adams, 135 So. 806, 102 Fla. 305, 78 A.L.R. 1193.

31. Ill.—Mortvedt v. Western Austin Co., 60 N.E.2d 764, 320 Ill.App. 337.

32. Tex.—Coleman v. West, Civ. App., 116 S.W.2d 870.

33. Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.

34. Ill.—Mortvedt v. Western Austin Co., 50 N.E.2d 764, 320 Ill.App. 337.

35. U.S.—Morris v. Sells-Floto Circus, C.C.A.N.C., 65 F.2d 782.

Fla.—Gosma v. Adams, 135 So. 806, 102 Fla. 305, 78 A.L.R. 1193.

Ill.—Wedig v. Kroger Grocery & Baking Co., 282 Ill.App. 370.

Plaintiff held guilty of contributory negligence

Ark.—Ward v. Haralson, 120 S.W.2d 322, 196 Ark. 785.

Mass.—Foschia v. First Nat. Stores, 194 N.E. 834, 290 Mass. 90.

Pa.—Leedom v. Philadelphia Transportation Co., Com.Pl., 58 Montg. Co. 392.

36. Cal.—Lawton v. Roles, 30 P.2d 81, 137 Cal.App. 133—Putnam v. Pickwick Stages, Northern Division, 276 P. 1055, 98 Cal.App. 268.

N.Y.—Massar v. Bell, 16 N.Y.S.2d 727, 258 App.Div. 924, reargument denied 17 N.Y.S.2d 1000, 258 App. Div. 966.

Pa.—Kelly v. Crawford, 8 A.2d 449, 137 Pa.Super. 197—Loser v. Man-nino, Com.Pl., 54 Dauph.Co. 268.

Va.—Isenhour v. McGranahan, 17 S. E.2d 383, 178 Va. 365.

Wash.—Field v. North Coast Transp. Co., 2 P.2d 672, 164 Wash. 123, 76 A.L.R. 1114.

Conduct held not negligent as matter of law

Ill.—McCaughan v. Boswell, 40 N.E. 2d 557, 313 Ill.App. 651.

Pa.—Neff v. Pirth, 47 A.2d 193.

37. Iowa.—Harmon v. Gilligan, 266 N.W. 288, 221 Iowa 605.

Pa.—Greger v. Hollis, Com.Pl., 61 Montg.Co. 77.

38. Minn.—Hansen v. Larson, 245 N. W. 835, 187 Minn. 389.

39. Ark.—Cohen v. Ramey, 147 S.W. 2d 338, 201 Ark. 713—Kittrell v. Wilkerson, 9 S.W.2d 788, 177 Ark. 1174.

Cal.—Ritchey v. Watson, 268 P. 345, 204 Cal. 387—Ford v. Wilson, 290 P. 120, 107 Cal.App. 131.

Iowa.—Goldapp v. Core, 19 N.W.2d 673.

Mass.—Sheriff v. Gillow, 67 N.E.2d 754, 320 Mass. 46.

Minn.—Erickson v. Northland Transp. Co., 282 N.W. 715, 181 Minn. 406.

N.J.—Cristofaro v. Brensfleck, 184 A. 619, 116 N.J.Law 357—Daxter v. Public Service Transp. Co., 143 A. 748, 6 N.J.Misc. 1099.

40. N.C.—Stovall v. Ragland, 190 S. E. 899, 211 N.C. 738.

Held not negligence as matter of law

N.C.—Stovall v. Ragland, supra.

41. Minn.—Douglas v. Jacobson, 228 N.W. 347, 179 Minn. 86.

42. Ill.—Warneke v. Torstenson, 26 N.E.2d 675, 304 Ill.App. 579.

Iowa.—Luther v. Jones, 261 N.W. 817, 220 Iowa 95.

Neb.—McClelland v. Interstate Transit Lines, 6 N.W.2d 384, 143 Neb. 439.

Pa.—Sabatelli v. Scull, Com.Pl., 29 Del.Co. 456.

Evidence held sufficient to go to jury

Kan.—Lechleitner v. Cummings, 163 P.2d 423, 160 Kan. 453.

43. Mich.—Rossien v. Berry, 9 N.W. 2d 895, 305 Mich. 693.

Held not negligence as matter of law

N.Y.—Corrigan v. Reiber, 257 N.Y.S. 569, 235 App.Div. 557.

Evidence held sufficient to go to jury

Cal.—Petersen v. Devine, 156 P.2d 936, 68 Cal.App.2d 387.

Iowa.—Schroeder v. Kindschuh, 294 N.W. 784, 229 Iowa 590.

Stop for traffic light

Minn.—Fredholm v. Smith, 259 N.W. 80, 193 Minn. 569.

44. Mich.—Heck v. Henne, 213 N.W. 112, 238 Mich. 198.

Minn.—Landeon v. De Jung, 17 N.W. 2d 648, 219 Minn. 287.

Wis.—Schneider v. Nedry, 228 N.W. 509, 201 Wis. 111.

45. Cal.—Shannon v. Thomas, 134 P.2d 522, 57 Cal.App.2d 187.

Iowa.—Glover v. Vernon, 285 N.W. 652, 226 Iowa 1089.

N.C.—Joyner v. Dall, 188 S.E. 209, 210 N.C. 663.

Ohio.—Union Gas & Electric Co. v. Hill, 194 N.E. 884, 49 Ohio App. 20.

Pa.—Yourkavitch v. Dallessandro, Com.Pl., 34 Berks Co.L.J. 285.

Wash.—Grubbs v. Grayson, 5 P.2d 1033, 165 Wash. 548.

42 C.J. p 1264 note 69.

guilty of contributory negligence in failing to keep to the right⁴⁶ or to move to the right in response to the signal of the overtaking vehicle,⁴⁷ or in making a left turn⁴⁸ after giving a signal⁴⁹ or without giving a signal,⁵⁰ or in making a left turn without keeping a proper lookout,⁵¹ or in failing to keep a proper position on the highway while making a left turn.⁵²

Various incidental questions involved in determining plaintiff's contributory negligence while being followed or passed have been held, on conflicting evidence, to be questions of fact,⁵³ including whether plaintiff had made a sudden stop,⁵⁴ whether plaintiff had given a proper signal of intention to turn⁵⁵ or to stop,⁵⁶ and whether he properly made a left turn.⁵⁷

Questions of law should be decided by the court and not submitted to the jury;⁵⁸ and, where the

evidence is uncontradicted and reasonable minds may not differ as to the inferences of fact to be drawn therefrom, the question whether plaintiff, who was being followed or passed, was chargeable with contributory negligence is one of law for the court.⁵⁹

(b) Vehicles Traveling in Opposite Directions

It is for the trier of facts, on conflicting evidence, to determine whether the plaintiff was guilty of contributory negligence in an accident occurring upon his meeting the defendant's vehicle approaching from the opposite direction.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact whether plaintiff was guilty of contributory negligence in an accident occurring on his meeting defendant's vehicle approaching from the opposite direction.⁶⁰

Conduct held not negligence as matter of law

Md.—Christy v. Hammond, 155 A. 322, 161 Md. 139.

48. Mich.—Sucony Vacuum Oil Co. v. Marvin, 21 N.W.2d 841, 313 Mich. 528.

47. Iowa—Glover v. Vernon, 285 N.W. 652, 226 Iowa 1089

Held not negligence as matter of law

Iowa—Goldapp v. Core, 19 N.W.2d 673, 236 Iowa 548

48. Or.—Turner v. McMillan, 14 P. 2d 294, 140 Or. 407.

49. U.S.—Hopkins v. Pearce, C.C.A. Va., 115 F.2d 781

50. Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521

RI.—Morin v. Nash Co. of Providence, 186 A. 599

51. Cal.—Dieckmann v. Signorini, 118 P.2d 319, 47 Cal.App.2d 481.

Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521.

Wash.—Burns v. Standring, 268 P. 866, 148 Wash. 291.

Held not negligence as matter of law

Kan.—Shattuck v. Pickwick Stages Corporation, 11 P.2d 996, 135 Kan. 602.

52. Cal.—Gomez v. Lindberg, 54 P. 2d 1153, 11 Cal.App.2d 730.

Held not negligence as matter of law

Cal.—Gomez v. Lindberg, 54 P.2d 1153, 11 Cal.App.2d 730.

53. Cal.—Butcher v. Thornhill, 68 P.2d 179, 14 Cal.App.2d 149.

Mich.—Losey v. Wetters, 270 N.W. 735, 278 Mich. 422.

54. Mich.—Resnik v. Trumbull-Chevrolet Sales Co., 16 N.W.2d 723, 310 Mich. 214.

55. Cal.—Dieckmann v. Signorini, 118 P.2d 319, 47 Cal.App.2d 481—Gomez v. Lindberg, 54 P.2d 1153, 11 Cal.App.2d 730

Iowa.—Harmon v. Gilligan, 266 N.W. 288, 221 Iowa 605

Mich.—Bugbee v. Fowle, 269 N.W. 570, 277 Mich. 485

56. Conn.—Merberg v. Moulton, 29 A.2d 774, 129 Conn. 536

Mich.—Resnik v. Trumbull-Chevrolet Sales Co., 16 N.W.2d 723, 310 Mich. 214

Wash.—Neeley v. Bock, 50 P.2d 524, 184 Wash. 135

Sufficiency of automatic taillight

Iowa.—Schroeder v. Kindschuh, 291 N.W. 784, 229 Iowa 590.

57. Cal.—Gomez v. Lindberg, 54 P. 2d 1153, 11 Cal.App.2d 730.

Wis.—Maas v. W. R. Arthur & Co., 2 N.W.2d 238, 239 Wis. 581.

58. Tex.—Hickman v. Sullivan, Civ. App., 128 S.W.2d 457, error dismissed, judgment correct.

Failure to yield right of way

In action by plaintiff whose automobile was struck in rear by defendant's truck, trial court's refusal to submit to jury question whether plaintiff failed to yield right of way to defendant's truck on its approach was proper, since plaintiff was under no legal duty to yield right of way—Hickman v. Sullivan, *supra*

59. Okl.—Union Transp. Co. v. Lamb, 123 P.2d 660, 190 Okl. 327.

Directed verdict held warranted

Ohio.—Hankey Baking Co. v. Sheen, 11 N.E.2d 287, 57 Ohio App. 58.

60. U.S.—Herzig v. Swift & Co., C. C.A.N.Y., 154 F.2d 64—Jackson v. Blue, C.C.A.Va., 152 F.2d 67—Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing

denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528

Ala.—Clift v. Donegan, 186 So. 476, 227 Ala. 304

Ark.—Oviatt v. Garretson, 171 S.W. 2d 287, 205 Ark. 792—National Mut. Casualty Co. v. Blackford, 141 S.W.2d 54, 200 Ark. 847—Routt v. Alexander, 78 S.W.2d 828, 190 Ark. 321

Cal.—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 Cal. App.2d 828—Polk v. Weinstein, 55 P.2d 588, 12 Cal.App.2d 360—Falasco v. Hulien, 41 P.2d 469, 6 Cal. App.2d 224—Arundel v. Turk, 41 P.2d 383, 6 Cal.App.2d 162—Yeager v. Bray, 32 P.2d 396, 138 Cal.App. 328—Himes v. Daniel, 15 P.2d 791, 127 Cal.App. 327—Eisey v. Domecq, 299 P. 794, 114 Cal.App. 42

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Accordingly, the rule has been applied in determining whether plaintiff was guilty of contributory negligence in that he failed to maintain his proper position on the highway;⁶¹ passed or at-

- Iowa 483—Carlson v. Jacob E. Decker & Sons, 253 N.W. 923, 218 Iowa 54—Rogers v. Lagomarcino-Grupe Co., 248 N.W. 1, 215 Iowa 1270.
- Kan.—Duncan v. Branson, 110 P.2d 789, 158 Kan. 344—Balono v. Nafziger, 21 P.2d 896, 137 Kan. 513—Spangler v. Hutchinson Motor Car Co., 264 P. 1073, 125 Kan. 615.
- Ky.—Kentucky Transport Co. v. Campbell, 186 S.W.2d 409, 299 Ky. 555—Silver Fleet Motor Express v. Casey, 155 S.W.2d 863, 288 Ky. 233—Huber & Huber v. Noe's Adm'x, 68 S.W.2d 406, 252 Ky. 779—Berryman v. Worthington, 43 S.W.2d 5, 240 Ky. 756—Bradley v. Schmidt, 4 S.W.2d 703, 223 Ky. 784, 57 A.L.R. 1100.
- Mass.—Boutillier v. Wesinger, 78 N.E.2d 195, 322 Mass. 495—Campbell v. Ashler, 70 N.E.2d 302, 320 Mass. 475—Fitzgerald v. Packard, 58 N.E.2d 755, 317 Mass. 431—Jackson v. Anthony, 185 N.E. 389, 282 Mass. 540—Wall v. King, 182 N.E. 855, 280 Mass. 577—White v. Calcutt, 168 N.E. 815, 269 Mass. 252.
- Mich.—Quick v. Western Michigan Transp. Co., 293 N.W. 696, 294 Mich. 402—Patterson v. Jacobs, 286 N.W. 643, 289 Mich. 351—Essmeister v. Roadway Transit Co., 266 N.W. 391, 275 Mich. 387—Flynn v. Kramer, 261 N.W. 77, 271 Mich. 500—Van Dixhorn v. Central Motor Freight Co., 251 N.W. 361, 265 Mich. 81—Martin Parry Corporation v. Berner, 244 N.W. 180, 259 Mich. 621—Hollingshead v. Gunderman, 239 N.W. 280, 256 Mich. 299.
- Minn.—Malmgren v. Foldesl, 3 N.W.2d 669, 212 Minn. 354—Jaenisch v. Vigen, 297 N.W. 29, 209 Minn. 543—Lee v. Osmundson, 289 N.W. 63, 206 Minn. 487—Oxborough v. Murphy Transfer & Storage Co., 260 N.W. 305, 194 Minn. 335—Herrick v. Nelson, 246 N.W. 881, 188 Minn. 241—Olson v. Byam, 224 N.W. 256, 176 Minn. 619—Storhaugen v. Motor Truck Service Co., 213 N.W. 372, 171 Minn. 47.
- Mo.—Johnessee v. Central States Oil Co., App. 200 S.W.2d 383—Smith v. Wellbacher Truck Service Co., App. 35 S.W.2d 996.
- Neb.—Olson v. Hansen, 240 N.W. 551, 122 Neb. 492.
- N.J.—Wilkinson v. Walsh, 178 A. 721, 115 N.J.Law 243—McClave v. Barnaba, 144 A. 190, 7 N.J.Misc. 112—Diemer v. Shepard, 140 A. 578, 6 N.J.Misc. 186.
- N.Y.—Rodgers v. Schenectady Ry. Co., 51 N.Y.S.2d 410, 268 App.Div. 938—Jones v. Gray, 45 N.Y.S.2d 519, 267 App.Div. 242, stay granted 47 N.Y.S.2d 281, 267 App.Div. 853, appeal denied 47 N.Y.S.2d 606, 267 App.Div. 926.
- N.C.—Jackson v. Browning, 29 S.E.2d 21, 224 N.C. 75.
- N.D.—Schultz v. Winston & Newell Co., 283 N.W. 69, 68 N.D. 674.
- Ohio.—Dietz v. Chandler, App. 56 N.E.2d 937—Thompson v. Kerr, App. 51 N.E.2d 742.
- Or.—Wilbur v. Home Lumber & Coal Co., 282 P. 236, 131 Or. 180.
- Pa.—Burzese v. Beaver Valley Motor Coach Co., 34 A.2d 61, 348 Pa. 95—Healey v. Robertson, 101 Pa. Super. 342—Brown v. Greggs, 101 Pa. Super. 131—Gerbrick v. Henry, Com.Pl., 60 York Leg.Rec. 149.
- R.I.—Adam v. United Electric Rys Co., 196 A. 251, 59 R.I. 460—Grello v. Curran, 157 A. 72—Comstock v. John Hope & Sons Engraving & Mfg Co., 139 A. 654.
- S.C.—Daniel v. Tower Trucking Co., 32 S.E.2d 5, 205 S.C. 333.
- Tenn.—Colonial Baking Co. v. Aquino, 103 S.W.2d 613, 20 Tenn. App. 695.
- Tex.—Iranicky v. Trojanowsky, Civ. App. 153 S.W.2d 649, error refused—Newlin v. Smith, Civ. App. 142 S.W.2d 610, reversed on other grounds 150 S.W.2d 233, 136 Tex. 260.
- Vt.—Loomis v. Abelson, 144 A. 378, 101 Vt. 459.
- Va.—Chick Transit Corporation v. Edenton, 196 S.E. 648, 170 Va. 361—Baptist v. Slate, 173 S.E. 512, 162 Va. 1.
- Wash.—McPherson v. Toyokalcho Wakamatsu, 62 P.2d 732, 188 Wash. 320—Thomas v. Adams, 24 P.2d 432, 174 Wash. 118—Pomikala v. Cartwright, 16 P.2d 204, 170 Wash. 192—Weand v. Walker, 1 P.2d 326, 163 Wash. 392—Crowe v. O'Rourke, 262 P. 136, 146 Wash. 74.
- Wis.—Kiviniemi v. Hildenbrand, 231 N.W. 252, 201 Wis. 619.
- 42 C.J. p 1264 note 71.
- Caro required in passing vehicles traveling in opposite direction see supra §§ 305-320.
- Conduct held not negligence as matter of law**
- Mich.—Wiles v. New York Cent. R. Co., 19 N.W.2d 90, 311 Mich. 540.
- Evidence held sufficient to go to jury**
- Minn.—Paulson v. Fisk, 261 N.W. 182, 194 Minn. 507.
- N.C.—James v. Carolina Coach Co., 178 S.E. 607, 207 N.C. 742.
- Pa.—Amey v. Erb, 146 A. 141, 296 Pa. 561—Brown v. Bahl, 170 A. 346, 111 Pa. Super. 598.
- Wis.—Hefeke v. Rotter, 222 N.W. 220, 197 Wis. 300.
- After completing turn**
- Cal.—Mize v. Davy, 165 P.2d 26, 72 Cal.App.2d 607.
- Minn.—Packar v. Brooks, 300 N.W. 400, 211 Minn. 89.
- Va.—Royals v. Planters Mfg. Co., 30 S.E.2d 20, 182 Va. 694.
- Wash.—Karp v. Herder, 44 P.2d 808, 181 Wash. 583.
- At curve**
- U.S.—Evansville Container Corporation v. McDonald, C.C.A.Tenn., 132 F.2d 80.
- Mo.—Everhardt v. Garner, App., 100 S.W.2d 71—Stone v. Garrett Const. Co., App., 92 S.W.2d 951.
- N.C.—Drown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626.
- Pa.—Long v. Pennsylvania Truck Lines, 5 A.2d 224, 335 Pa. 236.
- On hill**
- N.H.—Cone v. Lynch, 145 A. 263, 83 N.H. 550.
- Ohio.—Hangen v. Hadfield, 20 N.E.2d 715, 135 Ohio St. 281.
- On narrow bridge**
- Ky.—Pope-Cawood Lumber & Supply Co. v. Clect, 33 S.W.2d 360, 236 Ky. 366.
- Miss.—Sternberg Dredging Co. v. Screws, 166 So. 754, 175 Miss. 383.
- Pa.—Ludwig v. Ewell, 18 A.2d 75, 142 Pa. Super. 580.
- Tenn.—Texas Co. v. Ingram, 64 S.W.2d 208, 16 Tenn. App. 267.
- Collision with driverless truck**
- Cal.—Lloyd v. Boulevard Express, 249 P. 837, 79 Cal.App. 406.
- Other vehicle out of control because of blowout**
- Ill.—Selman v. Midwest Haulers, 33 N.E.2d 140, 309 Ill.App. 154—Fogelman v. Christoff, 10 N.E.2d 364, 291 Ill.App. 622.
61. U.S.—Car & General Ins. Corporation v. Keal Driveway Co., C. C.A.Fla., 132 F.2d 834, certiorari denied Keal Driveway Co. v. Car & General Ins. Corporation, 63 S. Ct. 1330, 319 U.S. 766, 87 L.Ed. 1716.
- Ala.—Carter v. Ne-Hi Bottling Co., 146 So. 821, 226 Ala. 324.
- Cal.—Mize v. Davy, 165 P.2d 26, 72 Cal.App.2d 607—Heglin v. F. C. B. A. Market, 161 P.2d 976, 70 Cal. App.2d 803—Tuderles v. Hertz Driveurself Stations, 160 P.2d 554, 70 Cal.App.2d 192—Salgado v. Matsui, 119 P.2d 777, 48 Cal.App.2d 230—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435—Hill v. Peres, 28 P.2d 944, 136 Cal.App. 144—McLellan v. Cocola, 24 P.2d 200, 133 Cal.App. 9—Kellner v. Witte, 23 P.2d 1045, 133 Cal.App. 231—Freitas v. Passerino, 21 P.2d 993, 131 Cal.App. 585.
- Fla.—Stanley v. Powers, 169 So. 861, 125 Fla. 323.

tempted to pass another vehicle traveling in the same direction as plaintiff;⁶² traveled at a negligent or excessive speed;⁶³ failed to keep his vehicle under control;⁶⁴ failed to keep a proper lookout;⁶⁵ failed to see an obstruction,⁶⁶ or the ap-

proaching vehicle,⁶⁷ in time to avoid the collision;⁶⁸ misjudged the speed, distance, or course of the approaching vehicle;⁶⁹ failed to stop or slow down on, or while approaching, a narrow bridge;⁷⁰ failed to stop or slow down sufficiently when his

Ga.—Payne v. Cobb, 9 S.E.2d 852, 62 Ga.App. 767.

Idaho.—Stallinger v. Johnson, 139 P. 2d 460, 65 Idaho 101.

Ill.—Martin v. Starr, 255 Ill.App. 189.

Iowa.—Jordan v. Schantz, 264 N.W. 259, 220 Iowa 1251.

Kan.—Rainman v. National Mut. Casualty Co., 133 P.2d 145, 156 Kan. 294—Hogan v. Santa Fe Trail Transp. Co., 85 P.2d 28, 148 Kan. 720, 120 A.L.R. 521.

Ky.—J. N. Youngblood Truck Lines v. Hatfield, 201 S.W.2d 567, 304 Ky. 600—Bohn v. Sams, 193 S.W. 2d 459, 302 Ky. 63—Ligon v. Redding, 188 S.W.2d 483, 300 Ky. 329—Ward v. Martin, 147 S.W.2d 1027, 285 Ky. 337—Taylor v. Vaughan, 32 S.W.2d 724, 236 Ky. 102

Mass.—Hubbard v. Conti, 75 N.E.2d 639, 321 Mass. 743—Coates v. Bates, 164 N.E. 448, 265 Mass. 441

Mich.—Smith v. Matlicka, 8 N.W.2d 900, 305 Mich. 32.

Minn.—Tri-State Transfer Co. v. Nowotny, 270 N.W. 684, 198 Minn. 537—Romann v. Bender, 252 N.W. 80, 190 Minn. 419.

Mo.—King v. Friederich, App., 43 S.W.2d 840.

Neb.—Callahan v. Prewitt, 10 N.W.2d 705, 143 Neb. 787, vacated on other grounds 13 N.W.2d 660, 143 Neb. 793.

N.H.—Beaudin v. Continental Baking Co., 50 A.2d 77, 94 N.H. 202

N.J.—Claypoole v. Motor Finance Corporation, 15 A.2d 794, 125 N.J. Law 440—Diemer v. Shepard, 140 A. 578, 6 N.J. Misc. 186.

N.Y.—Rosenberg v. H. L. & F. McBride, Inc., 11 N.Y.S.2d 33, 256 App. Div. 494.

Okl.—Dierksen v. Hollingworth, 89 P. 2d 358, 184 Okl. 611.

Pa.—Paley v. Trautman, 177 A. 819, 317 Pa. 589—Pranskevich v. Hippensteel, Com.Pl., 36 Luz.Leg.Reg 344.

Tenn.—Jetton v. Polk, 68 S.W.2d 127, 17 Tenn.App. 395.

Va.—Williams v. Greene, 26 S.E.2d 89, 181 Va. 707—Johnson v. Kelam, 175 S.E. 634, 162 Va. 757.

Wis.—Lelsch v. Tigerton Lumber Co., 27 N.W.2d 367, 250 Wis. 463—Booth v. Frankenstein, 245 N.W. 191, 209 Wis. 362.

Held not negligence as matter of law

Ala.—Luquire Ins. Co. v. McCalla, 13 So.2d 865, 244 Ala. 479.

Cal.—Heslop v. Kinyoun, 136 P.2d 621, 58 Cal.App.2d 287—Finney v. Wierman, 126 P.2d 143, 52 Cal.App. 2d 282—Polk v. Weinstein, 55 P.2d 588, 12 Cal.App.2d 360.

R.I.—Williams v. Carpentier, 9 A.2d 275, 63 R.I. 459.

Tex.—White v. Beaumont Implement Co., Civ.App., 21 S.W.2d 559.

Evidence held sufficient to go to jury

Iowa.—Roushar v. Dixon, 2 N.W.2d 660, 231 Iowa 993.

Neb.—Ulrich v. Batchelder, 10 N.W. 2d 637, 143 Neb. 697.

Around curve

U.S.—Old Dominion Stages v. Cates, C.C.A.Tenn., 65 F.2d 258, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592.

Ky.—Gayheart v. Caudill, 111 S.W.2d 394, 271 Ky. 1.

N.Y.—Pekete v. H. L. & F. McBride, Inc., 281 N.Y.S. 25, 245 App. Div. 788.

N.C.—Steelman v. Benfield, 46 S.E.2d 829, 228 N.C. 651—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 218 N.C. 320.

Wash.—Van Cello v. Clark, 289 P. 19, 157 Wash. 321—I'arsons v. Clark, 289 P. 22, 157 Wash. 697.

62. Ark.—Jewel Tea Co. v. McCrary, 122 S.W.2d 534, 197 Ark. 294

Cal.—Robbiano v. Bovet, 24 P.2d 466, 218 Cal. 589.

Ill.—Kellenberger v. Mitchell, 44 N.E.2d 73, 316 Ill.App. 112

Iowa.—Burbridge v. Briggs, 15 N.W. 2d 909, 235 Iowa 12

Ky.—C. L. & L. Motor Express v. Lyons, 53 S.W.2d 978, 245 Ky. 611.

Mo.—Turk v. Endsley, App., 1 S.W. 2d 1038.

N.H.—Mack v. Hoyt, 55 A.2d 891.

Tex.—Gillette Motor Transport v. Fine, Civ.App., 131 S.W.2d 817, error dismissed, judgment correct.

Va.—Howe v. Jones, 174 S.E. 764, 162 Va. 442.

Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

63. Cal.—Collins v. Graves, 61 P.2d 1198, 17 Cal.App.2d 288

Iowa.—McWilliams v. Beck, 262 N.W. 781, 220 Iowa 906—Miller v. Wood Bros. Thresher Co., 222 N.W. 551.

Ky.—Miles v. Southeastern Motor Truck Lines, 173 S.W.2d 990, 295 Ky. 156—Foley's Adm'r v. Witt, 172 S.W.2d 81, 294 Ky. 498.

N.C.—Brown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626.

R.I.—Gendron v. Stockley, 34 A.2d 758, 69 R.I. 437.

Failure to slacken speed

Kan.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.

Minn.—Knopp v. McDonald, 222 N.W. 580, 176 Minn. 83.

64. Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409.

Wis.—McGuiggan v. Hiller Bros., 253 N.W. 403, 214 Wis. 388.

Held not negligence as matter of law

Md.—Dwyer v. Chew, 131 A. 350, 149 Md. 281.

65. Ill.—Skamenca v. Recser, 13 N.E.2d 668, 294 Ill.App. 216.

Iowa.—McWilliams v. Beck, 262 N.W. 781, 220 Iowa 906.

Md.—American Ry. Express Co. v. Kraft, 140 A. 896, 154 Md. 516.

Tex.—Good v. Born, Civ.App., 197 S.W.2d 589, error refused no reversible error—Parvin v. Byers, Civ. App., 16 S.W.2d 914, error dismissed.

Vt.—Parizo v. Wilson, 144 A. 866, 101 Vt. 514.

Wis.—McGuiggan v. Hiller Bros., 253 N.W. 403, 214 Wis. 388.

42 C.J. p. 1261 note 71 [d].

66. Neb.—Miers v. McMaken, 22 N.W.2d 422, 117 Neb. 133

67. Cal.—Betschart v. Steel, 143 P. 2d 81, 61 Cal.App.2d 517—Cooper v. Stevens, 62 P.2d 763, 17 Cal.App.2d 746

Iowa.—Holden v. Hanner, 1 N.W.2d 671, 231 Iowa 468—Graham v. Orr, 292 N.W. 838, 228 Iowa 755.

Held not negligence as matter of law

Iowa.—Caudle v. Zenor, 251 N.W. 69, 217 Iowa 77.

68. Conn.—Toth v. Perry, 182 A. 464, 120 Conn. 680.

Minn.—Johnson v. Reinhard Bros. Co., 285 N.W. 536, 205 Minn. 212.

Held not negligence as matter of law

Cal.—Schurman v. Los Angeles Creamery Co., 254 P. 681, 81 Cal. App. 758

Kan.—Harshaw v. Kansas City Public Service Co., 139 P.2d 141, 157 Kan. 95

Pa.—Shellenberger v. Reading Transp. Co., 154 A. 297, 303 Pa. 122.

69. Cal.—Betschart v. Steel, 143 P. 2d 81, 61 Cal.App.2d 517—Cooper v. Stevens, 62 P.2d 763, 17 Cal.App.2d 746.

Wash.—Lowe v. City of Seattle, 1 P. 2d 237, 163 Wash. 362.

70. Iowa.—Yance v. Hoskins, 281 N.W. 489, 118 A.L.R. 1186.

Kan.—Towell v. Staley, 166 P.2d 699, 161 Kan. 127.

N.C.—Hobbs v. Drewier, 37 S.E.2d 121, 226 N.C. 146.

vision was obscured;⁷¹ failed to stop in order to avoid a collision;⁷² failed to take proper steps to avoid the collision;⁷³ or in that he was guilty of careless or negligent driving in other respects.⁷⁴

Various incidental questions involved in determining plaintiff's contributory negligence in an accident with a vehicle traveling in the opposite direction have been held, on conflicting evidence, to be questions of fact for the trier of facts,⁷⁵ including such questions as whether plaintiff was in the exercise of due care for his own safety at the time of the accident,⁷⁶ whether defendant's vehicle could have been seen,⁷⁷ and whether plaintiff could have avoided the accident.⁷⁸

Where the evidence is uncontradicted and not reasonably subject to differing inferences, it is a matter of law for the court to decide that plaintiff

was⁷⁹ or was not⁸⁰ guilty of contributory negligence in connection with the accident. It is similarly for the court, rather than the jury, where the evidence is insufficient to warrant submission of the issue.⁸¹

(c) Vehicles on Intersecting Paths

It is for the trier of facts, on conflicting evidence, to determine whether the plaintiff was guilty of contributory negligence in an accident occurring when the plaintiff's and the defendant's vehicles approached each other on intersecting paths.

Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question of fact for the jury or other trier of the facts whether plaintiff was guilty of contributory negligence in a collision between his and defendant's motor vehicles approaching each other on intersecting paths.⁸²

Held not negligence as matter of law
Cal.—Thorsen v. Pacific Greyhound Lines, 62 P.2d 176, 17 Cal.App.2d 464.

Iowa.—Yance v. Hoskins, 281 N.W. 489, 225 Iowa 1108, 118 A.L.R. 1186
Tex.—Wright v. McCoy, Civ.App., 131 S.W.2d 52.

71. Mich.—Odell v. Powers, 278 N.W. 819, 284 Mich. 201.

Minn.—Hockenhuil v. Strom Const. Co., 2 N.W.2d 430, 212 Minn. 71.

Wis.—Leonard v. Bottomley, 245 N.W. 849, 210 Wis. 411, followed in 245 N.W. 852, 210 Wis. 420, and 245 N.W. 853, 210 Wis. 421.

72. Cal.—Williams v. Pickwick Stages System, 297 P. 98, 112 Cal. App. 597—Must v. Claxton, 290 P. 48, 107 Cal App. 59.

Minn.—Moan v. Aasen, 31 N.W.2d 265, 225 Minn. 504.

Or.—Schassen v. Columbia Gorge Motor Coach System, 270 P. 530, 126 Or. 363.

Wash.—Johnson v. Burnham, 88 P.2d 833, 198 Wash. 500.

W.Va.—Breedlove v. Galloway, 153 S.E. 298, 109 W.Va. 164.

W.—Zastrow v. Schaumburger, 245 N.W. 202, 210 Wis. 116.
42 C.J. p 1264 note 71 [e].

73. Ill.—Smith v. Courtney, 281 Ill. App. 530.

Mass.—Jones v. Plotkin, 172 N.E. 891, 273 Mass. 24.

Mo.—Crawshaw v. Mable, App., 52 S.W.2d 1029.

N.C.—Brown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626—Eversole v. Sprinkle, 167 S.E. 452, 204 N.C. 122.

Pa.—Franskevich v. Hippensteel, 36 Luz.Leg.Reg. 344.

Va.—Traylor v. Atlantic Greyhound Lines, 184 S.E. 188, 166 Va. 295.

Wash.—Ansapach v. Saraceno, 270 P. 811, 149 Wash. 312.

Wis.—Plesik v. Deuster, 11 N.W.2d 358, 243 Wis. 598—Kull v. Advance-Rumely Thrasher Co., 245 N.W. 589, 209 Wis. 565.

Held not negligence as matter of law
Ohio.—Sumner Co. v. Fisher, 162 N.E. 639, 28 Ohio App. 219.

Evidence held sufficient to go to jury
Ala.—Law v. Saks, 1 So.2d 28, 241 Ala. 37.

74. N.C.—Brown v. Southern Paper Products Co., 24 S.E.2d 334, 222 N.C. 626.

Driving with one hand

U.S.—Petroleum Carrier Corp. v. Snyder, C.C.A.Ga., 161 F.2d 323.

Mich.—Fitzcharles v. Mayer, 278 N.W. 788, 284 Mich. 122.

Driving car in ruts

N.Y.—Glas v. Ahlers, 259 N.Y.S. 399, 236 App.Div. 379.

Vt.—Bunnell v. McGregor, 143 A. 643, 101 Vt. 379.

Arm resting on window

(1) In general

N.D.—Motley v. Standard Oil Co., 240 N.W. 206, 61 N.D. 660.

Me.—Tomlinson v. Clement Bros., 154 A. 355, 130 Me. 189.

(2) Held not negligence as matter of law.—Edwards v. Woods, 119 S.W.2d 359, 342 Mo. 1097.

Not having proper lights

Ill.—Wise v. Kuehne Mfg. Co., 53 N.E.2d 711, 322 Ill App. 26.

S.C.—Bowers v. Carolina Public Service Co., 145 S.E. 790, 148 S.C. 161.

Failure to sound horn on hill

(1) In general.

Iowa.—Lane v. Varlamos, 239 N.W. 689, 213 Iowa 795.

Tex.—Allen v. Denk, Civ.App., 87 S.W.2d 308.

(2) Held not negligence as matter of law.—Parizo v. Wilson, 144 A. 856, 101 Vt. 514.

75. Kan.—Duncan v. Branson, 110 P.2d 789, 153 Kan. 344.

Adequacy of brakes

Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010

76. Ill.—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill App 12.

Iowa.—Schuster v. Gillispie, 251 N.W. 735, 217 Iowa 386.

Mass.—White v. Calcutt, 168 N.E. 815, 269 Mass. 252.

R.I.—Bitgood v. Williams, 160 A. 919, 52 R.I. 341

Tenn.—L'atillo v. Gambill, 124 S.W.2d 272, 22 Tenn.App. 485.

77. Cal.—Robbiano v. Bovet, 24 P.2d 466, 218 Cal. 589.

78. Ga.—Macon Busses v. Dashiell, 35 S.E.2d 666, 73 Ga App. 108.

79. R.I.—Rawding v. Lonsdale Bakery Co., 42 A.2d 275, 71 R.I. 50.

80. Cal.—Herbert v. Cassinelli, 166 P.2d 377, 73 Cal.App.2d 277.

Ill.—Schoen v. Wolfson, 263 Ill.App. 414.

Ky.—Pickering v. Simpkins, 111 S.W.2d 650, 271 Ky. 288.

Mass.—Stafford v. Commonwealth Co., 160 N.E. 820, 263 Mass. 240.

Minn.—Ind v. Bailey, 269 N.W. 638, 198 Minn. 217.

81. Ala.—Christ v. Spizman, 35 So.2d 568.

82. U.S.—Woody v. Utah Power & Light Co., C.C.A.Utah, 54 F.2d 220

—Standard Oil Co. of New Jersey v. Sewell, C.C.A.Md., 37 F.2d 230—

Mann v. Funk, D.C.Pa., 50 F.Supp. 305, affirmed, C.C.A., 141 F.2d 260.

Ark.—Lumpkin v. Shofner, 168 S.W.2d 614, 205 Ark. 306—Safeway Cab & Storage Co. v. Hamilton, 112 S.W.2d 973, 196 Ark. 1179.

Cal.—Roller v. Daleys, Inc., 28 P.2d 345, 219 Cal. 542—Wilkinson v. Brown, 190 P.2d 958, 84 Cal.App.2d 401—Adams v. Schmoker, 129 P.2d

This rule has been applied in determining whether plaintiff, in connection with crossing vehicles at

- 961, 54 Cal.App.2d 719—Wilkinson v. Marcellus, 125 P.2d 584, 51 Cal. App.2d 630—Barlow v. Crome, 112 P.2d 303, 44 Cal.App.2d 356—Anderson v. San Francisco Examiner, 112 P.2d 297, 44 Cal.App.2d 349—Blackmore v. Brennan, 110 P.2d 723, 43 Cal.App.2d 280—Day v. Pickwick Stages System, 25 P.2d 16, 134 Cal.App. 92—Boness v. McPhinstine, 23 P.2d 420, 132 Cal. App. 677—Bennis v. Young, 20 P.2d 111, 130 Cal.App. 580—Miller v. Schlimming, 18 P.2d 357, 129 Cal. App. 171—Cummins v. Yellow & Checker Cab Co., 15 P.2d 536, 127 Cal.App. 170—Tyson v. Burton, 294 P. 750, 110 Cal.App. 428—Cherry v. Delaney, 290 P. 895, 107 Cal.App. 655
- Colo.—Goody-Courter Coal Co. v. Connor, 274 P. 739, 85 Colo. 151.
- Del.—Odgers v. Clark, 19 A.2d 724, 2 Terry 232
- Idaho.—Brixey v. Craig, 288 P. 152, 49 Idaho 319.
- Ill.—Hamann v. Lawrence, 188 N.E. 333, 354 Ill. 197—Leech v. Newell, 56 N.E.2d 138, 323 Ill.App. 510—Elston Fuel Corporation v. Diamond Coal Co., 31 N.E.2d 427, 308 Ill.App. 325—Rose v. Meyer, 25 N.E.2d 413, 303 Ill.App. 365
- Ind.—D. Graft & Sons v. Williams, 61 N.E.2d 72, 115 Ind.App. 597—Superior Meat Products v. Holloway, 48 N.E.2d 83, 113 Ind.App. 320—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507—Stork v. Wislhart, 168 N.E. 711, 90 Ind.App. 264.
- Iowa.—Sanford v. Goodridge, 13 N.W.2d 40, 234 Iowa 1036—Pestotnik v. Balliet, 10 N.W.2d 99, 233 Iowa 1047—Stein v. Sharpe, 295 N.W. 155, 229 Iowa 812—Short v. Powell, 291 N.W. 406, 228 Iowa 333—Hupp v. Doolittle, 285 N.W. 247, 226 Iowa 814—Branch v. Des Moines Ry. Co., 243 N.W. 379, 214 Iowa 689—Wambbeam v. Hayes, 219 N.W. 813, 205 Iowa 1394—Shuck v. Keefe, 218 N.W. 31, 205 Iowa 365.
- Kan.—Fisher v. Central Surety & Insurance Corporation, 86 P.2d 583, 149 Kan. 38.
- Ky.—Stephens v. Glass, 176 S.W.2d 139, 296 Ky. 90—Bowman v. Ernst, 71 S.W.2d 1013, 254 Ky. 376—Louisville Taxicab & Transfer Co. v. Boughter, 36 S.W.2d 12, 237 Ky. 611—Mann's Ex'r v. Leyman Motor Co., 28 S.W.2d 956, 234 Ky. 639—Coleman v. Nelson, 6 S.W.2d 454, 224 Ky. 460.
- Md.—Wlodkowski v. Yerkaitis, 57 A.2d 792—Bode v. Carroll-Independent Coal Co., 191 A. 685, 172 Md. 406.
- Mass.—Edwards v. Warwick, 59 N.E.2d 194, 317 Mass. 573—Gaines v. Ratnowsky, 41 N.E.2d 25, 311 Mass. 254—Shockett v. Akeson, 37 N.E.2d 1015, 310 Mass. 289—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394—Aromando v. Leach, 28 N.E.2d 534, 306 Mass. 286—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448—Bresnick v. Heath, 198 N.E. 175, 292 Mass. 293—Mahoney v. Norcross, 187 N.E. 227, 284 Mass. 153—Stickel v. Cassasa, 167 N.E. 248, 268 Mass. 59—Bogert v. Thompson, 156 N.E. 884, 260 Mass. 206.
- Mich.—Wright v. Barron, 28 N.W.2d 278, 318 Mich. 409—Schmidt v. Willbrant, 21 N.W.2d 194, 313 Mich. 450—Meehl v. Barr Transfer Co., 296 N.W. 844, 296 Mich. 697—Sexton v. Niewoonder, 296 N.W. 321, 296 Mich. 443—Weller v. Speet, 267 N.W. 758, 275 Mich. 655—Bunker v. Reid, 238 N.W. 265, 255 Mich. 536—Torbert v. Smith's Estate, 229 N.W. 406, 250 Mich. 62—Hale v. Rogers, 221 N.W. 282, 244 Mich. 69
- Minn.—Leitner v. Pacific Gamble Robinson Co., 26 N.W.2d 228, 223 Minn. 260—Johnson v. Farrell, 298 N.W. 256, 210 Minn. 351—Neubarth v. Fink, 297 N.W. 171, 210 Minn. 55—Williams v. Russell, 265 N.W. 270, 196 Minn. 397—Duncanson v. Jeffries, 263 N.W. 92, 195 Minn. 347—Matz v. Krippner, 254 N.W. 912, 191 Minn. 580—Quinn v. Zimmer, 239 N.W. 902, 184 Minn. 589—Hustvet v. Kuusinen, 238 N.W. 330, 184 Minn. 222—Coffman v. Kummier, 228 N.W. 751, 179 Minn. 120.
- Mo.—Jungeblut v. Maris, 172 S.W.2d 861, 351 Mo. 301—Chamberlain v. Hamilton, App. 93 S.W.2d 1014—Parkville Milling Co. v. Massman, App. 83 S.W.2d 128—Hollums v. Randol, 40 S.W.2d 500, 225 Mo. App. 1092—Lord v. Austin, App. 39 S.W.2d 575—Moore v. Fitzpatrick, App. 31 S.W.2d 590.
- Neb.—Meyer v. Platte Val. Const. Co., 25 N.W.2d 412, 147 Neb. 860—DeBus v. Amen, 5 N.W.2d 92, 142 Neb. 109—Olson v. Lilley, 2 N.W.2d 15, 140 Neb. 779—Moncrief v. Interstate Transit Lines, 261 N.W. 163, 129 Neb. 168.
- N.J.—Wiese v. Baldanza Bros., 179 A. 377, 13 N.J.Misc. 472—Zauber v. Van Wagoner, 172 A. 730, 12 N.J. Misc. 473—Durgett v. Public Service Co-ordinated Transport, 150 A. 557, 8 N.J.Misc. 457—Francisco v. Coca Cola Bottling Co. of New York, 159 A. 319, 10 N.J.Misc. 370—Atkins v. Price, 144 A. 113, 7 N.J.Misc. 70—M. Reichman & Son v. Public Service Transport Co., 142 A. 431, 6 N.J.Misc. 636—Dobbin v. Ratiner, 140 A. 32, 6 N.J.Misc. 117.
- N.M.—Chavez v. Worley, 152 P.2d 393, 48 N.M. 449.
- N.Y.—Wasserman v. Congdon, 12 N.Y.S.2d 132, 257 App.Div. 888—Knickerbocker Laundry Co. v. Stanchi, 288 N.Y.S. 592, 248 App. Div. 730—Plantz v. Greiner, 248 N.Y.S. 740, 232 App.Div. 73.
- N.C.—Gunn v. Blue Bird Taxi Co., 193 S.E. 747, 212 N.C. 540—Niblock v. Blue Bird Taxi Co., 182 S.E. 330, 208 N.C. 737.
- Ohio.—Schaller v. Chapman, App., 66 N.E.2d 266.
- Or.—Cox v. Jones, 5 P.2d 102, 138 Or. 327—McCartney v. Westbrook, 286 P. 525, 132 Or. 488—Knox v. Abrams, 286 P. 517, 132 Or. 500.
- Pa.—Mellott v. Tuckey, 38 A.2d 40, 350 Pa. 74—Sweet v. Rounds, 36 A.2d 815, 349 Pa. 152—Reppert v. White Star Lines, 186 A. 788, 323 Pa. 346, 106 A.L.R. 413—Rosshelm v. Bernot, Inc., 165 A. 27, 310 Pa. 154—Robinson v. Berger, 144 A. 899, 295 Pa. 95—McCormick Transp. Co. v. Philadelphia Transp. Co., 55 A.2d 771, 161 Pa. Super. 533—Jones v. Karis, 27 A.2d 750, 149 Pa. Super. 285—McCandless v. Krut, 14 A.2d 181, 140 Pa. Super. 183—Hess v. Mumma, 7 A.2d 72, 136 Pa. Super. 58—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa. Super. 437—Toyer v. Lipkin, 160 Pa. Super. 383—Boner v. Seuffert, 100 Pa. Super. 369—Holt v. Metropolitan Storage Co., 157 A. 373, 103 Pa. Super. 265—Fry v. Derito, 97 Pa. Super. 131—Smith v. Blafkin, 95 Pa. Super. 520—Matys v. Consumers Ice & Coal Co., Com. Pl., 37 Luz. Leg. Reg. 6, reversed on other grounds 36 A.2d 821, 154 Pa. Super. 568.
- RI.—Doherty v. Oakland Beach Volunteer Fire Co., 40 A.2d 737, 70 R. I. 446—Champagne v. General Baking Co., 136 A. 839—W. P. Hamblin, Inc. v. Chernick, 136 A. 245.
- S.C.—Cox v. McElrahman, 45 S.E.2d 595, 211 S.C. 378.
- S.D.—Fester v. George, 25 N.W.2d 455
- Va.—Barnes v. Mabry, 42 S.E.2d 304, 156 Va. 243—Virginia Electric & Power Co. v. McCaleb, 184 S.E. 244, 166 Va. 152—Virginia Electric & Power Co. v. Morgan's Adm'r, 173 S.E. 373, 162 Va. 123.
- Wash.—Perron v. Press, 81 P.2d 867, 196 Wash. 14—Nystuen v. Spokane County, 77 P.2d 1002, 194 Wash. 312—Harry v. Beatty, 81 P.2d 97, 177 Wash. 153—Leach v. Erickson, 17 P.2d 859, 171 Wash. 236—Teshirogi v. Belanger, 9 P.2d 66, 167 Wash. 278—Murphy v. Hunziker, 2 P.2d 270, 164 Wash. 40—Hellenhalt v. Edmonson, 290 P. 831, 158 Wash. 276.
- 42 C.J. p 1264 note 74.
- Care required at crossings or intersections see supra §§ 350-369.

intersections, was guilty of contributory negligence in failing to operate his vehicle in a proper manner;⁸³ in failing to stop before entering an intersection where he was required to stop;⁸⁴ or in failing to stop at a proper place;⁸⁵ in entering or approaching the intersection at an excessive speed;⁸⁶ in entering a blind intersection, or one the view of which was partially obstructed, at an excessive

speed or in an improper manner;⁸⁷ in failing to maintain his proper position on the highway;⁸⁸ or in failing to sound his horn as he approached the intersection.⁸⁹ The rule has also been applied in determining whether plaintiff was guilty of contributory negligence in or while making, or attempting to make, a turn into an intersecting street,⁹⁰ or, more specifically, in or while making,

Plaintiff held not negligent as matter of law

Cal.—McCoulou v. Vejar, 297 P. 534, 212 Cal. 49—Kienlen v. Holt, 288 P. 866, 108 Cal.App. 135.
 Colo.—Buerger Bros. Supply Co. v. Denver Fire Reporter & Protective Co., 113 P.2d 671, 108 Colo. 40.
 Ga.—Brown v. Sanders, 160 S.E. 542, 44 Ga.App. 114.
 Mass.—McMillan v. Cantrall, 153 N.E. 331, 257 Mass. 103.
 Or.—Santoro v. Brooks, 254 P. 1019, 121 Or. 424.
 Pa.—Christensen v. Jules Junker, Inc., 181 A. 326, 119 Pa.Super. 335—Liberman v. Northern Trust Co., 100 Pa.Super. 223.
 Wis.—Svenson v. Vondrak, 227 N.W. 240, 200 Wis. 312.

Nonsuit held not warranted

Cal.—Grove v. Hodge Transp. System, 265 P. 354, 89 Cal.App. 663.
 N.H.—Mudgett v. McDonald, 161 A. 33, 85 N.H. 508.

Evidence held sufficient to go to jury

Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.
 Ill.—Hodges v. Humphreys, 30 N.E.2d 920, 307 Ill.App. 670.
 Me.—Libby v. Heikkinen, 32 A.2d 604, 140 Me. 23.
 Mich.—Kerns v. Lewis, 224 N.W. 647, 246 Mich. 423—Kiefer v. Fink, 210 N.W. 205, 236 Mich. 274.
 N.J.—Beck v. Fleet Carrier Corporation, 190 A. 509, 117 N.J.Law 545.
 Or.—Luster v. North Coast Transp. Co., 275 P. 666, 128 Or. 650.
 Tenn.—Wilson v. Mullen, 11 Tenn. App. 319.
 Wash.—Leer v. Cohen, 116 P.2d 535, 10 Wash.2d 239.
 Wis.—Gibson v. Streeter, 6 N.W.2d 662, 241 Wis. 600.

83. Iowa—Sexauer v. Dunlap, 222 N.W. 420, 207 Iowa 1018.

84. Ill.—Zimmer v. Hill, 20 N.E.2d 811, 300 Ill.App. 613—Leahy v. Morris, 6 N.E.2d 914, 289 Ill.App. 99—Ruddiman v. Eclipse Laundry Co., 6 N.E.2d 694, 289 Ill.App. 609.
 Mich.—Nicewander v. Diamond, 4 N.W.2d 533, 302 Mich. 239.

N.Y.—Lee v. City Brewing Corporation, 18 N.E.2d 628, 279 N.Y. 380.

N.C.—Nichols v. Goldston, 46 S.E.2d 320, 228 N.C. 514—Swinson v. Nance, 15 S.E.2d 284, 219 N.C. 772.
 Pa.—Jones v. Bell Tel. Co. of Pa., Super., 49 A.2d 272.

R.I.—Audette v. New England Transp. Co., 46 A.2d 570, 71 R.I. 420.

Wash.—Perren v. Press, 81 P.2d 867, 196 Wash. 14—Strong v. Ernst, 14 P.2d 697, 169 Wash. 617.

Held not negligence as matter of law

Cal.—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 36 Cal.App.2d 700

Ind.—Lindley v. Skidmore, 33 N.E.2d 797, 109 Ind.App. 178.

Mich.—Henry v. Sanderson, 245 N.W. 517, 260 Mich. 563

Pa.—Torrens v. Belfatto, 176 A. 533, 116 Pa.Super. 339.

85. Cal.—Dickinson v. Pacific Greyhound Lines, 131 P.2d 401, 55 Cal.App.2d 824—Matsuda v. Luond, 126 P.2d 359, 52 Cal.App.2d 453.

Ky.—Gartrell v. Harris' Condms'xs, 187 S.W.2d 1019, 300 Ky. 82.

Conduct held not negligent as matter of law

Ill.—Wilson v. Superb Cleaning & Dyeing Corp., 61 N.E.2d 773, 326 Ill.App. 262.

Tex.—Polasek v. Gaines Bros., Civ. App., 185 S.W.2d 609, error refused.

86. Mich.—Valenti v. Mayer, 4 N.W. 2d 5, 301 Mich. 551.

N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

N.C.—Stewart v. Yellow Cab Co., 42 S.E.2d 405, 227 N.C. 368

Pa.—Holt v. Pariser, 54 A.2d 89, 161 Pa.Super. 315—Wald v. A. W. Golden, Inc., Com Pl., 33 Berks Co.L.J. 299.

Tex.—Gulf Brewing Co. v. Goodwin, Civ.App., 135 S.W.2d 812, error dismissed, judgment correct.

Utah.—Martin v. Sheffield, 189 P.2d 127.

Wash.—Harry v. Beatty, 31 P.2d 97, 177 Wash. 153—Martin v. Hadenfeldt, 289 P. 533, 157 Wash. 563.

Held not negligence as matter of law

Cal.—Schroeder v. McCargar, 30 P.2d 543, 137 Cal.App. 320.

Mich.—Kiefer v. Fink, 210 N.W. 205, 236 Mich. 274.

Vt.—Sulham v. Bernasconi, 170 A. 913, 106 Vt. 192.

Wash.—Hines v. Foster, 6 P.2d 597, 166 Wash. 165.

87. U.S.—Vearn v. Crane, C.C.A.Ind., 114 F.2d 896—Walkup v. Bardsley, C.C.A.Minn., 111 F.2d 789.

Cal.—Lundgren v. Converse, 93 P.2d 819, 34 Cal.App.2d 445.

D.C.—Herndon v. Higdon, Mun.App., 31 A.2d 854.

Iowa—Sanford v. Goodridge, 13 N.W. 2d 40, 234 Iowa 1036

Me.—Gold v. Portland Lumber Corporation, 16 A.2d 111, 137 Me. 143.

Minn.—Mattfeld v. Nester, 32 N.W.2d 291, 226 Minn. 106—Hayden v. Lundgren, 221 N.W. 715, 175 Minn. 449.

Held not negligence as matter of law

Cal.—Setsuko Nitta v. Haslam, 33 P. 2d 678, 138 Cal.App. 736

Conn.—Dreher v. Smith, 45 A.2d 712, 132 Conn. 472.

88. Cal.—Setsuko Nitta v. Haslam, 33 P.2d 678, 138 Cal.App. 736—Lubenko v. San Joaquin Baking Co., 31 P.2d 1053, 138 Cal.App. 127

Ky.—Parris' Adm'x v. Molter, 65 S.W. 2d 52, 251 Ky. 432.

N.H.—Judd v. Perkins, 138 A. 312, 83 N.H. 39.

42 C.J. p 1264 note 74 [f].

Held not negligence as matter of law

Mass.—Ray's Checker Taxi v. Blaisdell, 66 N.E.2d 563, 319 Mass 487.
 Pa.—Stewart v. Crawford, Com.Pl., 55 Montg.Co. 164.

89. Iowa—Quick v. Paulson, 292 N.W. 853, 228 Iowa 665—In re Green's Estate, 278 N.W. 285, 224 Iowa 1268—Sexauer v. Dunlap, 222 N.W. 420, 207 Iowa 1018.

Vt.—Reid v. Abbiati, 32 A.2d 133, 113 Vt. 233.

Wash.—Hamilton v. Lesley, 25 P.2d 102, 174 Wash. 516.

Held not negligence as matter of law

Iowa.—Short v. Powell, 291 N.W. 406, 228 Iowa 333.

90. Cal.—Sutton v. Tanger, 1 P.2d 521, 115 Cal.App. 267.

Conn.—Bennett v. De Leonardo, 145 A. 61, 109 Conn. 602, followed in Shelton v. De Leonardo, 145 A. 63, 109 Conn. 608.

N.C.—Pittman v. Downing, 183 S.E. 362, 209 N.C. 219.

Pa.—Adams v. Gardiner, 160 A. 589, 306 Pa. 576—Luft v. Da Costa, 164 A. 137, 107 Pa.Super. 553.

Wis.—Guth v. Fisher, 251 N.W. 223, 218 Wis. 323.

or attempting, a left turn⁹¹ or a complete or U-turn,⁹² or in failing to yield the right of way to the other vehicle.⁹³

So, also, the rule has been applied in determin-

ing whether plaintiff was guilty of contributory negligence in failing to see defendant's vehicle in time to avoid the collision;⁹⁴ in failing to observe traffic or maintain a lookout for traffic on intersect-

91. U.S.—*Dubrock v. Interstate Motor Freight System*, C.C.A.Pa., 143 F.2d 304, certiorari denied 65 S.Ct. 119, 323 U.S. 765, 89 L.Ed. 613—*Klas v. Yellow Cab Co.*, C.C.A.Ill., 106 F.2d 935—*Jones v. Thompson*, C.C.A.Tex., 80 F.2d 456.

Cal.—*Cropper v. Stevens*, 62 P.2d 763, 17 Cal App 2d 746—*Huber v. Scott*, 10 P.2d 150, 122 Cal App 334—*Morehead v. Roehm*, 4 P.2d 955, 118 Cal App 312—*Ying v. Pickwick Stages System*, 3 P.2d 597, 117 Cal. App. 312.

Colo.—*Morgan v. Gore*, 44 P.2d 918, 96 Colo. 508.

Ill.—*Wallace v. Parnell*, 28 N.E.2d 569, 366 Ill. App. 310.

Ind.—*Kraning v. Bloxson*, 5 N.E.2d 649, 103 Ind App 660, rehearing denied 9 N.E.2d 107, 103 Ind App 660.

Iowa.—*Banghart v. Meredith*, 291 N.W. 918, 229 Iowa 608—*Pierce v. Dencker*, 294 N.W. 781, 229 Iowa 479—*Hinrichs v. Mengel*, 293 N.W. 452, 238 Iowa 1124—*Holub v. Fitzgerald*, 243 N.W. 575, 214 Iowa 857.

Kan.—*Bergman v. Kansas City Public Service Co.*, 58 P.2d 110, 144 Kan. 27.

Ky.—*Hilsenrad v. Bowling*, 166 S.W. 2d 847, 292 Ky 368.

Mass.—*Zawacki v. Finn*, 29 N.E.2d 730, 307 Mass. 86.

Mich.—*Pugh v. Butler*, 289 N.W. 209, 291 Mich 446.

Minn.—*Hayward v. Vollbrecht*, 293 N.W. 246, 208 Minn. 191—*Ost v. Ulring*, 292 N.W. 207, 207 Minn. 560—*Spencer v. Johnson*, 281 N.W. 879, 203 Minn. 403—*Jenson v. Glemaker*, 263 N.W. 624, 195 Minn. 556—*Fulweiler v. Twin City Motor Bus Co.*, 239 N.W. 609, 184 Minn. 519.

N.J.—*Wassmer v. Public Service Electric & Gas Co.*, 5 A.2d 794, 122 N.J. Law 367—*Wassmer v. Public Service Electric & Gas Co.*, 5 A.2d 762, 122 N.J. Law 367—*Anderson v. Cassidy*, 196 A. 653, 119 N.J. Law 331—*Lipschitz v. New York & New Jersey Produce Corporation*, 168 A. 390, 111 N.J. Law 392—*Newhouse v. Phillips*, 166 A. 482, 110 N.J. Law 421—*Smith v. West Side Hardware Co.*, 186 A. 46, 14 N.J. Misc. 398—*Samuel v. Christiansen*, 158 A. 479, 10 N.J. Misc. 223—*Shotkin v. Arrow Sanitary Laundry*, 155 A. 379, 9 N.J. Misc. 662.

N.M.—*Williams v. Haas*, 189 P.2d 632.

N.Y.—*Sanford v. Moreau*, 292 N.Y.S. 595, 249 App.Div. 915—*Guthrie v. Thomas*, 24 N.Y.S.2d 934, affirmed 24 N.Y.S.2d 936, 260 App.Div. 1041,

appeal denied 25 N.Y.S.2d 1001, 261 App Div. 836.

N.D.—*Fagerlund v. Jensen*, 24 N.W. 2d 816, 74 N.D. 766.

Or.—*Williams v. Bryson*, 40 P.2d 61, 149 Or. 413.

Pa.—*Rochelle v. Fabli*, 55 A.2d 580, 161 Pa. Super. 431.

S.C.—*Lynch v. Pee Dee Express*, 30 S.E.2d 449, 204 S.C. 537.

Tex.—*Porter v. Pollis*, Civ App., 169 S.W.2d 216, error refused.

Va.—*Slate v. Saul*, 40 S.E.2d 171, 185 Va. 700.

Wash.—*Shinkle v. North Coast Transp. Co.*, 19 P.2d 1111, 172 Wash. 276—*Geer v. Gellerman*, 4 P.2d 611, 165 Wash. 10.

Wis.—*Chessman v. Werner*, 210 N.W. 820, 191 Wis. 330.

42 C.J. p 1264 note 74 [c]

Held not negligence as matter of law

Cal.—*Kennedy v. Berg*, 62 P.2d 1374, 18 Cal App 2d 53.

La.—*White v. American Employers Ins. Co.*, App. 197 So. 803.

Mich.—*Moquin v. Nastwold*, 21 N.W. 2d 116, 313 Mich. 243.

Minn.—*Dahl v. Collette*, 289 N.W. 522, 206 Minn. 604.

Evidence held sufficient to go to jury

Wash.—*Vercruisse v. Cascade Laundry Co.*, 74 P.2d 920, 193 Wash. 181.

92. Ohio.—*Hill v. Union Gas & Electric Co.*, 200 N.E. 199, 51 Ohio App. 144.

Pa.—*Romanowski v. Morganstein*, 170 A. 379, 111 Pa. Super. 443.

Tex.—*Phelan Co. v. Schneider*, Civ. App., 146 S.W.2d 244, error refused.

93. U.S.—*Bonk v. Welch*, C.C.A.Wis., 78 F.2d 478.

Cal.—*Muir v. Cheney Bros.*, 148 P.2d 138, 64 Cal App 2d 55—*Almanerz v. San Diego Electric Ry. Co.*, 59 P.2d 513, 15 Cal App 2d 423—*Fugelsang v. Steiner*, 1 P.2d 553, 115 Cal. App. 167.

Colo.—*Boyd v. Close*, 257 P. 1079, 82 Colo. 150.

Fla.—*De Salvo v. Curry*, 33 So.2d 215—*Economy Cab Co. of Jacksonville v. Pinholster*, 15 So.2d 674, 153 Fla. 726—*Toll v. Waters*, 189 So. 393, 138 Fla. 349.

Ill.—*Edwards v. Hill-Thomas LIME & Cement Co.*, 32 N.E.2d 945, 309 Ill. App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180.

—*Coleman v. Hait*, 13 N.E.2d 188, 293 Ill. App. 615.

Iowa.—*Falt v. Krug*, 32 N.W.2d 781—*Lathrop v. Knight*, 297 N.W. 291, 230 Iowa 272—*Sexauer v. Dunlap*, 222 N.W. 420, 207 Iowa 1018.

Md.—*Friedman v. Hendler Creamery Co.*, 148 A. 426, 158 Md. 131.

Minn.—*Hardware Mut. Casualty Co. v. Anderson*, 253 N.W. 374, 191 Minn. 158—*Hayden v. Lundgren*, 221 N.W. 715, 175 Minn. 449.

N.Y.—*Lee v. City Brewing Corporation*, 18 N.E.2d 628, 279 N.Y. 380—*Hoefner v. Siegler*, 238 N.Y.S. 303, 228 App Div. 667.

Or.—*Carlson v. Homestead Bakery*, 18 P.2d 244, 141 Or. 323.

Pa.—*Gruskin v. Stitt*, 13 A.2d 412, 339 Pa. 137.

Tex.—*Safety First Bus Co. v. Skibinski*, Civ App., 36 S.W.2d 288.

Va.—*Gray v. Van Zieg*, 37 S.E.2d 751, 155 Va. 7.

Wash.—*Brewer v. Berner*, 131 P.2d 940, 15 Wash.2d 644—*Fetterman v. Levitch*, 109 P.2d 1064, 7 Wash.2d 431—*Huber v. Hemrich Brewing Co.*, 62 P.2d 451, 188 Wash. 235—*McIntyre v. Erickson*, 12 P.2d 399, 168 Wash. 355—*McHugh v. Mason*, 283 P. 184, 151 Wash. 572.

42 C.J. p 1264 note 74 [d]

Held not negligence as matter of law

U.S.—*Glynn v. Kruppner*, C.C.A. Minn., 60 F.2d 406.

Conn.—*Speerle v. Dabney*, 155 A. 56, 113 Conn. 302.

Mich.—*Rathburn v. Riedel*, 289 N.W. 285, 291 Mich. 652.

N.H.—*Fitzpatrick v. Parsons*, 10 A.2d 660, 90 N.H. 458—*Hissonnette v. Cheverette*, 176 A. 285, 87 N.H. 211—*Buttrick v. Flynn*, 173 A. 804, 87 N.H. 45.

N.C.—*Clone v. Fisher*, 27 S.E.2d 642, 223 N.C. 635.

94. U.S.—*Howe v. Scheibel*, D.C.Pa., 47 F. Supp. 295—*Buelow v. McDevitt*, D.C.Pa., 45 F. Supp. 29.

Cal.—*Armstrong v. Studer*, 37 P.2d 475, 2 Cal App 2d 166.

Colo.—*Woods v. Siegrist*, 149 P.2d 241, 112 Colo. 257—*Boyd v. Close*, 257 P. 1079, 82 Colo. 150.

Conn.—*Weimer v. Brock-Hall Dairy Co.*, 40 A.2d 277, 131 Conn. 361—*Garofano v. Dworkin*, 19 A.2d 421, 127 Conn. 648—*Smith v. Hirschberg*, 169 A. 618, 117 Conn. 692.

D.C.—*Standard Oil Co. of N. J. v. Sheppard*, 148 F.2d 363, 80 U.S. App. D.C. 71.

Iowa.—*Rhinehart v. Shambaugh*, 298 N.W. 876, 230 Iowa 788.

Mass.—*Gaines v. Ratnowsky*, 41 N.E.2d 25, 311 Mass. 254.

Mich.—*Thompson v. Michigan Cab Co.*, 272 N.W. 710, 279 Mich. 370.

Minn.—*Litman v. Walso*, 1 N.W.2d 391, 211 Minn. 398—*Spencer v. Johnson*, 281 N.W. 879, 203 Minn. 402—*Overly v. Troy Launderers & Cleaners*, 265 N.W. 268, 196 Minn. 413—*Carlson v. Stork*, 246 N.W.

ing streets;⁹⁵ in failing to maintain a lookout properly and carefully,⁹⁶ as where he failed to exercise care in the manner of making, and the point from which he made, his observations,⁹⁷ or where, having the right of way, he failed to maintain a

proper lookout for vehicles proceeding on the disfavored highway or in the disfavored direction;⁹⁸ or, having looked, in failing to look again, make further observations, or maintain a constant lookout;⁹⁹ or, having looked, and having seen defend-

746, 188 Minn. 204—Eckman v. Lum, 245 N.W. 638, 187 Minn. 437. Mo.—Stelmach v. Saul, App., 50 S.W.2d 721.

Neb.—Spaulding v. Howard, 27 N.W.2d 832, 148 Neb. 496—Meyer v. Platte Val. Const. Co., 25 N.W.2d 412, 147 Neb. 860—Roberts v. Carlson, 8 N.W.2d 175, 142 Neb. 851—Whitaker v. Keogh, 14 N.W.2d 596, 144 Neb. 790, followed in 14 N.W.2d 600, 144 Neb. 796—Thrapp v. Meyers, 209 N.W. 238, 114 Neb. 689, 47 A.L.R. 585.

N.J.—Struyk v. Griffin, 153 A. 612, 107 N.J.Law 334—Schaack v. J. A. Holmes Const. Co., 158 A. 494, 10 N.J.Misc. 226, affirmed 163 A. 663, 110 N.J.Law 16.

N.Y.—Jahrestorfer v. Stillman, 11 N.Y.S.2d 551, 256 App.Div. 1105.

Pa.—Renz v. Hazlett, 198 A. 675, 330 Pa. 306—Kaiser Co. v. American Individual Laundry Co., 10 A.2d 64, 138 Pa.Super. 124.

S.D.—Fester v. George, 25 N.W.2d 455.

Va.—Angell v. McDaniel, 181 S.E. 370, 165 Va. 1.

Wash.—Pyle v. Wilbert, 98 P.2d 664, 2 Wash.2d 429—Carlson v. Whelan, 84 P.2d 1001, 197 Wash. 104—Harry v. Beatty, 31 P.2d 97, 177 Wash. 153.

Wis.—Reynolds v. Madison Bus Co., 26 N.W.2d 653, 250 Wis. 294.

Held not negligence as matter of law
U.S.—Van Wie v. U. S., D.C.Iowa, 77 F.Supp. 22.

Cal.—Kroijer v. Jenkins, 6 P.2d 96, 119 Cal.App. 175—Morehead v. Roehm, 4 P.2d 995, 118 Cal.App. 312.

Conn.—Pizzarello v. Sheldon, 36 A.2d 376, 130 Conn. 643—Alderman v. Kelly, 32 A.2d 66, 130 Conn. 98. D.C.—Shu v. Basinger, Mun.App., 57 A.2d 295.

Iowa.—Arends v. De Bruyn, 252 N.W. 249, 217 Iowa 529.

Md.—Greenfield v. Hook, 8 A.2d 888, 177 Md. 116, 136 A.L.R. 1485.

Mich.—Scurlock v. Peglow, 249 N.W. 35, 263 Mich. 658.

Minn.—Mahowald v. Beckrich, 2 N.W.2d 569, 212 Minn. 78—Roerner v. Wiemann, 289 N.W. 562, 206 Minn. 548.

Mo.—Thompson v. Energy Const. Co., App., 295 S.W. 524.

N.Y.—Lazar v. Goldfarb, 75 N.Y.S.2d 272, 273 App.Div. 753.

Pa.—Craig v. Gottlieb, 55 A.2d 573, 161 Pa.Super. 526—Cunningham v. Spangler, 186 A. 173, 123 Pa.Super. 151—Sassman v. D'ger, Com.Pl., 63 Montg.Co. 81—Elgleson v. Gill,

Com.Pl., 59 Montg.Co. 4—King v. McQuale, Com.Pl., 56 Montg.Co. 207—Miscovich v. Houston, Com.Pl., 24 West.Co.L.J. 25.

R.I.—De Arruda v. Newport Creamery, 197 A. 474, 60 R.I. 153.

Wash.—Garrett v. Byerly, 284 P. 343, 155 Wash. 351, 68 A.L.R. 254.

Evidence held sufficient to go to jury

Mich.—Seymour v. Carr, 11 N.W.2d 344, 307 Mich. 109.

Wash.—Vercruysse v. Cascade Laundry Co., 74 P.2d 920, 193 Wash. 184.

95. U.S.—Foresman v. Pepin, D.C. Pa., 71 F.Supp. 772, affirmed, C.C. A., 161 F.2d 872.

Cal.—Yack v. Tiffin, 158 P.2d 620, 69 Cal.App.2d 226—Jacobsen v. Vaughn, 21 P.2d 141, 131 Cal.App. 277.

Conn.—Stiles v. Countermash, 171 A. 509, 118 Conn. 691.

Iowa.—Roe v. Kurtz, 210 N.W. 550, 203 Iowa 906.

Kan.—Marshall v. Boucher, 107 P.2d 698, 152 Kan. 697.

Mich.—Travis v. Eisenlord, 239 N.W. 304, 256 Mich. 261.

Minn.—Kane v. Locke, 12 N.W.2d 495, 216 Minn. 170.

N.M.—Mayfield v. Crowder, 35 P.2d 291, 38 N.M. 471.

Ohio.—Goodyear Tire & Rubber Co. v. Marhofer, 176 N.E. 120, 38 Ohio App. 143.

Or.—Stryker v. Hastie, 282 P. 1087, 131 Or. 282.

Pa.—Taylor v. Burke, Com.Pl., 33 Del.Co. 560.

42 C.J. p 1264 note 74 [b].

Conduct held not negligence as matter of law

Cal.—Pruitt v. Krovitz, 139 P.2d 992, 59 Cal.App.2d 666.

Pa.—McCormick Transp. Co. v. Philadelphia Transp. Co., 55 A.2d 771, 161 Pa.Super. 533—Miller v. Stauffer, Com.Pl., 37 Berks Co.L.J. 247. Tenn.—Duling v. Burnett, 124 S.W.2d 294, 22 Tenn.App. 522.

Tex.—Scroggs v. Morgan, Civ.App., 107 S.W.2d 911, reversed on other grounds 130 S.W.2d 283, 133 Tex. 581.

96. Ind.—Lewin v. Moll, 186 N.E. 905, 98 Ind.App. 1.

Md.—McDowell, Pyle & Co. v. Magazine Service, 164 A. 148, 164 Md. 170.

Minn.—Pearson v. Norell, 269 N.W. 643, 198 Minn. 303—Johnston v. Jordan, 258 N.W. 433, 193 Minn. 298.

Neb.—Roberts v. Carlson, 8 N.W.2d

175, 142 Neb. 851—Olson v. Lilley, 2 N.W.2d 15, 140 Neb. 779.

N.H.—Adams v. Landry, 35 A.2d 510, 93 N.H. 74.

N.J.—Le Bavin v. Suburban Gas Co., 45 A.2d 664, 134 N.J.Law 10.

Pa.—Van Ronk v. Holland Laundry, 170 A. 470, 111 Pa.Super. 529.

Tex.—Schuhmacher Co. v. Fahn, Civ. App., 78 S.W.2d 205, error dismissed.

Wyo.—Ries v. Cheyenne Cab & Transfer Co., 79 P.2d 468, 53 Wyo. 104.

Held not negligence as matter of law

Cal.—Hoffman v. McNamara, 282 P. 990, 102 Cal.App. 280.

Wis.—Nowicki v. Northwestern Nat. Casualty Co., 12 N.W.2d 918, 244 Wis. 632.

97. U.S.—Nielsen v. Richman, C.C.A. S.D., 114 F.2d 343, certiorari denied Richman v. Nielsen, 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 458.

Cal.—Lavin v. Fereria, 52 P.2d 518, 10 Cal.App.2d 710.

Pa.—Freedman v. Ziccardi, 30 A.2d 172, 151 Pa.Super. 159.

Held not negligence as matter of law

Minn.—Kraus v. Saffert, 293 N.W. 253, 208 Minn. 220.

98. Colo.—Denver Equipment Co. v. Newell, 169 P.2d 174, 115 Colo. 23.

Iowa.—Liddle v. Hyde, 247 N.W. 827, 216 Iowa 1311.

S.D.—Robertson v. Hennrich, 29 N.W.2d 329.

Tex.—Edson v. Perry-Foley Funeral Home, Civ.App., 132 S.W.2d 282, error dismissed, judgment correct.

Wis.—Kilcoyne v. Trausch, 269 N.W. 276, 223 Wis. 528.

Held not negligence as matter of law

Iowa.—Simanek v. Belhel, 7 N.W.2d 792, 232 Iowa 1150.

Pa.—Walter v. Nu-Car Carriers, 49 A.2d 535, 159 Pa.Super. 600.

99. Cal.—Briggs v. Koyer, 32 P.2d 649, 138 Cal.App. 487.

D.C.—Lansburgh & Bros. v. Binnix, Mun.App., 42 A.2d 922.

Ill.—Anderson v. Krancic, 66 N.E.2d 316, 328 Ill.App. 364.

Ky.—Danville Cab Co. v. Hendren, 201 S.W.2d 561, 304 Ky. 528.

Mich.—Adams v. Canfield, 248 N.W. 800, 263 Mich. 666.

Minn.—Guthrie v. Brown, 256 N.W. 898, 192 Minn. 434.

Mo.—Ritzheimer v. Marshall, App., 168 S.W.2d 159—Martin v. Kiefer, App., 95 S.W.2d 1214.

ant's vehicle approaching, in proceeding nevertheless across the intersection, having misjudged the speed or distance or danger of the approaching vehicle;¹ or, having seen the threat, in failing to stop his vehicle, or to take other steps to avoid the collision, in time.²

Pa.—Phillips v. Aronimink Transp. Co., Com.Pl., 28 Del.Co. 467—Mulien v. Allen, Com.Pl., 63 Montg.Co. 19.

R.I.—Simpson v. Gautreau, 5 A.2d 302, 62 R.I. 309.

S.D.—Fester v. George, 25 N.W.2d 455.

Tex.—Brown v. Winn, Civ.App., 176 S.W.2d 595, error refused.

Wash.—Fetterman v. Levitch, 109 P.2d 1064, 7 Wash.2d 431—Warren v. Hynes, 102 P.2d 691, 4 Wash.2d 128—Huber v. Hemrich Brewing Co., 62 P.2d 451, 188 Wash. 235.

Wis.—Nelson v. Klemm, 245 N.W. 657, 210 Wis. 432.

Held not negligence as matter of law
Cal.—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272—Swartz v. Faddershon, 268 P. 430, 92 Cal. App. 285

Iowa.—Rhinehart v. Shambaugh, 298 N.W. 876, 230 Iowa 780.

Mich.—Leete v. Gould, 13 N.W.2d 844, 308 Mich. 345—Swainston v. Kennedy, 235 N.W. 240, 253 Mich. 518.

Minn.—Mattfeld v. Nester, 32 N.W.2d 291, 226 Minn. 106—Jeddleloh v. Hockenhill, 18 N.W.2d 582, 219 Minn. 541—Norling v. Stempf, 293 N.W. 250, 208 Minn. 143.

N.J.—Neidig v. Fisher, 8 A.2d 564, 123 N.J.Law 242.

N.Y.—Goschar v. Bauer, 13 N.Y.S.2d 328.

Pa.—Gruskin v. Stitt, 13 A.2d 412, 339 Pa. 137—Clark v. Philadelphia Housing Authority, 65 A.2d 435, 161 Pa.Super 542—Randich v. Arena & Sons, 39 A.2d 458, 156 Pa.Super. 99—Sommer v. Blacka, 34 A.2d 830, 153 Pa.Super. 643—Gardner v. Kline, 9 A.2d 487, 137 Pa.Super. 505, followed in Wawa Dairy Farms v. Kline, 9 A.2d 490, 137 Pa.Super 510—Dresh v. Imes, Com.Pl., 37 Berks Co.L.J. 45.

Wash.—Ellis v. Olson, 246 P. 944, 139 Wash. 351.

Wis.—Pichler v. Ladwig, 217 N.W. 320, 194 Wis. 535.

Evidence held sufficient to go to jury

Iowa.—DeBuhr v. Taylor, 5 N.W.2d 597, 232 Iowa 792.

1. U.S.—Nielsen v. Richman, C.C.A. S.D., 114 F.2d 343, certiorari denied Richman v. Nielsen, 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 458—Glynn v. Krippner, C.C.A.Minn., 60 F.2d 406.

al.—Page v. Mazzei, 3 P.2d 11, 213 Cal. 644—Granath v. Andrus, 160 P.2d 129, 70 Cal.App.2d 99—Dickinson v. Pacific Greyhound Lines, 131 P.2d 401, 65 Cal.App.2d 824—Ebert v. Tide Water Associated Oil Co.,

129 P.2d 135, 54 Cal.App.2d 497—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 36 Cal. App.2d 700—Avalos v. Grimalde, 87 P.2d 392, 30 Cal.App.2d 725—Sene-gram v. Groobman, 86 P.2d 859, 30 Cal.App.2d 514—Setsuko Nitta v. Haslam, 33 P.2d 678, 138 Cal.App. 736—Enz v. Johns, 296 P. 115, 112 Cal.App. 1—Couchman v. Snelling, 295 P. 845, 111 Cal.App. 192—Sites v. Howrey, 291 P. 597, 108 Cal. App. 348.

Conn.—Weimer v. Brock-Hall Dairy Co., 40 A.2d 277, 131 Conn. 361—Guhring v. Gumpfer, 169 A. 189, 117 Conn. 548.

Ill.—Bentley v. Olson, 58 N.E.2d 316, 324 Ill.App. 281—Krawitz v. Levinstein, 52 N.E.2d 60, 320 Ill.App. 618—Katsinas v. Colgate-Palmolive Peet Co., 20 N.E.2d 127, 299 Ill. App. 347.

Mich.—Saunders v. Joseph, 2 N.W.2d 471, 300 Mich. 479—Rife v. Colestock, 297 N.W. 238, 297 Mich. 194—Swainston v. Kennedy, 235 N.W. 240, 253 Mich. 518—Lefevre v. Roberts, 230 N.W. 917, 250 Mich. 675.

Minn.—Montague v. Loose-Wiles Lhacuit Co., 261 N.W. 188, 194 Minn. 546.

Mo.—Hartley v. McKee, App., 86 S.W.2d 359.

Nev.—Carter v. City of Fallon, 11 P.2d 817, 54 Nev. 195.

N.J.—Craig v. Morgenweck, 194 A. 188, 15 N.J.Misc. 637—Haugard v. Grois, 165 A. 887, 11 N.J.Misc. 339—Em-Ess Auto Service v. Murray, 165 A. 290, 11 N.J.Misc. 238.

N.C.—Sebastian v. Horton Motor Lines, 197 S.E. 539, 213 N.C. 770. Or.—Nyhart v. Oregon Stages, 268 P. 982, 126 Or. 105.

Pa.—Morris v. Philadelphia Gas Works Co., 176 A. 735, 317 Pa. 420—Hayes v. Shomaker, 152 A. 827, 302 Pa. 72—Robinson v. Ondack, 29 A.2d 366, 151 Pa.Super. 46—Lochhead v. Nierenberg, 18 A.2d 472, 143 Pa.Super. 507—Probka v. Poils, 188 A. 393, 124 Pa.Super. 129—Lewis v. Hermann, 171 A. 109, 112 Pa.Super. 338—Elchelberger v. Ornsdorf, 165 A. 534, 109 Pa.Super. 64—Rocks v. Bender, 157 A. 705, 103 Pa.Super. 546—Short v. Trego, Com.Pl., 33 Del.Co. 44.

R.I.—Hobas v. Cirigliano, 38 A.2d 298, 70 R.I. 227—United Electric Rys. Co. v. Pennsylvania Petroleum Products Co., 178 A. 861, 65 R.I. 154.

S.C.—Bedford v. Armory Wholesale Grocery Co., 10 S.E.2d 330, 195 S.C. 150.

S.D.—Campbell v. Jackson, 272 N.W. 293, 65 S.D. 154.

Wash.—Swanson v. Sewall, 48 P.2d 939, 183 Wash. 462—Martin v. Westinghouse Electric & Mfg. Co., 297 P. 1098, 162 Wash. 150.

Held not negligence as matter of law

U.S.—Snowden v. Matthews, C.C.A. Okl., 160 F.2d 130.

Cal.—Swartz v. Faddershon, 268 P. 430, 92 Cal.App. 285

Conn.—Brangi v. Marshall, 168 A. 21, 117 Conn. 675.

Ga.—Economy Gas & Appliance Co. v. Kinslow, 39 S.E.2d 899, 74 Ga. App. 418.

Iowa.—Cowles v. Joelson, 286 N.W. 419, 226 Iowa 1202.

Mich.—Anderson v. Detroit Motorbus Co., 214 N.W. 172, 239 Mich. 390.

Mo.—Ritzheimer v. Marshall, App., 168 S.W.2d 159.

Mont.—Flynn v. Helena Cab & Bus Co., 21 P.2d 1105, 94 Mont. 204.

N.M.—Chavez v. Worley, 152 P.2d 393, 48 N.M. 449.

Or.—Peters v. Hockley, 53 P.2d 1059, 152 Or. 434, 103 A.L.R. 1347—Nyhart v. Oregon Stages, 268 P. 982, 126 Or. 105.

Pa.—Lookatch v. Robinson, 179 A. 66, 318 Pa. 545—Steingart v. Kancay, 19 A.2d 499, 144 Pa.Super. 534—Jacobson v. George B. Newton Coal Co., 170 A. 322, 112 Pa.Super. 138—Toyer v. Lipkin, 100 Pa.Super. 383—Keystone Lead Co. v. Frechle, 94 Pa.Super. 395—Malter v. Kennedy, 94 Pa.Super. 254—Miller v. Stauffer, Com.Pl., 27 Berks Co. 247—Stoltzfus v. Tingley, Com.Pl., 3 Chester Co.L.R. 238.

S.D.—Mills v. Armstrong, 13 N.W.2d 726, 70 S.D. 1.

Evidence held sufficient to go to jury

N.J.—Neidig v. Fisher, 8 A.2d 564, 123 N.J.Law 242.

Question for court sitting without jury

Cal.—Packer v. Wagner, 292 P. 523, 109 Cal.App. 26.

2. Iowa.—Stilson v. Ellis, 225 N.W. 346, 208 Iowa 1157.

Mo.—Paffner v. Kroger Grocer & Baking Co., App., 140 S.W.2d 79

Pa.—McCormick Transp. Co. v. Philadelphia Transp. Co., 55 A.2d 771, 161 Pa.Super. 533.

Tex.—Southland Greyhound Lines v. King, Civ.App., 77 S.W.2d 281, error granted.

Wash.—Carlson v. Whelan, 84 P.2d 1001, 197 Wash. 104—Anderson v. Wheeler, 46 P.2d 726, 182 Wash. 249.

Wis.—Volland v. McGee, 300 N.W. 506, 238 Wis. 598—Schmallenberg v. Smith, 296 N.W. 597, 237 Wis.

It is also a question of fact, on conflicting evidence, whether plaintiff was guilty of contributory negligence where he was entitled to the right of way;³ where defendant indicated that he yielded the right of way to plaintiff;⁴ where he entered the intersection with the traffic light in his favor;⁵ where he was driving on a through or main or

much-traveled highway,⁶ or was entering an intersection with such a highway;⁷ where plaintiff's vehicle had entered the intersection first,⁸ and had nearly cleared the intersection;⁹ where plaintiff approached and entered the intersection from defendant's right;¹⁰ where plaintiff approached and

285—Roellig v. Gear, 260 N.W. 232, 217 Wis. 651—Dormeyer v. Hall, 212 N.W. 257, 192 Wis. 197.
42 C.J. p 1264 note 74 [b].

Held not negligence as matter of law

Minn.—Shockman v. Union Transfer Co., 19 N.W.2d 812, 220 Minn. 334.
Mo.—Peck v. W. F. Williamson Advertising Service in St. Louis, App., 68 S.W.2d 847.
Pa.—Lewis v. Hermann, 171 A. 109, 112 Pa.Super. 338—Barrett v. Bass, 96 Pa.Super. 123.

3. Cal.—Avalos v. Grimalte, 87 P.2d 392, 30 Cal.App.2d 725—Almanerz v. San Diego Electric Ry. Co., 59 P.2d 513, 15 Cal.App.2d 423—Olson v. J. J. Jacobs Motor Co., 278 P. 1051, 99 Cal.App. 423.

Ill.—L. B. Piper & Co. v. Yellow Cab Co., 246 Ill.App. 487.

Ind.—Johnson v. Wilson, 5 N.E.2d 533, 211 Ind. 51—Keltner v. Patton, 185 N.E. 270, 204 Ind. 550.

Md.—Wlodkowski v. Yerkaitis, 57 A. 2d 792.

Mich.—Walling v. City of Detroit, 13 N.W.2d 246, 308 Mich. 163—Strong v. Kittenger, 1 N.W.2d 479, 300 Mich. 126—Holloway v. Nassar, 267 N.W. 619, 276 Mich. 212.

Minn.—Sanders v. Gilbertson, 29 N.W.2d 357, 224 Minn. 516—Krinke v. Gramer, 246 N.W. 376, 187 Minn. 595—Sieg v. Wagner, 217 N.W. 493, 173 Minn. 439.

Mo.—Sponsler v. Schroeder, App., 72 S.W.2d 150.

Neb.—Whitaker v. Keogh, 14 N.W.2d 596, 144 Neb. 790, followed in 14 N.W.2d 600, 144 Neb. 796.

N.D.—Zettle v. Lutovsky, 7 N.W.2d 180, 72 N.D. 331.

Pa.—Swift v. Corrado, 141 A. 491, 292 Pa. 543.

Conduct held not negligence as matter of law

U.S.—McCrea v. Nonweiler, D.C.Pa., 58 F.Supp. 79, affirmed, C.C.A., 146 F.2d 109.

Pa.—Brown v. McNamara, 50 A.2d 748, 160 Pa.Super. 206.

Wash.—Fothergill v. Kalja, 48 P.2d 643, 183 Wash. 112, adhered to 53 P.2d 1198, 183 Wash. 112.

4. Mich.—Strong v. Kittenger, 1 N.W.2d 479, 300 Mich. 126.

Held not negligence as matter of law

Colo.—Widman v. Ashcraft, 188 P.2d 889, 117 Colo. 373.

5. Cal.—Freeman v. Churchill, 183

P.2d 4, 30 Cal.2d 453—Isaacs v. City and County of San Francisco, 167 P.2d 221, 73 Cal.App.2d 621.

N.C.—Liske v. Walton, 153 S.E. 318, 198 N.C. 741.

Ohio.—Pesta v. Ruf, App., 48 N.E.2d 876—Cook v. Hunter, 3 N.E.2d 680, 52 Ohio App. 354.

Pa.—Graft v. Scott Bros., 172 A. 659, 315 Pa. 262—Sommer v. Blacka, 34 A.2d 830, 153 Pa.Super. 643—Sobierski v. Schwotzer, 33 A.2d 277, 152 Pa.Super. 661—Pellegrini v. Coll, 2 A.2d 491, 133 Pa.Super. 294—Engstler v. Penn News Co., 175 A. 761, 115 Pa.Super. 343—Bachman v. Reading Coach Co., 175 A. 747, 115 Pa.Super. 504—Dunn v. Philadelphia Rural Transit Co., 169 A. 258, 111 Pa.Super. 102—Baum v. Fulton, Com Pl., 50 Lanc.L.Rev. 499—Kleinsmith v. Erb, Com Pl., 22 Lehigh Co.L.J. 306

Evidence held sufficient to go to jury

Ill.—Groot v. City of Chicago, 53 N.E.2d 245, 321 Ill.App. 502.

6. Ill.—Schaefer v. Then, 63 N.E.2d 624, 327 Ill.App. 206.

Mich.—Seymour v. Carr, 11 N.W.2d 344, 307 Mich. 109—Rugenstein v. Orr's Estate, 297 N.W. 62, 297 Mich. 37—Meehl v. Barr Transfer Co., 296 N.W. 844, 296 Mich. 697—Dramis v. Dunbar, 273 N.W. 576, 280 Mich. 300—Marciniak v. Sundeen, 270 N.W. 729, 278 Mich. 407—Michaels v. Smith, 216 N.W. 413, 240 Mich. 671.

Minn.—Baker v. Jordan, 223 N.W. 137, 176 Minn. 285.

Neb.—Riekes v. Schantz, 12 N.W.2d 766, 144 Neb. 150.

Pa.—Steingart v. Kaney, 19 A.2d 499, 144 Pa.Super. 534—Roth v. Hurd, 13 A.2d 891, 140 Pa.Super. 401.

Utah.—Hess v. Robinson, 183 P.2d 510, 109 Utah 60.

7. U.S.—U. S. v. Moscow-Idaho Seed Co., C.C.A.Idaho, 92 F.2d 170.

Conn.—Julianette v. Colonial Beacon Oil Co., 54 A.2d 505, 133 Conn. 720.

Ind.—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind. App. 610.

Mich.—Parker v. England, 254 N.W. 169, 266 Mich. 467.

Mo.—Thompson v. Energy Const. Co., App., 295 S.W. 524.

Neb.—Parks v. Metz, 299 N.W. 643, 140 Neb. 235.

N.D.—Logan v. Schjeldahl, 262 N.W. 463, 66 N.D. 152.

Pa.—Kelly v. Veneziale, 35 A.2d 67, 348 Pa. 325—Goddard v. Armour & Co., 7 A.2d 79, 136 Pa.Super. 158.
Wash.—Brum v. Hammermeister, 14 P.2d 700, 169 Wash. 659, affirmed 18 P.2d 1119, 171 Wash. 702.

8. Mass.—Shockett v. Akesson, 37 N.E.2d 1015, 310 Mass. 289.

Mich.—Pelham v. Keip, 11 N.W.2d 219, 306 Mich. 500.

Minn.—Jeddellon v. Hockenhuil, 18 N.W.2d 582, 219 Minn. 541—Henjum v. Smith, 252 N.W. 227, 190 Minn. 378.

N.H.—Fitzpatrick v. Parsons, 10 A.2d 660, 90 N.H. 458.

Pa.—Gardner v. Kline, 9 A.2d 487, 137 Pa.Super. 505, followed in Wawa Dairy Farms v. Kline, 9 A.2d 490, 137 Pa.Super. 510

Tex.—American Grocery Co. v. Abraham, Civ App., 94 S.W.2d 1231, error dismissed.

9. Cal.—Asbury v. Goldberg, 47 P.2d 311, 8 Cal.App.2d 70.

Pa.—Christensen v. Jules Junker, Inc., 181 A. 326, 119 Pa.Super. 335.

Tex.—Moncada v. Snyder, Civ App., 129 S.W.2d 817, affirmed 152 S.W.2d 1077, 137 Tex. 112

Vt.—Beattie v. Parkhurst, 163 A. 589, 105 Vt. 91.

Wash.—Hamilton v. Lesley, 25 P.2d 102, 174 Wash. 516—Thompson v. Florito, 9 P.2d 789, 167 Wash. 495, affirmed 12 P.2d 1119, 167 Wash. 495.

10. Cal.—Leblanc v. Coverdale, 3 P.2d 312, 213 Cal. 654—Everts v. Rosenberg, 41 P.2d 166, 4 Cal.App.2d 500—Wise v. Stott, 300 P. 883, 114 Cal.App. 702.

Md.—Billotti v. Saval, 168 A. 890, 165 Md. 563.

Mich.—Grodli v. Microw, 221 N.W. 637, 244 Mich. 511.

Minn.—Evert v. Schurer, 285 N.W. 892, 205 Minn. 272.

N.J.—Emery v. Fritchey, 169 A. 828, 112 N.J.Law 161—Lester v. Karasik, 170 A. 842, 12 N.J.Misc. 195—Olenick v. Standard Oil Co. of New Jersey, 151 A. 485, 8 N.J.Misc. 744, affirmed 156 A. 376, 108 N.J.Law 201.

N.C.—Hobbs v. Kirby, 171 S.E. 94, 205 N.C. 238.

N.D.—Bagg v. Otter Tail Power Co., 297 N.W. 774, 70 N.D. 704.

Or.—McCulley v. Homestead Bakery, 18 P.2d 226, 141 Or. 460.

Pa.—Shields v. Neff, 2 A.2d 622, 133 Pa.Super. 289.

entered the intersection from defendant's left;¹¹ where plaintiff's vehicle struck defendant's vehicle;¹² where plaintiff's vehicle was struck by defendant's vehicle;¹³ where plaintiff's vehicle skidded at the intersection;¹⁴ where defendant's vehicle skidded at the intersection;¹⁵ where plaintiff collided with a vehicle having special privileges, such as an ambulance, or a fire or police department vehicle;¹⁶ where plaintiff had entered or attempted to cross an intersection after stopping;¹⁷ where plaintiff entered the highway from a private driveway;¹⁸ where plaintiff stopped in the highway to

permit defendant to pass;¹⁹ or where plaintiff swerved or turned or drove off the road or made some other attempt in order to avoid a collision.²⁰

The rule has also been applied in determining plaintiff's contributory negligence in connection with an accident where defendant's vehicle turned into the highway on which plaintiff was proceeding;²¹ where defendant's vehicle came out of a private driveway;²² where defendant was backing across or into the highway;²³ where defendant was making or attempting to make a turn,²⁴ such as a complete or U-turn,²⁵ or a left turn,²⁶ after giving

R.I.—Higginbotham v. Young, 193 A. 626, 59 R.I. 1.

S.D.—Litz v. Arbelter, 233 N.W. 914, 57 S.D. 481.

Tex.—Moncada v. Snyder, 152 S.W.2d 1077, 137 Tex 112.

11. Cal.—Smith v. Pollard, 8 P.2d 906, 121 Cal.App. 358.

Iowa.—Hartman v. Red Ball Transp. Co., 233 N.W. 23, 211 Iowa 64.

Kan.—Scheve v. Helman, 47 P.2d 70, 142 Kan 370.

Mass.—Walsh v. Wilson, 183 N.E. 261, 281 Mass 78.

Minn.—Reynolds v. Goetze, 255 N.W. 249, 192 Minn. 37.

Mo.—Cook v. Day, 172 S.W.2d 648—Hange v. Umbright, 119 S.W.2d 382—Ross v. Wilson, 163 S.W.2d 342, 236 Mo App 1178.

N.J.—Reddy v. Borlinsky, 140 A 325, 104 N.J.Law 389—Cottrell v. Champion, 145 A. 322, 7 N.J.Misc. 311.

N.C.—Matthews v. Cheatham, 188 S.E. 87, 210 N.C. 592.

Okl.—Sinclair Oil & Gas Co. v. Armour, 45 P.2d 754, 172 Okl. 442.

Wash.—Eggert v. Schumacher, 22 P.2d 52, 173 Wash. 119—Hirst v. Standard Oil Co. of California, 261 P. 405, 145 Wash 597.

12. Pa.—Young v. Gill, 157 A 348, 103 Pa Super. 467.

Held not negligence as matter of law
Pa.—Young v. Gill, *supra*.

13. N.Y.—Stevens v. Fraboni, 30 N.Y.S.2d 253, 262 App Div. 1056.

14. Cal.—Hellman v. Bradley, 56 P.2d 607, 13 Cal.App.2d 159.

15. Pa.—Fitzpatrick v. Pralon Cleaners & Dyers, 195 A. 644, 129 Pa.Super. 437.

R.I.—United Electric Rys. Co. v. Pennsylvania Petroleum Products Co., 192 A. 749, 58 R.I. 305.

Wash.—Hughes v. Wallace, 107 P.2d 910, 6 Wash.2d 396.

16. U.S.—Henry W. Putnam Memorial Hospital v. Allen, C.C.A.Vt., 34 F.2d 827.

Ala.—Echols v. Vinson, 124 So. 510, 220 Ala. 229.

Cal.—Rogers v. City of Los Angeles, 44 P.2d 466, 6 Cal.App.2d 294—

Lufkin v. City of Bakersfield, 20 P.2d 788, 131 Cal App 21.

Mass.—Nestor v. Tewksbury, 182 N.E. 335, 280 Mass 199.

Minn.—Travis v. Collett, 17 N.W.2d 68, 218 Minn. 592—Hogle v. City of Minneapolis, 258 N.W. 721, 193 Minn. 326.

Tex.—Reverra-Fewell Undertaking Co. v. James, Civ App., 13 S.W.2d 464.

17. Fla.—Hart v. Held, 5 So.2d 878, 149 Fla 33.

Ill.—St. Clair Nat. Bank v. Monaghan, 256 Ill App 471.

Iowa.—Odegard v. Gregerson, 12 N.W.2d 559, 224 Iowa 325—Shutes v. Weeks, 262 N.W. 518, 220 Iowa 616.

Mich.—Leete v. Gould, 13 N.W.2d 844, 308 Mich 315—Lindzy v. Svaab, 248 N.W. 617, 263 Mich 261.

Mo.—Bramblett v. Harlow, App., 75 S.W.2d 626.

N.J.—Innauer v. Kennedy, 168 A. 445, 111 N.J.Law 328.

Pa.—Bowers v. Gaglione, 185 A 315, 322 Pa 329—Guarante v. Long, Com Pl., 33 Del Co. 124—Hancock v. Aronimink Transp Co., Com Pl., 27 Del Co. 429—Weaver v. Scranton Bus Co., Com Pl., 44 Lock Jur. 233—Walls v. Kralik, Com.Pl., 60 Montg Co 218.

Va.—Greenleaf v. Richards, 16 S.E.2d 374, 178 Va. 40.

Wash.—Garrett v. Standard Oil Co. of California, 23 P.2d 402, 173 Wash. 394.

Held not negligence as matter of law
Tex.—Polascek v. Gaines Bros., Civ. App., 185 S.W.2d 609, error refused.

18. Iowa.—Tinley v. Chambers Implement Co., 249 N.W. 390, 216 Iowa 458.

N.H.—Spear v. Penna, 27 A.2d 92, 92 N.H. 190.

R.I.—Harding v. Pierce, 13 A.2d 276, 64 R.I. 490.

19. Pa.—Federman v. O'Connor, 178 A. 155, 117 Pa.Super. 295.

20. Cal.—Douglass v. Crahtree, 134 P.2d 912, 57 Cal.App.2d 508—Pattigson v. Cavanagh, 63 P.2d 868, 18 Cal.App.2d 123, transfer denied,

Sup., 64 P.2d 945, 18 Cal.App.2d 123.

Ill.—Mueth v. Jaska, 23 N.E.2d 805, 302 Ill App 289.

Minn.—Timmerman v. March, 271 N.W. 697, 199 Minn. 376.

Pa.—Korenkiewicz v. York Motor Express Co., 10 A.2d 864, 138 Pa Super. 210—Evans v. Stewart, 157 A. 515, 103 Pa Super 549.

R.I.—Rayno v. Giannini, 136 A. 885, 42 C.J. p 1264 note 74 [a].

Held not negligence as matter of law

Cal.—Mogle v. Hunt, 293 P. 844, 110 Cal App 177.

Pa.—Williams v. Stern, 40 A.2d 101, 156 Pa Super 250.

Evidence held sufficient to go to jury
N.Y.—Dickerson v. Daniels & Kennedy, 8 N.Y.S.2d 293, 255 App Div. 990, reargument denied 10 N.Y.S.2d 213, 256 App.Div. 827.

21. Ill.—McCarty v. O'H. Yates & Co., 14 N.E.2d 254, 291 Ill.App. 474.

Mo.—Wheeler v. Breeding, App., 109 S.W.2d 1237.

Pa.—Todd v. Nesta, 157 A. 678, 306 Pa. 280—Rosenmiller v. Zucker, 2 A.2d 620, 133 Pa Super. 216.

22. Minn.—Salters v. Uhlir, 292 N.W. 762, 208 Minn 66.

Mo.—Wheeler v. Breeding, App., 109 S.W.2d 1237.

Pa.—Pleet v. Morris, 98 Pa Super. 69.

23. Minn.—Carlson v. Peterson, 284 N.W. 817, 205 Minn. 20.
42 C.J. p 1264 note 72.

24. Cal.—Gialdini v. Russell, 25 P.2d 845, 134 Cal.App. 524.

25. Cal.—Ruperto v. Thomas, 298 P. 851, 113 Cal App. 523.

26. Ark.—East v. Woodruff, 193 S.W.2d 664, 209 Ark 1046.

Cal.—Fruitt v. Marshall, 115 P.2d 507, 46 Cal App 2d 169.

Conn.—Morgan v. Marchesseault, 169 A. 609, 117 Conn. 607.

Ky.—Rutherford v. Smith, 145 S.W.2d 533, 284 Ky. 592.

Mass.—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 207.

Minn.—Abraham v. Byman, 8 N.W.2d 231, 214 Minn. 355.

a left-turn signal;²⁷ where defendant was driving on the wrong side of the highway;²⁸ where defendant's vehicle was traveling at a high and dangerous rate of speed which was not anticipated or realized by plaintiff;²⁹ where defendant failed to yield the right of way as plaintiff assumed he would;³⁰ or where defendant failed to stop or slow down at an intersection where he was required to, as plaintiff assumed he would.³¹

Various incidental questions of fact have been held, on conflicting evidence, to be for the jury;³² including such questions as whether plaintiff was in the exercise of due care for his safety;³³ whether plaintiff had the right of way;³⁴ or had forfeited it;³⁵ whether plaintiff had violated the right of way statutes;³⁶ and whether a violation of the right of way regulations was justifiable or excusable;³⁷ whether the traffic lights were in plaintiff's favor

Mo.—Hamre v. Conger, 209 S.W.2d 242, 357 Mo. 497.

N.Y.—Boylan v. Whitehouse, 242 N.Y.S. 11, 229 App.Div. 372

Pa.—Wilson v. Consolidated Dressed Beef Co., 145 A. 81, 295 Pa. 168—Lieb v. Wawa Dairy Farms, 194 A. 758, 129 Pa.Super. 70.

Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181—Virginia Stage Lines v. Duff, 39 S.E.2d 634, 185 Va. 592
Wis.—Stylow v. Milwaukee Electric Railway & Transport Co., 5 N.W.2d 750, 241 Wis. 211.

Held question for court sitting without jury

Pa.—Seckinger v. Economy Laundry, 3 A.2d 46, 133 Pa.Super. 414.

Evidence held sufficient to go to jury

Tex.—Adams v. Siefferman, Civ.App., 197 S.W.2d 506.

27. Cal.—Manning v. O'Rourke, 8 P.2d 181, 120 Cal.App. 432

28. Mass.—Thibeault v. Poole, 186 N.E. 632, 283 Mass. 480.

Wis.—Gerbing v. McDonald, 229 N.W. 860, 201 Wis. 214, followed in 229 N.W. 864, 201 Wis. 222.

29. Ind.—H. E. McGonigal, Inc. v. Etherington, App., 79 NE 2d 777
Minn.—Mattfeld v. Nester, 32 N.W. 2d 291, 226 Minn. 106—Matz v. Krippner, 254 N.W. 912, 191 Minn. 580.

Neb.—Spaulding v. Howard, 27 N.W. 2d 832, 148 Neb. 496

N.J.—Spear v. Hummer, 168 A. 170, 11 N.J.Misc. 709.

Pa.—Boehm v. Heston, 189 A. 298, 325 Pa. 89.

Wash.—Gibson v. Spokane United Rys., 84 P.2d 349, 197 Wash. 58.

Plaintiff held not negligent as matter of law

U.S.—Glynn v. Krippner, C.C.A.Minn., 60 F.2d 406.

Kan.—Sullivan v. Johnston, 190 P. 2d 417, 164 Kan. 386.

N.H.—Fitzpatrick v. Parsons, 10 A. 2d 660, 90 N.H. 458.

30. Cal.—De Priest v. City of Glendale, 169 P.2d 17, 74 Cal.App.2d 464.

Ill.—L. B. Piper & Co. v. Yellow Cab Co., 246 Ill.App. 487.

Minn.—Ernst v. Union City Mission, 272 N.W. 385, 199 Minn. 489.

Plaintiff held not negligent as matter of law

Ind.—Snider v. Truex, 51 N.E.2d 477, 222 Ind. 18.

Or.—Santoro v. Brooks, 254 P. 1019, 121 Or. 424.

31. Ark.—Rexer v. Carter, 186 S.W. 2d 147, 208 Ark. 342.

Cal.—Wauchope v. Baumbach, 296 P. 310, 112 Cal.App. 64.

Ill.—Mueth v. Jaska, 23 N.E.2d 805, 302 Ill.App. 289.

Iowa.—Wheeler v. Peterson, 240 N.W. 683, 213 Iowa 1239

Kan.—Keir v. Trager, 7 P.2d 49, 134 Kan 505, 81 A.L.R. 181

Mich.—Campbell v. Osterland, 277 N.W. 875, 283 Mich. 175—Hilliker v. Nelson, 257 N.W. 717, 269 Mich. 359—Jayton v. Cregan & Mallory Co., 252 N.W. 337, 265 Mich. 574

—Haynes v. Clark, 233 N.W. 321, 252 Mich. 295.

N.J.—Pollack v. New Jersey Bell Telephone Co., 181 A. 318, 116 N.J. Law 28

Pa.—Holland v. Kohn, 38 A.2d 500, 155 Pa.Super. 95—Dougherty v. Glose, Com.Pl., 22 Lehigh Co.L.J. 395.

Plaintiff held not negligent as matter of law

Pa.—Glennon v. Ostroff, 24 A.2d 29, 147 Pa.Super. 182—King v. McQuale, Com.Pl., 56 Montg.Co. 207

32. U.S.—Schwartz v. Eitel, C.C.A. Wis., 132 F.2d 760.

Cal.—Bischell v. State, 157 P.2d 41, 68 Cal.App.2d 557.

Colo.—Potts v. Bird, 27 P.2d 745, 93 Colo. 547.

N.Y.—Armstrong v. Koller, 25 N.Y.S. 2d 984, 261 App.Div. 1017.

Tenn.—Walters v. Staton, 111 S.W. 2d 381, 21 Tenn.App. 401.

Va.—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570.

Wash.—Murphy v. Hunziker, 2 P.2d 270, 164 Wash. 40.

Evidence held sufficient to go to jury

Conn.—Peckham v. Knofia, 36 A.2d 740, 130 Conn. 646.

33. U.S.—Glynn v. Krippner, C.C.A. Minn., 60 F.2d 406.

Ill.—Ritter v. Nieman, 74 N.E.2d 911, 332 Ill.App. 283—Nelson v. Nihan, 74 N.E.2d 549, 331 Ill.App. 610—Ritter v. Neiman, 67 N.E.2d 417, 329 Ill.App. 163—Nash v.

Welch, 57 N.E.2d 648, 324 Ill.App. 225.

Me.—Collins v. Kelley, 179 A. 65, 133 Me. 410.

Mass.—Barrows v. Checker Taxi Co., 195 N.E. 112, 290 Mass. 231—Harlow v. Corcoran, 195 N.E. 108, 290 Mass. 289—Dodge v. Town Taxi, 183 N.E. 260, 281 Mass. 77—Ferreira v. Zaccolanti, 183 N.E. 261, 281 Mass. 91—Palombella v. Foss, 178 N.E. 232, 277 Mass. 143—Keyes v. Checker Taxi Co., 176 N.E. 207, 275 Mass. 461—Bagdazarian v. Nathanson, 169 N.E. 148, 269 Mass. 386.

Mich.—Foote v. Huelster, 261 N.W. 296, 272 Mich. 194—Scott v. Wallace, 230 N.W. 946, 251 Mich. 28—Tregonning v. Castantini, 220 N.W. 171, 243 Mich. 233.

Minn.—Bayers v. Bongfeldt, 277 N.W. 239, 201 Minn. 546—Greene v. Freeman, 217 N.W. 485, 173 Minn. 622.

Mo.—Wheeler v. Breeding, App., 109 S.W.2d 1237.

N.J.—Purcell v. Pollock, 143 A. 426, 105 N.J. Law 221.

Ohio.—Smith v. Brane, App., 61 N.E.2d 908—Nunn v. Davidson, 9 N.E.2d 732, 55 Ohio App. 297

Pa.—Romanowski v. Morganstein, 170 A. 379, 111 Pa.Super. 443

R.I.—De Robbio v. Hart, 45 A.2d 169, 71 R.I. 347

Wash.—Novotney v. Thompson, 257 P. 236, 144 Wash. 155.

34. Ark.—Payne v. Mosley, 162 S.W.2d 889, 204 Ark. 510.

Neb.—Meyer v. Platte Val. Const. Co., 25 N.W.2d 412, 147 Neb. 860

N.C.—Kennedy v. Smith, 39 S.E.2d 380, 226 N.C. 514.

35. Pa.—Reiter v. Andrews, 38 A. 2d 508, 155 Pa.Super. 449.

36. Minn.—Packar v. Brooks, 300 N.W. 400, 211 Minn. 99.

Mo.—Roberts v. Wilson, 33 S.W.2d 169, 225 Mo.App. 932.

Ohio.—Heidle v. Baldwin, 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186.

Provision granting fire apparatus right of way

Mass.—Nestor v. Tewksbury, 182 N.E. 335, 280 Mass. 199.

37. Cal.—Satterlee v. Orange Glenn School Dist. of San Diego County, 177 P.2d 279, 29 Cal.2d 581.

or against him;³⁸ whether plaintiff properly stopped at a stop street;³⁹ or when otherwise required to;⁴⁰ whether plaintiff saw, or knew of the existence of, a sign bearing a traffic instruction or prohibition;⁴¹ whether plaintiff was driving at a prudent speed with his car under control;⁴² whether plaintiff kept a proper lookout;⁴³ and whether plaintiff could or should have seen defendant's automobile;⁴⁴ what side of the road plaintiff was driving upon;⁴⁵ whether plaintiff drove to the left of the intersection of the centers of the intersecting streets, and where such point was;⁴⁶ whether in the light of the respective speeds and distances of the two vehi-

cles plaintiff had a reasonable opportunity to cross the intersection without danger of collision;⁴⁷ and the relative locations of the vehicles when they struck.⁴⁸

Uncontradicted or insufficient evidence. Where the evidence is uncontradicted and the only inference which can reasonably be made therefrom is clear, the question whether or not plaintiff is guilty of contributory negligence is a matter of law for the court.⁴⁹ Where the evidence is insufficient to carry the issue to the jury, it is for the court to rule as a matter of law with respect to the alleged contributory negligence of plaintiff.⁵⁰

38. D.C.—Peake v. Ramsey, Mun App., 43 A 2d 763.

Ill.—Ambrose v. Doyle, 76 N.E.2d 802, 333 Ill.App. 161—Heil v. Kas-tengren, 65 N.E.2d 579, 328 Ill. App. 801.

39. U.S.—Nielsen v. Richman, C.C.A. S.D., 114 F.2d 343, certiorari denied Richman v. Nielsen, 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 458.

D.C.—Lansburgh & Bros v. Binnix, Mun App., 42 A.2d 922.

Iowa—Willemson v. Reedy, 244 N.W. 691, 215 Iowa 193.

Me.—Eaton v. Marcelle, 29 A.2d 162, 139 Me. 256.

Minn.—Neubarth v. Fink, 297 N.W. 171, 210 Minn. 55.

N.J.—Le Bavin v. Suburban Gas Co., 45 A.2d 664, 134 N.J.Law 10.

Ohio—Smith v. Branc, App., 61 N.E.2d 908.

Wash.—Pyle v. Wubert, 98 P.2d 664, 2 Wash.2d 429.

W.Va.—Hambrick v. Spalding, 179 S.E. 807, 116 W.Va. 235.

Evidence held sufficient to go to jury
Cal.—Dickinson v. Pacific Greyhound Lines, 131 P.2d 401, 55 Cal.App.2d 824.

40. Mass.—Nestor v. Tewksbury, 182 N.E. 335, 280 Mass. 199.

41. U.S.—Klas v. Yellow Cab Co., C.C.A. Ill., 106 F.2d 935.

Ill.—Goad v. Grissom, 57 N.E.2d 514, 324 Ill.App. 123.

Wash.—Cushman v. Standard Oil Co. of California, 260 P. 996, 145 Wash. 481.

42. Pa.—Holt v. Pariser, Com.Pl., 10 Fay.L.J. 31.

43. N.H.—Bissonnette v. Cheverette, 176 A. 285, 87 N.H. 211.

Tex.—Larson v. Whitten, Civ.App., 111 S.W.2d 786, error dismissed.

Wash.—Fetterman v. Levitch, 109 P.2d 1064, 7 Wash.2d 431.

Wis.—Nowicki v. Northwestern Nat. Casualty Co., 12 N.W.2d 918, 244 Wis. 632.

44. Cal.—Roller v. Daleys, Inc., 28 P.2d 345, 219 Cal. 642.

D.C.—Lansburgh & Bros. v. Binnix, Mun.App., 42 A.2d 922.

Pa.—Miscovich v. Houston, Com.Pl., 24 West Co.L.J. 25—Bross v. Ofak, Com.Pl., 49 Dauph Co. 433.

S.C.—Lynch v. Pee Dee Express, 30 S.E.2d 449, 204 S.C. 537.

45. Mass.—O'Brien v. Guiterman, 152 N.E. 883, 256 Mass. 560.

46. Conn.—Decker v. Roberts, 12 A.2d 541, 126 Conn. 478.

47. Cal.—Galway v. Guggolz, 4 P.2d 290, 117 Cal.App. 639.

Me.—Hill v. Janson, 31 A.2d 236, 139 Me. 344.

N.H.—Gendron v. Glidden, 148 A. 461, 84 N.H. 162.

N.Y.—Southcombe v. Coyle, 8 N.Y.S.2d 557.

Or.—Van Zandt v. Goodman, 179 P.2d 724, 181 Or. 80.

Pa.—Redmond v. Koons, 97 Pa.Super. 229—Brayman v. DeWolf, 97 Pa.Super. 225.

48. Okl.—Binding-Stevens Seed Co. v. Petris, 67 P.2d 956, 180 Okl. 95.

49. Mass.—Zawacki v. Finn, 29 N.E.2d 730, 307 Mass. 86.

Mich.—Wallace v. Rosenfeld, 280 N.W. 733, 285 Mich. 204.

1'a.—Haney v. Woolford, 188 A. 405, 124 Pa.Super. 208—Brayman v. DeWolf, 97 Pa.Super. 225—Elscheid v. Dewhirst, Com.Pl., 48 Dauph.Co. 316—Harward v. McGinley, Com.Pl., 56 Montg.Co. 382.

Tex.—Phelan Co. v. Schneider, Civ. App., 146 S.W.2d 244, error refused.

Wash.—Harry v. Beatty, 31 P.2d 97, 177 Wash. 153.

42 C.J. p 1264 note 77.

Plaintiff held guilty of contributory negligence

(1) In general.

Cal.—Solko v. Jones, 3 P.2d 1028, 117 Cal.App. 372.

Colo.—Kracaw v. Michelotti, 276 P. 333, 85 Colo. 384.

Iowa.—Parrack v. McGaffey, 251 N.W. 871, 217 Iowa 368.

Md.—Askin v. Long, 6 A.2d 246, 176 Md. 545.

Mich.—Faustman v. Hewitt, 264 N.W. 863, 274 Mich. 458.

Minn.—Engholm v. Northland Transp. Co., 238 N.W. 795, 184 Minn. 349.

Mo.—Hamre v. Conger, 209 S.W.2d 242, 357 Mo. 497.

Pa.—McAmbley v. Martin, 100 Pa.Super. 593—Fraser v. Voight, 100 Pa.Super. 248—Why v. Stratton, 92 Pa.Super. 476—Frank v. Fleet, 87 Pa.Super. 494—Miller v. Devine, Com.Pl., 54 Dauph Co. 418—Sweet v. Rounds, Com.Pl., 26 Erie Co. 32, affirmed 36 A.2d 815, 349 Pa. 152.

S.C.—Branham v. Wolfe Transp. Co., 169 S.E. 899, 170 S.C. 164.

(2) Where plaintiff was traveling at excessive speed under circumstances.

Minn.—Williams v. Jungbauer, 252 N.W. 658, 191 Minn. 16.

Pa.—Simon v. Moens, 51 A.2d 737, 356 Pa. 361.

(3) Where plaintiff was entering intersection with favored highway.—Shedlock v. Marshall, 46 A.2d 349, 186 Md. 218—Madge v. Fabrizio, 20 A.2d 172, 179 Md. 517.

(4) Where plaintiff made an improper left turn.—Marshall v. Richter, 237 N.Y.S. 834, 227 App.Div. 830.

(5) Failure to yield right of way.

Ind.—D. Graff & Sons v. Williams, 61 N.E.2d 72, 115 Ind.App. 597.

Pa.—Affelgren v. Kinka, 40 A.2d 418, 351 Pa. 99.

(6) Failure to keep proper lookout.

Kan.—Ray v. Allen, 152 P.2d 851, 159 Kan. 167.

R.I.—Edwards v. Johnson, 42 A.2d 442, 71 R.I. 67.

Wash.—Hauswirth v. Pom-Arleau, 119 P.2d 674, 11 Wash.2d 354—Huber v. Hemrich Brewing Co., 62 P.2d 451, 188 Wash. 235.

(7) Failure to stop at stop street.

Ky.—Mullen v. Coleman, 179 S.W.2d 600, 297 Ky. 351.

Md.—Madge v. Fabrizio, 20 A.2d 172, 179 Md. 517.

Neb.—Ritter v. Hering, 280 N.W. 231, 135 Neb. 1.

50. N.H.—Pickard v. Morris, 13 A.2d 609, 91 N.H. 65.

N.Y.—Teemley v. Clute, 279 N.Y.S.

(d) Passing Parked Vehicles

Where the evidence is conflicting or subject to differing inferences, it is for the trier of facts to determine the plaintiff's contributory negligence in a collision with, or an accident connected with, a parked vehicle.

Where the evidence is conflicting, or reasonably subject to differing inferences of fact, it is a question of fact whether plaintiff was guilty of contributory negligence in a collision with a car parked or stopped upon the highway or partially there-

upon,⁵¹ or upon the side or edge of the highway,⁵² or upon the wrong side of the highway,⁵³ or whether plaintiff was guilty of contributory negligence in an accident resulting when plaintiff collided with another car in an effort to avoid colliding with an improperly parked car.⁵⁴

Thus, it is for the trier of the facts to determine whether plaintiff was guilty of contributory negligence where the parked or stopped vehicle is not lighted by lights or flares as required by law;⁵⁵

- 361, 244 App.Div. 843, affirmed 200 N.E. 40, 269 N.Y. 649.
- Pa.—Sillies v. American Stores Co., 53 A.2d 610, 357 Pa. 176.
- Wash.—Langer v. Auto Interurban Co., 183 P.2d 188, 28 Wash.2d 343
51. Ala.—Winn v. Cudahy Packing Co. of Alabama, 4 So.2d 135, 241 Ala. 581.
- Cal.—Skaggs v. Willhour, 292 P. 649, 210 Cal. 524—Williams v. Layne, 127 P.2d 582, 53 Cal.App.2d 81—Pattee v. King, 24 P.2d 564, 133 Cal.App. 601—Flynn v. Bledsoe Co., 267 P. 887, 92 Cal.App. 145
- Colo.—Calnon v. Sorel, 119 P.2d 615, 108 Colo. 467.
- Ga.—Payne v. A. B. C. Truck Lines, 5 S.E.2d 590, 61 Ga.App. 36, conforming to answers to certified questions 5 S.E.2d 241, 189 Ga. 112.
- Idaho.—Stanger v. Hunter, 291 P. 1060, 49 Idaho 723.
- Ill.—Bell v. Illinois Farm Supply Co., 78 N.E.2d 838, 334 Ill.App. 216—Becherer v. Belleville-St. Louis Coach Co., 53 N.E.2d 731, 322 Ill.App. 37—Johnson v. Mueller, 41 N.E.2d 125, 314 Ill.App. 204—Wilson v. Decatur Garage Co., 39 N.E.2d 379, 313 Ill.App. 148—Miller v. Burch, 254 Ill.App. 387.
- Ind.—Toenges v. Walter, 32 N.E.2d 95, 109 Ind.App. 41.
- Iowa.—Knaus Truck Lines v. Commercial Freight Lines, 29 N.W.2d 204, 238 Iowa 1356—Anderson v. Kist, 294 N.W. 726, 229 Iowa 462.
- Kan.—Watson v. Travelers Mut. Casualty Co., 73 P.2d 64, 146 Kan. 623—Hayden v. Jack Cooper Transport Co., 5 P.2d 837, 134 Kan. 172.
- Ky.—Peck's Adm'r v. Bell Line, 144 S.W.2d 483, 284 Ky. 288—Owen Motor Freight Lines v. Russell's Adm'r, 86 S.W.2d 708, 260 Ky. 795—Robinson Transfer Co. v. Turner, 50 S.W.2d 546, 244 Ky. 181—Bradley v. Clarke, 293 S.W. 1082, 219 Ky. 438.
- Md.—Frederick & Baltimore Transp. Co. v. Mumford, 139 A. 541, 154 Md. 8.
- Mass.—Price v. Pearson, 16 N.E.2d 855, 301 Mass. 260.
- Minn.—Golden v. Geyer, 263 N.W. 103, 195 Minn. 354—Mechler v. McMahon, 239 N.W. 605, 184 Minn. 476.
- Mo.—Herrington v. Hoey, 139 S.W.2d 477, 345 Mo. 1108—Clason v. Lenz, 61 S.W.2d 727, 332 Mo. 1113—Proctor v. Jacob Ruppert, 159 S.W.2d 328, 236 Mo.App. 684—McGrory v. Thurnau, App. 84 S.W.2d 147.
- N.Y.—Krtill v. City of New York, 20 N.Y.S.2d 981, 259 App.Div. 1049—Hager v. Paddelford, 299 N.Y.S. 722, 252 App.Div. 819, affirmed 15 N.E.2d 672, 278 N.Y. 515.
- N.C.—Lambert v. Caronna, 175 S.E. 303, 206 N.C. 616—Johnson v. Hoffer & Boney Transfer Co., 168 S.E. 495, 204 N.C. 420.
- N.D.—Gausvik v. Larsen Richter Co., 212 N.W. 846, 55 N.D. 218.
- Ohio.—Doran v. Bethesda, 160 N.E. 110, 26 Ohio App. 426.
- Tenn.—Ringwald v. Beene, 92 S.W.2d 411, 170 Tenn. 116
- Tex.—McCullough Box & Crate Co. v. Liles, Civ App., 162 S.W.2d 1055, error refused—Pure Foods Products v. Gibson, Civ.App., 118 S.W.2d 925, error dismissed—Humble Oil & Refining Co. v. Ooley, Civ. App., 46 S.W.2d 1038, error dismissed—Hewitt v. Green, Civ App., 28 S.W.2d 892.
- Wash.—Newton v. Pacific Highway Transport Co., 139 P.2d 725, 48 Wash.2d 507—Henning v. Manlowe, 46 P.2d 1057, 182 Wash. 355—Thornton v. Eneroth, 30 P.2d 951, 177 Wash. 1—Gaches v. Daw, 10 P.2d 1111, 168 Wash. 162—McMoran v. Associated Oil Co., 257 P. 846, 144 Wash. 276.
- Caro required in passing parked or standing vehicle see supra § 338.
- Held not negligence as matter of law**
- La.—Hemel v. U. S. Fidelity & Guaranty Co., App. 31 So.2d 38.
- Mass.—Jacobs v. Moniz, 192 N.E. 515, 288 Mass. 102.
- Minn.—Johnson v. Kutches, 285 N.W. 881, 205 Minn. 383.
- Mo.—Snyder v. Murray, 17 S.W.2d 639, 223 Mo.App. 671, followed in 17 S.W.2d 646.
- Evidence held sufficient to go to jury**
- Kan.—Brugh v. Albers, 40 P.2d 380, 141 Kan. 223.
- Question for judge sitting without jury**
- Cal.—Thompson v. Steveson, 126 P.2d 127, 52 Cal.App.2d 260.
- N.J.—Lewis v. M. & V. Motor Co., 146 A. 689, 7 N.J.Misc. 638, affirmed 150 A. 919, 106 N.J.Law 572.
52. Ga.—Simmons v. Jones, 191 S.E. 490, 55 Ga.App. 831.
- Minn.—Forster v. Consumers' Wholesale Supply Co., 218 N.W. 249, 174 Minn. 105.
53. Ky.—Padgett v. Brangan, 15 S.W.2d 277, 228 Ky. 440.
- Wis.—Delfosse v. New Franken Oil Co., 230 N.W. 31, 201 Wis. 401.
54. U.S.—New Amsterdam Cas. Co. v. Ledoux, CCA La., 159 F.2d 905
- N.Y.—Peck v. Independent Automobile Forwarding Corporation, 8 N.Y.S.2d 754, 256 App.Div. 859, affirmed 21 N.E.2d 215, 280 N.Y. 728.
55. U.S.—Car & General Ins. Corp. v. Cheshire, CCA La., 159 F.2d 985.
- Ala.—Breeden v. Cudahy Packing Co., 171 So. 632, 233 Ala. 369.
- Ark.—Coca Cola Bottling Co. v. Shipp, 297 S.W. 856, 171 Ark. 130.
- Cal.—Woods v. Walker, 124 P.2d 844, 51 Cal.App.2d 307—Hall v. Associated Oil Co., 65 P.2d 954, 19 Cal.App.2d 491—Silvey v. Harm, 8 P.2d 570, 120 Cal.App. 561—Gammon v. Wales, 300 P. 988, 115 Cal.App. 133.
- Ga.—Hudgins Contracting Co. v. Smith, 188 S.E. 732, 54 Ga.App. 687.
- Ill.—Russell v. Consolidated Forwarding Corp., 71 N.E.2d 853, 330 Ill.App. 529—Meng v. Lucash, 69 N.E.2d 367, 329 Ill.App. 512.
- Ind.—Koplovitz v. Jensen, 151 N.E. 390, 197 Ind. 475—McKee v. Suesz, 167 N.E. 720, 90 Ind.App. 407.
- Kan.—Long v. American Employers' Ins. Co., 83 P.2d 674, 148 Kan. 520—Conwill v. Fairmount Creamery Co., 18 P.2d 193, 136 Kan. 861.
- Me.—Estabrook v. Barton, 25 A.2d 217, 138 Me. 722.
- Mass.—Langill v. First Nat. Stores, 11 N.E.2d 593, 298 Mass. 559—Woolner v. Perry, 163 N.E. 750, 265 Mass. 74.
- Minn.—Cowperthwait v. Tadsen, 2 N.W.2d 429, 212 Minn. 49—Martin v. Tracy, 246 N.W. 6, 187 Minn. 529—Mechler v. McMahon, 230 N.W. 776, 180 Minn. 252—Knutson v. Farmers' Co-op. Creamery of Jenkins, 230 N.W. 270, 180 Minn. 116.
- Mo.—Pfeiffer v. Schee, App., 107 S.W.2d 170.
- N.H.—MacDonald v. Appleyard, 53 A.2d 434.
- N.J.—Treftz v. Kirby, 146 A. 688, 7 N.J.Misc. 555—Sussex Print Works v. Noehenson, 142 A. 437, 6 N.J.

or where the lights are obscured;⁵⁶ or where the view of the parked vehicle is obscured,⁵⁷ as by fog or thick weather,⁵⁸ or by the blinding lights of vehicles approaching from the opposite direction.⁵⁹

So, also, the trier of the facts must determine, on conflicting evidence, whether plaintiff was guilty of contributory negligence in that he failed to keep a proper lookout;⁶⁰ or failed to see the stopped vehicle until it was too late;⁶¹ or drove too close to

Misc. 625—Vollinger v. Schwarz & Son, 137 A. 646, 5 N.J.Misc. 588.
N.Y.—Lonstein v. Onondaga Freight Corporation, 38 N.Y.S.2d 698, 265 App Div. 978, affirmed 49 N.E.2d 1005, 290 N.Y. 735.

N.C.—Cummins v. Southern Fruit Co., 36 S.E.2d 11, 225 N.C. 625—Leonard v. Tatum & Dalton Transfer Co., 12 S.E.2d 729, 218 N.C. 667—Page v. McLamb, 3 S.E.2d 275, 215 N.C. 789—Williams v. Frederickson Motor Express Lines, 151 S.E. 197, 198 N.C. 193.

Ohio—Mostov v. Unkefer, 187 N.E. 714, 24 Ohio App. 420.

Tex.—Swift v. Michaels, Civ App., 110 S.W.2d 933, error dismissed—Pennington Produce Co. v. Wonn, Civ App., 49 S.W.2d 482, error refused.

Vt.—Chaffee v. Duclos, 166 A. 2, 105 Vt. 384

Va.—Armstrong v. Rose, 196 S.E. 613, 170 Va. 190.

Conduct held not negligence as matter of law

(1) In general.

Cal.—Jessen v. Angelus Furniture & Mfg. Co., 42 P.2d 1063, 5 Cal.App.2d 477.

Ga.—Bach v. Bragg Bros & Blackwell, 186 S.E. 711, 53 Ga App. 574.

Ill.—Budds v. Keeshin Motor Exp. Co., 61 N.E.2d 579, 326 Ill.App. 59.

Ind.—Northwestern Transit v. Wagner, 61 N.E.2d 591, 223 Ind. 447

Iowa—Prewitt v. Rutherford, 30 N.W.2d 141, 238 Iowa 1321

Mass.—Jacobs v. Moniz, 192 N.E. 515, 288 Mass. 102

Minn.—Jacobs v. Belland, 214 N.W. 55, 171 Minn. 338

Mo.—Knudson v. Kansas City Public Service Co., App., 141 S.W.2d 252.

Wash.—Kegler v. Hogland Transfer Co., 85 P.2d 1051, 197 Wash. 566.

(2) In action for death of motorist whose automobile collided with the rear of a parked truck at night, wherein there was evidence to sustain a finding that the rear of the truck was unlighted, evidence that truck driver waved lighted flashlight was insufficient to show that the motorist was guilty of contributory negligence as a matter of law—Cushman Motor Delivery Co. v. McCabe, 36 N.E.2d 769, 219 Ind. 156.

56. Cal.—Gonzalez v. Nichols, 294 P. 758, 110 Cal.App. 738.

Held not negligence as matter of law
Cal.—Gonzalez v. Nichols, supra.

57. Cal.—Smarda v. Fruit Growers' Supply Co., 36 P.2d 701, 1 Cal.App. 2d 265.

Idaho.—Baldwin v. Mittry, 102 P.2d 643, 61 Idaho 427.

Iowa—Kadlec v. Al Johnson Const. Co., 252 N.W. 103, 217 Iowa 299.

Minn.—Szyperski v. Swift & Co., 269 N.W. 401, 198 Minn. 154—Vogel v. Nash-Finch Co., 265 N.W. 350, 196 Minn. 509—Tully v. Flour City Coal & Oil Co., 253 N.W. 22, 191 Minn. 84.

Mo.—McLarny v. Cary, App., 98 S.W.2d 141.

Wyo.—Merback v. Blanchard, 109 P.2d 49, 56 Wyo. 286.

Held not negligence as matter of law
Cal.—Smyth v. Harris & Devine, 38 P.2d 862, 3 Cal.App.2d 194.

Evidence held sufficient to go to jury
U.S.—Miller v. Advance Transp. Co., C.C.A. Ill., 126 F.2d 442, certiorari denied Advance Transp. Co. v. Miller, 63 S.Ct. 32, 317 U.S. 641, 87 L. Ed. 516.

Defective windshield wiper
N.J.—Apgar v. Hoffman Const. Co., 11 A.2d 25, 124 N.J. Law 86.

Car parked on curve
Cal.—Callison v. Dondero, 124 P.2d 852, 51 Cal App 2d 403

58. Cal.—Porter v. Signal Trucking Service, 138 P.2d 753, 59 Cal App 2d 289.

Mo.—Drakesmith v. Rvan, App., 57 S.W.2d 727—Mayne v. May Stern Furniture Co., App., 21 S.W.2d 211.

N.J.—Shappell v. Apex Express, 37 A.2d 849, 131 N.J. Law 583—Morrison v. Van Seiver, 180 A. 836, 115 N.J. Law 473—Shinn v. Chiacchio, 148 A. 208, 8 N.J. Misc. 43.

N.C.—Clarke v. Martin, 2 S.E.2d 10, 215 N.C. 405—Cole v. Koonce, 198 S.E. 637, 214 N.C. 188.

Wash.—Helf v. Hansen & Keller Truck Co., 9 P.2d 110, 167 Wash. 206.

Held not negligence as matter of law
Cal.—Lombard v. Swall, 37 P.2d 696, 2 Cal.App.2d 59.

Ill.—Barnstable v. Calandro, 270 Ill. App. 57.

Wash.—Rowe v. Safeway Stores, 128 P.2d 293, 14 Wash.2d 363.

59. U.S.—Central Surety & Insurance Corporation v. Murphy, C.C.A. Kan., 103 F.2d 117.

Cal.—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765.

Ga.—Burnsed v. Spivey, 184 S.E. 410, 52 Ga.App. 646.

Ill.—Reidel v. Camp, 37 N.E.2d 579, 311 Ill.App. 656.

Kan.—Denison v. Manwarren, 95 P.2d 256, 150 Kan. 591.

Md.—Marshall v. Sellers, 53 A.2d 5.
Mo.—Bedsaul v. Feeback, 106 S.W.2d

431, 341 Mo. 50—Powell v. Schofield, 15 S.W.2d 876, 223 Mo.App. 1041.

N.H.—Berounsky v. Ogden, 21 A.2d 838, 91 N.H. 424.

Pa.—Buohl v. Lockport Brewing Co., 37 A.2d 524, 349 Pa. 377.

Tenn.—Virginia Ave Coal Co. v. Bailey, 205 S.W.2d 11, 185 Tenn. 242

—Dixie-Ohio Express Co v Moore, 118 S.W.2d 1021, 22 Tenn App. 131.

Wash.—Griffith v. Thompson, 268 P. 607, 148 Wash. 243.

Conduct held not negligence as matter of law

Wash.—O'Neil v. Gruhn, 85 P.2d 1064, 197 Wash. 557

60. Cal.—Casey v. Gritsch, 36 P.2d 696, 1 Cal.App.2d 206.

Ill.—Spiers v. Anderson Motor Service Co., 271 Ill App 178—Herberger v. Anderson Motor Service Co., 268 Ill App. 403

Tex.—Lone Star Gas Co. v. Fouché, Civ App., 190 S.W.2d 501, refused for want of merit.

Held not negligence as matter of law
Wis.—Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215.

61. Cal.—Stoltz v. Converse, 172 P.2d 78, 75 Cal.App.2d 909—Casey v. Gritsch, 36 P.2d 696, 1 Cal.App.2d 206

Ga.—S. C. Jones Co. v. Yawn, 188 S.E. 603, 51 Ga App. 826

Md.—Marshall v. Sellers, 53 A.2d 5.

Mass.—Brennan v. Promen 47 N.E.2d 336, 312 Mass. 97—Rotefsky v. Bova, 174 N.E. 192, 271 Mass. 23.

Minn.—Twa v. Northland Greyhound Lines, 275 N.W. 846, 201 Minn. 234.

N.J.—Girdwood v. Balder, 140 A. 894, 6 N.J. Misc. 302

S.C.—Flowers v. South Carolina State Highway Dept., 34 S.E.2d 769, 206 S.C. 454.

Plaintiff held not negligent as matter of law

(1) In general.

Colo.—Grunsfeld v. Yenter, 69 P.2d 309, 100 Colo. 570.

Ill.—Russell v. Consolidated Forwarding Corp., 62 N.E.2d 44, 327 Ill App. 204.

Iowa—Prewitt v. Rutherford, 30 N.W.2d 141, 238 Iowa 1321—Knaus Truck Lines v. Commercial Freight Lines, 29 N.W.2d 204, 238 Iowa 1356.

La.—Dodge v. Bituminous Cas. Corp., App., 33 So 2d 95.

Mass.—Jacobs v. Moniz, 192 N.E. 515, 288 Mass. 102.

(2) Fact that one driving behind plaintiff saw parked truck before collision did not establish contribu-

the parked car;⁶² or did not realize that the vehicle in front of him was standing still;⁶³ or failed to have or use proper lights;⁶⁴ or in that he violated a speed regulation;⁶⁵ or otherwise drove at an improper speed.⁶⁶

Various incidental questions involved in determining plaintiff's contributory negligence in an accident in connection with a parked vehicle have been held, on conflicting evidence, to be for the triers of the facts to determine.⁶⁷

Uncontradicted or insufficient evidence. Where the evidence is uncontradicted, and not reasonably subject to differing inferences of fact,⁶⁸ or where the evidence is insufficient to carry the issue to the jury,⁶⁹ it is for the court to rule, as a matter of law, on the alleged contributory negligence of plaintiff.

(e) Acts in Emergencies

It is for the trier of the facts to determine, on conflicting evidence, whether plaintiff, operating a motor vehicle, was confronted with an emergency, and whether he was guilty of contributory negligence in his course of action therein.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of facts whether plaintiff was confronted with an emergency,⁷⁰ whether such emergency resulted from the fault of the other driver,⁷¹ and whether, confronted by an emergency, plaintiff was guilty of contributory negligence, in that he did not do what a man of average prudence would have done under the circumstances.⁷²

Thus, it is for the trier of the facts to determine

tory negligence as matter of law.—*McMoran v. Associated Oil Co.*, 257 P. 846, 144 Wash. 276.

Evidence held sufficient to go to jury
N.H.—*Putnam v. Bowman*, 195 A 865, 89 N.H. 200

62. Cal.—*Christiansen v. Hollings*, 112 P.2d 723, 44 Cal App 2d 332.

63. Cal.—*Doane v. Smith*, 147 P.2d 650, 63 Cal.App.2d 691.

Conduct held not negligence as matter of law

Cal.—*Doane v. Smith*, supra.

64. Iowa.—*Mueller v. State Automobile Ins. Ass'n*, 274 N.W. 106, 223 Iowa 888, 113 A.L.R. 1256.

N.Y.—*Krtill v. City of New York*, 20 N.Y.S.2d 981, 259 App.Div. 1049—*Lewis v. Rowland*, 232 N.Y.S. 71, 225 App.Div. 25.

Wash.—*Gilbert v. Solberg*, 289 P. 1003, 157 Wash. 490.

Using dim lights only

Mich.—*Meyer v. Weimaster*, 270 N.W. 715, 278 Mich. 370.

65. Ga.—*Minnick v. Jackson*, 13 S.E.2d 891, 64 Ga.App. 554.

Held not negligence as matter of law
Ga.—*Minnick v. Jackson*, supra.

Violation of "assured clear distance ahead" rule

The driver of automobile, striking parked automobile in rear under circumstances showing violation of statutory "assured clear distance ahead" rule, will be held guilty of contributory negligence as matter of law, unless circumstances present legal excuse for violation of statute or diverting circumstances warrant jury in holding that statute was inapplicable.—*Schroeder v. Kindschuh*, 294 N.W. 784, 229 Iowa 590.

66. Iowa.—*Jeck v. McDougall Const. Co.*, 246 N.W. 595, 216 Iowa 516.

Kan.—*Sponable v. Thomas*, 33 P.2d 721, 139 Kan. 710.

Mass.—*Minnehan v. Hiland*, 180 N.E. 295, 278 Mass 518.

Held not negligence as matter of law
Ky.—*R. B. Tyler Co. v. Curd*, 42 S.W.2d 298, 240 Ky 253.

67. Ga.—*Hansberger Motor Transp. Co. v. Pate*, 181 S.E. 796, 51 Ga. App. 877.

Mass.—*Langill v. First Nat. Stores*, 11 N.E.2d 593, 298 Mass 559—*Jacobs v. Moniz*, 192 N.E. 515, 288 Mass. 102.

Wash.—*Kegler v. Hogland Transfer Co.*, 85 P.2d 1051, 197 Wash 566.

68. Minn.—*Mechler v. McMahon*, 230 N.W. 776, 180 Minn. 252.

Plaintiff held guilty of contributory negligence

(1) In general.

Iowa.—*Peckinpauhaugh v. Engelke*, 247 N.W. 822, 215 Iowa 1248.

Pa.—*Simrell v. Eschenbach*, 154 A. 369, 303 Pa. 156—*Cimohoski v. Rycheski*, Com Pl., 39 Lack.Jur. 105.

Wash.—*Graves v. Mickel*, 29 P.2d 405, 176 Wash. 329.

(2) Evidence that motorist on clear night where road was straight and visibility was good for over half a mile failed to discover parked lighted bus until motorist was within twelve feet thereof, and that an ordinary person in possession of his faculties would have seen the bus, established motorist's contributory negligence as matter of law.—*Sumner v. Thomas*, 33 S.E.2d 825, 72 Ga. App. 351.

69. Cal.—*Casey v. Gritsch*, 36 P.2d 696, 1 Cal.App.2d 206.

70. Kan.—*Deselms v. Combs*, 174 P.2d 107, 162 Kan. 15.

Mo.—*Clason v. Lenz*, 61 S.W.2d 727, 332 Mo. 1113.

N.J.—*Clayton v. Vallaster*, 194 A. 167, 118 N.J.Law 568.

Pa.—*Johannes v. Shumway*, 22 A.2d 650, 343 Pa. 326.

Acts in emergencies generally see supra § 257.

Vehicle parked on wrong side

Iowa.—*Anderson v. Kist*, 294 N.W. 726, 229 Iowa 462.

Automobile crossing highway at high speed

Or.—*Noble v. Sears*, 257 P. 809, 122 Or. 162.

71. Or.—*Noble v. Sears*, supra.

Which driver created emergency

Wis.—*Haskins v. Thenell*, 286 N.W. 555, 233 Wis. 97.

72. U.S.—*Dyess v. W. W. Clyde & Co.*, C.C.A.Utah, 132 F.2d 972—*Oklahoma Natural Gas Co. v. McKee*, C.C.A.Okl., 121 F.2d 583

Cal.—*Lopez v. Wisler*, 136 P.2d 816, 58 Cal.App.2d 455—*Power v. Crown Stage Co.*, 256 P. 457, 82 Cal App. 660.

Iowa.—*Olson v. Shafer*, 221 N.W. 949, 207 Iowa 1001.

Kan.—*Leinbach v. Pickwick Greyhound Lines*, 10 P.2d 33, 135 Kan 40.

Mass.—*Jennings v. Bragdon*, 194 N.E. 697, 289 Mass. 595.

Minn.—*Ranum v. Swenson*, 19 N.W. 2d 327, 220 Minn. 170.

Mo.—*Nowlin v. Kansas City Public Service Co.*, App., 58 S.W.2d 324.

N.H.—*Labreque v. Childs*, 55 A.2d 473.

N.J.—*Clayton v. Vallaster*, 194 A. 167, 118 N.J.Law 568.

Ohio.—*Interstate Motor Freight Corporation v. Girard*, 163 N.E. 206, 29 Ohio App. 101.

Vt.—*Sulham v. Bernasconi*, 170 A. 913, 106 Vt. 192.

Va.—*Marks v. Ore*, 45 S.E.2d 894, 187 Va. 146.

Wash.—*White v. Fenner*, 133 P.2d 270, 16 Wash.2d 226—*Miller v. Stevens*, 128 P.2d 494, 14 Wash.2d 489

—*Anderson v. Wheeler*, 46 P.2d 726, 182 Wash. 249.

whether plaintiff was guilty of contributory negligence in that he did not act with reasonable diligence after discovering the danger;⁷³ that he failed to bring his vehicle to a stop;⁷⁴ that he did,⁷⁵ or did not,⁷⁶ apply his brakes on a slippery highway; that he increased his speed to avoid the collision;⁷⁷ that he violated the speed laws;⁷⁸ that he swerved to the left side of the highway,⁷⁹ or failed to swerve to the left side of the highway;⁸⁰ that he swerved and lost control;⁸¹ or that he swerved and drove off the highway,⁸² or failed to drive off the highway.⁸³

Where the evidence is insufficient to carry the issue to the jury, it is for the court to rule as a matter of law whether plaintiff was confronted with an emergency or was contributorily negligent if so confronted.⁸⁴

Judgment in good faith

A motorist was not as a matter of law contributorily negligent, where reasonable minds would differ as to whether he took the course of action he did take in the exercise of his judgment in good faith.—*Deselms v. Combs*, 174 P.2d 107, 162 Kan. 15.

Emergency due to negligent parking

Ark.—*England v. White*, 155 S.W.2d 576, 202 Ark. 1155

Fla.—*Steele v. Independent Fish Co.*, 13 So.2d 14, 152 Fla. 739.

Submission under emergency rule held proper

Iowa.—*Babendure v. Baker*, 253 N.W. 834, 218 Iowa 31.

Minn.—*Travis v. Collett*, 17 N.W.2d 68, 218 Minn. 592.—*Christensen v. Hennepin Transp. Co.*, 10 N.W.2d 406, 215 Minn. 394, 147 A.L.R. 945.

N.H.—*Berounsky v. Ogden*, 9 A.2d 510, 90 N.H. 334.

Pa.—*West v. Morgan*, Com.Pl., 52 Dauph.Co. 361, affirmed 27 A.2d 46, 345 Pa. 61.

Error in judgment held not negligence as matter of law

(1) In general.

Me.—*Tomlinson v. Clement Bros.*, 154 A. 355, 130 Me. 189.

Mo.—*Mayne v. May Stern Furniture Co.*, App., 21 S.W.2d 211.

Pa.—*Rasener v. Atlantic Refining Co.*, 181 A. 456, 119 Pa.Super. 395.

(2) Fact that plaintiff released the wheel and clasped her child when the collision appeared unavoidable was held not to constitute negligence as a matter of law.—*Tibbetts v. Harbach*, 198 A. 610, 135 Me. 397.

73. Kan.—*Revell v. Bennett*, 176 P.2d 538, 162 Kan. 345.

N.H.—*Bellevance v. Boucher*, 199 A. 364, 89 N.H. 361.

74. Pa.—*Altomari v. Kruger*, 188 A. 828, 325 Pa. 235.

c. Guests or Occupants

(1) Of motor vehicle owned or operated by defendant

(2) Of motor vehicles other than defendant's

(1) Of Motor Vehicle Owned or Operated by Defendant

It is for the trier of facts, on conflicting evidence, to determine whether a guest or occupant of a vehicle owned or operated by the defendant was guilty of contributory negligence or had assumed the risk of the operator's negligence or misconduct.

Where the evidence is conflicting, or is reasonably subject to differing inferences of fact, it is a question of fact whether a guest or occupant of a motor vehicle owned or operated by defendant was guilty of contributory negligence⁸⁵ or had as-

Conduct held not contributory negligence as matter of law

Mo.—*Egan v. Palmer*, 293 S.W. 460, 221 Mo App 823.

Pa.—*Fitzpatrick v. Pralon Cleaners & Dyers*, 195 A. 644, 129 Pa.Super. 437.

Wis.—*Thorpe v. Clover Cream Dairy Co.*, 225 N.W. 207, 198 Wis 609.

75. U.S.—*Bos v. Richards*, C.C.A. Ill., 71 F.2d 262.

76. Vt.—*Luce v. Chandler*, 195 A. 246, 109 Vt. 275.

77. U.S.—*Chilpala v. A. A. Morrison & Co.*, D.C.Pa., 44 F.Supp 894, affirmed, C.C.A., 132 F.2d 320

Neb.—*Riekes v. Schantz*, 12 N.W.2d 766, 144 Neb. 150.

78. U.S.—*Williams v. Powers*, C.C.A. Ohio, 135 F.2d 153.

79. Ariz.—*Haner v. Willson-Coffin Trading Co.*, 67 P.2d 487, 49 Ariz. 402.

Cal.—*Mathers v. Riverside County*, 141 P.2d 419, 22 Cal.2d 781.—*Hetherington v. Crossley Transp. Co.*, 191 P.2d 463, 84 Cal.App.3d 722.

Iowa.—*Lein v. John Morrell & Co.*, 224 N.W. 576, 207 Iowa 1271

Mich.—*Triestram v. Way*, 281 N.W. 420, 286 Mich. 13.

N.H.—*Beaudin v. Continental Baking Co.*, 50 A.2d 77, 94 N.H. 202.

Wash.—*Kellerher v. Porter*, 189 P.2d 223, 29 Wash.2d 650.—*Luther v. Pacific Fruit & Produce Co.*, 255 P. 365, 143 Wash. 308.

Held not negligence as matter of law

Pa.—*Jamison v. Kamerer*, 169 A. 231, 313 Pa. 1.

S.D.—*Zeller v. Pokovsky*, 278 N.W. 174, 66 S.D. 71.

80. Wash.—*O'Neil v. Gruhn*, 85 P.2d 1064, 197 Wash. 557.

Held not negligence as matter of law

Wash.—*O'Neil v. Gruhn*, supra.

81. Ky.—*Hogge v. Anchor Motor Freight* of Delaware, 126 S.W.2d 877, 277 Ky. 460.

Pa.—*Logan v. Hughes*, Com.Pl., 45 Lack Jur. 94.

Wash.—*Lawe v. City of Seattle*, 1 P.2d 237, 163 Wash. 362.

82. Ky.—*Marsee v. Bates*, 29 S.W.2d 632, 235 Ky. 60.

Mass.—*Harrington v. Cudahy Packing Co.*, 172 N.E. 893, 273 Mass. 15.

Minn.—*Blom v. Wilson*, 296 N.W. 502, 209 Minn. 419.

Conduct held not negligence as matter of law

Minn.—*Smith v. Carlson*, 296 N.W. 132, 209 Minn 268

Pa.—*Reese v. Yonosko*, Com.Pl., 19 Erie Co. 508.

83. Md.—*Acme Poultry Corp. v. Melville*, 53 A.2d 1.

84. Mich.—*Angstman v. Wilson*, 241 N.W. 909, 258 Mich. 195

Tex.—*Texas Pacific Coal & Oil Co. v. Wells*, Civ.App., 151 S.W.2d 927, affirmed *Wells v. Texas Pac. Coal & Oil Co.*, 164 S.W.2d 660, 140 Tex. 2.

Submission under emergency rule held error

In action for injuries to one attempting to stop truck backing down incline after motor was not able to pull load to top of grade, submission of issue of contributory negligence based on theory that human beings were in imminent peril or in danger of injury was held error under evidence.—*Henshaw v. Belyea*, 31 P.2d 348, 220 Cal. 458.

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85. U.S.—*Crowell v. M. R. & R. Trucking Co.*, C.C.A.Fla., 157 F.2d 963.—*Copp v. Van Hise*, C.C.A. Mont., 119 F.2d 691.

Ala.—*Baker v. Rainer*, 124 So. 737, 220 Ala. 207.—*McDermott v. Silbert*, 119 So. 681, 218 Ala. 670.

- Ark.**—Arkansas Valley Co-op. Rural Electric Co. v. Elkins, 141 S.W.2d 538, 200 Ark. 833.
- Cal.**—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540—Shields v. King, 277 P. 1043, 207 Cal. 275—McMahon v. Schindler, 102 P.2d 378, 88 Cal.App.2d 642—Yates v. J. H. Krumlinde & Co., 71 P.2d 298, 22 Cal.App.2d 387—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298—Williamsen v. Fitzgerald, 2 P.2d 201, 116 Cal.App. 19—Queirolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal.App. 610.
- Conn.**—Kilday v. Voltz, 166 A. 754, 117 Conn. 170.
- Ga.**—Dawson Motor Co. v. Petty, 186 S.E. 877, 53 Ga.App. 746—Evans v. Caldwell, 163 S.E. 920, 45 Ga.App. 193.
- Idaho.**—Dillon v. Brooks, 6 P.2d 851, 51 Idaho 510.
- Ill.**—Belcher v. Citizens Coach Co., 57 N.E.2d 659, 324 Ill.App. 226—McMahon v. Duncan, 41 N.E.2d 301, 314 Ill.App. 235—Leonard v. Stone, 39 N.E.2d 388, 313 Ill.App. 149, reversed on other grounds 45 N.E.2d 620, 380 Ill. 343—Palmer v. Miller, 35 N.E.2d 104, 310 Ill.App. 582, reversed on other grounds 43 N.E.2d 973, 380 Ill. 256—Bandet v. Burns, 266 Ill.App. 382—Fisher v. Johnson, 238 Ill.App. 25.
- Ind.**—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65.
- Iowa.**—Wells v. Wildin, 277 N.W. 308, 224 Iowa 913, 115 A.L.R. 169—Schuster v. Gillespie, 251 N.W. 735, 217 Iowa 386—In re Hill's Estate, 208 N.W. 334, 202 Iowa 1038, modified on other grounds 210 N.W. 241, 202 Iowa 1038.
- Kan.**—Pool v. Day, 58 P.2d 912, 143 Kan. 226—Houser v. Nelson, 298 P. 777, 133 Kan. 142.
- Ky.**—Jesse v. Dunn, 51 S.W.2d 918, 244 Ky. 613—Stephenson's Adm'x v. Sharp's Ex'rs, 1 S.W.2d 957, 222 Ky. 496.
- La.**—Delaune v. Breaux, 135 So. 253, 18 La.App. 609, affirmed 139 So. 753, 174 La. 43.
- Me.**—Howe v. Houde, 15 A.2d 740, 137 Me. 119.
- Mass.**—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64—Curley v. Mahan, 193 N.E. 34, 288 Mass. 369—Kirby v. Keating, 171 N.E. 671, 271 Mass. 390—Learned v. Hawthorne, 169 N.E. 557, 269 Mass. 554—Labatte v. Lavalley, 155 N.E. 433, 258 Mass. 527.
- Mich.**—Emery v. Ford, 207 N.W. 856, 234 Mich. 11.
- Minn.**—Klingman, v. Loew's Inc., 296 N.W. 528, 209 Minn. 449—Holmes v. Lilygren Motor Co., 275 N.W. 416, 201 Minn. 44—Jude v. Jude, 271 N.W. 475, 199 Minn. 217—Miller v. J. A. Tyrholm & Co., 265 N.W. 324, 196 Minn. 438—Christensen v. Pestorous, 250 N.W. 363, 189 Minn. 548—Coleman v. Clement's Chevrolet Co., 219 N.W. 92, 174 Minn. 277.
- Mo.**—Chappee v. Gus V. Brecht Butchers' Supply Co., 30 S.W.2d 35—Roshel v. Litchfield & M. Ry. Co., App. 112 S.W.2d 876—Miller v. Rollins, App., 102 S.W.2d 686—Myers v. Hauser, App., 61 S.W.2d 214—Allison v. Dittbrenner, App., 50 S.W.2d 199—Rosenstein v. Lewis Automobile Co., App., 34 S.W.2d 1023.
- Neb.**—Hendren v. Hill, 267 N.W. 340, 131 Neb. 163—Glick v. Poska, 339 N.W. 626, 122 Neb. 102.
- N.H.**—Balcus v. Sterling Exp. Co., 51 A.2d 479, 94 N.H. 270.
- N.J.**—Loeb v. Gurtman, 35 A.2d 894, 131 N.J. Law 227—Yanco v. Thon, 157 A. 101, 108 N.J. Law 235—Willett v. Heyer, 140 A. 411, 104 N.J. Law 391—Preiss v. Public Service Co-ordinated Transport, 166 A. 628, 11 N.J. Misc. 426.
- N.Y.**—Jones v. Gray, 45 N.Y.S.2d 519, 267 App.Div. 242, stay granted 47 N.Y.S.2d 281, 267 App.Div. 853, appeal denied 47 N.Y.S.2d 606, 267 App.Div. 926—Lahr v. Tirrill, 291 N.Y.S. 269, 249 App.Div. 667, reversed on other grounds 8 N.E.2d 298, 274 N.Y. 112, reargument denied 10 N.E.2d 575, 274 N.Y. 611—Sherman v. Leicht, 264 N.Y.S. 492, 238 App.Div. 271.
- N.C.**—King v. Pope, 163 S.E. 447, 202 N.C. 554.
- N.D.**—Kist v. Kist, 243 N.W. 820, 62 N.D. 408.
- Ohio.**—Pasku v. Friedman Transfer & Const. Co., App., 78 N.E.2d 182—Collins v. McClure, App., 49 N.E.2d 181, affirmed 56 N.E.2d 171, 143 Ohio St. 569.
- Or.**—Koski v. Anderson, 71 P.2d 1009, 157 Or. 349—Rice v. City of Portland, 17 P.2d 562, 141 Or. 205.
- Pa.**—Cormican v. Menke, 159 A. 36, 306 Pa. 156—Perry v. Ryback, 153 A. 770, 302 Pa. 559—Inquinto v. Notarfrancesco, 195 A. 169, 129 Pa. Super. 121—Adams v. Gefsky, 161 A. 598, 106 Pa. Super. 401.
- S.C.**—Crappe v. Southern Ry. Co., 21 S.E.2d 737, 201 S.C. 176.
- S.D.**—Russell v. Crow, 245 N.W. 249, 60 S.D. 230—Simmons v. Leighton, 244 N.W. 883, 60 S.D. 524.
- Tenn.**—Caldwell v. Hodges, 77 S.W.2d 817, 18 Tenn.App. 355—Claxton v. Claxton, 64 S.W.2d 854, 16 Tenn. App. 399.
- Tex.**—Napier v. Mooneyham, Civ. App., 94 S.W.2d 564, error dismissed.
- Vt.**—Russell v. Pilger, 37 A.2d 403, 113 Vt. 537.
- Wash.**—Cody v. Bennett, 31 P.2d 83, 177 Wash. 199.
- W.Va.**—Stone v. Rudolph, 32 S.E.2d 742, 127 W.Va. 335.
- Wis.**—Hutzler v. McDonnell, 2 N.W.2d 207, 239 Wis. 568—Haight v. Luedtke, 1 N.W.2d 882, 239 Wis. 389—Helgestad v. North, 289 N.W. 822, 233 Wis. 349—Brothers v. Berg, 254 N.W. 384, 214 Wis. 661, 42 C.J. p. 1264 note 78.
- Question for court sitting without jury**
Pa.—Oestreich v. Zibman, 169 A. 14, 110 Pa. Super. 457.
- Evidence held sufficient to go to jury**
Tex.—Ford Motor Co. v. Maddin, 76 S.W.2d 474, 124 Tex. 131.
- Vt.**—Huestis v. Lapham's Estate, 32 A.2d 115, 113 Vt. 191—Higgins v. Metzger, 143 A. 394, 101 Vt. 285.
- Va.**—Yorke v. Cottle, 4 S.E.2d 372, 173 Va. 372.
- Wis.**—Duss v. Friess, 273 N.W. 547, 225 Wis. 406.
- Conduct held not negligent as matter of law**
Ill.—Thompson v. Riemer, 283 Ill. App. 371.
- Ky.**—Wathen v. Mackey, 187 S.W.2d 1000, 300 Ky. 115.
- Md.**—Newman v. Stocker, 157 A. 761, 161 Md. 552.
- Mass.**—Holland v. Pitocchelli, 13 N.E.2d 390, 299 Mass. 554—Stowe v. Mason, 194 N.E. 671, 289 Mass. 577.
- Minn.**—Goldberg v. Cook, 289 N.W. 512, 206 Minn. 450.
- Mo.**—Heyde v. Patten, App., 39 S.W.2d 813.
- Mont.**—Baatz v. Noble, 69 P.2d 579, 105 Mont. 59—Marinkovich v. Tierney, 17 P.2d 93, 93 Mont. 72.
- N.H.**—Noel v. Lapointe, 164 A. 769, 86 N.H. 162.
- N.Y.**—Wormuth v. Wormuth, 299 N.Y.S. 380, 252 App.Div. 828, appeal dismissed.
- Wis.**—Potter v. Potter, 272 N.W. 34, 224 Wis. 251.
- Husband driving wife**
N.Y.—Bodin v. Bishop, McCormick & Bishop, 296 N.Y.S. 304, 251 App. Div. 303.
- N.D.**—Fitzmaurice v. Fitzmaurice, 242 N.W. 526, 62 N.D. 191.
- Wis.**—Archer v. Chicago, M. & St. P. & P. Ry. Co., 255 N.W. 67, 215 Wis. 509, 95 A.L.R. 851.
- Father driving son**
Wis.—Groh v. W. O. Krahn, Inc., 271 N.W. 374, 223 Wis. 662.
- Hand caught in door**
N.J.—Alban v. Sommer, Sup., 146 A. 428.
- Jumping from vehicle**
U.S.—Palmer v. Meren, D.C.Pa., 44 F. Supp. 704.
- Occupant seizing steering wheel**
Minn.—Grengs v. Erickson, 29 N.W.2d 881, 225 Minn. 153.
- Overcrowding of driver's seat**
Wash.—Carlson v. P. F. Collier & Son Corporation, 67 P.2d 842, 190 Wash. 301.
- Teaching defendant to drive**
Mass.—Holland v. Pitocchelli, 13 N.E.2d 390, 299 Mass. 554.

sumed the risk of the operator's negligence or misconduct.⁸⁶

The rule has been applied in determining whether plaintiff was guilty of contributory negligence in that, while a guest or occupant of defendant's motor vehicle, he failed to be on the lookout for, or to observe, an approaching vehicle or other hazard,⁸⁷ as where plaintiff was intoxicated⁸⁸ or asleep;⁸⁹ or in that he distracted his host's at-

tention from the road, as by conversing with him;⁹⁰ or in that he failed to warn the driver of some traffic hazard or obstruction,⁹¹ such as the existence of a stop sign or signal⁹² or an approaching vehicle;⁹³ or in that he assented to, or acquiesced in, his host's negligence,⁹⁴ as where he failed to warn, or remonstrate with, the operator or protest against his negligence or misconduct in the operation of the vehicle,⁹⁵ such as his negligent or excessive

86. Cal.—Allen v. Robinson, App., 193 P.2d 498.

Fla.—Wharton v. Day, 10 So.2d 417, 151 Fla. 772—Cormier v. Williams, 4 So.2d 525, 148 Fla. 201.

Ind.—Hidgway v. Yenny, 57 N.E.2d 581, 223 Ind. 16.

Minn.—Grabow v. Hanson, 32 N.W.2d 593, 226 Minn. 265.

Okl.—Townsend v. Cotten, 68 P.2d 790, 180 Okl. 128.

Wis.—Jansen v. Herkert, 23 N.W.2d 503, 249 Wis. 124—Haugen v. Wittkopf, 7 N.W.2d 886, 242 Wis. 276—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501—Helgestad v. North, 289 N.W. 822, 233 Wis. 349.

87. Md.—Dashiell v. Moore, 11 A.2d 640, 177 Md. 657.

N.H.—Macgowan v. Mills, 35 A.2d 797, 93 N.H. 84.

N.Y.—Reilly v. Rawleigh, 281 N.Y.S. 366, 245 App. Div. 190.

Ohio—Alloy Cast Steel Co. v. Arthur, 179 N.E. 743, 40 Ohio App. 503.

Pa.—Bynon v. Porter, 9 A.2d 357, 336 Pa. 441—Hilton v. Blose, 147 A. 100, 297 Pa. 458—Wherry v. Cox, Com. Pl., 28 Del. Co. 299.

W. Va.—Darling v. Browning, 200 S.E. 737, 120 W. Va. 666.

Wis.—Cherney v. Simonis, 265 N.W. 203, 220 Wis. 339, followed in 265 N.W. 206, 220 Wis. 346—Schmidt v. Leuthener, 227 N.W. 17, 199 Wis. 567—Krause v. Hall, 217 N.W. 290, 195 Wis. 565.

42 C.J. p. 1264 note 78 [f].

Held not negligence as matter of law
Cal.—Marchetti v. Southern Pac. Co., 269 P. 529, 204 Cal. 679.

Wis.—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501—Groh v. W. O. Krahn, Inc., 271 N.W. 374, 223 Wis. 662.

88. U.S.—Kopycinski v. Farrar, D. C.N.D., 63 F.Supp. 857, appeal dismissed, C.C.A., 155 F.2d 725.

89. Ga.—Longino v. Moore, 187 S.E. 203, 53 Ga.App. 674.

Idaho.—Curtis v. Curtis, 70 P.2d 369, 58 Idaho 76.

La.—Clinton v. City of West Monroe, App., 187 So. 561, followed in Willis v. City of West Monroe, 187 So. 829, Madden v. City of West Monroe, 187 So. 829 and Ferritt v. City of West Monroe, 187 So. 830.

Minn.—Hardgrove v. Bade, 252 N.W. 334, 190 Minn. 523.

Mo.—Scism v. Alexander, 93 S.W.2d 36, 230 Mo.App. 1175.

N.H.—Gilbert v. Joyal, 190 A. 809, 89 N.H. 557.

N.Y.—Nelson v. Nygren, 181 N.E. 52, 259 N.Y. 71—Reilly v. Rawleigh, 281 N.Y.S. 366, 245 App. Div. 190.

N.C.—Baird v. Baird, 28 S.E.2d 225, 223 N.C. 730.

Okl.—Anderson v. Eaton, 68 P.2d 858, 180 Okl. 243.

Pa.—Burns v. Wasilindra, Com. Pl., 60 Montg. Co. 28.

Tenn.—Lea v. Gentry, 73 S.W.2d 170, 167 Tenn. 661—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn. App. 596.

Wash.—White v. Stanley, 13 P.2d 457, 169 Wash. 342.

Wis.—Suschnick v. Underwriters Casualty Co., 248 N.W. 477, 211 Wis. 474, followed in Cater v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 484, and Hoensch v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 483.

42 C.J. p. 1264 note 78 [g].

Held not negligence as matter of law
Cal.—Malone v. Clemow, 295 P. 70, 111 Cal. App. 13.

Ga.—Longino v. Moore, 187 S.E. 203, 53 Ga.App. 674—West v. Rosenberg, 160 S.E. 808, 44 Ga.App. 211.

Me.—Wells v. Sears, 4 A.2d 680, 136 Me. 160.

Mass.—O'Brien v. Janelle, 78 N.E.2d 460, 321 Mass. 316.

N.H.—Salvas v. Cantin, 160 A. 727, 85 N.H. 489.

N.Y.—Clark v. Harrischfeger Sales Corporation, 264 N.Y.S. 873, 238 App. Div. 493—Nelson v. Nygren, 253 N.Y.S. 539, 233 App. Div. 573, affirmed 181 N.E. 52, 259 N.Y. 71.

Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.

Wash.—Cody v. Bennett, 31 P.2d 83, 177 Wash. 199.

Wis.—Forbes v. Forbes, 277 N.W. 112, 226 Wis. 477.

90. Ga.—Crandall v. Sammons, 7 S.E.2d 575, 62 Ga.App. 1.

Minn.—Winans v. Sinaovski, 2 N.W.2d 127, 211 Minn. 606.

91. Cal.—Ledgerwood v. Ledgerwood, 300 P. 144, 114 Cal. App. 538.

Me.—Shea v. Hern, 171 A. 248, 132 Me. 361.

Mo.—Dennis v. Wood, 211 S.W.2d 470, 357 Mo. 886.

Pa.—Morrison v. Gordon, Com. Pl., 20 Erie Co. 350.

S.D.—Zeigler v. Ryan, 271 N.W. 767, 65 S.D. 110.

Va.—Mize v. Gardner Motor Co., 186 S.E. 108, 166 Va. 415.

Wash.—Meath v. Northern Pac. Ry. Co., 38 P.2d 533, 179 Wash. 177.

42 C.J. p. 1264 note 78 [e].

Held not negligence as matter of law

Ill.—Moore v. Jansen & Schaefer, 265 Ill. App. 459.

Mass.—Horneman v. Brown, 190 N.E. 735, 286 Mass. 65.

Pa.—Jones v. Rogers, 165 A. 509, 108 Pa. Super. 517.

Evidence held sufficient to go to jury

Cal.—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 510.

92. Cal.—Allen v. Robinson, App., 193 P.2d 498.

N.J.—Audino v. Hantman, 166 A. 698, 11 N.J. Misc. 478.

93. Ill.—Elmer v. Miller, 255 Ill. App. 465.

Md.—Warner v. Markoe, 189 A. 260, 171 Md. 351.

Mich.—Fabiano v. Carey, 271 N.W. 754, 279 Mich. 269.

Minn.—Farnham v. Pepper, 258 N.W. 293, 193 Minn. 222.

Pa.—Ashworth v. Hannum, 32 A.2d 407, 347 Pa. 393—Little v. Straw, 192 A. 894, 326 Pa. 577.

Vt.—Senecal v. Bleau, 189 A. 139, 108 Vt. 486.

Held not negligence as matter of law

Me.—Skillin v. Skillin, 154 A. 570, 130 Me. 223.

Neb.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636.

94. La.—Lorance v. Smith, 138 So. 871, 173 La. 883.

S.D.—Holdhusen v. Schaible, 244 N.W. 392, 60 S.D. 275.

Negligence as matter of law held not established

Iowa.—White v. Center, 254 N.W. 90, 218 Iowa 1027.

95. Ga.—Dixon v. Merry Bros. Brick & Tile Co., 193 S.E. 599, 56 Ga.App. 626.

Hawaii.—Casil v. Murata, 31 Hawaii 123.

Idaho.—McCoy v. Kregel, 17 P.2d 547, 52 Idaho 626.

speed;⁹⁶ or in that he stood or rode in a dangerous position in the vehicle,⁹⁷ or attempted to board or alight from the vehicle in a dangerous fashion.⁹⁸

The rule has also been applied in determining plaintiff's contributory negligence in that he relied on the operator of the vehicle,⁹⁹ at least in the ab-

Ill.—Hohimer v. Fricke, 46 N.E.2d 169, 317 Ill.App. 372.

Mass.—Blackman v. Coffin, 15 N.E.2d 469, 300 Mass. 432.

Mich.—Thomas v. Currier Lumber Co., 277 N.W. 857, 283 Mich. 134

Mo.—Sanford v. Gideon-Anderson Co., App., 31 S.W.2d 580.

Mont.—Baatz v. Noble, 69 P.2d 579, 105 Mont. 59.

Neb.—Rogers v. Brown, 260 N.W. 794, 129 Neb. 9.

Okl.—Hartman v. Dunn, 95 P.2d 897, 186 Okl. 9.

Pa.—Little v. Straw, 192 A. 894, 326 Pa. 577—Ellsworth v. Lauth, 166 A. 855, 311 Pa. 286.

Tenn.—Crosen v. Marsh, 12 Tenn. App. 33.

Tex.—Ford Motor Co. v. Madden, Civ. App., 42 S.W.2d 165, affirmed Ford Motor Co. v. Maddin, 76 S.W.2d 474, 124 Tex. 131.

W.Va.—Boyce v. Black, 15 S.E.2d 588, 123 W.Va. 234.

42 C.J. p 1264 note 78 [d] (2).

Held not negligence as matter of law
Minn.—Amon v. Nehr, 223 N.W. 456, 176 Minn. 410.

Pa.—Bynon v. Porter, 9 A.2d 357, 336 Pa. 441.

Va.—Waller v. Waller, 46 S.E.2d 42, 187 Va. 25.

Wis.—Suschnick v. Underwriters Casualty Co., 248 N.W. 477, 211 Wis. 474, followed in Cater v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 484, and Hoenisch v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 483.

96. U.S.—Ingerick v. Mess, C.C.A.N. Y., 63 F.2d 233.

Ark.—Keller v. White, 293 S.W. 1017, 173 Ark. 885.

Cal.—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal.2d 480—Ledgerwood v. Ledgerwood, 300 P. 144, 114 Cal.App. 538.

Colo.—Carlson v. Millisack, 261 P. 657, 82 Colo. 491.

Ky.—Sanderson v. Finley, 122 S.W. 2d 999, 276 Ky. 1.

Md.—Warner v. Neubert, 187 A. 829, 171 Md. 693.

Mass.—Schusterman v. Rosen, 183 N. E. 414, 280 Mass. 582—Gallup v. Lazott, 171 N.E. 658, 271 Mass. 406.

Mich.—Ford v. Maney's Estate, 282 N.W. 393, 251 Mich. 461, 70 A.L.R. 1315.

Minn.—Truso v. Ehnert, 225 N.W. 98, 177 Minn. 249.

Miss.—Weyen v. Weyen, 139 So. 608, modified on other grounds and suggestion of error overruled 139 So. 856, 165 Miss. 257.

Mont.—Marinkovich v. Tierney, 17 P. 2d 93, 93 Mont. 72.

N.H.—Bennett v. Bennett, 31 A.2d 374, 92 N.H. 379—Noel v. Lapointe, 164 A. 769, 86 N.H. 162

N.C.—Groome v. Davis, 2 S.E.2d 771, 215 N.C. 510.

Ohio.—Bailey v. Parker, 170 N.E. 607, 34 Ohio App. 207—Rogers v. Ziegler, 152 N.E. 781, 21 Ohio App. 186.

Or.—Mitchell v. Bruening, 9 P.2d 811, 139 Or. 244.

S.C.—Cummings v. Tweed, 10 S.E.2d 322, 195 S.C. 173.

Tenn.—Dedman v. Dedman, 291 S. W. 449, 155 Tenn. 241—Shook v. Simmons, 137 S.W.2d 332, 23 Tenn. App. 685—Renfro v. Keen, 89 S.W. 2d 170, 19 Tenn. App. 345.

Vt.—Round v. Pike, 148 A. 283, 102 Vt. 324.

Wash.—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 369—Zelinsky v. Howe, 1 P.2d 294, 163 Wash. 277.

W.Va.—Reall v. Deiriggi, 34 S.E.2d 253, 127 W.Va. 662—Malcolm v. American Service Co., 191 S.E. 527, 118 W.Va. 637.

42 C.J. p 1264 note 78 [d] (1).

Question held for court sitting without jury

Cal.—Norton v. Puter, 32 P.2d 172, 138 Cal.App. 253.

Held not negligence as matter of law

Cal.—Benjamin v. Noonan, 277 P. 1045, 207 Cal. 279—Lowery v. Hallett, 287 P. 110, 105 Cal.App. 84.

Ill.—Rohrer v. Denton, 28 N.E.2d 572, 306 Ill.App. 317.

Ky.—Hensley v. Golden, 196 S.W.2d 739, 302 Ky. 856.

Minn.—Waggoner v. Gummerum, 231 N.W. 10, 180 Minn. 391.

N.Y.—Wormuth v. Wormuth, 299 N. Y.S. 380, 252 App. Div. 828, appeal denied.

Vt.—Higgins v. Metzger, 143 A. 394, 101 Vt. 285.

Wash.—Dye v. City of Seattle, 24 P.2d 67, 173 Wash. 515.

Wis.—Bryden v. Priem, 209 N.W. 703, 190 Wis. 483.

97. Cal.—Boysen v. Porter, 52 P.2d 582, 10 Cal.App.2d 431.

Conn.—Vultz v. Orange Volunteer Fire Ass'n, 172 A. 220, 118 Conn. 307.

Mo.—Weatherly v. Rabe, 66 S.W.2d 545, 334 Mo. 591—Nolan v. Joplin Transfer & Storage Co., 203 S.W. 2d 740, 239 Mo.App. 915.

Ohio.—Delk v. Young, App., 35 N.E. 2d 969.

Pa.—Clayton v. McAlpin, 32 Pa. Dist. & Co. 464.

Wis.—Corwin v. Salter, 216 N.W. 653, 194 Wis. 333.

42 C.J. p 1264 note 78 [a].

Danger of particular positions held for jury

(1) Riding on running board.
Ga.—Taylor v. Morgan, 188 S.E. 44, 54 Ga.App. 426.

Ky.—R. B. Tyler Co. v. Kirby's Adm'r, 293 S.W. 155, 219 Ky. 389.

Md.—Bauer v. Calic, 171 A. 713, 166 Md. 387.

Mass.—Swistik v. Paradis, 192 N.E. 920, 288 Mass. 377.

Or.—Rice v. City of Portland, 17 P. 2d 562, 141 Or. 205.

(2) Riding on top of load—Dach v. General Casualty Co., 4 N.W.2d 170, 241 Wis. 34.

(3) Standing on bumper at defendant's request.—Holtzinger v. Scarborough, 30 S.E.2d 835, 71 Ga.App. 318

(4) Standing on highway alongside parked car—Herzberg v. White, 66 P.2d 253, 49 Ariz. 313.

(5) Standing on platform of open truck.—Wells v. Weed, 267 N.W. 379, 197 Minn. 464.

Positions held not negligent as matter of law

(1) Riding on running board.
Cal.—Yates v. J. H. Krumlinde & Co., 71 P.2d 298, 22 Cal. App.2d 387.

Ky.—Prather's Adm'r v. Allen, 164 S.W.2d 402, 291 Ky. 353.

Mo.—Sanford v. Gideon-Anderson Co., App., 31 S.W.2d 580.

N.H.—Balcus v. Sterling Exp. Co., 51 A.2d 479, 94 N.H. 270—Vandell v. Sanders, 155 A. 193, 85 N.H. 143, 80 A.L.R. 550.

(2) Standing in rear of truck.—Guarnaccia v. Wlezenski, 31 A.2d 464, 130 Conn. 20.

(3) Standing on ledge of truck.—Michaud v. Taylor, 27 A.2d 820, 139 Me. 124.

98. Cal.—Hernandez v. Murphy, 115 P.2d 565, 46 Cal.App.2d 201.

Mass.—Moat v. Magrath, 199 N.E. 307, 293 Mass. 19.

Pa.—McFadden v. Pennzoll Co., 19 A. 2d 370, 341 Pa. 433.

S.C.—Polly v. Walton, 179 S.E. 667, 176 S.C. 72.

Tenn.—Harrison v. Graham, 107 S. W.2d 517, 21 Tenn.App. 189.

42 C.J. p 1264 note 78 [b].

Flailing hand in door jamb

Minn.—Wildes v. Wildes, 247 N.W. 508, 188 Minn. 441.

99. Ohio.—Simensky v. Zwyer, 178 N.E. 422, 40 Ohio App. 275.

Held not negligence as matter of law

sence of known circumstances of danger;¹ or in that he continued to ride with the driver although he knew or should have known that he was a negligent driver,² or an excessively speedy driver,³ as where he continued to ride with the driver after vainly protesting against his excessive speed;⁴ or in that he rode or continued to ride in a vehicle

known to be defective⁵ or notwithstanding dangerous driving conditions;⁶ or in that he rode or continued to ride with the driver notwithstanding the driver's incompetency or incapacity,⁷ as where the driver was tired or drowsy and fell asleep,⁸ or was intoxicated,⁹ or had consumed some intoxicating liquors.¹⁰

Mich.—*Ford v. Maney's Estate*, 232 N.W. 393, 251 Mich. 461, 70 A.L.R. 1315.

1. Ala.—*Bradford v. Carson*, 137 So. 426, 223 Ala. 594.

Conduct held not negligent as matter of law

Ala.—*Bradford v. Carson*, *supra*.

2. Ga.—*Mann v. Harmon*, 8 S.E.2d 549, 62 Ga.App. 231.

Md.—*Warner v. Markoe*, 189 A. 260, 171 Md. 351.

Mass.—*McGaffigan v. Kennedy*, 18 N.E.2d 344, 302 Mass. 12.

N.C.—*Taylor v. Caudle*, 185 S.E. 446, 210 N.C. 60.

Ohio.—*Gill v. Arthur*, 43 N.E.2d 894, 69 Ohio App. 386.

Wis.—*Krause v. Hall*, 217 N.W. 290, 195 Wis. 565.

3. US.—*Scheer v. Rockne Motors Corporation*, C.C.A.N.Y., 68 F.2d 942.

Ark.—*Ragland v. Snotzmeier*, 55 S.W.2d 923, 186 Ark. 778.

Cal.—*Gardner v. Kreig*, 293 P. 710, 109 Cal. App. 616.

Me.—*Trumpfeller v. Crandall*, 155 A. 646, 130 Me. 279.

Minn.—*Hubenette v. Ostby*, 6 N.W. 2d 637, 213 Minn. 349—*Stenstrom v. Blooston*, 224 N.W. 462, 177 Minn. 95.

Neb.—*Landrum v. Roddy*, 12 N.W. 2d 82, 143 Neb. 934, 149 A.L.R. 1041.

N.J.—*Sussman v. Sussman*, 156 A. 496, 108 N.J. Law 384—*Linzmayr v. Phair*, 156 A. 918, 9 N.J. Misc. 1154.

Or.—*Layman v. Heard*, 66 P.2d 492, 156 Or. 94.

Pa.—*Young v. Freeman*, 164 A. 114, 108 Pa. Super. 399.

Wash.—*Quayle v. Knox*, 27 P.2d 115, 175 Wash. 182.

Wis.—*Demochitz v. Wells*, 253 N.W. 790, 214 Wis. 599—*Biersach v. Wechselberg*, 238 N.W. 905, 206 Wis. 113—*Royer v. Saecker*, 234 N.W. 742, 204 Wis. 265.

Held not negligence as matter of law

Cal.—*Benjamin v. Noonan*, 277 P. 1045, 207 Cal. 279.

Ky.—*New York Indemnity Co. v. Ewen*, 298 S.W. 182, 221 Ky. 114.

Mass.—*Channon v. Lynch*, 193 N.E. 145, 292 Mass. 316.

Mo.—*Heyde v. Patten*, App., 19 S.W. 2d 813.

4. Ariz.—*Friedman v. Friedman*, 9 P.2d 1015, 40 Ariz. 98.

N.Y.—*Wormuth v. Wormuth*, 299 N.Y.S. 380, 252 App. Div. 828, appeal dismissed.

Wis.—*Raddant v. Labutzke*, 289 N.W. 659, 233 Wis. 381—*Pecor v. Home Indemnity Co. of New York*, 291 N.W. 313, 234 Wis. 407.

5. Iowa.—*Mitchell v. Heaton*, 1 N.W.2d 284, 231 Iowa 269, 138 A.L.R. 832.

N.J.—*Brummer v. Smith*, 172 A. 732, 12 N.J. Misc. 482.

S.D.—*Knutsen v. Dilger*, 253 N.W. 459, 62 S.D. 474.

Wis.—*Demochitz v. Wells*, 253 N.W. 790, 214 Wis. 599.

Conduct held not negligent as matter of law

Pa.—*Zimmer v. Little*, 10 A.2d 911, 138 Pa. Super. 374.

6. Ky.—*Roberts v. White*, 99 S.W. 2d 447, 266 Ky. 483.

Mass.—*Lefebvre v. Ascher*, 198 N.E. 251, 292 Mass. 336.

7. Ala.—*Thomas v. Carter*, 117 So. 634, 218 Ala. 55.

Colo.—*Wilson v. Hill*, 86 P.2d 1084, 103 Colo. 409.

Iowa.—*Wittrock v. Newcom*, 277 N.W. 286, 224 Iowa 925.

Ky.—*Thompson v. Kost*, 181 S.W.2d 445, 298 Ky. 32.

Mass.—*Dean v. Bolduc*, 4 N.E.2d 441, 296 Mass. 15—*Semons v. Towne*, 188 N.E. 605, 285 Mass. 96.

Pa.—*Lloyd v. Noakes*, 96 Pa. Super. 164.

Wis.—*Struck v. Vetter*, 290 N.W. 131, 233 Wis. 540.

8. Cal.—*Erickson v. Vogt*, 80 P.2d 533, 27 Cal. App.2d 77.

Mass.—*Belletete v. Morin*, 76 N.E. 2d 660.

Mont.—*Wise v. Stagg*, 22 P.2d 308, 94 Mont. 321.

N.J.—*Decker v. Everson*, 187 A. 783, 14 N.J. Misc. 860.

Pa.—*Frank v. Markley*, 173 A. 186, 315 Pa. 257.

Wis.—*Krantz v. Krantz*, 248 N.W. 155, 211 Wis. 249.

Held not assumption of risk as matter of law

Conn.—*Freedman v. Hurwitz*, 164 A. 647, 116 Conn. 283.

9. Cal.—*Lindemann v. San Joaquin Cotton Oil Co.*, 55 P.2d 870, 5 Cal. 2d 480—*Pennix v. Winton*, 143 P. 2d 940, 61 Cal. App.2d 761, hearing denied 145 P.2d 561, 61 Cal. App.2d 761—*Mann v. Chase*, 107 P.2d 498, 41 Cal. App.2d 701—*McMahon v.*

Schindler, 102 P.2d 378, 38 Cal. App. 2d 642—*Haught v. White*, 60 P.2d 548, 16 Cal. App. 2d 426—*Anderson v. Pickens*, 4 P.2d 794, 118 Cal. App. 212.

Ga.—*Mann v. Harmon*, 8 S.E.2d 549, 62 Ga. App. 231—*Britt v. Davis*, 187 S.E. 125, 53 Ga. App. 783.

Iowa.—*White v. Zell*, 276 N.W. 76, 224 Iowa 359.

Ky.—*Spencer v. Boes*, 205 S.W.2d 150, 305 Ky. 573—*Cline v. Rich*, 179 S.W.2d 237, 297 Ky. 145—*Mahin's Adm'r v. McClellan*, 131 S.W. 2d 478, 279 Ky. 595—*Toppass v. Perkins' Adm'r*, 104 S.W.2d 423, 268 Ky. 186.

Me.—*Bubar v. Fisher*, 180 A. 923, 134 Me. 10.

Md.—*Powers v. State*, for Use and Benefit of *Reynolds*, 11 A.2d 909, 178 Md. 23—*Meese v. Goodman*, 176 A. 631, 167 Md. 658, 98 A.L.R. 480.

Mass.—*Dean v. Bolduc*, 4 N.E.2d 441, 296 Mass. 15—*Caldbeck v. Flint*, 183 N.E. 739, 281 Mass. 360—*O'Connell v. McKeown*, 170 N.E. 402, 270 Mass. 432.

Minn.—*Beckman v. Wilkins*, 232 N.W. 38, 181 Minn. 245.

Mont.—*Wise v. Stagg*, 22 P.2d 308, 94 Mont. 321—*McNair v. Berger*, 15 P.2d 834, 92 Mont. 441.

N.D.—*Bentley v. Oldtyme Distillers*, 289 N.W. 92, 69 N.D. 587.

Or.—*Willoughby v. Driscoll*, 121 P. 2d 917, 168 Or. 187.

Held not negligence as matter of law
Cal.—*Knickrihm v. Hazel*, 40 P.2d 305, 3 Cal. App.2d 721.

Hawaii.—*Wong v. McCandless*, 31 Hawaii 750.

N.H.—*Boston v. B. & M. Super Service*, 20 A.2d 633, 91 N.H. 392.

Evidence held sufficient to go to jury
Colo.—*United Broth. of Carpenters and Joiners of America, Local Union No. 55, v. Salter*, 167 P.2d 954, 114 Colo. 513.

Va.—*Yorke v. Mason*, 4 S.E.2d 375, 173 Va. 379.

10. Cal.—*House v. Schmelzer*, 40 P. 2d 577, 3 Cal. App.2d 601.

Colo.—*United Broth. of Carpenters and Joiners of America, Local Union No. 55, v. Salter*, 167 P.2d 954, 114 Colo. 513.

Minn.—*Gudbrandsen v. Pelto*, 271 N.W. 465, 199 Minn. 220.

Or.—*Willoughby v. Driscoll*, 120 P. 2d 768, 168 Or. 187, affirmed 121 P.2d 917, 168 Or. 187—*Pointer v. Osborne*, 76 P.2d 1134, 158 Or. 573.

Various incidental questions of fact involved in determining the contributory negligence of a guest or passenger in defendant's vehicle have been held, on conflicting evidence, to be for the jury to decide,¹¹ including such questions as whether plaintiff knew, or by the exercise of reasonable care should have known, whether the driver was, and, if so, to what extent he was, intoxicated;¹² whether he was in a position which was inherently dangerous;¹³ whether he should have realized or anticipated the dangers in the manner of operation of the vehicle, and whether he should have taken some action with respect to them;¹⁴ whether he had

made sufficient protests or warnings as to the dangers involved in the manner of operation of the vehicle;¹⁵ and, in the case of a car leased or furnished by defendant, whether the driver was under the control of the occupants of the car so as to make his contributory negligence imputable to them.¹⁶

Evidence uncontradicted or insufficient. Where the evidence is uncontradicted and the inference to be reasonably drawn therefrom is clear, it is for the court to rule as a matter of law with reference to the alleged contributory negligence, or assumption of risk, of plaintiff¹⁷ or as to his liability

Wash.—Wold v. Gardner, 294 P. 574, 159 Wash. 665.

Conduct held not negligent as matter of law

Colo.—United Broth. of Carpenters and Joiners of America, Local Union No. 55, v. Salter, 167 P.2d 954, 114 Colo 513.

La.—Denham v. Taylor, 131 So 614, 15 La App. 545, rehearing denied 132 So. 372, 19 La.App. 814.

Md.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md. 23.

11. N.Y.—Malkowski v. Diasparra, 59 N.Y.S.2d 417, 270 App Div 768.

Whether plaintiff was defendant's passenger

N.Y.—Malkowski v. Diasparra, supra.

12. Cal.—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal. 2d 480—Kropkin v. Huston, 179 P. 2d 575, 79 Cal App 2d 332—Tomlinson v. Kiraundjian, 24 P.2d 539, 133 Cal.App 418.

Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.

Hawaii—Wong v. McCandless, 31 Hawaii 750.

Ky.—Sutherland v. Davis, 151 S.W. 2d 1021, 286 Ky. 743—Mahin's Adm'r v. McClellan, 131 S.W.2d 478, 279 Ky. 595.

Md.—Powers v. State, for Use and Benefit of Reynolds, 11 A.2d 909, 178 Md 23.

Mont.—Westergard v. Peterson, 159 P.2d 518, 117 Mont. 550.

N.H.—Boston v. B & M Super Service, 20 A.2d 633, 245 N.H. 392.

N.J.—Sothorn v. Vandyke, 174 A. 877, 114 N.J. Law 1.

Ohio—Kirk v. B. Rkenbach, App., 32 N.E.2d 76.

Or.—Willoughby v. Driscoll, 121 P.2d 917, 168 Or. 187.

Vt.—Steele v. Lackey, 177 A. 309, 107 Vt. 192.

Wis.—Suschnick v. Underwriters Casualty Co., 248 N.W. 477, 211 Wis. 474, followed in Cater v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 484, and Hoenisch

v. Underwriters Casualty Co., 248 N.W. 481, 211 Wis. 483

13. N.Y.—Neary v. Middlesex Transp. Co., 61 N.Y.S.2d 565, 270 App Div 912, reversed on other grounds 72 N.E.2d 12, 296 N.Y. 818

Or.—Rice v. City of Portland, 17 P. 2d 562, 141 Or. 205.

Tenn.—Harrison v. Graham, 107 S. W.2d 517, 21 Tenn App. 189.

14. Minn.—Hubenette v. Ostby, 6 N. W.2d 637, 213 Minn. 349.

N.Y.—Reilly v. Rawleigh, 281 N.Y. S. 366, 245 App Div. 190.

Pa.—Ellsworth v. Lauth, 166 A. 855, 311 Pa. 286—Cormican v. Menke, 159 A. 36, 306 Pa. 156

S.D.—Miller v. Stevens, 256 N.W. 152, 63 S.D. 10.

Tenn.—Louisville & N. R. Co. v. Tracey, 12 Tenn.App. 167.

Wash.—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 369.

W.Va.—Boyce v. Black, 15 S.E.2d 588, 123 W.Va. 231.

Wis.—Brothers v. Berg, 254 N.W. 384, 214 Wis. 661—Teas v. Eisenlord, 253 N.W. 795, 215 Wis. 455—Sommerfeld v. Flurry, 223 N.W. 408, 198 Wis. 163.

15. Kan.—Pool v. Day, 53 P.2d 912, 143 Kan. 226.

Pa.—Curry v. Riggles, 153 A. 325, 302 Pa. 156.

Tenn.—Croson v. Marsh, 12 Tenn. App. 33.

16. D.C.—Bernhardt v. City, etc., R. Co., 263 F. 1009, 49 App.D.C. 265. 42 C.J. p 1265 note 79.

17. Cal.—Mann v. Chase, 107 P.2d 498, 41 Cal App.2d 701—McMahon v. Schindler, 102 P.2d 378, 38 Cal. App.2d 642—Hirsch v. D'Autremont, 23 P.2d 1066, 133 Cal.App. 106.

Colo.—United Broth. of Carpenters and Joiners of America, Local Union No. 55, v. Salter, 167 P.2d 954, 114 Colo. 513.

Ind.—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65.

Md.—State, to Use of Brandau, v. Brandau, 6 A.2d 233, 176 Md. 584.

Neb.—Glick v. Poska, 239 N.W. 626, 122 Neb. 102.

Tenn.—Lea v. Gentry, 73 S.W.2d 170, 167 Tenn. 664.

Wis.—Boureston v. Boureston, 285 N.W. 426, 231 Wis. 666.

42 C.J. p 1265 note 81.

Plaintiff held guilty of contributory negligence

(1) In general

Md.—State, to Use of Brandau, v. Brandau, 6 A.2d 233, 176 Md. 584. Wis.—Huebner v. Fischer, 288 N.W. 254, 232 Wis. 600.

(2) Where he was riding or continuing to ride with a driver known to be intoxicated

Ark.—Lewis v. Chitwood Motor Co., 115 S.W.2d 1072, 196 Ark. 86.

Cal.—Connor v. Johnson, 22 P.2d 760, 132 Cal App. 449

Iowa—Garrity v. Mangan, 6 N.W.2d 292, 232 Iowa 1188.

Ky.—Spencer v. Boes, 205 S.W.2d 150, 305 Ky. 573—Newton's Adm'r v. Stengel, 181 S.W.2d 251, 297 Ky. 732—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743—Rennolds' Adm'r v. Waggener, 111 S.W.2d 647, 271 Ky. 300.

Mont.—Wise v. Stagg, 22 P.2d 308, 94 Mont. 321.

Tenn.—Hicks v. Herbert, 113 S.W. 2d 1197, 173 Tenn. 1.

(3) Where he failed to warn driver against a known threatened danger.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636.

(4) Where he failed to protest or warn driver against continuing to drive negligently or too fast.

Pa.—Kropko v. Galida, 38 A.2d 491, 155 Pa.Super. 446.

Tenn.—Renfro v. Keen, 89 S.W.2d 170, 19 Tenn.App. 345—Coppedge v. Blackburn, 15 Tenn.App. 587.

(5) Where he failed to leave vehicle after protests were disregarded.—Friedman v. Friedman, 9 P.2d 1015, 40 Ariz. 96.

(6) Where he was guilty of unnecessarily riding in dangerous position.

Pa.—De Gregorio v. Malloy, 52 A.2d

for the contributory negligence of the driver.¹⁸ So also, where the evidence is insufficient to carry the issue to the jury, the court should rule on the alleged contributory negligence of plaintiff as a matter of law.¹⁹

(2) Of Motor Vehicles Other than Defendant's

Where the evidence is conflicting it is for the trier

of facts to determine whether the guest or occupant of a motor vehicle other than the defendant's was guilty of contributory negligence.

Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the trier of facts, whether the guest or occupant of a motor vehicle other than defendant's was guilty of contributory negligence²⁰ and whether he exercised due or ordinary care for

195, 356 Pa. 511—Valente v. Lindner, 17 A.2d 371, 340 Pa. 508.

Plaintiff held not guilty of contributory negligence

Idaho.—French v. Tebben, 27 P.2d 474, 53 Idaho 701.
Ky.—Ralston v. Dossey, 157 S.W.2d 739, 289 Ky. 40.
Minn.—Kapla v. Lehti, 30 N.W.2d 685, 235 Minn. 325—Lurgess v. Crafts, 238 N.W. 798, 181 Minn. 384.

18. Mo.—Mahany v. Kansas City R. Co., 228 S.W. 821, 286 Mo. 601
42 C.J. p 1265 note 82.

19. U.S.—R. J. Reynolds Tobacco Co. v. Newby, C.C.A.Idaho, 145 F. 2d 768.

Cal.—Queirolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal.App. 610.

Iowa.—In re Hill's Estate, 208 N.W. 334, 202 Iowa 1038, modified on other grounds 210 N.W. 241, 202 Iowa 1038.

Ky.—Hollis v. Bourne, 167 S.W.2d 50, 292 Ky. 578—Haller's Pet Shop v. Pearlman, 69 S.W.2d 9, 253 Ky 130.

Minn.—Kerzie v. Rodine, 11 N.W.2d 771, 216 Minn. 44.

Okl.—Miller v. Price, 33 P.2d 624, 168 Okl. 452.

Wis.—Maurer v. Fesing, 290 N.W. 191, 233 Wis. 565.

Particular issues

(1) Crowded driver's seat.

Conn.—Kinley v. Hines, 137 A. 9, 106 Conn. 82.

Ohio.—Obrecht v. Tallentire, 183 N. E. 295, 43 Ohio App. 376.

(2) Failure to see and warn driver about particular hazard.—Robinson v. Higgins, 174 S.W.2d 687, 295 Ky. 446.

(3) Failure to protest.

Ky.—Edmiston v. Robinson, 168 S.W. 2d 740, 293 Ky. 273.

Minn.—Hartel v. Warren, 265 N.W. 282, 196 Minn. 465.

Ohio.—Fay v. Thrasher, 66 N.E.2d 236, 77 Ohio App. 179.

(4) Guest sleeping.—Jansen v.

Herkert, 23 N.W.2d 503, 249 Wis. 124.

(5) Riding with dangerous driver or at dangerous speed.—York v. York, 194 S.E. 486, 212 N.C. 695.

(6) Riding with incompetent or in-

capacitated driver.—Robinson v. Higgins, 174 S.W.2d 687, 295 Ky. 446.

(7) Riding with intoxicated driver. Mass.—Collette v. Moskus, 4 N.E.2d 336, 295 Mass. 576.

Ohio.—McCoy v. Faulkenberg, 4 N.E. 2d 281, 53 Ohio App. 98.

20. U.S.—Constitution Pub. Co. v. Dale, C.C.A.Ala., 164 F.2d 210—Thompson v. Bell, C.C.A.Mich., 129 F.2d 211—Roedegir v. Phillips, C.C. A.N.C., 85 F.2d 995—Blaydes v. Barnes, C.C.A.Va., 81 F.2d 198—Liberty Baking Co. v. Kellum, C.C. A.Pa., 79 F.2d 931—Roberts v. White Star Bus Line, C.C.A.Puerto Rico, 38 F.2d 1, certiorari denied White Star Bus Line v. Roberts, 50 S.Ct. 963, 281 U.S. 764, 74 L.Ed. 1172

Cal.—Ritchey v. Watson, 268 P. 345, 204 Cal 387—Graves v. Kern County Transp. Corporation, 296 P. 902, 112 Cal App. 261

Del.—Burton v. Delaware Poultry Co., 15 A.2d 440, 2 Terry 68

Ill.—Thomas v. Buchanan, 192 N.E. 215, 357 Ill. 270—Meng v. Lucash, 69 N.E.2d 367, 329 Ill.App. 512—Rutowicz v. United Motor Coach Co., 261 Ill App. 377.

Iowa.—O'Meara v. Green Const. Co., 282 N.W. 735, 225 Iowa 1365—Rogers v. Jefferson, 272 N.W. 532, 223 Iowa 718—Miller v. Lowe, 261 N.W. 822, 220 Iowa 105—Schwind v. Gibson, 260 N.W. 853, 220 Iowa 377—Leckliter v. City of Des Moines 233 N.W. 58, 211 Iowa 251—Rudd v. Jackson, 213 N.W. 428, 203 Iowa 661.

Kan.—Landsley v. Bonar, 283 P. 921, 129 Kan. 441.

Ky.—Owen Motor Freight Lines v. Russell's Adm'r, 86 S.W.2d 708, 260 Ky. 795, applying Illinois law.

Mo.—Davis v. F. M. Stamper Co., 148 S.W.2d 765, 347 Mo. 761—Stevens v. Westport Laundry Co., 25 S.W.2d 491, 224 Mo.App. 955.

Mont.—Black v. Martin, 292 P. 577, 88 Mont. 256.

N.H.—Woodman v. Peck, 7 A.2d 251, 90 N.H. 292, 122 A.L.R. 1402.

N.J.—Parave v. Public Service Interstate Transp. Co., 160 A. 375, 109 N.J.Law 155—Cannazzari v. Triangle Bus Co., 141 A. 165, 6 N.J.Misc. 345.

N.Y.—Jones v. Gray, 45 N.Y.S.2d 519, 267 App Div. 242, stay granted 47 N.Y.S.2d 281, 267 App Div. 853, ap-

peal denied 47 N.Y.S.2d 606, 267 App.Div. 926—Hart v. Ruduk, 253 N.Y.S. 615, 233 App.Div. 453—Sherman v. Millard, 259 N.Y.S. 415, 144 Misc. 748, reversed on other grounds Sherman v. Leicht, 264 N.Y.S. 492, 238 App Div. 271.

N.C.—Hill v. Lopez, 45 S.E.2d 539, 228 N.C. 433.

Okl.—Stillwater Milling Co. v. Temp-lin, 77 P.2d 732, 182 Okl. 309.

Or.—Holzhauer v. Portland Traction Co., 169 P.2d 127, 178 Or. 607—Noble v. Sears, 257 P. 809, 122 Or 162

Pa.—Cormican v. Menke, 159 A. 36, 306 Pa. 156—Davis v. American Ice Co., 131 A. 720, 285 Pa 177—Ansel v. Marcus, Com Pl., 50 Dauph Co. 39.

R.I.—Kullabsky v. New England Transp. Co., 38 A.2d 152, 70 R.I. 220.

S.C.—Crappe v. Southern Ry. Co., 21 S.E.2d 737, 201 S.C. 176

S.D.—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596—Davis v. Farris, 1 Tenn App. 144.

Tex.—Garcia v. Moncada, 94 S.W.2d 123, 127 Tex 453—William Cameron Co. v. Downing, Civ.App. 147 S.W.2d 963—Le Sage v. Smith, Civ. App. 145 S.W.2d 308, error dismissed, judgment correct.

Utah.—Earle v. Salt Lake & Utah R. Corp., 165 P.2d 877, 109 Utah 111.

Vt.—Loomis v. Abelson, 144 A. 378, 101 Vt. 459.

Va.—Abrams v. Winesburg, 182 S.E. 233, 165 Va. 241.

Wis.—Kiviniemi v. Hildenbrand, 231 N.W. 252, 201 Wis. 619.

42 C.J. p 1265 note 83

Conduct held not negligent as matter of law

Fla.—Frazee v. Gillespie, 124 So. 6, 98 Fla 582.

Ill.—Starr v. Rossin, 23 N.E.2d 740, 302 Ill App. 325

Kan.—Dobson v. Baxter Chat Co., 85 P.2d 1, 148 Kan. 750.

Mo.—Davis v. F. M. Stamper Co., 148 S.W.2d 765, 347 Mo. 761.

Evidence held sufficient to go to jury

Ala.—Moore v. Cruik, 191 So 252, 238 Ala. 414.

N.C.—Newbern v. Leary, 1 S.E.2d 384, 215 N.C. 134.

his safety.²¹ This rule has been applied in determining whether a guest or occupant of a motor vehicle was guilty of contributory negligence in connection with a collision at an intersection;²² a col-

lision with another vehicle going in the same direction,²³ with another vehicle going in the opposite direction,²⁴ or with a parked or stopped vehicle;²⁵

Plaintiff being driven by member of family

- (1) By husband.
Ill.—Fitzpatrick v. California & Hawaiian Sugar Refining Corporation, 32 N.E.2d 990, 309 Ill.App. 215.
Iowa.—Newman v. Hotz, 285 N.W. 287, 226 Iowa 834.
Mich.—Major v. Southwestern Motor Sales, 22 N.W.2d 96, 314 Mich. 122.
—Moore v. Rety, 22 N.W.2d 68, 314 Mich. 52.
Pa.—Meads v. Rutter, 184 A. 560, 122 Pa.Super. 64.
42 C.J. p 1173 note 55 [a].
(2) By wife.—Finley v. Austin, Mo.App., 132 S.W.2d 1109.

- (3) By son.—Wolff v. Stenger, 239 N.W. 181, 59 S.D. 231.

Riding on motorcycle

- (1) In general.
Ala.—Utility Trailer Works v. Phillips, 29 So.2d 289.
Cal.—Landers v. Crescent Creamery Co., 5 P.2d 934, 118 Cal.App. 707.
Ind.—Young v. Mader, 14 N.E.2d 329, 105 Ind.App. 532.—Pumphrey v. Tannehill, 1 N.E.2d 301, 102 Ind. App. 113.
Iowa.—Williams v. Kearney, 278 N.W. 180, 224 Iowa 1006.
N.C.—Mason v. Johnston, 1 S.E.2d 379, 215 N.C. 95.

- (2) Conduct held not negligent as matter of law.—Julich v. T. A. Gillespie Co., 146 A. 785, 7 N.J.Misc. 630.

Passenger obscuring driver's vision

Whether plaintiff in riding on step of truck and obscuring wagon driver's view of road was negligent was for jury.—Robinson v. American Ice Co., 141 A. 244, 292 Pa. 366.

Jumping from vehicle

- Tex.—Browning v. Beck, Civ.App., 73 S.W.2d 626, error granted.

Failure to jump

- N.H.—Schwotzer v. Sherwood, 179 A. 361, 87 N.H. 486.

Failure of guest to stop car

Whether guest engaging in joint operation of car is chargeable with contributory negligence in failing to use means at his command to stop car before collision is fact question.—Moncada v. Garcia, Tex.Civ.App., 62 S.W.2d 215, reversed on other grounds Garcia v. Moncada, Com. App., 94 S.W.2d 123.

21. Ga.—Longino v. Moore, 187 S.E. 203, 53 Ga.App. 644.

- Ill.—Ritter v. Nieman, 74 N.E.2d 911, 332 Ill.App. 283.—Kern v. Howard, 49 N.E.2d 881, 320 Ill.App. 141.—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12.—Minx v. Yenerich, 14 N.E.2d 665, 295 Ill.

- App. 612.—Smith v. Courtney, 281 Ill.App. 530.

- Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.—Davis v. Dondanville, 26 N.E.2d 568, 107 Ind.App. 665.
Iowa.—Jensvold v. Chicago Great Western R. Co., 12 N.W.2d 293, 234 Iowa 627.—In re Green's Estate, 278 N.W. 285, 224 Iowa 126.—Stingley v. Crawford, 258 N.W. 316, 219 Iowa 509.

- Me.—Elliott v. Montgomery, 197 A. 322, 135 Me. 372.
Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394.

- Mo.—McCloskey v. Renne, 37 S.W.2d 950, 225 Mo.App. 810.

- Ohio.—Community Traction Co. v. Konte, 172 N.E. 533, 35 Ohio App. 361, affirmed 172 N.E. 442, 123 Ohio St. 514.

- Or.—Hamilton v. Haworth, 177 P.2d 409, 180 Or. 477.—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133.

- S.C.—Crappe v. Southern Ry. Co., 21 S.E.2d 737, 201 S.C. 176.

- W.Va.—Porterfield v. Sudduth, 185 S.E. 209, 117 W.Va. 231.

Blind guest

- Ill.—Belcher v. Citizens Coach Co., 57 N.E.2d 659, 324 Ill.App. 226.

Minor

- Ill.—Nash v. Welch, 57 N.E.2d 648, 324 Ill.App. 225.

Plaintiff being driven by husband

- R.I.—Spaziano v. Raponi, 13 A.2d 810, 65 R.I. 163.

22. Ark.—Safeway Cab & Storage Co. v. Hamilton, 112 S.W.2d 973, 196 Ark. 1179.

- Cal.—Smith v. Pollard, 8 P.2d 906, 121 Cal.App. 358.

- Conn.—Speerle v. Dabney, 155 A. 56, 113 Conn. 302.

- Ill.—Thomas v. Buchanan, 192 N.E. 215, 357 Ill. 270.

- Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.

- Iowa.—Gillespie v. Gentosi, 294 N.W. 586, 229 Iowa 356.—Rogers v. Jefferson, 277 N.W. 570, 223 Iowa 718.—Rogers v. Jefferson, 275 N.W. 874, 224 Iowa 324.—Rogers v. Jefferson, 272 N.W. 532, 223 Iowa 718.—Enfield v. Butler, 264 N.W. 546, 221 Iowa 615.—Newland v. G. McClelland & Son, 250 N.W. 229, 217 Iowa 568.

- Kan.—Stallings v. Graham, 73 P.2d 1090, 146 Kan. 867.—Cook v. Vaughan, 274 P. 204, 127 Kan. 479.

- Mass.—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326.

- Minn.—Johnston v. Selfe, 251 N.W. 525, 190 Minn. 269.—Krinke v. Gramer, 246 N.W. 376, 187 Minn. 595.—Kieffer v. Sherwood, 238 N.W. 331, 184 Minn. 205.

- Mo.—Miller v. Rollins, App., 102 S.W.2d 686.—Benzel v. Anishanzlin, App., 297 S.W. 180.

- N.Y.—Merkling v. Ford Motor Co., 296 N.Y.S. 393, 251 App.Div. 89.

- R.I.—Doherty v. Oakland Beach Volunteer Fire Co., 40 A.2d 737, 70 R.I. 446.

- S.C.—Neese v. Toms, 12 S.E.2d 859, 196 S.C. 67.

- Wash.—Gaskill v. Amadon, 38 P.2d 229, 179 Wash. 375.

Conduct held not negligent as matter of law

- Cal.—Klunien v. Holt, 288 P. 866, 106 Cal.App. 135.

- Ind.—Maites v. Brugner, 159 N.E. 156, 88 Ind.App. 36.

- Mont.—Flynn v. Helena Cab & Bus Co., 21 P.2d 1105, 94 Mont. 204.

23. U.S.—Gary v. Consolidated Forwarding Co., C.C.A.Wis., 115 F.2d 632.

- Ark.—Saliba v. Allison, 96 S.W.2d 443, 192 Ark. 1021.

- Ill.—Williams v. Matlin, 66 N.E.2d 719, 328 Ill.App. 645.—Rhoden v. Peoria Creamery Co., 278 Ill.App. 452.

- Iowa.—McCoy v. Cole, 249 N.W. 213, 216 Iowa 1320.

- Md.—Mitchell v. Dowdy, 42 A.2d 717, 184 Md. 634.

- Mass.—Bessey v. Salemme, 19 N.E.2d 76, 302 Mass. 188, 123 A.L.R. 1156.

- N.Y.—Sherman v. Leicht, 264 N.Y.S. 492, 238 App.Div. 271.

- Pa.—Mansur v. Josephson, 5 A.2d 102, 333 Pa. 467.—Hirth v. Marano, 170 A. 438, 112 Pa.Super 187.

- Va.—Diamond Cab Co. v. Jones, 174 S.E. 675, 162 Va. 412.

- Wash.—Nelson v. Brownfield, 153 P.2d 877, 21 Wash.2d 898.

24. Cal.—Huber v. Scott, 10 P.2d 150, 122 Cal.App. 334.

- Idaho.—Evans v. Davidson, 77 P.2d 661, 58 Idaho 600.

- Ill.—Beery v. Breed, 32 N.E.2d 675, 309 Ill.App. 433.

- Iowa.—Albert v. Maher Bros. Transfer Co., 243 N.W. 561, 215 Iowa 197.

- Kan.—Long v. Shafer, 188 P.2d 646, 164 Kan. 211.

- Me.—Kimball v. Bauckman, 158 A. 694, 131 Me. 14.

- Mass.—Beebe v. Randall, 23 N.E.2d 142, 304 Mass. 207.

- Mich.—Spillman v. Weimaster, 271 N.W. 564, 279 Mich. 93.

- Pa.—Hall v. Spriggs, Com.Pl., 22 Wash.Co. 166.

25. Ga.—Donahoo v. Goldin, 7 S.E.2d 820, 61 Ga.App. 841.

- Ill.—Carroll v. Krause, 15 N.E.2d 323, 295 Ill.App. 552.—Price v. Illinois Bell Telephone Co., 269 Ill.App. 581.

or a collision in fog or thick weather,²⁶ or on or near a bridge,²⁷ or under slippery road conditions,²⁸ or when the vehicle in which plaintiff was riding was stopped on the highway,²⁹ or was being driven on the wrong side of the highway.³⁰

Particular conduct as contributory negligence.
In accordance with the general rule, it is ordinarily

a question for the jury to determine whether a guest or occupant of a motor vehicle was guilty of contributory negligence in that he failed to keep a lookout, so as to warn the driver of hazards,³¹ as where he fell asleep³² or was under the influence of intoxicating liquors;³³ or in that he failed to see, discover, or realize the peril in time, so as to give warning;³⁴ or in that he failed to warn or

Kan.—Witte v. Hutchins, 12 P.2d 724, 135 Kan. 776.

Ky.—Midland Baking Co. v. Kitchen, 168 S.W.2d 372, 293 Ky. 160.

Mass.—Renaud v. New England Transp. Co., 189 N.E. 789, 286 Mass. 39.

Minn.—Brown v. Murphy Transfer & Storage Co., 251 N.W. 5, 190 Minn. 81—Olson v. Purity Baking Co., 242 N.W. 283, 185 Minn. 571.

Mo.—Taylor v. Silver King Oil & Gas Co., App., 203 S.W.2d 147.

N.H.—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69.

N.Y.—Rutledge v. City of New York, 10 N.Y.S.2d 417, 256 App.Div. 515

S.C.—Mowers v. South Carolina State Highway Dept., 34 S.E.2d 769, 206 S.C. 454.

Wash.—Graves v. Mickel, 29 P.2d 405, 176 Wash. 329

W.Va.—Porterfield v. Sudduth, 185 S.E. 209, 117 W.Va. 231.

Wis.—Bruins v. Brandon Canning Co., 257 N.W. 35, 216 Wis. 387.

26. Ill.—Peterson v. Clark, 20 N.E.2d 817, 300 Ill.App. 606—Landquist v. Schmidt, 7 N.E.2d 501, 289 Ill.App. 614.

N.Y.—Johnson v. City of Amsterdam, 282 N.Y.S. 417, 245 App.Div. 894

Wash.—Peterson v. King County, 90 P.2d 729, 199 Wash. 106.

Wis.—Haight v. Luedtke, 1 N.W.2d 882, 239 Wis. 389.

27. Iowa.—Hawkins v. Burton, 281 N.W. 790, 225 Iowa 1138.

Ky.—Paducah Coca-Cola Bottling Co. v. Reeves, 88 S.W.2d 39, 261 Ky. 539—Pope-Cawood Lumber & Supply Co. v. Cleet, 33 S.W.2d 360, 236 Ky. 366.

28. Iowa.—Johnson v. Overland Transp. Co., 288 N.W. 601, 227 Iowa 487.

Pa.—Reiser v. Smith, 2 A.2d 753, 332 Pa.Super. 389.

29. N.M.—Silva v. Waldie, 82 P.2d 282, 42 N.M. 514.

30. Mass.—Cerez v. Webber, 63 N.E.2d 889, 318 Mass. 703.

31. U.S.—Brinegar v. Green, C.C.A. Iowa, 117 F.2d 316.

Ariz.—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 43 Ariz. 57.

Ark.—Willbanks v. Laster, 199 S.W.2d 602, 211 Ark. 88.

Iowa.—Stingley v. Crawford, 258 N.W. 316, 219 Iowa 509.

Kan.—Richmond v. Clinton, 58 P.2d 1116, 144 Kan. 328.

Mass.—Harlow v. Corcoran, 195 N.E. 108, 290 Mass. 289.

Mich.—DeVries v. Owens, 295 N.W. 249, 295 Mich. 522—Howell v. Hakes, 232 N.W. 216, 251 Mich. 372.

Pa.—Harris v. E. Oostdyk Motor Transp. Corporation, 17 A.2d 347, 340 Pa. 478—Grutski v. Kline, Com. Pl., 61 Montg.Co. 33, affirmed in part and reversed in part on other grounds 43 A.2d 142, 352 Pa. 401.

Tex.—Dallas Ry. & Terminal Co. v. Orr, Civ.App., 210 S.W.2d 863, affirmed, Sup., 215 S.W.2d 862—Magnolia Petroleum Co. v. Owen, Civ. App., 101 S.W.2d 354, error dismissed.

Wis.—Canzoneri v. Heckert, 269 N.W. 716, 223 Wis. 25

42 C.J. p 1265 note 83 [g].

Held not negligence as matter of law
Iowa.—Simmering v. Hutt, 284 N.W. 459, 226 Iowa 648.

Mass.—Brightman v. Blanchette, 30 N.E.2d 864, 307 Mass. 584.

Mo.—Buehler v. Festus Mercantile Co., 119 S.W.2d 961, 343 Mo. 139.

Pa.—Horn v. Langerio, Com.Pl., 1 Lebanon 173.

S.D.—Scheuring v. Northern States Power Co., 294 N.W. 175, 67 S.D. 484.

Wis.—Rock v. Sarazen, 244 N.W. 577, 209 Wis. 126, followed in 244 N.W. 578, 209 Wis. 130.

Road obscured or concealed from plaintiff

Mo.—Clifton v. Caraker, App., 50 S.W.2d 758.

Tenn.—Roddy Mfg. Co. v. Dixon, 105 S.W.2d 513, 21 Tenn.App. 81—Johnson v. Maury County Trust Co., 15 Tenn.App. 326.

Vt.—Leclair v. Boudreau, 143 A. 401, 101 Vt. 270, 63 A.L.R. 1427.

32. U.S.—Pagenkamp v. Devillez, C. C.A.Ill., 80 F.2d 485—Stafford v. Roadway Transit Co., D.C.Pa., 70 F.Supp. 555, motion refused 73 F. Supp. 458, affirmed in part and reversed in part on other grounds, C.C.A., 165 F.2d 920.

Ill.—Smith v. Courtney, 281 Ill.App. 530.

Iowa.—Fry v. Smith, 253 N.W. 147, 217 Iowa 1295.

Mass.—Button v. Crowley, 187 N.E. 615, 284 Mass. 308.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn. App. 596.

Wash.—Edwards v. Washkuhn, 119 P.2d 905, 11 Wash.2d 425.

Conduct held not negligent as matter of law

Ga.—Longino v. Moore, 187 S.E. 203, 53 Ga.App. 674.

Ill.—Thompson v. Riemer, 283 Ill. App. 371.

Tex.—D. & H. Truck Line v. Hopson, Civ.App., 4 S.W.2d 1013, error refused.

Evidence held sufficient to go to jury
Ohio.—Carl v. Shaffer, 50 N.E.2d 182, 71 Ohio App. 339.

33. U.S.—Kopycinski v. Farrar, D. C.N.D., 63 F.Supp. 857, appeal dismissed, C.C.A., 155 F.2d 725.

Ark.—Missouri Pac. Transp. Co. v. Talley, 136 S.W.2d 688, 199 Ark. 835, certiorari dismissed 61 S.Ct. 5, 311 U.S. 722, 85 L.Ed. 470.

Okl.—Equels v. Tulsa City Lines, 147 P.2d 460, 194 Okl. 79.

34. U.S.—Daugherty v. Pompea Transporting Corporation, C.C.A. Mass., 62 F.2d 349.

Ill.—Plich v. Biggar, 5 N.E.2d 610, 287 Ill.App. 633—Frost v. Biggar, 5 N.E.2d 609, 287 Ill.App. 632.

Iowa.—Stilson v. Ellis, 225 N.W. 346, 208 Iowa 1157.

Md.—State, to Use of Creasey v. Pennsylvania R. Co., 59 A.2d 190.

Mo.—Cotton v. Ship-By-Truck Co., 85 S.W.2d 80, 337 Mo. 270.

N.J.—Schack v. J. A. Holmes Const. Co., 158 A. 494, 10 N.J. Misc. 226, affirmed 163 A. 663, 110 N.J. Law 16.

N.D.—Billingsley v. McCormick Transfer Co., 237 N.W. 714, 61 N.D. 184.

Tenn.—Woodfin v. Insel, 13 Tenn. App. 493.

Tex.—Lincoln v. Stone, Civ.App., 42 S.W.2d 128, reversed on other grounds, Com.App., 59 S.W.2d 100.

Wash.—Duvall v. Pioneer Sand & Gravel Co., 71 P.2d 567, 191 Wash. 417.

Conduct held not negligent as matter of law

(1) In general.
Ark.—Rose v. Greb, 112 S.W.2d 961, 195 Ark. 532.

Ill.—Price v. Bailey, 265 Ill.App. 358

Kan.—Orr v. Hensy, 135 P.2d 565, 156 Kan. 614—Gardner v. Leighton, 58 P.2d 1111, 144 Kan. 335.

Mo.—Davis v. F. M. Stamper Co., 148 S.W.2d 765, 347 Mo. 761.

Va.—Walker v. Crosen, 191 S.E. 753, 168 Va. 410.

sufficiently warn the driver of some hazard or danger, such as an approaching vehicle³⁵ or hazardous driving conditions;³⁶ or in that he failed to warn and protest against the negligent or improper manner in which the vehicle was being driven,³⁷ as

where he failed to warn and protest against the driver's excessive speed.³⁸ The rule has also been applied in determining plaintiff's contributory negligence in that he assumed a dangerous position in the vehicle;³⁹ or in that he rode in a vehicle which

(2) Guest sitting in back seat.—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245.

Fact that plaintiff was mistaken in the observations made was held not to render him guilty of contributory negligence as a matter of law.

U.S.—Kuper v. Betzer, C.C.A.S.D., 115 F.2d 842.

N.H.—Platek v. Swindell, 151 A. 262, 84 N.H. 402.

35. U.S.—Kuper v. Betzer, C.C.A.S.D., 115 F.2d 842—U. S. Can Co. v. Ryan, C.C.A.Mo., 39 F.2d 445, certiorari denied 51 S.Ct. 23, 282 U.S. 842, 75 L.Ed. 748.

Cal.—Sellers v. Wood Hydraulic Holst & Body Co., 271 P. 1055, 205 Cal. 519—Swartz v. Feddershon, 268 P. 430, 92 Cal.App. 285.

Ga.—Russell v. Bayne, 163 S.E. 290, 45 Ga.App. 55.

Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71—Smith v. Carter, 23 N.E.2d 738, 302 Ill.App. 285—Orr v. Herzog, 64 N.E.2d 382, 327 Ill.App. 555—St. Clair Nat. Bank v. Monaghan, 256 Ill.App. 471—Layton v. Ogonoski, 256 Ill.App. 461—Elmer v. Miller, 255 Ill.App. 465.

Me.—Nadeau v. Perkins, 193 A. 877, 135 Me. 215.

Md.—Yellow Cab Co. v. Lacy, 170 A. 190, 165 Md. 588.

Mass.—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326.

Mo.—Reed v. Goleman, App., 167 S.W. 2d 125.

Neb.—Crandall v. Ladd, 7 N.W.2d 642, 142 Neb. 736.

Okl.—Haynie v. Olson Drilling Co., 118 P.2d 230, 189 Okl. 527.

Pa.—Hough v. American Reduction Co. of Pittsburgh, 172 A. 722, 315 Pa. 234—McDougall v. Schaab, 178 A. 168, 117 Pa.Super. 285—Winters v. York Motor Express Co., 176 A. 812, 116 Pa.Super. 421—Walls v. Kralik, Com.Pl., 60 Montg.Co. 248. S.D.—Bak v. Walberg, 273 N.W. 381, 65 S.D. 292.

Wis.—Fischer v. London Guarantee & Accident Co., 283 N.W. 295, 230 Wis. 47.

42 C.J. p 1265 note 83 [d].

Held not negligence as matter of law

(1) In general.

Ill.—Belcher v. Citizens Coach Co., 64 N.E.2d 747, 327 Ill.App. 618—Brockman v. Peoples Gas Light & Coke Co., 48 N.E.2d 802, 319 Ill.App. 115—Hagen v. Bailus, 283 Ill.App. 249.

Kan.—Henderson v. National Mut. Cas. Co., 187 P.2d 508, 164 Kan. 109.

Neb.—Whitney v. Penrod, 32 N.W.2d 131, 149 Neb. 636.

Pa.—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209.

(2) Guest sitting in back seat.—Schlossstein v. Bernstein, 142 A. 324, 293 Pa. 245.

36. Cal.—Smith v. Cantlay & Tanxola, 189 P.2d 542, 83 Cal.App.2d 689.

Iowa.—Rabenold v. Hutt, 283 N.W. 865, 226 Iowa 321—Gregory v. Suhr, 277 N.W. 721, 224 Iowa 954.

Mo.—Reed v. Coleman, App., 167 S.W.2d 125.

37. Ga.—Lazar v. Black & White Cab Co., 179 S.E. 250, 50 Ga.App. 567.

Mass.—Levellie v. Wright, 15 N.E.2d 247, 300 Mass. 382—Ouillette v. Sheerin, 9 N.E.2d 713, 297 Mass. 536.

Mo.—Parsons v. Himmelsbach, App. 68 S.W.2d 841, certiorari quashed State ex rel Himmelsbach v. Becker, 85 S.W.2d 420, 337 Mo. 341.

Ohio.—Matis v. Woodruff, 166 N.E. 203, 31 Ohio App. 73.

Conduct held not negligent as matter of law

Cal.—Huber v. Scott, 10 P.2d 150, 122 Cal.App. 334.

Me.—Keller v. Banks, 156 A. 817, 130 Me. 397.

Pa.—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209.

42 C.J. p 1175 note 70 [a].

38. Ala.—White v. Thorington, 120 So. 914, 219 Ala. 101.

Ark.—Watts v. Safeway Cab & Storage Co., 100 S.W.2d 965, 193 Ark. 413.

Ill.—Waltrovich v. Black, 254 Ill.App. 49.

Mass.—Beach v. Minkley, 19 N.E.2d 20, 302 Mass. 228.

N.H.—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69—Ramsdell v. John B. Varick Co., 170 A. 12, 86 N.H. 457.

Okl.—Stillwater Milling Co. v. Tempelin, 77 P.2d 732, 182 Okl. 309.

Tex.—Lincoln v. Stone, Civ.App., 42 S.W.2d 128, reversed on other grounds, Com.App., 59 S.W.2d 100. 42 C.J. p 1265 note 83 [e].

Conduct held not negligent as matter of law

Wash.—Shirley v. American Automobile Ins. Co., 300 P. 155, 163 Wash. 136.

42 C.J. p 1174 note 67 [a] (2).

39. U.S.—Crane Co. v. Matheas, C.C.A.La., 42 F.2d 215.

Cal.—Houze, State Compensation Insurance Fund, Intervener, v. Kovacevich, 113 P.2d 255, 44 Cal.App.2d 936.

Iowa.—Hamilton v. Boyd, 256 N.W. 290, 218 Iowa 385.

Kan.—Farmer v. Central Mut. Ins. Co. of Chicago, Ill., 67 P.2d 511, 145 Kan. 951.

N.C.—Roberson v. Carolina Taxi Service, 200 S.E. 863, 214 N.C. 624.

Pa.—Upton v. Ferrari, Com.Pl., 5 Fay.L.J. 223.

Danger of particular positions held for jury

(1) On running board.

U.S.—New Amsterdam Cas. Co. v. Ledoux, C.C.A.La., 159 F.2d 905.

Ala.—Brasfield v. Hood, 128 So. 433, 221 Ala. 240.

Ga.—Atlantic Ice & Coal Co. v. Folds, 171 S.E. 581, 47 Ga.App. 832.

Kan.—Hamilton v. Harrison, 268 P. 119, 126 Kan. 188.

Me.—Elliott v. Montgomery, 197 A. 322, 135 Me. 372.

N.J.—Schuettich v. Hudson Builders' Material Corporation, 168 A. 281, 111 N.J.Law 308—Gavin v. Cohn, 186 A. 330, 5 N.J.Misc. 296.

N.Y.—Hagadorn v. Socony-Vacuum Oil Co., 78 N.Y.S.2d 28, 273 App. Div. 922.

Or.—Holmes v. Goble, 285 P. 822, 132 Or. 540.

Pa.—De Gregorio v. Malloy, 52 A.2d 195, 356 Pa. 511—Srednick v. Sylak, 23 A.2d 333, 343 Pa. 486—Lettieri v. Blaisden, 101 Pa.Super. 423.

S.C.—Oakman v. Ogilvie, 193 S.E. 920, 185 S.C. 118.

Wis.—Koss v. A. George Schulz Co., 218 N.W. 175, 195 Wis. 243.

(2) Resting arm on window.

Ark.—East Arkansas Lumber Co. v. Moss, 52 S.W.2d 49, 186 Ark. 30.

Ky.—Howling v. Poe, 150 S.W.2d 897, 286 Ky. 267—Miracle v. Cavins, 72 S.W.2d 25, 254 Ky. 644.

Ohio.—Mack v. Weir, App., 60 N.E.2d 931.

Pa.—Kovalish v. Smith, 53 A.2d 534—Thomas v. Geo. W. Boyd Co., 166 A. 767, 311 Pa. 267—Brenton v. Colbert, 157 A. 619, 305 Pa. 277.

Va.—Seife v. Fuller, 18 S.E.2d 254, 179 Va. 30.

Positions held not negligent as matter of law

(1) On running board.

Ky.—Bell & Bell v. Rascoe, 63 S.W.2d 932, 250 Ky. 756.

Mich.—Anderson v. Detroit Motorbus Co., 214 N.W. 172, 239 Mich. 390.

Neb.—Melcher v. Murphy, 21 N.W.2d 411, 149 Neb. 541.

N.Y.—Webb v. Miles, 291 N.Y.S. 200, 249 App.Div. 688.

W.Va.—Webb v. Batten, 187 S.E. 325, 117 W.Va. 644.

was not properly equipped,⁴⁰ or which was overcrowded, or the driver's seat of which was overcrowded;⁴¹ or in that he remained in the vehicle despite dangerous highway conditions;⁴² or in that he continued to ride in a vehicle which was negligently driven⁴³ or which was driven at an excessive rate of speed;⁴⁴ or in that he rode with a driver known to be incompetent, inexperienced, or imprudent,⁴⁵ such as an intoxicated driver⁴⁶ or a tired or sleepy driver.⁴⁷

Various incidental questions of fact involved in

determining the contributory negligence of a guest or occupant of a vehicle have been held, on conflicting evidence, to be for the jury to decide,⁴⁸ including such questions as whether plaintiff protested or warned the driver of car in which he was riding,⁴⁹ and whether a duty rested on him to do so under the circumstances;⁵⁰ whether the driving of the car in which plaintiff was riding was under his control and direction,⁵¹ so as to make the contributory negligence of the driver imputable to him,⁵² and whether the driver was guilty of contributory negligence;⁵³ whether plaintiff had assumed the

(2) Arm resting on window—Gray v. Adolph, Tex.Civ.App., 117 S.W.2d 122, error refused.

(3) Other positions.

Conn—Keheley v. Uhl, 26 A.2d 357, 129 Conn. 30.

Iowa—Hamilton v. Boyd, 256 N.W. 290, 218 Iowa 885.

Ky.—Wilkerson v. Sanderson, 26 S.W.2d 1, 233 Ky. 493.

NH—Platek v. Swindell, 151 A. 262, 84 N.H. 402.

42 C.J. p 1137 note 71 [b] (2).

40. U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 211.

Mass—Farr v. Whitney, 156 N.E. 863, 260 Mass. 193.

Vt.—Senecal v. Bieau, 189 A. 139, 108 Vt. 486.

Improper, defective, or obscured lights

Conn—Turcio v. Goodwin, 18 A.2d 360, 127 Conn. 483.

Ill—Quirk v. Schramm, 77 N.E.2d 417, 333 Ill.App. 293—Carroll v. Krause, 15 N.E.2d 323, 295 Ill.App. 552.

Minn—Ward v. Bandel, 231 N.W. 214, 181 Minn. 32.

Riding in disabled vehicle

Pa—McLaughlin v. Pittsburgh R. Co., 97 A. 107, 252 Pa. 32.

42 C.J. p 1176 note 81 [b].

41. U.S.—McCrate v. Morgan Packing Co., C.C.A. Ohio, 117 F.2d 702.

Ark—Presley v. Schenck, 110 S.W.2d 5, 194 Ark. 1069.

Ky.—Greer v. Richards' Adm'r, 115 S.W.2d 568, 273 Ky. 91.

N.D.—Billingsley v. McCormick Transfer Co., 228 N.W. 427, 58 N.D. 921.

Ohio—Sheen v. Kubiac, 1 N.E.2d 943, 131 Ohio St. 52.

Held not negligence as matter of law

Cal.—Hawthorne v. Gunn, 11 P.2d 411, 123 Cal.App. 462.

Mass—Carpenter v. Anderson, 17 N.E.2d 898, 301 Mass. 550.

Wash.—Bernard v. Portland Seattle Auto Freight, 118 P.2d 167, 11 Wash.2d 17.

42 C.J. p 1175 note 77 [g].

42. Ky.—O'Neil & Hearne v. Bray's Adm'r, 90 S.W.2d 353, 262 Ky. 377.

Pa—Janeway v. Lafferty Bros., 185 A. 827, 323 Pa. 324.

43. Kan—Packer v. Fairmont Creamery Co., 149 P.2d 629, 158 Kan. 580.

42 C.J. p 1265 note 83 [f].

44. Mo—Reed v. Coleman, App., 187 S.W.2d 125.

NY—Alby v. Krupa, 26 N.Y.S.2d 68, 261 App.Div. 1029.

SD—Lapp v. J. Lauesen & Co., 293 N.W. 536, 67 S.D. 411.

Va—Murray v. Smithson, 48 S.E.2d 239.

Conduct held not negligent as matter of law

Mass—Renaud v. New England Transp. Co., 189 N.E. 789, 286 Mass. 39.

Mont—Black v. Martin, 292 P. 577, 88 Mont. 256.

45. Tex—Walsh v. Dallas Railway & Terminal Co., 167 S.W.2d 1018, 140 Tex. 385.

42 C.J. p 1265 note 83 [h].

Held not negligence as matter of law

Mo.—McCloskey v. Renne, 37 S.W.2d 950, 225 Mo.App. 810.

46. Ky—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 471.

Mass—Cerez v. Webber, 63 N.E.2d 889, 318 Mass. 703.

Mo—Benoist v. Driveaway Co. of Missouri, App., 122 S.W.2d 86.

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

Conduct held not negligent as matter of law

Pa.—Landy v. Rosenstein, 188 A. 855, 325 Pa. 209.

47. Wash—Edwards v. Washkuhn, 119 P.2d 905, 11 Wash.2d 425.

48. Ark.—Houck v. Marshall, 132 S.W.2d 181, 198 Ark. 938—Priest v. Silbernagel & Co., 96 S.W.2d 466,

192 Ark. 973—Debin v. Texas Co., 81 S.W.2d 935, 190 Ark. 849.

Cal.—Silva v. Market St. Ry. Co., 123 P.2d 904, 50 Cal.App.2d 796.

Del.—Burton v. Delaware Poultry Co., 15 A.2d 440, 2 Terry 68.

Mo.—McCloskey v. Renne, 37 S.W.2d 950, 225 Mo.App. 810.

Tex.—Jackson v. Edmondson, Civ. App., 129 S.W.2d 369, reversed on

other grounds 151 S.W.2d 794, 136 Tex. 405.

Utah—Caperon v. Tuttle, 116 P.2d 402, 100 Utah 476, 135 A.L.R. 1399.

49. Iowa—Codner v. Stowe, 208 N.W. 330, 201 Iowa 800.

50. U.S.—Wicker v. Scott, C.C.A. Ohio, 29 F.2d 807.

Ark—Watts v. Safeway Cab & Storage Co., 100 S.W.2d 965, 193 Ark. 413.

51. Ark—Priest v. Silbernagel & Co., 96 S.W.2d 466, 192 Ark. 973.

Mass—Renaud v. New England Transp. Co., 189 N.E. 789, 286 Mass. 39.

N.J.—End v. Zola, 147 A. 725, 7 N.J. Misc. 1043—Van Seiver v. Abbott's Alderney Dairies, 113 A. 153, 6 N.J. Misc. 949.

Pa—Smith v. Sweeney, Com.Pl., 29 Erie Co. 360.

42 C.J. p 1265 note 85.

Proper opportunity

With respect to liability of truck driver's employer for injuries to guest in automobile which collided with rear of truck when motorist started to pass truck and, because of approach of an automobile from opposite direction, attempted to return to lane of traffic behind the truck, which suddenly and without warning stopped on the highway, the guest did not as a matter of law have an adequate and proper opportunity to control or influence the situation for safety.—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa. Super. 547.

Evidence held sufficient to go to jury

Tenn—Thompson v. Malone & Hyde, 65 S.W.2d 1079, 16 Tenn.App. 152.

52. Pa.—Keller v. Keystone Furniture Co., 1 A.2d 562, 132 Pa. Super. 547.

42 C.J. p 1265 note 85.

53. Ala.—Moore v. Cruft, 191 So. 252, 238 Ala. 414.

Ill—Thomas v. Buchanan, 192 N.E. 215, 357 Ill. 270.

Iowa—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 417.

S.C.—Nesmith v. Atlantic Coast Line R. Co., 36 S.E.2d 581, 207 S.C. 472.

Tex.—Southern Ice & Utilities Co. v.

risk,⁵⁴ and whether plaintiff was riding in an inherently dangerous position.⁵⁵

Evidence uncontradicted or insufficient. Where the evidence is uncontradicted and the inference to be reasonably drawn therefrom is clear,⁵⁶ or where the evidence is insufficient to take the issue of plaintiff's contributory negligence to the jury,⁵⁷ it is for the court to rule, as a matter of law, on the alleged contributory negligence of plaintiff; and where no inference can be drawn that the driver's negligence or failure to observe the regulations contributed to the accident, a verdict for defendant as

against a guest riding with such driver cannot be directed on that ground.⁵⁸

d. Motorcyclists

It is for the trier of facts, on conflicting evidence, to determine whether plaintiff, a motorcyclist, was guilty of contributory negligence.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of facts, whether plaintiff, a motorcyclist, struck by defendant, was guilty of contributory negligence.⁵⁹ This

Richardson, Civ.App., 60 S.W.2d 308, reversed on other grounds, Com.App., 95 S.W.2d 956.

Wis.—Hotz v. Ingels, 253 N.W. 177, 214 Wis. 356.

42 C.J. p 1265 note 86.

Driver held not negligent as matter of law

Pa.—Corse v. Ferguson, 180 A. 65, 118 Pa.Super. 606.

Excessive speed and failure to see vehicle

Mich.—Valenti v. Mayer, 4 N.W.2d 5, 301 Mich. 551.

54. Wis.—Fischer v. London Guarantee & Accident Co., 283 N.W. 295, 230 Wis. 47.

55. N.Y.—Neary v. Middlesex Transp. Co., 61 N.Y.S.2d 565, 270 App.Div. 912, reversed on other grounds 72 N.E.2d 12, 296 N.Y. 818.

56. Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.

Iowa.—Carpenter v. Wolfe, 273 N.W. 169, 223 Iowa 417.

42 C.J. p 1265 note 88.

Plaintiff held free from contributory negligence

(1) In general.

Minn.—Shockman v. Union Transfer Co., 19 N.W.2d 812, 220 Minn. 334—Jacobsen v. Ahasay, 246 N.W. 670, 188 Minn. 179

Neb.—Hamblen v. Steckley, 27 N.W. 2d 178, 148 Neb. 283.

Or.—Hamilton v. Haworth, 177 P.2d 409, 180 Or. 477.

(2) Where nothing which plaintiff automobile passenger could have done would have changed conduct of driver and have prevented collision at highway intersection, there was no error in not submitting issue of contributory negligence to jury.

Cal.—Murphy v. National Ice Cream Co., 300 P. 91, 114 Cal.App. 482.

Minn.—Wilson v. Davidson, 17 N.W. 2d 31, 219 Minn. 42.

Plaintiff held guilty of contributory negligence

(1) In general.

Ill.—Walker v. Illinois Commercial Tel. Co., 43 N.E.2d 412, 315 Ill.App. 553.

Pa.—Alperdt v. Paige, 140 A. 555,

292 Pa. 1—Morningstar v. Northeast Pennsylvania R. Co., 137 A. 800, 290 Pa. 14

(2) Failure to keep lookout.—Berafano v. Exner, 216 N.W. 165, 194 Wis. 149

(3) Looking and telling driver to proceed.—Rock v. Sarazen, 244 N.W. 577, 209 Wis. 126, followed in 244 N.W. 578, 209 Wis. 130.

(4) Overcrowding of driver's seat.—Herr v. Thames, La.App., 165 So 530.

(5) Riding in dangerous position Conn.—Hinch v. Elliott, 175 A. 684, 119 Conn. 207.

Ohio.—Central Transfer & Storage Co. v. Frost, App., 36 N.E.2d 494.

Pa.—Earl v. Wisner, 30 A.2d 803, 346 Pa. 357—DiGiuseppe v. Hrivnak, Com Pl., 13 Som.Co Leg.J. 287.

(6) Riding in vehicle without lights.—Hudgins v. Standard Oil Co. of California, 43 P.2d 597, 5 Cal App. 2d 618.

Assumption of risk

If guests in automobile, riding to fire in community, should have anticipated that accident would be sustained, because of character of trip, they assumed risk as matter of law.—Sommerfield v. Flury, 223 N.W. 408, 198 Wis. 163.

57. Ga.—Lazar v. Black & White Cab Co., 179 S.E. 250, 50 Ga.App. 567.

Ky.—Hollis v. Bourne, 167 S.W.2d 50, 292 Ky. 578—Haller's Pet Shop v. Pearlman, 69 S.W.2d 9, 253 Ky. 130.

Mass.—Elfman v. Kronenberg, 13 N.E.2d 405, 299 Mass. 492.

Minn.—Guin v. Mastrud, 288 N.W. 716, 206 Minn. 382—Anderson v. Gray, 288 N.W. 704, 206 Minn. 367—Findley v. Brittenham, 271 N.W. 449, 199 Minn. 197—Engholm v. Northland Transp. Co., 238 N.W. 795, 184 Minn. 349.

Neb.—Fulcher v. Ike, 6 N.W.2d 610, 142 Neb. 418—Gleason v. Baack, 289 N.W. 349, 137 Neb. 272.

N.J.—Falicki v. Camden County Beverage Co., 37 A.2d 858, 131 N.J.Law 590.

Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 861, 146 Ohio St. 657.

Or.—Whiting v. Andrus, 144 P.2d 501, 173 Or. 133.

Pa.—Kerr v. Hofer, 32 A.2d 402, 347 Pa. 356.

Tex.—Tippit v. Gohman, Civ.App., 145 S.W.2d 908, error dismissed, judgment correct.

Wis.—Forecki v. Kohlberg, 295 N.W. 7, 237 Wis. 67, rehearing denied 296 N.W. 619, 237 Wis. 67.

42 C.J. p 1265 note 87.

Particular issues

(1) Intoxication of driver.—Augusta v. Paradis, 22 N.E.2d 578, 61 Ohio App. 323.

(2) Overcrowding of driver's seat.—Obrecht v. Tallentire, 183 NE 295, 43 Ohio App 376.

(3) Whether occupant was aware of driver's negligence and appreciated hazard involved in time to protest effectively.—Olson v. State Farm Mut. Auto. Ins. Co. of Bloomington, Ill., 30 N.W.2d 196, 252 Wis. 37

58. Pa.—Scorsoni v. Pittsburgh Provision, etc., Co., 116 A. 154, 272 Pa. 253.

42 C.J. p 1265 note 89

59. Ariz.—Kaufrroath v. Wilbur, 185 P.2d 522, 66 Ariz. 152.

Cal.—Dwelly v. McReynolds, 56 P. 2d 1232, 6 Cal 2d 128—Carver v. Donin, 50 P.2d 833, 9 Cal App 2d 631.

Ill.—DeMay v. Brew, 46 N.E.2d 138, 317 Ill.App. 183.

Kan.—Washburn v. Martin, 278 P. 712, 128 Kan. 505.

Me.—Gustin v. Asskov, 151 A. 443, 129 Me. 491.

Minn.—Hennek v. Lundh, 280 N.W. 180, 203 Minn. 154—Viken v. Dickson, 214 N.W. 471, 172 Minn. 1.

N.J.—Rehfuss v. Prospect Boiler Co., 164 A. 395, 110 N.J.Law 349—Van Der Byl v. Schepp, 162 A. 640, 109 N.J.Law 602—Gray v. Elmo, 156 A. 825, 9 N.J.Misc. 1093.

Or.—Hawn v. W. J. Jones & Son, 284 P. 194, 131 Or. 660.

R.I.—Nichols v. Wood, 136 A. 845.

Tex.—Schnick v. Morris, Civ.App., 24 S.W.2d 491, error refused.

rule has been applied in determining whether particular acts or conduct of plaintiff motorcyclist constituted contributory negligence,⁶⁰ such as failure to stop where required to stop;⁶¹ violation of a statute regarding starting, turning, or stopping;⁶² driving on the wrong side of the street;⁶³ failure to yield the right of way;⁶⁴ improperly carrying passengers;⁶⁵ failure to have proper lights;⁶⁶ failure to sound the horn or give warning signals;⁶⁷ failure to maintain a proper lookout;⁶⁸ failure to see

another vehicle in time to prevent an accident;⁶⁹ failure to anticipate danger;⁷⁰ traveling at an excessive or improper speed or losing control of his vehicle;⁷¹ and his conduct when confronted by an emergency not his own fault.⁷²

The general rule has also been applied in determining the contributory negligence of a motorcyclist in various situations,⁷³ such as accidents or collisions at intersections or between vehicles on intersecting paths;⁷⁴ accidents or collisions when

Va.—Wright v. Viar, 174 S.E. 766, 162 Va. 510.

Wash.—Pollard v. Wittman, 183 P.2d 175, 28 Wash.2d 367—Quitslund v. Barton & Co., 255 P. 666, 143 Wash. 444.

Wis.—Steidl v. Caliebe, 254 N.W. 524, 215 Wis. 582

Motor cycle policemen see *infra* subdivision j of this section.

Conduct held not negligence as matter of law

Me.—Bolduc v. Garcelon, 144 A. 395, 127 Me. 482.

Mo.—Trimble v. Price, App., 282 S.W. 89

N.J.—Julich v. T. A. Gillespie Co., 146 A. 785, 7 N.J.Misc. 630.

Or.—Frame v. Arrow Towing Service, 64 P.2d 1312, 155 Or. 522.

Evidence held sufficient to go to jury
U.S.—Hill Transp. Co. v. Everett, C. C.A.N.H., 115 F.2d 746.

Fla.—Turner v. Modern Beauty Supply Co., 10 So.2d 488, 152 Fla. 3

Question for court sitting without jury

Cal.—Boyle v. Stewart, 3 P.2d 326, 116 Cal.App. 714—Enos v. Norton, 292 P. 276, 109 Cal.App. 19.

Impaired vision

Fact that motorcyclist was blind in left eye was held not so to incapacitate him, as matter of law, that he could not operate motorcycle without endangering public.—Wilson v. Bittner, 276 P. 268, 129 Or. 122, 64 A.L.R. 132.

60. Cal.—Dwelly v. McReynolds, 56 P.2d 1232, 6 Cal.2d 128.

Ky.—Saxton v. Tucker, 134 S.W.2d 590, 280 Ky. 777.

42 C.J. p. 1266 note 92.

61. Ill.—Karraker v. Smith, 77 N.E.2d 421, 333 Ill.App. 266—Manzeske v. Yellow Cab Co., 54 N.E.2d 239, 322 Ill.App. 280.

Pa.—Wolfe v. Beardsley, 53 A.2d 92, 357 Pa. 1.

42 C.J. p. 1266 note 92 [c].

Held not negligence as matter of law

Minn.—Brown v. Knutson, 228 N.W. 752, 179 Minn. 123.

62. Cal.—Ederer v. Shanzer, 25 P.2d 38, 134 Cal.App. 137.

42 C.J. p. 1266 note 92 [b].

63. Cal.—Henslee v. Fox, 77 P.2d 307, 25 Cal.App.2d 286.

Mont.—McGinnis v. Phillips, 205 P. 215, 62 Mont. 223.

Wis.—Beno v. Peasley, 239 N.W. 407, 206 Wis. 237.

64. Wash.—Bredemeyer v. Johnson, 36 P.2d 1062, 179 Wash. 225.

42 C.J. p. 1266 note 92 [f].

65. Iowa.—Fischer v. Steinbauer, 10 N.W.2d 649, 233 Iowa 777.

Evidence held sufficient to go to jury
Iowa.—Fischer v. Steinbauer, *supra*.

66. N.Y.—Anderson v. Calkins, 298 N.Y.S. 985, 252 App.Div. 836, followed in 298 N.Y.S. 986, 252 App. Div. 836

Or.—Landis v. Wick, 57 P.2d 759, 154 Or. 199, rehearing denied 59 P.2d 403, 154 Or. 199.

Wash.—Pollard v. Wittman, 183 P.2d 175, 28 Wash.2d 367.

67. Cal.—Nix v. Woodworth, 53 P.2d 765, 11 Cal.App.2d 322.

Mo.—Young v. City of Farmington, 196 S.W.2d 124.

Conduct held not negligence as matter of law

Iowa.—Jakeway v. Allen, 290 N.W. 507, 227 Iowa 1182.

Wash.—Byrne v. Stanford, 292 P. 1014, 159 Wash. 271.

68. Ariz.—Keeler v. Maricopa Tractor Co., 123 P.2d 166, 59 Ariz. 94.

Md.—Cogswell v. Krazier, 39 A.2d 815, 183 Md. 654.

42 C.J. p. 1266 note 92 [d].

Held not negligence as matter of law
U.S.—Van House v. Acorn Steel Co., C.C.A.Pa., 144 F.2d 204.

69. Cal.—Boone v. Bank of America Nat. Trust & Savings Ass'n, 29 P.2d 409, 220 Cal. 93—Flores v. Fitzgerald, 268 P. 369, 204 Cal. 374.

Mich.—Peters v. Wurzburg, 255 N.W. 316, 267 Mich. 45.

Va.—Tignor v. Virginia Electric & Power Co., 184 S.E. 234, 166 Va. 284.

Held not negligence as matter of law
Or.—Casto v. Hansen, 261 P. 428, 123 Or. 20.

70. Cal.—Dwelly v. McReynolds, 56 P.2d 1232, 6 Cal.2d 128.

Ga.—Hennemier v. Morris, 173 S.E. 924, 48 Ga.App. 840.

Md.—Pitcher v. Daugherty, 8 A.2d 917, 177 Md. 145.

71. Cal.—Nix v. Woodworth, 53 P.2d 765, 11 Cal.App.2d 322—Flood v. Miura, 8 P.2d 552, 120 Cal.App. 467.

Ky.—Saxton v. Tucker, 134 S.W.2d 590, 280 Ky. 777.

Mich.—White v. Vandevelde, 279 N.W. 899, 284 Mich. 669.

N.J.—Gray v. Elmo, 156 A. 825, 9 N.J.Misc. 1093.

N.C.—Exum v. Baumrind, 188 S.E. 200, 210 N.C. 650.

Wash.—Gephart v. Stout, 118 P.2d 801, 11 Wash.2d 184.

42 C.J. p. 1266 note 92 [a].

Entering intersection

Conn.—Zint v. Wheeler, 169 A. 52, 117 Conn. 484.

Ill.—Manzeske v. Yellow Cab Co., 54 N.E.2d 239, 322 Ill.App. 280.

Pa.—Christ v. Hill Metal & Roofing Co., 171 A. 607, 314 Pa. 375.

Violation of speed limit did not as a matter of law show that motorcyclist was contributorily negligent.

Gauthier v. Carbonneau, 277 N.W. 135, 226 Wis. 527.

Evidence held sufficient to go to jury
Iowa.—Fischer v. Steinbauer, 10 N.W.2d 649, 233 Iowa 777.

72. Minn.—Merritt v. Stuve, 9 N.W.2d 329, 215 Minn. 44.

Wis.—Gauthier v. Carbonneau, 277 N.W. 135, 226 Wis. 527.

Conduct held not negligence as matter of law

(1) Fact that motorcyclist turned off and speeded up—Stolte v. Larkin, C.C.A.Minn., 110 F.2d 226.

(2) Fact that motorcyclist applied brakes.

N.H.—Labreque v. Childs, 55 A.2d 473, 94 N.H. 451.

Pa.—Melcher v. Stengel, 136 A. 785, 288 Pa. 522.

(3) Fact that motorcyclist failed to apply brakes.—Snodgrass v. Cleveland Co-op. Coal Co., 167 N.E. 493, 31 Ohio App. 470.

73. Me.—White v. Michaud, 159 A. 570, 131 Me. 124.

N.J.—Buchan v. Chismar, 151 A. 102, 8 N.J.Misc. 573.

Va.—Stratton v. Bergman, 192 S.E. 813, 169 Va. 249.

74. U.S.—Van House v. Acorn Steel Co., D.C.Pa., 53 F.Supp. 990, affirmed, C.C.A., 144 F.2d 204.

following or passing a vehicle ahead traveling in the same direction,⁷⁵ or when meeting a vehicle approaching from the opposite direction,⁷⁶ and collisions with a parked vehicle.⁷⁷

Incidental questions involved in determining the contributory negligence of a motorcyclist have also been held, on conflicting evidence, to be for the trier of the facts.⁷⁸

Evidence uncontradicted or insufficient. Where the evidence is uncontradicted and not reasonably subject to differing inferences⁷⁹ or where the evidence is insufficient properly to raise the issue of contributory negligence,⁸⁰ the court should rule on the issue as a matter of law.

e. Bicyclists

Where the evidence is conflicting or subject to differing inferences, it is for the trier of facts to determine whether plaintiff, a bicyclist, was guilty of contributory negligence.

Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question of fact for the trier of the facts whether plaintiff, a bicyclist, struck by defendant, was guilty of contributory negligence,⁸¹ in that he violated the rules as to the proper position for the bicycle on the highway,⁸² failed to keep a proper lookout,⁸³ or to see the vehicle approaching;⁸⁴ failed to have or use the proper equipment on the bicycle;⁸⁵ traveled at an improper or excessive

- Cal—Landers v. Crescent Creamery Co., 5 P.2d 934, 118 Cal.App. 707.
Ky—Woods v. Jaglowicz, 32 S.W.2d 1, 235 Ky. 637.
Mass.—Payson v. Checker Taxi Co., 159 N.E. 449, 262 Mass. 22—Rogert v. Thompson, 156 N.E. 884, 260 Mass. 206.
Minn—Fickling v. Nassif, 294 N.W. 848, 208 Minn. 538.
N.H.—Bruce v. Capitol Motor Transp. Co., 183 A. 265, 87 N.H. 462.
N.J.—Paul v. Flannery, 26 A.2d 553, 128 N.J.Law 438—Yates v. Madigan, 171 A. 679, 112 N.J.Law 443, affirmed 176 A. 362, 114 N.J.Law 258—Corcione v. Zingerman, 166 A. 506, 111 N.J.Law 75.
N.Y.—Boles v. Jump, 5 N.Y.S.2d 73, 254 App.Div. 772, reargument denied 6 N.Y.S.2d 348, 254 App.Div. 882.
Or—Casto v. Hansen, 261 P. 428, 123 Or. 20.
Pa.—Barton v. Franklin, 163 A. 521, 309 Pa. 243—Ross v. Reigelman, 14 A.2d 591, 141 Pa.Super. 293—Ford v. Reinohl, 182 A. 120, 120 Pa.Super. 285—Jackson v. Curry, 177 A. 346, 117 Pa.Super. 63, 42 C.J. p 1266 note 92 [i].
75. Iowa—Thomas v. Charter, 278 N.W. 920, 224 Iowa 1278.
Md.—Greyhound Cab v. Sewell, 190 A. 814, 172 Md. 699.
Mich.—White v. Vandeveld, 279 N.W. 899, 284 Mich. 669.
Mo.—Bates v. Friedman, App., 7 S.W.2d 452.
Mont.—Marsh v. Ayres, 260 P. 702, 80 Mont. 401.
Wash.—Curtis v. Perry, 18 P.2d 840, 171 Wash. 542, 42 C.J. p 1266 note 92 [g].
76. Ark.—Lewis v. Shackleford, 157 S.W.2d 509, 203 Ark. 500.
Cal.—Gunter v. Claggett, 151 P.2d 271, 65 Cal.App.2d 636—Smith v. Rothschild, 39 P.2d 464, 3 Cal.App.2d 273—Wixon v. Rausch Improvement Co., 266 P. 964, 91 Cal.App. 129.
Ind.—Pumphrey v. Tannhill, 8 N.E.2d 414, 104 Ind.App. 468.
Iowa—Cooley v. Killingsworth, 228 N.W. 880, 209 Iowa 646, 42 C.J. p 1266 note 92 [b].
77. N.J.—Ryan v. Deans, 176 A. 160, 114 N.J.Law 199.
78. Mich.—White v. Vandeveld, 279 N.W. 899, 284 Mich. 669.
79. Plaintiff held guilty of contributory negligence
Md—Pitcher v. Daugherty, 8 A.2d 917, 177 Md. 145.
Wash.—Pollard v. Wittman, 183 P.2d 175, 28 Wash.2d 367.
80. Mass.—Kzcowski v. Johnowicz, 192 N.E. 6, 287 Mass. 441.
81. Cal.—Fraser v. Stelling, 126 P.2d 653, 52 Cal.App.2d 564—Tracey v. L. A. Paving Co., 41 P.2d 942, 4 Cal.App.2d 700.
Ky—Cumberland Bus Co. v. Heltton, 13 S.W.2d 753, 227 Ky. 587.
Mass.—Hedman v. Morse, 180 N.E. 240, 278 Mass. 437.
Mich.—Saums v. Parfet, 258 N.W. 235, 270 Mich. 165—Essenberg v. Achterhof, 237 N.W. 43, 255 Mich. 55—Alt v. Konkle, 211 N.W. 661, 237 Mich. 264.
Minn.—Dentinger v. Uleberg, 213 N.W. 377, 171 Minn. 81.
Mo—Taylor v. Sesler, App., 113 S.W.2d 812.
N.H.—Halley v. Brown, 24 A.2d 267, 92 N.H. 1.
N.J.—Hammersma v. Smith, 165 A. 555, 110 N.J.Law 523.
Tenn.—Bourne v. Barlar, 67 S.W.2d 751, 17 Tenn.App. 375.
Wash.—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 466, 42 C.J. p 1266 note 93.
What constitutes contributory negligence of bicyclists see supra § 464.
Plaintiff held not negligent as matter of law
Va.—Cooke v. Griggs, 33 S.E.2d 764, 183 Va. 851.
At intersection
Minn.—Carlson v. F. A. Martocchio Co., 229 N.W. 341, 179 Minn. 332.
Pa.—Walters v. Truski, Com.Pl., 61 Montg. Co. 25.
Wash.—Sebern v. Northwest Cities Gas Co., 10 P.2d 210, 167 Wash. 600, 42 C.J. p 1266 note 93 [h].
Bicyclist on through street
Mich.—Townshend v. Reader, 238 N.W. 381, 252 Mich. 465.
Bicyclist making turn
Cal.—Mury v. Reeskau, 33 P.2d 1033, 139 Cal.App. 398.
Kan.—Baldwin v. Devlin, 8 P.2d 320, 134 Kan. 844.
Wash.—Sigol v. Kaplan, 266 P. 154, 147 Wash. 269.
Head-on collision
Mass.—Podwipinska v. Teixeira, 178 N.E. 830, 277 Mass. 366.
82. Idaho—Maler v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.
Wash.—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 466, 42 C.J. p 1266 note 93 [d].
Conduct held not negligence as matter of law
Cal.—Green v. Pedigo, 170 P.2d 999, 75 Cal.App.2d 300.
83. Tex.—Carter v. Ferris, Civ.App., 93 S.W.2d 504, error dismissed, 42 C.J. p 1266 note 93 [c].
Held not negligence as matter of law
Tex.—Carter v. Ferris, supra.
84. Mich.—Brown v. Tanner, 274 N.W. 744, 281 Mich. 150.
85. Cal.—La Count v. Pasarich, 270 P. 210, 205 Cal. 181—Neilson v. Walker, 286 P. 1091, 105 Cal.App. 23—Young v. Boy Scouts of America, 51 P.2d 191, 9 Cal.App.2d 760.
Mass.—Hoxie v. Bardwell, 191 N.E. 640, 287 Mass. 121.
Wis.—Prange v. Rognstad, 236 N.W. 650, 205 Wis. 62.
Horn
Cal.—Green v. Pedigo, 170 P.2d 999, 75 Cal.App.2d 300.
Lighted headlamp
Idaho—Maler v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642.

speed;⁸⁶ made a turn improperly;⁸⁷ failed to yield the right of way to the motorist;⁸⁸ or failed to conduct himself properly when faced with an emergency.⁸⁹

Incidental questions of fact involved in determining the contributory negligence of a bicyclist have been held, on conflicting evidence, to be for the trier of the facts,⁹⁰ including such questions as whether plaintiff was on the right or the wrong side of the road,⁹¹ or whether he swerved to the left on the approach of an automobile from behind,⁹² or in front.⁹³

Evidence uncontradicted or insufficient. Where the evidence is uncontradicted and not reasonably subject to differing inferences,⁹⁴ or where the evidence is insufficient to warrant submission of the issue to the jury,⁹⁵ the court must rule on the alleged contributory negligence of a bicyclist as a matter of law.

f. Drivers or Occupants of Horse-Drawn Vehicles

It is for the trier of facts, on conflicting evidence, to determine whether the driver or occupant of a horse-drawn vehicle was guilty of contributory negligence.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the trier of the facts whether the driver of a horse-drawn vehicle, struck by defendant, was guilty of contributory negligence,⁹⁶ in failing to maintain his proper position on the highway;⁹⁷ in failing to yield the right of way to the motor vehicle;⁹⁸ or in that the vehicle did not have or display adequate lights or reflectors.⁹⁹ So, also, where the occupants of a horse-drawn vehicle are injured because the horses were frightened by the motor vehicle, whether plaintiffs were contributorily negligent in the matter is, on conflicting evidence, a question of fact for the jury.¹ However, where the evidence of contributory negligence is insufficient to warrant submission of the issue to the jury, it should not be so submitted by the court.²

Incidental questions of fact are for the jury on conflicting evidence,³ as, for example, whether or not plaintiff's horse was frightened,⁴ or whether plaintiff turned to the left in passing a parked automobile,⁵ or whether plaintiff was asleep at the time of the collision,⁶ or whether the driving of the car was within the control and direction of

86. Cal.—Neilson v. Walker, 286 P. 1091, 105 Cal App 23

87. Kan.—Moseman v. L. M. Penwell Undertaking Co., 100 P.2d 669, 151 Kan 610
42 C.J. p 1266 note 93 [b].

88. N.J.—Zanzonico v. Yellow Cab Co., 133 A. 84, 4 N.J. Misc. 458.

Held not negligence as matter of law
Cal.—Green v. Pedigo, 170 P.2d 999, 4 N.J. Misc. 458.

89. N.C.—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 231 N.C. 390

Conduct not negligent as matter of law

N.C.—Tarrant v. Pepsi Cola Bottling Co., supra.

90. Ohio.—Kalovsky v. Meyer Dairy Products Co., 164 N.E. 370, 30 Ohio App. 118.

91. Utah.—Cheney v. Buck, 189 P. 81, 56 Utah 29.

92. Mich.—Niedzinski v. Coryell, 184 N.W. 476, 215 Mich. 498.

Tex.—Stamper v. Scholtz, Civ.App., 17 S.W.2d 184.

93. Mo.—Harris v. Pew, 170 S.W. 344, 185 Mo.App. 275.

94. Ind.—Winski v. Clegg, 142 N.E. 130, 81 Ind.App. 560.

Plaintiff held guilty of contributory negligence

Pa.—Cortier v. Hanna, Com.Pl., 32 Del.Co. 13.

42 C.J. p 1266 note 93.

95. Tex.—Jennison v. Darnielle, Civ App., 146 S.W.2d 788, error dismissed.

96. Ark.—Laves v. Harris, 63 S.W. 2d 971, 187 Ark 1107
SD—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.

Tenn.—Collins v. Desmond, 1 Tenn. App 54
42 C.J. p 1266 note 1.

What constitutes contributory negligence of driver or occupant of horse-drawn vehicle see supra § 465.

Parked wagons

Ark.—Duckworth v. Stephens, 30 S.W.2d 840, 182 Ark 161.

Mich.—Reid v. Coon, 219 N.W. 613, 213 Mich 37

42 C.J. p 1266 note 1 [d].

Unexpectedly stopping or backing

Ala.—Caruth v. Sparkman, 147 So 884, 226 Ala. 594.

97. Iowa.—Ege v. Born, 236 N.W. 75, 212 Iowa 1138.

Mo.—Nordmann v. J. Hahn Bakery Co., App., 298 S.W. 1037.

42 C.J. p 1266 note 1 [g].

98. Mich.—Sak v. Waldecker, 239 N.W. 391, 256 Mich. 219

Mo.—Nordmann v. J. Hahn Bakery Co., App., 298 S.W. 1037.

42 C.J. p 1266 note 1 [f].

99. Ark.—Missouri Pac. Transp. Co v. Brown, 99 S.W.2d 245, 193 Ark. 304.

Cal.—Holmes v. Koepsel, 105 P.2d 993, 40 Cal.App.2d 793

Mo.—Knebel v. Poese, App., 153 S.W.2d 841.

N.H.—Eastman v. Herrick, 173 A. 807, 87 N.H. 58

Ohio—Miller v. Schneider, App., 40 N.E.2d 219

Tex.—Jones Fine Bread Co v. Cook, Civ App., 154 S.W.2d 889—Williams v. Russell, Civ App., 112 S.W.2d 264

Wash.—Clausen v. Jones, 71 P.2d 362, 191 Wash 334

42 C.J. p 1266 note 1 [b].

Light held not insufficient as matter of law

N.H.—Eastman v. Herrick, 173 A. 807, 87 N.H. 58.

1. Ark.—McAfee v. Nooner, 80 S.W. 2d 55, 190 Ark 659.

Held not negligence as matter of law

Ark.—McAfee v. Nooner, supra.

2. Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

3. Ky.—Consolidated Coach Corporation v. Eckler, 58 S.W.2d 582, 248 Ky. 309.

4. Ill.—Ward v. Meredith, 77 N.E. 118, 220 Ill. 66.

5. R.I.—Rutkovich v. Ciaella, 135 A. 401.

6. Mont.—Savage v. Boyce, 184 P. 887, 53 Mont. 470.

plaintiff, an occupant therein, so as to make the negligence of the driver of the wagon imputable to plaintiff.⁷

g. Persons on Horseback

It is for the trier of facts to determine, on conflicting evidence, whether a person on horseback was guilty of contributory negligence.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the trier of the facts whether a person on horseback, injured by defendant, was guilty of contributory negligence.⁸

h. Persons Owning or in Charge of Animals

It is for the trier of facts to determine, on conflicting evidence, whether persons, owning or in charge of animals, who are injured or damaged by defendant were guilty of contributory negligence.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the jury or other trier of the facts to determine whether a person who was in charge of animals, and who was injured by defendant,⁹ or who was injured when the animal or animals were frightened by defendant,¹⁰ was guilty of contributory negligence. Similarly, in an action by the owner of an animal to recover damages for loss suffered when the animal was injured by

a motor vehicle, it is a question of fact for the jury on conflicting evidence whether the owner or person in charge of the animal was guilty of contributory negligence.¹¹

Animals running at large. In an action by an owner of a stray animal to recover damages for injuries to the animal struck by defendant's automobile, the question whether the animal was unlawfully running at large is for the jury on conflicting evidence,¹² provided, it has been held, plaintiff was guilty of negligence in permitting it to escape from his control.¹³

i. Pedestrians

- (1) In general
- (2) Walking along highway
- (3) Crossing highway

(1) In General

Whether a pedestrian injured by defendant was guilty of contributory negligence is, on conflicting evidence, a question for the trier of the facts.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact whether a pedestrian injured by defendant was guilty of contributory negligence.¹⁴ The rule has been applied in determining whether a pedestrian was guilty of con-

7. Minn.—Tereau v. Meeds, 130 N.W. 3, 114 Minn. 517.

8. U.S.—Norfolk Southern Bus Corporation v. Lask, C.C.A. Va., 43 F.2d 45.

Kan.—Thornton v. Franse, 12 P.2d 728, 135 Kan. 782.

Ky.—Fullenwider v. Brawner, 6 S.W.2d 264, 224 Ky. 274.

Mass.—Butler v. Graves, 187 N.E. 115, 284 Mass. 84.

N.D.—Schulkey v. Brown, 230 N.W. 6, 59 N.D. 345.

Tenn.—Studer v. Plumlee, 172 S.W. 305, 130 Tenn. 517.

Contributory negligence of persons on horseback generally see *supra* § 466.

9. Minn.—Raths v. Sherwood, 262 N.W. 563, 195 Minn. 225.

42 C.J. p. 1267 note 9.

Contributory negligence of persons in charge of animals see *supra* § 467.

Proceeding on left-hand side of highway

Or.—Sertic v. McCullough, 63 P.2d 884, 155 Or. 216.

10. Iowa.—Lawson v. Fordyce, 12 N.W.2d 301, 234 Iowa 632.

Evidence held sufficient to go to jury Iowa.—Lawson v. Fordyce, *supra*.

Conduct held not negligence as matter of law

Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.

11. Ala.—Foster v. Byrd, 180 So. 125, 28 Ala App 168.

N.C.—Jones v. Craddock, 190 S.E. 224, 211 N.C. 382.

Driving cattle without advance guard

Mo.—Anderson v. Dail, 77 S.W.2d 169, 229 Mo.App. 272—Anderson v. Dail, 21 S.W.2d 496, 224 Mo.App. 403.

12. Ill.—De Buck v. Gadde, 49 N.E.2d 789, 319 Ill App 609.

N.D.—Armann v. Caswell, 152 N.W. 813, 30 N.D. 406.

Conduct held not negligence as matter of law

Pa.—Floyd v. Sheller, Com.Pl., 54 Montg Co. 148.

13. Tex.—Ellis v. Lewis, Civ.App., 142 S.W.2d 294.

14. U.S.—Bell v. Shoff, C.C.A.Pa., 89 F.2d 339.

Ark.—Snow v. Riggs, 290 S.W. 591, 172 Ark. 835.

Cal.—Umamoto v. McDonald, 58 P.2d 1274, 6 Cal 2d 587—Henshaw v. Belyea, 31 P.2d 348, 220 Cal. 458

—Malro v. Yellow Cab Co. of California, 281 P. 66, 208 Cal. 350—Thompson v. Held, 183 P.2d 711,

81 Cal.App.2d 275—Barry v. Madalena, 146 P.2d 974, 63 Cal App.2d 302—McNear v. Pacific Greyhound Lines, 146 P.2d 34, 63 Cal App.2d 11—Duchren v. Stewart, 102 P.2d 784, 39 Cal App.2d 201—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App.2d 738—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587—Wagy v. Brave, 24 P.2d 209, 133 Cal App. 413—Maggart v. Bell, 2 P.2d 516, 116 Cal App 306—Baill v. Erickson, 297 P. 960, 113 Cal. App. 36—Nicol v. Davis, 290 P. 114, 107 Cal.App. 26—Briggs v. Jess Mead, Inc., 270 P. 263, 93 Cal. App. 666—Davis v. Tanner, 262 P. 1106, 88 Cal.App. 67—Ohlson v. Callender, 262 P. 357, 87 Cal.App. 382—Milner v. Toliver, 261 P. 1069, 87 Cal.App. 38—O'Farrell v. Andrus, 260 P. 957, 86 Cal App. 474—Katz v. T. I. Butler Co., 254 P. 679, 81 Cal.App. 747—Henry v. Lingsweller, 253 P. 357, 81 Cal. App. 142.

Colo.—Berkowitz v. Barry, 7 P.2d 405, 90 Colo. 170.

Conn.—Domochel v. Becce, 175 A. 569, 119 Conn. 175—Alston v. Consolidated Motor Lines, 173 A. 899, 118 Conn. 707—Waselik v. Ferris Const. Co., 157 A. 642, 114 Conn. 85—Tomasko v. Raucci, 155 A. 64, 113 Conn. 274.

tributary negligence in failing to see an approach- | ing vehicle,¹⁵ or a projection therefrom;¹⁶ in al-

- D.C.—Washington Terminal Co. v. Martin, 167 F.2d 762.
- Fla.—Motor Transit Co. v. Betha, 173 So. 501, 127 Fla. 680.
- Ga.—Elfred v. Anchor Duck Mills, 179 S.E. 188, 50 Ga.App. 531.
- Idaho.—Asumendi v. Ferguson, 65 P. 2d 713, 57 Idaho 450—Wyland v. Twin Falls Canal Co., 285 P. 676, 48 Idaho 789.
- Ill.—Moore v. Young, 46 N.E.2d 852, 317 Ill.App. 474—Blumb v. Getz, 13 N.E.2d 1019, 294 Ill.App. 432—Krause v. Dodge Bros Corporation, 9 N.E.2d 262, 291 Ill.App. 604—Hoobler v. Voelpel, 246 Ill.App. 69.
- Ind.—Fishman v. Eads, 168 N.E. 495, 90 Ind.App. 137.
- Iowa.—Grahv v. Danner, 18 N.W.2d 595, 236 Iowa 700.
- Kan.—Turner v. George Rushton Baking Co., 11 P.2d 746, 135 Kan. 484.
- Ky.—Igo v. Smith, 138 S.W.2d 497, 282 Ky 336—Page's Adm'r v. Scott, 54 S.W.2d 23, 245 Ky. 648—Consolidated Coach Corporation v. Phillips, 34 S.W.2d 722, 236 Ky 823.
- Me.—Gerrish v. Ferris, 23 A.2d 891, 138 Me 213—Giles v. Perkins, 22 A.2d 132, 138 Me 96—Dyer v. Ayoub, 187 A. 757, 134 Me 502—Young v. Potter, 174 A. 387, 133 Me. 104.
- Md.—Crunkilton v. Hook, 42 A.2d 517, 185 Md 1—Sugar v. Ilafele, 17 A.2d 118, 179 Md 75—Jones v. Wayman, 182 A. 417, 169 Md 670—Epps v. Rainey, 181 A. 730, 169 Md. 701—Webb-Pepploe v. Cooper, 151 A. 235, 159 Md 426—Consolidated Gas Electric Light & Power Co. of Baltimore v. Rudiger, 134 A. 326, 151 Md 226.
- Mass.—Da Silvia v. Dalton, 76 N.E. 2d 8, 322 Mass. 102—Levin v. Twin Tanners, 60 N.E.2d 6, 318 Mass. 13—Wanamaker v. Shaw, 2 N.E.2d 209, 294 Mass. 416—Walsh v. Gillis, 176 N.E. 802, 276 Mass 33—Quinn v. Miller, 165 N.E. 872, 267 Mass. 84—Plitts v. Coulson, 164 N.E. 83, 265 Mass. 366—Moran v. Brodeur, 158 N.E. 349, 261 Mass. 120—Simonson v. Angel, 152 N.E. 52, 256 Mass. 258.
- Mich.—Ehlers v. Barbeau, 289 N.W. 241, 291 Mich. 528—Campbell v. Brown, 267 N.W. 877, 276 Mich. 449—Frye v. Brinker, 262 N.W. 263, 272 Mich. 339—Janse v. Haywood, 259 N.W. 347, 270 Mich 632—Sanderson v. Barkman, 249 N.W. 492, 264 Mich. 152—Tio v. Molter, 247 N.W. 772, 262 Mich. 656—Fenn v. Mills, 220 N.W. 770, 243 Mich. 634—Sudinski v. Krohn, 219 N.W. 665, 242 Mich. 497—Nord v. West Michigan Flooring Co., 214 N.W. 238, 238 Mich. 669—Arnell v. Gordon, 207 N.W. 825, 234 Mich. 140.
- Minn.—Horsman v. Bigelow, 239 N. W. 250, 184 Minn. 514—Saunders v. Yellow Cab Corporation of Minnesota, 233 N.W. 599, 182 Minn 62—Schmitt v. Jackson, 219 N.W. 912, 174 Minn. 577—Weckworth v. Proudfoot, 214 N.W. 52, 171 Minn. 321—Pollock v. McCormick, 210 N.W. 630, 169 Minn. 55—Yorek v. Potter, 207 N.W. 188, 166 Minn. 131.
- Miss.—Meridian Coca-Cola Co. v. Watson, 134 So. 824, 161 Miss. 108.
- Mo.—Murray v. St. Louis Public Service Co., App., 201 S.W.2d 775—Zeller v. Wolff-Wilson Drug Co., App., 51 S.W.2d 881—Nickelson v. Cowan, App., 9 S.W.2d 534.
- Mont.—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.
- N.H.—Lemariier v. A. Towle Co., 51 A.2d 42, 94 N.H. 216—Simoneau v. General Ice Cream Corporation, 154 A. 634, 85 N.H. 57.
- N.J.—Hargrave v. Stockloss, 21 A.2d 820, 127 N.J. Law 262—Williams v. Harriott, 180 A. 851, 115 N.J. Law 497—Cook v. Berg, 175 A. 210, 12 N.J.Misc. 814—Ravese v. Hock, 142 A. 343, 6 N.J.Misc. 629—Ziegler v. Bonine, 135 A. 77, 4 N.J.Misc. 1005.
- N.Y.—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 944, 260 App. Div. 1007—Schelker v. Commercial Credit Corporation, 7 N.Y.S.2d 823, 255 App.Div. 887—Valois v. Bodine, 291 N.Y.S. 377, 249 App.Div. 671.
- N.C.—Knight v. Bryant, 198 S.E. 644, 214 N.C. 822—Jones v. Bagwell, 177 S.E. 170, 207 N.C. 378.
- N.D.—Nichols v. Kluver, 237 N.W. 640, 61 N.D. 42.
- Ohio.—Horwitz v. Eurove, 193 N.E. 644, 129 Ohio St. 8, 96 A.L.R. 782—Closs v. Ball, 22 N.E.2d 141, 60 Ohio App. 513—Brinkley v. Rhea, 4 N.E.2d 270, 53 Ohio App. 128, petition dismissed Rhea v. Brinkley, 198 N.E. 40, 130 Ohio St. 172—Dreihls v. Taxicabs of Cincinnati, 186 N.E. 832, 45 Ohio App. 129.
- Okl.—Martin v. McLain, 87 P.2d 1075, 184 Okl. 418.
- Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226.
- Pa.—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—McClellan v. Fox, 177 A. 823, 318 Pa. 433—McCaftrey v. Schwartz, 132 A. 810, 285 Pa. 561—Baer v. Seidel, Com.Pl., 36 Berks Co. 201—Morris v. White, Com.Pl., 33 Luz.Leg.Reg. 437.
- Tex.—Corpus Juris quoted in Spears Dairy v. Bohrer, Civ.App., 54 S.W.2d 872, 876.
- Utah.—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.
- Vt.—Parker v. Smith, 135 A. 495, 100 Vt. 130.
- Va.—Smith v. Virginia Ry. & Power Co., 131 S.E. 440, 144 Va. 169.
- Wash.—Cannon v. City Electric & Fixture Co., 290 P. 828, 158 Wash. 46—Naccarato v. Pengelly, 269 P. 813, 148 Wash. 429.
- Wis.—Tillier v. Swette, 241 N.W. 341, 207 Wis. 373.
- 42 C.J. p 1267 note 11.
- Plaintiff held not negligent as matter of law**
- Cal.—Wickman v. Lowenstein, 28 P. 2d 681, 136 Cal.App. 279—Adams v. Kaiser, App., 285 P. 751—Webb v. Tischauer, 264 P. 526, 89 Cal.App. 267.
- Ind.—Indiana Ins Co v. Handlon, 24 N.E.2d 1003, 216 Ind. 442.
- Kan.—Finigan v. Ship By Truck Co., 283 P. 485, 129 Kan. 577.
- Ky.—Creasy v. Bunch, 22 S.W.2d 446, 232 Ky. 56.
- Md.—Porter v. Greenbrier Quarry Co., 155 A. 428, 161 Md. 34.
- Mass.—King v. Weitzman, 166 N.E. 711, 267 Mass. 447.
- Mo.—Weber v. Evans, App., 15—S.W.2d 370.
- Wis.—Bump v. Voights, 249 N.W. 508, 212 Wis 256.
- 42 C.J. p 1147 note 37.
- Evidence held sufficient to go to jury**
- Ill.—Alden v. Coultrip, 275 Ill.App. 306.
- Mass.—Hall v. Shain, 197 N.E. 437, 291 Mass 506.
- Tex.—Landers v. Overaker, Civ.App., 141 S.W.2d 451, error dismissed. Judgment correct.
- Nonsuit held properly denied**
- N.C.—Lewis v. Hunter, 193 S.E. 814, 212 N.C. 504.
- Defendant intentionally running down plaintiff**
- In action for intentionally striking plaintiff with automobile, record did not disclose, as matter of law, that plaintiff placed herself in driveway with intention of being injured, or when knowing car could not be stopped in time; nor did it authorize holding, as matter of law, that plaintiff realized danger in time to withdraw from peril.—Perkins v. Nall, Tex.Civ.App., 37 S.W.2d 211, error refused.
- Emergency as excusing conduct**
- Cal.—Anthony v. Hobbie, App., 193 P.2d 748.
- 42 C.J. p 1267 note 11 [c].
15. N.Y.—Zajac v. Rochester Soda Water Co., 20 N.Y.S.2d 531, 259 App.Div. 1056.
- Held not negligence as matter of law**
- Ohio.—Riegel v. Oakwood St. Ry. Co., App., 42 N.E.2d 678.
16. Pa.—Dorris v. Bridgman & Co., 145 A. 827, 296 Pa. 198.

lowing a very short distance as clearance between himself and the vehicle;¹⁷ in walking or running into the side of a moving vehicle;¹⁸ in running out into the street or highway;¹⁹ or in lying in the street.²⁰ The rule has also been applied in determining plaintiff's contributory negligence where plaintiff, at the time he was struck by defendant's vehicle, was on the sidewalk;²¹ or on a loading platform;²² or upon the shoulder of the highway;²³ or in a private driveway;²⁴ or where plaintiff was injured by the motor vehicle backing into him.²⁵

Incidental questions of fact. The trier of facts must ordinarily also determine various incidental questions of fact,²⁶ such as the facts of the acci-

dent, that is, how and where the accident occurred;²⁷ whether the pedestrian saw or heard the vehicle;²⁸ whether the pedestrian was on the pavement at the time of the accident;²⁹ whether plaintiff walked into the vehicle;³⁰ whether plaintiff pedestrian performed his duty of using ordinary care for his own safety;³¹ and whether the presumption that the pedestrian acted as a prudent person was rebutted.³²

Where the evidence is uncontradicted and the inference to be made therefrom is clear, the court must hold as a matter of law that plaintiff either was,³³ or was not,³⁴ guilty of contributory negligence.

Standing or sitting on highway. Where the evi-

17. Cal.—Webb v. Tischauser, 264 P. 526, 89 Cal.App. 267.

Plaintiff held not negligent as matter of law

Cal.—Webb v. Tischauser, supra.

18. Ill.—Scally v. Flannery, 11 N.E. 2d 123, 292 Ill.App. 349.

N.Y.—Frey v. Green Bus Lines, 19 N.Y.S.2d 810, 259 App.Div. 891, reargument denied 21 N.Y.S.2d 389, 259 App.Div. 1029, appeal denied 29 N.E.2d 397, 284 N.Y. 818.

Wis.—Jones v. Nolan, 222 N.W. 229, 197 Wis. 311.

Conduct held not negligence as matter of law

Tex.—Yanowski v. Fort Worth Transit Co., Civ.App., 204 S.W.2d 1091.

19. U.S.—Nettles v. Southwest Telephone Co., D.C. Ark., 26 F.Supp. 12, appeal dismissed, C.C.A., Nettles v. Southwest Telephone Co., 106 F.2d 1010.

Or.—Greenslitt v. Three Bros Baking Co., 133 P.2d 597, 170 Or. 345.

20. Mass.—Snow v. Nickerson, 22 N.E.2d 593, 304 Mass. 63.

21. Kan.—Stotts v. Taylor, 285 P. 571, 130 Kan. 158.

Ky.—Guyan Chevrolet Co. v. Dillow, 95 S.W.2d 796, 264 Ky. 812.

Ohio.—Riegel v. Oakwood St. Ry. Co., App., 42 N.E.2d 676.

Pa.—Crago v. Sickman, 165 A. 841, 310 Pa. 546—Hall v. Robert Hawthorne Co., 55 A.2d 557, 161 Pa. Super. 470.

R.I.—Goff v. Craft's Inc., 20 A.2d 520, 67 R.I. 11, reargument denied 21 A.2d 10, 67 R.I. 11—Peters v. United Electric Rys. Co., 189 A. 901, 57 R.I. 311.

W.Va.—Wuncke v. Welker, 36 S.E. 2d 410, 128 W.Va. 299.

Held not negligence as matter of law
Mass.—White v. Checker Taxi Co., 187 N.E. 49, 284 Mass. 73.

Pa.—Ross v. Rifle, 164 A. 913, 310 Pa. 176.

22. Ohio.—Rider v. Gellenbeck, 48 N.E.2d 888, 71 Ohio App. 457.

23. Cal.—Coughman v. Harman, 26 P.2d 851, 175 Cal.App. 49.

Conn.—Minnaci v. Logudice, 11 A.2d 354, 126 Conn. 345.

Iowa.—James v. Roach, 290 N.W. 87, 228 Iowa 129.

Minn.—Allanson v. Ceynar, 280 N.W. 6, 203 Minn. 93.

Wash.—Hanson v. Ellers, 2 P.2d 719, 164 Wash. 185.

24. Cal.—Gootar v. Levin, 293 P. 706, 109 Cal.App. 703.

Iowa.—Dickeson v. Lzicar, 225 N.W. 406, 208 Iowa 275.

Mass.—Milliman v. Coulter, 17 N.E. 2d 162, 301 Mass. 320.

Mo.—Steinmetz v. Saathoff, App., 84 S.W.2d 434.

25. U.S.—Levin v. Joseph E. Seagram & Sons, C.C.A. Ill., 158 F.2d 55, certiorari denied Joseph E. Seagram & Sons v. Levin, 67 S.Ct. 971, 330 U.S. 835, 91 L.Ed. 1282.

Ark.—Missouri Pac. Transp. Co. v. George, 133 S.W.2d 37, 198 Ark. 1110.

D.C.—Yellow Cab Co. of D. C. v. Griffith, Mun.App., 40 A.2d 340.

Ky.—Grimes v. Thompson, 289 S.W. 290, 217 Ky. 389.

Md.—Universal Credit Co. v. Merryman, 195 A. 689, 173 Md. 256.

Or.—Sears v. Goldsmith, 298 P. 219, 136 Or. 151.

26. Ky.—Grant v. Adams, 291 S.W. 785, 218 Ky. 535.

27. Ky.—Smith v. Dunning, 122 S.W.2d 781, 275 Ky. 733.

28. Cal.—Bailey v. Wilson, 61 P.2d 68, 16 Cal.App.2d 645.

29. Ill.—Wolfram v. Bennehoff, 56 N.E.2d 849, 324 Ill.App. 16.

Ky.—Brown v. Gibbs, 172 S.W.2d 62, 294 Ky. 423.

30. N.Y.—Frey v. Green Bus Lines, 19 N.Y.S.2d 810, 259 App.Div. 891,

reargument denied 21 N.Y.S.2d 889, 259 App.Div. 1029, appeal denied. Va.—Moore v. Scott, 169 S.E. 902, 160 Va. 610.

31. Cal.—Crooks v. Doeg, 40 P.2d 590, 4 Cal.App.2d 21.

Ill.—Schmidt v. Anderson, 21 N.E.2d 825, 301 Ill.App. 28—Nordman v. Carlson, 10 N.E.2d 53, 291 Ill.App. 438.

Iowa.—James v. Roach, 290 N.W. 87, 228 Iowa 129.

Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

Tenn.—Harbor v. Wallace, App., 211 S.W.2d 172.

Wash.—Hadley v. Simpson, 127 P. 2d 260, 14 Wash.2d 93—Hadley v. Simpson, 115 P.2d 675, 9 Wash.2d 541.

32. Cal.—Hoppe v. Bradshaw, 108 P. 2d 947, 42 Cal.App.2d 334—Whicker v. Crescent Auto Co., 66 P.2d 749, 20 Cal.App.2d 240.

Pa.—Nalevanko v. Marie, 195 A. 49, 328 Pa. 586—Giles v. Bennett, 148 A. 90, 298 Pa. 158.

33. Cal.—Spring v. Tawa, 192 P. 1051, 49 Cal.App. 100.

Ill.—Fickerle v. Herman Seekamp, Inc., 274 Ill.App. 310.

Me.—Smith v. Joe's Sanitary Market, 169 A. 900, 132 Me. 234.

Mich.—Neeb v. Jacobson, 224 N.W. 401, 245 Mich. 678.

Mo.—Iman v. Walter Freund Bread Co., 58 S.W.2d 477, 332 Mo. 461.

Ohio.—Focht v. Justis, 77 N.E.2d 506, 81 Ohio App. 297.

Pa.—Oldroyd v. W. W. Kirby & Son, 176 A. 203, 317 Pa. 220—Bateman v. Zorocoff, 2 A.2d 574, 133 Pa. Super. 245—Manion v. Brooke, Com. Pl., 60 Montg.Co. 221, 58 York Leg. Rec. 118.

S.D.—Culhane v. Waterhouse, 215 N.W. 885, 51 S.D. 584.

34. Ky.—Adams v. Parish, 225 S.W. 467, 189 Ky. 628.

Minn.—Lee v. Zaske, 6 N.W.2d 798, 213 Minn. 244.

dence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact whether a pedestrian standing or sitting upon the highway and struck by defendant was guilty of contributory negligence,³⁵ in failing to keep a lookout or a proper lookout,³⁶ in failing to see a motor vehicle approaching,³⁷ in standing behind a parked car,³⁸ or in sitting upon the curb.³⁹

(2) Walking along Highway

It is a question for the trier of the facts, on conflicting evidence, whether a pedestrian walking along the highway was guilty of contributory negligence.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the jury or other trier of facts whether a pedestrian walking along the highway and struck by defendant was guilty of contributory negligence.⁴⁰ This rule has been applied in determining whether plaintiff was guilty of contributory negligence in walking along the traveled portion of the road or highway,⁴¹ even though a sidewalk or other safe way for walking is provided;⁴² in walking along the shoulder of the high-

35. Ark.—Healy & Roth v. Balmat, 74 S.W.2d 242, 189 Ark. 442.

Cal.—Froehnert v. Heidt, 59 P.2d 541, 15 Cal App 2d 129—Smith v. Pacific Greyhound Corporation, 35 P.2d 169, 139 Cal App 696.

Ill.—Kirman v. Hutchinson, 254 Ill. App 469

Iowa.—Yale v. Hanson, 288 N.W. 905, 227 Iowa 813.

Me.—Huntoon v. Wiley, 49 A 2d 910.

Md.—Lashley v. Dawson, 160 A 738, 162 Md 549

Mich.—Breen v. Thole, 229 N.W. 498, 249 Mich 666

Minn.—Hoppe v. Peterson, 265 N.W. 338, 196 Minn 538—Scheppmann v. Swennes, 215 N.W. 861, 172 Minn. 493.

NH.—Feuerstein v. Grady, 169 A. 622, 86 N.H. 408.

N.J.—Williams v. Hershfield Agency, 176 A 574, 13 N.J.Misc. 134—Schoenfelder v. Pope, 158 A 828, 10 N.J.Misc. 247

N.Y.—Muller v. Heuchel, 282 N.Y. S 649, 246 App Div 547

N.C.—Baker v. Perrott, 46 S.E.2d 461, 228 N.C. 558.

Tenn.—Henry v. Sharp, 9 Tenn.App 350

Utah—Nelson v. Lott, 17 P.2d 272, 81 Utah 265.

Va.—Samples v. Trimble, 182 S.E. 247, 165 Va 306.

W.Va.—Redmond v. Greater Fairmont Bakery, 171 S.E. 109, 114 W. Va 131.

42 C.J. p 1269 note 24.

Court sitting without jury

Cal.—Cotton v. Kerns, 32 P.2d 153, 138 Cal App 374.

Held not negligence as matter of law
Ala.—Cooper v. Agee, 132 So. 173, 222 Ala. 334.

Cal.—Foerster v. Direito, 170 P.2d 986, 75 Cal.App.2d 323.

La.—Perrodin v. Thibodeaux, App., 191 So. 148.

Neb.—Grantham v. Watson Bros. Transp. Co., 9 N.W.2d 157, 142 Neb. 367.

Pa.—Morin v. Kreidt, 164 A. 799, 310 Pa. 90.

Evidence held sufficient to go to jury
Md.—Fotterall v. Hillisary, 13 A.2d 358, 178 Md. 335.

Incidental questions of fact are for the jury to determine—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89.

36. Mich.—Molitor v. Burns, 28 N.W.2d 106, 318 Mich. 261.
42 C.J. p 1269 note 24 [a].

37. Conn.—Larsen v. Thomas, 176 A. 400, 119 Conn 335

Conduct held not negligence as matter of law
Conn.—Larsen v. Thomas, supra.

38. Pa.—Venorick v. Revetta, Com. Pl. 5 Kay L.J. 165, reversed on other grounds 33 A.2d 655, 152 Pa. Super 455.

Held not negligence as matter of law
Pa.—Pedlow v. Lippens, 40 A 2d 426, 351 Pa. 259.

39. N.J.—Vander Pyle v. Alexander Hamilton Garage, 192 A. 436, 118 N.J.Law 238.

40. Cal.—Houser v. Bozwell, 182 P.2d 314, 80 Cal App 2d 702—Takako Inai v. Ede, 139 P.2d 76, 59 Cal App 2d 549—Blodget v. Preston, 5 P.2d 25, 118 Cal App. 297.

Conn.—Tomasko v. Itauci, 155 A 64, 113 Conn. 274—Schmeiske v. Laubin, 145 A 890, 109 Conn 206.

Fla.—Clair v. Meriwether, 174 So. 591, 127 Fla. 841.

Ill.—Rowley v. Rust, 26 N.E.2d 520, 304 Ill.App. 364.

Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649

Kan.—Moler v. Cox, 149 P.2d 611, 158 Kan. 589.

Mass.—Duff v. Webster, 51 N.E.2d 957, 315 Mass. 102—Lucier v. Norcross, 37 N.E.2d 498, 310 Mass. 213, 137 A.L.R. 749.

Mich.—Reetz v. Schemansky, 270 N.W. 811, 278 Mich. 626.

Minn.—Ralston v. Tomlinson, 292 N.W. 24, 207 Minn. 485—Boyer v. Josephson, 240 N.W. 538, 185 Minn. 221.

N.H.—Dane v. MacGregor, 53 A.2d 290, 94 N.H. 294—Monroe v. Sterling, 26 A 2d 21, 92 N.H. 11.

N.J.—Klein v. Frank, 160 A. 411, 109 N.J.Law 221.

Pa.—O'Leary v. Willis, 200 A. 125, 131 Pa Super. 578.

R.I.—Geremia v. Yellow Cab Co. of Rhode Island, 144 A. 771.

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Va.—Catron v. Birchfield, 165 S.E. 499, 159 Va 60.

W.Va.—O'Dell v. Universal Credit Co., 191 S.E. 568, 118 W.Va. 678.

42 C.J. p 1267 note 15.

Plaintiff held not negligent as matter of law

Cal.—Peatfield v. Pacific Gas Radiator Co., 265 P. 324, 89 Cal App 625

Iowa—Orr v. Hart, 258 N.W. 84, 219 Iowa 408.

Me.—Barlow v. Lowery, 59 A 2d 702.

N.H.—Dorrien v. Sirois, 175 A. 236, 87 N.H. 141

Pushing pushcart without light on it
Idaho—Franklin v. Wooters, 45 P 2d 804, 55 Idaho 619.

41. US.—White v. State of Maryland, to Use of Anderson, CCA Md., 106 F 2d 392

Cal.—Armstrong v. Sengo, 61 P.2d 1188, 17 Cal App 2d 300.

Mich.—Kemp v. Aldrich, 282 N.W. 833, 286 Mich 591, reversed on other grounds 286 N.W. 81, 286 Mich 715.

N.J.—Cordts v. Vanderbilt, 147 A. 464, 7 N.J.Misc. 856

Pa.—Dennis v. Munyan, 11 A.2d 566, 139 Pa Super. 310—Wynn v. Diglossia, Com Pl., 58 Montg Co. 45.

R.I.—Wilmarth v. Cray, 149 A. 612, 50 R.I. 496

Held not negligence as matter of law
Neb.—Nichols v. Havlat, 1 N.W.2d 829, 110 Neb. 723, opinion set aside on other grounds 7 N.W.2d 84, 142 Neb. 534.

N.M.—Lopez v. Townsend, 82 P.2d 921, 42 N.M. 601.

Ohio.—Sprung v. E. I. Dupont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94.

R.I.—Banewicz v. Sullivan, 20 A.2d 273, 66 R.I. 494.

42. Idaho.—Franklin v. Wooters, 45 P.2d 804, 55 Idaho 619.

Pa.—Christopher v. General Baking

way;⁴³ in walking along the highway at night;⁴⁴ in failing to maintain a proper lookout;⁴⁵ or to look back or behind;⁴⁶ or while walking on the left side of the highway, against the traffic.⁴⁷ However, where the evidence of contributory negligence of a pedestrian is insufficient, the issue should not be submitted to the jury but should be decided by the court.⁴⁸

Various incidental questions of fact have been held to be for the trier of facts to determine.⁴⁹

Walking on right side of road. It is ordinarily for the jury to decide whether plaintiff was guilty

of contributory negligence where he was walking upon the right side of the road or highway,⁵⁰ particularly where he was acting in violation of regulations requiring the pedestrian to walk facing traffic.⁵¹ However, it has also been held that the fact that plaintiff was walking upon the right side of the highway, in violation of a regulation, constitutes contributory negligence as a matter of law,⁵² unless there is evidence of justification for such conduct;⁵³ but whether such conduct was justified has been held to be a question for the jury.⁵⁴

Co., 30 A.2d 124, 346 Pa. 285—Gillbert v. Stipa, 41 A.2d 284, 157 Pa. Super. 1—Bright v. Stettenbauer, Com.Pl., 32 Berks Co.L.J. 154, reversed on other grounds 15 A.2d 676, 339 Pa. 545—Wynn v. DiGlosia, Com.Pl., 58 Montg.Co. 45.
42 C.J. p 1267 note 15 [d].

Pedestrian held not negligent as matter of law

Me.—Cole v. Wilson, 143 A. 178, 127 Me. 316.

43. N.Y.—La Duke v. International Paper Co., 17 N.Y.S.2d 608, 258 App.Div. 375—Hayes v. Fairbanks, 9 N.Y.S.2d 226, 255 App.Div. 943.
Tenn.—Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 24 Tenn.App. 487.
Va.—Gregory v. Daniel, 4 S.E.2d 786, 173 Va. 442.

44. U.S.—White v. State of Maryland, to Use of Anderson, C.C.A. Md., 106 F.2d 392—Speich v. Cromley, C.C.A.Pa., 94 F.2d 543.

Ala.—Pittman v. Calhoun, 165 So. 391, 231 Ala. 460.

Idaho.—Geist v. Moore, 70 P.2d 403, 58 Idaho 149.

Ind.—Cottrell v. Lorenz, 4 N.E.2d 685, 102 Ind.App. 659.

Neb.—Carlson v. Roberts, 274 N.W. 473, 133 Neb. 166.

R.I.—Banewicz v. Sullivan, 20 A.2d 273, 66 R.I. 494—Bryan v. Green, 150 A. 498.

45. Ga.—Wright v. Bales, 7 S.E.2d 765, 62 Ga.App. 328.

Ky.—Trainor's Adm'r v. Keller, 79 S.W.2d 232, 257 Ky. 840.

Ohio.—Sprung v. E. I. Dupont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94.

46. Cal.—Burk v. Extrafine Bread Bakery, 280 P. 522, 208 Cal. 105—Erickson v. Grady, 6 P.2d 1002, 119 Cal.App. 596—Strasburger v. Prescott, 295 P. 357, 111 Cal.App. 104.
Mich.—Marth v. Lambert, 287 N.W. 916, 290 Mich. 557.

N.H.—Burns v. Cote, 164 A. 771, 86 N.H. 167.

N.J.—Kovacs v. Ford, 158 A. 473, 108 N.J.Law 379.

Conduct held not negligence as matter of law

Mich.—Thurkow v. City of Detroit, 291 N.W. 29, 292 Mich. 617—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19.

Neb.—Nichols v. Havlat, 1 N.W.2d 829, 140 Neb. 723, opinion set aside on other grounds 7 N.W.2d 84, 142 Neb. 531.

N.H.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

47. Ark.—Lion Oil Refining Co. v. Smith, 133 S.W.2d 895, 199 Ark. 397.

Ky.—Igo v. Smith, 138 S.W.2d 497, 282 Ky. 336—Fork Ridge Bus Line v. Matthews, 58 S.W.2d 615, 248 Ky. 419.

N.H.—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.

42 C.J. p 1267 note 15 [b].

Evidence held sufficient to go to jury
Ill.—McGee v. Henry, 39 N.E.2d 412, 313 Ill.App. 147.

48. Neb.—Johnson v. Anoka-Butte Lumber Co., 5 N.W.2d 114, 141 Neb. 851—Cotten v. Stolley, 248 N.W. 384, 124 Neb. 855.

49. Pa.—Wynn v. DiGlosia, Com.Pl., 58 Montg.Co. 45.

Whether plaintiff could have seen vehicle

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Whether plaintiff walked on right

Wis.—Lockwe v. Ritter, 241 N.W. 339, 207 Wis. 333.

50. Cal.—Conness v. McCarty, 14 P. 2d 507, 216 Cal. 415—Gayton v. Pacific Fruit Express Co., 15 P.2d 217, 127 Cal.App. 50.

Ky.—Kelly v. Marcum, 114 S.W.2d 1102, 272 Ky. 609.

Mich.—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19—Korstange v. Kroese, 246 N.W. 127, 261 Mich. 298.

N.Y.—Tedia v. Ellman, 19 N.E.2d 987, 280 N.Y. 124.

Tenn.—Hodge v. Hamilton, 293 S.W. 752, 155 Tenn. 403.

Utah.—Chatelain v. Thackeray, 100 P.2d 191, 98 Utah 525.

Wis.—Rodaks v. Herr, 251 N.W. 453, 213 Wis. 310.

42 C.J. p 1267 note 15 [a].

Held not negligence as matter of law
Neb.—Nichols v. Havlat, 1 N.W.2d 829, 140 Neb. 723, opinion set aside on other grounds 7 N.W.2d 84, 142 Neb. 534—Cotten v. Stolley, 248 N.W. 384, 124 Neb. 855.

51. Miss.—Rasque v. Anticich, 172 So. 141, 177 Miss. 855.

N.J.—Mursky v. Brody, 181 A. 273, 13 N.J. Misc. 725.

N.Y.—Caloro v. Smith, 77 N.Y.S.2d 621, 273 App.Div. 927.

Whether district was residential

Whether pedestrian injured by automobile while walking upon right side of highway was struck in residence district as defined by statute, and hence had legal right to walk on either side of highway, was for jury.—McGough v. Hendrickson, 136 P.2d 110, 58 Cal.App.2d 60.

Conduct held not negligence as matter of law

(1) In general.

Ark.—Snow v. Riggs, 290 S.W. 591, 172 Ark. 835.

Ill.—Rowley v. Rust, 26 N.E.2d 520, 304 Ill.App. 364.

Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649.

N.J.—Hamilton v. Althouse, 178 A. 792, 115 N.J.Law 248.

N.C.—Lewis v. Watson, 47 S.E.2d 484, 229 N.C. 20.

(2) Walking upon the right shoulder of the road has been held not to constitute contributory negligence under the rule as a matter of law. Cal.—Summers v. Dominguez, 84 P.2d 237, 29 Cal.App.2d 308.

Ill.—Blumb v. Getz, 8 N.E.2d 620, 366 Ill. 273, conformed to 13 N.E.2d 1019, 294 Ill.App. 432.

52. Iowa.—Anderson v. Holsteen, 26 N.W.2d 855, 238 Iowa 630.

Minn.—Wojtowicz v. Belden, 1 N.W. 2d 409, 211 Minn. 461.

53. Iowa.—Anderson v. Holsteen, 26 N.W.2d 855.

54. N.H.—Stowe v. Hartford, 18 A.

(3) Crossing Highway

Where the evidence is conflicting, it is for the trier of facts to determine whether a pedestrian was guilty of contributory negligence while crossing the highway.

Where the evidence is conflicting or different

inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of the facts whether a pedestrian crossing the highway and struck by defendant was guilty of contributory negligence.⁵⁵

- 2d 382, 91 N.H. 261—Murphy v. Granz, 17 A.2d 449, 91 N.H. 244.
Wash.—Gerl v. Bender, 168 P.2d 144, 25 Wash.2d 50.
55. Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381, 60 Ariz. 354.
Ark.—Coca Cola Bottling Co. v. McNulty, 50 S.W.2d 577, 185 Ark. 970.
Cal.—Cooper v. Smith, 289 P. 614, 209 Cal. 562—Filson v. Balkins, 273 P. 578, 206 Cal. 209—Edwards v. McCormick, 181 P.2d 58, 79 Cal.App.2d 800—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183—Jones v. Heinrich, 122 P.2d 304, 49 Cal.App.2d 702—Schulman v. Los Angeles Ry. Corporation, 111 P.2d 924, 44 Cal.App.2d 122—King v. Unger, 94 P.2d 1040, 35 Cal.App.2d 192—Guillot v. Hagman, 86 P.2d 865, 30 Cal.App.2d 582—Bailey v. Wilson, 61 P.2d 68, 16 Cal.App.2d 645—Olliphant v. Brown, 46 P.2d 790, 7 Cal.App.2d 584—Strange v. Los Angeles Examiner, 12 P.2d 678, 124 Cal.App. 419—Meneau v. Nutter, 12 P.2d 138, 124 Cal.App. 29—Lincoln v. Williams, 6 P.2d 563, 119 Cal.App. 498—Tietman v. Red Top Cab Co., 3 P.2d 381, 117 Cal.App. 40—Maggart v. Bell, 2 P.2d 516, 116 Cal.App. 306—McVea v. Nickols, 286 P. 761, 105 Cal.App. 28—Jones v. Barion, 283 P. 885, 103 Cal.App. 59—Sonstette v. Bush, 283 P. 336, 102 Cal.App. 396—Ching Wing v. Kishi, 268 P. 483, 92 Cal.App. 495.
Colo.—Schneider v. Ingalsbe, 280 P. 880, 86 Colo. 265.
Conn.—Rosen v. Goldstein, 24 A.2d 840, 128 Conn. 605—Marini v. Wynn, 20 A.2d 400, 128 Conn. 63—Puza v. Hamway, 193 A. 776, 123 Conn. 205—Schofield v. Spelke, 177 A. 134, 119 Conn. 699—Fagan v. Ohler, 153 A. 778, 112 Conn. 667—Miceli v. Chappell, 150 A. 508, 111 Conn. 723—Lampe v. Simpson, 138 A. 141, 106 Conn. 356.
Fla.—Rhodes v. Grund, 146 So. 558, 108 Fla. 323.
Ga.—Peck v. Baker, 46 S.E.2d 751, 76 Ga.App. 588.
Ill.—Goldberg v. Capitol Freight Lines, 47 N.E.2d 67, 382 Ill. 283—Schneff v. Mirring, 69 N.E.2d 352, 329 Ill.App. 511—Kawkes v. Richter Food Products, 49 N.E.2d 852, 320 Ill.App. 134—Derango v. Rubin, 34 N.E.2d 719, 310 Ill.App. 536—Synwolt v. Klank, 15 N.E.2d 895, 296 Ill.App. 79—Cobb v. Butler, 2 N.E.2d 568, 285 Ill.App. 585—Hoobler v. Veolpel, 246 Ill.App. 69.
Iowa.—Hayes v. Stunkard, 10 N.W.2d 19, 233 Iowa 582—Swan v. Dailey-Luce Auto Co., 293 N.W. 468, 228 Iowa 880—Scott v. McKelvey, 290 N.W. 729, 228 Iowa 264—Heacock v. Baule, 245 N.W. 753, supplemental opinion 249 N.W. 437, 216 Iowa 311, 93 A.L.R. 151.
Kan.—Moore v. Wichita Yellow Cab Co., 12 P.2d 736, 136 Kan. 99.
Ky.—Honaker v. Crutchfield, 57 S.W.2d 502, 247 Ky. 495—Nesler v. Anderson, 10 S.W.2d 281, 225 Ky. 819.
Me.—Hill v. Finnermore, 172 A. 826, 132 Me. 459.
Md.—Legum v. State, for Use of Moran, 173 A. 565, 167 Md. 339.
Mass.—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216—McSorley v. Risdon, 180 N.E. 145, 278 Mass. 415—Karpowicz v. Manasus, 176 N.E. 497, 275 Mass. 413—Martin v. Florin, 172 N.E. 895, 273 Mass. 13—Hutchinson v. H. E. Shaw Co., 172 N.E. 788, 273 Mass. 51—Du Bois v. Powdrell, 171 N.E. 474, 271 Mass. 394—Tyrrell v. Caruso, 168 N.E. 924, 269 Mass. 379—Barrett v. Checker Taxi Co., 160 N.E. 792, 263 Mass. 252—Puccia v. Seignie, 154 N.E. 765, 258 Mass. 234.
Mich.—Brow v. Bozyk, 26 N.W.2d 586, 317 Mich. 31—Dokev v. Carpenter, 2 N.W.2d 802, 300 Mich. 648—Maloney v. Moore, 292 N.W. 356, 293 Mich. 428—Holmes v. Merson, 280 N.W. 139, 285 Mich. 136—Ritter v. Terman, 280 N.W. 136, 285 Mich. 128—Lagassée v. Quick, 262 N.W. 915, 273 Mich. 295—Lawrence v. Bartling & Dull Co., 238 N.W. 180, 255 Mich. 580—Gray v. Elliott, 236 N.W. 779, 254 Mich. 275—Leary v. Fisher, 227 N.W. 767, 248 Mich. 574—Fenn v. Mills, 220 N.W. 770, 243 Mich. 634—Rowland v. Brown, 213 N.W. 90, 237 Mich. 570.
Minn.—Smith v. Barry, 17 N.W.2d 324, 219 Minn. 182—Schendel v. Klein, 9 N.W.2d 342, 215 Minn. 73—Bird v. Johnson, 272 N.W. 168, 199 Minn. 252—Wiester v. Kaufer, 247 N.W. 237, 188 Minn. 341.
Mo.—Pitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—Smith v. Gately Stores, App., 24 S.W.2d 200.
N.J.—Gribbin v. Fox, 32 A.2d 853, 130 N.J.Law 357, affirmed 35 A.2d 719, 131 N.J.Law 187—Hyman v. Bierman, 31 A.2d 762, 130 N.J.Law 170—Dobrzynski v. Liveright, 194 A. 160, 118 N.J.Law 589—Poling v. Meles, 178 A. 737, 115 N.J.Law 191—McConachy v. Skalerew, 171 A. 817, 113 N.J.Law 17—Lowe v. Tegen, 185 A. 526, 14 N.J.Misc. 419—Cofone v. Gnassi, 136 A. 505, 5 N.J.Misc. 343.
N.Y.—Dranofsky v. Collins, 67 N.Y. S.2d 620, 271 App.Div. 932—Aetna Cas. & Sur. Co. v. Tucker, 59 N.Y.S.2d 355, 270 App.Div. 783—Olsen v. Jacklowitz, 11 N.Y.S.2d 601, 256 App.Div. 1107, appeal denied—Pierce v. Armour & Co., 235 N.Y.S. 532, 226 App.Div. 393, affirmed 171 N.E. 786, 253 N.Y. 568.
N.D.—Schlinker v. Jaskowskiak, 232 N.W. 897, 60 N.D. 136.
Ohio.—Martin v. Heintz, 184 N.E. 852, 126 Ohio St. 227—Seward v. Schmidt, App., 49 N.E.2d 696—Weaver v. Liberty Cabs, App., 33 N.E.2d 853—Valentine v. Pavilonis, 160 N.E. 737, 27 Ohio App. 26.
Okla.—Phillips Petroleum Co. v. Johnson, 72 P.2d 488, 181 Okl. 256.
Or.—Siskel v. Calhoun, 34 P.2d 659, 147 Or. 606—Krieger v. Doolittle, 18 P.2d 1041, 142 Or. 122.
Pa.—Halkias v. Lakjer, 50 A.2d 286, 355 Pa. 422—Tancredi v. M. Buten & Sons, 38 A.2d 55, 350 Pa. 35—Pensak v. Peerless Oil Co., 166 A. 792, 311 Pa. 207—Robertson v. Jewel Tea Co., 163 A. 530, 309 Pa. 293—Giles v. Bennett, 148 A. 90, 298 Pa. 158—Kolb v. Isenberg, 28 A.2d 729, 150 Pa.Super. 482—Pinto v. Bell Fruit Co., 24 A.2d 768, 148 Pa. Super. 132—Wren v. Miller, 194 A. 326, 128 Pa.Super. 507—Clarke v. Hughes, 165 A. 532, 108 Pa.Super. 586—Henry v. Butler, 161 A. 556, 106 Pa.Super. 200—Vivino v. Nevius, 98 Pa.Super. 574—Jackson v. Chapman, Com.Pl., 48 Dauph. Co. 145.
R.I.—Young v. Thornley, 166 A. 690.
Tenn.—Union Transfer Co. v. Finch, 64 S.W.2d 222, 16 Tenn.App. 293.
Tex.—Merritt v. Phoenix Refining Co., Civ.App., 103 S.W.2d 415—Kooek v. Goodnight, Civ.App., 71 S.W.2d 927, error refused.
Va.—Holland v. Edelblute, 20 S.E.2d 506, 179 Va. 685—Heindl v. Perritt, 163 S.E. 93, 158 Va. 104.
Wash.—Miller v. Edwards, 171 P.2d 821, 25 Wash.2d 635—Lindberg v. Steele, 104 P.2d 940, 5 Wash.2d 54—Kuhnhausen v. Woodbeck, 97 P.2d 1099, 2 Wash.2d 338—Demase v. Nemitz, 258 P. 25, 144 Wash. 404.
W.Va.—Otte v. Miller, 24 S.E.2d 90, 125 W.Va. 317.
42 C.J. p 1268 note 17.
- Question held for court sitting without jury**
Cal.—Flach v. Fikes, 267 P. 1079, 204 Cal. 329.
- Conduct held not negligence as matter of law**
Cal.—Anthony v. Hobbie, 155 P.2d 826, 25 Cal.2d 814—Lang v. Barry,

The rule has been applied in determining whether plaintiff was guilty of contributory negligence while crossing at an intersection or regular crossing or crosswalk;⁵⁶ or was guilty of contributory neg-

- 161 P.2d 949, 71 Cal.App.2d 121—Clark v. Bowers, 2 P.2d 486, 116 Cal.App. 88.
- Md.—Matthews v. Pohlmyer, 176 A. 479, 167 Md. 689.
- Mass.—Hall v. Shain, 197 N.E. 437, 291 Mass. 501.
- Mich.—Arndt v. Grayewski, 271 N.W. 740, 279 Mich. 224.
- N.H.—Gosselin v. Lemay, 153 A. 716, 85 N.H. 13.
- N.M.—Russell v. Davis, 37 P.2d 536, 38 N.M. 533.
- N.Y.—Rabinowitz v. Solomon, 223 N.Y.S. 264, 221 App.Div. 366.
- Or.—Hinckley v. Marsh, 263 P. 886, 124 Or. 1.
- Tex.—Bonz v. White's Auto Stores, 172 S.W.2d 481, 141 Tex. 366.
- Evidence held sufficient to go to jury**
- Ill.—Cihal v. Carver, 79 N.E.2d 82, 334 Ill.App. 234.
- Iowa.—Robertson v. Carlgren, 234 N.W. 824, 211 Iowa 963.
- Mass.—Lekarczyk v. Dupre, 163 N.E. 642, 265 Mass. 33.
- Vt.—Taylor v. Mayhew, 195 A. 249, 109 Vt. 251.
- 42 C.J. p 1268 note 17 [g].
- Stepping from behind or between cars or obstruction**
- Cal.—Hoppe v. Bradshaw, 108 P.2d 947, 42 Cal.App.2d 334—Rasic v. Schultheiss, 9 P.2d 550, 121 Cal.App. 560.
- Conn.—Spagnola v. New Method Laundry Co., 152 A. 403, 112 Conn. 399.
- Ill.—Mulligan v. Andel, 245 Ill.App. 132.
- Iowa.—Sparks v. Long, 11 N.W.2d 716, 234 Iowa 21—O'Hara v. Chaplin, 233 N.W. 516, 211 Iowa 404.
- Ky.—Smith v. Goodwin, 165 S.W.2d 976, 292 Ky. 37—Williams v. Schmidt, 280 S.W. 494, 213 Ky. 122.
- Me.—Cooper & Co. v. American Can Co., 153 A. 889, 130 Me. 76.
- Md.—Weitzel v. List, 155 A. 425, 161 Md. 28.
- Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.
- At night**
- Conn.—Haskin v. Mulligan, 165 A. 351, 116 Conn. 716.
- Iowa.—Lorimer v. Hutchinson Ice Cream Co., 249 N.W. 220, 216 Iowa 884.
- Ky.—Hart Dry Cleaning Co. v. Grizel, 290 S.W. 1057, 218 Ky. 111.
- Md.—Edwards v. State, for Use of Guy, 170 A. 761, 166 Md. 217.
- Mass.—Pease v. Lensen, 190 N.E. 18, 286 Mass. 207—Clark v. C. E. Fay Co., 183 N.E. 423, 281 Mass. 240.
- N.J.—Trussell v. Gibson, 166 A. 698, 11 N.J.Misc. 481.
- N.Y.—Becker v. Zullo, 280 N.Y.S. 917, 245 App.Div. 788.
- Or.—Keys v. Griffith, 55 P.2d 15, 153 Or. 190.
- Wash.—Eaton v. Hewitt, 17 P.2d 906, 171 Wash. 260.
- Wis.—Risch v. Lawhead, 248 N.W. 127, 211 Wis. 270.
- Slippery street**
- N.Y.—Powell v. Ames, 30 N.Y.S.2d 943, 263 App.Div. 765
- Pedestrian pushing pushcart**
- Pa.—Joannides v. Norris, 23 A.2d 53, 146 Pa.Super. 488.
- Stopping to talk while crossing**
- Va.—Chenman v. Paxson's Adm'r, 195 S.E. 492, 170 Va. 6.
56. U.S.—Suburban Transit Corp. v. Malone, C.C.A.S.C., 156 F.2d 423—Bell v. Shoff, C.C.A.Pa., 89 F.2d 339—Philadelphia & Reading Coal & Iron Co. v. Halloran, C.C.A.Pa., 71 F.2d 523.
- Ark.—Hutson Motor Co. v. Lake, 98 S.W.2d 947, 193 Ark. 200—Walker v. Earnhart, 63 S.W.2d 974, 187 Ark. 1110—Murphy v. Clayton, 15 S.W.2d 391, 179 Ark. 225
- Cal.—Goodwin v. Foley, 170 P.2d 503, 75 Cal.App.2d 135—Levin v. Martin, 148 P.2d 717, 61 Cal.App.2d 326—O'Brien v. Schellberg, 140 P.2d 159, 59 Cal.App.2d 761—Connolly v. Zafft, 130 P.2d 752, 55 Cal.App.2d 363—Box v. Van Sleeton, 101 P.2d 780, 38 Cal.App.2d 554—Martin v. Vierra, 93 P.2d 261, 34 Cal.App.2d 86, approval withheld by Supreme Court 94 P.2d 567, 34 Cal.App.2d 86, hearing denied 94 P.2d 567, 34 Cal.App.2d 86—Broun v. Blair, 80 P.2d 95, 26 Cal.App.2d 613—Collohan v. Rosellini, 68 P.2d 367, 21 Cal.App.2d 33—Hannauer v. Boring, 62 P.2d 378, 17 Cal.App.2d 598—Lam Ong v. Pacific Motor Trucking Co., 51 P.2d 1112, 10 Cal.App.2d 329—Nicholas v. Leslie, 46 P.2d 761, 7 Cal.App.2d 590—Inello v. Taylor, 17 P.2d 1039, 128 Cal.App. 508—Welch v. Wirsching, 16 P.2d 691, 127 Cal.App. 725—Wilson v. California Cab Co., 13 P.2d 758, 125 Cal.App. 383—Walker v. Mason, 293 P. 125, 109 Cal.App. 361—Hare v. Canfield, 282 P. 405, 102 Cal.App. 124—Potter v. Driver, 275 P. 526, 97 Cal.App. 311.
- Conn.—Branch v. Mashkin Freight Lines, 57 A.2d 136, 134 Conn. 278—Nevulis v. Wentland, 197 A. 883, 124 Conn. 116—Patterson v. Fagan, 154 A. 168, 113 Conn. 754.
- D.C.—Schweinhaut v. Flaherty, 49 F.2d 533, 60 App.D.C. 151, certiorari denied 51 S.Ct. 656, 283 U.S. 864, 75 L.Ed. 1468.
- Ill.—Panella v. Well-McLain Co., 67 N.E.2d 699, 329 Ill.App. 240—De Young v. Ralley, 67 N.E.2d 221, 329 Ill.App. 1—Meltzer v. Shklovsky, 53 N.E.2d 272, 321 Ill.App. 400—
- Williams v. Stearns, 256 Ill.App. 425.
- Ind.—Red Cab v. White, 13 N.E.2d 356, 213 Ind. 269—Davis v. U. S. Nat. Bank of Indiana Harbor at East Chicago, 186 N.E. 339, 98 Ind. App. 580.
- Iowa.—Huffman v. King, 268 N.W. 144, 222 Iowa. 150—Wilkinson v. Queal Lumber Co., 212 N.W. 682, 203 Iowa 476
- Kan.—Eaton v. Sa'yor, 10 P.2d 873, 135 Kan. 411—Shrout v. Bird, 9 P.2d 673, 135 Kan. 218—Nicholas v. Wiles, 271 P. 307, 126 Kan. 687.
- Ky.—Pryor's Adm'r v. Otter, 105 S.W.2d 564, 268 Ky. 602—Keys v. Nash's Adm'r, 94 S.W.2d 1006, 264 Ky. 398.
- Me.—Stone v. Roger, 154 A. 73, 130 Me. 512—Tilley v. Johnson, 153 A. 180, 130 Me. 18—Sturtevant v. Quelletie, 140 A. 368, 126 Me. 558
- Md.—Crunkilton v. Hock, 42 A.2d 517, 185 Md. 1—Henkelmann v. Metropolitan Life Ins. Co., 26 A.2d 418, 180 Md. 591—Sheer v. Rathje, 197 A. 613, 174 Md. 79—Matthews v. Pohlmyer, 176 A. 479, 167 Md. 689—Coplan v. Warner, 149 A. 1, 158 Md. 463—Panitz v. Webb, 135 A. 406, 151 Md. 639.
- Mass.—Buckman v. McCarthy Freight System, 70 N.E.2d 524, 320 Mass. 551—Tookmanian v. Fanning, 31 N.E.2d 536, 308 Mass. 162—Durling v. Lamontain, 178 N.E. 827, 277 Mass. 517—Regan v. Rosenmark, 172 N.E. 90, 272 Mass. 256.
- Mich.—Burnash v. Compton, 298 N.W. 408, 298 Mich. 70—Neesley v. Lord, 297 N.W. 226, 297 Mich. 163.
- Minn.—Hickok v. Margolis, 22 N.W.2d 850, 221 Minn. 480—Johnson v. McCune, 280 N.W. 177, 203 Minn. 128—Bolster v. Cooper, 247 N.W. 250, 188 Minn. 364—Plante v. Pulaski, 243 N.W. 64, 186 Minn. 280—Kinnonen v. Adolphson, 216 N.W. 605, 173 Minn. 138—Rimmer v. Cohen, 215 N.W. 198, 172 Minn. 134.
- Mo.—O'Shea v. Pattison-McGrath Dental Supplies, 180 S.W.2d 19, 352 Mo. 855—Bullmore v. Deeler, App., 33 S.W.2d 161.
- Neb.—Hammond v. Morris, 24 N.W.2d 633, 147 Neb. 600—Halliday v. Raymond, 22 N.W.2d 614, 147 Neb. 179—Lyons v. Joseph, 246 N.W. 859, 124 Neb. 442.
- N.H.—Carr v. Orrill, 166 A. 270, 86 N.H. 226.
- N.J.—Strutko v. Mann, 11 A.2d 31, 124 N.J.Law 183—Stern v. Stulz-Sickles Co., 162 A. 571, 109 N.J.Law 415—Puerro v. Salerno, 162 A. 527, 109 N.J.Law 381—Brotman v. Doan, 143 A. 328, 105 N.J.Law 132—Bora v. Yellow Cab Co., 135 A. 889, 103 N.J.Law 377—Ackley v. Hannawacker, 171 A. 138, 12 N.J.

ligence while jaywalking,⁵⁷ or crossing between intersections, or at places other than regular cross-

ings or crosswalks,⁵⁸ in violation of traffic reg-

- Misc. 223—Grauss v. Alpert, 169 A. 847, 12 N.J.Misc. 67—Stern v. Brabson, 155 A. 128, 9 N.J.Misc. 558—Zecourt v. Gray, Inc., 152 A. 182, 8 N.J.Misc. 845—Dugan v. Public Service Transp. Co., 136 A. 195, 5 N.J.Misc. 245.
- N.Y.—Lambros v. Miller, 58 N.Y.S.2d 577, 269 App.Div. 1046—Ringhoff v. Lincoln Service, 45 N.Y.S.2d 771, 267 App.Div. 824, reargument denied 47 N.Y.S.2d 132, 267 App.Div. 871—Uralaky v. Gribbon, 275 N.Y.S. 733, 242 App.Div. 533—Luciani v. Five Boroughs Truckmen's Service Ass'n, 269 N.Y.S. 200, 240 App.Div. 70—Carolan v. Venechanos, 260 N.Y.S. 165, 236 App.Div. 812, reargument denied 260 N.Y.S. 967, 236 App.Div. 852—Castro v. New York Rys. Corporation, 231 N.Y.S. 649, 224 App.Div. 623.
- N.D.—Armstrong v. McDonald, 4 N.W.2d 191, 72 N.D. 28.
- Ohio—Goldberg v. Jordan, 196 N.E. 775, 130 Ohio St. 1—Reed v. Hensel, 159 N.E. 843, 26 Ohio App. 79.
- Or.—Lynch v. Clark, 194 P.2d 416—Bracht v. Palace Laundry Co., 65 P.2d 1039, 156 Or. 151—Emmons v. Skaggs, 4 P.2d 1115, 138 Or. 70.
- Pa.—Bauer v. Sacks, 50 A.2d 351, 355 Pa. 488—Halkias v. Lakjer, 50 A.2d 286, 355 Pa. 422—Lane v. Samuels, 39 A.2d 626, 350 Pa. 446—Mashinsky v. City of Philadelphia, 3 A.2d 790, 333 Pa. 97—Michener v. Lewis, 170 A. 272, 314 Pa. 156—McGurk v. Belmont, 146 A. 539, 297 Pa. 192—Kaminski v. Bradley, 182 A. 150, 120 Pa.Super. 297—Mashinsky v. City of Philadelphia, Com.Pl., 30 Mun.L.R. 177.
- R.I.—Gilfoyl v. Fishbein, 5 A.2d 232, 62 R.I. 277—Salerno v. Sheern, 3 A.2d 657, 62 R.I. 121.
- Tex.—Texas Motor Coaches v. Palmer, Civ.App., 97 S.W.2d 253, reversed on other grounds 121 S.W.2d 323, 132 Tex. 77.
- Vt.—Parker v. Smith, 135 A. 495, 100 Vt. 130.
- Va.—Thornton v. Downes, 14 S.E.2d 345, 177 Va. 451—Miller v. Jones, 6 S.E.2d 607, 174 Va. 336—Sawyer v. Blankenship, 169 S.E. 551, 160 Va. 651—Ebel v. Traylor, 164 S.E. 721, 158 Va. 557—Adkins v. Young Men's Christian Ass'n of Lynchburg, 141 S.E. 117, 149 Va. 193.
- Wash.—Hinton v. Carmody, 45 P.2d 32, 182 Wash. 123—Howard v. Ige-land, 17 P.2d 848, 171 Wash. 323—Hiteshue v. Robinson, 16 P.2d 610, 170 Wash. 272—Baker v. Rosala, 5 P.2d 1019, 165 Wash. 532—Brown v. Nelson, 271 P. 894, 149 Wash. 587.
- Wis.—Callahan v. Rando, 3 N.W.2d 688, 240 Wis. 417—Edwards v. Kohn, 241 N.W. 321, 207 Wis. 381—Block v. Seibold, 217 N.W. 694, 195 Wis. 114.
- 42 C.J. p 1268 note 17 [a].
- Question held for court sitting without jury**
Cal.—MacCorkell v. Williams, 295 P. 879, 111 Cal.App. 572—Ohison v. Callender, 262 P. 357, 87 Cal.App. 382.
- Held not negligence as matter of law**
Cal.—De Lannoy v. Grammatikos, 14 P.2d 542, 126 Cal.App. 79.
- Pa.—Kunish v. Porter, 99 Pa.Super. 235.
57. Cal.—Brannock v. Bromley, 86 P.2d 1062, 30 Cal.App.2d 516.
- Wash.—Bobst v. Hardisty, 91 P.2d 567, 199 Wash. 304—Lund v. Western Union Telegraph Co., 74 P.2d 220, 192 Wash. 579.
- Crossing highway diagonally**
Ala.—Cooper v. Auman, 122 So. 351, 219 Ala. 336.
- Mass.—Legg v. Bloom, 184 N.E. 832, 282 Mass. 303.
- Minn.—Saunders v. Yellow Cab Corporation of Minnesota, 233 N.W. 599, 182 Minn. 62.
- Mo.—Lach v. Buckner, 86 S.W.2d 954, 229 Mo.App. 1066.
- N.C.—Morris v. Johnson, 199 S.E. 390, 214 N.C. 402.
- Va.—McBride v. First Nat Bank, 196 S.E. 589, 170 Va. 282.
- Wash.—Durham v. Crist, 38 P.2d 1054, 180 Wash. 213.
58. Cal.—Watkins v. Nutting, 110 P.2d 384, 17 Cal.2d 490—Genola v. Barnett, 93 P.2d 109, 14 Cal.2d 217—Armstrong v. Allen, 171 P.2d 552, 75 Cal.App.2d 514—Hubbell v. Clink, 166 P.2d 384, 73 Cal.App.2d 295—Kashevaroff v. Webb, 166 P.2d 306, 73 Cal.App.2d 177—Kapitan v. Smith, 161 P.2d 270, 70 Cal.App.2d 454—Hearn v. Gunther, 134 P.2d 3, 57 Cal.App.2d 82—Casalegno v. Leonard, 105 P.2d 125, 40 Cal.App.2d 575—Brannock v. Bromley, 86 P.2d 1062, 30 Cal.App.2d 516—Mitrovitch v. Graves, 78 P.2d 227, 25 Cal.App.2d 649—Bamber v. Bel-prez, 58 P.2d 1325, 15 Cal.App.2d 110—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671.
- Conn.—Branch v. Mashkin Freight Lines, 57 A.2d 136, 134 Conn. 278.
- Fla.—Howland v. Cates, 34 So.2d 562—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635.
- Ill.—Wollard v. Quinn, 17 N.E.2d 725, 297 Ill.App. 650—Jones v. Standerfer, 15 N.E.2d 924, 296 Ill.App. 145.
- Iowa.—McMurry v. Guth, 295 N.W. 133, 229 Iowa 776—Orth v. Gregg, 250 N.W. 113, 217 Iowa 516.
- Ky.—Remmers' Ex'r v. Mayhugh, 197 S.W.2d 450, 303 Ky. 366—Ramsey v. Sharpley, 171 S.W.2d 427, 294 Ky. 286.
- Me.—Rice v. Keene, 151 A. 199, 129 Me. 489—Page v. Moulton, 141 A. 183, 127 Me. 80.
- Md.—Geschwendt v. Yoe, 198 A. 720, 174 Md. 374—Lusk v. Lambert, 163 A. 188, 163 Md. 335.
- Mass.—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216.
- Mich.—Black v. Amba, 12 N.W.2d 381, 307 Mich. 644—Hinchey v. J. P. Burroughs & Son, 215 N.W. 346, 240 Mich. 273.
- Minn.—Smith v. Barry, 17 N.W.2d 324, 219 Minn. 182—Jasinuk v. Lombard, 250 N.W. 568, 189 Minn. 594—Heikkinen v. Cashen, 235 N.W. 879, 183 Minn. 146.
- Mo.—Marks v. Hurst, App., 296 S.W. 249.
- Neb.—Watters v. McPherson, 4 N.W.2d 605, 141 Neb. 607.
- N.J.—Devine v. Chester, 144 A. 322, 7 N.J. Misc. 131.
- N.C.—Templeton v. Kelley, 2 S.E.2d 696, 215 N.C. 577.
- N.D.—State v. Yellow Cab Co., 245 N.W. 382, 62 N.D. 733.
- Ohio—Sprung v. E. I. Dupont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94.
- Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186—Scott v. Brogan, 73 P.2d 688, 157 Or. 549—Maneff v. Lamer, 51 P.2d 287, 152 Or. 619.
- Pa.—Elbell v. Smith, 55 A.2d 321—Atkinson v. Coskey, 47 A.2d 156, 354 Pa. 297—Grebe v. Kligerman, 164 A. 796, 310 Pa. 60—Kaminski v. Confora, Com.Pl., 34 Berks Co. L.J. 90.
- R.I.—Romano v. Caldarone, 53 A.2d 923.
- S.D.—Bock v. Sellers, 285 N.W. 437, 66 S.D. 450.
- Tex.—Brooks v. Enriquez, Civ.App., 172 S.W.2d 794, error refused.
- Utah—Morton v. Hood, 143 P.2d 434, 105 Utah 484.
- Vt.—Colburn v. Frost, 9 A.2d 104, 111 Vt. 17—Howley v. Kantor, 163 A. 628, 105 Vt. 128.
- Va.—McQuown v. Phaup, 2 S.E.2d 330, 172 Va. 419.
- Wash.—Hooven v. Moen, 272 P. 50, 150 Wash. 8—Suprunowski v. Brown & White Cab Co., 252 P. 155, 142 Wash. 65.
- W.Va.—Walker v. Bedwinek, 170 S.E. 908, 114 W.Va. 100.
- Wis.—Ford v. Werth, 221 N.W. 729, 197 Wis. 211.
- 42 C.J. p 1268 note 17 [b].
- Pedestrian held not negligent as matter of law**
Cal.—Brown v. Regan, 75 P.2d 1063, 10 Cal.2d 519—Umemoto v. McDonald, 58 P.2d 1274, 6 Cal.2d 587—Douglas v. Hoff, 185 P.2d 607, 82 Cal.App.2d 82—Bays v. Clugston, 161 P.2d 953, 71 Cal.App.2d 55—

ulations;⁵⁹ while waiting in the center of the highway for an opportunity to cross the other half in safety;⁶⁰ while crossing at a traffic-regulated point with the traffic light or control in his favor,⁶¹ or against the traffic light or control,⁶² or where the traffic light or control changed during the pedes-

trian's crossing;⁶³ or while crossing a private driveway.⁶⁴

The rule has also been applied in determining the contributory negligence of plaintiff while crossing the highway in that he failed to see the approaching vehicle in time to avoid injury from

- Coursault v. Schwebel**, 5 P.2d 77, 118 Cal.App. 259.
- La.—Pettaway v. K. C. S. Drug Co.**, App., 166 So. 902—**Morgan v. Domino**, App., 166 So. 208.
- Me.—Milligan v. Weare**, 28 A.2d 463, 139 Me. 199—**Hill v. Finnemore**, 172 A. 826, 132 Me. 459.
- Md.—Thursby v. O'Rourke**, 23 A.2d 656, 180 Md. 223—**Nelson v. Seiler**, 139 A. 564, 154 Md. 63.
- Mass.—Soosierian v. Town Taxi**, 191 N.E. 763, 287 Mass. 65.
- Minn.—Hollander v. Dietrich**, 232 N. W. 630, 181 Minn. 376—**Anderson v. Duban**, 212 N.W. 180, 170 Minn. 155.
- Mo.—Richards v. Gardner**, App., 193 S.W.2d 354.
- Pa.—Tancredi v. M. Buten & Sons**, 38 A.2d 55, 350 Pa. 35—**Morris v. Harmony Short Line Motor Transp. Co.**, 34 A.2d 534, 348 Pa. 117—**Hamilton v. Moore**, 6 A.2d 787, 335 Pa. 433—**Rhoads v. Herbert**, 148 A. 603, 298 Pa. 522—**Kolb v. Isenberg**, 28 A.2d 729, 150 Pa. Super. 482—**Pinto v. Bell Fruit Co.**, 24 A.2d 768, 148 Pa. Super. 132—**Joannides v. Norris**, 23 A.2d 53, 146 Pa. Super. 488—**Hartley v. Navickis**, Com.Pl., 33 Del.Co. 161—**Valentine v. Fisher**, Com.Pl., 55 Montg. Co. 192.
- Tex.—Southern Transp. Co. v. Adams**, Civ.App., 141 S.W.2d 739, error dismissed, judgment correct.
- Wash.—Sheu v. Yellow Cab Co. of Spokane**, 49 P.2d 925, 184 Wash. 109.
- Wis.—Post v. Thomas**, 3 N.W.2d 344, 240 Wis. 519—**Weber v. Barrett**, 298 N.W. 53, 238 Wis. 50—**De Goev v. Hermesen**, 288 N.W. 770, 233 Wis. 69.
- Evidence held sufficient to go to jury**
- Tenn.—Kelley-Powell Co. v. Landen**, 7 Tenn.App. 92.
- 59. Cal.—Follett v. Brown**, 5 P.2d 51, 118 Cal.App. 198.
- Conduct held not negligence as matter of law**
- Cal.—Fuentes v. Ling**, 130 P.2d 121, 21 Cal.2d 59.
- Minn.—Smith v. Barry**, 17 N.W.2d 324, 219 Minn. 182.
- Evidence held sufficient to go to jury**
- Nev.—Styris v. Folk**, 146 P.2d 782, 139 P.2d 614, 62 Nev. 208.
- 60. Cal.—Cowgill v. Rasmussen**, 37 P.2d 860, 2 Cal.App.2d 279.
- Mass.—Fruth v. Dunbar**, 200 N.E. 13, 293 Mass. 403.
- Mich.—Rentz v. Anhut**, 279 N.W. 891, 284 Mich. 695—**Fraser v. McArthur**, 260 N.W. 772, 271 Mich. 622.
- Minn.—Anderson v. Kelley**, 265 N.W. 821, 196 Minn. 578.
- N.J.—Newham v. Nazzara**, 152 A. 467, 107 N.J.Law 208.
- Wash.—Farrow v. Ostrom**, 117 P.2d 963, 10 Wash.2d 666.
- Wis.—Peter v. Hopp**, 227 N.W. 38, 199 Wis. 549.
- Held not negligence as matter of law**
- Cal.—Lower v. Hughes**, 251 P. 952, 80 Cal App. 444.
- Conn.—Marini v. Wynn**, 20 A.2d 400, 128 Conn. 53—**Barbieri v. Pandiscio**, 163 A. 469, 116 Conn. 48.
- Mich.—Burnash v. Compton**, 298 N. W. 408, 298 Mich. 70—**Shank v. Luckner**, 296 N.W. 852, 296 Mich. 705—**Wallace v. Kramer**, 296 N.W. 838, 296 Mich. 680—**Straub v. Andrews**, 294 N.W. 121, 295 Mich. 129—**Carter v. C. F. Smith Co.**, 281 N. W. 380, 285 Mich. 621.
- Pa.—Sciullo v. Scholz**, 188 A. 121, 324 Pa. 268.
- Va.—Lucas v. Craft**, 170 S.E. 836, 161 Va. 228.
- Wash.—Carmin v. Port of Seattle**, 116 P.2d 338, 10 Wash.2d 139.
- 61. U.S.—Malone v. Suburban Transit Co.**, D.C.S.C., 64 F.Supp. 859, affirmed, C.C.A., Suburban Transit Corp. v. Malone, 156 F.2d 422.
- Conn.—Hoffberg v. Epstein**, 36 A.2d 388, 130 Conn. 613.
- D.C.—American Ice Co. v. Moorehead**, 66 F.2d 792, 62 App.D.C. 266.
- Mass.—Wilson v. Freeman**, 171 N.E. 469, 271 Mass. 438.
- Mich.—Willis v. Tucker**, 245 N.W. 577, 261 Mich. 83.
- N.H.—Jackson v. Smart**, 5 A.2d 713, 90 N.H. 153.
- N.Y.—Schaffer v. Gambetta**, 24 N.Y. S.2d 674, 261 App.Div. 132, affirmed 40 N.E.2d 654, 287 N.Y. 796.
- N.D.—Blackstead v. Kent**, 247 N.W. 607, 63 N.D. 246.
- Pa.—Harrington v. Pugarelli**, 25 A. 2d 149, 344 Pa. 204—**Altman v. Kelly**, 9 A.2d 423, 336 Pa. 481—**Newman v. Protective Motor Service Co.**, 148 A. 711, 298 Pa. 509—**Jacobson v. Palma**, 175 A. 731, 115 Pa. Super. 401—**Catarious v. Benjamin**, 100 Pa. Super. 184.
- R.I.—Dwinell v. Oakley**, 200 A. 445, 61 R.I. 88.
- Wash.—Mathews v. Lord Elec. Co.**, 194 P.2d 379.
- Wis.—Raabe v. Brzoskowski**, 236 N. W. 133, 204 Wis. 319, followed in 236 N.W. 134, 204 Wis. 322.
- 62. Cal.—Welch v. Sink**, 74 P.2d 832, 24 Cal.App.2d 231—**Augenthaler v. Pinkert**, 32 P.2d 686, 138 Cal.App. 455.
- Conn.—Evans v. Dickinson**, 16 A.2d 582, 127 Conn. 297.
- D.C.—Gutshall v. Wood**, 123 F.2d 174, 74 App.D.C. 379.
- Ill.—Mazanec v. Prosser**, 56 N.E.2d 489, 323 Ill.App. 652.
- Ky.—Peak v. Arnett**, 26 S.W.2d 1035, 233 Ky. 756.
- Mass.—Nolan v. Shea**, 45 N.E.2d 956, 312 Mass. 631—**Margeson v. Town Taxi**, 165 N.E. 20, 266 Mass. 192.
- Minn.—Laison v. Fox**, 250 N.W. 449, 189 Minn. 536.
- N.H.—Bellemare v. Ford**, 45 A.2d 882, 94 N.H. 38.
- N.Y.—Fitzgerald v. Ladabouch**, 299 N.Y.S. 880, 252 App.Div. 912, affirmed 14 N.E.2d 212, 277 N.Y. 669.
- Failure to press button changing light**
- Mass.—Bartley v. Phillips**, 57 N.E.2d 26, 317 Mass. 35.
- 63. Ind.—Stinebaugh v. Lucid**, 7 N. E.2d 69, 103 Ind App 690.
- Iowa.—Dougherty v. McFee**, 265 N. W. 176, 221 Iowa 391.
- Mass.—Neverett v. Patch**, 4 N.E.2d 304, 295 Mass. 454.
- Mich.—Helman v. Kulle**, 27 N.W.2d 92, 317 Mich. 548—**Werker v. McGrain**, 24 N.W.2d 111, 315 Mich. 287.
- Minn.—Himmel v. Orliski**, 21 N.W.2d 605, 221 Minn. 192.
- N.C.—Ward v. Bowles**, 45 S.E.2d 354, 228 N.C. 273.
- Ohio.—Juergens v. Bell Distributing**, 21 N.E.2d 90, 135 Ohio St. 335—**Focht v. Justis**, 77 N.E.2d 506, 81 Ohio App. 297.
- Pa.—MacDougall v. American Ice Co.**, 176 A. 428, 317 Pa. 222.
- Conduct held not negligence as matter of law**
- Mass.—Reinhardt v. Newton Public Market**, 194 N.E. 660, 290 Mass. 86.
- N.Y.—Goodman v. Brown**, 298 N.Y.S. 574, 164 Misc. 145.
- 64. Cal.—Sunseri v. Dime Taxi Corporation**, 135 P.2d 654, 57 Cal.App. 2d 926—**Kapper v. Harris**, 52 P.2d 569, 10 Cal.App.2d 630.
- Mich.—Cebulak v. Lewis**, 32 N.W.2d 21, 320 Mich. 710.
- Vt.—Duchaine v. Ray**, 6 A.2d 28, 110 Vt. 313.

it;⁶⁵ or in that he crossed without looking;⁶⁶ direction;⁶⁸ or in that he crossed with his view or without properly or carefully looking;⁶⁷ in every obstructed, as by an object he was carrying;⁶⁹

65. Cal.—Spillers v. Silver, 158 P.2d 617, 69 Cal.App.2d 231—Young v. Tassop, 118 P.2d 371, 47 Cal.App.2d 557—Naudack v. Canini, 85 P.2d 510, 29 Cal.App.2d 687—Welch v. Sink, 74 P.2d 832, 24 Cal.App.2d 231—Reichle v. Hazle, 71 P.2d 849, 22 Cal.App.2d 543—Crooks v. Doeg, 40 P.2d 590, 4 Cal.App.2d 21—Noble v. Bacon, 18 P.2d 699, 129 Cal. App. 177.

Conn.—Rosen v. Goldstein, 24 A.2d 840, 128 Conn. 605—Alston v. Consolidated Motor Lines, 173 A. 899, 118 Conn. 707.

Ill.—Caslow v. Checker Taxi Co., 34 N.E.2d 99, 310 Ill.App. 394—Rubottom v. Crane Co., 8 N.E.2d 218, 290 Ill.App. 601—Smoot v. Hollingsworth, 265 Ill.App. 447.

Ind.—Dulin v. Long, 54 N.E.2d 652, 115 Ind.App. 94.

Iowa.—Swan v. Dalley-Luce Auto Co., 281 N.W. 504, 225 Iowa 89—Minks v. Stenberg, 250 N.W. 883, 217 Iowa 119.

Mass.—Preston v. Cianci, 73 N.E.2d 246, 321 Mass. 297—Leiland v. Quinn, 182 N.E. 475, 280 Mass. 320—McGuigan v. Atkinson, 179 N.E. 627, 278 Mass. 261—Arnold v. Colbert, 173 N.E. 423, 273 Mass. 161.

Minn.—Olson v. Evert, 28 N.W.2d 753, 224 Minn. 528.

Mo.—Muttan v. Hoover Co., 166 S.W.2d 557, 350 Mo. 506.

Pa.—Curran v. Battaglini, 39 A.2d 630, 156 Pa.Super. 173—Miller v. Carey, 177 A. 511, 117 Pa.Super. 218.

Tex.—Seinsheimer v. Burkhart, 122 S.W.2d 1063, 132 Tex. 336.

Pedestrian held not negligent as matter of law

Cal.—Connolly v. Zaft, 130 P.2d 752, 55 Cal.App.2d 383—Von Arx v. City of Burlingame, 60 P.2d 305, 16 Cal.App.2d 29—Jones v. Barion, 283 P. 885, 103 Cal.App. 59—Katz v. T. I. Butler Co., 254 P. 679, 81 Cal.App. 747.

Conn.—Skovronski v. Genovese, 200 A. 575, 124 Conn. 482—Tuozzoli v. Coulson, 200 A. 324, 124 Conn. 691.

Ill.—McCarthy v. Gray, 25 N.E.2d 135, 303 Ill.App. 336.

Ky.—Layne v. Cottle, 150 S.W.2d 681, 286 Ky. 221.

Mass.—Tookmanian v. Fanning, 31 N.E.2d 536, 308 Mass. 162—Nicholson v. Babb, 23 N.E.2d 103, 304 Mass. 216.

Mich.—Wood v. Priborsky, 244 N.W. 162, 259 Mich. 556.

Mo.—Breitschaft v. Wyatt, App., 167 S.W.2d 931.

N.J.—Volpe v. Perruzzi, 8 A.2d 580, 123 N.J.Law 323.

N.Y.—Cooke v. Cook, 155 N.E. 908,

244 N.Y. 588—Knox v. Palmer, 286 N.Y.S. 50, 247 App.Div. 798.

Ohio.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284.

Pa.—Smith v. Wistar, 194 A. 486, 327 Pa. 419—Mantia v. Pearlman, 91 Pa.Super. 478—Burton v. Morvay, Com.Pl., 27 Erie Co. 46, affirmed 41 A.2d 865, 351 Pa. 620.

Tex.—Roaz v. White's Auto Stores, 172 S.W.2d 481, 141 Tex. 366.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

66. Ala.—Montgomery City Lines v. Scott, 26 So.2d 200, 248 Ala. 27.

Cal.—Emery v. Los Angeles R. Corporation, 143 P.2d 112, 61 Cal.App.2d 455.

Conn.—Lutzen v. Henry Jenkins Transp. Co., 54 A.2d 267, 133 Conn. 669.

Fla.—Greiper v. Coburn, 190 So. 902, 139 Fla. 293.

Iowa.—Robertson v. Carlgren, 234 N.W. 824, 211 Iowa 963.

Mass.—Byrne v. Dunn, 5 N.E.2d 10, 296 Mass. 184.

Mich.—Lucy v. Dowd, 267 N.W. 839, 276 Mich. 289—Sahms v. Marcus, 214 N.W. 969, 239 Mich. 682.

Minn.—Aide v. Taylor, 7 N.W.2d 757, 214 Minn. 212, 145 A.L.R. 530.

Miss.—Hall v. Caughran, 134 So. 576, 160 Miss. 571.

Mo.—Frees v. Hosack, App., 119 S.W.2d 460—Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo.App. 380.

N.J.—Goldenberg v. Reggio, 171 A. 677, 112 N.J.Law 440.

Ohio.—Souder v. Hassenfeldt, 194 N.E. 47, 48 Ohio App. 377.

Wis.—Doepeke v. Reimer, 258 N.W. 345, 217 Wis. 49.

42 C.J. p. 1268 note 17 [c].

Conduct held not negligence as matter of law

Cal.—Hendricks v. Pappas, 187 P.2d 436, 82 Cal.App.2d 774—Hyams v. Simoncelli, 106 P.2d 68, 41 Cal.App.2d 126.

Me.—Ross v. Russell, 48 A.2d 403.

Mich.—Latsch v. Hillhard, 227 N.W. 547, 248 Mich. 416.

Evidence held sufficient to go to jury
Tenn.—Tri-State Transit Co. of Louisiana v. Duffey, 173 S.W.2d 706, 27 Tenn.App. 731.

67. U.S.—Engstrom v. De Witt, C.C. A.Minn., 58 F.2d 137.

Cal.—Douglas v. Hoff, 185 P.2d 607, 82 Cal.App.2d 82—Burr v. Damarrel, 75 P.2d 621, 24 Cal.App.2d 622—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70.

Conn.—La Femina v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 45 A.2d 158, 132 Conn. 420.

D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, cert. orari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.

Ill.—Raimondi v. Ziffirin Truck Lines, 70 N.E.2d 221, 329 Ill.App. 650—Mazer v. Consumers Co., 13 N.E.2d 862, 294 Ill.App. 609.

Iowa.—Lawlor v. Gaylord, 10 N.W.2d 531, 233 Iowa 834—Swan v. Dalley-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 235 Iowa 189.

Ky.—Wilder v. Cadle, 13 S.W.2d 497, 227 Ky. 486.

Mass.—Conrad v. Marman, 191 N.E. 765, 287 Mass. 229—Sooserian v. Town Taxi, 191 N.E. 763, 287 Mass. 65.

Mich.—Krukowski v. Englehardt, 267 N.W. 806, 276 Mich. 136—Dreyfus v. Daronco, 234 N.W. 587, 253 Mich. 235.

N.H.—Nicholalde v. Wallace, 169 A. 874, 86 N.H. 465.

Or.—Bracht v. Palace Laundry Co., 65 P.2d 1039, 156 Or. 151.

Wash.—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1.

Held not negligence as matter of law

Or.—Martin v. Harrison, 186 P.2d 534.

W.Va.—Skaft v. Dodd, 44 S.E.2d 621.

68. Mo.—White v. Powell, 145 S.W.2d 375, 346 Mo. 1195.

Pa.—Altman v. Kelly, 9 A.2d 423, 336 Pa. 481—Lowers v. Zuker, 157 A. 339, 102 Pa.Super. 581—Blake v. Marinelli, Com.Pl., 30 Erie Co. 116, affirmed 53 A.2d 550, 357 Pa. 314.

Wis.—Salsich v. Bunn, 238 N.W. 394, 205 Wis. 524, 79 A.L.R. 1069.

Pedestrian held not negligent as matter of law

U.S.—Blodgett v. Pinkerton Tobacco Co., C.C.A. Mich., 79 F.2d 945.

Ga.—Jackson v. Crimer, 24 S.E.2d 603, 69 Ga.App. 18.

Mich.—Dreyfus v. Daronco, 234 N.W. 587, 253 Mich. 235—Rowland v. Brown, 213 N.W. 90, 237 Mich. 570.

Minn.—Aide v. Taylor, 7 N.W.2d 757, 214 Minn. 212, 145 A.L.R. 530.

Mo.—Hicks v. De Luxe Cab Co., App., 189 S.W.2d 152.

N.Y.—Pecora v. Marique, 79 N.Y.S.2d 350, 273 App.Div. 705.

Pa.—Murphy v. Fetter, Com.Pl., 7 Sch.Reg. 54.

Vt.—Duchaine v. Ray, 6 A.2d 28, 110 Vt. 313.

On one-way street

N.J.—Lee v. Platoff, 187 A. 137, 117 N.J.Law 121.

69. Cal.—Rasic v. Schultheiss, 9 P.2d 550, 121 Cal.App. 560.

N.H.—Chemikles v. J. M. Wilson Co., 152 A. 275, 84 N.H. 437.

or in that, having once looked, he failed to look again or to look continuously while crossing;⁷⁰ or in that, having seen or become aware of the approaching vehicle, he misjudged its speed, distance, or danger, and crossed despite its approach.⁷¹ The rule has also been applied in determining

Held not negligence as matter of law

Cal.—Lincoln v. Williams, 6 P.2d 563, 119 Cal.App. 498.

70. U.S.—Dryfoos v. Scavenger Service Corporation, C.C.A.Ill., 115 F.2d 637.

Cal.—Salomon v. Meyer, 32 P.2d 631, 1 Cal.2d 11—Villafuerte v. Strunz, 190 P.2d 642, 84 Cal.App.2d 320—Glover v. Los Angeles Ry. Corp., 164 P.2d 264, 72 Cal.App.2d 187—Young v. Tassop, 118 P.2d 371, 47 Cal.App.2d 557—Fischer v. Keen, 110 P.2d 693, 43 Cal.App.2d 244—Kostouros v. O'Connell, 103 P.2d 1028, 39 Cal.App.2d 618—King v. Unger, 78 P.2d 255, 25 Cal.App.2d 632.

Colo.—Stahl v. Cooper, 188 P.2d 894, 117 Colo. 445.

Conn.—Keeling v. Neuss Floor Covering Co., 14 A.2d 33, 126 Conn. 716—Giannatasio v. Nealon, 169 A. 912, 117 Conn. 696.

Ill.—Moran v. Gatz, 62 N.E.2d 443, 390 Ill. 478.

Iowa.—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 189.

Ky.—Murphy v. Homans, 150 S.W.2d 14, 286 Ky. 191.

Md.—Weinstein v. Meyer, 191 A. 238, 172 Md. 233—Shalvitz v. Etmsanski, 164 A. 169, 164 Md. 125—Bielski v. Rising, 163 A. 207, 163 Md. 492.

Mass.—Laroche v. Singson, 183 N.E. 767, 281 Mass. 369.

Mich.—Campbell v. Brown, 267 N.W. 877, 276 Mich. 449.

Mont.—Webster v. Mountain States Telephone & Telegraph Co., 89 P.2d 602, 108 Mont. 188.

Nev.—Styris v. Folk, 146 P.2d 782, 62 Nev. 208, 139 P.2d 614.

N.H.—McCarthy v. Souther, 137 A. 445, 83 N.H. 29.

Ohio.—Chevalley v. Degar, App., 52 N.E.2d 544.

Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186.

Pa.—Harrington v. Pugarelli, 25 A.2d 149, 344 Pa. 204—Hamilton v. Moore, 6 A.2d 787, 335 Pa. 433.

R.I.—Sokoloski v. Breen, 7 A.2d 723, 63 R.I. 115—Hemmerle v. Aldrich, 192 A. 166, 58 R.I. 227.

Tenn.—Hunter v. Stacey, 141 S.W.2d 921, 24 Tenn.App. 158.

Tex.—Blunt v. H. G. Berning, Inc., Civ.App., 211 S.W.2d 773, error refused—Norris Bros. v. Mattinson, Civ.App., 145 S.W.2d 204.

Vt.—Izor v. Brigham, 17 A.2d 236, 111 Vt. 438.

Va.—Moore v. Scott, 169 S.E. 902, 160 Va. 610.

Wash.—Farrow v. Ostrom, 117 P.2d

963, 10 Wash.2d 666—Shepherd v. Smith, 88 P.2d 601, 198 Wash. 395—Ahrens v. Anderson, 57 P.2d 410, 186 Wash. 182.

W.Va.—Yuncke v. Welker, 36 S.E.2d 410, 128 W.Va. 299.

42 C.J. p 1268 note 17 [d].

Conduct held not negligence as matter of law

Cal.—Rinker v. Carl, 283 P. 317, 102 Cal.App. 436—Davis v. Renton, 278 P. 442, 99 Cal.App. 264.

Conn.—Inerney v. New England Transp Co., 41 A.2d 764, 131 Conn. 633—Skovronski v. Genovese, 200 A. 575, 124 Conn. 482—Alston v. Consolidated Motor Lines, 173 A. 899, 118 Conn. 707.

Ill.—Raimondi v. Ziffrin Truck Lines, 70 N.E.2d 221, 329 Ill.App. 650.

Iowa.—Lawlor v. Gavlord, 10 N.W.2d 531, 233 Iowa 834.

Md.—Wintrobe v. Hart, 13 A.2d 365, 178 Md. 289.

Mass.—Kelly v. Railway Express Agency, 52 N.E.2d 411, 315 Mass. 301.

Mich.—Lawrence v. Bartling & Dull Co., 238 N.W. 180, 255 Mich. 580.

Minn.—Reier v. Hart, 277 N.W. 405, 202 Minn. 154.

Mo.—Richards v. Gardner, App., 193 S.W.2d 354.

Ohio.—Titus v. Stouffer, App., 40 N.E.2d 178.

Pa.—Lowery v. Zuker, 157 A. 339, 102 Pa.Super 581.

R.I.—Pucciarelli v. United Electric Rys Co., 11 A.2d 924, 61 R.I. 269.

S.D.—Block v. Sellers, 285 N.W. 437, 66 S.D. 450.

Va.—Lucas v. Craft, 170 S.E. 836, 161 Va. 228.

Wash.—Lindberg v. Steele, 104 P.2d 940, 5 Wash.2d 54—Moseley v. Mills, 259 P. 715, 145 Wash. 253.

W.Va.—Walker v. Bodwinek, 170 S.E. 908, 114 W.Va. 100.

71. U.S.—Boston Elevated Ry. v. Greaney, C.C.A.Mass., 68 F.2d 657.

Cal.—Armstrong v. Allen, 171 P.2d 552, 75 Cal.App.2d 514—Lang v. Barry, 161 P.2d 949, 71 Cal.App.2d 121—Bennett v. Robertson, 150 P.2d 547, 65 Cal.App.2d 278—Shipway v. Monise, 139 P.2d 60, 59 Cal.App.2d 565—Connolly v. Zaft, 130 P.2d 752, 55 Cal.App.2d 383—Sanker v. Humborg, 119 P.2d 431, 46 Cal.App.2d 203—Wiswell v. Shinnars, 117 P.2d 677, 47 Cal.App.2d 156—Naudack v. Canini, 85 P.2d 510, 29 Cal.App.2d 687—Welch v. Sink, 74 P.2d 832, 24 Cal.App.2d 231—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70—Reichle v. Hazie, 71 P.2d 849, 22 Cal.App.2d 543—Varner v. Skov, 67 P.2d 123, 20

Cal.App.2d 232—Shaw v. Robertson, 48 P.2d 128, 8 Cal.App.2d 520.

Colo.—Publix Cab Co. v. Phillips, 58 P.2d 486, 98 Colo. 542.

Conn.—Olsen v. Genalski, 184 A. 876, 121 Conn. 340.

Fla.—Baston v. Shelton, 13 So.2d 453, 152 Fla. 879.

Ill.—Knight v. Citizens Coach Co., 30 N.E.2d 180, 307 Ill.App. 251—Hoefling v. Reynolds, 11 N.E.2d 20, 292 Ill.App. 637.

Kan.—Claggett v. Phillips Petroleum Co., 73 P.2d 1015, 146 Kan. 846.

Md.—Ebert Ice Cream Co. v. Eaton, 187 A. 865, 171 Md. 30.

Mass.—Mosher v. Hayes, 192 N.E. 313, 288 Mass. 58—Laroche v. Singson, 183 N.E. 767, 281 Mass. 369—Joughin v. Federal Motor Transp. Co., 181 N.E. 754, 279 Mass. 408.

Mich.—Morrison v. Grass, 22 N.W.2d 82, 314 Mich. 87—Sweet v. Sturgis, 290 N.W. 813, 292 Mich. 323—Burton v. Yellow & Checker Cab & Transfer Co., 278 N.W. 106, 283 Mich. 384—Moore v. Noorthek, 273 N.W. 758, 280 Mich. 431—Walker v. McGraw, 271 N.W. 570, 279 Mich. 97.

Minn.—Reier v. Hart, 277 N.W. 405, 202 Minn. 154.

Nev.—Styris v. Folk, 146 P.2d 782, 62 Nev. 208.

N.H.—MacKellvie v. Rice, 32 A.2d 818, 92 N.H. 465—Carlin v. Drake, 192 A. 568, 89 N.H. 52.

N.J.—Simko v. Mount, 168 A. 308, 111 N.J.Law 292—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380.

Ohio.—McKee v. Liming, 165 N.E. 304, 31 Ohio App. 303.

Or.—Martin v. Harrison, 186 P.2d 534—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135—Westhoff v. Shannon, 22 P.2d 895, 143 Or. 407.

Pa.—Burton v. Morvay, 41 A.2d 865, 351 Pa. 620.

R.I.—Harmon v. Costanza, 23 A.2d 180, 67 R.I. 291.

S.C.—Marks v. I. M. Pearlstine & Sons, 26 S.E.2d 835, 203 S.C. 318.

Va.—Belthea v. Virginia Elec. & Power Co., 33 S.E.2d 651, 183 Va. 873.

Wis.—Hagen v. Thompson, 29 N.W.2d 515, 251 Wis. 484—Halamka v. Schneider, 222 N.W. 821, 197 Wis. 538.

42 C.J. p 1268 note 17 [e].

Pedestrian held not negligent as matter of law

Cal.—Fuentes v. Ling, 130 P.2d 121, 21 Cal.2d 59—Torrey v. Nelson, 124 P.2d 336, 51 Cal.App.2d 191.

Iowa.—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehear-

plaintiff's contributory negligence in failing to anticipate negligence on the part of the motorist;⁷² in failing to yield the right of way as required by statute;⁷³ in stepping back into the path of the vehicle in an effort to avoid injury;⁷⁴ and in cases where plaintiff may have been under the influence of intoxicating liquors.⁷⁵

Various incidental questions of fact have also been held, on conflicting evidence, to be for the jury or trier of facts,⁷⁶ including such questions as whether a pedestrian crossing a street or high-

way exercised reasonable or ordinary care for his own safety;⁷⁷ whether the presumption of due care in plaintiff's favor was overcome;⁷⁸ the extent of plaintiff's duty to maintain a proper lookout;⁷⁹ and whether he looked before crossing and kept a careful and proper lookout;⁸⁰ whether he could or must have seen an approaching vehicle had he looked properly;⁸¹ whether or not the traffic light was in his favor;⁸² whether he crossed at, and within the bounds, of a pedestrian crosswalk;⁸³ whether he acted properly when he rea-

ing denied 281 N.W. 504, 225 Iowa 89.

Mass.—Shea v. Butler, 53 N.E.2d 678, 315 Mass. 523—Desjarlais v. Kelley, 12 N.E.2d 190, 299 Mass. 182. Mich.—Gayden v. Arabais, 291 N.W. 42, 292 Mich. 651.

N.H.—Burns v. Cote, 173 A. 806, 87 N.H. 74.

Or.—Hecker v. Union Cab Co., 293 P. 726, 134 Or. 385—Hanna v. Royce, 249 P. 173, 119 Or. 450.

Pa.—Di Gregorio v. Skinner, 41 A.2d 649, 351 Pa. 441—Harrington v. Pugarelli, 25 A.2d 149, 344 Pa. 204.

Tex.—Miller v. Rhodius, Civ. App., 153 S.W.2d 491, error refused.

Wash.—Child v. Hill, 271 P. 266, 149 Wash. 468.

Evidence held sufficient to go to jury Iowa.—Handlon v. Henshaw, 221 N.W. 489, 206 Iowa 771.

72. Pa.—Goldschmidt v. Schumann, 155 A. 297, 304 Pa. 172.

Pedestrian held not negligent as matter of law

Cal.—Hyams v. Simoncelli, 106 P.2d 68, 41 Cal.App.2d 126.

Ill.—Gannon v. Kiel, 252 Ill.App. 550.

Me.—Haskell v. Herbert, 48 A.2d 637.

—Ross v. Russell, 48 A.2d 403.

Mass.—Desjarlais v. Kelley, 12 N.E.2d 190, 299 Mass. 182.

Pa.—Altsman v. Kelly, 9 A.2d 423, 336 Pa. 481.

Va.—Beane v. Keyser, 137 S.E. 898, 103 W.Va. 248.

W.Va.—Ritter v. Hicks, 135 S.E. 601, 102 W.Va. 541, 50 A.L.R. 1505.

73. Cal.—Shaw v. Robertson, 48 P.2d 128, 8 Cal.App.2d 520.

Iowa.—McMurry v. Guth, 295 N.W. 133, 229 Iowa 776.

Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226.

Tex.—Brooks v. Enriquez, Civ.App., 172 S.W.2d 794, error refused.

Held not negligence as matter of law Cal.—Mitrovitch v. Graves, 78 P.2d 227, 25 Cal.App.2d 649.

74. Mo.—Marshak v. William J. Brennan Grocery Co., App., 83 S.W.2d 185—Phillips v. Yellow Cab Co., 36 S.W.2d 419, 225 Mo.App. 1172.

Mont.—McKeon v. Kilduff, 281 P. 345, 85 Mont. 562.

N.Y.—Steele v. C. G. Meaker Co., 227

N.Y.S. 644, 131 Misc. 675, affirmed 233 N.Y.S. 901, 226 App.Div. 717.

75. Mass.—Pochi v. Brett, 65 N.E.2d 195, 319 Mass. 197—Baczek v. Damian, 29 N.E.2d 682, 307 Mass. 167.

76. Cal.—Salomon v. Meyer, 32 P.2d 631, 1 Cal.2d 11—Gallardo v. Luke, 91 P.2d 211, 33 Cal.App.2d 230.

Mass.—Karsokas v. Universal Motor Sales Co., 178 N.E. 228, 277 Mass. 154.

77. Cal.—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183.

Ill.—Bartels v. McGarvey, 63 N.E.2d 617, 327 Ill.App. 206.

Iowa.—Huffman v. King, 268 N.W. 144, 222 Iowa 150.

Ky.—Best's Adm'r v. Adams, 28 S.W.2d 484, 234 Ky. 702.

Md.—Sheriff Motor Co. v. State, for Use of Parker, 179 A. 508, 169 Md. 79.

Mass.—Noyes v. Whiting, 194 N.E. 93, 289 Mass. 270—Donovan v. Mutrie, 164 N.E. 377, 265 Mass. 472—Hicks v. H. B. Church Truck Service Co., 156 N.E. 254, 259 Mass. 272.

Mich.—Gayden v. Arabais, 291 N.W. 42, 292 Mich. 651—Nickels v. Hallen, 225 N.W. 569, 247 Mich. 291—Sahms v. Marcus, 214 N.W. 969, 239 Mich. 682.

N.H.—Feuerstein v. Grady, 169 A. 622, 86 N.H. 406.

N.J.—Horn v. Szumski, 137 A. 792, 5 N.J.Misc. 672.

Or.—Keys v. Griffith, 55 P.2d 15, 153 Or. 190.

Pa.—Halkias v. Lakjer, 50 A.2d 286, 355 Pa. 422.

R.I.—Silvia v. Calz, 7 A.2d 704, 63 R.I. 172.

Tenn.—Zamora v. Shappley, 173 S.W.2d 721, 27 Tenn.App. 768.

W.Va.—Beane v. Keyser, 137 S.E. 898, 103 W.Va. 248—Ritter v. Hicks, 135 S.E. 601, 102 W.Va. 541, 50 A.L.R. 1505.

Wis.—McDonald v. Wickstrand, 238 N.W. 820, 206 Wis. 58.

78. Cal.—Wiswell v. Shinnors, 117 P.2d 677, 47 Cal.App.2d 156.

Mass.—Griffin v. Feeney, 181 N.E. 710, 279 Mass. 602—Mulroy v. Marinakis, 171 N.E. 670, 271 Mass. 421.

79. Cal.—Strange v. Los Angeles Examiner, 12 P.2d 678, 124 Cal.App. 419.

80. Cal.—Salsberry v. Smith, App., 192 P.2d 73—Goodwin v. Foley, 170 P.2d 503, 75 Cal.App.2d 195.

Ill.—Stansfield v. Wood, 231 Ill.App. 586.

Iowa.—Lawlor v. Gaylord, 10 N.W.2d 531, 233 Iowa 834.

Ky.—Downing v. Baucom's Adm'r, 287 S.W. 362, 216 Ky. 108.

N.J.—Sokiera v. H. A. Jaeger, Inc., 169 A. 347, 12 N.J.Misc. 17, affirmed 171 A. 786, 112 N.J.Law 500.

Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226—Hecker v. Union Cab Co., 293 P. 726, 134 Or. 385.

Pa.—Curran v. Battaglini, 39 A.2d 630, 156 Pa.Super. 173—Armstrong v. McGraw, 175 A. 279, 115 Pa. Super. 156.

Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204—Shaver v. Mason, Civ.App., 13 S.W.2d 450.

W.Va.—Skaff v. Dodd, 44 S.E.2d 621.

81. Cal.—Strange v. Los Angeles Examiner, 12 P.2d 678, 124 Cal. App. 419.

Vt.—Parker v. Smith, 135 A. 495, 100 Vt. 130.

Wash.—Davis v. Riegel, 44 P.2d 771, 182 Wash. 1.

82. Cal.—De Lannoy v. Grammatikos, 14 P.2d 542, 126 Cal.App. 79.

Md.—Wintrobe v. Hart, 13 A.2d 365, 178 Md. 289.

Pa.—Ferguson v. Charis, 170 A. 131, 314 Pa. 164.

83. Cal.—Hendricks v. Pappas, 187 P.2d 436, 82 Cal.App.2d 774—Taha v. Finegold, 184 P.2d 533, 81 Cal. App.2d 536.

Md.—Legum v. State, for Use of Moran, 173 A. 565, 167 Md. 339.

Or.—De Witt v. Sandy Market, 115 P.2d 184, 167 Or. 226.

Wis.—Hagen v. Thompson, 29 N.W.2d 515, 251 Wis. 484—Smith v. Superior & Duluth Transfer Co., 10 N.W.2d 153, 243 Wis. 292, rehearing denied 11 N.W.2d 95, 243 Wis. 292.

Violation of jaywalking ordinance

Tenn.—National Funeral Home v. Dalehite, 15 Tenn.App. 482.

lized the danger of the approaching vehicle;⁸⁴ and the speed at which he was walking across the street.⁸⁵ However, incidental questions of fact as to which there can be no difference of opinion on the basis of the proved evidence have been held to be for the court.⁸⁶

Uncontradicted or insufficient evidence. Where the evidence is uncontradicted and the inference to be reasonably made therefrom is clear, it is held as matter of law either that plaintiff was⁸⁷ or was not⁸⁸ guilty of contributory negligence. Where the evidence of contributory negligence,⁸⁹ or of the pedestrian's exercise of due care,⁹⁰ is insufficient to warrant submission of the issue to the jury, the court must itself, as a matter of law, decide the issue.

Acts in emergencies. Whether the conduct of a pedestrian faced with an emergency while crossing a street constitutes contributory negligence has been held to be a question for the jury to decide,⁹¹

and it is also ordinarily a question for the jury whether plaintiff pedestrian was in fact faced by an emergency⁹² not of his own making.⁹³

j. Persons Working in or upon Highway

- (1) In general
- (2) Police or traffic officers

(1) In General

Where the evidence is conflicting, the trier of facts should determine the contributory negligence of persons injured while engaged in work or activity upon the highway.

The rule that, where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of the facts whether a person injured by a motor vehicle was guilty of contributory negligence, as considered supra subdivision a of this section, has been applied to persons injured while engaged in work or activity upon the highway,⁹⁴ such as

84. Pa.—Maselli v. Stephens, 200 A. 590, 331 Pa. 491.

85. Md.—Thursby v. O'Rourke, 23 A. 2d 656, 180 Md. 223.

Wash.—Morso v. E. H. Stanton Co., 134 P. 941, 75 Wash. 220, L.R.A. 1916A 943.

86. Pa.—Watson v. Lit Bros., 135 A. 631, 288 Pa. 175.

87. Cal.—Casalegno v. Leonard, 105 P.2d 125, 40 Cal.App.2d 575—Francis v. Riddle, 59 P.2d 532, 15 Cal. App.2d 282.

Mich.—De Jager v. Vandenberg, 284 N.W. 673, 288 Mich. 136.

Mo.—Iman v. Walter Freund Tread Co., 58 S.W.2d 477, 332 Mo. 461.

N.J.—Branigan v. Demarest, 160 A. 319, 109 N.J.Law 123.

Pa.—Carnevale v. McCrady-Rodgers Co., 178 A. 472, 318 Pa. 369—Tulli v. Holt, Com.Pl., 30 Del. Co. 149.

Tenn.—Zamora v. Shapley, 173 S. W.2d 721, 27 Tenn.App. 768.

Wash.—Williams v. Brockman, 193 P. 2d 863.

42 C.J. p 1269 note 21.

Failure to look

(1) In general.
Ill.—Good v. Behrendt, 52 N.E.2d 826, 321 Ill.App. 303.

Pa.—Cuneo v. Fayette County, Com. Pl., 5 Fay L.J. 138.

42 C.J. p 1269 note 21 [a].

(2) Whether a pedestrian who fails to look at all, or looks straight ahead without glancing to either side, or who is in a position where he cannot see and takes no precaution for his safety, is negligent with respect to injuries sustained when struck by an automobile is for the court.—Connolly v. Zafft, 130 P.2d 752, 55 Cal.App. 2d 383—Sanker v. Humborg, 119 P.2d 431, 46 Cal.App.2d 203—Young v.

Tassop, 118 P.2d 371, 47 Cal.App.2d 557—Hart v. Irvine, 117 P.2d 11, 46 Cal.App.2d 805—Casey v. Deleho, 102 P.2d 557, 39 Cal.App.2d 91—Welch v. Sink, 74 P.2d 832, 24 Cal.App.2d 231—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70—Reichle v. Hazie, 71 P.2d 849, 22 Cal.App.2d 543.

Failure to see and avoid vehicle

Conn.—Iruza v. Hamway, 193 A. 776, 123 Conn. 205.

Iowa.—Sheridan v. Limbrecht, 218 N. W. 278, 205 Iowa 573.

Pedestrian walking into side of vehicle

N.J.—Newman v. Katz, 169 A. 643, 112 N.J.Law 49.

83. Cal.—Curcio v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46
Ill.—English v. Gordon, 231 Ill.App. 316.

89. Iowa.—Nyswander v. Gonser, 253 N.W. 829, 218 Iowa 136.

Minn.—Cogin v. Ide, 265 N.W. 315, 196 Minn. 493.

R.I.—Dick v. Whitfield, 190 A. 799, 58 R.I. 21.

90. R.I.—Sarcone v. Outlet Co., 163 A. 741, 53 R.I. 76.

91. Iowa.—McMurry v. Guth, 295 N. W. 133, 229 Iowa 776.

Mass.—Stinson v. Noble, 17 N.E.2d 703, 301 Mass. 483—Byrne v. Dunn, 5 N.E.2d 10, 296 Mass. 184.

Mich.—Burton v. Yellow & Checker Cab & Transfer Co., 278 N.W. 106, 283 Mich. 384.

Mo.—Lee v. City Ice Co., App., 64 S. W.2d 736.

Mont.—McKeon v. Kilduff, 281 P. 345, 85 Mont. 562.

Pa.—Bauer v. Sacks, 50 A.2d 351, 355 Pa. 488.

42 C.J. p 1268 note 17 [f].

Conduct held not negligent as matter of law

Wash.—Stiles v. Corbett, 241 P. 294, 136 Wash. 670.

92. Tenn.—Getz v. Weiss, 160 S.W. 2d 438, 25 Tenn.App. 520.

93. Mass.—Donovan v. Mutrie, 164 N.E. 377, 265 Mass. 472.

94. Mont.—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.

Pa.—Susser v. Wiley, 39 A.2d 616, 350 Pa. 427—Caulton v. Eyre & Co., 199 A. 136, 330 Pa. 385.

42 C.J. p 1269 note 25.

What constitutes contributory negligence of persons working in or upon highway see supra § 476.

Particular work or activity

(1) Gateman.—Scott v. Shedy, 102 P.2d 575, 39 Cal.App.2d 96.

(2) Loading or unloading vehicles.—Viretto v. Tricarico, 165 A. 345, 116 Conn. 718.

(3) Peddling fruits and vegetables.—Serio v. Bowman Dairy Co., 73 N. E.2d 160, 331 Ill.App. 414.

(4) Milk wagon driver standing on step of milk wagon.—Hayes v. Axelrod, 3 A.2d 346, 332 Pa. 518.

(5) School janitor acting as traffic officer.—Beyrent v. Kaplan, 172 A. 651, 315 Pa. 353, 92 A.L.R. 1515.

(6) Filling station operator flagging approaching bus to stop for passengers.—Hill v. Southern Kansas Stage Lines Co., 53 P.2d 923, 143 Kan. 44.

(7) Attempting to stop traffic approaching dangerous condition upon highway.—Petersen v. Lang Transp. Co., 90 P.2d 94, 32 Cal.App.2d 462.

(8) Acts in emergency.—Shaver v.

work relating to the construction, maintenance, or operation of highways,⁹⁵ work relating to public utility facilities which make use of the highways,⁹⁶ and work or activity in the repair or adjustment of vehicles temporarily stopped upon the highway,

or the removal of obstructions impeding such vehicles.⁹⁷ Where, however, the evidence is uncontradicted, or is insufficient to raise the issue, the court should rule on the alleged contributory negligence as a matter of law.⁹⁸

United Parcel Service, 266 P. 606, 90 Cal.App. 764.

95. US—R B Tyler Co v. Greenup, CCA Tenn., 140 F.2d 896—Sprinkle v. Davis, CCA Va., 111 F.2d 925, 128 A.L.R. 1101—Sprinkle v. Davis, CCA Va., 104 F.2d 487.

Ark.—D. F. Jones Const. Co. v. Milze, 146 SW 2d 709, 201 Ark. 702.

Cal.—Mecham v. Crump, 30 P.2d 568, 137 Cal.App. 200—Woods v. Wisdom, 24 P.2d 863, 133 Cal.App. 694—Porter v. Rasmussen, 15 P.2d 888, 127 Cal.App. 405—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742

Conn.—Paff v. H T Smith Express Co., 181 A. 621, 120 Conn. 553—Distefano v. Universal Trucking Co., 164 A. 492, 116 Conn. 249.

Ill.—Leon v. McMillan, 5 NE 2d 742, 287 Ill.App. 579.

Iowa—Lind v. Eddy, 6 NW 2d 427, 232 Iowa 1328, 146 A.L.R. 695—Wamsler v. Rostian, 298 NW 860, 230 Iowa 792—Rehmann v. Heesch, 288 NW 695, 227 Iowa 566

Ky.—Berry v. Irwin, 295 SW. 1020, 220 Kv 708

Mass.—Ferrairs v. Hewes, 16 NE 2d 674, 301 Mass. 116

Pa.—Jenkins v. Fady, 144 A. 429, 294 Pa. 490—Peters v. Schroeder, 138 A. 755, 290 Pa. 217.

R.I.—Ball v. Webster, 13 A.2d 278, 65 RI 34

Tenn.—Havron v. Page, 157 S.W.2d 856, 25 Tenn.App. 367.

W Va.—Tilley v. Cole, 13 S.E.2d 153, 123 W.Va. 28.

Particular work or activity

(1) Road inspector—Daughtry v. Cline, 30 S.E.2d 322, 224 N.C. 381, 154 A.L.R. 789.

(2) State highway employee painting divisor line in center of highway—Blrnesser v. McGath, 52 A.2d 188, 356 Pa. 375.

(3) Flagman

Cal.—Roddy v. American Smelting & Refining Co., 93 P.2d 841, 34 Cal. App.2d 457.

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

(4) Bridge tender.—Koch v. Barker, 41 N.E.2d 329, 314 Ill.App. 378.

(5) Toll bridge ticket collector. U.S.—Sutton v. Public Service Interstate Transp. Co., C.C.A.N.Y., 157 F.2d 947, certiorari denied Public Service Interstate Transp. Co. v. Sutton, 67 S.Ct. 870, 330 U.S. 828, 91 L.Ed. 1277.

N.J.—Byer v. H. R. Ritter Trucking Co., 35 A.2d 633, 131 N.J.Law 199.

Acts in emergency

Pa.—West v. Morgan, 27 A.2d 46, 345 Pa. 61.

96. R.I.—Riley v. Tsagarakis, 145 A. 12, 50 R.I. 62.

Particular work or activity

(1) Street railway employee.

Mo.—Gaylor v. Wienshienk, 283 S.W. 464, 221 Mo.App. 585.

R.I.—Riley v. Tsagarakis, 145 A. 12, 50 R.I. 62.

(2) Street light repair man—High v. Bond, 290 P. 145, 107 Cal.App. 153.

97. US—Burdick v. Powell Bros Truck Lines, CCA Ill., 124 F.2d 694—Tacconi v. Salvation Army, C. C.A.Utah, 95 F.2d 599—Bohrbrink v. Malone, CCA Ill., 14 F.2d 601

Cal.—Fleming v. Flick, 35 P.2d 210, 140 Cal.App. 14—White v. Davis, 284 P. 1086, 103 Cal.App. 531

Ga.—Tatum v. Crosswell, 174 SE 258, 49 Ga.App. 27

Ill.—Blachek v. City Ice & Fuel Co., 35 NE 2d 416, 311 Ill.App. 1—King v. Meeker, 269 Ill.App. 57

Iowa.—Murchland v. Jones, 279 NW. 382, 225 Iowa 149

Kan.—Waltmire v. Ford, 78 P.2d 893, 147 Kan. 732.

Ky.—Glasgow Ice Cream Co. v. Fults' Adm'r, 105 S.W.2d 135, 268 Ky. 447.

Mich.—Haara v. Vreeland, 236 NW. 836, 254 Mich. 462.

Minn.—Rakken v. Lewis, 26 NW 2d 478, 223 Minn. 329—Duff v. Bemidji Motor Service Co., 299 NW. 196,

210 Minn. 456—Corridan v. Agranoff, 297 N.W. 759, 210 Minn. 237—Anderson v. Johnson, 294 N.W. 224,

208 Minn. 373—Peterson v. Norris, 258 N.W. 729, 193 Minn. 400.

N.H.—Colby v. Avery, 40 A.2d 841, 93 NH 250.

N.D.—Harmon v. Haas, 241 N.W. 70, 61 N.D. 772, 80 A.L.R. 1131.

Pa.—Latchaw v. Hoefner, 2 A.2d 722, 332 Pa. 422—Handfinger v. Barnwell Bros, 189 A. 312, 325 Pa. 319—Koppenhaver v. Swab, 174 A. 393,

316 Pa. 207.

Tex.—Tarry Warehouse & Storage Co. v. Price, Civ.App., 76 S.W.2d 162, error dismissed—Texarkana Electric Co. v. Putsch, Civ.App., 53 S.W.2d 87.

Wash.—Gooschin v. Ladd, 33 P.2d 653, 177 Wash. 625.

Particular work or activity

(1) Fixing or changing tires.

Cal.—Rivera v. Hasenjaeger, 85 P.2d 167, 29 Cal.App.2d 431.

Idaho.—Joslin v. Idaho Times Pub. Co., 91 P.2d 386, 60 Idaho 235—Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 56 Idaho 242.

Me.—Tibbetts v. Dunton, 174 A. 453, 133 Me. 128.

Minn.—Budish v. Villaume Box & Lumber Co., 232 NW. 264, 181 Minn. 259.

N.D.—Hutchinson v. Kinzley, 262 N. W. 251, 98 A.L.R. 1307.

Ohio.—Basinger v. Yarian, App., 49 N.E.2d 104.

Tex.—Carson v. Amberson, Civ.App., 148 S.W.2d 972, error dismissed, judgment correct.

Vt.—Mangan v. Smith, 56 A.2d 476, 115 Vt. 250.

(2) Wiping snow or ice from windshield or windows

Ill.—Kraaz v. Henke, 62 N.E.2d 44, 326 Ill.App. 466.

Iowa.—Winter v. Davis, 251 N.W. 770, 217 Iowa 424.

Pa.—Lonasco v. Veill, 45 A.2d 417, 158 Pa.Super. 456

S.D.—Griebel v. Ruden, 253 N.W. 447, 62 S.D. 469.

(3) Pushing vehicle.

Cal.—Shannon v. Thomas, 134 P.2d 523, 57 Cal.App.2d 187—Wright v. Ponitz, 112 P.2d 25, 44 Cal.App.2d 215.

Ill.—Short v. Chrisman, 53 N.E.2d 731, 322 Ill.App. 71—McGoorty v. Benhart, 27 NE 2d 289, 305 Ill.App. 458—Stout v. Skinner, 283 Ill.App. 330.

Iowa.—Huston v. Lindsay, 276 N.W. 201, 224 Iowa 281.

Mich.—Newell v. Ritter, 256 N.W. 464, 268 Mich. 405.

N.J.—Chiesa v. Public Service Coordinated Transport, 24 A.2d 369, 128 N.J.Law 69.

Or.—Holman v. Uglow, 3 P.2d 120, 137 Or. 358, followed in Hayes v. Uglow, 3 P.2d 126, 137 Or. 373.

S.C.—Powell v. Drake, 18 S.E.2d 745, 199 S.C. 212.

(4) Work connected with operation of wrecking car.

U.S.—Kovinski v. Rowe, CCA Mich., 131 F.2d 687.

Conn.—Nichols v. Williams, 16 A.2d 605, 127 Conn. 337.

Persons held not negligent as matter of law

Ark.—Blakemore v. Stevens, 67 S.W. 2d 733, 188 Ark. 755.

Iowa.—Youngman v. Sloan, 281 N.W. 130, 225 Iowa 558—Fortman v. McBride, 263 N.W. 345, 220 Iowa 1003.

Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.

Pa.—Rieffer v. Niehl Transp. Co., 163 A. 529, 309 Pa. 251.

98. Iowa.—Winter v. Davis, 251 N. W. 770, 217 Iowa 424.

(2) Police or Traffic Officers

On conflicting evidence, whether a police or traffic officer struck by the defendant was guilty of contributory negligence is a question of fact.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question for the trier of the facts whether a police or traffic officer struck by defendant was guilty of contributory negligence,⁹⁹ in that he failed to maintain a proper lookout.¹ However, where the evidence is uncontradicted and the inference of contributory negligence on the part of plaintiff may reasonably be made therefrom, it may be held that plaintiff was guilty of contributory negligence as a matter of law.²

Incidental questions of fact are for the jury on conflicting evidence,³ as, for example, how fast plaintiff, a motorcycle policeman, was going,⁴ whether he gave a warning of his approach to a street intersection,⁵ and whether he was driving his motorcycle on the wrong side of the road,⁶

and, if so, whether he had a valid reason therefor,⁷ whether at the time he was engaged in the duties of his position or was riding for his own purposes,⁸ and whether he was in a position of imminent danger not of his own making, so as to invoke the emergency doctrine.⁹

k. Persons Boarding or Alighting from Streetcar, Bus, or Other Vehicle

Whether or not persons struck by defendant's vehicle while boarding or alighting from a streetcar, bus, or other vehicle, or while waiting or walking in the street before boarding or after alighting, were guilty of contributory negligence is a question of fact for the jury or other trier of the facts.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of the facts whether a person struck by defendant's vehicle was guilty of contributory negligence while boarding or about to board a streetcar, bus, or other vehicle,¹⁰ or while alighting from such a vehicle.¹¹

Evidence held insufficient

Evidence in action for injuries to motorist whose car was "sideswiped" when he stopped temporarily to clean windshield was held insufficient to make issue for jury of plaintiff's contributory negligence in failing to maintain proper lookout, or in stepping into path of defendant's car.—*Winter v. Davis*, *supra*.

99. Ill.—*Cooney v. Hughes*, 34 N.E. 2d 566, 310 Ill.App. 371.

Ky.—*Louisville Ry. Co. v. Offutt's Adm'x*, 55 S.W.2d 391, 246 Ky 508. Mass.—*Runnells v. Cassidy*, 29 N.E. 2d 732, 307 Mass. 128.—*Mathews v. Carr*, 171 N.E. 660, 271 Mass. 362. N.J.—*Rusk v. Jeffries*, 164 A. 313, 110 N.J.Law 307.

N.Y.—*Spencer v. Saporito*, 283 N.Y.S. 489, 246 App.Div. 642.

Pa.—*Shaffer v. Torrens*, 58 A.2d 439, 359 Pa. 187.—*Seret v. Carbley*, 39 A. 2d 607, 350 Pa. 434.

W.Va.—*Oldfield v. Woodall*, 166 S.E. 691, 113 W.Va. 35.

Wis.—*Martell v. Kutcher*, 216 N.W. 522, 195 Wis. 19.

42 C.J. p 1269 note 26.

Contributory negligence of police or traffic officers generally see *supra* § 475.

Assuming dangerous position on vehicle

Where driver of dump truck, who was taking a seriously injured person to hospital asked policeman to clear traffic, and, as there was no room for him in cab of truck, policeman stood on running board of truck, whether policeman was guilty of contributory negligence was for jury.—*De Gregorio v. Malloy*, 52 A.2d 195, 356 Pa. 511.

1. Pa.—*Shaffer v. Torrens*, 58 A.2d 439, 359 Pa. 187.

Policeman held not negligent as matter of law

Pa.—*Shaffer v. Torrens*, *supra*.

2. Ala.—*Lessman v. West*, 101 So. 515, 20 Ala.App. 289.

42 C.J. p 1270 note 33.

3. Cal.—*Livezey v. Rogers*, 88 P.2d 169, 31 Cal.App.2d 412.

4. Conn.—*Eukers v. Summer*, 147 A. 671, 110 Conn. 230.

N.J.—*Desmond v. Basch*, 108 A. 362, 94 N.J.Law 52.

5. N.J.—*Desmond v. Basch*, *supra*.

6. N.J.—*Desmond v. Basch*, *supra*.

7. N.J.—*Desmond v. Basch*, *supra*.

8. N.J.—*Desmond v. Basch*, *supra*.

Whether officer was making emergency call

Cal.—*Livezey v. Rogers*, 88 P.2d 169, 31 Cal.App.2d 412.

9. Cal.—*Kehlor v. Satterlee*, 98 P.2d 759, 37 Cal.App.2d 116.

10. Mo.—*Hoelker v. American Press*, 296 S.W. 1008, 317 Mo. 64.

42 C.J. p 1270 note 34 [a].

Contributory negligence of persons boarding or alighting from streetcar, bus, or other vehicle see *supra* §§ 477-482.

Evidence held sufficient to go to jury

Cal.—*Dubbs v. Sweetland*, 121 P.2d 525, 49 Cal.App.2d 257.

Tex.—*Cronk v. J. G. Pegues Motor Co.*, Civ.App., 167 S.W.2d 254, error refused.

Entering parked automobile

Iowa.—*Hanson v. Manning*, 239 N.W. 793, 213 Iowa 625.

Me.—*Peabody v. Sweet*, 152 A. 312, 129 Me. 375.

Ohio.—*Smith v. Hoskins*, 17 N.E.2d 955, 59 Ohio App. 298.

Tenn.—*Ezell v. Post Sign Co.*, App., 205 S.W.2d 13.

Entering vehicle from side adjacent to traffic

(1) The question of negligence in entering a vehicle from the side adjacent to traffic is ordinarily one of fact for the jury.

U.S.—*Powell Bros. Truck Lines v. Platt*, C.C.A. Okl., 92 F.2d 879.

Pa.—*Ross v. Pittsburgh Motor Coach Co.*, 39 A.2d 148, 156 Pa.Super. 45.

Wash.—*Discargar v. City of Seattle*, 171 P.2d 205, 25 Wash.2d 306.

Wis.—*Scory v. La Fave*, 254 N.W. 643, 215 Wis. 21.

(2) Intended occupant of an automobile is not negligent as matter of law for walking into street in order to enter parked automobile from street side if he does not thereby place himself in a position of danger.—*Ross v. Pittsburgh Motor Coach Co.*, 39 A.2d 148, 156 Pa.Super. 45.

11. Cal.—*Harvey v. Aceves*, 1 P.2d 1043, 115 Cal.App. 333.—*Palmer v. Schultz*, 290 P. 79, 107 Cal.App. 94.

Ga.—*Parker v. Lee Baking Co.*, 167 S.E. 747, 46 Ga.App. 470.

Ill.—*Dennehy v. W. A. Wood Co.*, 2 N.E.2d 586, 285 Ill.App. 598.

Mass.—*Skelley v. Kane*, 159 N.E. 439, 262 Mass. 136.

Neb.—*Brenning v. Remington*, 287 N.W. 776, 126 Neb. 883.

42 C.J. p 1270 note 34 [b].

Plaintiff held not negligent as matter of law

U.S.—*Wawin Coal Co. v. Orr*, C.C.A. Minn., 33 F.2d 27.

Ga.—*Hexter v. Burgess*, 184 S.E. 769, 52 Ga.App. 819.

So, also, it is ordinarily a question of fact for the trier of the facts whether plaintiff was guilty of contributory negligence when moving to a street-car, bus, or other vehicle to board it,¹² and crossing a street for that purpose;¹³ or while moving from such vehicle,¹⁴ and crossing a street,¹⁵ after

alighting from it. Similarly, the trier of facts must decide, on conflicting evidence, the contributory negligence of plaintiff while waiting in the street to board, or after alighting from, a streetcar, bus, or other vehicle;¹⁶ or while standing in a safety zone for that purpose;¹⁷ or while crossing to trans-

Md.—Feldser v. Beeman, 4 A.2d 750, 176 Md. 377, 123 A.L.R. 786.

Pa.—Brosky v. Klotz, Com.Pl., 19 Lehigh Co. L.J. 412.

Evidence held sufficient to go to jury
Vt.—Porter v. Fleming, 156 A. 903, 104 Vt. 76.

Alighting from parked automobile
U.S.—Virginia Motor Express v. Jimenez, C.C.A.Va., 76 F.2d 694.

Cal.—Ketchum v. Pattee, 98 P.2d 1051, 37 Cal.App.2d 122.

Ill.—McNally v. Chauncey Body Corporation, 42 N.E.2d 853, 315 Ill. App. 190.

Minn.—Judge v. Endriss, 284 N.W. 788, 204 Minn. 589.

Mo.—Wulze v. Aquardo, App., 6 S.W.2d 1017.

Pa.—Sprague v. Zeck, 194 A. 904, 327 Pa. 592.

Alighting from threshing outfit
Mich.—Sanderson v. Barkman, 261 N.W. 291, 272 Mich. 179.

12. Mo.—Baumker v. Dunsworth, App., 7 S.W.2d 417—Bopp v. Standard Sanitary Mfg. Co., 299 S.W. 137, 221 Mo.App. 188.

Pa.—Felscher v. Kutney, Com.Pl., 34 Luz. Leg. Reg. 309.

R.I.—Cunningham v. Walsh, 163 A. 223, 53 R.I. 23.

Plaintiff not negligent as matter of law

La.—Murphy v. Gladney's, Inc., 124 So. 780, 12 La.App. 442.

Ohio—Thorpe v. Broadway-Overland Co., 181 N.E. 907, 42 Ohio App. 160.

13. Conn.—Syssa v. Hemingway, 138 A. 223, 106 Conn. 499.

Ill.—Fischer v. Kluck, 15 N.E.2d 346, 295 Ill. App. 621.

Ind.—Conner v. Jones, 59 N.E.2d 577, 115 Ind.App. 660, rehearing denied 60 N.E.2d 534, 115 Ind.App. 660.

Md.—Summers v. Brown, 183 A. 246, 170 Md. 695.

Ohio—Trentman v. Cox, 160 N.E. 715, 118 Ohio St. 247.

Pa.—Morris v. Harmony Short Line Motor Transp. Co., 34 A.2d 534, 348 Pa. 117.

Plaintiff held not negligent as matter of law

Ind.—Conner v. Jones, 59 N.E.2d 577, 115 Ind.App. 660, rehearing denied 60 N.E.2d 534, 115 Ind.App. 660.

Md.—Sillik v. Hoeck, 178 A. 852, 168 Md. 639.

Evidence held sufficient to go to jury

Ill.—Langford v. Smith, 51 N.E.2d 789, 320 Ill.App. 684.

Ky.—Shatz v. Raiser, 158 S.W.2d 627, 289 Ky. 297.

Question held for court sitting without jury

Cal.—McQuigg v. Childs, 3 P.2d 309, 213 Cal. 661.

14. Cal.—Stewart v. Connolly, 128 P.2d 894, 54 Cal.App.2d 352—Gernhardt v. Rancadore, 24 P.2d 946, 134 Cal.App. 65.

Ind.—Gatewood v. Lynch, 23 N.E.2d 289, 107 Ind.App. 168.

Mich.—Brown v. Arnold, 6 N.W.2d 914, 303 Mich. 616.

Neb.—Sgroi v. Yellow Cab & Baggage Co., 247 N.W. 355, 124 Neb. 525.

N.J.—Landra v. Marone, 144 A. 565, 105 N.J.Law 405.

Ohio—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284.

Wash.—Anderson v. Grandy, 283 P. 186, 154 Wash. 547.

Question held for court sitting without jury

Cal.—McGarry v. Coyle, 7 P.2d 312, 120 Cal.App. 182.

Plaintiff held not negligent as matter of law

Mo.—Smart v. Raymond, App., 142 S.W.2d 100.

Alighting on left-hand side

Cal.—Market St. Ry. Co. v. George, 3 P.2d 41, 116 Cal.App. 572.

Kan.—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320.

15. U.S.—Long Transp. Co. v. Domurat, C.C.A.Ill., 93 F.2d 23.

Cal.—Croxall v. Broadway Department Store, 15 P.2d 546, 127 Cal. App. 153—Cassinelli v. Bennen, 294 P. 748, 110 Cal.App. 722.

Md.—Brown v. Bendix Radio Div. of Bendix Aviation Corp., 51 A.2d 292.

Mass.—Campbell v. Cairns, 20 N.E.2d 427, 302 Mass. 584.

N.J.—Shrodes v. Ferguson, 168 A. 647, 111 N.J.Law 312.

Pa.—Weibel v. Ferguson, 19 A.2d 357, 342 Pa. 113—Kirk v. McKnight, 167 A. 36, 311 Pa. 483—Bert v. Walker, 21 A.2d 488, 146 Pa.Super. 50.

R.I.—Walling v. Jenks, 6 A.2d 540, 62 R.I. 424.

Tenn.—Tiffany v. Shipley, 161 S.W.2d 373, 25 Tenn.App. 539.

Wash.—Tobin v. Goodwin, 290 P. 215, 157 Wash. 658—Reitan v. Crooks, 279 P. 97, 153 Wash. 75—Wright v. Zido, 276 P. 542, 151 Wash. 486—Machenheimer v. Falknor, 255 P. 1031, 144 Wash. 27.

42 C.J. p 1270 note 37.

Plaintiff held not negligent as matter of law

Cal.—Coursault v. Schwebel, 5 P.2d 77, 118 Cal.App. 259.

Md.—Fisher v. Finan, 163 A. 828, 163 Md. 418.

Or.—Nislev v. Sawyer Service, Inc., 261 P. 890, 123 Or. 293.

After alighting from parked automobile

U.S.—Abood v. Turner, C.C.A.Pa., 72 F.2d 880.

N.Y.—Richardson v. Merrifield, 299 N.Y.S. 344, 252 App.Div. 832.

Passing in front of bus or car

U.S.—D'Allesandro v. Bechtol, C.C.A.Fla., 104 F.2d 845, certiorari denied 60 S.Ct. 295, 308 U.S. 619, 84 L. Ed. 517.

Ark.—Pollock v. Hamm, 6 S.W.2d 541, 177 Ark. 348.

Colo.—Crosby v. Canino, 268 P. 1021, 84 Colo. 225.

Ill.—Moore v. Sautter, 70 N.E.2d 260, 330 Ill. App. 132.

Mo.—Gardner v. Burkart Mfg. Co., App., 7 S.W.2d 706.

N.J.—Myles v. Sussman, 171 A. 547, 12 N.J. Misc. 341—Heinsmann v. Kumpf, 153 A. 370, 9 N.J. Misc. 265.

Ohio.—Titus v. Stouffer, App., 40 N.E.2d 178—Meier v. Joseph R. Peebles Sons Co., 11 N.E.2d 707, 57 Ohio App. 80.

42 C.J. p 1270 note 37 [b].

Passing behind bus or car

(1) In general.

Ill.—Krolczyk v. Heritage Coal Co., 4 N.E.2d 801, 287 Ill.App. 619.

Minn.—Hedlin v. Swenson, 232 N.W. 265, 181 Minn. 277.

Wis.—West v. Johnson, 233 N.W. 94, 202 Wis. 416.

42 C.J. p 1270 note 37 [c].

(2) Conduct held not negligence as matter of law

Ga.—Hirsch v. Plowden, 134 S.E. 833, 35 Ga.App. 763.

Mass.—Connell v. Kelleher, 58 N.E.2d 645, 317 Mass. 413.

16. Cal.—Coats v. Hathorn, 8 P.2d 1038, 121 Cal.App. 257.

Mich.—Petrusha v. Korinek, 213 N.W. 188, 237 Mich. 583.

Plaintiff held not negligent as matter of law

Tenn.—Rice Bros. Auto Co. v. Ely, 178 S.W.2d 88, 27 Tenn.App. 81.

Waiting for another car

Pa.—Smith v. Shatz, 200 A. 620, 331 Pa. 453.

17. Cal.—Pearson v. Whitworth, 171 P.2d 745, 75 Cal.App.2d 751—Kings-ton v. Hardt, 62 P.2d 1376, 18 Cal. App.2d 61.

Kan.—Scott v. Vaughn, 37 P.2d 1012, 140 Kan. 529.

fer from one vehicle to another;¹⁸ or while crossing the street after the car or bus for which plaintiff had been waiting went by without stopping.¹⁹

Incidental questions of fact, such as whether plaintiff alighted from the car before or after it had stopped at the time he received his injuries,²⁰ or whether he was negligent in not discovering the approaching automobile,²¹ have also been held to be questions for the jury.

Evidence uncontradicted or insufficient. Where the evidence is uncontradicted and not reasonably subject to differing inferences,²² or where it is insufficient to support a finding of negligence,²³ the court must rule on the alleged contributory negligence of plaintiff as a matter of law.

I. Persons under Disability

- (1) In general
- (2) Children

Pa.—Cervinka v. Horlacher Delivery Service, 165 A. 857, 310 Pa. 504.
Wash.—Anselmo v. Morsing, 6 P.2d 377, 166 Wash. 111, rehearing denied 9 P.2d 100, 166 Wash. 111.

Plaintiff held not negligent as matter of law

Cal.—Strafiotis v. Daniels, 265 P. 558, 90 Cal.App. 144.

18. Cal.—Kingston v. Hardt, 62 P. 2d 1376, 18 Cal.App.2d 61.

Or.—Marsters v. Isensee, 192 P. 907, 97 Or. 567.

19. D.C.—Yellow Cab Co. of D. C. v. Griffith, Mun.App., 40 A.2d 340.

Failure to use established crosswalk
D.C.—Yellow Cab Co. of D. C. v. Griffith, supra.

20. N.J.—Horowitz v. Gottwalt, Sup., 102 A. 930.

21. Or.—Nisley v. Sawyer Service, Inc., 261 P. 890, 123 Or. 293.

22. Pa.—Ross v. Pittsburgh Motor Coach Co., 39 A.2d 148, 156 Pa.Super. 45.

Wash.—Anselmo v. Morsing, 6 P.2d 377, 166 Wash. 111, rehearing denied, 1932, 9 P.2d 100, 166 Wash. 111.

Plaintiff held guilty of contributory negligence

U.S.—Valanda v. Baum & Reissman, C.C.A.Pa., 113 F.2d 188.

Pa.—Crawford v. Shenango Valley Traction Co., 157 A. 40, 102 Pa.Super. 440.

Tex.—Kooch v. Goodnight, Civ.App., 71 S.W.2d 927, error refused.

Person in safety zone

In action for injuries sustained by passenger transferring from one car to another when struck by automobile while standing in safety zone, refusing to submit issue of contributory negligence was held not error.

—La Sance v. Casey, 295 P. 520, 211 Cal. 333.

23. N.H.—Manor v. Gagnon, 32 A.2d 688, 92 N.H. 435.

24. Ky.—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533.

Questions of law and fact as to competency or disability of motorist see supra subdivision b (1) of this section

What constitutes contributory negligence of persons under disability see supra § 484.

Child under disability

Whether a boy eleven years of age, afflicted with epilepsy, lack of proper muscular coordination, and defective eyesight, was negligent so as to preclude recovery for injuries sustained in collision with automobile while crossing street in or near pedestrian lane at intersection, accompanied by two older boys, who may have obstructed his vision, was a question for jury.—Hinckel v. Steigers, Wash., 191 P.2d 279.

Unconsciousness

(1) In action for death of a pedestrian who was struck by motorist's automobile while lying on highway at night, whether pedestrian was negligent was for jury.—Kriesak v. Crowe, C.C.A.Pa., 131 F.2d 1023.

(2) A person crossing a street at a point other than a crosswalk is not barred from recovery as a matter of law if he is unconscious at the time he was struck by an automobile traveling on the street.—Kleiner v. Johnson, 23 N.W.2d 467, 249 Wis. 148.

Inability to run

Mich.—Haight v. Fox, 289 N.W. 273, 291 Mich. 601.

Feeble-mindedness

Ohio.—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335.

(1) In General

It is for the trier of facts, on conflicting evidence, to determine whether a pedestrian under disability was guilty of contributory negligence, and whether a pedestrian was intoxicated, and, if so, the effect thereof.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of the facts whether a pedestrian under disability, struck by defendant, was guilty of contributory negligence,²⁴ as in the case of pedestrians who are deaf,²⁵ blind,²⁶ have imperfect eyesight,²⁷ or are of advanced age.²⁸

Intoxication. It is also a question for the jury on conflicting evidence whether plaintiff, a pedestrian, was intoxicated, and the effect thereof.²⁹

25. Mich.—Covert v. Randall, 298 N. W. 396, 298 Mich. 38.

Pa.—Adams v. Armour & Co., 16 A.2d 142, 142 Pa.Super. 280.

Tenn.—Hamilton v. Moyers, 140 S. W.2d 799, 24 Tenn.App. 86

42 C.J. p 1270 note 42.

26. Or.—Weinstein v. Wheeler, 15 P. 2d 383, 141 Or. 216

42 C.J. p 1270 note 43

27. N.H.—Clark v. Temple, 164 A. 763, 86 N.H. 170.

Blind in one eye

Conn.—Muse v. Page, 4 A.2d 329, 125 Conn. 219

Mass.—Reed v. Union St. Ry. Co., 71 N.E.2d 114, 320 Mass. 706.

Wash.—Woods v. Greenblatt, 1 P.2d 880, 163 Wash. 433.

Failure to wear glasses

Mass.—Bryant v. Emerson, 197 N.E. 2, 291 Mass. 227.

28. Mo.—Althage v. People's Motorbus Co. of St. Louis, 8 S.W.2d 924, 320 Mo. 598.

42 C.J. p 1270 note 44.

29. Cal.—Benton v. Douglas, 187 P. 2d 469, 82 Cal.App.2d 784—Johnston v. Brewer, 105 P.2d 365, 40 Cal. App.2d 583.

Conn.—Kupchunas v. Connecticut Co., 26 A.2d 775, 129 Conn. 160.

Idaho.—Geist v. Moore, 70 P.2d 403, 58 Idaho 149.

Md.—Sugar v. Hafele, 17 A.2d 118, 179 Md. 75.

Mass.—Pochi v. Brett, 65 N.E.2d 195, 319 Mass. 197—Martin v. Florin, 172 N.E. 895, 273 Mass. 13.

Mich.—Greene v. Richer, 270 N.W. 194, 278 Mich. 1.

N.H.—Carr v. Orrill, 166 A. 270, 86 N.H. 226.

Or.—Brady v. Schnitzer, 295 P. 961, 135 Or. 250.

(2) Children

Where the evidence is conflicting, it is for the trier of facts to determine the contributory negligence of a child struck by a motor vehicle operated by the defendant.

Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question of fact for the trier of the

facts whether a child, struck by a motor vehicle operated by defendant, used due care or was guilty of contributory negligence.³⁰

The rule has been applied in determining the contributory negligence of a minor while a guest or occupant of a motor vehicle;³¹ or while riding a motorcycle,³² or a bicycle,³³ or some other ve-

Evidence held sufficient to go to jury
Cal.—Emery v. Los Angeles R. Corporation, 143 P.2d 112, 61 Cal App. 2d 455.

Mass.—Baczek v. Damian, 29 N.E.2d 682, 307 Mass. 167.

Neb.—Nichols v. Havlat, 7 N.W.2d 84, 142 Neb. 534.

Exoneration by court held error

In action by pedestrian for injuries sustained when struck by automobile, it was error for trial court to exonerate plaintiff from contributory negligence arising out of intoxication on the ground that evidence supported inference that plaintiff did what would have absolved a sober person from negligence, where there was proof from which a jury might properly infer that plaintiff was so drunk that he could not walk or rely on assumption that defendant would avoid hitting him.—Benedict v. Berg, 281 W.W. 650, 229 Wis. 1.

30. Ark.—Monk v. Jones, 83 S.W.2d 526, 190 Ark. 1117.—Murphy v. Clayton, 15 S.W.2d 391, 179 Ark. 225

Cal.—Schroeder v. Baumgartner, 262 P. 740, 202 Cal. 626.—Fortier v. Hogan, 1 P.2d 23, 115 Cal App. 50.

Conn.—Baldwin v. Robertson, 172 A. 859, 118 Conn. 431

Ill.—Ehrenheim v. Yellow Cab Co., 239 Ill.App. 403.

Iowa.—Gehlbach v. McCann, 249 N. W. 144, 216 Iowa 296

Ky.—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666.

Mass.—De Francisco v. Heath, 28 N. E.2d 995, 306 Mass. 527.—Schneider v. De Christopher, 16 N.E.2d 857, 301 Mass. 241.—Stacy v. Dorchester Awning Co., 195 N.E. 350, 290 Mass. 356.—Samson v. Abramson, 176 N.E. 199, 275 Mass. 477.—Cairney v. Cook, 165 N.E. 406, 266 Mass. 279.—Clark v. Martin, 158 N.E. 265, 261 Mass. 60.—Hart v. Morris & Co., 156 N.E. 15, 259 Mass. 211.

Minn.—Allerdyce v. Martin, 298 N.W. 363, 210 Minn. 366.—Holm v. King, 217 N.W. 122, 173 Minn. 260.

N.J.—Yohannan v. Benisch, 135 A. 876, 103 N.J.Law 462.—Rullis v. Public Service Electric & Gas Co., 155 A. 455, 9 N.J.Misc. 738.—Webster v. Wickham, 135 A. 781, 5 N.J. Misc. 186.

N.Y.—Razauckas v. New York Dugan Bros., 33 N.Y.S.2d 411, 263 App. Div. 1002, affirmed 43 N.E.2d 722, 289 N.Y. 592.—Vincinere v. Ward,

20 N.Y.S.2d 451, 259 App.Div. 1019, affirmed 35 N.E.2d 497, 285 N.Y. 823.—Lo Vaglio v. Kahn, 1 N.Y.S.2d 322, 253 App Div. 824.—Mosher v. Lamora, 282 N.Y.S. 379, 245 App. Div. 903.—Shulman v. Roseth Corporation, 238 N.Y.S. 575, 227 App. Div. 577.

Pa.—Fabel v. Hazlett, Com.Pl., 25 Wash Co. 110, affirmed 43 A.2d 373, 157 Pa Super 416

R.I.—Knight v. Trainor, 194 A. 713, 59 R.I. 208.

Tenn.—Holt v. Walsh, 174 S.W.2d 657, 180 Tenn. 307

Va.—Wash v. Holland, 183 S.E. 236, 166 Va. 45.

42 C.J. p 1270 note 45.

"It is pointed out by the authorities generally that usually in the case of a child as in that of an adult, it becomes a question of fact for the jury whether such child in using the street and meeting automobile travel hazards exercises such care in protecting itself from injuries as can be reasonably expected on the part of one of its age, judgment and experience"—Archuleta v. Jacobs, 94 P. 2d 706, 709, 43 N.M. 425

31. Cal.—Christiana v. Rattaro, 184 P.2d 682, 81 Cal App.2d 597.—Woodman v. Hemet Union High School Dist. of Riverside County, 29 P.2d 257, 136 Cal.App. 544.

Ga.—Eddleman v. Askew, 179 S.E. 247, 50 Ga App. 540.

N.Y.—Schwartz v. Kraft, 300 N.Y.S. 645, 253 App.Div. 736.

Ohio.—May v. Szwed, 39 N.E.2d 630, 68 Ohio App. 459.

Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.—Baran v. Kalczynski, 198 A. 40, 330 Pa. 52.

Tenn.—Coppedge v. Blackburn, 15 Tenn.App. 587.

Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.

Wash.—Emboddy v. Cox, 289 P. 44, 157 Wash. 464.

W.Va.—Jones v. Ambrose, 38 S.E.2d 263, 128 W.Va. 715.

42 C.J. p 1270 note 45 [a].

Questions of law and fact as relating to contributory negligence of guests or occupants of motor vehicles generally see supra subdivision c of this section.

Riding in dangerous position

(1) Whether a minor riding in a dangerous position was guilty of contributory negligence has been held to be a question of fact.

Cal.—Hernandez v. Murphy, 115 P.2d 565, 46 Cal App.2d 201.

Ill.—Warput v. Reading Coal Co., 250 Ill App 450.

Mich.—Breger v. Feigenson Bros. Co., 249 N.W. 493, 264 Mich. 37.

N.J.—Doryk v. Perth Amboy Bottling Co., 139 A. 419, 104 N.J.Law 87.

Pa.—Hough v. American Reduction Co of Pittsburgh, 172 A. 722, 315 Pa. 234.—DiQuiseppe v. Hrivnak, Com.Pl., 13 Som.Leg.J. 287.

(2) In particular instances minors riding in a dangerous position were held not guilty of contributory negligence as a matter of law.

Mass.—Kilmain v. D'Urbano, 16 N.E. 2d 659, 301 Mass. 131.

Pa.—Harris v. Selavitch, 9 A.2d 375, 336 Pa. 294.

32. Ill.—Reilly v. Peterson Furniture Co., 40 N.E.2d 780, 314 Ill.App. 46

42 C.J. p 1270 note 45 [d].

33. U.S.—Johnson v. Railway Express Agency, CCA.Ill., 131 F.2d 1009.

Ala.—Reaves v. Hoffman, 180 So. 600, 28 Ala.App. 188.

Cal.—Hunt v. Los Angeles Ry. Corporation, 294 P. 745, 110 Cal.App. 456.

D.C.—E. P. Hinkel & Co. v. Gerondikas, Mun App. 48 A.2d 459.

Ill.—Johnson v. McKnight, 39 N.E.2d 700, 313 Ill.App. 260

Iowa.—Montanick v. McMillin, 280 N. W. 608, 225 Iowa 442.

Ky.—Thomas v. Dahl, 170 S.W.2d 337, 293 Ky. 808.

Md.—Bozman v. State, to Use of Cronhardt, 9 A.2d 60, 177 Md 151.—Miles v. State, for Use of Wistling, 198 A. 724, 174 Md. 292.

Mass.—Hinckley v. Capital Motor Transp. Co., 72 N.E.2d 419, 321 Mass. 174.

Mich.—Ertzbischoff v. Smith, 282 N. W. 159, 286 Mich. 306.—Crookshank v. Henry Vroom & Son, 270 N.W. 181, 277 Mich. 672.—Stockfisch v. Fox, 267 N.W. 754, 275 Mich 630.

Minn.—Carlson v. Sanitary Farm Dairies, 273 N.W. 665, 200 Minn. 177

Neb.—Wiegand v. Lincoln Traction Co., 236 N.W. 188, 121 Neb. 130.

N.Y.—Rockcastle v. Malley, 290 N.Y. S. 444, 248 App.Div. 943.

Or.—Davis v. Lavenik, 165 P.2d 277, 178 Or. 90.

Pa.—Kaplan v. Brooks, 35 A.2d 89,

hicle,³⁴ or a horse;³⁵ or while walking,³⁶ or running,³⁷ or standing,³⁸ in the street; or while boarding or alighting from a streetcar, bus, or other vehicle,³⁹ or a school bus.⁴⁰ The rule has also been applied in determining the negligence of a child while crossing the street;⁴¹ at a regular

154 Pa.Super. 40—Wittman v. Stalford, Com.Pl., 32 Del.Co. 145.
Tenn.—Holt v. Walsh, 174 S.W.2d 657, 180 Tenn. 307.
W.Va.—Fielder v. Service Cab Co., 11 S.E.2d 115, 122 W.Va. 522.
Wis.—Osborne v. Montgomery, 234 N.W. 372, 203 Wis. 223
42 C.J. p 1270 note 45 [c].

Motor held not negligent as matter of law

Cal.—Hart v. Irvine, 117 P.2d 11, 46 Cal.App.2d 805.
Ill.—Glassman v. Keller, 9 N.E.2d 589, 291 Ill.App. 262.
Iowa.—Trailer v. Schelm, 288 N.W. 865, 227 Iowa 780.
Mass.—Phillips v. Larson, 80 N.E.2d 7, 323 Mass. 87—Cloutre v. Lees, 75 N.E.2d 242, 321 Mass. 679.
N.Y.—Taylor v. Yukowels, 77 N.Y. S.2d 620, 273 App.Div. 915, motion denied 79 N.Y.S.2d 325, 273 App. Div. 973, motion denied 80 N.E.2d 459, 297 N.Y. 1041.

Evidence held sufficient to go to jury

U.S.—Railway Exp. Agency, Inc. v. DiFonzo, C.C.A.Mass., 165 F.2d 957
—Roundtree v. Post, C.C.A.La., 134 F.2d 340.
Cal.—Wright v. Sniffin, 181 P.2d 675, 80 Cal.App.2d 358.
N.C.—Cowper v. Brown, 44 S.E.2d 878, 228 N.C. 213—Wall v. Bain, 23 S.E.2d 330, 222 N.C. 375—Wooten v. Smith, 200 S.E. 921, 215 N.C. 48.
S.C.—Murray v. Martin, 199 S.E. 301, 188 S.C. 334.

34. Iowa.—Kallansrud v. Libbey, 13 N.W.2d 684, 234 Iowa 700.

N.Y.—Hammer v. Bloomingdale Bros., 213 N.Y.S. 743, 215 App.Div. 308.

Wis.—De Groot v. Van Akkeren, 273 N.W. 725, 225 Wis. 105.
42 C.J. p 1270 note 45 [b].

Riding scooter

In action for death of child of eight, struck by delivery automobile while crossing intersection on scooter, question whether presumption that minor took due care for his own safety was controverted was for jury.—Fortier v. Hogan, 1 P.2d 23, 115 Cal.App. 50.

35. Ky.—Rose v. Edmonds, 111 S.W. 2d 427, 271 Ky. 36.
Neb.—Spangler v. Brown, 289 N.W. 639, 137 Neb. 510.

36. Cal.—Scalf v. Elcher, 53 P.2d 368, 11 Cal.App.2d 44.

Conn.—Sherman v. William M. Ryan & Sons, 21 A.2d 378, 128 Conn. 182.
Ill.—Schwans v. Sangamo Electric Co., 13 N.E.2d 1007, 294 Ill.App. 395.

Ind.—Mellencamp v. Cockerham, 23 N.E.2d 599, 107 Ind.App. 398.

Iowa.—Riddle v. Frankl, 247 N.W. 493, 215 Iowa 1083.

Minn.—Hubred v. Wagner, 14 N.W.2d 115, 217 Minn. 129—Harkness v. Zube, 235 N.W. 281, 182 Minn. 594.
Mont.—Pierce v. Safeway Stores, 20 P.2d 253, 93 Mont. 560.

N.H.—Grogan v. York, 38 A.2d 295, 93 N.H. 184.

Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn.App. 607.

Vt.—Peno v. Bushey, 4 A.2d 339, 110 Vt. 260, followed in 4 A.2d 340.

Wis.—Murphy v. Lachmund Lumber & Coal Co., 215 N.W. 822, 194 Wis. 119.

42 C.J. p 1270 note 45 [e].

Held not negligent as matter of law

Cal.—Satariano v. Sleight, 129 P.2d 35, 54 Cal.App.2d 278.

Mass.—Holden v. Bloom, 50 N.E.2d 193, 314 Mass. 309, 147 A.L.R. 722.
N.Y.—Conti v. Luchs, 73 N.Y.S.2d 763, 272 App.Div. 1025, motion denied 77 N.E.2d 523, 297 N.Y. 1033.
Pa.—Neidlinger v. Haines, 200 A. 581, 331 Pa. 529.

Evidence held sufficient to go to jury

Cal.—Escobar v. McNeil, 124 P.2d 70, 51 Cal.App.2d 122.
Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521.

37. Iowa.—Webster v. Luckow, 258 N.W. 685, 219 Iowa 1048.

Mass.—Dirsa v. Hamilton, 182 N.E. 844, 280 Mass. 482.

N.Y.—Mere v. Hull, 290 N.Y.S. 239, 248 App.Div. 935.

Pa.—Fabel v. Hazlett, 43 A.2d 373, 157 Pa.Super. 416.

38. Cal.—Powers v. Shelton, 169 P. 2d 482, 74 Cal.App.2d 757.

Minn.—McCarthy v. City of St. Paul, 276 N.W. 1, 201 Minn. 276.

42 C.J. p 1270 note 45 [f].

Recovery held not precluded as a matter of law.—Howe v. Amoskeag Mfg. Co., 174 A. 776, 87 N.H. 122.

39. Cal.—Dinsmore v. California Highway Indemnity Exchange, 1 P.2d 431, 213 Cal. 107—Moreno v. Rossi, 290 P. 481, 107 Cal.App. 569
—Richmond v. Moore, 284 P. 681, 103 Cal.App. 173.

Ga.—Houston v. Taylor, 179 S.E. 207, 50 Ga.App. 811.

Mass.—Mroczek v. Craig, 44 N.E.2d 644, 312 Mass. 236.

N.J.—Horowitz v. Schanerman, 187 A. 346, 117 N.J.Law 314.

Pa.—Zoeller v. Smallstig, 179 A. 755, 118 Pa.Super. 265.

Tex.—Hilliard v. Murdock, Civ.App., 20 S.W.2d 1070, error refused.

40. Cal.—Shannon v. Central-Gaither Union School Dist., 23 P.2d 769, 133 Cal.App. 124.

Conn.—Lange v. Hoyt, 159 A. 575, 114 Conn. 590, 82 A.L.R. 486.

Mass.—Pond v. Somes, 20 N.E.2d 449, 302 Mass. 587.

Ohio.—Wheaton v. Conkle, 14 N.E.2d 363, 57 Ohio App. 373.

Pa.—Fedorovich v. Glenn, 9 A.2d 358, 337 Pa. 60.

Va.—Carlton v. Martin, 168 S.E. 348, 160 Va. 149.

Wash.—Kellum v. Rounds, 81 P.2d 783, 195 Wash. 518—Romano v. Short Line Stage Co., 253 P. 657, 142 Wash. 419.

41. Ala.—Graham v. Werfel, 157 So. 201, 229 Ala. 385.

Ark.—Patterson v. Bell, 164 S.W.2d 902, 204 Ark. 777—Brotherton v. Walden, 161 S.W.2d 391, 204 Ark

92—Gates v. Plummer, 291 S.W. 816, 173 Ark. 27.

Cal.—Blanton v. Curry, App., 121 P. 2d 125, affirmed and supplemented 129 P.2d 1, 20 Cal.2d 793—Nightingale v. Birnbaum, 52 P.2d 955, 11 Cal.App.2d 34—Anderson v. Walters, 27 P.2d 100, 135 Cal.App. 380—Wong Kit v. Crescent Creamery Co., 262 P. 481, 87 Cal.App. 563.

Ill.—Pohl v. Fazzi, 32 N.E.2d 191, 308 Ill.App. 440—Vall v. Graham, 259 Ill.App. 172.

Kan.—Briley v. Nussbaum, 252 P. 223, 122 Kan. 438, modified on other grounds 254 P. 351, 123 Kan. 58.

Md.—York Ice Machinery Corporation v. Sachs, 173 A. 240, 167 Md. 113.

Mass.—Maszaferro v. Dupuis, 75 N. E.2d 503, 321 Mass. 718—Fayard v. Morrissey, 183 N.E. 154, 281 Mass. 166—Joyce v. Wolf, 161 N.E. 809, 264 Mass. 23—Jean v. Nester, 158 N.E. 893, 261 Mass. 442.

Minn.—Luther v. Dornack, 229 N.W. 784, 179 Minn. 528.

N.J.—Tomaszewski v. Schactman, 174 A. 530, 113 N.J.Law 579—Nichols v. Grunstein, 144 A. 593, 105 N.J. Law 363—Andresen v. Zimmerman, 169 A. 638, 12 N.J.Misc. 87.

N.C.—Manheim v. Blue Bird Taxi Corporation, 200 S.E. 382, 214 N.C. 689.

Pa.—Di Domenico v. Fluck, 176 A. 210, 317 Pa. 385.

R.I.—Bourre v. Texas Co., 154 A. 86, 51 R.I. 234—Bourre v. Texas Co., 154 A. 82, 51 R.I. 254.

Tex.—Ligon v. Green, Civ.App., 206 S.W.2d 629.

Wis.—West v. Day, 212 N.W. 648, 193 Wis. 187.

42 C.J. p 1270 note 45 [h].

Held not negligent as matter of law

Mich.—Chadwick v. Kempf, 2 N.W.2d 440, 300 Mich. 402.
N.Y.—Nazinitzky v. Sincoff, 15 N.Y. S.2d 71, 258 App.Div. 742.

intersection or crosswalk;⁴² at a place other than an intersection or crosswalk;⁴³ without maintaining a proper lookout;⁴⁴ or without seeing the approaching vehicle;⁴⁵ or without properly estimating the speed or position of the vehicle.⁴⁶ So, also,

it has been held to be a question of fact, on conflicting evidence, whether a child was guilty of contributory negligence while playing in the street;⁴⁷ while coasting in the street,⁴⁸ in violation of an ordinance;⁴⁹ roller skating;⁵⁰ running

Evidence held sufficient to go to jury
Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.

Mass.—Ferris v. Turner, 70 N.E.2d 715, 320 Mass. 555.

Stepping from behind vehicle or obstruction

Cal.—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Me.—Ross v. Russell, 48 A.2d 403.

Mass.—Bartley v. Almeida, 76 N.E.2d 22, 322 Mass. 104—Milbury v. Turner Center System, 174 N.E. 471, 274 Mass. 358, 73 A.L.R. 1070.

N.Y.—Day v. Johnson, 39 N.Y.S.2d 203, 265 App.Div. 383.

N.C.—Morgan v. Carolina Coach Co., 45 S.E.2d 339, 228 N.C. 280.

42. Cal.—Moore v. Bishop, 297 P. 580, 113 Cal.App. 25.

Md.—Henkelmann v. Metropolitan Life Ins. Co., 26 A.2d 418, 180 Md. 591.

NH.—George v. New England Dressed Meat & Wool Co., 164 A. 209, 86 N.H. 121.

NY.—Bulson v. Lear, 226 N.Y.S. 479, 222 App.Div. 413.

Okl.—Fay v. Brewer, 75 P.2d 425, 181 Okl. 554.

Pa.—Flowers v. Pistella, 200 A. 904, 132 Pa.Super. 338.

42 C.J. p 1270 note 45 [h] (2).

Diagonally across intersection

Conn.—Di Leo v. Dolinsky, 27 A.2d 126, 129 Conn. 203.

43. Cal.—Akoboff v. Dusenbury, 106 P.2d 33, 41 Cal.App.2d 173—Jones v. Davies, 24 P.2d 364, 133 Cal. App. 389.

Iowa.—Flickinger v. Phillips, 267 N.W. 101, 221 Iowa 837.

Mass.—Boni v. Goldstein, 177 N.E. 581, 276 Mass. 372.

Mich.—Dedo v. Skinner, 296 N.W. 265, 296 Mich. 299—Zylstra v. Graham, 221 N.W. 318, 244 Mich. 319, opinion adhered to 224 N.W. 343, 246 Mich. 91.

N.Y.—Touris v. Fairmont Creamery Co., 240 N.Y.S. 225, 228 App.Div. 569.

Ohio.—Fightmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.

Tex.—Green v. Ligon, Civ.App., 190 S.W.2d 742, refused no reversible error.

42 C.J. p 1270 note 45 [h] (3).

Held not negligent as matter of law
Minn.—Peterson v. Miller, 235 N.W. 15, 182 Minn. 532—Hollander v. Dietrich, 232 N.W. 630, 181 Minn. 376.

N.Y.—Fury v. De Robertis, 40 N.Y.S. 2d 197.

44. Cal.—Jones v. Davies, 24 P.2d 364, 133 Cal.App. 389—Patania v. Yellow-Checker Cab Co., 283 P. 295, 102 Cal.App. 600.

Me.—Hamlin v. N. H. Bragg & Sons, 147 A. 602, 128 Me. 358.

N.Y.—Robbins v. Acme Transfer & Storage Co., 55 N.Y.S.2d 41, 269 App.Div. 783—Mavnard v. Phillips, 267 N.Y.S. 868, 149 Misc. 664.

N.C.—Manheim v. Blue Bird Taxi Corporation, 200 S.E. 382, 214 N.C. 689.

Tex.—Blunt v. H. G. Berning, Inc., Civ.App., 211 S.W.2d 773, error refused.

Wis.—Mueller v. O'Leary, 257 N.W. 161, 216 Wis. 585.

Conduct held not negligence as matter of law

Mass.—Birch v. Strout, 20 N.E.2d 429, 303 Mass. 28.

Ohio.—Michalsky v. Gaertner, 5 N.E. 2d 181, 53 Ohio App. 341.

Evidence held sufficient to go to jury

Fla.—Connell v. Petri, 30 So.2d 922.

Tex.—Green v. Ligon, Civ.App., 190 S.W.2d 742, refused no reversible error.

45. Mass.—Fitzgerald v. Brennan, 197 N.E. 20, 291 Mass. 179.

Minn.—Peterson v. Miller, 235 N.W. 15, 182 Minn. 532.

N.J.—Mancino v. Urbanlak, 200 A. 483, 120 N.J.Law 424.

Wis.—Baumann v. Eva-Caroline Home Laundry, 250 N.W. 773, 213 Wis. 78.

Minor held not negligent as matter of law

N.Y.—Constantinides v. Manhattan Transit Co., 34 N.Y.S.2d 600, 264 App.Div. 147.

46. Cal.—Jones v. Davies, 24 P.2d 364, 133 Cal.App. 389.

47. Ill.—Moran v. Borden Co., 33 N.E.2d 166, 309 Ill.App. 391—Greene v. Frenzel Bros. Co., 18 N.E.2d 719, 298 Ill.App. 622.

Mass.—Falzone v. Burgoyne, 58 N.E. 2d 751, 317 Mass. 493—Gaulin v. Yagobian, 158 N.E. 352, 261 Mass. 145.

Mich.—Clemens v. City of Sault Ste. Marie, 286 N.W. 232, 289 Mich. 254.

N.J.—Rizio v. Public Service Electric & Gas Co., 23 A.2d 585, 128 N.J.Law 60.

Okl.—Davis v. Bailey, 19 P.2d 147, 182 Okl. 86.

Pa.—Hahn v. Anderson, 192 A. 489, 326 Pa. 463.

Tenn.—Potter v. Golden Rule Grocery Co., 84 S.W.2d 364, 169 Tenn. 240.

42 C.J. p 1270 note 45 [i].

Conduct held not negligence as matter of law

Mont.—Lesage v. Largey Lumber Co., 43 P.2d 896, 99 Mont. 372.

Or.—Forrest v. Turlay, 266 P. 229, 125 Or. 251.

Evidence held sufficient to go to jury

Ill.—Moser v. East St. Louis & Interurban Water Co., 62 N.E.2d 558, 326 Ill.App. 542.

W.Va.—Vance v. Logan Williamson Bus Co., 46 S.E.2d 783.

48. Conn.—Oginskas v. Fredsal, 143 A. 888, 108 Conn. 505.

Ind.—Tabor v. Continental Baking Co., 38 N.E.2d 257, 110 Ind.App. 633.

Me.—Illingworth v. Madden, 192 A. 273, 135 Me. 159, 110 A.L.R. 1090.

Md.—Zulver v. Roberts, 161 A. 9, 162 Md. 636.

NH.—Cleveland v. Reasby, 33 A.2d 554, 92 N.H. 518.

N.J.—Mollen v. Public Service Interstate Transp. Co., 166 A. 216, 110 N.J.Law 557—Paretti v. Mitchell, 167 A. 29, 11 N.J.Misc. 563, affirmed 170 A. 615, 112 N.J.Law 384.

Pa.—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149—Fisher v. Duquesne Brewing Co. of Pittsburgh, 187 A. 90, 123 Pa.Super. 208—Morris v. Kauffman, 182 A. 758, 120 Pa.Super. 515.

Minor held not negligent as matter of law

N.J.—Reeves v. Prosser, 162 A. 729, 109 N.J.Law 485.

Pa.—Smith v. Pachter, 25 A.2d 343, 344 Pa. 363.

Evidence held sufficient to go to jury

Ill.—Popadowski v. Bergaman, 26 N.E.2d 722, 304 Ill.App. 422.

Mass.—Wright v. Carlson, 45 N.E.2d 840, 312 Mass. 584.

Pa.—Smith v. Pachter, 19 A.2d 85, 342 Pa. 21.

49. Mass.—Sadak v. Tucker, 37 N.E.2d 495, 310 Mass. 153—Brown v. Daley, 173 N.E. 545, 273 Mass. 432.

N.Y.—Tyne v. B. F. Goodrich Co., 297 N.Y.S. 425, 252 App.Div. 24.

50. N.J.—Elchinger v. Krouse, 144 A. 638, 105 N.J.Law 402.

N.C.—Leach v. Varley, 189 S.E. 636, 211 N.C. 207—Hollingsworth v. Burns, 185 S.E. 476, 210 N.C. 40.

Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.

42 C.J. p 1270 note 45 [j].

or darting into the street;⁵¹ or in other circumstances.⁵²

Incidental questions of fact involved in determining the contributory negligence of a child have been held, on conflicting evidence, to be for the trier of the facts to decide.⁵³

Evidence uncontradicted or insufficient. Where the evidence is uncontradicted and the inference to be made therefrom is clear, it should be held

by the court as a matter of law that plaintiff was,⁵⁴ or was not,⁵⁵ guilty of contributory negligence. So, also, where the evidence is insufficient to warrant submission of the issue, the court should rule on the question as a matter of law.⁵⁶

Capacity of child. It is generally a question of fact for the jury whether the child is or is not old or experienced enough to be capable of exercising some care under the circumstances,⁵⁷

51. Cal.—Mize v. Duffy, 288 P. 798, 106 Cal.App. 15.

Idaho.—Bennett v. Deaton, 68 P.2d 895, 57 Idaho 752.

Iowa.—Lenth v. Schug, 281 N.W. 510, 226 Iowa 1, reheard 287 N.W. 596, 226 Iowa 1.

Ky.—Ballback's Adm'r v. Boland-Maloney Lumber Co., 208 S.W.2d 940, 306 Ky. 647.

Mass.—Woods v. De Mont, 77 N.E.2d 220, 322 Mass. 233.

N.Y.—Winant v. City of New York, 67 N.Y.S.2d 662, affirmed 67 N.Y.S.2d 485, 271 App.Div. 883.

N.C.—Absher v. Miller, 16 S.E.2d 829, 220 N.C. 197.

Tex.—Sorrentino v. McNeill, Civ.App., 122 S.W.2d 723, error refused.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

From behind vehicle or obstruction
Ga.—Smith v. Kleinberg, 174 S.E. 731, 49 Ga.App. 194.

Minn.—Eckhardt v. Hanson, 264 N.W. 776, 196 Minn. 270, 107 A.L.R. 1.

S.D.—Alendal v. Madsen, 275 N.W. 352, 65 S.D. 502.

W.Va.—Pierson v. Liming, 167 S.E. 131, 113 W.Va. 145.

52. Cal.—Hoffman v. Maguire, 44 P. 2d 444, 6 Cal.App.2d 398.

N.C.—Dotson v. Early, 161 S.E. 685, 202 N.C. 8.

Fushing automobile

N.J.—Allen v. Tatum, 167 A. 668, 11 N.J.Misc. 666.

Stealing ride

Mass.—Capano v. Melchionno, 7 N.E.2d 593, 297 Mass. 1.

Minn.—Middaugh v. Waseca Canning Co., 281 N.W. 818, 203 Minn. 456.

42 C.J. p 1270 note 45 [k].

On school grounds

(1) Whether child injured on school ground was guilty of contributory negligence was held a question for the jury.

Mass.—Tenney v. Reed, 159 N.E. 913, 262 Mass. 335.

Wash.—Gattavara v. Lundin, 7 P.2d 958, 166 Wash. 548.

(2) It has been so held where a child was warned to stay away from the school grounds.—Smith v. Harger, 191 P.2d 25, 84 Cal.App.2d 361.

53. Cal.—Fietz v. Hubbard, 138 P.2d 315, 59 Cal.App.2d 124.

N.Y.—Schuvar v. Werner, 50 N.E.2d 533, 291 N.Y. 32.

Conduct in emergency

Whether boy, rushing into path of car when seeing danger, was excused under emergency rule, was held for jury under evidence.—Autio v. Miller, 11 P.2d 1039, 92 Mont. 150.

54. Ind.—Tabor v. Continental Baking Co., 38 N.E.2d 257, 110 Ind. App. 633.

Requirements of evidence stated

(1) Extremely clear proof would be necessary to justify holding that six-year-old girl, struck by automobile while crossing intersection, was contributorily negligent as matter of law.—Conner v. Henderson, 291 P. 641, 108 Cal.App. 237.

(2) In action for injuries sustained by minor pedestrian when struck by an automobile while crossing the street, testimony given on plaintiffs' case, in order to establish contributory negligence as a matter of law, must have been totally inconsistent with the exercise of ordinary care by the pedestrian, even disregarding the disputable presumption as to exercise of ordinary care for his own safety to which pedestrian was entitled because of his inability to testify due to loss of memory resulting from injuries; and, if on the pedestrian's case, the jury could reasonably find that it was more probable or even equally probable that pedestrian was not guilty of contributory negligence, the granting of a nonsuit on that ground would be error.—Satariano v. Sleight, 129 P.2d 35, 54 Cal.App.2d 278.

Improper turn by bicyclist

Evidence of minor bicyclist's violation of statute or ordinance forbidding making of a left turn without passing to right of center of intersection must be undisputed to raise presumption that bicyclist was guilty of contributory negligence as a matter of law.—Holt v. Walsh, 174 S.W.2d 657, 180 Tenn. 307.

Sudden turn of bicycle without warning

In action for death of boy riding bicycle, struck in rear by automobile driven by defendant in attempting to pass bicycle, defendant's unimpeached testimony that deceased sud-

denly turned bicycle to right directly in front of automobile without warning after having turned from right to left side of highway required instruction of verdict for defendant.—Bixby v. Ayers, 298 N.W. 533, 139 Neb. 652.

Failure to bring bicycle under control

A bicyclist riding downhill on narrow street, on seeing automobile parked on curve, had duty of bringing bicycle under such control that he could stop behind parked automobile and not run into it if necessity created by vehicle approaching in opposite direction should develop, and his failure to fulfill this duty was contributory negligence as matter of law.—Gallen v. Griffiths, 38 A.2d 721, 155 Pa Super. 306.

Running into street

N.C.—Proctor v. Carter Fabrics Corp., 40 S.E.2d 472, 227 NC 698.

55. N.Y.—Puleo v. National Transp. Co., 48 N.Y.S.2d 867, 268 App Div. 790.

42 C.J. p 1271 note 47.

56. Ill.—Buffa v. Blank, 6 N.E.2d 250, 288 Ill App. 628.

Tex.—Temple Lumber Co. v. Living, Civ.App., 289 S.W. 746.

57. Ala.—Graham v. Werfel, 157 So. 201, 229 Ala. 385.

Mich.—Stehouwer v. Lewis, 227 N.W. 759, 249 Mich. 76, 74 A.L.R. 844.

N.Y.—Touris v. Fairmont Creamery Co., 240 N.Y.S. 225, 228 App.Div. 569.

Tenn.—Taylor v. Robertson, 12 Tenn. App. 320.

42 C.J. p 1271 note 46.

As to children of particular ages

(1) Six-year-old child.—Van Lydegraf v. Scholz, 4 N.W.2d 121, 240 Wis. 599.

(2) Child nearly eight.—De Nardi v. Palanca, 8 P.2d 220, 120 Cal.App. 371.

(3) Children eight to nine. Cal.—Fortier v. Hogan, 1 P.2d 23, 115 Cal.App. 50.

Va.—Wash v. Holland, 183 S.E. 236, 166 Va. 45.

Wash.—Borget v. Saginaw Logging Co., 86 P.2d 1117, 198 Wash. 61.

(4) Eleven-year-old child.—Hunt v. Los Angeles Ry. Corporation, 294 P. 745, 110 Cal.App. 456.

except where it may be held, as a matter of law, that a minor of a certain age has,⁵⁸ or does not have,⁵⁹ such capacity.

Parents with respect to child. Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the trier of the facts whether a parent of a child struck by defendant was guilty of contributory negligence with respect to his care or supervision of the child.⁶⁰

§ 528. — Ultimate Negligence; Last Clear Chance Doctrine

Where evidence is conflicting or subject to different inferences, it is a question of fact whether the defendant, notwithstanding plaintiff's contributory negligence, had opportunity to avoid the accident and was guilty of

negligence so as to be liable under the doctrine of ultimate negligence or last clear chance.

Where the evidence is conflicting or different inferences of fact may reasonably be drawn therefrom, it is a question of fact for the trier of the facts whether defendant, notwithstanding the contributory negligence of plaintiff, had opportunity to avoid the accident and was guilty of negligence with respect thereto, subjecting him to liability under the doctrine variously known as the doctrine of the last clear chance, the doctrine of ultimate negligence, the doctrine of discovered peril, or the humanitarian doctrine.⁶¹ However, it is essential that the evidence be sufficient to warrant submission of the issue of negligence under this doctrine to the jury;⁶² and, where the evidence is uncontradicted and no inference may reason-

(5) Fourteen-year-old.—*Flowers v. Pistella*, 200 A. 904, 132 Pa.Super. 338.

(6) Girl six years of age.—*Birch v. Strout*, 20 N.E.2d 429, 303 Mass. 28.

(7) Girl of eight.—*Moeller v. Packard*, 261 P. 315, 86 Cal.App. 459.

(8) Five-year-old boy. Cal.—*Mecchi v. Lyon Van & Storage Co.*, 102 P.2d 422, 38 Cal.App.2d 674, hearing denied 104 P.2d 26, 38 Cal.App.2d 674.

Mass.—*Capano v. Melchionno*, 7 N.E.2d 593, 297 Mass. 1.

(9) Boy five years and seven months.—*McKay v. Hedger*, 34 P.2d 221, 139 Cal.App. 266.

(10) Boy six years of age. Cal.—*Whelan v. Bigelow*, 92 P.2d 952, 33 Cal.App.2d 717.

N.Y.—*Maynard v. Phillips*, 267 N.Y.S. 868, 149 Misc. 664.

(11) Eight-year-old boy.—*Christiana v. Rattaro*, 184 P.2d 682, 81 Cal.App.2d 597.

(12) Eleven-year-old boy.—*Bowman v. Stouman*, 141 A. 41, 292 Pa. 293.

(13) Twelve-year-old boy.—*Ohm v. Miller*, 167 N.E. 482, 31 Ohio App. 446.

(14) Fourteen-year-old boy.—*Turanne v. Smith*, 9 N.W.2d 409, 215 Minn. 64.

Conduct in emergency

In action for injuries received by fourteen-year-old pedestrian when struck by truck while crossing street at pedestrian crosswalk at intersection, capacity of pedestrian and measurement of her responsibility with respect to being confronted by a sudden danger was for jury and not for the court.—*Flowers v. Pistella*, 200 A. 904, 132 Pa.Super. 338.

58. Tenn.—*Holt v. Walsh*, 174 S.W.2d 657, 180 Tenn. 307.

Age of minor

(1) Eighteen years of age.—*Holt v. Walsh*, supra.

(2) A fifteen-year-old boy.—*Gallenz v. Griffiths*, 38 A.2d 721, 155 Pa. Super. 306.

(3) Where testimony of nine-year-old boy seeking to recover for injuries sustained when struck by automobile established that he had sufficient intelligence to understand danger of being struck by automobile, trial court was justified in assuming that he was legally capable of being guilty of contributory negligence, and submission of that issue was unnecessary.—*Dixon v. Stringer*, 126 S.W.2d 448, 277 Ky. 347.

Subject to adult standard of care

Boy, fifteen years of age, riding on truck as guest, would not be liable as matter of law for contributory negligence in collision of truck with automobile unless he failed to exercise care which would have been exercised under similar circumstances by ordinarily prudent adult in face of palpable and manifest peril.—*Laseter v. Clark*, 189 S.E. 265, 54 Ga.App. 669.

59. N.Y.—*Verni v. Johnson*, 68 N.E.2d 431, 295 N.Y. 436.

Age of child

(1) Three years and two months.—*Verni v. Johnson*, supra.

(2) Seven-year-old boy.—*Benning v. Schlemmer*, 14 N.E.2d 941, 57 Ohio App. 457.

(3) Boy five years old struck by automobile could not as matter of law be held to same degree of care as adult.—*Morro v. Brockett*, 145 A. 659, 109 Conn. 87.

60. Cal.—*Jordan v. Guerra*, 144 P.2d 349, 28 Cal.2d 469.

42 C.J. p 1271 note 48.

61. U.S.—*U. S. Can Co. v. Ryan*, C. C.A.Mo., 39 F.2d 445, certiorari de-

nied 51 S.Ct. 23, 282 U.S. 842, 75 L.Ed. 748.

Iowa.—*Russell v. Leschensky*, 276 N.W. 608, 224 Iowa 334.

Mo.—*Doherty v. St. Louis Butter Co.*, 98 S.W.2d 742, 339 Mo. 996—*Doty v. Fisher*, App., 200 S.W.2d 534—*Swain v. Anders*, 140 S.W.2d 730, 235 Mo.App. 125—*Kasperski v. Rainey*, App., 135 S.W.2d 11—*Robinson v. O'Shanky*, App., 96 S.W.2d 895—*Marshak v. William J. Brennan Grocery Co.*, App., 83 S.W.2d 185—*Bramblett v. Harlow*, App., 75 S.W.2d 626—*Gavin v. Forrest*, App., 72 S.W.2d 177—*Stevens v. Westport Laundry Co.*, 25 S.W.2d 491, 224 Mo.App. 955—*McCarter v. Burger*, App., 6 S.W.2d 979.

N.H.—*Mack v. Hoyt*, 55 A.2d 891, 94 N.H. 492.

Va.—*Dobson-Peacock v. Curtis*, 186 S.E. 13, 166 Va. 550.

42 C.J. p 1271 note 49.

Doctrine of last clear chance:

Generally see the C.J.S. title Negligence §§ 136-139, also 45 C.J. p 984 note 82-p 995 note 41.

With respect to motor vehicles generally see supra §§ 493 (1)-493 (5).

Evidence held sufficient to go to jury U.S.—*Skaggs Safeway Stores v. Dunkle*, C.C.A.Neb., 49 F.2d 169, certiorari denied 52 S.Ct. 9, 284 U.S. 622, 76 L.Ed. 531.

Mo.—*Crawshaw v. Mable*, App., 52 S.W.2d 1029.

42 C.J. p 1271 note 49 [h].

62. Mo.—*Gurwell v. Jefferson City Lines*, 192 S.W.2d 683, 239 Mo.App. 305.

Requisites of submissible case

(1) In order to justify submission of a case to the jury on the humanitarian or last clear chance theory, every necessary element of the cause of action based on such theory must be established by the evidence.—

ably be made therefrom that defendant could have avoided the accident, the last clear chance doctrine has no application as a matter of law.⁶³ It has been held that, even though the evidence does not warrant submission of the issue of negligence under this doctrine, the case should not be completely withdrawn from the jury unless every assigned ground of primary negligence is unsupported.⁶⁴ Where the negligence of each of the parties continued concurrently up to the moment of injury, it

has been held that the question of ultimate negligence or last clear chance should not be submitted to the jury.⁶⁵

In accordance with these rules, where the evidence is conflicting, the applicability of the last clear chance doctrine, and the liability of defendant thereunder, have been held to be questions of fact where the injured person was the operator or occupant of a motor vehicle⁶⁶ which collided with defendant's vehicle at an intersection,⁶⁷ or with

Gurwell v. Jefferson City Lines, supra.

(2) Issue of discovered peril should have been submitted in automobile accident case if discarding adverse evidence, and, crediting all evidence and legitimate conclusions favorable to plaintiff, jury might have found for plaintiff on issue.—**Fernandez v. Rahe, Tex Civ.App., 61 S.W.2d 529, error refused.**

Failure to blow horn

In order to make a submissible case under humanitarian doctrine based on defendants' failure to sound horn, more is required than showing of a mere possibility that accident might have been avoided if horn had been sounded; and evidence must disclose that a reasonably sufficient time was afforded after peril was discoverable during which interval it was reasonably possible for horn to have been sounded, for plaintiff to have heeded horn and to have escaped to safety.—**Smith v. Siedhoff, Mo., 209 S.W.2d 233.**

Evidence held not sufficient to go to jury

Mo.—Payne v. Reed, 59 S.W.2d 43, 332 Mo. 343.

Tex.—Texas Bus Lines v. Whatley, Civ.App., 210 S.W.2d 626, error refused, no reversible error—Adams v. Siefferman, Civ.App., 197 S.W.2d 506—Jewell v. El Paso Electric Co., Civ App., 47 S.W.2d 328, error dismissed.

42 C.J. p 1271 note 49 [1].

63. Fla.—Ward v. City Fuel Oil Co., 2 So.2d 586, 147 Fla. 320.

Ky.—Knecht v. Buckshorn, 25 S.W.2d 727, 233 Ky. 329.

Mo.—Smith v. Siedhoff, 209 S.W.2d 233.

R.I.—Sarcione v. Outlet Co., 163 A.741, 53 R.I. 76.

42 C.J. p 1272 note 51.

64. Mo.—Irvin v. Kelting, App., 46 S.W.2d 924.

65. Mich.—Routt v. Berridge, 293 N.W. 900, 294 Mich. 666—Szost v. Dykman, 233 N.W. 203, 252 Mich. 151.

Wash.—Thompson v. Porter, 151 P.2d 423, 21 Wash.2d 449.

68. U.S.—Atlantic Refining Co. v. Jones, C.C.A.W.Va., 70 F.2d 89,

Idaho.—York v. Alho, 16 P.2d 980, 52 Idaho 528.

Mo.—Yontz v. Shernaman, App., 94 S.W.2d 917—Ford v. Pieper, App., 24 S.W.2d 1054—Brooks v. Menaugh, App., 10 S.W.2d 327.

N.H.—Mack v. Hoyt, 55 A.2d 891, 94 N.H. 492.

N.C.—Newbern v. Leary, 1 S.E.2d 384, 215 N.C. 134.

Tex.—Vontsteen v. Rollish, Civ App., 133 S.W.2d 589, error refused—Friske v. Graham, Civ.App., 123 S.W.2d 139.

Wash.—Browning v. Bremerton-Charleston Transit Co., 183 P.2d 1005, 28 Wash.2d 713.

W.Va.—Strode v. Dyer, 177 S.E. 878, 115 W.Va. 733.

Failure to use chains

In determining whether automobile collision case should have been submitted under last clear chance doctrine, question whether defendant's failure to use chains on icy road was prudent was held immaterial, last chance rule referring only to existing situation and means immediately at hand.—**Ramsdell v. John B. Varick Co., 170 A. 12, 86 N.H. 457.**

Evidence held sufficient to go to jury

Ala.—Faulkner v. Gilchrist, 143 So. 803, 225 Ala. 391

Cal.—Boynton v. Richfield Oil Co., 4 P.2d 614, 117 Cal.App. 699.

Mo.—Davis v. Howell, 27 S.W.2d 13, 324 Mo. 1227—Spriggs v. Calumet Cab Co., App., 161 S.W.2d 741—Jones v. Austin, App., 154 S.W.2d 378—Vandenberg v. Snider, App., 83 S.W.2d 201—Burton v. Phillips, App., 7 S.W.2d 712.

Wash.—Smith v. Bratnober, 62 P.2d 455, 188 Wash. 244.

Evidence held insufficient to go to jury

Iowa.—Rutherford v. Gilchrist, 255 N.W. 516, 218 Iowa 127.

Mich.—Allen v. Edelson, 251 N.W. 319, 265 Mich. 110.

Mo.—Cook v. Day, 172 S.W.2d 648—Bauer v. Wood, 154 S.W.2d 356, 236 Mo.App. 266—Sapp v. Carman Co., App., 95 S.W.2d 658.

N.H.—Ramsdell v. John B. Varick Co., 170 A. 12, 86 N.H. 457.

Tex.—Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380—Schumacher v. Missouri Pac. Transp. Co., Civ.

App., 116 S.W.2d 1136, error dismissed—Cantu v. South Texas Transp. Co., Civ.App., 110 S.W.2d 995.

67. Cal.—Root v. Pacific Greyhound Lines, 190 P.2d 48, 84 Cal.App.2d 135—Betschart v. Steel, 143 P.2d 81, 61 Cal.App.2d 517—Smith v. Aggola, 81 P.2d 997, 27 Cal.App.2d 750—Jacobsen v. Vaughn, 21 P.2d 141, 131 Cal.App. 277—Handley v. Lombardi, 9 P.2d 867, 122 Cal.App. 22.

Fla.—Dunn Bus Service v. McKinley, 178 So. 865, 130 Fla. 778.

Ill.—Beard v. Rockford Milwaukee Dispatch Co., 8 N.E.2d 957, 290 Ill. App. 615.

Mo.—Teague v. Plaza Exp. Co., 190 S.W.2d 254, 354 Mo. 582—Bowman v. Standard Oil Co. of Indiana, 169 S.W.2d 384, 350 Mo. 958—Hangege v. Umbright, 119 S.W.2d 382—Byrnes v. Poplar Bluff Printing Co., 74 S.W.2d 20—Shelley v. Hall Drive It Yourself Co., App., 112 S.W.2d 904—Villinger v. Nighthawk Freight Service, App., 104 S.W.2d 740—J'ower v. Frischer, 87 S.W.2d 692, 229 Mo.App. 1056—Parkville Milling Co. v. Massman, App., 83 S.W.2d 128—La Font v. Bryant, App., 60 S.W.2d 415—Brockman v. Robinson, App., 48 S.W.2d 128—Elliot v. Richardson, App., 28 S.W.2d 408—Jageles v. Berberich, App., 20 S.W.2d 577—Banks v. Empire Dist. Electric Co., App., 4 S.W.2d 875.

Neb.—Parsons v. Berry, 264 N.W. 742, 180 Neb. 264.

Va.—Slate v. Saul, 40 S.E.2d 171, 185 Va. 700—Gray v. Van Zaig, 37 S.E.2d 751, 185 Va. 7.

42 C.J. p 1271 note 49 [e].

Evidence held sufficient to go to jury
U.S.—Nielsen v. Richman, C.C.A.S.D., 114 F.2d 343, certiorari denied Richman v. Nielsen, 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 458.

Cal.—Bullock v. Western Wholesale Drug Co., 266 P. 978, 91 Cal.App. 369.

Colo.—Woods v. Siegrist, 149 P.2d 241, 112 Colo. 257.

Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 307.

Miss.—Avent v. Tucker, 194 So. 596, 183 Miss. 207.

defendant's vehicle which was traveling in the same direction,⁶⁸ or approaching from the opposite direction,⁶⁹ or of a vehicle making a left turn,⁷⁰ or one which was parked or stopped on the highway,⁷¹ where the injured person was a motor-

cyclist,⁷² a bicyclist,⁷³ a driver or occupant of a horse-drawn vehicle,⁷⁴ or a person riding, owning, or in charge of animals;⁷⁵ where the injured person was a pedestrian⁷⁶ crossing the street or high-

Mo.—Sollenberger v. Kansas City Public Service Co., 202 S.W.2d 25, 356 Mo. 454—Fisher v. Ozark Milk Service, 201 S.W.2d 305, 356 Mo. 95—Diallo v. Lynch, 101 S.W.2d 7, 340 Mo. 82—White v. Teague, App., 177 S.W.2d 517, affirmed 182 S.W.2d 288, 353 Mo. 247—Zimmerman v. Salter, App., 141 S.W.2d 137—Kasparski v. Rainey, App., 135 S.W.2d 11—Martin v. Kiefer, App., 95 S.W.2d 1214—Nagle v. Alberter, App., 53 S.W.2d 289.
N.H.—Mack v. Hoyt, 55 A.2d 891, 94 N.H. 492.
S.D.—Nielsen v. Richman, 299 N.W. 74, 68 S.D. 104.
Va.—Barnes v. Mabry, 42 S.E.2d 304, 186 Va. 243.

Evidence held insufficient to go to jury

Iowa—Hogan v. Nesbit, 246 NW 270, 216 Iowa 75.
Ky.—Consolidated Coach Corporation v. Hopkins' Adm'r, 37 S.W.2d 1, 238 Ky. 136.
Mich.—Wells v. Oliver, 277 N.W. 872, 283 Mich. 168.
Mo.—Gosney v. May Lumber & Coal Co., 179 S.W.2d 51, 352 Mo. 693—Roberts v. Consolidated Paving & Material Co., 70 S.W.2d 543, 335 Mo. 6—Miller v. Wilson, App., 288 S.W. 997.
N.H.—La Coss v. National Casket Co., 190 A. 286, 88 N.H. 403.
42 C.J. p 1271 note 49 [i] (3).

68. Iowa.—Glover v. Vernon, 285 N.W. 652, 226 Iowa 1089.
N.C.—Morris v. Seashore Transp. Co., 182 S.E. 487, 208 N.C. 807.
Tex.—Southland Greyhound Lines v. Richards, Civ.App., 77 S.W.2d 272, error dismissed.

Evidence held insufficient to go to jury
W.Va.—Juergens v. Frent, 163 S.E. 618, 111 W.Va. 670.

69. Ark.—A. S. Barboro & Co. v. James, 168 S.W.2d 202, 205 Ark. 53.
Idaho.—Evans v. Davidson, 77 P.2d 661, 58 Idaho 600.
Ky.—Weintraub v. Cincinnati, N. & C. Ry. Co., 184 S.W.2d 345, 299 Ky. 114—Cincinnati, N. & C. Ry. Co. v. Renaker, 153 S.W.2d 906, 287 Ky. 388.
Neb.—Roby v. Anker, 32 N.W.2d 491, 149 Neb. 734.
R.I.—Cromstock v. John Hope & Sons Engraving & Mfg. Co., 139 A. 654.
Tex.—Texas Bus Lines v. Whatley, Civ.App., 210 S.W.2d 626, error refused, no reversible error.

Evidence held sufficient to go to jury

Cal.—Pair v. Hammond Lumber Co., 295 P. 581, 111 Cal.App. 426.
Conn.—Germion v. Noe, 27 A.2d 378, 129 Conn. 333.
Mo.—Eisenbarth v. Powell Bros. Truck Lines, 161 S.W.2d 263—Branson v. Abernathy Furniture Co., 130 S.W.2d 562, 344 Mo. 1171—Melenson v. Howell, 130 S.W.2d 555, 344 Mo. 1137—Clarke v. Jackson, 116 S.W.2d 122, 342 Mo. 537—Francis v. Missouri Pac. Transp. Co., App., 85 S.W.2d 915.
Tex.—Beverly v. Bauer, Civ.App., 99 S.W.2d 641, error dismissed.

Evidence held insufficient to go to jury

Mo.—Rafferty v. Levy, App., 153 S.W.2d 765—Swain v. Anders, 140 S.W.2d 730, 235 Mo.App. 125.
Tex.—Posey v. Schuhmacher Co., 215 S.W.2d 880—Thurmond v. Pepper, Civ.App., 119 S.W.2d 900, error dismissed—English v. Terry, Civ.App., 85 S.W.2d 1063, affirmed 112 S.W.2d 446, 130 Tex. 632.

70. Mo.—Tunget v. Cook, App., 94 S.W.2d 921—Repp v. Kirkwood Ice Cream Co., App., 25 S.W.2d 135.
N.H.—Howe v. Phofolos, 161 A. 379, 85 N.H. 539.

Evidence held insufficient to go to jury

Tex.—Brown v. Winn, Civ.App., 176 S.W.2d 595, error refused.

71. Cal.—Winn v. Long, 265 P. 805, 203 Cal. 758—Giorgetti v. Wollaston, 257 P. 109, 83 Cal.App. 358
Iowa.—Russell v. Leschensky, 276 N.W. 608, 224 Iowa 334.
N.C.—Hunter v. Bruton, 5 S.E.2d 719, 216 N.C. 540.

Evidence held sufficient to go to jury
Mo.—Cross v. Wears, App., 67 S.W.2d 517.

Neb.—Folken v. Petersen, 1 N.W.2d 916, 140 Neb. 800.

Tex.—Rogers v. Cotton, App., 42 S.W.2d 173, error dismissed.

Evidence held insufficient to go to jury

Mo.—Freed v. Mason, App., 137 S.W.2d 673.

72. Ala.—Birmingham Stove & Range Co. v. Vanderford, 116 So. 334, 217 Ala. 342.

Vt.—Laferrriere v. Gray, 160 A. 270, 104 Vt. 366.

42 C.J. p 1271 note 49 [c].

Evidence held sufficient to go to jury
Mo.—Cameron v. Howerton, 174 S.W.2d 206—Phillips v. Henson, 30 S.W.2d 1065, 326 Mo. 282.

Evidence held insufficient to go to jury

Mo.—Burton v. Joyce, App., 22 S.W.2d 890.

73. Ala.—Godfrey v. Vinson, 110 So. 13, 215 Ala. 166.

Kan.—Baldwin v. Devlin, 8 P.2d 320, 134 Kan. 844.

Mich.—Essenberg v. Achterhof, 237 N.W. 43, 255 Mich. 55.

Mo.—Thompson v. Wilson, App., 119 S.W.2d 848.

W.Va.—Felder v. Service Cab Co., 11 S.E.2d 115, 122 W.Va. 522.

42 C.J. p 1271 note 49 [b].

Evidence held sufficient to go to jury
Va.—Parker v. Norfolk Orange Crush Bottling Co., 8 S.E.2d 301, 175 Va. 249.

Evidence held insufficient to go to jury

Mo.—Bumgarner v. Ekstrum, 67 S.W.2d 520, 228 Mo.App. 424.

Tex.—Hornsby v. Houston Electric Co., Civ.App., 125 S.W.2d 346, error dismissed, judgment correct

74. Mo.—Knebel v. Poese, App., 153 S.W.2d 844—Nordmann v. J. Hahn Bakery Co., App., 298 S.W. 1037.
42 C.J. p 1271 note 49 [f].

Evidence held sufficient to go to jury
Mo.—Knebel v. Poese, App., 153 S.W.2d 844.

75. Mo.—Holloway v. Barnes Grocer Co., 15 S.W.2d 917, 223 Mo.App. 1026.

Mule driver struck by motorcycle
Mo.—Houslev v. Berberich Delivery, App., 87 S.W.2d 209

Evidence held insufficient to go to jury

Mo.—Hates v. Brown Shoe Co., 114 S.W.2d 31, 342 Mo. 411.

76. Cal.—Bailey v. Wilson, 61 P.2d 68, 16 Cal.App.2d 645.

Conn.—McLaughlin v. Schreiber, 138 A. 467, 105 Conn. 610, overruled Lanfare v. Putnam, 161 A. 242, 115 Conn. 267.

D.C.—Tyler v. Starke, 128 F.2d 611, 76 U.S.App.D.C. 42.

Fla.—Brandt v. Dodd, 8 So.2d 471, 150 Fla. 635.

Ky.—Kinsella v. Meyer's Adm'r, 102 S.W.2d 974, 267 Ky. 508—Lutton v. Pinckley, 69 S.W.2d 347, 253 Ky. 323—Cumberland Grocery Co. v. Hewlett, 22 S.W.2d 97, 231 Ky. 702.

Mo.—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26—Allen v. Kessler, 64 S.W.2d 630—Reith v. Toher, 8 S.W.2d 607, 320 Mo. 725—Dove v. Stafford, 91 S.W.2d 161, 230 Mo.App. 241—Taylor v. Kelder, 88 S.W.2d 436, 229 Mo.App. 1117—Scoggins v. Miller, App., 80 S.W.2d 724

way,⁷⁷ also where the injured person was a pe- | destrian running out into the street or high-

—Bramblett v. Harlow, App., 75 S. W.2d 626—Robertson v. Scoggins, App., 73 S.W.2d 430—Hodgins v. Jones, App., 64 S.W.2d 309—Woods v. Moore, App., 48 S.W.2d 202—Loughlin v. Marr-Bridger Grocer Co., App., 10 S.W.2d 75—Nickelson v. Cowan, App., 9 S.W.2d 534—Ikemeyer v. Stanford, App., 2 S.W.2d 106.

N.H.—Frost v. Stevens, 184 A. 869, 88 N.H. 164.

Tex.—Surkey v. Smith, Civ.App., 136 S.W.2d 893, error refused.

Va.—Herbert v. Stephenson, 35 S.E. 2d 753, 184 Va. 457—Dobson-Pea- cock v. Curtis, 186 S.E. 13, 166 Va. 550—Lucas v. Craft, 170 S.E. 836, 161 Va. 228.

42 C.J. p 1271 note 49 [a].

Defendant held not negligent as mat- ter of law

In action for death of pedestrian who was struck by automobile, testi- mony of witness as to test with automobile of same model as defend- ant's and with headlights of test au- tomobile on same beam as defendant testified he had his at time of acci- dent was not conclusive of fact that defendant, by ordinary care, could have seen pedestrian in a position of peril at such time as thereafter to avoid accident with means at his dis- posal, so as to establish the defend- ant's negligence under last clear chance doctrine as a matter of law. —Hartman v. Dyer, 182 S.W.2d 646, 298 Ky. 173.

Evidence held sufficient to go to jury
U.S.—Hoffecker v. Jenkins, C.C.A. Va., 151 F.2d 951.

Cal.—Martin v. Vierra, 93 P.2d 261, 34 Cal.App.2d 86, approval with- held by Supreme Court and hearing denied 94 P.2d 567, 34 Cal.App.2d 86.

Idaho—Geist v. Moore, 70 P.2d 403, 58 Idaho 149.

Ky.—Hartman v. Dyer, 182 S.W.2d 646, 298 Ky. 173—Short Way Lines v. Sutton's Adm'r, 164 S.W.2d 809, 291 Ky. 541.

Mich.—Siegel v. Detroit Cab Co., 225 N.W. 601, 246 Mich. 620—Sudinski v. Krohn, 219 N.W. 665, 242 Mich. 497.

Mo.—Shields v. Keller, 153 S.W.2d 60, 348 Mo. 326—Chastain v. Winton, 152 S.W.2d 165, 347 Mo. 1211—Levins v. Vigne, 98 S.W.2d 737, 339 Mo. 660—Steger v. Meehan, 63 S.W.2d 109—Silliman v. Munger Laundry Co., 44 S.W.2d 159, 329 Mo. 235—Althage v. People's Mo- torbus Co. of St. Louis, 8 S.W.2d 924, 320 Mo. 598—Schulz v. Smor- cina, 1 S.W.2d 113, 318 Mo. 486—Arnold v. Mansella, App., 186 S.W. 2d 882—Cardis v. Roessel, 186 S. W.2d 753, 238 Mo.App. 1234—Breitschaft v. Wyatt, App., 167 S. W.2d 931—Dickens v. Heltzman,

App., 141 S.W.2d 183—Robinson v. O'Shansky, App., 96 S.W.2d 895—Schmitt v. Shuplak, App., 42 S. W.2d 959—Woods v. Moffitt, 38 S. W.2d 525, 225 Mo.App. 801—Joch- ens v. Neville, App., 22 S.W.2d 887 —Thomassen v. West St. Louis Water & Light Co., App., 251 S.W. 450, affirmed in part and reversed in part on other grounds 278 S.W. 979, 312 Mo. 150.

Tex.—Hall v. Weaver, Civ.App., 101 S.W.2d 1035, error dismissed
Va.—Stuart v. Coates, 42 S.E.2d 311, 186 Va. 227.

Evidence held insufficient to go to jury

U.S.—Thomas v. Goldman, C.C.A.Va., 167 F.2d 315.

Cal.—Gulino v. Finocchiaro, 17 P.2d 754, 128 Cal.App. 496.

Conn.—Middletown Trust Co v. Arm- our & Co., 191 A. 532, 122 Conn. 615—Strong v. Carrier, 164 A. 501, 116 Conn. 262.

D.C.—Peiffer v. Mann, 76 F.2d 1000, 64 App.D.C. 230, certiorari denied 56 S.Ct. 98, 296 U.S. 587, 80 L.Ed. 415

Iowa.—Nagel v. Bretthauer, 298 N. W. 852, 230 Iowa 707—Reynolds v. Aller, 284 N.W. 825, 226 Iowa 642 —Albrecht v. Berry, 208 N.W. 205, 202 Iowa 250.

Ky.—Payne's Adm'r v. Stone, 187 S. W.2d 267, 299 Ky. 704.

Mich.—Anderson v. Bliss, 274 N.W. 809, 281 Mich. 323.

Mo.—Danzo v. Humfeld, 180 S.W.2d 722—Goodson v. Schwandt, 300 S. W. 795, 318 Mo. 666—Kelly v. Rieth, App., 168 S.W.2d 115—Ben- son v. Smith, App., 38 S.W.2d 743.
N.C.—Miller v. Lewis & Holmes Mo- tor Freight Corporation, 11 S.E.2d 300, 218 N.C. 464

Tex.—Surkey v. Smith, Civ.App., 136 S.W.2d 893, error refused—Huntley v. Psimenos, Civ.App., 67 S.W.2d 350, error dismissed.

77. Cal.—Center v. Yellow Cab Co. of Los Angeles, 13 P.2d 918, 216 Cal. 205

Idaho—Stearns v. Graves, 111 P.2d 882, 62 Idaho 312.

Iowa.—Pettijohn v. Weede, 258 N.W. 72, 219 Iowa 465.

Mo.—Smithers v. Barker, 111 S.W.2d 47, 341 Mo. 1017—Marshak v. Wil- liam J. Brennan Grocery Co., App., 83 S.W.2d 165—Burke v. Laurie, App., 61 S.W.2d 268—Matlocks v. Emerson Drug Co., App., 33 S.W.2d 142—Roemich v. Wilson, App., 28 S.W.2d 430—Fouls v. Lehman, App., 17 S.W.2d 994.

N.D.—Hausken v. Coman, 268 N.W. 430, 66 N.D. 633.

Va.—Yellow Cab Corporation of Abingdon v. Henderson, 16 S.E.2d 389, 178 Va. 207—Chenman v. Pax- son's Adm'r, 195 S.E. 492, 170 Va. 6.

Wash.—Smith v. Gamp, 35 P.2d 40, 178 Wash. 451.

42 C.J. p 1271 note 49 [a] (1).

Plaintiff struck by motorcycle

Okl.—Getman - MacDonell - Sum- mers Drug Co. v. Acosta, 19 P.2d 149, 162 Okl. 77.

Liability held not shown as matter of law

In action by pedestrian struck by truck while crossing street in middle of block, where truck driver saw pe- destrian before truck struck pedes- trian, but jury found that pedestrian was negligent and that driver did not see pedestrian in time to avoid in- juring pedestrian and that truck driver's failure to sound horn was not negligence, liability of owner and driver of truck under doctrine of dis- covered peril was not established as matter of law—Tumlinson v. San Antonio Brewing Ass'n, Tex.Civ.App., 170 S.W.2d 620, error refused.

Evidence held sufficient to go to jury

Cal.—Cooper v. Smith, 289 P. 614, 209 Cal. 562—Olson v. Combs, 36 P.2d 708, 1 Cal.App.2d 260.

Conn.—Wilson v. Dunbar, 180 A. 296, 120 Conn. 255.

Iowa.—Groves v. Webster City, 270 N.W. 329, 222 Iowa 849

Md.—Shalvitz v. Etmanski, 164 A. 169, 164 Md 125

Mich.—Smarinsky v. Markowitz, 251 N.W. 539, 265 Mich. 412.

Mo.—Smith v. Fine, 175 S.W.2d 761, 351 Mo. 1179—Pletcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—Miller v. Williams, 76 S.W.2d 355 —Payne v. Reed, 59 S.W.2d 43, 332 Mo. 343—Gray v. Columbia Ter- minals Co., 52 S.W.2d 809, 331 Mo. 73—Gerran v. Minor, App., 192 S. W.2d 57—Johnson v. Scheerer, App., 109 S.W.2d 1231—Gambell v. Irvine, App., 102 S.W.2d 784—Smithers v. Barker, App., 97 S.W. 2d 121, reversed on other grounds 111 S.W.2d 47, 341 Mo. 1017—Hud- low v. Langerhans, 91 S.W.2d 629, 230 Mo.App. 1160—Hawken v. Schwartz, App., 72 S.W.2d 877—Ellis v. Wolfe-Shoemaker Motor Co., 55 S.W.2d 309, 227 Mo.App. 508—Lydon v. Atlas Linen & Towel Service Co., App., 53 S.W.2d 38—Schmitt v. American Press, App., 42 S.W.2d 969—Zimmer v. Daugh- erty, App., 32 S.W.2d 765—Wright v. Kidwell, App., 14 S.W.2d 499.

Tex.—Martinez v. Pena, Civ.App., 139 S.W.2d 337, error dismissed, judg- ment correct.

42 C.J. p 1271 note 49 [h] (1).

Evidence held insufficient to go to jury

Iowa.—Spaulding v. Miller, 264 N.W. 8, 220 Iowa 1107.

Mo.—Putnam v. Unionville Granite Works, App., 122 S.W.2d 389.

way;⁷⁸ where the injured person was working on the highway,⁷⁹ or alighting from a vehicle;⁸⁰ or where the injured person was a child,⁸¹ a guest or occupant of defendant's vehicle,⁸² or of the vehicle of another.⁸³

Incidental questions. Various incidental questions of fact relating to the issue of defendant's liability under the last clear chance doctrine have been held, on conflicting evidence, to be for the jury,⁸⁴ including such questions as whether plaintiff was in a position of danger,⁸⁵ and entitled to warning;⁸⁶ when or at what point plaintiff first got into the danger zone,⁸⁷ as regards the duty to

warn;⁸⁸ when it first became motorist's duty to take steps to avoid a collision;⁸⁹ whether motorist should have seen a pedestrian's danger, and acted on it, sooner;⁹⁰ and whether defendant would have seen plaintiff's peril had he kept a lookout.⁹¹

§ 529. — Comparative Negligence

The application of the rules relating to questions of law and fact generally to the determination of the liability of defendant under the doctrine of comparative negligence is considered in the C. J. S. title Negligence § 262, also 42 C.J. p 1272 note 53; 45 C.J. p 1315 notes 91-99.

R.I.—Dick v. Whitfield, 190 A. 799, 58 R.I. 21.
42 C.J. p 1271 note 49 [i] (1), (2).

78. Idaho—Byington v. Horton, 102 P 2d 652, 61 Idaho 389.

Evidence held sufficient to go to jury
Idaho—Asumendi v. Ferguson, 65 P. 2d 713, 57 Idaho 450.

79. U.S.—Sprinkle v. Davis, C.C.A. Va., 111 F 2d 925, 128 A.L.R. 1101.
Fla.—Merchants' Transp. Co. v. Daniel, 149 So. 401, 109 Fla. 496

Evidence held sufficient to go to jury
Del.—Baker v. Reid, 57 A 2d 103.

Evidence held insufficient to go to jury
Mo.—Smith v. Siedhoff, 209 S.W.2d 233.

80. Mo.—Venters v. Bunnell, 93 S. W.2d 70, 230 Mo.App. 1190.

Evidence held sufficient to go to jury
Mo.—McCarthy v. Sheridan, 83 S.W. 2d 907, 336 Mo. 1201—Venters v. Bunnell, 93 S.W.2d 70, 230 Mo App 1190.

81. Cal.—Springer v. Soderstrom, 129 P 2d 499, 54 Cal App 2d 704—Galwey v. Pacific Auto Stages, 273 P. 866, 96 Cal.App. 169.

Ga.—Smith v. Kleinberg, 174 S.E. 731, 49 Ga.App. 194.

Ky.—Thomas v. Dahl, 170 S.W.2d 337, 293 Ky. 808.

Mass.—Rocha v. Alber, 18 N.E.2d 1018, 302 Mass. 155.

Mo.—Radabaugh v. Williford, 116 S. W.2d 118, 342 Mo. 528—Doty v. Fisher, App., 200 S.W.2d 534—Riechers v. Meyer, App., 28 S.W.2d 405—Lanham v. Vesper-Buick Automobile Co., App., 6 S.W.2d 995, part of opinion quashed on other grounds State ex rel. Vesper-Buick Automobile Co. v. Daues, 19 S.W.2d 700, 323 Mo. 388, 67 A.L.R. 157.

N.Y.—Dino v. Eastern Glass Co., 246 N.Y.S. 306, 231 App.Div. 75.
42 C.J. p 1271 note 49 [d].

Evidence held sufficient to go to jury
Iowa.—Winegardner v. Manny, 21 N. W.2d 209, 237 Iowa 412.

Md.—Stafford v. Zake, 20 A.2d 144, 179 Md. 460.

Mo.—Doherty v. St. Louis Butter Co., 98 S.W.2d 742, 339 Mo. 996—Lindsey v. Vance, 88 S.W.2d 150, 337 Mo. 1111—Ponticello v. Lillensiek, App., 83 S.W.2d 150—Ponticello v. Lillensiek, App., 72 S.W.2d 134—Cervillo v. Manhattan Oil Co., 49 S.W.2d 183, 226 Mo.App. 1090—Murphy v. Quick Tire Service, App., 47 S.W.2d 203—Irvin v. Keltling, App., 46 S.W.2d 924—Stofel v. Reid Bros Express & Transfer Co., App., 35 S.W.2d 948—Whitley v. Stein, App., 34 S.W.2d 998—Hubbard v. Badalamenti, App., 6 S. W.2d 983—Floun v. Birger, App., 296 S.W. 203.

N.C.—Dolson v. Early, 161 S.E. 685, 202 N.C. 8.

Tex.—Dr. Pepper Bottling Co. v. Rainholdt, Civ.App., 66 S.W.2d 496, reversed on other grounds Schroeder v. Rainholdt, 97 S.W.2d 679, 128 Tex. 269—Fernandez v. Rahe, Civ. App., 61 S.W.2d 529, error refused.
Utah—Graham v. Johnson, 166 P.2d 230, 109 Utah 346, rehearing denied and modified on other grounds 172 P.2d 665, 109 Utah 365.

42 C.J. p 1271 note 49 [h] (2).

82. Ky.—Prather's Adm'r v. Allen, 164 S.W.2d 402, 291 Ky. 353.

Minn.—Turenne v. Smith, 9 N.W.2d 409, 215 Minn. 64.

Mo.—McCombs v. Ellsberry, 85 S.W. 2d 135, 337 Mo. 491—Favorite v. Bethel, 55 S.W.2d 702, 227 Mo.App. 645—Rosenstein v. Lewis Automobile Co., App., 34 S.W.2d 1023—Stevens v. Westport Laundry Co., 25 S.W.2d 491, 224 Mo.App. 955.

Evidence held sufficient to go to jury
Mo.—Buehler v. Festus Mercantile Co., 119 S.W.2d 961, 343 Mo. 139—Pabst v. Armbruster, App., 91 S. W.2d 652—Danklef v. Armbruster, App., 91 S.W.2d 660—Penrod v. St. Louis, Red Bud & Chester Motorbus & Service Corporation, App., 60 S.W.2d 1012.

83. Mo.—Anderson v. Northrop, 96 S.W.2d 521, 230 Mo.App. 1225—Schneider v. Silbergeld, App., 31 S. W.2d 267.

Guest's obliviousness or inextricability

In automobile guest's action against owner and driver of taxicab for injuries sustained when taxicab collided with rear end of automobile which was stopped for a required boulevard stop signal, questions of guest's obliviousness or inextricability were not involved and were not required to be submitted to jury, where taxicab driver testified that he saw automobile when driver got near the intersection—Jones v. Austin, Mo.App., 154 S.W.2d 378.

Evidence held sufficient to go to jury
Mo.—White v. Teague, 182 S.W.2d 288, 353 Mo. 241—Hollister v. A. S. Aloe Co., 156 S.W.2d 606, 348 Mo. 1055—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326—Pence v. Kansas City Laundry Service Co., 59 S.W.2d 633, 332 Mo. 930—Becker v. Malpe, App., 50 S. W.2d 695

Evidence held insufficient to go to jury

Mo.—Bauer v. Wood, 154 S.W.2d 356, 236 Mo App 266.

84. Cal.—Smith v. Pacific Greyhound Corporation, 35 P.2d 169, 139 Cal.App. 696.

Mo.—Thompson v. Wilson, App., 119 S.W.2d 848

Mont.—Simpson v. Miller, 34 P.2d 528, 97 Mont. 328.

Wash.—Smith v. Gamp, 35 P.2d 40, 178 Wash. 451.

85. Cal.—Smith v. Pacific Greyhound Corporation, 35 P.2d 169, 139 Cal App 696.

86. Mo.—Hodgins v. Jones, App., 64 S.W.2d 309.

87. Mo.—Villinger v. Nighthawk Freight Service, App., 104 S.W.2d 740.

88. Mo.—Womack v. Missouri Pac. R. Co., 88 S.W.2d 368, 337 Mo. 1160.

89. Mo.—Francis v. Missouri Pac. Transp. Co., App., 85 S.W.2d 915.

90. D.C.—Tyler v. Starke, 128 F.2d 611, 76 U.S.App.D.C. 42.

91. Mont.—Autio v. Miller, 11 P.2d 1039, 92 Mont. 150.

§ 530. Instructions

- a. In general
- b. Correctness
- c. Completeness and particularity
- d. Form and language

a. In General

The general rules governing instructions to the jury in civil actions ordinarily apply in actions for injuries arising out of the operation of motor vehicles.

The rules relating to instructions to the jury in civil actions generally, particularly those which apply in actions for negligence, govern and control the instructions in actions to recover damages for injuries caused by the operation of motor vehicles.⁹² It is the duty of the trial court to instruct the jury as to the rights and duties of all the actors concerned in the accident.⁹³ The court may give an instruction that the jury should not be guided by passion, sympathy, or prejudice in arriving at its verdict,⁹⁴ but a failure to do so is not error.⁹⁵

Effect of request or absence thereof. As a rule, the failure to give a particular instruction, or to give an instruction on any theory or phase of the case or on any particular subject, is not error where no request therefor has been made.⁹⁶ It is error to refuse to give a requested instruction correctly stating the law on a material matter not sufficiently or substantially covered by other instructions.⁹⁷ On the other hand, it is not error to refuse to give a requested instruction where, in so far as it correctly

states the law applicable to the case, the subject matter thereof is fully or substantially and adequately covered by other instructions given by the court,⁹⁸ or where the instructions given by the court fully cover the issues;⁹⁹ and this is true even though the requested instruction could properly have been given.¹ Where the case is submitted to the jury for a special verdict only, it is proper to refuse a requested instruction on the ultimate question of liability.²

Definitions. It may be proper or necessary for the trial court to define particular words and phrases used in the instructions;³ but it is not necessary to define words of common meaning and not constituting technical terms.⁴ It has been held that in the absence of a request for an instruction defining the term, the failure of the court to define "negligence"⁵ or a word which is in general use⁶ and the meaning of which is probably understood by every juror⁷ is not error; but it has also been held that failure to give a necessary definition is error, even in the absence of a request for a definition.⁸

A "dogfall" instruction is an instruction to the effect that, if the jury shall believe that both drivers were negligent and their concurrent negligence caused the accident and consequent injuries, they will not award damages either to plaintiff or to defendant.⁹

b. Correctness

Instructions should correctly state the law on the subject matter covered, and a requested instruction con-

92. U.S.—Saario v. Charles F. Vachris, Inc., C.C.A.N.Y., 151 F.2d 668—Thompson v. Bell, C.C.A.Mich., 129 F.2d 211.

Conn.—Zatkin v. Katz, 11 A.2d 843, 126 Conn. 445.

Ohio.—Houser v. Humbel, 72 N.E.2d 590, 79 Ohio App. 122.

Pa.—Emmons v. Eshbach, 22 Pa.Dist. & Co. 675, 44 Lanc.L.Rev. 430, 42 C.J. p 1272 note 56.

Instructions held inadequate

N.Y.—Tomaschoff v. Stapleton Drug Co., 30 N.Y.S.2d 724, 263 App.Div. 728.

Instructions held sufficient or proper

Iowa.—Ege v. Born, 236 N.W. 75, 212 Iowa 1138.

Md.—Yellow Cab Co. v. Henderson, 39 A.2d 546, 183 Md. 546.

Tenn.—Norvell & Wallace v. Lester, 14 Tenn.App. 62—Malone & Bowden Tile & Marble Co., Inc., v. Hall, 4 Tenn.App. 307—East End Tire & Oil Co. v. Mallory, 2 Tenn.App. 101.

93. Wash.—Hadley v. Arms, 241 P. 26, 136 Wash. 632.

94. Wash.—Cloherty v. Griffith, 144 P. 912, 82 Wash. 634.

95. Wash.—Cloherty v. Griffith, supra.

96. Conn.—Mongillo v. New England Banana Co., 160 A. 433, 115 Conn. 112.

Ga.—Studdstill v. Bergsteiner, 103 S. E. 691, 25 Ga.App. 405.

Iowa.—Gregory v. Suhr, 277 N.W. 721, 224 Iowa 954—Jones v. Lozier, 191 N.W. 103, 195 Iowa 365.

Ky.—Pope-Cawood Lumber & Supply Co. v. Clest, 33 S.W.2d 360, 236 Ky. 366.

Mo.—Rogles v. United Rys. Co., 232 S.W. 93—Raymond v. Elm Tree Inn Co., 245 S.W. 354, 211 Mo.App. 493.

N.J.—Illis v. Oberle, 147 A. 461, 106 N.J.Law 244.

Ohio.—Burkhardt v. Hancock, 153 N. E. 497, 25 Ohio App. 183.

Pa.—Bowman v. Stouman, 141 A. 41, 292 Pa. 293.

Tex.—Lefkowitz v. Sherwood, Civ. App., 136 S.W. 850.

Wis.—Siegl v. Watson, 195 N.W. 867, 181 Wis. 619.

42 C.J. p 1274 notes 79–81.

97. Ill.—Scott v. Vurdulas, 264 Ill. App. 495.

42 C.J. p 1273 note 74.

98. Ky.—Melville v. Rollwage, 188 S.W. 638, 171 Ky. 607, L.R.A.1917B 133.

42 C.J. p 1273 note 75.

99. Wash.—Simonson v. Huff, 215 P. 49, 124 Wash. 549.

1. Cal.—Whitfield v. Debrincat, 123 P.2d 591, 50 Cal.App.2d 389.

42 C.J. p 1274 note 77.

2. Wis.—Christl v. Hauert, 160 N. W. 1061, 164 Wis. 624.

3. Tex.—Hampton Co. v. Joyce, Civ. App., 80 S.W.2d 1066.

42 C.J. p 1273 notes 69, 70.

4. Conn.—Lamke v. Harty Bros. Trucking Co., 114 A. 533, 96 Conn. 505, 508.

42 C.J. p 1273 note 71.

5. Mo.—Russell v. Bauer-Berger Grocery Co., App., 288 S.W. 985.

6. "Park"

Or.—O'Brien v. Royce, 227 P. 520, 111 Or. 488.

7. Or.—O'Brien v. Royce, supra.

8. Tex.—Patterson v. Williams, Civ. App., 225 S.W. 89.

9. Ky.—McFarland v. Bruening, 185 S.W.2d 247, 299 Ky. 367.

taining an inaccurate statement of the law is properly refused.

An instruction given by the court must correctly state the law on the subject matter covered thereby.¹⁰ However, an instruction may be correct in substance even though there is some question about the accuracy of certain words and phrases employed therein.¹¹ Sometimes an objection to a particular instruction or a portion thereof is not sustained where, in view of other instructions or on a reading of the entire charge, it appears that the jury were correctly and adequately instructed on the subject matter embraced in the instruction in question;¹² but there are cases in which an error in one instruction may not be cured by other instructions.¹³

Requested instructions. It is proper to refuse to give a requested instruction which contains an inaccurate statement of law;¹⁴ and some authorities hold that a requested instruction cannot be qualified by the trial court,¹⁵ but other authorities hold

that a requested instruction which is defective or erroneous may be modified by the court and given in its modified form.¹⁶

As to particular matters. The rule that an instruction must correctly state the law on the subject matter covered thereby is applicable to instructions on the responsibility of defendant for the operation of the motor vehicle;¹⁷ the care required;¹⁸ the rights and duties of the operator of a motor vehicle;¹⁹ and the relative rights and duties of such an operator and the operator of another motor vehicle²⁰ or a person sitting in a stationary buggy;²¹ common or joint enterprise;²² sole or joint liability;²³ damages;²⁴ and instructions defining terms.²⁵ The rule is also applicable to instructions as to the anticipation of, or the assumptions which an individual may make respecting, the presence or actions of others,²⁶ such as assumptions which one may make as to the obedience of others to the law and the rules of the road,²⁷ the exercise of due care

10. Conn.—Zatkin v. Katz, 11 A.2d 843, 126 Conn. 445.
42 C.J. p 1274 note 87.

Instructions held erroneous

US—Saario v. Charles F. Vachris, Inc., C.C.A.N.Y., 151 F.2d 668.
Miss—Rowlands v. Morphis, 130 So. 906, 158 Miss. 662.

Mo—Brooks v. Menaugh, 284 S.W. 803.

Ohio—Liberty Highway Co. v. Callahan, 157 N.E. 708, 24 Ohio App. 374.

Wash.—Barach v. Island Empire Telephone & Telegraph Co., 275 P. 713, 151 Wash. 279.

42 C.J. p 1274 note 87 [a].

Instructions held not erroneous

Ga—Hollomon v. Hopson, 166 S.E. 45, 45 Ga.App. 762.

Ind—Cousins v. Glassburn, 24 N.E. 2d 1013, 216 Ind. 431—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind. 394—Van Drake v. Thomas, 38 N.E.2d 878, 110 Ind.App. 586.

Iowa—Ege v. Born, 236 N.W. 75, 212 Iowa 1138.

Mo—Vesper v. Ashton, 118 S.W.2d 84, 233 Mo.App. 204.

N.H.—American Motorists Ins. Co. v. Rush, 190 A. 432, 88 N.H. 383.

N.J.—Bergman v. Ginsburg, 143 A. 444, 105 N.J.Law 204.
42 C.J. p 1274 note 87 [b].

11. Ky.—American Dye Works v. Baker, 276 S.W. 133, 210 Ky. 508.
42 C.J. p 1274 note 88.

12. Cal.—Yack v. Tiffin, 158 P.2d 620, 69 Cal.App.2d 226—Box v. Van Slooten, 191 P.2d 780, 38 Cal.App. 2d 554.
42 C.J. p 1274 note 89.

13. Ill.—Wolfgram v. Bennehoff, 56 N.E.2d 849, 324 Ill.App. 18.
42 C.J. p 1275 note 90.

14. Ala.—Green v. City of Birmingham, 4 So.2d 394, 241 Ala. 684.
Cal.—Simpson v. Steinhoff, 21 P.2d 960, 131 Cal.App. 660.
42 C.J. p 1275 note 91.

15. Ala.—Louis Platz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689.
42 C.J. p 1275 note 92.

16. Cal.—Furtado v. Bird, 146 P. 58, 26 Cal.App. 152.
42 C.J. p 1275 note 93.

17. N.H.—Defoe v. Stratton, 114 A. 29, 80 N.H. 109.
42 C.J. p 1275 note 95.

18. Tenn.—Kidd v. Kirby, 1 Tenn. App. 242.
42 C.J. p 1275 note 96.

19. Wash.—Colvin v. Auto Interurban Co., 232 P. 365, 132 Wash. 591.
42 C.J. p 1276 note 9.

20. Wis.—Bertschy v. Seng, 195 N.W. 854, 181 Wis. 643.
42 C.J. p 1276 note 10.

21. Ky.—Higgins v. Forkner, 277 S.W. 983, 211 Ky. 588.

22. Pa.—Conside v. Michlovitz, Com.Pl., 45 Dauph. Co. 258.

Instructions held erroneous

N.J.—Harber v. Graham, 143 A. 340, 105 N.J.Law 213, 61 A.L.R. 1232.

23. **Instructions held erroneous**
Va.—Lough v. Price, 172 S.E. 269, 161 Va. 811.

Instructions held not erroneous

Cal.—Bleumel v. Krolzy, 298 P. 825, 113 Cal.App. 585—Dougherty v. Ellingson, 275 P. 456, 97 Cal.App. 87.
Ind.—Hoeppner v. Saltzgaber, 200 N.E. 458, 102 Ind.App. 458—Riches v. Hogmire, 199 N.E. 887, 101 Ind. App. 530.

Pa.—Baugh v. McCallum, 14 A.2d 364, 140 Pa.Super. 276.

24. Ky.—Helm v. Phelps, 164 S.W. 92, 157 Ky. 795.
42 C.J. p 1276 note 1, p 1277 note 27.

Instructions held erroneous

D.C.—Giddings v. Zellan, 160 F.2d 585, 82 U.S.App.D.C. 92, certiorari denied Zellan v. Giddings, 68 S.Ct. 61, 332 U.S. 759, 92 L.Ed. —.

Instructions held not erroneous

Ind.—D. Graff & Sons v. Williams, 61 N.E.2d 72, 115 Ind.App. 597.

25. Wash.—Gosa v. Hyde, 202 P. 274, 117 Wash. 672.
42 C.J. p 1276 note 14.

26. N.H.—Fine v. Parella, 25 A.2d 121, 92 N.H. 81.

Instructions held erroneous or properly refused

Ala.—Thomas v. Carter, 117 So. 634, 218 Ala. 55.

Minn.—Heath v. Wolesky, 233 N.W. 239, 181 Minn. 492.

Ohio—Liberty Highway Co. v. Callahan, 157 N.E. 708, 24 Ohio App. 374.

Instructions held not erroneous

Cal.—Mathews v. Dudley, 297 P. 544, 212 Cal. 58, corrected 298 P. 819.

Or.—McMillen v. Rogers, 154 P.2d 219, 175 Or. 453.

Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.

Wash.—Green v. Floe, 183 P.2d 771, 23 Wash.2d 620.

Instructions held erroneous

Cal.—Yack v. Tiffin, 158 P.2d 620, 69 Cal.App.2d 226.

Instructions held not erroneous

Cal.—Forrest v. Pickwick Stages System, 281 P. 723, 101 Cal.App. 426.

by others,²⁸ the stopping of other vehicles at an intersection,²⁹ and the yielding by others of the right of way.³⁰

c. Completeness and Particularity

An instruction should include the essential elements of the rule involved in the particular instruction and should not be too general or vague.

An instruction given³¹ or requested³² should not omit any essential elements or conditions of the rule or rules governing the right, duty, or liability constituting the subject matter of the instruction; but sometimes, in view of the evidence, particular omissions have been held not prejudicial.³³ Some instructions have been condemned as being too general,³⁴ vague,³⁵ or not sufficiently specific,³⁶ at least where more specific instructions were requested.³⁷ However, in the absence of a request for a better instruction, an instruction stating a particular rule or doctrine and actually embracing all elements thereof is not rendered erroneous by the fact that it is extremely terse or meager,³⁸ is more abbreviated than one which is frequently given,³⁹ or

is couched only in general terms;⁴⁰ if a party desires a more elaborate, amplified, or specific instruction on a particular subject than the one given by the court, it is his duty to request it.⁴¹ Sometimes an instruction is held sufficient for the practical purposes of the trial, even though it is too indefinite in one part and too specific in another.⁴²

d. Form and Language

The instructions should not be argumentative, confusing, conflicting, or ambiguous; and a requested instruction which is badly worded may properly be refused.

The instructions given by the court must not be argumentative,⁴³ confusing or misleading,⁴⁴ or inconsistent, conflicting, or contradictory.⁴⁵ Also an instruction given by the court should not be ambiguous;⁴⁶ but an ambiguity in a particular instruction is not fatal where the charge, as a whole, leaves no doubt as to the correct principles of law applicable to the case.⁴⁷

Requested instruction. The trial court may properly refuse to give a requested instruction which is badly worded,⁴⁸ or refuse to give a requested in-

Ga.—Etheridge v. Guest, 12 S.E.2d 483, 63 Ga.App. 637

Ind.—Toenges v. Walter, 32 N.E.2d 95, 109 Ind.App. 41.

Wash.—Green v. Floe, 183 P.2d 771, 28 Wash.2d 620.

Instructions held not prejudicial
Ohio.—Thompson v. Kerr, App., 51 N.E.2d 742.

28. Cal.—Powers v. Shelton, 169 P.2d 482, 74 Cal.App.2d 757.

Instructions held not erroneous
Cal.—Polk v. Weinstein, 55 P.2d 588, 12 Cal.App.2d 360.

29. **Instructions held erroneous or properly refused**

Mass.—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326.

Instructions held proper or erroneously refused

Mich.—Ithodes v. Finn, 284 N.W. 720, 288 Mich. 262.

Wis.—Loizzo v. Conforti, 240 N.W. 790, 207 Wis. 129.

30. **Instructions held not erroneous**
Wash.—Miller v. Edwards, 171 P.2d 821, 25 Wash.2d 635—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.

31. Ohio.—Blackford v. Kaplan, 20 N.E.2d 522, 135 Ohio St. 263
42 C.J. p 1277 note 32.

32. Cal.—Jones v. Bayley, 122 P.2d 293, 49 Cal.App.2d 647.
42 C.J. p 1277 note 33.

33. Minn.—Pearson v. Northland Transp. Co., 239 N.W. 602, 184 Minn. 560.
42 C.J. p 1277 note 34.

34. Kan.—Sharp v. Sproat, 208 P. 613, 111 Kan. 735, 26 A.L.R. 1421
42 C.J. p 1277 note 35.

35. Ala.—Bains Motor Co. v. Le Croy, 96 So. 483, 209 Ala. 345.

36. Ark.—Dubisson v. McMullin, 259 S.W. 400, 163 Ark. 186.

Mo.—Boyer v. Oldham, App., 209 S.W. 617.

37. Ark.—Dubisson v. McMullin, 259 S.W. 400, 163 Ark. 186.

Kan.—Sharp v. Sproat, 208 P. 613, 111 Kan. 735, 26 A.L.R. 1421.

38. Cal.—Townsend v. Butterfield, 143 P. 760, 168 Cal. 564.

39. Wash.—Van Dyke v. Johnson, 144 P. 540, 82 Wash. 377.

40. Wash.—Van Dyke v. Johnson, supra.

41. Iowa.—Brown v. Des Moines Steam Bottling Works, 156 N.W. 829, 174 Iowa 715, 1 A.L.R. 835.
42 C.J. p 1278 note 42.

Effect of absence of request generally see supra subdivision a of this section.

42. Md.—Taxicab Co. v. Ottenritter, 135 A. 587, 151 Md. 525.

43. Ala.—Karpeles v. City Ice Delivery Co., 73 So. 642, 198 Ala. 449.
42 C.J. p 1278 note 48.

44. Iowa.—Kaufman v. Borg, 242 N.W. 104, 214 Iowa 293.

Mo.—Kimbrough v. Chervitz, App., 180 S.W.2d 772, reversed on other grounds 186 S.W.2d 461, 353 Mo. 1154.

42 C.J. p 1278 note 49.

Instructions held confusing or misleading

Cal.—Sills v. Forbes, 91 P.2d 246, 33 Cal.App.2d 219

Ill.—Piper v. Speroni, 47 N.E.2d 120, 317 Ill.App. 540—Brackett v. Builders' Lumber Co., 253 Ill.App. 107

Mo.—Bobos v. Krey Packing Co., 296 S.W. 157, 317 Mo. 108.

Ohio.—Casper v. Higgins, 6 N.E.2d 3, 54 Ohio App. 21.

42 C.J. p 1278 note 49 [b].

Instructions held not confusing or misleading

Cal.—Clarke v. Volpa Bros., 124 P.2d 377, 51 Cal.App.2d 173.

Okl.—Skaggs v. Gypsy Oil Co., 36 P.2d 865, 169 Okl. 209

S.C.—Daugherty v. Williams, 142 S.E. 722, 144 S.C. 437.

Tenn.—C. D. Kenny Co. v. Williams, 1 Tenn.App. 134.

42 C.J. p 1278 note 49 [c].

45. Cal.—Wright v. Sniffin, 181 P.2d 675, 80 Cal.App.2d 358.

Ill.—Kilmczuk v. Druley-O'Brien Co., 17 N.E.2d 266, 297 Ill.App. 635.
42 C.J. p 1279 note 50.

46. Mo.—Boyer v. Oldham, App., 209 S.W. 617.

47. Mont.—Rohan v. Sherman, 202 P. 749, 61 Mont. 519.

48. Mo.—Thornton v. Stewart, App., 240 S.W. 502.

Instructions held properly refused

In action for death of individual struck by truck, requested instructions using words "plaintiffs" and "plaintiff" where the word "deceased" should have been used, and using

struction which is argumentative,⁴⁹ ambiguous,⁵⁰ confusing or misleading,⁵¹ or which is not couched in language calculated to enlighten the jury.⁵² In some jurisdictions the trial court may give an instruction in its own language⁵³ and need not follow the language of a requested instruction,⁵⁴ even where it is pertinent⁵⁵ and is couched in proper language,⁵⁶ and it is preferable for the court to use its own language in presenting to the jury the subject matter of a requested instruction.⁵⁷ However, under the statutes of a few jurisdictions, the trial court is required to give or refuse a requested written charge in the exact language in which it is written⁵⁸ and is without authority to change its verbiage.⁵⁹

§ 531. — Identity and Ownership of Vehicle

Proper instructions as to the ownership of a vehicle may be given where the matter of ownership is a material issue in the case.

Proper instructions as to the ownership of a motor vehicle involved in an accident may be given where the matter of ownership has been made a material issue in the case by the pleadings and proof.⁶⁰ It has been held proper to instruct the

jury that the fact of nonregistration of the vehicle may be viewed as one of the circumstances to be considered by the jury in determining its ownership.⁶¹ It may not be error for the court in its instructions to assume that a particular individual was the owner of a motor vehicle involved in an accident where the only testimony on the subject is to the effect that the vehicle was owned by such person, and throughout the entire trial the vehicle was repeatedly referred to, without objection, as the vehicle of such individual.⁶² An instruction as to ownership has been held properly refused where the alleged owner admitted the execution of a bill of sale to him and the issuance of a license in his name, and the only evidence that he did not have title was his statement to that effect.⁶³

§ 532. — Negligence in General

Instructions on the question of the negligence of the operator of a motor vehicle are governed by the general rules as to the propriety of instructions and the necessity that they set forth the law correctly.

The general rules governing the propriety of instructions, and the necessity that they set forth the law correctly, apply to instructions on the question of negligence, or the duties or care required, of the operator of a motor vehicle.⁶⁴ These rules

the word "he" to refer to corporation defendant, were properly refused where it was questionable whether jury would have understood that the word "deceased" was intended where the word "plaintiff" was used—*Schipper v. Brashear Truck Co.*, Mo., 132 S.W.2d 993, 125 A.L.R. 674.

49. R.I.—*Ribas v. Revere Rubber Co.*, 91 A. 58, 37 R.I. 189. 42 C.J. p 1279 note 55.

50. Wash.—*Hansen v. Sandvik*, 222 P. 205, 128 Wash. 60.

51. Ala.—*Baker v. Baker*, 124 So. 740, 220 Ala. 201. 42 C.J. p 1279 note 57.

52. Ga.—*Roberts v. Phillips*, 134 S. E. 837, 35 Ga. App. 743.

53. Wash.—*Hayes v. Staples*, 225 P. 417, 129 Wash. 436—*Simonson v. Huff*, 215 P. 49, 124 Wash. 519.

54. Wash.—*Hayes v. Staples*, 225 P. 417, 129 Wash. 436.

55. Wash.—*Hayes v. Staples*, supra.

56. Wash.—*Hayes v. Staples*, supra.

57. Conn.—*Roth v. Chatlos*, 116 A. 332, 97 Conn. 282, 22 A.L.R. 1554.

58. Ala.—*Louis Pizitz Dry Goods Co. v. Cusimano*, 91 So. 779, 206 Ala. 689—*Barfield v. Evans*, 65 So. 928, 187 Ala. 579.

Charge in language of request generally see the C.J.S. Trial § 411, also 64 C.J. p 922 note 54—p 926 note 82.

59. Ala.—*Barfield v. Evans*, supra.

60. Ala.—*Taunton v. Dobbs*, 199 So. 9, 210 Ala. 287.

Instruction held erroneously refused N.Y.—*Brown v. Steamship Terminal Operating Corporation*, 195 N.E. 692, 267 N.Y. 83, motion denied 196 N.E. 595, 267 N.Y. 591.

Instruction held erroneous

Iowa—*Craddock v. Bickelhaupt*, 288 N.W. 109, 227 Iowa 202, 135 A.L.R. 474.

61. Iowa—*Tigue Sales Co. v. Reliance Motor Co.*, 221 N.W. 514, 207 Iowa 567.

62. Ky.—*McCulloch's Adm'r v. Abell's Adm'r*, 115 S.W.2d 386, 272 Ky. 756.

63. Ky.—*Wright v. Clausen*, 92 S.W. 2d 93, 263 Ky. 298.

64. Cal.—*Finney v. Wierman*, 126 P. 2d 143, 52 Cal.App.2d 282—*Whitfield v. Debrincat*, 120 P.2d 40, reheard 123 P.2d 591, 50 Cal.App.2d 389.

Ky.—*Atlantic Greyhound Corp. v. Franklin*, 192 S.W.2d 753, 301 Ky. 867.

N.C.—*Barnes v. Teer*, 10 S.E.2d 614, 218 N.C. 122, rehearing granted and vacated on other grounds 15 S.E. 2d 379, 219 N.C. 823.

Pa.—*Sharkey v. Ramage*, 33 Luz.Leg. Reg. 417.

R.I.—*Sears v. A. Bernardo & Sons*, 115 A. 647, 44 R.I. 106.

Wash.—*Wold v. Gardner*, 8 P.2d 975, 167 Wash. 191.

42 C.J. p 1275 note 97.

Instructions held erroneous, insufficient, or properly refused

(1) Generally

Cal.—*Noble v. Bacon*, 18 P.2d 699, 129 Cal.App. 177.

Iowa—*Gross v. Humke Sanitary Bakery*, 227 N.W. 620, 209 Iowa 40.

Mich.—*Vashaw v. Marquette Public Service Garage*, 284 N.W. 910, 288 Mich. 363.

Miss.—*McDonough Motor Express v. Spiers*, 177 So. 655, 180 Miss. 78.

Mo.—*Ryan v. Burrow*, 33 S.W.2d 928, 326 Mo. 896—*Jageles v. Berberich*, App. 20 S.W.2d 577.

Nev.—*Wells, Inc. v. Shoemaker*, 177 P.2d 451, 64 Nev. 57.

N.Y.—*Weidenfeld v. Surface Transp. Corp. of N. Y.*, 55 N.Y.S.2d 780, 269 App.Div. 341.

N.C.—*Hunter v. Bruton*, 5 S.E.2d 719, 216 N.C. 540.

W.Va.—*Johnson v. Majestic Steam Laundry*, 171 S.E. 902, 114 W.Va. 352.

42 C.J. p 1275 notes 96 [c] (1), 97 [b], p 1277 note 24.

(2) Extent or degree of care in general.

Ala.—*Baker v. Rainier*, 124 So. 737, 220 Ala. 207.

Cal.—*Raynor v. City of Arcata*, 77 P.2d 1054, 11 Cal.2d 113—*Baef v.*

have also been applied with respect to instructions on or involving negligence per se,⁶⁵ gross negligence,⁶⁶ the duty to bring one's vehicle to a stop,⁶⁷ and the position of a vehicle as being on the left side or right side of the road.⁶⁸ Instructions on the question of care or negligence should not be con-

- Kleiber Motor Truck Co., 43 P.2d 575, 5 Cal.App.2d 748.
- Conn.—Harty v. Haskell, 142 A. 466, 108 Conn. 95.
- Ga.—Boutelle v. White, 149 S.E. 805, 40 Ga.App. 415.
- Ind.—Drewrys Limited, U. S. A., v. Crippen, 44 N.E.2d 1006, 113 Ind. App. 120.
- Mo.—Padgett v. Missouri Motor Distributing Corporation, 177 S.W.2d 490—Jungeblut v. Maris, 172 S.W.2d 861, 351 Mo. 301.
- N.J.—Krause v. Emanuel E. Katz, Inc., 185 A. 537, 14 N.J.Misc. 424.
- Pa.—Haffelfinger v. Schell, Com.Pl., 50 Dauph Co. 1.
- (3) Ambulance driver.—Head v. Wilson, 97 P.2d 509, 36 Cal.App.2d 244.
- (4) Fire chief.—Raynor v. City of Arcata, 77 P.2d 1054, 11 Cal.2d 113.
- Instructions held sufficient, proper, or erroneously refused**
- (1) Generally.
- Ala.—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359—Pittman v. Calhoun, 165 So. 391, 231 Ala. 460.
- Ark.—Compressed Industrial Gases v. Todd, 129 S.W.2d 262, 198 Ark. 409—Jacks v. Culpepper, 37 S.W.2d 94, 183 Ark. 505.
- Cal.—Beck v. Sirota, 109 P.2d 419, 42 Cal.App.2d 551—Steers v. City and County of San Francisco, 5 P.2d 32, 118 Cal.App. 361—Metcalf v. Romano, 257 P. 114, 83 Cal.App. 508.
- Conn.—Morosini v. Davis, 148 A. 371, 110 Conn. 358.
- Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.
- Ga.—Wallace v. Howard, 198 S.E. 812, 58 Ga.App. 428—Southeastern Express Co. v. Nightingale, 126 S.E. 915, 32 Ga.App. 515.
- Ill.—Bobalek v. Atlans, 43 N.E.2d 584, 315 Ill.App. 514.
- Iowa.—McSpadden v. Axmear, 181 N.W. 4, 191 Iowa 547.
- Mich.—Vashaw v. Marquette Public Service Garage, 284 N.W. 910, 268 Mich. 863.
- Mo.—Wels v. Raber, 166 S.W.2d 1073, 350 Mo. 586—Bloch v. Kinder, 93 S.W.2d 932, 338 Mo. 1099.
- N.J.—Carambas v. Armin Bergida Inc., 136 A. 729, 103 N.J.Law 313, affirmed Carambas v. Armin Bergida, Inc., 140 A. 919, 104 N.J.Law 433.
- N.Y.—Connell v. Berland, 228 N.Y.S. 20, 223 App.Div. 234, affirmed 162 N.E. 557, 248 N.Y. 641.
- N.C.—Fisher v. Deaton, 146 S.E. 60, 196 N.C. 461.
- N.D.—Jondahl v. Campbell, 238 N.W. 697, 61 N.D. 555.
- S.C.—Parker v. Simmons, 161 S.E. 169, 163 S.C. 42.
- Utah.—Collins v. Liddle, 247 P. 476, 87 Utah 242.
- Vt.—Russell v. Pilger, 37 A.2d 403, 113 Vt. 537.
- 42 C.J. p 1275 notes 96 [c] (2), 97 [c].
- (2) Extent or degree of care in general.
- Cal.—Freeman v. Churchill, 183 P.2d 4, 30 Cal.2d 453—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702.
- D.C.—Radio Cab v. Houser, 128 F.2d 604, 76 U.S.App.D.C. 35.
- Ga.—Yellow Cab Co. v. Adams, 31 S.E.2d 195, 71 Ga.App. 404.
- Ind.—Johnson v. Pedicord, 10 N.E.2d 295, 105 Ind.App. 71—Armstrong v. Binzer, 199 N.E. 863, 102 Ind.App. 497.
- Iowa.—Grisell v. Johnson, 294 N.W. 618, 229 Iowa 361.
- Md.—Yellow Cab Co. v. Lacy, 170 A. 190, 165 Md. 588.
- Mo.—Jungeblut v. Maris, 172 S.W.2d 861, 351 Mo. 301—Oliver v. Morgan, 73 S.W.2d 993—Sloan v. Farmer, App., 168 S.W.2d 467—Schlue v. Missouri Pacific Transp. Co., App., 62 S.W.2d 934—Blackwill v. Franke, App., 49 S.W.2d 211, certiorari quashed State ex rel Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76—Hults v. Miller, App., 299 S.W. 85.
- Tenn.—East End Tire & Oil Co. v. Mallory, 2 Tenn.App. 101.
- Tex.—Stedman Fruit Co. v. Smith, Civ.App., 28 S.W.2d 622, error dismissed—Cannan v. Dupree, Civ. App., 294 S.W. 298.
- Vt.—McAndrews v. Leonard, 134 A. 710, 99 Vt. 512.
- Va.—Voight v. Reher, 46 S.E.2d 15, 187 Va. 157.
- Wis.—Patterson v. Edgerton Sand & Gravel Co., 277 N.W. 636, 227 Wis. 11—Helm v. Wendlandt, 240 N.W. 815, 207 Wis. 139.
- (3) Vehicles driven by police officers
- Ky.—Fayette County v. Hill, 201 S.W.2d 866, 304 Ky. 621.
- Pa.—Epp v. Bynane, Com.Pl., 26 Erie Co. 339.
- (4) Skidding.
- N.H.—Burns v. Cote, 164 A. 771, 86 N.H. 167.
- Or.—Haltom v. Fellows, 73 P.2d 680, 157 Or. 514.
- Wash.—Tuveson v. J. M. Colman Co., 82 P.2d 579, 196 Wash. 286.
- (5) Legal excuse.—Edwards v. Terley, 274 N.W. 910, 223 Iowa 1119.
- 65. Instruction held erroneous**
- Ohio.—Times Square Garage Co. v. Spencer, 166 N.E. 901, 121 Ohio St. 77.
- Instruction held not erroneous**
- N.C.—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.
- 66. Ga.—Rutland v. Dean, 6 S.E.2d 601, 60 Ga.App. 896.**
- Idaho.—French v. Tebben, 27 P.2d 474, 53 Idaho 701.
- Instructions held erroneous or properly refused**
- Cal.—Nelson v. Westergaard, 19 P.2d 867, 130 Cal.App. 79.
- Ga.—Yellow Cab Co. v. Adams, 31 S.E.2d 195, 71 Ga.App. 404.
- N.J.—Siegel v. Saunders, 181 A. 48, 115 N.J.Law 539—Harber v. Graham, 143 A. 340, 105 N.J.Law 213, 61 A.L.R. 1232.
- N.C.—White v. McCabe, 180 S.E. 704, 208 N.C. 301.
- Or.—Smith v. Lafiar, 20 P.2d 391, 143 Or. 65.
- Va.—Gale v. Wilber, 175 S.E. 739, 163 Va. 211.
- Instructions held proper or erroneously refused**
- Ga.—Cast v. Mopper, 199 S.E. 249, 58 Ga.App. 506.
- Mass.—Learned v. Hawthorne, 169 N.E. 557, 269 Mass. 554.
- Or.—Lee v. Hoff, 97 P.2d 715, 163 Or. 374—Cockerham v. Potts, 20 P.2d 423, 143 Or. 80—Storia v. Spokane, Portland & Seattle Transp. Co., 297 P. 367, 136 Or. 315, rehearing denied 298 P. 1065, 136 Or. 315.
- Va.—Masters v. Cardi, 42 S.E.2d 203, 186 Va. 261.
- 42 C.J. p 1273 note 74 [b] (4).
- 67. Instructions held erroneous or properly refused**
- Cal.—Tuller v. Atchison, T. & S. F. Ry. Co., 145 P.2d 321, 62 Cal.App. 2d 852.
- Kan.—Anderson v. Thompson, 22 P.2d 438, 137 Kan. 754.
- Instructions held not erroneous**
- Colo.—Interstate Motor Lines v. Neal, 179 P.2d 665, 116 Colo. 242.
- Ky.—Dixie Ohio Exp. Co. v. Vickery, 206 S.W.2d 821, 306 Ky. 171.
- Miss.—B. Kullman & Co. v. Samuels, 114 So. 807, 148 Miss. 871.
- 68. Instructions held erroneous**
- Ky.—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554.
- N.Y.—Dietz v. Dinkel, 246 N.Y.S. 623, 230 App.Div. 699.
- Or.—Hartley v. Berg, 25 P.2d 932, 145 Or. 44.
- Instructions held not erroneous**
- Cal.—Rosander v. Market St. Ry. Co., 265 P. 541, 89 Cal.App. 721.
- Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.
- Tenn.—Henry v. Sharp, 9 Tenn.App. 350.

fusing or misleading.⁶⁹

It has been said that an instruction containing a general definition of ordinary care is not a sufficient statement of the care required of the operator of an automobile;⁷⁰ but there is also authority to the effect that, except as to a particular act or omission made negligence per se by statute or ordinance,⁷¹ the trial court should not instruct the jury what ordinary care requires to be done in a particular case.⁷² Where the duties of the drivers of motor vehicles involved in a collision were equal and reciprocal, the instructions should so advise the jury.⁷³ Whether the presence of three persons in the front seat of an automobile furnishes a basis for a charge on negligence depends, in the absence of statute or ordinance, on the particular circum-

stances of the case.⁷⁴

§ 533. — Contributory Negligence in General

Appropriate instructions correctly setting forth the law may and should be given on the subject of contributory negligence, where the matter is an issue for the jury in the case.

Where there are pleadings and evidence on which an instruction on contributory negligence may properly be based, such an instruction,⁷⁵ rather than one withdrawing the question from the jury,⁷⁶ may and should be given. Instructions on contributory negligence should correctly instruct the jury regarding the acts or omissions on the part of plaintiff which would bar recovery;⁷⁷ they should explain to the

69. Instructions held confusing or misleading

- Cal.—Head v. Wilson, 97 P.2d 509, 36 Cal.App.2d 244.
Ind.—Keeshin Motor Express Co. v. Sowers, 48 NE2d 459, 221 Ind. 440.
Iowa.—Kaufman v. Borg, 212 N.W. 104, 214 Iowa 293.

Instructions held not confusing or misleading

- (1) Generally.
Cal.—Ballois v. Natural, 269 P. 972, 93 Cal.App. 601.
Conn.—Ghent v. Stevens, 159 A. 94, 114 Conn. 415.
Mo.—Riner v. Rlek, App., 57 S.W.2d 724.
Okla.—Bowring v. Denco Bus Lines, 162 P.2d 525, 196 Okl. 1.
Pa.—Nevin Bus Line v. Paul R. Hostetter Co., 155 A. 872, 305 Pa. 72.
Wis.—Hein v. Wendlandt, 240 N.W. 815, 207 Wis. 139.

(2) As to gross negligence.

- Ga.—Edwards v. Ford, 26 S.E.2d 306, 69 Ga.App. 578—McCord v. Bonford, 173 S.E. 208, 48 Ga.App. 738.
Mass.—Dean v. Bolduc, 4 N.E.2d 441, 296 Mass. 15.
Va.—Margiotta v. Aycock, 174 S.E. 831, 162 Va. 557.

70. Ky.—Weldner v. Otter, 188 S.W. 335, 171 Ky. 167.

71. Ga.—Powell v. Berry, 89 S.E. 753, 145 Ga. 696, L.R.A.1917A 306.

72. Ga.—Powell v. Berry, *supra*.

73. Ky.—Dixie Ohio Exp. Co. v. Vickery, 206 S.W.2d 821, 306 Ky. 171.

74. Ohio.—Sheen v. Kublac, 1 N.E. 2d 943, 131 Ohio St. 52.

75. U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 211—Peterson v. Sheridan, C.C.A.Iowa, 115 F.2d 121.
Ill.—Mowat v. Sandel, 262 Ill.App. 395.

- Ky.—Colyer v. Hudson, 87 S.W.2d 92, 261 Ky. 84.

- Mo.—King v. Rieth, 108 S.W.2d 1, 341 Mo. 467.
N.C.—Wright v. D. Pender Grocery Co., 187 S.E. 564, 210 N.C. 462.
Okla.—Burton v. Harn, 156 P.2d 618, 195 Okl. 232.
Pa.—Xenos v. White Star Lines, Com Pl., 19 Wash. Co. 145.
42 C.J. p 1273 note 74 [b] (5), p 1283 note 21.
Applicability to pleadings and evidence generally see *infra* § 556.

When instruction justified

In order to sustain an instruction that plaintiffs were barred from recovery by decedent's contributory negligence unless entitled to recover under last clear chance doctrine, it was not necessary that contributory negligence of pedestrian be proximate cause of accident, but instruction could be sustained if pedestrian contributed directly in any way to his injuries.—Spooner v. Wincup, 288 N.W. 894, 227 Iowa 768.

76. Ind.—Indianapolis v. Pell, 111 N.E. 22, 62 Ind.App. 191.
42 C.J. p 1283 note 22.

77. Ohio.—Sharp v. Russell, 174 N.E. 617, 37 Ohio App. 306.

Instructions held erroneous or properly refused

- (1) Generally.
Ala.—Roberts v. McCall, 17 So.2d 159, 245 Ala. 359.
Cal.—Corbin v. Bedel, 158 P.2d 221, 69 Cal.App.2d 60—Breeze v. Southern Petro Tank Line Co., 43 P.2d 584, 5 Cal.App.2d 507—Hupp v. Griffith Co., 15 P.2d 211, 127 Cal. App. 63—Gaster v. Hinkley, 258 P. 988, 85 Cal.App. 55.
D.C.—McWilliams v. Lewis, 125 F.2d 200, 75 U.S.App.D.C. 153.
Ga.—Minnick v. Jackson, 13 S.E.2d 891, 64 Ga.App. 554.
Ill.—Williams v. Stearns, 256 Ill.App. 425.
Iowa.—Ryan v. Perry Rendering Works, 245 N.W. 801, 215 Iowa

- 363—Gross v. Humke Sanitary Bakery, 227 N.W. 620, 209 Iowa 40.
Ky.—McLellan v. Threlkeld, 129 S.W. 2d 977, 279 Ky. 114.
Mich.—Vashaw v. Marquette Public Service Garage, 284 N.W. 910, 288 Mich. 363.
Mo.—McLarny v. Cary, App., 98 S.W.2d 144.
N.J.—Krause v. Emanuel E. Katz, Inc., 185 A. 537, 14 N.J.Misc. 424.
N.D.—Bolen v. Dolph, 245 N.W. 259, 62 N.D. 700.
Ohio.—Simko v. Miller, 13 N.E.2d 914, 133 Ohio St. 345—F. D. Lawrence Electric Co. v. Enterprise Lumber Co., 162 N.E. 434, 28 Ohio App. 30—Valentine v. Pavilonis, 160 N.E. 737, 27 Ohio App. 26.
Wash.—O'Neill v. Gruhn, 85 P.2d 1064, 197 Wash. 557.
W.Va.—Willhide v. Biggs, 188 S.E. 876, 118 W.Va. 160.
42 C.J. p 1275 note 98 [a], p 1277 note 25.

- (2) Degree of care.—Szuch v. N1 Sun Lines, 58 S.W.2d 471, 332 Mo. 469—Hires v. Letts Melick Grocery Co., 296 S.W. 408.

Instructions held sufficient, proper, or erroneously refused

- (1) Generally.
U.S.—Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 306 U.S. 635, 84 L.Ed. 528.
Ala.—Brasfield v. Hood, 128 So. 433, 221 Ala. 240—Smith v. Crenshaw, 126 So. 127, 220 Ala. 510.
Ariz.—Seller v. Whiting, 84 P.2d 452, 52 Ariz. 542.
Ark.—Harvey v. Kirk, 168 S.W.2d 827, 205 Ark. xix—Compressed Industrial Gases v. Todd, 129 S.W.2d 262, 198 Ark. 409.
Cal.—Bach v. C. Swanston & Son, 286 P. 1097, 105 Cal.App. 72—Marston v. Pickwick Stages, 248 P. 930, 78 Cal.App. 526.

jury, with reasonable clarity, the meaning of contributory negligence and in what manner the jury would be justified in finding that it was present.⁷⁸

An instruction on contributory negligence should not be confusing or misleading,⁷⁹ nor should it be so general and involved, and so wanting in substance, as not to afford the jury any guide in determining whether or not plaintiff was guilty of contributory negligence.⁸⁰ It has been held to be better practice to give a concrete, rather than general, instruction on contributory negligence.⁸¹ A requested instruction on contributory negligence

which is long and involved, carries several distinct matters, and places undue emphasis on a particular matter is properly refused.⁸² Where the evidence discloses several separable incidents or situations in each of which a duty on the part of plaintiff to exercise ordinary care existed, the instruction on that question should be sufficiently specific to inform the jury that plaintiff's duty was to exercise ordinary care in each situation.⁸³

Instructions on contributory negligence should conform and be confined to the pleadings,⁸⁴ issues,⁸⁵ and evidence⁸⁶ in the case; the court should not in-

Conn.—Eukers v. Summer, 147 A. 671, 110 Conn. 230.

D.C.—Behrman v. Sims, 157 F.2d 862, 81 U.S.App.D.C. 303.

Ga.—Minnick v. Jackson, 13 S.E.2d 891, 64 Ga.App. 554—Gossett v. Kraft Phenix Cheese Corporation, 198 S.E. 298, 58 Ga.App. 265.

Ill.—Hopfinger v. O'Banion, 73 N.E.2d 145, 331 Ill.App. 302—Shennan v. Chrispens Truck Lines, 44 N.E.2d 339, 316 Ill.App. 160—Bobalek v. Atlans, 43 N.E.2d 584, 315 Ill.App. 514.

Iowa.—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771—Starry v. Hanold, 211 N.W. 696, 202 Iowa 1180.

Ky.—Dixie Ohio Exp. Co. v. Vickery, 206 S.W.2d 821, 306 Ky. 171—Comer v. Yancy, 65 S.W.2d 459, 251 Ky. 461.

Md.—State for Use of Shipley, v. Lupton, 161 A. 393, 163 Md. 180.

Mich.—Shannon v. Jamestown Tp., 232 N.W. 371, 251 Mich. 597.

Mo.—Benzel v. Anishanzlin, App., 297 S.W. 180.

Neb.—Howarter v. Olson, 19 N.W.2d 346, 145 Neb. 507.

N.Y.—Bibby v. Reid Bros. Exp., 67 N.Y.S.2d 805, 271 App.Div. 944.

Pa.—Lerch v. Noble, 8 Pa.Dist. & Co. 629, 40 Lanc.L.Rev. 157—Wald v. A. W. Golden, Inc., Com.Pl., 33 Berks Co. 299.

Tenn.—Goebel v. Fleming, 13 Tenn.App. 473—Ijams v. Knoxville Power & Light Co., 1 Tenn.App. 627, 42 C.J. p 1275 note 98 [b].

(2) Degree or extent of care.

Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.

Ga.—Wallace v. Howard, 198 S.E. 812, 58 Ga.App. 428—Maner v. Dykes, 190 S.E. 189, 55 Ga.App. 436.

Ill.—Selman v. Midwest Haulers, 33 N.E.2d 140, 309 Ill.App. 154—Jones v. Eisenberg, 20 N.E.2d 906, 299 Ill.App. 551.

Ind.—Chicago, I. & L. Ry. Co. v. Downey, 5 N.E.2d 656, 103 Ind.App. 672.

Mich.—Vashaw v. Marquette Public Service Garage, 284 N.W. 910, 288 Mich. 363.

Minn.—Jaenisch v. Vigen, 297 N.W. 29, 209 Minn. 543.

Mo.—Clark v. Trilinsky, App., 170 S.W.2d 459.

Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.

(3) Definition of "contributory negligence"

Ark.—Coffee v. Arkansas Power & Light Co., 113 S.W.2d 1100, 195 Ark. 559.

Fla.—Baston v. Shelton, 13 So.2d 453, 152 Fla. 879.

Tex.—Stedman Fruit Co. v. Smith, Civ.App., 28 S.W.2d 622, error dismissed.

42 C.J. p 1276 note 14 [b] (2).

(4) Driving on wrong side of road.
—Haner v. Willson-Coffin Trading Co., 67 P.2d 487, 49 Ariz. 402.

Instructions held not prejudicial

Okl.—Burton v. Harn, 156 P.2d 618, 195 Okl. 232.

42 C.J. p 1275 note 98 [d].

78. Del.—Island Express v. Frederick, 171 A. 181, 5 W.V.Larr. 569.

Word "immediately" in instruction denying recovery if plaintiff negligently walked immediately in front of bus meant that plaintiff so walked without indicating intention to bus driver.—Linders v. People's Motorbus Co. of St. Louis, 32 S.W.2d 580, 326 Mo. 695.

Instruction held inadequate

Conn.—Kucineski v. Davey, 197 A. 688, 123 Conn. 662.

79. Instructions held confusing or misleading

Ala.—Ruffin Coal & Transfer Co. v. Rich, 108 So. 600, 214 Ala. 622.

Cal.—Marston v. Pickwick Stages, 248 P. 930, 78 Cal.App. 526.

Mo.—King v. Rieth, 108 S.W.2d 1, 341 Mo. 467.

Mont.—Adami v. Murphy, 164 P.2d 150, 118 Mont. 172.

42 C.J. p 1278 note 49 [b] (4).

Instructions held not confusing or misleading

Ala.—Williams v. Wicker, 179 So. 250, 235 Ala. 348.

Iowa.—Ryan v. Perry Rendering Works, 245 N.W. 301, 215 Iowa 363

—Starry v. Hanold, 211 N.W. 696, 202 Iowa 1180.

Or.—Sine v. Mehlhorn, 126 P.2d 853, 168 Or. 688.

42 C.J. p 1278 note 49 [c] (4).

80. Mont.—Pilgeram v. Haas, 167 P.2d 339, 118 Mont. 431.

81. Ky.—Mann v. Woodward, 290 S.W. 333, 217 Ky. 491.

42 C.J. p 1278 note 46.

82. Iowa.—Taylor v. Kral, 29 N.W.2d 241, 238 Iowa 1018.

83. Mo.—Boyer v. Oldham, App., 209 S.W. 617.

84. Tex.—Yellow Cab Co. v. Waldie, Civ.App., 289 S.W. 125.

42 C.J. p 1279 note 70 [a]

Instructions held properly refused

Mo.—Cotton v. Ship-By-Truck Co., 85 S.W.2d 80, 337 Mo. 270

Instructions held proper or sufficient
U.S.—Fair v. Floyd, C.C.A.N.J., 75 F.2d 920.

Mo.—Edwards v. Woods, 119 S.W.2d 359, 342 Mo. 1097.

Tex.—Schumacher Co. v. Shooter, 124 S.W.2d 857, 132 Tex. 560—Whistler v. Freeman, Civ.App., 62 S.W.2d 674.

85. Instructions held erroneous or properly refused

Ala.—Crotwell v. Cowan, 184 So. 195, 236 Ala. 578—Lindsey v. Kindt, 128 So. 139, 221 Ala. 190.

Cal.—Ackles v. Lane, 35 P.2d 200, 140 Cal.App. 188.

Instructions held proper

Ala.—Williams v. Wicker, 179 So. 250, 235 Ala. 348.

Conn.—Flucherino v. Shey, 143 A. 886, 108 Conn. 544.

Nev.—Wells, Inc. v. Shoemaker, 177 P.2d 451, 64 Nev. 57.

Or.—Holman v. Uglov, 3 P.2d 120, 137 Or. 358, followed in Hayes v. Uglov, 3 P.2d 126, 137 Or. 373.

86. Instructions held properly refused, or not required or warranted, under evidence

(1) Generally.

Ark.—Presley v. Schenebeck, 110 S.W.2d 5, 194 Ark. 1069.

Cal.—Martinelli v. Poley, 292 P. 451, 210 Cal. 450—Christiansen v. Hol-

struct on contributory negligence where there is no evidence thereof.⁸⁷ An instruction which excludes from the consideration of the jury all evidence of contributory negligence other than that referred to in the instruction may be erroneous.⁸⁸

§ 534. — Injury Avoidable Notwithstanding Contributory Negligence

Instructions on doctrines such as the last clear chance doctrine or the humanitarian doctrine should be given where applicable under the pleadings and evidence

in the case, and, where given, should correctly set forth the law without being confusing or misleading.

Instructions involving the avoidability of an accident and the right to recover notwithstanding the negligence of the injured person, such as instructions involving the last clear chance or humanitarian doctrine, or the doctrine of discovered peril, may and should be given where they are applicable under the circumstances of the case.⁸⁹ Such instructions should set forth the law on the subject correctly,⁹⁰ and, in accordance with general rules, they

lings, 112 P.2d 723, 44 Cal App 2d 332—Forbes v. Matto, 96 P.2d 166, 35 Cal.App.2d 481—Warneke v. Griffith Co., 24 P.2d 583, 133 Cal. App 481.
Conn.—Zatkin v. Waterbury Wrecking Co., 21 A.2d 924, 128 Conn. 280.
D.C.—Brooks Transp. Co. v. McCutcheon, 154 F.2d 841, 80 U.S.App. D.C. 406.
Ill.—McNally v. Chauncy Body Corporation, 42 N.E.2d 853, 315 Ill. App. 190.
Ind.—Keeslin Motor Express Co. v. Sowers, 48 N.E.2d 459, 221 Ind. 440.
Iowa—Taylor v. Kral, 29 N.W.2d 241, 238 Iowa 964—Appleby v. Cass, 234 N.W. 477, 211 Iowa 1145.
Mich.—Oliver v. Ashworth, 214 N.W. 85, 239 Mich. 53.
Minn.—Corridan v. Agranoff, 297 N.W. 759, 210 Minn. 237.
Miss.—Rhodes v. Fullilove, 134 So. 840, 161 Miss. 41—Franks v. Armstrong, 120 So. 829, 152 Miss. 719.
Mont.—Adami v. Murphy, 164 P.2d 150, 118 Mont. 172.
N.H.—Abbott v. Hayes, 26 A.2d 842, 92 N.H. 126.
N.J.—Winters v. Dorovitz, 167 A. 230, 11 N.J. Misc. 616.
Pa.—Sema v. Pettinger, 171 A. 86, 112 Pa.Super. 323.
Tenn.—Sundock v. Pittman, 52 S.W.2d 156, 165 Tenn. 17.
Va.—West v. L. Bromm Baking Co., 186 S.E. 291, 166 Va. 530.
Wash.—Murphy v. Hunziker, 2 P.2d 270, 164 Wash. 40—McClanahan v. Fisher, 290 P. 864, 158 Wash. 114.
(2) Assumption as to width of oncoming vehicle.—Foley's Adm'r v. Witt, 172 S.W.2d 81, 294 Ky. 498.

(3) Assumption of risk.
U.S.—R. B. Tyler Co. v. Greenup, C.C.A.Tenn., 140 F.2d 896.
Cal.—Pollard v. Foster, 129 P.2d 448, 54 Cal.App.2d 502—Martin, Continental Casualty Co., Intervener, v. Clinton Const. Co., 105 P.2d 1029, 41 Cal.App.2d 35, rehearing denied 106 P.2d 629, 41 Cal.App.2d 35.

(4) Care owed by one with defective eyesight.—Armstrong v. Day, 284 P. 1083, 103 Cal.App. 465.

(5) Traveling on wrong side of road.—Thronton v. Phillips, 90 S.W.2d 347, 262 Ky. 346.

Instructions held justified, proper, or erroneously refused

(1) Generally.
U.S.—Sun Oil Co. v. Gregory, C.C.A. Tex., 56 F.2d 108—Henry W. Putnam Memorial Hospital v. Allen, C.C.A.Vt., 34 F.2d 927.
Ala.—Chambers v. Cox, 130 So. 416, 222 Ala. 1.
Cal.—Barone v. Jones, 177 P.2d 30, 77 Cal.App.2d 656—Barry v. Madalena, 146 P.2d 974, 63 Cal App 2d 302—Fleming v. Flick, 35 P.2d 210, 140 Cal App 14—Warneke v. Griffith Co., 24 P.2d 583, 133 Cal App 481.
Ga.—American Bakeries Co. v. Johnson, 200 S.E. 485, 59 Ga App 150—Eddleman v. Askew, 179 S.E. 247, 50 Ga App. 510.
Iowa—Ryan v. Perry Rendering Works, 245 N.W. 301, 215 Iowa 363—Ryan v. Shirk, 224 N.W. 824, 207 Iowa 1327.
Kan.—Berry v. Weeks, 73 P.2d 1086, 146 Kan. 969.
Ky.—Castle v. McGaffee, 154 S.W.2d 241, 287 Ky. 561—Mossbarger's Adm'r v. Louisville & N. R. Co., 130 S.W.2d 54, 279 Ky. 178—Major v. Rudolph, 290 S.W. 688, 218 Ky. 1.
Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 307—Paulini v. Western Mill & Lumber Corporation, 166 A. 609, 165 Md. 45—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.
Mo.—Berthold v. Danz, App., 27 S.W.2d 448.
Ohio.—Bartson v. Craig, 169 N.E. 291, 121 Ohio St. 371—Ransom v. Feehey, 76 N.E.2d 908, 81 Ohio App. 7.
Pa.—Copertino v. Chrobak, 29 A.2d 504, 346 Pa. 49—Sema v. Pettinger, 171 A. 86, 112 Pa.Super. 323.
Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.
Wash.—Blissell v. Seattle Vancouver Motor Freight, 168 P.2d 390, 25 Wash.2d 68.
(2) Assumption of risk.
Cal.—La Porte v. Houston, App., 189 P.2d 544.
Wis.—Biersach v. Wechselberg, 238 N.W. 905, 206 Wis. 113.

(3) Driving on wrong side of road.

—Hamilton v. Carpenter, 290 P. 724, 49 Idaho 629.

(4) Overloading of vehicle.—Nelson v. Belcher Lumber Co., 166 So. 808, 232 Ala. 116.

(5) Duty to stop.
Ala.—Titus v. Bradfoot, 145 So. 423, 226 Ala. 21.

Mo.—Bloch v. Kinder, 93 S.W.2d 932, 338 Mo. 1099.

Or.—Sanders v. Taber, 155 P. 1194, 79 Or. 522.

Mo.—Ottoby v. Mississippi Valley Trust Co., 196 S.W. 428, 197 Mo App 473.

U.S.—Arnold v. Owens, C.C.A.N.C., 78 F.2d 495.

Ark.—Roark Transp. v. Sneed, 68 S.W.2d 996, 188 Ark. 928.

Cal.—Jones v. Yuma Motor Freight Terminal, 114 P.2d 438, 45 Cal App 2d 497.

D.C.—Menter v. Barnes, D.C., 47 F. Supp. 932.

Ky.—Nowak v. Joseph, 121 S.W.2d 939, 275 Ky. 470.

Md.—Mahan v. State, to Use of Carr, 191 A. 575, 172 Md. 373.

Mo.—Gardner v. Turk, 123 S.W.2d 158, 343 Mo. 899—Quinn v. Berberich, App., 51 S.W.2d 153, quashed on other grounds State ex rel. Berberich v. Hlad, 61 S.W.2d 667, 333 Mo. 1224.

N.Y.—Dino v. Eastern Glass Co., 246 N.Y.S. 306, 231 App Div. 75.

Tenn.—Hodge v. Hamilton, 293 S.W. 752, 155 Tenn. 403.

Wash.—Browning v. Bremerton-Charleston Transit Co., 183 P.2d 1005, 28 Wash.2d 713.

42 C.J. p 1273 note 70 [a] (2).

90. D.C.—Goodyear Service v. Pretzfelder, 84 F.2d 242, 65 App.D.C. 389.

Ky.—Prather's Adm'r v. Allen, 164 S.W.2d 402, 291 Ky. 353.

Mo.—State ex rel. Grisham v. Allen, 124 S.W.2d 1080, 344 Mo. 66, mandate conformed to Grisham v. Free-wald, App., 130 S.W.2d 653—Blunk v. Snider, 111 S.W.2d 163, 342 Mo. 26—Borgstede v. Waldbauer, 88 S.W.2d 373, 337 Mo. 1205—Arnold v. Manzella, App., 186 S.W.2d 882—Day v. Banks, App., 102 S.W.2d 946, opinion quashed on other grounds State ex rel. Banks v. Hostetter,

125 S.W.2d 835, 344 Mo. 155—Cramer v. Parker, App., 100 S.W.2d 640.

42 C.J. p 1277 note 16.

Instructions held erroneous or properly refused

(1) Generally.

Ariz.—Keen v. Clarkson, 108 P.2d 573, 56 Ariz. 437.

Cal.—Lasch v. Edgar, 116 P.2d 949, 46 Cal.App.2d 726—Bramble v. McEwan, 104 P.2d 1054, 40 Cal.App.2d 400—Cunningham v. Cox, 15 P.2d 169, 126 Cal.App. 685.

D.C.—Regal Cleaners & Dyers v. Pesagno, 109 F.2d 453, 71 App.D.C. 199.

Ky.—Herndon v. Waldon, 47 S.W.2d 1047, 243 Ky. 312.

Mo.—Teague v. Plaza Exp. Co., 190 S.W.2d 254, 354 Mo. 582—Shields v. Keller, 153 S.W.2d 60, 348 Mo. 326—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326—Buehler v. Festus Mercantile Co., 119 S.W.2d 961, 343 Mo. 139—Radabaugh v. Williford, 116 S.W.2d 118, 342 Mo. 528—Smithers v. Barker, 111 S.W.2d 47, 341 Mo. 1017—Borgstede v. Waldbauer, 88 S.W.2d 373, 337 Mo. 1205—Taylor v. Superior Oxy-Acetylene Co., 73 S.W.2d 186, 335 Mo. 379—Causey v. Wittig, 11 S.W.2d 11, 321 Mo. 358—Crawford v. Byers Transp. Co., App., 186 S.W.2d 756—Stitzell v. Arthur Morgan Trucking Co., App., 118 S.W.2d 49—Hartley v. McKee, App., 86 S.W.2d 359—Ilawken v. Schwartz, App., 72 S.W.2d 877—Becker v. Maipie, App., 50 S.W.2d 695—Schmitt v. American Press, App., 42 S.W.2d 969—Holloway v. Barnes Grocer Co., 15 S.W.2d 917, 223 Mo. App. 1026.

Okl.—Graybill v. Clancy, 291 P. 87, 144 Okl. 237.

Wash.—Huber v. Hemrich Brewing Co., 62 P.2d 451, 188 Wash. 235—Fennel v. Yellow Cab Co., 244 P. 253, 138 Wash. 198.

42 C.J. p 1277 note 16 [a].

(2) As extending or limiting zone of danger or imminent peril.—Baker v. Wood, Mo., 142 S.W.2d 83—State ex rel. Snider v. Shain, 137 S.W.2d 527, 345 Mo. 950—Gray v. Columbia Terminals Co., 52 S.W.2d 809, 331 Mo. 73—Crawford v. Byers Transp. Co., Mo.App., 186 S.W.2d 756—Hanks v. Anderson-Parks, Inc., Mo.App., 143 S.W.2d 314.

(3) As to knowledge or appreciation of peril.

Cal.—Smith v. Pacific Greyhound Corporation, 35 P.2d 169, 139 Cal. App. 696.

Conn.—Biedrziński v. O'Keefe, 135 A. 388, 105 Conn. 373.

Iowa.—Steele v. Brada, 239 N.W. 538, 213 Iowa 708.

Mo.—Borgstede v. Waldbauer, 88 S.W.2d 373, 337 Mo. 1205—Byrnes v. Poplar Bluff Printing Co., 74 S.W.

2d 20—Schulz v. Smercina, 1 S.W.2d 113, 318 Mo. 486—Sculley v. Rolwing, App., 88 S.W.2d 394—Parkville Milling Co. v. Massman, App., 83 S.W.2d 128.

(4) As to nature of peril.—Byrnes v. Poplar Bluff Printing Co., Mo., 74 S.W.2d 20.

(5) As to primary or antecedent negligence.—Taylor v. Superior Oxy-Acetylene Co., 73 S.W.2d 186, 335 Mo. 379—Freeman v. Berberich, 60 S.W.2d 393, 332 Mo. 831—Hagerman v. Rodgers, Mo.App., 101 S.W.2d 526—Disano v. Hall, Mo.App., 14 S.W.2d 483.

Instructions held sufficient or not erroneous

(1) Generally.

U.S.—Pearman v. Crain, C.C.A.Mo., 166 F.2d 109—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101.

Cal.—Hurtel v. Albert Cohn, Inc., 52 P.2d 922, 5 Cal.2d 145—Root v. Pacific Greyhound Lines, 190 P.2d 48, 84 Cal.App.2d 135—Smith v. Aggula, 81 P.2d 997, 27 Cal.App.2d 750—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587.

Conn.—Paskewicz v. Hickey, 149 A. 671, 111 Conn. 219—Klett v. Frenyea, 149 A. 399, 111 Conn. 99—Deutsch v. La Bonne, 149 A. 244, 111 Conn. 41.

D.C.—Schear v. Ludwig, 143 F.2d 20, 79 U.S.App.D.C. 95, certiorari denied 65 S.Ct. 72, 323 U.S. 734, 89 L.Ed. 589—Chr. Heurich Brewing Co. v. McGavin, 16 F.2d 334, 56 App.D.C. 389.

Idaho.—Stearns v. Graves, 111 P.2d 882, 62 Idaho 312.

Kan.—Engle v. Bowen, 251 P. 1108, 122 Kan. 283.

Ky.—Cincinnati, N. & C. Ry. Co. v. Renaker, 153 S.W.2d 906, 287 Ky. 388.

Mich.—Agranowitz v. Levine, 298 N.W. 388, 298 Mich. 18—Sudinski v. Krohn, 219 N.W. 665, 242 Mich. 497—Steele v. Stahelin, 207 N.W. 822, 234 Mich. 307—Halsle v. Hargreaves, 206 N.W. 356, 233 Mich. 234.

Mo.—Teague v. Plaza Exp. Co., 205 S.W.2d 563, 356 Mo. 1186—Johnson v. Hurck Delivery Service, 187 S.W.2d 200, 353 Mo. 1207—Pennington v. Weis, 184 S.W.2d 416, 353 Mo. 750—Bowman v. Standard Oil Co. of Indiana, 169 S.W.2d 384, 350 Mo. 958—Hollister v. A. S. Aloe Co., 156 S.W.2d 606, 348 Mo. 1055—Melenson v. Howell, 130 S.W.2d 555, 344 Mo. 1137—Doherty v. St. Louis Butter Co., 98 S.W.2d 742, 339 Mo. 996—Carle v. Akin, 87 S.W.2d 406—Hein v. Peabody Coal Co., 85 S.W.2d 604, 337 Mo. 626—McCarthy v. Sheridan, 83 S.W.2d 907, 336 Mo. 1201—Brown v. Callicotte, 73 S.W.2d 190—Hart v. Weber, 53 S.W.2d 914—Bartner v.

Darst, 285 S.W. 449—Gurwell v. Jefferson City Lines, App., 192 S.W.2d 683—Williams v. Davis, App., 168 S.W.2d 483—Spriggs v. Calumet Cab Co., App., 161 S.W.2d 741—Zimmerman v. Salter, App., 141 S.W.2d 137—Haynie v. Jones, 127 S.W.2d 105, 233 Mo.App. 948—Dean v. Mocerl, App., 87 S.W.2d 218—Hartley v. McKee, App., 86 S.W.2d 359—Marshak v. William J. Brennan Grocery Co., App., 83 S.W.2d 185—Hodgins v. Jones, App., 64 S.W.2d 309—Woods v. Moffitt, 38 S.W.2d 525, 225 Mo.App. 801—Luck v. Pemberton, App., 29 S.W.2d 197—Ford v. Pieper, App., 24 S.W.2d 1054—Erleben v. Kaster, App., 21 S.W.2d 195—Martin v. Pevely Dairy Co., App., 17 S.W.2d 567—Pettit v. Goetz Sales Co., 281 S.W. 973, 221 Mo.App. 966.

N.C.—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.

Wash.—Browning v. Bremerton-Charleston Transit Co., 183 P.2d 1005, 28 Wash.2d 713—Moen v. Chestnut, 113 P.2d 1030, 9 Wash.2d 93—Stubbs v. Boone, 2 P.2d 727, 164 Wash. 368.

42 C.J. p 1277 note 16 [b].

(2) As limiting or extending the danger zone.—Kimbrough v. Chervitz, 186 S.W.2d 461, 353 Mo. 1154—Bowman v. Standard Oil Co. of Indiana, 169 S.W.2d 384, 350 Mo. 958—State ex rel. Himmelsbach v. Becker, 85 S.W.2d 420, 337 Mo. 341—Dipaoli v. Langemann, Mo.App., 192 S.W.2d 35—Thompson v. Wilson, Mo.App., 119 S.W.2d 848.

(3) As to existence or position of peril.

U.S.—Pearman v. Crain, C.C.A.Mo., 166 F.2d 109.

Minn.—Turenne v. Smith, 9 N.W.2d 409, 215 Minn. 64.

Mo.—Branson v. Abernathy Furniture Co., 130 S.W.2d 562, 344 Mo. 1171—Melenson v. Howell, 130 S.W.2d 555, 344 Mo. 1137—Brown v. Callicotte, 73 S.W.2d 190—Woods v. Moffitt, 38 S.W.2d 525, 225 Mo. App. 801.

Va.—Voigt v. Reber, 46 S.E.2d 15, 187 Va. 157.

(4) As to ability to avoid accident.

Cal.—Rogers v. Interstate Transit Co., 297 P. 884, 212 Cal. 36, certiorari denied Interstate Transit Co. v. Rogers, 52 S.Ct. 22, 284 U.S. 640, 76 L.Ed. 545.

Mo.—Stewart v. Kansas City Public Service Co., App., 49 S.W.2d 1061

—Martin v. Pevely Dairy Co., App., 17 S.W.2d 567.

Wash.—Moen v. Chestnut, 113 P.2d 1030, 9 Wash.2d 93.

Instructions held not prejudicial

Ky.—Ramsey v. Sharpley, 171 S.W.2d 427, 294 Ky. 286.

Mo.—Radabaugh v. Williford, 116 S.W.2d 118, 342 Mo. 528.

should not be confusing or misleading.⁹¹ Such instructions must be warranted by the pleadings⁹² and the issues or theories⁹³ in the case. An instruction to the effect that plaintiff is seeking recovery solely on the humanitarian doctrine is properly refused where plaintiff seeks recovery on other grounds.⁹⁴ Where the court has refused to permit the defense of contributory negligence to be asserted in the trial, and has refused to give instructions

on that theory or to permit argument thereon, it should not thereafter give an instruction on the theory of the last clear chance.⁹⁵

An instruction on the doctrine of the last clear chance or the like need not and should not be given where the evidence is insufficient to show its application to the facts of the case or where the practically undisputed evidence shows that it could not apply;⁹⁶ and it may be proper, under the evidence,

Amendment of instruction held proper

Va.—*W. B. Bassett & Co. v. Wood*, 132 S.E. 700, 146 Va. 654.

91. Instructions held confusing or misleading

Del.—*Baker v. Reid*, 57 A.2d 103.
Idaho.—*Stearns v. Graves*, 111 P.2d 882, 62 Idaho 312.

Mo.—*Martin v. Fehse*, 55 S.W.2d 440, 331 Mo. 861—*Schulz v. Smercina*, 1 S.W.2d 113, 318 Mo. 486—*Burke v. Pappas*, 293 S.W. 142, 316 Mo. 1235. 42 C.J. p 1278 note 49 [b] (6).

Instructions held not confusing or misleading

Mo.—*Hollister v. A. S. Aloe Co.*, 156 S.W.2d 606, 348 Mo. 1055—*Luck v. Pemberton*, App., 29 S.W.2d 197. 42 C.J. p 1278 note 49 [c] (9).

92. Instructions held not required or justified under pleadings

Ind.—*Baker v. Pritchard*, 194 N.E. 781, 100 Ind.App. 509.
Mo.—*Cummings v. Holly*, App., 60 S.W.2d 52. 42 C.J. p 1281 note 99.

Instructions held proper or warranted under pleadings

U.S.—*Evansville Container Corporation v. McDonald*, C.C.A.Tenn., 132 F.2d 80—*Swift & Co. v. Young*, C.C.A.N.C., 107 F.2d 170.

Kan.—*Blosser v. Wagner*, 59 P.2d 37, 144 Kan. 318.

Mo.—*Evans v. Farmers Elevator Co.*, 147 S.W.2d 593, 347 Mo. 326—*Johnson v. Scheerer*, App., 109 S.W.2d 1231—*Hagerman v. Rodgers*, App., 101 S.W.2d 526—*Hudlow v. Langerhans*, 91 S.W.2d 629, 230 Mo.App. 1160—*Taylor v. Kelder*, 88 S.W.2d 436, 229 Mo.App. 1117—*Cervillo v. Manhattan Oil Co.*, 49 S.W.2d 183, 226 Mo.App. 1090—*Woods v. Morfitt*, 38 S.W.2d 525, 225 Mo.App. 801—*Martin v. Pevely Dairy Co.*, App., 17 S.W.2d 567.

42 C.J. p 1281 note 96 [c].

93. Instructions held properly refused

Or.—*Landis v. Wick*, 57 P.2d 759, 154 Or. 199, rehearing denied 59 P.2d 403, 154 Or. 199.

Instructions held proper under issues or theories

Fla.—*Dunn Bus Service v. McKinley*, 178 So. 865, 130 Fla. 778.

42 C.J. p 1279 note 50 [b].

94. Mo.—*Benson v. Smith*, App., 38 S.W.2d 743.

95. W.Va.—*Vaughan v. Oates*, 37 S.E.2d 479, 128 W.Va. 554.

96. Cal.—*Dalley v. Williams*, 166 P.2d 595, 73 Cal.App.2d 427—*Hellman v. Bradley*, 56 P.2d 607, 13 Cal.App.2d 159.

Conn.—*Andrew v. White Line Bus Corporation*, 161 A. 792, 115 Conn. 464.

Mo.—*Goehring v. Beltz*, App., 14 S.W.2d 502.

42 C.J. p 1283 notes 35, 36.

Applicability to pleadings and evidence in general see *infra* § 556.

Instructions properly refused, or not warranted or required, under evidence

(1) Generally.

U.S.—*Mulberg v. Mason & Dixon Lines*, C.C.A.N.Y., 157 F.2d 805.

Cal.—*Dalley v. Williams*, 166 P.2d 595, 73 Cal.App.2d 427—*Warwick v. Maneely*, 101 P.2d 831, 40 Cal.App.2d 235, followed in 104 P.2d 838, two cases, 40 Cal.App.2d 812, and 104 P.2d 838, 40 Cal.App.2d 813—*Vitali v. Straight*, 68 P.2d 746, 21 Cal.App.2d 253—*Augenthuler v. Pinkert*, 32 P.2d 686, 138 Cal.App.455—*Pearce v. Elbe*, 276 P. 389, 98 Cal.App. 101.

Conn.—*Bullard v. De Cordova*, 175 A. 673, 119 Conn. 262—*Di Mauro v. Panico*, 161 A. 238, 115 Conn. 295.

D.C.—*Hochelsen v. Smith*, 158 F.2d 100, 81 U.S.App.D.C. 323—*Dean v. Century Motors*, 154 F.2d 201, 81 U.S.App.D.C. 9.

Fla.—*Davis v. Cuesta*, 1 So.2d 475, 146 Fla. 471.

Ky.—*Stephens v. Glass*, 176 S.W.2d 139, 296 Ky. 90—*C. L. & L. Motor Express v. Lyons*, 53 S.W.2d 978, 245 Ky. 611—*Robinson Transfer Co. v. Turner*, 50 S.W.2d 546, 244 Ky. 181—*Peak v. Arnett*, 26 S.W.2d 1035, 233 Ky. 756.

Md.—*Cable v. Amoss*, 28 A.2d 566, 181 Md. 56.

Minn.—*Boyer v. Josephson*, 240 N.W. 538, 185 Minn. 221.

Mo.—*Baker v. Wood*, 142 S.W.2d 83—*Ridge v. Jones*, 71 S.W.2d 713, 335 Mo. 219—*Spoeneman v. Uhri*, 60 S.W.2d 9, 332 Mo. 821—*Hanks v. Anderson-Parks, Inc.*, App., 143 S.W.2d 314—*Swain v. Anders*, 140 S.W.2d 730, 235 Mo.App. 125—*Morris v. Sektrich*, App., 118 S.W.2d 46—*Ritz*

v. Cousins Lumber Co., 59 S.W.2d 1072, 227 Mo.App. 1167—*Benson v. Smith*, App., 38 S.W.2d 749—*Benson v. Smith*, App., 38 S.W.2d 743—*Croak v. Croak*, App., 33 S.W.2d 998.

Va.—*Temple v. Moses*, 8 S.E.2d 262, 175 Va. 320.

Wash.—*Rettig v. Coca-Cola Bottling Co.*, 156 P.2d 914, 22 Wash.2d 572—*Portland-Seattle Auto Freight v. Jones*, 131 P.2d 736, 15 Wash.2d 603—*Mathias v. Elcheberger*, 45 P.2d 619, 182 Wash. 185.

(2) Child roller skating.—*Crock v. Magnolia Milling Co.*, 266 P. 727, 147 Wash. 589.

(3) Collision with bicycle or motorcycle.

Cal.—*Berton v. Cochran*, 185 P.2d 349, 81 Cal.App.2d 776.

Mo.—*McCoy v. Home Oil & Gas Co.*, App., 48 S.W.2d 113.

Okl.—*Graybill v. Clancy*, 291 P. 87, 144 Okl. 237.

(4) Head-on collision.

U.S.—*Evansville Container Corporation v. McDonald*, C.C.A.Tenn., 132 F.2d 80.

Ark.—*Houck v. Marshall*, 132 S.W.2d 181, 198 Ark. 938.

N.D.—*Ramage v. Trepanier*, 283 N.W. 471, 69 N.D. 19.

Wash.—*Etickson v. Barnes*, 107 P.2d 348, 6 Wash.2d 251.

(5) Pedestrians

Cal.—*Shipway v. Monise*, 139 P.2d 60, 59 Cal.App.2d 565—*Jones v. Heinrich*, 122 P.2d 304, 49 Cal.App.2d 702.

Conn.—*Sherman v. William M. Ryan & Sons*, 13 A.2d 134, 126 Conn. 674—*Puza v. Hamway*, 193 A. 776, 123 Conn. 205—*Notarfrancesco v. Smith*, 134 A. 151, 105 Conn. 49.

D.C.—*Regal Cleaners & Dyers v. Pessarno*, 109 F.2d 453, 71 App.D.C. 199.

Fla.—*Turner v. Seegar*, 10 So.2d 320, 151 Fla. 643—*Becker v. Blum*, 194 So. 275, 142 Fla. 60.

Ky.—*Hatfield v. Sargent's Adm'x*, 209 S.W.2d 306, 306 Ky. 782—*Jones v. Gardner*, 91 S.W.2d 520, 262 Ky. 812.

Va.—*Stark v. Hubbard*, 48 S.E.2d 216, 187 Va. 820.

Wash.—*Shea v. Yellow Cab Co. of Spokane*, 49 P.2d 925, 184 Wash. 109.

to instruct the jury that the last clear chance doctrine is not applicable;⁹⁷ but an instruction as to such doctrine is not necessarily erroneous because of the absence of direct evidence that defendant actually knew of the presence of the injured person.⁹⁸

It may be proper for the court to give an instruc-

tion authorizing a verdict for defendant if the jury believe that the evidence negatives one of the essential elements of the humanitarian doctrine.⁹⁹ An instruction that if plaintiff was guilty of contributory negligence he cannot recover is erroneous and properly refused where, under the circumstanc-

(6) Tractor-trailer.
Md.—Shedlock v. Marshall, 46 A.2d 349, 186 Md. 218.
Mo.—Hall v. Hannibal-Quincy Truck Line, 211 S.W.2d 723.

Instructions held justified, required, or sufficient under evidence

(1) Generally.
U.S.—Swift & Co. v. Young, C.C.A. N.C., 107 F.2d 170.
Ariz.—Casey v. Marshall, 169 P.2d 84, 64 Ariz. 260—Tenney v. Enkeball, 158 P.2d 519, 62 Ariz. 416.
Ark.—Davis v. Draper, 148 S.W.2d 662, 201 Ark. 1172—J. Foster & Co. v. Woodbridge, 134 S.W.2d 526, 199 Ark. 551—Sylvester v. U-Drive-Em System, 90 S.W.2d 232, 192 Ark. 75.
Cal.—Rogers v. Interstate Transit Co., 297 P. 884, 212 Cal. 36, certiorari denied Interstate Transit Co. v. Rogers, 52 S.Ct. 22, 284 U.S. 640, 76 L.Ed. 545—Pire v. Gladding McBean & Co., 130 P.2d 981, 55 Cal. App.2d 108—Jones v. Yuma Motor Freight Terminal, 114 P.2d 438, 45 Cal.App.2d 497—Gardini v. Arakelian, 61 P.2d 181, 18 Cal.App.2d 424—Hawkinson v. Scholz, 57 P.2d 945, 13 Cal.App.2d 687—Hellman v. Bradley, 56 P.2d 607, 13 Cal.App.2d 159—Wantz v. Ammons, 46 P.2d 210, 7 Cal.App.2d 643—Silveira v. Siegfried, 26 P.2d 666, 135 Cal.App. 218—Handley v. Lombardi, 9 P.2d 867, 122 Cal.App. 22—Moore v. Bishop, 297 P. 580, 113 Cal.App. 25—Brooks v. City and County of San Francisco, 295 P. 344, 111 Cal.App. 254—Mogle v. Hunt, 293 P. 844, 110 Cal.App. 177.
D.C.—Navarro v. Mayo, 154 F.2d 313, 81 U.S.App.D.C. 34—Brophy v. Weschler, D.C., 36 F.Supp. 635.
Fla.—Dunn Bus Service v. McKinley, 178 So. 865, 130 Fla. 778.
Idaho.—McKinley v. Wagner, 170 P. 2d 796, 67 Idaho 104.
Md.—Longenecker v. Zanghi, 2 A.2d 20, 175 Md. 307.
Mo.—Wright v. Spieldoch, 193 S.W.2d 42—Hollister v. A. S. Aloe Co., 156 S.W.2d 606, 348 Mo. 1055—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326—Brown v. Callicotte, App., 73 S.W.2d 190—Gurwell v. Jefferson City Lines, App., 192 S.W.2d 683—Capps v. Beene, App., 162 S.W.2d 80—Jones v. Austin, App., 154 S.W.2d 378—Anderson v. Northrop, 96 S.W.2d 521, 230 Mo. App. 1225—Yonts v. Shernaman, App., 94 S.W.2d 917—Passmore v. Hoyer, App., 63 S.W.2d 189—Woods

v. Moffitt, 38 S.W.2d 525, 225 Mo. App. 801—Loughlin v. Marr-Bridger Grocer Co., App., 10 S.W.2d 75.
Neb.—Ross v. Carroll, 299 N.W. 477, 140 Neb 350.
N.C.—Newbern v. Leary, 1 S.E.2d 384, 215 N.C. 134.
Va.—Voight v. Reber, 46 S.E.2d 15, 187 Va 157—Clay v. Bishop, 30 S.E.2d 585, 182 Va. 746.
Wash.—Browning v. Bremerton-Charleston Transit Co., 183 P.2d 1005, 28 Wash.2d 713—Moen v. Chestnut, 113 P.2d 1030, 9 Wash.2d 93—Chapin v. Stickel, 22 P.2d 290, 173 Wash. 174—Reamer v. Walter H. C. Griffiths, Inc., 291 P. 714, 158 Wash. 665.
W.Va.—Davenport v. Haupt, 169 S.E. 333, 113 W.Va. 595.
42 C.J. p 1283 note 34.

(2) Bicyclists or motorcyclists.
Cal. Norton v. Houlette, 258 P. 1104, 85 Cal.App. 233.
Fla.—Miller v. Ungar, 5 So.2d 598, 149 Fla. 79.
Ky.—Wilson v. Deegan's Adm'r, 139 S.W.2d 58, 282 Ky. 547—Colonial Supply Co. v. Bramlett, 60 S.W.2d 969, 249 Ky. 382.
Md.—Wickman v. Bohle, 196 A. 326, 173 Md 694.
Mo.—Wulsch v. Inland Valley Coal Co., App., 63 S.W.2d 423—McPherson v. Premier Service Co., App., 38 S.W.2d 277.

(3) Children.
Ky.—Dixon v. Stringer, 126 S.W.2d 448, 277 Ky. 347—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666.
Mo.—Gardner v. Turk, 123 S.W.2d 158, 343 Mo. 899—Johnston v. Raming, 100 S.W.2d 466, 340 Mo. 311—Cramer v. Parker, App., 100 S.W.2d 640.
Va.—Harris v. Wright, 200 S.E. 597, 172 Va. 67.

(4) Pedestrians.
U.S.—Linde Air Products Co. v. Cameron, C.C.A.W.Va., 82 F.2d 22.
Cal.—Zerbo v. Electrical Products Corporation, 300 P. 825, 212 Cal. 733—Powers v. Shelton, 169 P.2d 482, 74 Cal.App.2d 757—Baird v. James A. Hill Const. Co., 32 P.2d 390, 138 Cal.App. 410—Fletcher v. Starker, 29 P.2d 794, 136 Cal.App. 741—De Lannoy v. Grammatikos, 14 P.2d 542, 126 Cal.App. 79—Rasic v. Schultheiss, 9 P.2d 550, 121 Cal. App. 580.
D.C.—Schear v. Ludwig, 143 F.2d 20, 79 U.S.App.D.C. 95, certiorari de-

nied 65 S.Ct. 72, 323 U.S. 734, 89 L.Ed. 589.
Fla.—Williams v. Sauls, 9 So.2d 369, 151 Fla. 270.
Ky.—Heskamp v. Bradshaw's Adm'r, 172 S.W.2d 447, 294 Ky 618—Ramsey v. Sharpley, 171 S.W.2d 427, 294 Ky. 286—Kinsella v. Meyer's Adm'r, 102 S.W.2d 974, 267 Ky. 508—Smith v. Ferguson, 76 S.W.2d 606, 256 Ky. 545.
Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223.
Mo.—Pitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184—Wolfson v. Cohen, 55 S.W.2d 677—Johnson v. Scheerer, App., 109 S.W.2d 1231—Morhaus v. Hebel, App., 104 S.W.2d 737—Edwards v. Bell, App., 103 S.W.2d 315, hearing denied 123 S.W.2d 83, 343 Mo. 824—Collins v. Leahy, App., 102 S.W.2d 801—Scoggins v. Miller, App., 80 S.W.2d 724—Robertson v. Scoggins, App., 73 S.W.2d 430—Ellis v. Wolfe-Shocmaker Motor Co., 55 S.W.2d 309, 227 Mo.App. 508—Allen v. Autenrieth, App., 280 S.W. 79.
Nev.—Styris v. Folk, 146 P.2d 782, 139 P.2d 614, 62 Nev. 208.
Va.—Nelson v. Dayton, 36 S.E.2d 535, 184 Va. 754—Gregory v. Daniel, 4 S.E.2d 786, 173 Va. 442—Perkinson v. Persons, 178 S.E. 682, 164 Va. 172—Keeler v. Baumgardner, 171 S.E. 592, 161 Va. 507—Lucas v. Craft, 170 S.E. 836, 161 Va. 228.
Wash.—Flagg v. Vander Yacht, 24 P.2d 1063, 174 Wash. 521—Hiteshue v. Robinson, 16 P.2d 610, 170 Wash. 272—Settles v. Johnson, 298 P. 690, 162 Wash. 466—Reitan v. Crooks, 279 P. 97, 153 Wash. 75—Johnston v. Elmore, 251 P. 558, 141 Wash. 293.
W.Va.—Jacobson v. Hamill, 199 S.E. 593, 120 W.Va. 491—Attelli v. Laird, 146 S.E. 882, 106 W.Va. 717.
(5) Wagon.—Brown v. Callicotte, Mo., 73 S.W.2d 190.

97. Conn.—Beck v. Sosnowitz, 7 A.2d 389, 125 Conn. 553.

98. Cal.—Bailey v. Wilson, 61 P.2d 68, 16 Cal.App.2d 645.

99. Mo.—Branson v. Abernathy Furniture Co., 130 S.W.2d 562, 344 Mo. 1171.

Instruction held proper

Mo.—Branson v. Abernathy Furniture Co., supra.

Instruction held erroneous

Mo.—Collins v. Beckmann, 79 S.W.2d 1052.

es, the question of contributory negligence is immaterial or not decisive because a case is presented under the humanitarian doctrine.¹ It has been held proper, under particular circumstances to refuse to give a requested instruction which applies the last clear chance doctrine to plaintiff and charges that, notwithstanding defendant's negligence, plaintiff cannot recover if he discovered such negligence in time to avoid its consequences, and failed to do so.²

§ 535. — Acts in Emergencies

Appropriate instructions may be given concerning the duty of a person confronted with a sudden danger or emergency, where the issue has been properly raised.

An instruction stating the law governing the duty and responsibility of a person confronted with a sudden and unexpected danger or peril which could not have been reasonably anticipated and which was not brought about by his own negligence may properly be given where the pleadings and evidence are sufficient to warrant it;³ but in an action by a pe-

1. Mo.—*Hangge v. Umbright*, 119 S. W.2d 382—*Dilallo v. Lynch*, 101 S. W.2d 7, 340 Mo. 82—*Gray v. Columbia Terminals Co.*, 52 S.W.2d 809, 331 Mo. 73—*Dickens v. Heitzman*, App., 141 S.W.2d 183—*Venters v. Bunnell*, 93 S.W.2d 70, 230 Mo. App. 1190—*Dove v. Stafford*, 91 S. W.2d 161, 230 Mo.App. 241—*Francis v. Missouri Pac. Transp. Co.*, App., 85 S.W.2d 915—*La Font v. Bryant*, App., 60 S.W.2d 415—*Burgess v. Garvin*, 272 S.W. 108, 219 Mo.App. 162.

2. D.C.—*Chr. Heurich Brewing Co. v. McGavin*, 16 F.2d 334, 56 App.D. C. 389.

3. U.S.—*Car & General Ins. Corporation v. Keal Driveway Co., C.C.A. Fla.*, 132 F.2d 834, certiorari denied *Keal Driveway Co. v. Car & General Ins. Corporation*, 63 S.Ct. 1330, 319 U.S. 766, 87 L.Ed. 1716.

Conn.—*Fierberg v. Moulton*, 29 A.2d 774, 129 Conn. 536.

Ind.—*Zoludow v. Keeshin Motor Express*, 34 N.E.2d 980, 109 Ind.App. 575.

Minn.—*Packar v. Brooks*, 300 N.W. 400, 211 Minn. 99—*Sathrum v. Lee*, 230 N.W. 580, 180 Minn. 163.

N.H.—*Kardasinski v. Koford*, 190 A. 702, 88 N.H. 444, 111 A.L.R. 1017.

Ohio.—*Woodward v. Gray*, 29 Ohio N. P.N.S., 141, affirmed 188 N.E. 304, 46 Ohio App. 177.

Pa.—*Kins v. Deere*, 58 A.2d 335, 359 Pa. 106—*Weinberg v. Pavitt*, 155 A. 867, 304 Pa. 312.

Wis.—*Schloif v. Honeck*, 24 N.W.2d 602, 249 Wis. 276—*Klas v. Fenske*, 22 N.W.2d 596, 248 Wis. 534.

42 C.J. p 1284 note 63.

Applicability to pleadings and evidence in general see § 556.

Instruction necessitated by argument of counsel

Instruction on imminent peril was held properly given by reason of closing argument of counsel.—*Anthony v. Hobbie*, Cal.App., 193 P.2d 748.

Instructions held required or proper

(1) Generally.

U.S.—*Car & General Ins. Corporation v. Keal Driveway Co., C.C.A. Fla.*, 132 F.2d 834, certiorari denied *Keal Driveway Co. v. Car & General Ins. Corporation*, 63 S.Ct. 1330, 319 U.S. 766, 87 L.Ed. 1716.

Ariz.—*Webb v. Hardin*, 89 P.2d 30, 53 Ariz. 310.

Cal.—*Corbin v. Bedel*, 158 P.2d 221, 69 Cal.App.2d 60—*Pire v. Gladding McBean & Co.*, 130 P.2d 143, 55 Cal. App.2d 108, rehearing denied 130 P.2d 981, 55 Cal.App.2d 108—*Miller v. Cranston*, 106 P.2d 963, 41 Cal. App.2d 470—*Groat v. Walkup Drayage & Warehouse Co.*, 58 P.2d 200, 14 Cal.App.2d 350—*White v. Barker Bros.*, 55 P.2d 248, 12 Cal. App.2d 164—*Dunham v. Cantlay & Tanzola*, 49 P.2d 332, 9 Cal. App.2d 274—*Mogle v. Hunt*, 293 P. 844, 110 Cal. App. 177—*Comstock v. Morse*, 290 P. 108, 107 Cal. App. 71—*Olsen v. J. J. Jacobs Motor Co.*, 278 P. 1051, 99 Cal.App. 423—*Power v. Crown Stage Co.*, 256 P. 457, 82 Cal. App. 660.

Colo.—*Barsch v. Hammond*, 135 P.2d 519, 110 Colo. 441.

Ill.—*Selman v. Midwest Haulers*, 33 N.E.2d 140, 309 Ill. App. 154.

Ind.—*Toenges v. Walter*, 32 N.E.2d 95, 109 Ind.App. 41.

Ky.—*Berry v. Jorris*, 199 S.W.2d 616, 303 Ky. 799—*Moreland's Adm'r v. Stone*, 166 S.W.2d 998, 292 Ky. 521—*Coleman v. Nelson*, 6 S.W.2d 454, 224 Ky. 460—*Louisville Taxicab & Transfer Co. v. Ramey*, 300 S.W. 890, 222 Ky. 286—*Major v. Rudolph*, 290 S.W. 688, 218 Ky. 1.

Mich.—*Rossien v. Berry*, 9 N.W.2d 895, 305 Mich. 693.

Minn.—*Sanders v. Gilbertson*, 29 N. W.2d 357, 224 Minn. 546—*Vasutka v. Matsch*, 13 N.W.2d 483, 216 Minn. 530—*Packar v. Brooks*, 300 N.W. 400, 211 Minn. 99—*Stoker v. Anderson*, 238 N.W. 685, 184 Minn. 339.

N.H.—*Kardasinski v. Koford*, 190 A. 702, 88 N.H. 444, 111 A.L.R. 1017.

N.J.—*Wright v. Belth*, 157 A. 840, 9 N.J.Misc. 1183.

Ohio.—*Woodward v. Gray*, 188 N.E. 304, 46 Ohio App. 177.

Pa.—*Casey v. Siciliano*, 165 A. 1, 310 Pa. 238.

Va.—*Virginia Stage Lines v. Duff*, 39 S.E.2d 634, 185 Va. 592—*Gaines v. Campbell*, 166 S.E. 704, 159 Va. 504.

Wash.—*Kellerher v. Porter*, 189 P.2d 223, 29 Wash.2d 650—*Brewer v. Berner*, 121 P.2d 940, 15 Wash.2d

644—*Johnson v. Watson*, 120 P.2d 515, 11 Wash.2d 690.

Wis.—*Klas v. Fenske*, 22 N.W.2d 596, 248 Wis. 534—*Mellor v. Heggaton*, 236 N.W. 558, 205 Wis. 42.

(2) Bicyclists.—*Redd v. Airway Motor Coach Lines*, 137 P.2d 374, 104 Utah 9.

(3) Motorcyclists.

Cal.—*Kohlhauer v. Bronstein*, 67 P. 2d 1078, 21 Cal.App.2d 4.

Minn.—*Merritt v. Stuve*, 9 N.W.2d 329, 215 Minn. 44—*Viken v. Dickson*, 214 N.W. 471, 172 Minn. 1.

(4) Children.—*Fultz' Adm'r v. Williams*, 99 S.W.2d 803, 266 Ky. 651.

(5) Pedestrians.

Cal.—*Varner v. Skov*, 67 P.2d 123, 20 Cal.App.2d 232.

Ill.—*Green v. Drew*, 57 N.E.2d 227, 323 Ill. App. 84—*Mazanec v. Prosser*, 56 N.E.2d 489, 323 Ill.App. 652—*Zoludow v. Keeshin Motor Express*, 34 N.E.2d 980, 109 Ind.App. 575.

Iowa.—*Edwards v. Perley*, 274 N.W. 910, 223 Iowa 1119.

Ky.—*Fork Ridge Bus Line v. Matthews*, 58 S.W.2d 615, 248 Ky. 419.

Minn.—*Schendel v. Klein*, 9 N.W.2d 342, 215 Minn. 73.

Or.—*Sherrard v. Werline*, 91 P.2d 344, 162 Or. 135.

Vt.—*Healy v. Moore*, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Va.—*Samples v. Trimble*, 182 S.E. 247, 165 Va. 306—*Perkinson v. Persons*, 178 S.E. 682, 164 Va. 172.

Instructions held not required or warranted

(1) Generally.

Cal.—*Von Stetten v. Yellow-Checker Cab Co., Consolidated*, 281 P. 95, 100 Cal. App. 775—*Dougherty v. Ellingson*, 275 P. 456, 97 Cal.App. 87.

Kan.—*Tilden v. Ash*, 67 P.2d 614, 145 Kan. 909.

Ky.—*Ilome Laundry Co. v. Cook*, 125 S.W.2d 763, 277 Ky. 8—*Big Sandy Bus Line Co. v. Williams*, 56 S.W. 346, 246 Ky. 758.

Md.—*Dwyer v. Chew*, 131 A. 350, 149 Md. 281.

Minn.—*Corridan v. Agranoff*, 297 N. W. 759, 210 Minn. 237.

Mo.—*Shaw v. Fulkerson*, 96 S.W.2d 495, 339 Mo. 310.

destrian such an instruction should not be given in favor of defendant where the practically undisputed evidence shows as a matter of law that the presence of a pedestrian on the highway at the point in question was reasonably to have been anticipated,⁴ and that the emergency, if any, was due solely to defendant's negligence.⁵ An instruction on the rule

obtaining when a person is confronted with a sudden danger or emergency should correctly state the law,⁶ and a requested instruction containing an incorrect statement of law as to the degree of care required of the driver of an automobile when suddenly confronted with danger is properly refused.⁷ An instruction relating to sudden peril or danger

Neb.—Roby v. Aufer, 32 N.W.2d 491, 149 Neb 734.

N.C.—Hoke v. Atlantic Greyhound Corp., 42 S.E.2d 593, 227 N.C. 412.

Ohio.—Morgan v. Hunsicker, App., 60 N.E.2d 509.

Okl.—Graves v. Harrington, 60 P.2d 622, 177 Okl. 448.

Wash.—Hughes v. Wallace, 107 P.2d 910, 6 Wash.2d 396.

W.Va.—Elswick v. Charleston Transit Co., 36 S.E.2d 419, 128 W.Va. 241.

Wis.—Hanson v. Matas, 249 N.W. 505, 212 Wis. 275, 93 A.L.R. 546.

Wyo.—Henderson v. Land, 295 P. 271, 42 Wyo. 369.

(2) Bicyclists.

Cal.—Wright v. Sniffin, 181 P.2d 675, 80 Cal.App.2d 358—Fraser v. Stellingner, 126 P.2d 653, 52 Cal.App.2d 564.

Ky.—Bybee Bros. v. Imes, 155 S.W.2d 492, 288 Ky. 1.

(3) Children.

Cal.—Perry v. Plombo, 166 P.2d 888, 73 Cal.App.2d 569—Azzaro v. O'Connell, 9 P.2d 345, 121 Cal.App. 617.

Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189—Melts' Adm'r v. Louisville Gas & Electric Co., 1 S.W.2d 985, 232 Ky. 551.

Va.—Rall v. Witten, 154 S.E. 547, 155 Va. 40.

(4) Pedestrians.

Fla.—Becker v. Blum, 194 So. 275, 142 Fla. 60.

Mich.—Dubeau v. Bordeau, 289 N.W. 198, 291 Mich. 418—Herzberg v. Knight, 286 N.W. 145, 289 Mich. 29.

(5) Emergency resulting from driver's excessive speed.

D.C.—Jarvis v. Bostic, 79 F.2d 831, 65 App.D.C. 78.

Minn.—Bakken v. Lewis, 26 N.W.2d 478, 223 Minn. 329.

Wis.—Kane v. Loyd's Am. Line, 19 N.W.2d 296, 247 Wis. 145—Roellig v. Gear, 260 N.W. 232, 217 Wis. 651.

4. Utah.—Nikolopoulos v. Ramsey, 214 P. 304, 61 Utah 465.

5. Utah.—Nikolopoulos v. Ramsey, supra.

6. Cal.—Power v. Crown Stage Co., 256 P. 457, 82 Cal.App. 660.

Tex.—Hooks v. Orton, Civ.App., 30 S.W.2d 681.

Instructions held erroneous

(1) Generally.

Cal.—Van Fleet v. Heyler, 125 P.2d 586, 51 Cal.App.2d 719.

Idaho.—Stuart v. McVey, 87 P.2d 446, 59 Idaho 740.

Ill.—Witherspoon v. Central Greyhound Lines, 60 N.E.2d 378, 325 Ill.App. 574.

Mich.—Walker v. Rebeuhr, 237 N.W. 389, 255 Mich. 204.

Minn.—Nicholas v. Minnesota Milk Co., 4 N.W.2d 84, 212 Minn. 333.

Neb.—Callahan v. Prewitt, 13 N.W.2d 660, 143 Neb. 787.

Ohio.—Bush v. Harvey Transfer Co., 67 N.E.2d 851, 146 Ohio St. 657.

Or.—Dickson v. King, 49 P.2d 367, 151 Or. 512.

Tenn.—Finton v. Mercury Motors, App., 194 S.W.2d 351—Getz v. Weiss, 160 S.W.2d 438, 25 Tenn. App. 520.

42 C.J. p 1277 note 17 [a].

(2) For failure to include qualification that emergency must not be result of person's own negligence.

Cal.—Spear v. Leuenberger, 112 P.2d 43, 44 Cal.App.2d 236—Gootar v. Levin, 293 P. 706, 109 Cal.App. 703. N.H.—Frost v. Stevens, 184 A. 869, 88 N.H. 164.

(3) As relieving driver from duty to exercise care after emergency—Allwein v. Asbury Truck Co., 3 P.2d 320, 116 Cal.App. 736.

(4) As assuming that defendant owed plaintiff ordinary care instead of merely slight care.—Thomas v. Snow, 174 S.E. 837, 162 Va. 654.

(5) As omitting to charge that in emergency defendant was required to exercise care of ordinarily prudent person.—Puza v. Hamway, 193 A. 776, 123 Conn. 205.

Instructions held sufficient or not erroneous

Ala.—Pittman v. Calhoun, 165 So. 391, 231 Ala. 460—Hill v. Almon, 141 So. 625, 224 Ala. 658.

Ariz.—Western Truck Lines v. Berry, 78 P.2d 997, 52 Ariz. 38.

Cal.—Alward v. Paola, 179 P.2d 5, 79 Cal.App.2d 1—Petersen v. Devine, 156 P.2d 936, 68 Cal.App.2d 387—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382—Groat v. Walkup Drayage & Warehouse Co., 58 P.2d 200, 14 Cal.App.2d 350—Power v. Crown Stage Co., 256 P. 457, 82 Cal. App. 660.

Ga.—Whitfield v. Wheeler, 47 S.E.2d 658, 76 Ga.App. 857.

Ill.—Bunch v. McAllister, 266 Ill.App. 248.

Iowa.—McMahon v. Rauch, 298 N.W. 908, 230 Iowa 674—Jakeway v. Allen, 290 N.W. 507, 227 Iowa 1182—McCornack v. Pickerell, 283 N.W. 899, 225 Iowa 1076.

Kan.—Leimbach v. Pickwick Greyhound Lines, 10 P.2d 33, 135 Kan. 40.

Ky.—Edmiston v. Robinson, 168 S.W.2d 740, 293 Ky. 273—Deegan v. Wilson, 157 S.W.2d 68, 288 Ky. 801.

Mich.—Slayton v. Boesch, 23 N.W.2d 134, 315 Mich. 1—Breen v. Smart, 232 N.W. 226, 251 Mich. 679.

Mo.—Murphy v. Loeffler, 39 S.W.2d 550, 327 Mo. 1244.

N.D.—Kertz v. Skjeveland, 217 N.W. 529, 56 N.D. 351.

Ohio.—Carle v. Courtright, 40 N.E.2d 431, 69 Ohio App. 69, rehearing denied 43 N.E.2d 296, 69 Ohio App. 69.

Or.—Hornby v. Wiper, 63 P.2d 204, 155 Or. 203.

Pa.—Schiele v. Motor Freight Express, 36 A.2d 467, 348 Pa. 525, followed in Parsons v. Motor Freight Express, 36 A.2d 470, 348 Pa. 530. Tenn.—White v. White, 9 Tenn.App. 654.

Va.—Wash v. Holland, 183 S.E. 236, 166 Va. 46—Gaines v. Campbell, 166 S.E. 704, 159 Va. 504.

Wash.—Grapp v. Peterson, 168 P.2d 400, 25 Wash.2d 44.

14 C.J. p 1277 note 17 [b].

7. Cal.—Carnahan v. Motor Transit Co., 224 P. 143, 65 Cal.App. 402.

Instructions held properly refused

Ill.—Blumb v. Getz, 13 N.E.2d 1019, 294 Ill.App. 432.

Iowa.—Cooley v. Killingsworth, 228 N.W. 880, 209 Iowa 646.

Minn.—Carlson v. Sanitary Farm Dairies, 273 N.W. 665, 200 Minn. 177.

N.H.—Prokey v. Hamm, 23 A.2d 327, 91 N.H. 513—Richards v. Richards, 166 A. 823, 86 N.H. 273.

N.D.—Bolton v. Wells, 225 N.W. 791, 58 N.D. 286.

Tenn.—Caldwell v. Hodges, 77 S.W.2d 817, 18 Tenn.App. 355—Quigley v. Askew, 12 Tenn.App. 298.

Requested instruction held proper or improperly refused

Cal.—Petersen v. Lang Transp. Co., 90 P.2d 94, 32 Cal.App.2d 462.

Mich.—Lagassée v. Quick, 262 N.W. 915, 273 Mich. 295.

should not be misleading or confusing.⁸

§ 536. — Violation of Statute or Ordinance

Where the pleadings and evidence so warrant, appropriate and correct instructions may be given in an action for injuries arising out of the operation of motor vehicles, as to the rights and duties of the parties under a statute or ordinance.

It may be proper and necessary, where the evidence and pleadings so warrant, to instruct the jury as to rights and duties of the parties under a statute or ordinance.⁹ An instruction on a statute or ordinance should not ordinarily be given in the ab-

sence of evidence¹⁰ or allegations in the pleadings¹¹ showing the application of the statute or ordinance to the facts of the case. However, where defendant or his counsel concedes the existence of facts or circumstances rendering a particular statute applicable, the court may,¹² and should,¹³ give a proper instruction thereon. In the case of an ordinance not judicially noticed, the court need not give an instruction thereon where no evidence thereof has been introduced.¹⁴

An instruction bearing on a statute or ordinance should correctly state the law,¹⁵ and should be based on alleged violations of the statutes or ordinances

8. Ala.—Conner v. Foregger, 7 So 2d 856, 242 Ala. 275.

Cal.—Dodds v. Gifford, 16 P.2d 279, 127 Cal App 629—Allwein v. Asbury Truck Co., 3 P.2d 320, 116 Cal. App. 736.

Wis.—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66.

9. Cal.—Barry v. Maddalena, 146 P. 2d 974, 63 Cal.App.2d 302.

Ga.—Harwell v. Blue's Truck Line, 199 S.E. 759, 187 Ga. 78, mandate conformed to 200 S.E. 500, 59 Ga. App. 305.

Miss.—White v. Weitz, 152 So. 484, 169 Miss. 102.

N.C.—Gaffney v. Phelps, 178 S.E. 231, 207 N.C. 553.

S.C.—Hallman v. Cushman, 13 S.E.2d 498, 196 S.C. 402.

Tex.—Houston Oil Co. of Texas v. Wilson, Civ.App., 70 S.W.2d 285, error dismissed.

42 C.J. p 1272 notes 62, 63.

Instructions held properly given

US—Silent Automatic Sales Corporation v. Stayton, C.C.A.Mo., 45 F. 2d 471.

Cal.—Sartori v. Granucci, 266 P. 280, 204 Cal. 28—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421—Corbin v. Bedel, 158 P.2d 221, 69 Cal. App.2d 60.

Ga.—Battle v. Kilcrease, 189 S.E. 573, 54 Ga.App. 808—Hollomon v. Hopson, 166 S.E. 45, 45 Ga.App. 762—C. J. Kamper Grocery Co. v. Sauls, 144 S.E. 403, 38 Ga.App. 487.

Ill.—Selman v. Midwest Haulers, 33 N.E.2d 140, 309 Ill.App. 154.

Mo.—Klohr v. Edwards, App., 94 S.W.2d 99—Peck v. W. F. Williamson Advertising Service in St. Louis, App., 68 S.W.2d 847.

Mont.—Lesage v. Largey Lumber Co., 43 P.2d 896, 99 Mont. 372.

S.C.—Johnston v. Bagger, 149 S.E. 241, 151 S.C. 537.

Tenn.—Landrum v. Callaway, 12 Tenn.App. 150.

Va.—Gaines v. Campbell, 166 S.E. 704, 159 Va. 504.

42 C.J. p 1284 notes 51 [a], [b], 52 [a], [b].

Instruction held not confusing

Okl.—Burton v. Harn, 156 P.2d 618, 195 Okl. 232.

10. Cal.—Finney v. Wierman, 126 P. 2d 143, 52 Cal.App.2d 282—Ketchum v. Pattee, 98 P.2d 1051, 37 Cal. App.2d 122.

Minn.—Ohad v. Reese, 267 N.W. 490, 197 Minn. 483.

Mo.—Bach v. Diekroeger, App., 184 S.W.2d 755.

Wash.—Cunningham v. Dills, 145 P. 2d 273, 19 Wash.2d 845.

42 C.J. p 1284 notes 51 [c], 52 [c]. Applicability to pleadings and evidence in general see infra § 556.

11. Ill.—Brackett v. Builders' Lumber Co., 253 Ill.App. 107.

Instructions held proper under pleadings

Mo.—Bush v. Kansas City Public Service Co., 169 S.W.2d 331, 350 Mo. 876—Klohr v. Edwards, App., 94 S.W.2d 99—Robinson v. Ross, App., 47 S.W.2d 122.

S.C.—Johnston v. Bagger, 149 S.E. 241, 151 S.C. 537.

Tenn.—Greer v. McKee, 13 Tenn.App. 625.

12. Cal.—Dewhirst v. Leopold, 229 P. 30, 194 Cal. 424.

42 C.J. p 1284 note 53.

13. Mich.—Levyn v. Kopplin, 149 N.W. 993, 183 Mich. 232.

14. Ky.—Cline v. Cook, 287 S.W. 927, 216 Ky. 366.

Tex.—Staten v. Monroe, Civ.App., 150 S.W. 222.

15. Conn.—O'Brien v. Seaboard Freight Lines, 16 A.2d 826, 127 Conn. 374.

42 C.J. p 1276 note 15.

Instruction construed

An instruction which merely declares what acts constitute a violation of the law and tells the jury that they may consider any violations thereof in determining the issue of negligence, but which does not instruct the jury to find for plaintiff if the driver violated the law, does not charge that a violation of the law constitutes negligence

per se.—Pollock v. Hamm, 6 S.W.2d 541, 177 Ark. 348.

Instructions held erroneous

(1) Generally.

Ark.—Shipp v. Missouri Pac. Transp. Co., 122 S.W.2d 593, 197 Ark. 104.

Cal.—Finney v. Wierman, 126 P.2d 143, 52 Cal.App.2d 282.

Conn.—O'Brien v. Seaboard Freight Lines, 16 A.2d 826, 127 Conn. 374.

—Murphy v. Way, 141 A. 858, 107 Conn. 633.

Ill.—Brackett v. Builders' Lumber Co., 253 Ill.App. 107.

Iowa.—Gookin v. Guy W. Baker & Son, 276 N.W. 418, 224 Iowa 967.

Mass.—Jenkins v. North Shore Dye House, 178 N.E. 644, 277 Mass. 440.

Minn.—Sandhofner v. Calmenson, 212 N.W. 11, 170 Minn. 69.

Miss.—White v. Weitz, 152 So. 484, 169 Miss. 102.

N.Y.—Roles v. John A. Schwarz, Inc., 278 N.Y.S. 307, 244 App.Div. 729.

Ohio.—Rossert v. Louys, 189 N.E. 126, 46 Ohio App. 442.

42 C.J. p 1276 note 15 [b].

(2) Position at intersection.—Andrew v. White Line Bus Corporation, 161 A. 792, 115 Conn. 464.

Instructions held correct

(1) Generally.

Cal.—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382.

Ga.—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743—Cochran v. Kendrick, 158 S.E. 57, 43 Ga.App. 135.

Mass.—Ponticelli v. Cataldo, 152 N.E. 81, 255 Mass. 473.

Mich.—Ashley v. Breckenridge, 275 N.W. 734, 281 Mich. 688.

Minn.—Wlester v. Kaufer, 247 N.W. 237, 188 Minn. 341.

Neb.—Herman v. Firestone, 21 N.W. 2d 444, 146 Neb. 730.

N.H.—Clough v. Schwartz, 48 A.2d 921, 94 N.H. 148.

N.J.—Diemer v. Shepard, 140 A. 578, 6 N.J.Misc. 186—Pavlika v. Giglio, 137 A. 528, 5 N.J.Misc. 590.

N.M.—Bell v. Carter Tobacco Co., 71 P.2d 683, 41 N.M. 513.

Ohio.—Osman v. Cook, App., 43 N.E.2d 641.

as they existed at the time of the accident,¹⁶ and not at a time subsequent thereto when the law has been changed by amendment or the enactment of new provisions.¹⁷ A requested instruction as to the applicability of a statute,¹⁸ or the materiality or immateriality of a violation thereof,¹⁹ is properly refused where it contains an incorrect statement of the law.

Necessity of using language of statute or ordinance. It is proper²⁰ and desirable²¹ for an instruction stating the law embodied in a statute or ordinance to be couched in the exact language of the statute or ordinance; but a slight departure therefrom is not necessarily error,²² since it is sufficient to give an instruction substantially in the language

of the statute or ordinance.²³

§ 537. — Willful, Wanton, or Reckless Conduct

An instruction on the subject of willful, wanton, or reckless conduct should state the law correctly and should not be misleading or confusing.

It may be necessary or proper for the court, where the pleadings and evidence so warrant, to give an instruction on the subject of willful, wanton, or reckless conduct.²⁴ On the other hand, such an instruction need not and should not be given in the absence of pleadings²⁵ or evidence²⁶ on the subject. Instructions on the subject of willful, wanton, or reckless conduct,²⁷ such as instructions dealing with the necessity of establishing that conduct in

Tenn.—Kennedy v. Bruce, 5 Tenn. App. 583.

Va.—Masters v. Cardi, 42 S.E.2d 203, 186 Va. 261.

Wash.—Hadley v. Arms & Scott, 241 P. 26, 136 Wash. 632.
42 C.J. p 1276 note 15 [c].

(2) Position on road.
Mo.—Weisbrod v. Mueller, App., 285 S.W. 542—Roland v. Anderson, App., 282 S.W. 752.

Pa.—Heffelfinger v. Schell, Com.Pl., 50 Dauph Co. 1.

(3) Right of way.
Mo.—Peck v. W. F. Williamson Advertising Service in St. Louis, App., 68 S.W.2d 847.
N.J.—Maulsbury v. Shure, 170 A. 41, 12 N.J.Misc. 137.

(4) Width of vehicle and load.
Ill.—Moore v. Jansen & Schaefer, 265 Ill.App. 459.

Pa.—Nevin Bus Line v. Paul R. Hostetter Co., 155 A. 872, 305 Pa. 72.

(5) Intoxication of driver.—Jones v. Cary, 37 N.E.2d 944, 219 Ind. 268.

Instructions held not prejudicial
Tenn.—Kroger Grocery & Baking Co. v. Addington, 74 S.W.2d 450, 18 Tenn.App. 191.

Wash.—Gooschin v. Ladd, 33 P.2d 653, 177 Wash. 625.

42 C.J. p 1276 note 15 [d].

16. Iowa.—Gookin v. Guy W. Baker & Son, 276 N.W. 418, 224 Iowa 967.

42 C.J. p 1276 note 15 [a].

Ordinance repealed before accident
Ill.—Tuttle v. Checker Taxi Co., 274 Ill.App. 525.

17. Iowa.—Gookin v. Guy W. Baker & Son, 276 N.W. 418, 224 Iowa 967.

N.J.—McCusker v. B. & N. Transportation Co., 148 A. 896, 106 N.J. Law 167.

42 C.J. p 1276 note 15 [a] (2).

18. Cal.—Taylor v. Sims, 164 P.2d 17, 72 Cal.App.2d 60.

Mass.—Squires v. Fraska, 17 N.E.2d 693, 301 Mass. 474.

42 C.J. p 1277 note 29.

Statutory presumption
An instruction on a statutory presumption arising from violation of a statute has been held properly refused where all the facts and circumstances of the accident were disclosed by the evidence, and the liability of defendant was required to be determined from such facts and circumstances.—Natchez Coca-Cola Bottling Co. v. Watson, 133 So. 677, 160 Miss. 173.

19. Utah.—Collins v. Liddle, 247 P. 476, 67 Utah 242.

20. Cal.—Mann v. Scott, 182 P. 281, 180 Cal. 550.

42 C.J. p 1279 note 66.

21. Ky.—Wade v. Brents, 171 S.W. 188, 161 Ky. 607.

22. Ark.—Rogers v. Woods, 42 S.W. 2d 390, 184 Ark. 392.

Ohio.—Osman v. Cook, App., 43 N.E. 2d 641.

42 C.J. p 1279 note 68.

23. Iowa.—Bonnett v. Oertwig, 14 N.W.2d 739, 234 Iowa 864.

42 C.J. p 1279 note 69.

Entire language unnecessary
It may be unnecessary, in view of the contentions made by the parties in the case, to give to the jury the entire language of a statute.—Fouch v. Werner, 279 P. 183, 99 Cal.App. 557.

24. U.S.—Russell v. Turner, D.C. Iowa, 56 F.Supp. 455, affirmed, C. C.A., 148 F.2d 562.

Ill.—Streeter v. Humrichouse, 191 N.E. 684, 357 Ill. 234—Sarelas v. Meyer, 46 N.E.2d 140, 317 Ill.App. 382.

Ind.—Kettner v. Jay, 26 N.E.2d 546, 107 Ind.App. 643.

S.C.—Hallman v. Cushman, 13 S.E. 2d 498, 196 S.C. 402—Lumpkin v. Mankin, 134 S.E. 503, 136 S.C. 506.

Vt.—Hunter v. Preston, 166 A. 17, 105 Vt. 327.

Refusal of instruction held error
Conn.—Grant v. MacLelland, 147 A. 138, 109 Conn. 517.

N.Y.—Olefsky v. Ludwig, 272 N.Y.S. 158, 242 App.Div. 637.

25. Ala.—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359.

Applicability to pleadings and evidence in general see *infra* § 556.

Instruction held within issues
Ind.—Interstate Public Service Co v. Ford, 185 N.E. 525, 96 Ind.App. 639.

26. Ill.—Bezemek v. Panico, 23 N.E. 2d 216, 301 Ill.App. 408.

Kan.—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 164 Kan. 376.

Minn.—Carlson v. Sanitary Farm Dairies, 273 N.W. 665, 200 Minn. 177.

N.J.—Flammer v. Morelli, 126 A. 307, 100 N.J.Law 314.

Ohio.—Denzer v. Terpstra, 193 N.E. 647, 129 Ohio St. 1.

Instructions held justified by evidence
Ala.—Alabama Power Co. v. Buck, 35 So.2d 355, 250 Ala. 618—Conway v. Robinson, 113 So. 531, 216 Ala. 495.

Cal.—Hawkinson v. Scholz, 57 P.2d 945, 13 Cal.App.2d 687.

Ill.—Streeter v. Humrichouse, 191 N.E. 684, 357 Ill. 234—Granlie v. Valha, 37 N.E.2d 931, 312 Ill.App. 181.

Ohio.—Masters v. Von Lehmden, 173 N.E. 303, 36 Ohio App. 414.

Va.—Friedman v. Jordan, 184 S.E. 186, 166 Va. 65.

27. Iowa.—Greiner v. Hicks, 300 N.W. 727, 231 Iowa 141.

Va.—Gale v. Wilber, 175 S.E. 739, 163 Va. 211.

Instructions held correct
Ind.—Kraning v. Taggart, 1 N.E.2d 689, 103 Ind.App. 62.

Tenn.—Consolidated Coach Co. v. McCord, 102 S.W.2d 53, 171 Tenn. 253.

order to justify recovery,²⁸ or explaining or defining terms of this nature,²⁹ should state the law correctly, and should not be misleading or confusing.³⁰

§ 538. — Proximate Cause

Instructions on the issue of proximate cause or unavoidable accident may be appropriate in an action for injuries arising out of the operation of motor vehicles;

and such instructions, where given or requested, should not be misleading or state the law incorrectly.

It is proper and necessary, where the pleadings and evidence so warrant, to give instructions involving the question of causal connection or proximate cause in actions for injuries suffered in connection with the operation of motor vehicles.³¹ On the other hand, instructions on the question of causal connection, proximate cause, or particular mat-

28. Conn.—Grasso v. Frattolillo, 149 A. 838, 111 Conn. 209.

Ill.—Pillow v. Long, 20 N.E.2d 896, 299 Ill.App. 542—Luke v. Marion, 271 Ill.App. 48.

Ind.—Coconower v. Stoddard, 182 N.E. 466, 96 Ind.App. 287.

Instructions held correct

Ark.—Tilghman v. Rightor, 199 S.W. 2d 943, 211 Ark. 229.

Conn.—Lucas v. Hickcox, 169 A. 191, 117 Conn. 513.

Iowa.—Greiner v. Hicks, 300 N.W. 727, 231 Iowa 141.

Instructions held properly refused

D.C.—Radio Cab v. Houser, 128 F.2d 604, 76 U.S.App.D.C. 35.

Ohio.—Major v. Liggett, 50 N.E.2d 795, 72 Ohio App. 71.

Pa.—Davis v. Tredwell, 32 A.2d 411, 347 Pa. 341.

Instructions held not prejudicial

Ohio.—Frazier v. Semoff, 152 N.E. 780, 21 Ohio App. 6.

29. N.C.—Wise v. Hollowell, 171 S.E. 82, 205 N.C. 286.

Tex.—Napier v. Mooneyham, Civ. App., 94 S.W.2d 564, error dismissed.

Instructions held correct

(1) Generally.

Cal.—Francesconi v. Belluomini, 83 P.2d 298, 28 Cal.App.2d 701.

Ill.—Williams v. Kaplan, 242 Ill.App. 166.

Iowa.—Peter v. Thomas, 2 N.W.2d 643, 231 Iowa 985—Claussen v. Johnson's Estate, 278 N.W. 297, 224 Iowa 990.

Pa.—Heffelfinger v. Schell, Com.Pl., 50 Dauph.Co. 1.

42 C.J. p 1276 note 14 [b] (3).

(2) "Intentional."—Furcolo v. Auto Rental Co., 148 A. 377, 110 Conn. 540.

(3) "Recklessness."—Peter v. Thomas, 2 N.W.2d 643, 231 Iowa 985.

(4) "Reckless driving" or "reckless operation."

Iowa.—Martin v. Momyer, 300 N.W. 310, 230 Iowa 1158.

N.J.—Kemp v. Bright, 141 A. 796, 104 N.J.Law 529.

(5) "Wantonness."—Dean v. Adams, 30 So.2d 903, 249 Ala. 319—Caruth v. Sparkman, 147 So. 884, 226 Ala. 594.

(6) "Willful misconduct."—Nelson v. Westergaard, 19 P.2d 867, 130 Cal. App. 79.

(7) "Willful and wanton misconduct."—Heald v. Milburn, C.C.A.Ill., 125 F.2d 8, certiorari denied Milburn v. Heald, 62 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1764, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.Ed. 1764.

Instructions held erroneous or properly refused

U.S.—Cusack v. Longaker, C.C.A.N.Y., 95 F.2d 304.

Ala.—Ashley v. McMurray, 130 So. 401, 222 Ala. 32.

Cal.—Walker v. Bacon, 23 P.2d 520, 132 Cal.App. 625.

Ill.—Lantz v. Dortman, 58 N.E.2d 922, 324 Ill.App. 564—Holdoway v. Choisser, 27 N.E.2d 228, 305 Ill. App. 20—Hughes v. Medendorp, 13 N.E.2d 1015, 294 Ill.App. 424.

Ind.—Coconower v. Stoddard, 182 N.E. 466, 96 Ind.App. 287.

Ohio.—Akers v. Stirn, 25 N.E.2d 286, 136 Ohio St. 245—Major v. Liggett, 50 N.E.2d 795, 72 Ohio App. 71.

30. Instruction held misleading or confusing

Ala.—Graham v. Werfel, 157 So. 201, 229 Ala. 385

Iowa.—Slesseger v. Puth, 239 N.W. 46, 213 Iowa 164.

Instructions held not misleading

Cal.—Hastings v. Serleto, 143 P.2d 956, 61 Cal.App.2d 672—Ballos v. Natural, 269 P. 972, 93 Cal. App. 601.

Conn.—Amato v. Desenti, 169 A. 611, 117 Conn. 612.

Ill.—Secrist v. Raffleson, 62 N.E.2d 36, 326 Ill.App. 489.

Or.—Peters v. Johnson, 264 P. 459, 124 Or. 237.

Instruction held misleading but not prejudicial

Idaho.—Dawson v. Salt Lake Hardware Co., 136 P.2d 733, 64 Idaho 666.

31. U.S.—Dubrock v. Interstate Motor Freight System, C.C.A.Pa., 143 F.2d 304, certiorari denied 65 S.Ct. 119, 323 U.S. 765, 89 L.Ed. 613—Proel v. Nugent, C.C.A.N.H., 97 F. 2d 353.

Ark.—Taggart v. Scott, 104 S.W.2d 816, 193 Ark. 930.

Cal.—Creamer v. Cerrato, 36 P.2d 1094, 1 Cal.App.2d 441.

Conn.—Zatkin v. Katz, 11 A.2d 843, 126 Conn. 445—Corey v. Phillips, 10 A.2d 370, 126 Conn. 246.

Ill.—Oliver v. Kelley, 21 N.E.2d 649, 300 Ill.App. 487.

Iowa.—Miller v. Mathis, 8 N.W.2d

744, 233 Iowa 221—Greiner v. Hicks, 300 N.W. 727, 231 Iowa 141

—Hoover v. Haggard, 260 N.W. 540, 219 Iowa 1232—Kaufman v. Borg, 242 N.W. 104, 214 Iowa 293.

Ky.—Colyer v. Hudson, 87 S.W.2d 92, 261 Ky. 84—Louisville Auto Supply Co. v. Irvine, 278 S.W. 149, 212 Ky. 60.

Md.—Warner v. Markoe, 189 A. 260, 171 Md. 351.

Mo.—Gower v. Trumbo, 181 S.W.2d 653—Hopkins v. Highland Dairy Farms Co., 159 S.W.2d 254, 348 Mo. 1158.

Neb.—Wagner v. Watson Bros. Transfer Co., 259 N.W. 373, 128 Neb 535.

N.Y.—Mochmal v. Pegos, 12 N.Y.S.2d 414, 257 App. Div. 890, reargument denied 14 N.Y.S.2d 411, 257 App. Div. 1063

N.C.—Sample v. Spencer, 24 S.E.2d 241, 222 N.C. 580—Newman v. Queen City Coach Co., 169 S.E. 808, 205 N.C. 26—Moss v. Brown, 154 S.E. 48, 199 N.C. 189.

Or.—Wheeler v. Nickels, 126 P.2d 32, 168 Or. 604.

Pa.—Kins v. Deere, 58 A.2d 335, 359 Pa. 106—Weinberg v. Pavitt, 155 A. 867, 304 Pa. 312.

Tex.—Stotts v. Love, Civ. App., 184 S.W.2d 308, error refused—Ellis v. Lewis, Civ.App., 142 S.W.2d 294—Fleming's Fraternal Undertaking Co. v. Quarrels, Civ.App., 116 S.W.2d 1160—Scott v. Gardner, Civ. App., 106 S.W.2d 1109, error dismissed—Homan v. Borman, Civ. App., 19 S.W.2d 438.

Vt.—Bennett v. Robertson, 177 A. 625, 107 Vt. 202, 98 A.L.R. 152.

Va.—Chappell v. White, 29 S.E.2d 858, 182 Va. 625.

Wash.—Woodridge v. Pacific Coast Coal Co., 155 P.2d 1001, 22 Wash. 2d 314.

42 C.J. p 1272 notes 60, 61.

Hypothesizing defendant's version

In automobile guest's action for injuries in collision with defendant's automobile, defendant who claimed that the only cause of the collision was negligence of guest's host without defendant's conduct contributing or concurring in any way to cause the collision was entitled to have his version hypothesized to the jury.

—Semar v. Kelly, 176 S.W.2d 289, 352 Mo. 157.

ters related thereto may be improper where they are not applicable under the pleadings and issues³² or the evidence.³³ In any event, instructions relating to such matters should state the law correctly³⁴

32. Ala.—Alabama By-Products Corporation v. Rutherford, 195 So. 210, 239 Ala. 413.

Ga.—Harper v. Hall, 46 S.E.2d 201, 76 Ga.App. 441.

Ill.—Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12.

N.J.—Killeen v. Public Service Coordinated Transport, 159 A. 145, 10 N.J.Misc. 366, affirmed 163 A. 901, 110 N.J.Law 21.

Ohio.—Leopold v. Williams, 8 N.E.2d 476, 54 Ohio App. 540—McKinnon v. Pettibone, 184 N.E. 707, 44 Ohio App. 147, affirmed Pettibone v. McKinnon, 183 N.E. 766, 125 Ohio St. 605.

Okl.—Stroud v. Tompkins, 145 P.2d 396, 193 Okl. 483.

Applicability to pleadings and evidence in general see *infra* § 556.

Instructions held proper or erroneously refused

D.C.—Danzansky v. Zimballist, 105 F. 2d 457, 70 App.D.C. 234.

Ky.—Suter's Adm'r v. Kentucky Power & Light Co., 76 S.W.2d 29, 256 Ky. 356.

R.I.—Bourre v. Texas Co., 142 A. 621, 49 R.I. 364.

33. Conn.—Boyd v. Geary, 12 A.2d 644, 126 Conn. 396.

Kan.—Mencley, by Myers, v. Montgomery, 64 P.2d 550, 145 Kan. 109.

Mo.—Shields v. Keller, 153 S.W.2d 60, 348 Mo. 326.

Pa.—Klein v. Weissberg, 174 A. 636, 114 Pa.Super. 569.

Instructions held not warranted or required under evidence

(1) Generally.
U.S.—Jones v. Weaver, C.C.A. Ariz., 123 F.2d 403.

Cal.—Falasco v. Hulen, 44 P.2d 469, 6 Cal.App.2d 224—Traylen v. Cl-traro, 297 P. 649, 112 Cal.App. 172, followed in 297 P. 652, 112 Cal.App. 763.

Conn.—Kryger v. Panaszky, 195 A. 795, 123 Conn. 353.

Md.—Brotman v. McNamara, 29 A. 2d 264, 181 Md. 224.

Minn.—Novotny v. Bouley, 27 N.W.2d 813, 223 Minn. 592—Edblad v. Brower, 227 N.W. 493, 178 Minn. 465.

Mo.—Schroeder v. Rawlings, 127 S. W.2d 678, 344 Mo. 630.

Mont.—McDonough v. Smith, 284 P. 542, 86 Mont. 545.

N.H.—Weiss v. Wasserman, 15 A.2d 861, 91 N.H. 164.

N.J.—Killeen v. Public Service Coordinated Transport, 159 A. 145, 10 N.J.Misc. 366, affirmed 163 A. 901, 110 N.J.Law 21.

Okl.—Feuquay v. Ecker, 157 P.2d 745, 195 Okl. 285.

Pa.—Seret v. Carbley, 39 A.2d 607, 350 Pa. 434.

(2) Sole cause.

Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.

Iowa.—Stingley v. Crawford, 258 N. W. 316, 219 Iowa 509.

Mo.—Meibler v. Yourtee, 203 S.W.2d 727—Collins v. Leahy, 125 S.W.2d 874, 344 Mo. 250—State ex rel Goessling v. Daus, 284 S.W. 463, 314 Mo. 282.

(3) New and independent cause.

Cal.—Armstrong v. Day, 284 P. 1083, 103 Cal.App. 465.

Tex.—Jackson v. Edmondson, 151 S. W.2d 794, 136 Tex. 405—Texas Motor Coaches v. Palmer, 121 S.W.2d 323, 132 Tex. 77.

(4) Supervening negligence.—Redgate v. Doyle, 195 A. 196, 123 Conn. 291.

Instructions held justified or required under evidence

(1) Generally.

Cal.—Weddle v. Loges, 125 P.2d 914, 52 Cal.App.2d 115—Pearce v. Elbe, 276 P. 389, 98 Cal.App. 101—Alkus v. Davies, 260 P. 894, 86 Cal.App. 355.

Ky.—McDowell v. Bryden, 162 S.W. 2d 2, 290 Ky. 549.

Minn.—Becker v. Northland Transp Co., 274 N.W. 180, 200 Minn. 272, affirmed 275 N.W. 510, 200 Minn. 272.

Mo.—Hall v. Hannibal-Quincy Truck Line, 211 S.W.2d 723—Roberts v. Atlas Life Ins. Co., 163 S.W.2d 369, 236 Mo.App. 1162—Jackson v. City of Malden, App., 72 S.W.2d 850.

N.Y.—Ferraro v. Garden City Park Fire Com'rs, 18 N.Y.S.2d 194, 259 App.Div. 121—Schneider v. Railway Express Agency, 245 N.Y.S. 78, 230 App.Div. 404.

N.C.—Smith v. Bonney, 1 S.E.2d 371, 215 N.C. 183.

Ohio.—Martin v. Hooftstetter, App., 42 N.E.2d 556.

R.I.—Bourre v. Texas Co., 142 A. 621, 49 R.I. 364.

S.C.—Boyd v. Maxwell, 2 S.E.2d 395, 190 S.C. 103.

Tex.—Horne Motors v. Latimer, Civ. App., 148 S.W.2d 1000, error dismissed, judgment correct—Norris Bros. v. Mattinson, Civ.App., 145 S.W.2d 204—Justiss v. Naquin, Civ. App., 137 S.W.2d 72, error dismissed, judgment correct—Willis v. Smith, Civ.App., 120 S.W.2d 899, error dismissed—Tarver v. Valance, Civ.App., 97 S.W.2d 748—Ramin v. Cosio, Civ.App., 85 S.W.2d 802, certificate dismissed 79 S. W.2d 617, 124 Tex. 471.

Utah.—State v. McQuilkin, 193 P.2d 433—Van Cleave v. Lynch, 166 P. 2d 244, 109 Utah 637.

Va.—Isenhour v. McGranighan, 17

S.E.2d 333, 178 Va. 365—Wright v. Perry, 184 S.E. 206, 166 Va. 222. Wash.—Ross v. Johnson, 155 P.2d 486, 22 Wash.2d 275.

(2) Sole cause.

U.S.—Pearman v. Crain, C.C.A.Mo., 166 F.2d 109.

Cal.—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal.App.2d 477.

Del.—Island Express v. Frederick, 171 A. 181, 5 W.W.Harr. 569.

Ill.—Rzeszewski v. Farth, 58 N.E.2d 269, 324 Ill.App. 345.

Ind.—Vockel v. Rhynearson, 197 N. E. 705, 101 Ind.App. 637, rehearing denied 199 N.E. 162.

Ky.—Basham's Adm'x v. Witt, 159 S.W.2d 990, 289 Ky. 639.

Miss.—Hammond v. Morris, 126 So. 906, 156 Miss. 802.

Mo.—Teague v. Plaza Exp. Co., 205 S.W.2d 563, 356 Mo. 1186—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517—Bashkow v. McBride, App., 177 S.W.2d 637—Allen v. Cas-cio, 176 S.W.2d 552, 238 Mo.App. 144—Boyce v. Donnellan, 168 S.W. 2d 120, 237 Mo.App. 63—Geisendorf v. Brashear Truck Co., App., 54 S. W.2d 72.

N.Y.—Schloup v. Cobb, 66 N.Y.S.2d 739, 271 App.Div. 418.

(3) Supervening negligence.—Zen-uk v. Johnson, 158 A. 910, 114 Conn. 383.

34. Conn.—Corey v. Phillips, 10 A.2d 370, 126 Conn. 246.

Ky.—Prichard v. Collins, 15 S.W.2d 497, 228 Ky. 635.

Mo.—Schlemmer v. McGee, 185 S.W. 2d 806.

N.C.—Barnes v. Teer, 10 S.E.2d 614, 218 N.C. 122, rehearing granted and vacated on other grounds 15 S.E.2d 379, 219 N.C. 823.

Wis.—Berrafato v. Exner, 216 N.W. 165, 194 Wis. 149.

42 C.J. p 1278 notes 89, 14 [a], p 1277 note 26.

Instructions held erroneous or prop-erly refused

(1) Generally.

Ala.—Brown v. Standard Casket Mfg. Co., 175 So. 358, 234 Ala. 512—Alabama Produce Co. v. Smith, 141 So. 674, 224 Ala. 688—Whittaker v. Walker, 135 So. 185, 223 Ala. 167—Strickland v. Davis, 128 So. 233, 221 Ala. 247.

Colo.—Brown v. Maier, 38 P.2d 905, 96 Colo. 1.

Conn.—Reilly v. Antonio Pepe Co., 143 A. 568, 108 Conn. 436.

Ga.—Benton Rapid Express v. Sammons, 10 S.E.2d 290, 63 Ga.App. 23—Snellings v. Rickey, 197 S.E. 44, 57 Ga.App. 836.

Idaho.—Stuart v. McVey, 87 P.2d 446, 69 Idaho 740—Curtis v. Curtis, 70 P.2d 369, 58 Idaho 76—Quillin v.

Colquhoun, 247 P. 740, 42 Idaho 522.

Ill.—Klimczak v. Druley-O'Brien Co., 17 N.E.2d 266, 297 Ill.App. 635—Denton v. Midwest Dairy Products Corporation, 1 N.E.2d 807, 284 Ill. App. 279.

Ky.—Rabold v. Gonyer, 148 S.W.2d 728, 285 Ky. 618—McLellan v. Threlkeld, 129 S.W.2d 977, 279 Ky. 114.

Md.—Slime & Sons v. Hooper, 164 A. 548, 164 Md. 244.

Mich.—White v. Huffmaster, 32 N.W. 2d 447, 221 Mich. 225—Sedorchuk v. Weeder, 18 N.W.2d 397, 311 Mich. 6.

Mo.—Long v. Mlld, 149 S.W.2d 853, 347 Mo. 1002—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630—King v. Riehl, 108 S.W.2d 1, 341 Mo. 467—Reavis v. Gordon, App., 45 S.W.2d 99—Carr v. Threlkeld, App., 31 S.W.2d 592—Weber v. Evans, App., 15 S.W.2d 370.

N.J.—Taylor v. Rabinowitz, 175 A. 202, 12 N.J.Misc. 812.

N.Y.—Laedke v. Truesdale, 2 N.Y.S. 2d 708, 253 App.Div. 921.

Ohio.—Blackford v. Kaplan, 20 N.E. 2d 522, 135 Ohio St 268—Marchal v. Frankman, App., 58 N.E.2d 679—Seward v. Schmidt, App., 49 N.E. 2d 696.

R.I.—Nusso v. Powers, 190 A. 688, 57 R.I. 490.

Wash.—Graves v. Mickel, 29 P.2d 405, 176 Wash 329—Wiseman v. Skagit County Dairymen's Ass'n, 6 P.2d 369, 166 Wash. 57—Lee v. H. E. Gleason Co., 282 P. 133, 146 Wash 56.

42 C.J. p 1276 note 99 [c].

(2) Intervening, or new and independent, cause or negligence.

Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247.

Conn.—Boyd v. Geary, 12 A.2d 644, 126 Conn. 396.

Ga.—Petty v. Moore, 150 S.E. 852, 40 Ga.App. 606.

Ia.—Tolomeo v. Harmony Short Line Motor Transp. Co., 37 A.2d 511, 349 Pa. 420.

Tex.—Tarry Warehouse & Storage Co. v. Duvall, 115 S.W.2d 401, 131 Tex. 466—Southern Ice & Utilities Co. v. Richardson, 95 S.W.2d 956, 128 Tex. 82—Southland Greyhound Lines v. Cotten, 91 S.W.2d 326, 126 Tex. 596—Mercer v. Evans, Civ. App., 173 S.W.2d 206—Coleman v. West, Civ.App., 116 S.W.2d 870.

Vt.—Bennett v. Robertson, 177 A. 625, 107 Vt. 202, 98 A.L.R. 152.

(3) Sole cause.

Colo.—Brown v. Maier, 38 P.2d 905, 96 Colo. 1—Small v. Clark, 263 P. 933, 83 Colo. 211.

Miss.—Aycock v. Burnett, 128 So. 100, 157 Miss. 510.

Mo.—Hopkins v. Highland Dairy Farms Co., 159 S.W.2d 254, 348 Mo.

1158—Reiling v. Russell, 134 S.W. 2d 83, 345 Mo. 517—Blackburn v. Ready-Mixed Concrete Co., App., 188 S.W.2d 526—Schuettler v. Enterprise Commission Corporation, App., 34 S.W.2d 976.

Tex.—Dixie Motor Coach Corporation v. Galvan, 86 S.W.2d 633, 126 Tex. 109—A. B. C. Storage & Moving Co. v. Herron, Civ. App., 138 S.W.2d 211, error dismissed, judgment correct.

Wash.—Hartnett v. Standard Furniture Co., 299 P. 408, 162 Wash. 655.

(4) Negligence of injured person as proximate, direct, or remote cause of accident.

Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336—McBride v. Barclay, 122 So. 642, 219 Ala. 475.

Cal.—Lindenbaum v. Barbour, 2 P.2d 161, 213 Cal. 277—Robbins v. Roques, 16 P.2d 695, 128 Cal.App. 1.

Iowa.—Meggers v. Kinley, 265 N.W. 614, 221 Iowa 383.

Ohio.—Sharp v. Russell, 174 N.E. 617, 37 Ohio App. 306.

Wis.—Loehr v. Crocker, 211 N.W. 299, 191 Wis. 422, followed in 211 N.W. 302, 191 Wis. 429, 430.

(5) Concurrent negligence.—Zamenick v. Easman & Co., 290 N.Y. S. 766, 248 App.Div. 920.

(6) Omission of element of foreseeability.—Gaines v. Copeland, Tex. Civ.App., 209 S.W.2d 231.

Instructions held sufficient, correct, or erroneously refused

(1) Generally.

U.S.—Atlantic Greyhound Corp. v. Hunt, C.C.A.N.C., 163 F.2d 117, certiorari denied 68 S.Ct. 154.

Ala.—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359—Lang v. Gunn, 129 So. 318, 23 Ala App. 574.

Ariz.—Lutty v. Lockhart, 295 P. 975, 37 Ariz. 488.

Ark.—D. F. Jones Const. Co. v. Mize, 146 S.W.2d 709, 201 Ark. 702.

Cal.—Pollino v. Polich, 177 P.2d 63, 78 Cal App 2d 87—Burr v. Damarel, 75 P.2d 621, 24 Cal.App.2d 622—Corvello v. Baumsteiger, 1 P.2d 484, 115 Cal.App. 194—Sale v. Illinois Electric Co., 299 P. 561, 114 Cal.App. 71—Caraveo v. Pickwick Stages System, 298 P. 516, 113 Cal. App. 443—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal. App. 221—Dougherty v. Ellingson, 275 P. 456, 97 Cal.App. 87.

Conn.—Cosgrove v. Shusterman, 26 A.2d 471, 129 Conn. 1—Johnson v. Fiske, 6 A.2d 354, 125 Conn. 445—Grays v. Connecticut Co., 198 A. 259, 123 Conn 605—Stapleton v. Stapleton, 152 A. 403, 112 Conn. 682—Klett v. Frenyes, 149 A. 399, 111 Conn. 99—Eukers v. Summer, 147 A. 671, 110 Conn. 230.

D.C.—Danzanaky v. Zimboist, 105 F. 2d 457, 70 App.D.C. 234.

Fla.—Toll v. Waters, 189 So. 393, 138 Fla. 349.

Ga.—Great American Indemnity Co. v. Oxford, 27 S.E.2d 880, 70 Ga. App. 208—Mishoe v. Davis, 14 S. E.2d 187, 64 Ga.App. 700—Coble v. Georgia Motor Express, 8 S.E.2d 724, 62 Ga.App. 566—Wallace v. Howard, 198 S.E. 812, 58 Ga.App. 428—Maner v. Dykes, 190 S.E. 189, 55 Ga App 436, transferred, see, 187 S.E. 699, 183 Ga 118, transferred, see, 184 S.E. 438, 52 Ga. App. 715—Smeltzer v. Atlanta Coach Co., 176 S.E. 846, 49 Ga.App. 755—Petty v. Moore, 150 S.E. 852, 40 Ga.App. 606.

Ill.—Metropolitan Trust Co. v. Bowman Dairy Co., 15 N.E.2d 838, 369 Ill. 222—Bobalek v. Atlasa, 43 N. E.2d 584, 315 Ill.App. 514—Beery v. Breed, 36 N.E.2d 591, 311 Ill.App. 469—Derango v. Rubin, 34 N.E.2d 719, 310 Ill.App. 536—Bentkowski v. Bryan, 19 N.E.2d 841, 299 Ill. App. 217—Anderson v. Steinle, 6 N. E.2d 879, 289 Ill App. 167.

Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind 394.

Iowa.—Skalla v. Daeges, 15 N.W.2d 638, 234 Iowa 1260—Kuhn v. Kiose, 248 N.W. 230, 216 Iowa 36—Duncan v. Rhomberg, 236 N.W. 638, 212 Iowa 389.

Kan.—Adams v. Casebolt, 63 P.2d 927, 145 Kan. 3.

Ky.—McLellan v. Threlkeld, 129 S. W.2d 977, 279 Ky. 114—Field v. Collins, 98 S.W.2d 45, 266 Ky. 67—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246 Ky 758—Schneider v. Rolf, 278 S.W. 100, 211 Ky. 669.

Md.—Warner v. Neubert, 187 A. 829, 171 Md. 693—Yellow Cab Co. v. Lacy, 170 A. 190, 165 Md. 588—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Mass.—Bessey v. Salemme, 19 N.E.2d 75, 302 Mass. 188, 123 A.L.R. 1156.

Minn.—Becker v. Northland Transp. Co., 274 N.W. 180, 200 Minn. 272, affirmed 275 N.W. 510, 200 Minn. 272—Baufeld v. Warburton, 233 N. W. 237, 181 Minn. 506—Bell v. Pickett, 227 N.W. 854, 178 Minn. 540.

Miss.—Horn v. Guthrie, 21 So.2d 813—Chadwick v. Rush, 163 So. 823, 174 Miss. 75—Williams v. Larkin, 147 So. 337, 166 Miss. 837.

Mo.—Wells v. Raber, 166 S.W.2d 1073, 350 Mo. 586—Goldbaum v. James Mulligan Printing & Publishing Co., 149 S.W.2d 348, 347 Mo. 844—Smith v. Star Cab Co., 19 S. W.2d 467, 223 Mo. 441—Krueger v. Walters, 179 S.W.2d 615, 238 Mo. App. 340—Smart v. Raymond, App., 142 S.W.2d 100—Wheeler v. Breeding, App. 109 S.W.2d 1237—Greer v. St. Louis Public Service Co.,

and, where such instructions are given to the jury, they should not be confusing or misleading.³⁵ An instruction on the question of proximate cause, although not technically correct or in the best form,

nevertheless may not be prejudicial when considered in connection with all the instructions in the case, taken together.³⁶ The refusal of a requested instruction on proximate cause may not constitute

App. 87 S.W.2d 240, followed in 87 S.W.2d 247—Lach v. Buckner, 86 S.W.2d 954, 229 Mo.App. 1066.

Neb.—Triplett v. Lundeen, 272 N.W. 307, 132 Neb. 434.

N.H.—Bennett v. Bennett, 31 A.2d 374, 92 N.H. 379.

N.J.—Blen v. Meyers, 155 A. 480, 9 N.J.Misc. 676—Williams v. Curchin, 152 A. 81, 8 N.J.Misc. 840.

N.Y.—Annatto v. Spellacy, 298 N.Y.S. 153, 251 App.Div. 876.

N.C.—Baird v. Baird, 28 S.E.2d 225, 223 N.C. 730—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 218 N.C. 320—Holland v. Strader, 5 S.E.2d 311, 216 N.C. 436—Murphy v. Asheville-Knoxville Coach Co., 156 S.E. 550, 200 N.C. 92.

N.D.—Ziegler v. Ford Motor Co., 272 N.W. 743, 67 N.D. 286—Eddy v. Wells, 231 N.W. 785, 59 N.D. 663.

Ohio.—Booksbaum v. Cousins, 1 N.E. 2d 150, 51 Ohio App. 385, error dismissed 199 N.E. 217, 130 Ohio St. 336.

Pa.—Gyarmati v. Linde Air Products Co., 157 A. 485, 305 Pa. 188.

Tex.—Young v. Massey, 101 S.W.2d 809, 128 Tex. 638—Yessler v. Dodson, Civ.App., 104 S.W.2d 95, error dismissed—Young v. Massey, Civ.App., 95 S.W.2d 542, affirmed 101 S.W.2d 809, 128 Tex. 638—Ineeda Laundry v. Newton, Civ. App., 33 S.W.2d 208, error dismissed.

Va.—Sheckler v. Anderson, 29 S.E.2d 867, 182 Va. 701.

Wash.—Pozar v. Blankenship, 282 P. 52, 154 Wash. 261.

42 C.J. p 1276 notes 99 [d], 14 [b] (5).

(2) New and independent cause.—Lowrimore v. Sanders, 103 S.W.2d 739, 129 Tex. 563, affirmed Lowrimore v. Sanders, 106 S.W.2d 266, 129 Tex. 563—Kirkpatrick v. Neal, Tex.Civ. App., 153 S.W.2d 519, error refused—Vincent v. Johnson, Tex.Civ.App., 117 S.W.2d 135, error dismissed—Stedman Fruit Co. v. Smith, Tex.Civ.App., 28 S.W.2d 622, error dismissed.

(3) Sole cause.
U.S.—Pearman v. Crain, C.C.A.Mo., 166 F.2d 109.

Ark.—Compressed Industrial Gases v. Todd, 129 S.W.2d 262, 198 Ark. 409.

Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind. 394.

Md.—Yellow Cab Co. v. Lacy, 170 A. 190, 165 Md. 588.

Mo.—Kimbrough v. Chervitz, 186 S.W.2d 461, 353 Mo. 1154—Gower v. Trumbo, 181 S.W.2d 653—Long v. Mild, 149 S.W.2d 853, 347 Mo. 1002—Branson v. Abernathy Furniture Co., 130 S.W.2d 562, 344 Mo. 1171

—Engleman v. Railway Express Agency, 100 S.W.2d 540, 340 Mo. 360—Smith v. Star Cab Co., 19 S.W.2d 467, 323 Mo. 441—Allen v. Cascio, 176 S.W.2d 552, 238 Mo. App. 144.

(4) Causal connection between injury and negligence of injured person.

Ariz.—Lutty v. Lockhart, 295 P. 975, 37 Ariz. 488.

Cal.—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal App 2d 477—Fleming v. Flick, 35 P.2d 210, 140 Cal.App. 14.

Conn.—Kryger v. Panaszky, 195 A. 795, 123 Conn. 353—Sutton v. Hawk, 142 A. 385, 108 Conn. 9.

Ga.—Wallace v. Howard, 198 S.E. 812, 58 Ga.App. 428—Gosaett v. Kraft Phenix Cheese Corporation, 198 S.E. 298, 58 Ga.App. 265—Juhan v. Roberts, 140 S.E. 46, 37 Ga.App. 310.

Iowa.—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771.

Mo.—Kimbrough v. Chervitz, 186 S.W.2d 461, 353 Mo. 1154.

N.J.—Snyder v. Bicking, 181 A. 161, 115 N.J.Law 549, 102 A.L.R. 409.

(5) Concurrent negligence of two or more persons.

Ala.—Lang v. Gunn, 129 So. 318, 23 Ala.App. 574.

Ark.—Oster v. Jones, 84 S.W.2d 604, 191 Ark. 246.

Conn.—Mongillo v. New England Banana Co., 160 A. 433, 115 Conn. 112.

Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind. 394.

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Mich.—Wallace v. Kramer, 296 N.W. 838, 296 Mich. 680.

Minn.—Becker v. Northland Transp. Co., 274 N.W. 180, 200 Minn. 272, affirmed 275 N.W. 510, 200 Minn. 272.

Mo.—Glader v. City of Richmond Heights, App., 121 S.W.2d 254—Blackwill v. Franke, App., 49 S.W.2d 211, certiorari quashed State ex rel. Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76.

Ohio.—Fugh v. Akron-Chicago Transp. Co., 28 N.E.2d 1015, 84 Ohio App. 479, affirmed 28 N.E.2d 501, 137 Ohio St. 164.

Va.—Margiotta v. Aycock, 174 S.E. 831, 162 Va. 557.

Wash.—Edwards v. Washkuhn, 119 P.2d 905, 11 Wash.2d 425.

Instruction held too favorable

In action by passenger against owner of automobile for injuries sustained when automobile collided with another automobile, instruction that jury must find owner's negligence was the proximate cause of injury was more favorable to owner than he was entitled to.—Danzansky v. Zimbolist, 105 F.2d 457, 70 App.D.C. 234.

35. Instructions held confusing or misleading

U.S.—Jones v. Weaver, C.C.A.Ariz., 123 F.2d 403.

Ala.—Mobile City Lines v. Alexander, 30 So.2d 4, 249 Ala. 107—Chambers v. Cox, 130 So. 416, 222 Ala. 1.

Ga.—Morrow v. Southeastern Stages, 22 S.E.2d 336, 68 Ga.App. 142—Benton Rapid Express v. Sammons, 10 S.E.2d 290, 63 Ga.App. 23.

Ill.—Walters v. Checker Taxi Co., 60 N.E.2d 260, 325 Ill.App. 578—Paliokaitis v. Checker Taxi Co., 57 N.E.2d 216, 324 Ill.App. 21—Burke v. Zwick, 20 N.E.2d 912, 299 Ill.App. 558.

Md.—Paolini v. Western Mill & Lumber Corporation, 166 A. 609, 165 Md. 45.

Minn.—Dentinger v. Uleberg, 213 N.W. 377, 171 Minn. 81.

Mo.—King v. Rieth, 108 S.W.2d 1, 341 Mo. 467—Cross v. Wears, App. 67 S.W.2d 517—Counts v. Thomas, App., 63 S.W.2d 416—Schuetter v. Enterprise Commission Corporation, App., 34 S.W.2d 976—Weber v. Evans, App., 15 S.W.2d 370.

Mont.—Adami v. Murphy, 164 P.2d 150, 118 Mont. 172.

Ohio.—Collins v. McClure, 26 N.E.2d 780, 63 Ohio App. 312—Alloy Cast Steel Co. v. Arthur, 179 N.E. 743, 40 Ohio App. 503.

Va.—Stuart v. Coates, 42 S.E.2d 311, 186 Va. 227.

Instructions held not confusing or misleading

Ga.—Maner v. Dykes, 190 S.E. 189, 55 Ga.App. 436, transferred, see, 187 S.E. 699, 183 Ga. 118, transferred, see, 184 S.E. 438, 52 Ga. App. 715.

Mo.—Brinkley v. United Biscuit Co. of America, 164 S.W.2d 325, 349 Mo. 1227—Roberts v. Atlas Life Ins. Co., 163 S.W.2d 369, 236 Mo. App. 1162.

Ohio.—Morgan v. Hunsicker, App., 60 N.E.2d 509.

Va.—Margiotta v. Aycock, 174 S.E. 831, 162 Va. 557.

42 C.J. p 1278 note 49 [c] (6).

36. Cal.—Fox v. Ravera, 9 P.2d 590, 122 Cal.App. 35.

error where it is apparent from the other instructions given in the case that the jury fully understood the issue involved.³⁷ A proposed instruction dealing with causal connection may properly be modified to clarify and distinguish the meaning of a term.³⁸

Unavoidable accident. While, according to some authorities, it may be proper or necessary for the court to give an instruction on the question of accident or unavoidable accident,³⁹ other authorities have disapproved the giving of such an instruc-

tion.⁴⁰ The court need not instruct the jury with reference to the law of unavoidable accidents, where the instructions given eliminate the possibility of a recovery if the jury should find an unavoidable accident.⁴¹ In any event, such an instruction should state the law correctly⁴² and should not be confusing or misleading.⁴³

Where such issue is not presented by the pleadings or evidence, an instruction on accident or unavoidable accident should not be given, and, if requested, is properly refused.⁴⁴ Thus such an in-

Ind—Kuhn v. Stephenson, 161 N.E. 384, 87 Ind.App. 157.

37. Mass.—Forra v. Hume, 194 N.E. 301, 289 Mass. 266.

38. Cal.—Von Stetten v. Yellow-Checker Cab Co., Consolidated, 281 P. 95, 100 Cal.App. 775.

"Remote and secondary"

Modifying instruction that, if actions and omissions of automobile driver were remote and secondary, he was not liable for collision, by adding "and not sole proximate cause," was held proper as clarifying "remote and secondary."—Von Stetten v. Yellow-Checker Cab Co., Consolidated, supra.

39. Cal.—Graham v. Consolidated Motor Transport Co., 297 P. 617, 112 Cal.App. 648.

Mich.—Agranowitz v. Levine, 298 N. W. 388, 298 Mich. 18.

Okl.—Bowling v. Denco Bus Lines, 162 P.2d 525, 196 Okl. 1.
42 C.J. p 1273 note 69 [a].

40. In Alabama

(1) It has been said that the better practice is to refuse such a charge because of the tendency to confuse and mislead; and the refusal of such a charge has been held not to be error—Cosby v. Flowers, 30 So.2d 694, 249 Ala. 227—Conner v. Foregger, 7 So.2d 856, 242 Ala. 275—Berry v. Dannelly, 145 So. 663, 226 Ala. 151.

(2) There is some authority, however, upholding such instructions, and indicating that the refusal of such an instruction may constitute error.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553—Alabama Produce Co. v. Smith, 141 So. 674, 224 Ala. 688—42 C.J. p 1273 note 69 [a].

Instructions held properly refused

Mo.—Snyder v. Western Union Telegraph Co., App., 277 S.W. 362.

41. Vt.—Larrow v. Martell, 104 A. 826, 92 Vt. 435.

42. Instructions held sufficient or not erroneous

(1) Generally.
Cal.—Alward v. Paola, 179 P.2d 5, 79 Cal.App.2d 1—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382—Schub-

kegel v. Dunn, 87 P.2d 875, 31 Cal. App.2d 312—Yates v. J. H. Krumlinde & Co., 71 P.2d 298, 22 Cal. App.2d 387.

Ga.—Cochran v. Kendrick, 158 S.E. 57, 43 Ga.App. 135.

Or.—Hanks v. Norrly, 54 P.2d 836, 152 Or. 610—Daniels v. Riverview Dairy, 287 P. 77, 132 Or. 549—Archer v. Gage, 270 P. 521, 126 Or. 532.

Pa.—La Posta v. Himmer, 55 A.2d 751, 358 Pa. 69.

Tex.—Texas Textile Mills v. Gregory, 177 S.W.2d 938, 142 Tex. 308—Houston Oxygen Co. v. Davis, Civ.App., 145 S.W.2d 300, reversed on other grounds 161 S.W.2d 474, 139 Tex. 1, 140 A.L.R. 868—Glazer v. Wheeler, Civ.App., 130 S.W.2d 353, reversed on other grounds Wheeler v. Glazer, 153 S.W.2d 449, 137 Tex. 341, 140 A.L.R. 1301—Johnson v. Hodges, Civ.App., 121 S.W.2d 371, error dismissed—Southland Greyhound Lines v. King, Civ.App., 77 S.W.2d 281, error granted.

(2) Definition of "unavoidable accident."

Kan.—Engle v. Bowen, 251 P. 1108, 122 Kan. 283.

Md.—Dwyer v. Chew, 131 A. 350, 149 Md. 281.

Tex.—Langham v. Talbott, Civ.App., 211 S.W.2d 987, error refused no reversible error—Hyde v. Marks, Civ. App., 138 S.W.2d 619, error dismissed judgment correct—Johnson v. Hodges, Civ.App., 121 S.W.2d 371, error dismissed—Anizan v. Paquette, Civ.App., 113 S.W.2d 196, error dismissed—Stedman Fruit Co. v. Smith, Civ.App., 28 S.W.2d 622, error dismissed.

43 C.J. p 1276 note 14 [b] (6).

Instructions held erroneous or properly refused

Cal.—Bennett v. Robertson, 150 P.2d 547, 65 Cal.App.2d 278.

Ky.—Humphries v. Gray, 203 S.W.2d 8, 305 Ky. 205.

Tex.—Southern Transp. Co. v. Adams, Civ.App., 141 S.W.2d 739, error dismissed, judgment correct.

43. Instructions held confusing or misleading

Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336.

Or.—McVay v. Byars, 138 P.2d 210, 171 Or. 449.

Va.—Ball v. Witten, 154 S.E. 547, 155 Va. 40.

Instructions held not misleading

Tex.—Woodward v. Murphy, Civ. App., 29 S.W.2d 828, error refused.

44. Instructions held erroneous, or properly refused, under evidence

Ala.—Burns v. Bythwood, 184 So. 346, 28 Ala.App. 335, certiorari denied 184 So. 349, 236 Ala. 639.

Ark.—Crown Coach Co. v. Palmer, 102 S.W.2d 853, 193 Ark. 739.

Cal.—D'Avanzo v. Manno, 60 P.2d 524, 16 Cal.App.2d 346—Riley v. Berkeley Motors, 36 P.2d 398, 1 Cal.App.2d 217.

Ill.—Burns v. Storchak, 73 N.E.2d 168, 331 Ill.App. 347—Janowski v. Great Lakes Tank Truck Line, 64 N.E.2d 387, 327 Ill.App. 553—Hughes v. Medendorp, 13 N.E.2d 1015, 294 Ill.App. 424.

Ky.—Ramsey v. Sharpley, 171 S.W.2d 427, 294 Kv 286—Bybee Bros. v. Imes, 155 S.W.2d 492, 288 Ky. 1—Trevillian v. Boswell, 43 S.W.2d 715, 241 Ky. 237.

Md.—Garczynski v. Daniel, 57 A.2d 339—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172—Vizzini v. Dopkin, 6 A.2d 637, 176 Md 639—Paolini v. Western Mill & Lumber Corporation, 166 A. 609, 165 Md. 45—Schapiro v. Meyers, 153 A. 27, 160 Md. 208—Beall v. Ward, 149 A. 543, 158 Md. 646—Coplan v. Warner, 149 A. 1, 158 Md. 463.

Minn.—Naylor v. McDonald, 241 N. W. 674, 185 Minn. 518.

Mo.—Levins v. Vigne, 98 S.W.2d 737, 339 Mo. 660—Wright v. Quattrochi, 49 S.W.2d 3, 330 Mo. 173—Tramill v. Prater, 152 S.W.2d 684, 236 Mo. App. 757, certiorari quashed State ex rel. Tramill v. Shain, 161 S.W.2d 974, 349 Mo. 82—Jones v. Goldberg, App., 78 S.W.2d 509—Lamar v. Morton Salt Co., App., 242 S.W. 690.

Mont.—Jewett v. Gleason, 65 P.2d 3, 104 Mont. 63—Tanner v. Smith, 33 P.2d 547, 97 Mont. 229.

Ohio.—McIntire v. Wallace, App., 64 N.E.2d 66.

Tex.—Houston Electric Co. v. Mo-

struction is not justified where all the evidence tends to show that the death or injury in question was caused by the negligence of defendant⁴⁵ or by the negligence either of defendant or of plaintiff or decedent;⁴⁶ and a requested instruction on unavoidable accident is properly refused where each party contends that the collision was caused entirely by the negligence of the other, and the case is tried on that theory.⁴⁷ An instruction which tells the jury that, in order to class the accident as unavoidable, the driver should use every effort to avoid the injury is equivalent to saying all the available

means at his command.⁴⁸

§ 539. — Collision with Bicycle or Motorcycle

Instructions in cases involving collisions between motor vehicles and bicycles or motorcycles should set forth the law correctly, without being confusing or misleading.

The court should instruct the jury correctly on issues which have been properly raised concerning the relative rights and duties of the operator of a motor vehicle and a bicyclist⁴⁹ or motorcyclist.⁵⁰

Leroy, 163 S.W.2d 1062, 139 Tex. 170.
Wash.—Brewer v. Berner, 131 P.2d 940, 15 Wash.2d 644—Reitan v. Crooks, 279 P. 97, 153 Wash. 75.
W.Va.—Jones v. Berry, 45 S.E.2d 1—Utt v. Herold, 34 S.E.2d 357, 127 W.Va. 719.

Instructions held authorized under evidence

Ariz.—Webb v. Hardin, 89 P.2d 30, 53 Ariz. 310.
Cal.—La Porte v. Houston, App., 189 P.2d 544, affirmed, Sup., 199 P.2d 665—Kelley v. City and County of San Francisco, 137 P.2d 719, 58 Cal.App.2d 872—Comstock v. Morse, 290 P. 108, 107 Cal.App. 71.
D.C.—Weber v. Eaton, 160 F.2d 577, 82 U.S.App.D.C. 66.
Ill.—Piggott v. Newman, 78 N.E.2d 328, 334 Ill.App. 75.

Md.—State, for Use of Shipley, v. Lupton, 161 A. 393, 163 Md. 180.
Minn.—Lestic v. Kuehner, 283 N.W. 122, 204 Minn. 125.

Okl.—Burton v. Harn, 156 P.2d 618, 195 Okl. 232—Browne v. Bassett, 126 P.2d 705, 191 Okl. 22—Rowton v. Kemp, 125 P.2d 1003, 190 Okl. 558.

Tex.—Justiss v. Naquin, Civ.App., 137 S.W.2d 72, error dismissed, judgment correct.

Wash.—Rettig v. Coca-Cola Bottling Co., 156 P.2d 914, 22 Wash.2d 572—O'Connell v. Home Oil Co., 40 P.2d 991, 180 Wash. 461.

42 C.J. p 1282 note 17.

Instructions held not erroneous under pleadings

Cal.—Stevenson v. Fleming, 117 P. 2d 717, 47 Cal.App.2d 225—Pearce v. Eibe, 276 P. 389, 98 Cal.App. 101.

Applicability to pleadings and evidence in general see *infra* § 556.

45. Colo.—Interstate Motor Lines v. Neal, 179 P.2d 665, 116 Colo. 242.
Or.—Murphy v. Read, 72 P.2d 935, 157 Or. 487.

42 C.J. p 1283 note 19.

46. Mo.—Nehring v. Charles M. Monroe Stationery Co., App., 191 S. W. 1054.

47. Cal.—Fraser v. Stelling, 126 P.

2d 653, 52 Cal.App.2d 564—Groat v. Walkup Drayage & Warehouse Co., 58 P.2d 200, 14 Cal.App.2d 350.

Ga.—Ault v. Whittemore, 35 S.E.2d 530, 73 Ga.App. 16—Ault v. Whittemore, 35 S.E.2d 526, 73 Ga.App. 10.

N.J.—Wilcox v. Christian and Missionary Alliance, 12 A.2d 709, 124 N.J. Law 527.

Tex.—Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944, 124 Tex. 347, 97 A.L.R. 1513.

48. Okl.—Haskell v. Kennedy, 1 P. 2d 729, 151 Okl. 12.

49. Ala.—Crescent Motor Co. v. Stone, 94 So. 78, 208 Ala. 137.

Pa.—Thompson v. Philadelphia Transp. Co., 58 Pa.Dist. & Co. 337.

Instructions held erroneous or properly refused

Ala.—Godfrey v. Vinson, 110 So. 13, 215 Ala. 166.

Cal.—Flury v. Beeskau, 33 P.2d 1033, 139 Cal.App. 398.

Ind.—Pawlsch v. Atkins, 182 N.E. 636, 96 Ind.App. 132.

Mo.—Taylor v. Sesler, App., 113 S. W.2d 812.

Or.—Haynes v. Sprague, 295 P. 964, 137 Or. 23—Brenne v. Hecox, 277 P. 99, 129 Or. 210.

Instructions held not erroneous

Cal.—Hart v. Farris, 21 P.2d 432, 218 Cal. 69—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382.

Ind.—Ewing v. Duncan, 197 N.E. 901, 209 Ind. 33, 101 A.L.R. 554.

Iowa.—Grisell v. Johnson, 294 N.W. 618, 229 Iowa 364.

Ky.—Colonial Supply Co. v. Bramlett, 60 S.W.2d 969, 249 Ky. 382.

Mo.—Irgang v. Tieman Ccal & Material Co., App., 46 S.W.2d 919.

N.C.—Hood v. Orange Crush Bottling Co., 135 S.E. 609, 192 N.C. 827.

Or.—Kalafate v. DeCook, 18 P.2d 593, 141 Or. 576.

Tenn.—Holt v. Walsh, 174 S.W.2d 657, 180 Tenn. 307.

Wash.—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 466—Sebern v. Northwest Cities Gas Co., 10 P.2d 210, 167 Wash. 600.

50. Instructions held sufficient or not erroneous

Ariz.—Kauffroath v. Wilbur, 185 P.2d 522, 66 Ariz. 152.

Ark.—Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597, 197 Ark. 425.

Cal.—Jennings v. Arata, 188 P.2d 298, 83 Cal.App.2d 143—Fouch v. Werner, 279 P. 183, 99 Cal.App. 567—Wixon v. Raisch Improvement Co., 266 P. 964, 91 Cal.App. 129.

Ga.—Hinesley v. Anderson, 43 S.E.2d 736, 75 Ga.App. 394.

Iowa.—Jakeway v. Allen, 290 N.W. 507, 227 Iowa 1182—Jakeway v. Allen, 282 N.W. 374, 226 Iowa 13.

Mich.—White v. Vandevelde, 279 N. W. 899, 284 Mich. 669.

Minn.—Brown v. Knutson, 228 N.W. 752, 179 Minn. 123.

Ohio.—Swoboda v. Brown, 196 N.E. 274, 129 Ohio St. 512.

Or.—Lee v. Hoff, 97 P.2d 715, 163 Or. 374—Daniels v. Riverview Dairy, 287 P. 77, 132 Or. 549.

Va.—Hickerson v. Burner, 41 S.E.2d 451, 186 Va. 66.

Wash.—Curtis v. Perry, 18 P.2d 840, 171 Wash. 542.

Instructions held erroneous or properly refused

Iowa.—Hobbs v. Traut, 257 N.W. 320, 218 Iowa 1265.

Ky.—Woods v. Jaglowicz, 32 S.W.2d 1, 235 Ky. 637.

Mo.—Oesterreicher v. Grupp, 119 S. W.2d 307—Phillips v. Henson, 30 S. W.2d 1065, 326 Mo. 282.

N.J.—Yates v. Madigan, 171 A. 679, 112 N.J.Law 443, affirmed 176 A. 362, 114 N.J.Law 258.

Or.—Wheeler v. Nickels, 126 P.2d 32, 168 Or. 604—Frame v. Arrow Towing Service, 64 P.2d 1312, 155 Or. 523—Daniels v. Riverview Dairy, 287 P. 77, 132 Or. 549—Hawn v. W. J. Jones & Son, 284 P. 194, 131 Or. 660.

51. Limits of duty

In action by motorcyclist for injuries allegedly received when struck by automobile after falling from motorcycle, instruction that motorist must exercise reasonable care to anticipate presence of others should have limited such duty to those us-

Instructions on this subject should not be confusing or misleading,⁵¹ vague,⁵² or prejudicial.⁵³ While a clause setting forth the right of an automobile driver to assume that a motorcyclist would obey the law of the road need not be affixed to each separate statement of the law governing the case,⁵⁴ the driver may be entitled to have the idea embodied in a general instruction.⁵⁵

§ 540. — Injury to Animals or Person Riding or Driving Them

Instructions in actions for injuries to animals or to persons driving or leading them should set forth the law correctly and properly.

ing highway in lawful manner; and instruction relating to lack of knowledge by motorist that motorcyclist was on highway should have been made applicable only to occurrences on motorcyclist's side of road—*Pratto v Snyder*, 55 P.2d 255, 12 Cal App2d 88.

51. *Minn—Dentinger v. Uleberg*, 213 N.W. 377, 171 Minn. 81.

Or.—*Wheeler v. Nickels*, 126 P.2d 32, 168 Or 604.

52. Or.—*Haynes v. Sprague*, 295 P. 964, 137 Or 23

53. *Minn—Dentinger v. Uleberg*, 213 N.W. 377, 171 Minn. 81.

54. *Iowa—Jakeway v. Allen*, 282 N. W. 374, 226 Iowa 13.

55. *Iowa—Jakeway v. Allen*, supra

56. *Ga.—Benton Rapid Express v. Sammons*, 10 S.E.2d 290, 63 Ga App 23.

Instructions held erroneous or properly refused

Ala—Robertson v. Bowman, 154 So. 127, 26 Ala.App. 115.

Ga.—Benton Rapid Express v. Sammons, 10 S.E.2d 290, 63 Ga.App. 23

Mo.—Anderson v. Dall, 21 S.W.2d 496, 224 Mo App 403

Instructions held proper

Ala—Robertson v. Bowman, 154 So. 127, 26 Ala.App. 115.

57. Instructions held sufficient or not erroneous

Iowa—Lawson v. Fordyce, 21 N.W. 2d 69, 237 Iowa 28.

Mo.—Darnell v. Ransdall, App., 277 S.W. 372.

S.D.—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.

Instructions held erroneous or properly refused

Iowa—Lawson v. Fordyce, 21 N.W. 2d 69, 237 Iowa 28.

Mo.—Holloway v. Barnes Grocer Co., 15 S.W.2d 917, 223 Mo.App. 1026.

Instructions held not misleading

Mo.—Darnell v. Ransdall, App., 277 S.W. 372.

58. *Cal.—Blanton v. Curry*, 129 P.2d 1, 20 Cal.2d 793—*Kelley v. City*

and County of San Francisco, 137 P.2d 719, 58 Cal.App.2d 872
Ind—Acme-Evans Co v. Schnepf, 15 N.E.2d 742, 105 Ind App. 475.

Instructions held sufficient, proper, or erroneously refused

(1) Generally.

Ala.—Streetman v. Bowdon, 194 So. 831, 239 Ala 359

Cal.—Taylor v. Oakland Scavenger Co., 110 P.2d 1044, 17 Cal 2d 594—*Smith v Harger*, 191 P 2d 25, 84 Cal App 2d 361—*Powers v. Shelton*, 169 P 2d 482, 74 Cal App 2d 757—*Church v Payne*, 97 P 2d 819, 36 Cal App 2d 382—*Metcalf v. Romano*, 257 P. 114, 83 Cal App. 508.

Conn—Brangi v. Connecticut Motor Lines, 59 A 2d 295, 134 Conn 562.

Ga.—Huckabee v. Grace, 173 S.E. 744, 48 Ga App. 621.

Ill—Popadowski v. Bergaman, 26 N. E 2d 722, 304 Ill.App. 422—*Freehill v. Consumers' Co.*, 243 Ill.App. 1.

Ind—Rentschler v. Hall, 69 N.E.2d 619, 117 Ind.App. 255.

Iowa.—McMahon v. Rauch, 298 N.W. 908, 230 Iowa 674.

Kan—Harvey v. Cole, 153 P.2d 916, 159 Kan. 239.

Ky.—Ballback's Adm'r v. Boland-Maloney Lumber Co., 208 S.W.2d 940, 306 Ky. 647—*Kelly v. Marshall's Adm'r*, 120 S.W.2d 142, 274 Ky. 666—*Wheeler's Adm'r v. Sullivan's Adm'r*, 86 S.W.2d 1023, 260 Ky. 814—*P. Bannon Pipe Co. v. Craig's Adm'r*, 277 S.W. 855, 211 Ky. 562.

Md.—York Ice Machinery Corporation v. Sachs, 173 A. 240, 167 Md. 113.

Mass.—Bessey v. Salemme, 19 N.E.2d 75, 302 Mass. 188, 123 A.L.R. 1156.

Mich.—Guscinski v. Kenzie, 275 N.W. 820, 282 Mich. 204.

Mo.—Cramer v. Parker, App., 100 S. W.2d 640.

Neb.—Tews v. Bamrick, 26 N.W.2d 499, 148 Neb. 59.

N.H.—Marcoux v. Collins, 53 A.2d 322, 94 N.H. 345.

N.J.—Schifano v. Kaiser, 41 A.2d 206, 132 N.J.Law 499.

N.Y.—Malkowski v. Diapparra, 59 N. Y.S.2d 417, 270 App.Div. 768.

Pa.—Bowman v. Stouman, 141 A. 41, 292 Pa. 293—*Foglia v. Pittsburgh Transp Co.*, 179 A. 871, 119 Pa Super. 94—*Rutkowski v. Lavin*, Com.Pl., 34 Luz Leg Reg 186.

R.I.—Gallo v. Simpson Spring Co., 181 A. 915, 55 R I 410—*Bourre v. Texas Co.*, 142 A. 621, 49 R.I. 364.

Va.—Sheckler v. Anderson, 29 S.E.2d 867, 182 Va 701—*Farris v. Wright*, 200 S.E. 597, 172 Va 67.

Wash.—Rieger v. Kirkland, 111 P.2d 241, 7 Wash 2d 326

Wis—Hartzheim v. Smith, 298 N.W. 196, 238 Wis 55—*Hones v. Hermesen*, 236 N.W. 646, 205 Wis. 16.

(2) Contributory negligence of, or care required by, child

Ark—Murphy v. Clayton, 15 S.W.2d 391, 179 Ark. 225

Cal—Hoy v. Tornich, 250 P. 565, 199 Cal. 545—*Smith v Harger*, 191 P.2d 25, 84 Cal App 2d 361—*Church v. Payne*, 97 P 2d 819, 36 Cal.App. 2d 382—*Finnegan v. Giffen*, 265 P. 496, 89 Cal.App. 702.

Conn—Marfyak v. New England Transp. Co., 179 A. 9, 120 Conn. 46.

Fla.—Turner v. Seegar, 10 So.2d 320, 151 Fla. 643.

Ill—Popadowski v. Bergaman, 26 N. E.2d 722, 304 Ill App. 422.

Ind.—Pfisterer v. Key, 33 N.E.2d 830, 218 Ind. 521.

Iowa—Webster v. Luckow, 258 N. W. 685, 219 Iowa 1048.

Mass—Di Rienzo v. Goldfarb, 153 N. E 784, 257 Mass. 272.

Mich.—Stehouwer v. Lewis, 227 N.W. 759, 249 Mich. 76, 74 A.L.R. 844.

Minn.—Borowski v. Sargent, 246 N. W. 540, 188 Minn. 102.

Mo.—Erxleben v. Kaster, App., 21 S. W.2d 195.

Mont.—Lesage v. Largey Lumber Co., 43 P 2d 896, 99 Mont. 372.

N.Y.—Verni v. Johnson, 68 N.E.2d 431, 295 N.Y. 436—*Caloro v. Smith*, 77 N.Y.S.2d 621, 273 App.Div. 927—*Constantinides v. Manhattan Transit Co.*, 34 N.Y.S.2d 600, 264 App.Div. 147.

N.D.—Kalsow v. Grob, 237 N.W. 848, 61 N.D. 119.

Instructions in an action for injuries to an animal⁵⁶ or to persons driving or leading animals⁵⁷ as a result of the operation of a motor vehicle should state the law correctly and in a proper manner.

§ 541. — Injury to Child or Person under Disability

Instructions as to the duty of care owed by and to children or persons under a disability should correctly state the law applicable under the issues.

In general, instructions in actions involving injuries to children from the operation of motor vehicles should state the law correctly,⁵⁸ and such in-

structions should not be confusing or misleading;⁵⁹ | ings and evidence in the case.⁶⁰ It has been held
moreover, they should be warranted by the plead- | that defendant is not entitled to an instruction on

Ohio.—Wheaton v. Conkle, 14 N.E.2d 363, 57 Ohio App. 373—Fightmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.

Utah.—Woodward v. Spring Canyon Coal Co., 63 P.2d 267, 90 Utah 578.

Instructions held erroneous or properly refused

(1) Generally.

Cal.—Conroy v. Perez, 148 P.2d 680, 64 Cal.App.2d 217.

Ill.—Levin v. Lauterbach Coal & Ice Co., 67 N.E.2d 303, 329 Ill.App. 180—Popadowski v. Bergaman, 26 N.E.2d 722, 304 Ill.App. 422—Klimczak v. Druley-O'Brien Co., 17 N.E.2d 266, 297 Ill.App. 635—Cassens v. Tillberg, 13 N.E.2d 644, 294 Ill. App. 168.

Iowa.—Webster v. Luckow, 258 N.W. 685, 219 Iowa 1048.

Ky.—Ice Delivery Co. v. Thomas, 160 S.W.2d 605, 290 Ky. 230—Gretton v. Duncan, 38 S.W.2d 448, 238 Ky. 554.

N.M.—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.

N.Y.—Ulaszek v. Buczkowski, 19 N.Y.S.2d 912, 259 App.Div. 967, followed in 19 N.Y.S.2d 914, 259 App. Div. 967.

N.C.—Wooten v. Smith, 200 S.E. 921, 215 N.C. 48.

Ohio.—Leopold v. Williams, 8 N.E.2d 476, 54 Ohio App. 540.

Pa.—Levchik v. Shaffer, 194 A. 923, 327 Pa. 570.

Tenn.—Garis v. Eberling, 71 S.W.2d 215, 18 Tenn.App. 1.

Va.—Wash v. Holland, 183 S.E. 236, 166 Va. 45—Ball v. Witten, 154 S.E. 547, 155 Va. 40.

W.Va.—McCune v. Crawley Transp. Co., 198 S.E. 516, 120 W.Va. 301.

(2) Care required of child or duty owed by him.

U.S.—Blodgett v. Pinkerton Tobacco Co., C.C.A.Mich., 79 F.2d 945

Cal.—Scalf v. Elcher, 53 P.2d 368, 11 Cal.App.2d 44—Bieser v. Davies, 7 P.2d 388, 119 Cal.App. 659—Richmond v. Moore, 284 P. 681, 103 Cal. App. 173.

Conn.—Marfyak v. New England Transp. Co., 179 A. 9, 120 Conn. 46.

Ill.—Levin v. Lauterbach Coal & Ice Co., 67 N.E.2d 303, 329 Ill.App. 180—Kuzminski v. Waser, 41 N.E.2d 1008, 314 Ill.App. 438—Hughes v. Medendorp, 13 N.E.2d 1015, 294 Ill.App. 424—Cassens v. Tillberg, 13 N.E.2d 644, 294 Ill.App. 168—Nelson v. Seymour, 248 Ill.App. 392.

Ky.—Lehman v. Patterson, 182 S.W.2d 897, 298 Ky. 360—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.

Md.—Mahan v. State, to Use of Carr, 191 A. 675, 172 Md. 378.

N.H.—Cleveland v. Reasby, 33 A.2d 554, 92 N.H. 518.

N.Y.—Weidenfeld v. Surface Transp. Corp. of N. Y., 55 N.Y.S.2d 780, 269 App.Div. 341—Locklin v. Fisher, 36 N.Y.S.2d 162, 264 App.Div. 452, appeal denied 37 N.Y.S.2d 486, 264 App.Div. 961—Faichney v. Ketelsen, 295 N.Y.S. 246, 250 App.Div. 868.

Okl.—Morris v. White, 60 P.2d 1031, 177 Okl. 489.

Pa.—Thompson v. Philadelphia Transp. Co., 53 A.2d 120, 357 Pa. 3.

Tex.—Yellow Cab & Baggage Co. v. Smith, Civ App., 30 S.W.2d 697, error dismissed.

W.Va.—Jones v. Smithson, 193 S.E. 802, 119 W.Va. 389.

Instructions held not prejudicial

Ala.—Culverhouse v. Gammill, 115 So. 105, 217 Ala. 137

Ky.—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666.

Tenn.—Kidd v. Kirby, 1 Tenn.App. 242.

Wash.—Fabbio v. Diesel Oil Sales Co., 95 P.2d 788, 1 Wash.2d 234—Sasse v. Hale Morton Taxi & Auto Co., 246 P. 940, 139 Wash. 359.

Instruction held insufficient

In action for death of child who was killed when paper box in which child was playing in private driveway was struck by defendant's truck when making a delivery, an instruction on the ordinary law of the road was insufficient and court should further have instructed that if driver discovered or should have discovered that there was some motion of the box as would place on him the duty to investigate, and driver failed to make such investigation, such failure would be the proximate cause of death.—Meeks Motor Freight v. Ham's Adm'r, 193 S.W.2d 746, 302 Ky. 71.

59. Instructions held misleading

(1) Generally.

Ala.—Hampton v. Roberson, 163 So. 644, 231 Ala. 55.

Ky.—Golubic v. Rasnick, 39 S.W.2d 513, 239 Ky. 355.

N.J.—Schifano v. Kaiser, 41 A.2d 206, 132 N.J.Law 499

(2) Fault or contributory negligence of child.

Cal.—Carrillo v. Helms Bakeries, 44 P.2d 604, 6 Cal.App.2d 299.

Conn.—Morro v. Brockett, 145 A. 659, 109 Conn. 87.

Tenn.—Finton v. Mercury Motors, App., 194 S.W.2d 354.

Wash.—Everest v. Riecken, 193 P.2d 353.

Instructions held not misleading

Ky.—Ballback's Adm'r v. Boland-Maloney Lumber Co., 208 S.W.2d 940,

306 Ky. 647—Bray-Robinson Clothing Co. v. Higgins, 293 S.W. 151, 219 Ky. 293.

Md.—Zulver v. Roberts, 161 A. 9, 162 Md. 636.

60. Instructions held authorized under pleadings

Mo.—Nash v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 570—Hufts v. Miller, App., 299 S.W. 85.

Utah.—Woodward v. Spring Canyon Coal Co., 63 P.2d 267, 90 Utah 578.

Instructions held required or warranted under evidence

(1) Generally.

Ala.—Patrick v. Mitchell, 6 So.2d 889, 242 Ala. 414.

Cal.—Blanton v. Curry, 129 P.2d 1, 20 Cal.2d 793—Harrison v. Gamatero, 125 P.2d 904, 52 Cal.App.2d 178—Wilson v. Mardakis, 280 P. 989, 100 Cal.App. 678.

Conn.—De Lucia v. Polio, 140 A. 733, 107 Conn. 437.

Idaho.—Byington v. Horton, 102 P.2d 652, 61 Idaho 389—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.

Ill.—Freehill v. Consumers' Co., 243 Ill.App. 1.

Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521—Acme-Evans Co. v. Schnepf, 14 N.E.2d 561, 214 Ind. 394—Rentschler v. Hall, 69 N.E.2d 619, 117 Ind.App. 255—Acme-Evans Co. v. Schnepf, 15 N.E.2d 742, 105 Ind.App. 475.

Iowa.—Lenth v. Schug, 281 N.W. 510, 226 Iowa 1, affirmed 287 N.W. 596, 226 Iowa 1.

Kan.—Harvey v. Cole, 153 P.2d 916, 159 Kan 239.

Ky.—Lundy v. Brown's Adm'r, 205 S.W.2d 498, 305 Ky. 721—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189—Hall's Adm'r v. City of Greensburg, 43 S.W.2d 660, 241 Ky. 279.

Mich.—Bade v. Nies, 214 N.W. 170, 239 Mich. 37.

Mo.—Williams v. Excavating & Foundation Co., 93 S.W.2d 123, 230 Mo.App. 973—Cervillo v. Manhattan Oil Co., 49 S.W.2d 183, 226 Mo. App. 1090—Erleben v. Kaster, App., 21 S.W.2d 195.

N.H.—Bullard v. McCarthy, 195 A. 355, 89 N.H. 158.

N.J.—Schifano v. Kaiser, 41 A.2d 206, 132 N.J.Law 499—Rich v. Central Electrottype Foundry Corporation, 3 A.2d 584, 121 N.J.Law 481—Tomaszewski v. Schactman, 174 A. 530, 113 N.J.Law 579.

N.C.—Bass v. Hocutt, 19 S.E.2d 871, 221 N.C. 218.

Pa.—Heffelfinger v. Schell, Com.Pl., 50 Dauph.Co. 1.

Utah.—Van Cleave v. Lynch, 166 F.2d 244, 109 Utah 149.

the doctrine of sudden appearance in the case of an infant pedestrian chargeable with contributory negligence unless there is evidence that such infant slipped, fell, or was propelled into the path of the vehicle involuntarily,⁶¹ and that in the absence of such evidence the doctrine of sudden appearance is sufficiently presented by a contributory negligence instruction.⁶² A requested instruction with respect to the duty of a driver to a child is properly refused where it fails to disclose the whole duty of the driver.⁶³

Persons under disability. The instructions in actions involving injuries to a person who is under a

disability should correctly set forth the law⁶⁴ and should not tend to mislead or confuse the jury;⁶⁵ moreover, such instructions should be applicable under the evidence in the case.⁶⁶

§ 542. — Injury to Pedestrian

Instructions on the respective rights and duties of motorists and pedestrians should correctly set forth the law applicable under the pleadings and evidence, and should not be confusing or misleading.

In an action for injuries sustained by pedestrians as a result of the operation of motor vehicles, the parties are entitled to have the jury properly instructed on the issues presented,⁶⁷ and instructions

(2) Minor bicyclists
Idaho.—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642
Iowa.—Tuthill v. Alden, 30 N.W.2d 726.
Ky.—Lyons v. Great Atlantic & Pacific Tea Co., 193 S.W.2d 450, 301 Ky. 327—Thomas v. Dahl, 170 S.W.2d 337, 293 Ky. 808—Deegan v. Wilson, 157 S.W.2d 68, 288 Ky. 801.

Mo.—Nash v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 570.
Wash.—Rieger v. Kirkland, 111 P.2d 241, 7 Wash.2d 326

Instructions held not warranted or required under evidence

(1) Generally
Cal.—Wilson v. Mardakis, 280 P. 989, 100 Cal. App. 678.
Idaho.—Shaddy v. Daley, 76 P.2d 279, 58 Idaho 536.
Ill.—Hughes v. Medendorp, 13 N.E.2d 1015, 294 Ill. App. 424
Iowa.—Kallansrud v. Libbey, 13 N.W.2d 684, 234 Iowa 700.
Ky.—Dr. Pepper Bottling Co. of Kentucky v. Hazell, 144 S.W.2d 798, 284 Ky. 333—Roselle v. Birmingham, 46 S.W.2d 784, 242 Ky. 496.
Md.—York Ice Machinery Corporation v. Sachs, 173 A. 240, 167 Md. 113.

Mass.—Mroczek v. Craig, 44 N.E.2d 644, 312 Mass. 236.
Mich.—Guscinski v. Kenzie, 275 N.W. 820, 282 Mich. 204.
Minn.—Marcum v. Clover Leaf Creamery Co., 80 N.W.2d 24, 225 Minn. 139.

Mo.—Wilson v. Chattin, 72 S.W.2d 1001, 335 Mo. 375—Cervillo v. Manhattan Oil Co., 49 S.W.2d 183, 226 Mo. App. 1090—Renfro v. Central Coal & Coke Co., 19 S.W.2d 766, 223 Mo. App. 1219.

N.H.—Marcoux v. Collins, 53 A.2d 322, 94 N.H. 345.

N.J.—Koch v. Koll, 164 A. 441, 110 N.J. Law 293.

N.Y.—Ullaszek v. Buczkowski, 19 N.Y.S.2d 912, 259 App. Div. 987, followed in 19 N.Y.S.2d 914, 259 App.

Div. 967—Caronia v. Muller, 293 N.Y.S. 363, 250 App. Div. 722.

Or.—Lane v. Hatfield, 143 P.2d 230, 173 Or. 79.

Pa.—Curley v. Edwin A. Smith & Sons, 31 A.2d 113, 346 Pa. 489.

Va.—Price v. Burton, 154 S.E. 499, 155 Va. 229.

Wis.—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66

(2) Minor bicyclists.

Ky.—Thomas v. Dahl, 170 S.W.2d 337, 293 Ky. 808

Mich.—Ertzhischoff v. Smith, 282 N.W. 159, 286 Mich. 306

Wash.—Everest v. Riecken, 193 P.2d 353

Applicability to pleadings and evidence in general see *infra* § 556.

61. Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.

62. Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, *supra*.

63. Va.—Edgerton v. Norfolk Southern Bus Corp., 47 S.E.2d 409, 187 Va. 642.

64. Ky.—Whittaker v. Thornberry, 209 S.W.2d 498, 306 Ky. 830—Hatfield v. Sargent's Adm'r, 209 S.W.2d 306, 306 Ky. 782.

Wis.—Benedict v. Berg, 281 N.W. 650, 229 Wis. 1.

Instructions held sufficient or not erroneous

(1) Blind pedestrians or persons with defective eyesight.

Conn.—Kerin v. Baccel, 5 A.2d 876, 125 Conn. 335.

Or.—Weinstein v. Wheeler, 15 P.2d 383, 141 Or. 246.

(2) Deaf persons or persons with impaired hearing.

Ky.—Short Way Lines v. Sutton's Adm'r, 164 S.W.2d 809, 291 Ky. 541.

Or.—Mackie v. McGraw, 191 P.2d 403.

Wis.—Hanson v. Matas, 249 N.W. 505, 212 Wis. 275, 93 A.L.R. 546.

(3) Intoxicated pedestrians.

Cal.—Johnston v. Brewer, 105 P.2d 365, 40 Cal. App.2d 583.

Wash.—Mattson v. Cragin, 272 P. 86, 149 Wash. 638.

Instructions held properly refused

(1) Intoxicated persons.
U.S.—American Employers' Ins. Co. v. McLean, C.C.A. La., 127 F.2d 275.
Conn.—Zenuk v. Johnson, 158 A. 910, 114 Conn. 383.

(2) Persons with defective hearing.—Jones v. Bayley, 122 P.2d 293, 49 Cal. App.2d 647.

65. Cal.—Jones v. Bayley, *supra*.

66. Instructions held required under evidence

Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.

Instructions held properly refused under evidence

(1) Aged, lame woman—Bellemare v. Ford, 45 A.2d 882, 94 N.H. 38.

(2) Intoxicated person.—American Employers' Ins. Co. v. McLean, C.C.A. La., 127 F.2d 275.

67. U.S.—Proel v. Nugent, C.C.A.N. H., 97 F.2d 353

Cal.—Fischer v. Keen, 110 P.2d 693, 43 Cal. App.2d 244—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal. App. 221

Colo.—Stahl v. Cooper, 190 P.2d 891, 117 Colo. 468.

Conn.—Voronella v. White Line Bus Corporation, 192 A. 265, 123 Conn. 25.

Ind.—Holt v. Basore, App., 77 N.E.2d 903.

Iowa.—Dickeson v. Lzicar, 225 N.W. 406, 208 Iowa 275.

Ky.—Whittaker v. Thornberry, 209 S.W.2d 498, 306 Ky. 830—Field v. Collins, 92 S.W.2d 793, 263 Ky. 474—Southeastern Telephone Co. v. Payne, 69 S.W.2d 358, 253 Ky. 245.

Md.—Nelson v. Seiler, 139 A. 564, 154 Md. 63.

Mich.—Richardson v. Williams, 228 N.W. 766, 249 Mich. 350.

Mo.—Duckworth v. Dent, App., 135 S.W.2d 28, reversed on other grounds 142 S.W.2d 85, 346 Mo. 518.

N.Y.—Booth v. City of Rochester, 15 N.Y.S.2d 945, 258 App. Div. 849—

Burger v. Fifth Ave. Coach Co., 235 N.Y.S. 627, 222 App. Div. 187, re-

as to the relative rights of a pedestrian and the driver of a motor vehicle should be given where, under the evidence, such rights are important.⁶⁸ Such instructions should not be confusing or misleading⁶⁹ and should correctly set forth the law.⁷⁰ The instructions should be applicable under the pleadings

- versed on other grounds 164 N.E. 592, 249 N.Y. 583.
- N.D.—Ignatowitch v. McLaughlin, 262 N.W. 352, 66 N.D. 132.
- Ohio.—Glasco v. Mendelman, App., 58 N.E.2d 94, reversed on other grounds 56 N.E.2d 210, 143 Ohio St. 649.
- Pa.—Bright v. Stettenbauer, 15 A.2d 676, 339 Pa. 545.
- Utah.—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.
- Form of instruction**
- Ky.—Nowak v. Joseph, 121 S.W.2d 339, 275 Ky. 470.
68. Cal.—Brown v. Brashear, 133 P. 505, 22 Cal.App. 135.
69. **Instructions held confusing or misleading**
- Ala.—Montgomery City Lines v. Scott, 26 So.2d 200, 248 Ala. 27—City of Birmingham v. Whitworth, 119 So. 841, 218 Ala. 603.
- Cal.—Morris v. Purity Sausage Co., 38 P.2d 193, 2 Cal.App.2d 536—Warnke v. Griffith Co., 24 P.2d 583, 133 Cal.App. 481.
- Ill.—Brackett v. Builders' Lumber Co., 253 Ill.App. 107.
- Mo.—Weber v. Evans, App., 15 S.W. 2d 370.
- Ohio.—Scott v. Hy-Grade Food Products Corporation, 2 N.E.2d 608, 131 Ohio St. 225.
- Or.—Snabel v. Barber, 300 P. 331, 137 Or. 88.
- Va.—Stuart v. Coates, 42 S.E.2d 311, 186 Va. 227.
- Wash.—Baker v. Rosaja, 5 P.2d 1019, 165 Wash 532.
- W.Va.—Liston v. Miller, 169 S.E. 398, 113 W.Va. 730.
- Instructions held not confusing or misleading**
- Cal.—Burk v. Extrafine Bread Bakery, 280 P. 522, 208 Cal. 105—Galwey v. Pacific Auto Stages, 273 P. 866, 96 Cal.App. 169—Ballos v. Natural, 269 P. 972, 93 Cal.App. 601.
- Ga.—American Fidelity & Casualty Co. v. McWilliams, 191 S.E. 191, 55 Ga.App. 658.
- Mo.—Helbel v. Ahrens, 55 S.W.2d 473.
- Or.—Holman v. Uglow, 3 P.2d 120, 137 Or. 358—Hayes v. Uglow, 3 P.2d 126, 137 Or. 373.
70. Cal.—Hedding v. Pearson, 173 P.2d 382, 76 Cal.App.2d 481.
- Conn.—Kucineski v. Davey, 197 A. 688, 123 Conn. 662.
- 42 C.J. p 1276 note 11.
- Instructions held sufficient, not erroneous, or improperly refused**
- (1) Generally.
- U.S.—Cherry v. Dealers Transport Co., D.C.Mo., 64 F.Supp. 682.
- Ala.—Brown v. Woolverton, 121 So. 404, 219 Ala. 112, 64 A.L.R. 640.
- Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381, 60 Ariz. 354.
- Ark.—Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597, 197 Ark. 425.
- Cal.—Watkins v. Nutting, 110 P.2d 384, 17 Cal.2d 490—Burk v. Extrafine Bread Bakery, 280 P. 522, 208 Cal. 105—La Branch v. Scott, 185 P.2d 823, 82 Cal.App.2d 1—Powers v. Shelton, 169 P.2d 482, 74 Cal. App.2d 757—McNear v. Pacific Greyhound Lines, 146 P.2d 34, 63 Cal.App.2d 11—Jones v. Bayley, 122 P.2d 293, 49 Cal.App.2d 647—El Jitsuda v. Hirt, 111 P.2d 360, 43 Cal. App.2d 681—Martin v. Vierra, 93 P. 2d 261, 36 Cal.App.2d 86, hearing denied 94 P.2d 567, 36 Cal.App.2d 86—Dawson v. Lalanne, 70 P.2d 1002, 22 Cal.App.2d 314—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App. 738—Brush v. Kurstin, 53 P.2d 777, 11 Cal.App.2d 258—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal. App. 587—Augenthaler v. Pinkert, 32 P.2d 686, 138 Cal.App. 455—Warnke v. Griffith Co., 24 P.2d 583, 133 Cal.App. 481—Stealey v. Chessum, 11 P.2d 428, 123 Cal.App. 446—Hasty v. Trevillian, 283 P. 148, 102 Cal.App. 405—Brandes v. Rucker-Fuller Desk Co., 282 P. 1009, 102 Cal.App. 221—Vedder v. Bireley, 267 P. 724, 92 Cal.App. 52—Nichols v. Nelson, 252 P. 739, 80 Cal. App. 590.
- Conn.—Miller v. Stamford Transit Co., 32 A.2d 53, 130 Conn. 63—Montagna v. Jewell, 175 A. 570, 119 Conn. 178.
- Ga.—Hirsch v. Plowden, 134 S.E. 833, 35 Ga.App. 763.
- Idaho.—Stearns v. Graves, 111 P.2d 882, 62 Idaho 312.
- Ill.—Turzinski v. Pam, 64 N.E.2d 726, 392 Ill. 471, appeal transferred, see, 73 N.E.2d 162, 331 Ill.App. 413—Derango v. Rubin, 34 N.E.2d 719, 310 Ill.App. 536—Flickerle v. Herman Seckamp, Inc., 274 Ill.App. 310.
- Ind.—Vockel v. Rhynearson, 197 N.E. 705, 101 Ind. App. 637, rehearing denied 199 N.E. 162.
- Iowa.—Scott v. McKelvey, 290 N.W. 729, 228 Iowa 264.
- Ky.—Hughes v. Bates' Adm'r, 129 S.W.2d 138, 278 Ky. 592—Girtman's Adm'r v. Akins, 120 S.W.2d 660, 275 Ky. 2—Kelly v. Marcum, 114 S.W.2d 1102, 272 Ky. 609—Deshazer v. Cheatham, 24 S.W.2d 936, 233 Ky. 59.
- Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223.
- Mass.—Byrne v. Dunn, 5 N.E.2d 10, 296 Mass. 184.
- Minn.—Heikkinen v. Cashen, 235 N.W. 879, 183 Minn. 146—Modrinich v. Loyal Order of Moose, No. 1117, of Virginia, 227 N.W. 207, 178 Minn. 382.
- Mo.—Relling v. Russell, 153 S.W.2d 6, 348 Mo. 279—Goldbaum v. James Mulligan Printing & Publishing Co., 149 S.W.2d 348, 347 Mo. 844—Kenney v. Hoerr, 23 S.W.2d 96, 324 Mo. 368—Svehla v. Taxi Owners Ass'n, App., 157 S.W.2d 225—Lach v. Buckner, 86 S.W.2d 954, 229 Mo.App. 1066—Robertson v. Scoggins, App., 73 S.W.2d 430—Shannon v. People's Motorbus Co. of St. Louis, App., 20 S.W.2d 580—Buck v. Thatcher, 7 S.W.2d 398, 222 Mo.App. 1036—Russell v. Bauer-Berger Grocery Co., App., 288 S.W. 985.
- Mont.—Pierce v. Safeway Stores, 20 P.2d 253, 93 Mont. 560.
- Neb.—Chew v. Coffin, 12 N.W.2d 839, 144 Neb. 170.
- N.H.—L'Heureux v. Desmarais, 197 A. 327, 89 N.H. 237.
- N.J.—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380—Graff v. Louis Stern Sons, 135 A. 335, 103 N.J.Law 13.
- N.C.—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.
- Ohio.—Will v. McCoy, 20 N.E.2d 371, 135 Ohio St. 241—Hunter v. Brumby, 3 N.E.2d 353, 131 Ohio St. 443—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335—Titus v. Stouffer, App., 40 N.E.2d 178.
- Or.—Mackie v. McGraw, 191 P.2d 403—Larkins v. Utah Copper Co., 127 P.2d 354, 169 Or. 499—Zahara v. Brandt, 94 P.2d 718, 162 Or. 666—Cline v. Bush, 52 P.2d 652, 152 Or. 63—Krieger v. Doolittle, 18 P. 2d 1041, 142 Or. 122—Brady v. Schnitzer, 295 P. 961, 135 Or. 250—Collins v. Red Top Cab Co., 275 P. 913, 129 Or. 64.
- Tenn.—Dennie v. Isler, 8 Tenn.App. 1.
- Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.
- Va.—Herbert v. Stephenson, 35 S.E. 2d 753, 184 Va. 457—Lucas v. Craft, 170 S.E. 838, 161 Va. 228.
- Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881—Forquer v. Hidden, 71 P.2d 1000, 191 Wash. 638—Hiteshue v. Robinson, 16 P. 2d 610, 170 Wash. 272.
- (2) Contributory negligence of, or care owed by, pedestrian.
- U.S.—Smith v. Town of Orangetown, C.C.A.N.Y., 150 F.2d 782, certiorari denied 68 S.Ct. 171, 326 U.S. 787, 90 L.Ed. 462—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101—Sprinkle v. Davis, C.C.A.Va., 104 F.2d 487.
- Ala.—Brown v. Woolverton, 121 So. 404, 219 Ala. 112, 64 A.L.R. 640.

- Ariz.—Coe v. Hough, 35 P.2d 547, 43 Ariz. 293.
- Cal.—Benton v. Douglas, 187 P.2d 469, 82 Cal.App.2d 784—Ducat v. Goldner, 175 P.2d 914, 77 Cal.App.2d 332—Bosserman v. Olmstead, 175 P.2d 49, 77 Cal.App.2d 236—McGough v. Hendrickson, 138 P.2d 110, 58 Cal.App.2d 60—Fischer v. Keen, 110 P.2d 693, 43 Cal.App.2d 244—Colburn v. Schilling, 107 P.2d 279, 41 Cal.App.2d 541—Martin v. Vierra, 93 P.2d 261, 34 Cal.App.2d 86, hearing denied 94 P.2d 567, 34 Cal.App.2d 86—Dawson v. Lalanne, 70 P.2d 1002, 22 Cal.App.2d 314—Whicker v. Crescent Auto Co., 66 P.2d 749, 20 Cal.App.2d 240—Kap-pier v. Harris, 52 P.2d 569, 10 Cal.App.2d 630—Halaminsky v. Nelson, 42 P.2d 676, 5 Cal.App.2d 287—Morris v. Purity Sausage Co., 38 P.2d 193, 2 Cal.App.2d 536—Warn-ke v. Griffith Co., 24 P.2d 583, 133 Cal.App. 481—Morgan v. Los An-geles Rock & Gravel Corporation, 287 P. 152, 105 Cal.App. 221—Rin-ker v. Carl, 283 P. 317, 102 Cal.App. 436—Peters v. United Studios, 277 P. 156, 98 Cal App. 373—Vedder v. Bireley, 267 P. 724, 92 Cal.App. 52—Wright v. Foreman, 261 P. 481, 86 Cal.App. 595—Lower v. Hughes, 251 P. 952, 80 Cal App 444.
- Conn.—Atkins v. Varrone, 14 A.2d 731, 127 Conn. 156.
- D.C.—American Ice Co. v. Moorehead, 66 F.2d 792, 62 App.DC 266—Chr. Heurich Brewing Co. v. McGavin, 16 F.2d 334, 56 App DC 389
- Ind.—American Carloading Corpora-tion v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649.
- Iowa.—Scott v. McKelvey, 290 N.W. 729, 228 Iowa 264—Lorimer v. Hutchinson Ice Cream Co., 219 N. W. 220, 216 Iowa 384—Kessel v. Hunt, 244 N.W. 714, 215 Iowa 117.
- Kan.—Shrout v. Bird, 9 P.2d 673, 135 Kan. 218
- Ky.—Remmers' Ex'r v. Mayhugh, 197 S.W.2d 450, 303 Ky. 366—Ramsey v. Sharpley, 171 S.W.2d 427, 294 Ky. 286—Knight v. Silver Fleet Motor Express, 159 S.W.2d 1002, 289 Ky. 661—Cundiff v. Nave, 39 S. W.2d 471, 240 Ky. 47—Deshazer v. Cheatham, 24 S.W.2d 936, 233 Ky. 59—Berry v. Irwin, 295 S.W. 1020, 220 Ky. 708.
- Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223—Gordon v. Chait, 148 A. 232, 158 Md. 202.
- Mass.—Barrett v. Checker Taxi Co., 160 N.E. 792, 263 Mass. 252.
- Mich.—Krukowski v. Englehardt, 267 N.W. 806, 276 Mich. 136.
- Minn.—Heikkinen v. Cashen, 235 N. W. 879, 183 Minn. 146.
- Mo.—Kimbrough v. Chervitz, 186 S. W.2d 461, 363 Mo. 1154—Goldbaum v. James Mulligan Printing & Pub-lishing Co., 149 S.W.2d 348, 347 Mo. 844—Heibel v. Ahrens, 55 S.W.2d 473—Robertson v. Scoggins, App. 78 S.W.2d 430—Russell v. Bauer-berger Grocery Co., App., 288 S.W. 985.
- Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.
- N.Y.—Aetna Cas. & Sur. Co. v. Tuck-er, 59 N.Y.S.2d 355, 270 App.Div. 783.
- Ohio.—Moody v. Vickers, 72 N.E.2d 280, 79 Ohio App. 218—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335—Valentine v. Pavlonis, 160 N. E. 737, 27 Ohio App. 26.
- Or.—Mackie v. McGraw, 191 P.2d 403—Brady v. Schnitzer, 295 P. 961, 135 Or. 250.
- Pa.—La Posta v. Himmer, 55 A.2d 751, 358 Pa. 69.
- Utah.—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.
- Va.—Lucas v. Craft, 170 S.E. 836, 161 Va. 228.
- Wash.—Lublinter v. Ruge, 153 P.2d 694, 21 Wash.2d 881—Hiteshue v. Robinson, 16 P.2d 610, 170 Wash. 273—Hooven v. Moen, 272 P. 50, 150 Wash. 8—Jurisch v. Puget Transp. Co., 258 P. 39, 144 Wash. 409.
- Instructions held erroneous or prop-erly refused**
- (1) Generally.
- Ala.—Alabama By-Products Corpora-tion v. Rutherford, 195 So. 210, 239 Ala. 413—McBride v. Barclay, 122 So. 642, 219 Ala. 475.
- Cal.—Roddy v. American Smelting & Refining Co., 93 P.2d 841, 34 Cal App.2d 457—Thompson v. Baldwin, 80 P.2d 198, 26 Cal.App.2d 703—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587—Tuten v. Town of Emeryville, 35 P.2d 195, 139 Cal.App. 745—Bieser v. Davies, 7 P.2d 388, 119 Cal.App. 659—McCormac v. Chaney, 6 P.2d 978, 119 Cal.App. 470—Gootar v. Levin, 293 P. 706, 109 Cal.App. 703.
- Conn.—Caschetto v. Silliman & God-frey Co., 9 A.2d 286, 126 Conn. 22—Hill v. Way, 168 A. 1, 117 Conn. 359.
- Ill.—Deitch v. Rubenstein, 15 N.E.2d 60, 295 Ill.App. 612—Tuttle v. Checker Taxi Co., 274 Ill.App. 525—Williams v. Stearns, 256 Ill.App. 425.
- Iowa.—Edwards v. Perley, 274 N.W. 910, 223 Iowa 1119—Orth v. Gregg, 250 N.W. 113, 217 Iowa 516.
- Ky.—Cheatham v. Chabal, 192 S.W. 2d 812, 301 Ky. 616—McElrath v. Barnett, 120 S.W.2d 216, 274 Ky. 771—Gilbert's Adm'r v. Allen, 94 S. W.2d 341, 264 Ky. 202—Southeast-ern Telephone Co. v. Payne, 69 S. W.2d 358, 253 Ky. 245—Porter v. Music, 67 S.W.2d 958, 252 Ky. 582—Best's Adm'r v. Adams, 28 S.W. 2d 484, 234 Ky. 702—Jefferson's Adm'r v. Baker, 22 S.W.2d 448, 232 Ky. 98.
- Me.—Young v. Potter, 174 A. 387, 133 Me. 104.
- Mich.—Nickels v. Hallen, 225 N.W. 569, 247 Mich. 291.
- Miss.—Reid v. McDevitt, 140 So. 722, 163 Miss. 226.
- Mo.—Kenney v. Hoerr, 23 S.W.2d 96, 324 Mo. 368.
- N.J.—Butler v. Jersey Coast News Co., 160 A. 659, 109 N.J.Law 255—Winters v. Dorovitz, 167 A. 220, 11 N.J.Misc. 616—Dugan v. Public Service Transp. Co., 136 A. 195, 5 N.J.Misc. 245.
- N.Y.—Imbriale v. Skidmore, 300 N. Y.S. 4, 252 App Div 884—Uralsky v. Gribbon, 275 N.Y.S. 733, 242 App. Div. 533.
- N.C.—Donivant v. Swaim, 47 S.E.2d 707, 229 N.C. 114—Templeton v. Kelley, 5 S.E.2d 555, 216 N.C. 487, modified on other grounds 7 S.E.2d 380, 217 N.C. 164.
- N.D.—Clark v. Feldman, 224 N.W. 167, 57 N.D. 741.
- Ohio.—Kohn v. B. F. Goodrich Co., 38 N.E.2d 592, 139 Ohio St. 141—Loftus v. Palmer, App., 46 N.E.2d 312—Weaver v. Liberty Cabs, App., 33 N.E.2d 853.
- Or.—Cline v. Bush, 52 P.2d 652, 152 Or. 63.
- Pa.—Flynn v. Moore, 88 Pa.Super. 361.
- Tenn.—Gouldener v. Brittain, 114 S. W.2d 783, 173 Tenn. 32.
- Wash.—Strom v. Dobrin, 186 P.2d 906, 29 Wash.2d 198—Baker v. Ro-salia, 5 P.2d 1019, 165 Wash. 532.
- W.Va.—Liston v. Miller, 169 S.E. 398, 113 W.Va. 730.
- (2) Contributory negligence of, or duties owed by, pedestrian.
- U.S.—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101.
- Ala.—W & W. Pickle & Canning Co. v. Baskin, 181 So. 765, 236 Ala. 168—Cooper v. Auman, 122 So. 351, 219 Ala. 336.
- Ariz.—Coe v. Hough, 25 P.2d 547, 42 Ariz. 293.
- Cal.—Goodwin v. Foley, 170 P.2d 503, 75 Cal.App.2d 195—Casalegno v. Leonard, 105 P.2d 125, 40 Cal App. 2d 575—Martin v. Vierra, 93 P.2d 261, 34 Cal.App.2d 86, hearing de-nied 94 P.2d 567, 34 Cal.App.2d 86—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App.2d 738—Morris v. Purity Sausage Co., 38 P.2d 193, 2 Cal.App. 2d 536—Azzaro v. O'Connell, 9 P.2d 345, 121 Cal.App. 617.
- Colo.—Sherman v. Ross, 62 P.2d 1151, 99 Colo. 354.
- Conn.—McManus v. Jarvis, 22 A.2d 857, 128 Conn. 707.
- Idaho.—Quillin v. Colquhoun, 247 P. 740, 42 Idaho 522.
- Ill.—Ripke v. Bernstein, 76 N.E.2d 352, 332 Ill.App. 658—Breitmeier v. Sutera, 63 N.E.2d 667, 327 Ill.App. 221—Deitch v. Rubenstein, 15 N. E.2d 60, 295 Ill.App. 612.
- Ind.—American Carloading Corpora-tion v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649—Fields v. Hahn, 57 N.E.2d 955, 115 Ind. App. 365, petition dismissed 59 N. E.2d 359, 223 Ind. 178.

and evidence in the case and the theory on which | it was tried;⁷¹ and, in this connection, the propriety

Ky.—Jackson's Adm'r v. Rose, 40 S. W.2d 343, 239 Ky. 754.
Mass.—Noyes v. Whiting, 194 N.E. 93, 289 Mass. 270.
Mich.—Herzberg v. Knight, 286 N.W. 145, 289 Mich. 29—Pearce v. Rodell, 276 N.W. 883, 283 Mich. 19—Billingsley v. Gulick, 233 N.W. 225, 252 Mich. 235.
Minn.—Corridan v. Agranoff, 297 N.W. 759, 210 Minn. 237.
Mo.—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517—Bullmore v. Becler, App., 33 S.W.2d 161—Nickelson v. Cowan, App., 9 S.W.2d 534—Marks v. Hurst, App., 296 S.W. 249.
N.H.—L'Heureux v. Desmarais, 197 A. 327, 89 N.H. 237.
N.J.—Costanza v. Cavanaugh, 35 A.2d 612, 131 N.J.Law 175—Kovacs v. Ford, 158 A. 473, 108 N.J.Law 379—Hauranchalk v. Warren & Arthur Smadbeck, 177 A. 240, 13 N.J.Misc. 190.
N.Y.—Dlugoff v. Tecklin, 33 N.Y.S.2d 539, 263 App.Div. 998.
N.D.—Clark v. Feldman, 224 N.W. 167, 57 N.D. 741.
Ohio.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284—Giglio v. La-sita, 55 N.E.2d 666, 73 Ohio App. 207—Loftus v. Palmer, App., 46 N.E.2d 312—Liberty Highway Co. v. Mastin, 170 N.E. 604, 34 Ohio App. 183.
Or.—Scott v. Brogan, 73 P.2d 688, 157 Or. 549—Cline v. Bush, 52 P.2d 652, 152 Or. 63.
Tenn.—Tiffany v. Shipley, 161 S.W.2d 373, 25 Tenn. App. 539.
Tex.—Psimenos v. Huntley, Civ.App., 47 S.W.2d 622.
Vt.—Howley v. Kantor, 163 A. 628, 105 Vt. 128.
Wash.—Gable v. Field, 66 P.2d 356, 189 Wash. 526.
Instructions held not prejudicial
Cal.—Olson v. Meacham, 19 P.2d 527, 129 Cal. App. 670.
Iowa.—Orr v. Hart, 258 N.W. 84, 219 Iowa 408.
Mich.—Herzberg v. Knight, 286 N.W. 145, 289 Mich. 29.
Ohio.—Closs v. Ball, 22 N.E.2d 141, 60 Ohio App. 513.
Wash.—Jurisch v. Puget Transp. Co., 258 P. 39, 144 Wash. 409.

71. Instructions held required, warranted, or improperly refused, under pleadings or evidence

(1) Generally.
Ala.—Vansandt v. Brewer, 95 So. 463, 209 Ala. 181.
Ariz.—City of Phoenix v. Mullen, 174 P.2d 422, 65 Ariz. 83—Lutty v. Lockhart, 295 P. 975, 37 Ariz. 488.
Ark.—Saliba v. Saliba, 11 S.W.2d 774, 178 Ark. 250, 61 A.L.R. 1348.
Cal.—Anthony v. Hobbie, App., 193 P.2d 748—Powers v. Shelton, 169 P.2d 482, 74 Cal.App.2d 757—Casalegno v. Leonard, 105 P.2d 125, 40

Cal.App.2d 575—Reichle v. Hazle, 71 P.2d 849, 22 Cal.App.2d 543—Oliphant v. Brown, 46 P.2d 790, 7 Cal.App.2d 584—Goldhahn v. Drew, 39 P.2d 279, 3 Cal.App.2d 221—De Lannoy v. Grammatikos, 14 P.2d 542, 126 Cal.App. 79—Leiner v. Eng-Skell Co., 285 P. 905, 104 Cal. App. 228—Sonstelle v. Bush, 283 P. 336, 102 Cal.App. 396.
Conn.—Miller v. Stamford Transit Co., 32 A.2d 53, 130 Conn. 63—Zupanick v. Fielding, 158 A. 881, 114 Conn. 345.
Ill.—Cooney v. Hughes, 34 N.E.2d 566, 310 Ill.App. 371—Atkinson v. Hunter Associates, 283 Ill.App. 320.
Ind.—Pfisterer v. Key, 33 N.E.2d 330, 218 Ind. 521—Garner v. Morgan, 183 N.E. 916, 98 Ind.App. 461—Det-willer v. Culver Military Academy, 168 N.E. 246, 91 Ind. App. 355.
Iowa.—McMurry v. Guth, 295 N.W. 133, 229 Iowa 776—Ryan v. Shirk, 224 N.W. 824, 207 Iowa 1327.
Ky.—Short Way Lines v. Sutton's Adm'r, 164 S.W.2d 809, 291 Ky. 541—Hughes v. Bates' Adm'r, 129 S.W.2d 138, 278 Ky. 592—Smith v. Dunning, 122 S.W.2d 781, 275 Ky. 733—Murphy's Ex'x v. Clunkinger, 50 S.W.2d 942, 244 Ky. 336.
Md.—Holler v. Miller, 9 A.2d 250, 177 Md. 204.
Mich.—Mullaney v. Woodruff, 273 N.W. 395, 280 Mich. 66.
Miss.—R. Kullman & Co. v. Samuels, 114 So. 807, 148 Miss. 871.
Mo.—Holtz v. Daniel Hamm Drayage Co., 209 S.W.2d 883—Smith v. Sled-hoff, 209 S.W.2d 233—Kimbrough v. Chervitz, 186 S.W.2d 461, 353 Mo. 1154—Brettschaft v. Wyatt, App., 167 S.W.2d 931—Lach v. Buckner, 86 S.W.2d 954, 229 Mo.App. 1066—Woods v. Moore, App., 48 S.W.2d 202—Buck v. Thatcher, 7 S.W.2d 398, 222 Mo. App. 1036—Russell v. Bauer-Berger Grocery Co., App., 288 S.W. 985.
Mont.—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.
Ohio.—Meuer v. Doerflin, 5 N.E.2d 948, 53 Ohio App. 536.
Or.—Dixon v. Raven Dairy, 75 P.2d 347, 158 Or. 186—Cline v. Bush, 52 P.2d 652, 152 Or. 63—Snabel v. Barber, 300 P. 331, 137 Or. 88—Fiebiger v. Rambo, 284 P. 565, 132 Or. 115.
Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.
Wash.—Ross v. Johnson, 155 P.2d 486, 22 Wash.2d 275—Ballard v. Yellow Cab Co., 145 P.2d 1019, 20 Wash.2d 67.
W.Va.—Attelli v. Laird, 146 S.E. 882, 106 W.Va. 717.
Wis.—Callahan v. Rando, 3 N.W.2d 688, 240 Wis. 417.

(2) Contributory negligence of, or care owed by, pedestrian.
Ariz.—Coe v. Hough, 25 P.2d 547, 42 Ariz. 293.

Cal.—Anthony v. Hobbie, App., 193 P.2d 748—La Branch v. Scott, 185 P.2d 823, 82 Cal.App.2d 1—Houser v. Bozwell, 182 P.2d 314, 80 Cal. App.2d 702—Carney v. RKO Radio Pictures, 178 P.2d 482, 78 Cal.App. 2d 659—Colburn v. Schilling, 107 P.2d 279, 41 Cal.App.2d 541—Garcia v. Conrad, 104 P.2d 527, 40 Cal. App.2d 167.

Iowa.—Spoonier v. Wisecup, 288 N.W. 894, 227 Iowa 768.

Ky.—Whittaker v. Thornberry, 209 S.W.2d 498, 306 Ky. 830—Straughan's Adm'r v. Fendley, 191 S.W.2d 391, 301 Ky. 209—Tompson v. Day's Adm'r, 86 S.W.2d 1027, 261 Ky. 40.

Mass.—Donovan v. Mutrie, 164 N.E. 377, 265 Mass. 472.

Mich.—Siegel v. Detroit Cab Co., 225 N.W. 601, 246 Mich. 620.

Minn.—Bird v. Johnson, 272 N.W. 168, 199 Minn. 252.

Mo.—Johnson v. Dawidoff, 177 S.W. 2d 467, 352 Mo. 343—Zimmer v. Daugherty, App., 32 S.W.2d 765—Taggart v. Joseph Maserang Drug Co., 14 S.W.2d 453, 223 Mo.App. 292—Russell v. Bauer-Berger Grocery Co., App., 288 S.W. 985

N.Y.—Duffield v. New York City Omnibus Corporation, 20 N.Y.S.2d 267, 259 App.Div. 647.

Or.—Zahara v. Brandt, 94 P.2d 718, 162 Or. 666—Riley v. Good, 18 P.2d 222, 142 Or. 155—Houston v. Maunula, 255 P. 477, 121 Or. 552
Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Wash.—Lublimer v. Ruge, 153 P.2d 694, 21 Wash.2d 881—Shepherd v. Smith, 88 P.2d 601, 198 Wash. 395—Lund v. Western Union Telegraph Co., 74 P.2d 220, 192 Wash. 579.

(3) Crossing at place other than crosswalk.

Cal.—Barry v. Maddalena, 146 P.2d 974, 63 Cal.App.2d 302—Foti v. Morrissey, 134 P.2d 51, 57 Cal.2d 328—Reed v. Stroh, 128 P.2d 829, 54 Cal.App.2d 183.

Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

Ohio.—Moody v. Vickers, 72 N.E.2d 280, 79 Ohio App. 218.

Applicability to pleadings and evidence in general see *infra* § 556.

Instructions held not warranted or required under pleadings or evidence

(1) Generally.
U.S.—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101.
Ala.—Cooper v. Auman, 122 So. 351, 219 Ala. 386.

of an instruction requested by defendant, as far as concerns the sufficiency of the evidence to warrant it, is determined by the probative evidence favorable to defendant, and not to the pedestrian.⁷²

It may be proper for the court to call attention to the differing degrees of care required of a pedestrian, dependent on whether he was crossing at a street intersection or crosswalk, or was crossing at some other place;⁷³ and, where one of the contested questions in the case is whether or not the pedestrian was on a crosswalk within a statutory definition of that term, which in turn depends on whether a particular avenue is an alley or a street, the instructions of the court should afford the jury appropriate assistance in deciding the question.⁷⁴

Where the evidence is conflicting as to whether the accident occurred at one place or another, the court should instruct separately as to the reciprocal rights and duties of pedestrians and vehicles at each place⁷⁵ and thereby give the jury appropriate instructions to apply to the case according to their finding as to the exact location.⁷⁶ It has been held that defendant is not entitled to an instruction on sudden appearance unless it be shown that the pedestrian slipped, fell, or was propelled into the path of the car involuntarily, and contributory negligence is not pleaded,⁷⁷ and that in the absence of such conditions the theory of sudden appearance is sufficiently presented to the jury by a contributory negligence instruction.⁷⁸ An instruction as to the con-

Cal.—Duehren v. Stewart, 102 P.2d 784, 39 Cal.App.2d 201—Chandler v. Benafel, 39 P.2d 890, 3 Cal.App.2d 368—De Lannoy v. Grammatikos, 14 P.2d 542, 126 Cal.App. 79.
Conn.—Montagna v. Jewell, 175 A. 570, 119 Conn. 178.
Colo.—Sherman v. Ross, 62 P.2d 1151, 99 Colo. 354.
D.C.—Scheer v. Ludwig, 143 F.2d 20, 79 U.S.App.D.C. 95, certiorari denied 65 S.Ct. 72, 323 U.S. 734, 89 L.Ed. 1589.
Ind.—Fields v. Hahn, 57 N.E.2d 955, 115 Ind.App. 365, petition dismissed 59 N.E.2d 359, 223 Ind. 178.
Iowa.—Sparks v. Long, 11 N.W.2d 716, 234 Iowa 21—Orr v. Hart, 258 N.W. 84, 219 Iowa 408—Taylor v. Wistey, 254 N.W. 50, 218 Iowa 785—Heacock v. Baule, 249 N.W. 437, 216 Iowa 311, 93 A.L.R. 151—Heacock v. Baule, 245 N.W. 753.
Ky.—Schulze Baking Co. v. Daniel's Adm'r, 112 S.W.2d 1011, 271 Ky. 717—Womack v. Ison, 95 S.W.2d 277, 264 Ky. 640—Field v. Collins, 92 S.W.2d 793, 263 Ky. 474—Peak v. Arnett, 26 S.W.2d 1035, 233 Ky. 756—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.
Md.—Opecello v. Meads, 135 A. 488, 152 Md. 29, 50 A.L.R. 1385.
Mass.—Morse v. Sturgis, 159 N.E. 622, 262 Mass. 312.
Mich.—Lagassée v. Quick, 262 N.W. 915, 273 Mich. 295—Hanna v. McClave, 260 N.W. 138, 271 Mich. 133—Nickels v. Hallen, 225 N.W. 569, 247 Mich. 291.
Minn.—Plante v. Pulaski, 243 N.W. 64, 186 Minn. 280—Naylor v. McDonald, 241 N.W. 674, 185 Minn. 518.
Mo.—Carle v. Akin, 87 S.W.2d 406—McCarthy v. Sheridan, 83 S.W.2d 907, 326 Mo. 1201—Bullmore v. Beeler, App., 33 S.W.2d 161.
Mont.—Jewett v. Gleason, 65 P.2d 3, 104 Mont. 63.
N.H.—Frost v. Stevens, 184 A. 869, 88 N.H. 164.
N.J.—Henry v. Ehrlich Transfer &

Trucking Co., 196 A. 444, 119 N.J. Law 493—Butler v. Jersey Coast News Co., 160 A. 659, 109 N.J. Law 255.
N.Y.—Waters v. Miller, 225 N.Y.S. 720, 222 App.Div. 267.
Ohio—Scott v. Hy-Grade Food Products Corporation, 2 N.E.2d 608, 131 Ohio St. 225.
Or.—Vandevert v. Youngson, 12 P.2d 1029, 140 Or. 77.
Tenn.—Tiffany v. Shipley, 161 S.W.2d 373, 25 Tenn.App. 539—Havron v. Page, 157 S.W.2d 856, 25 Tenn.App. 367.
Vt.—French v. Nelson, 17 A.2d 323, 111 Vt. 386.
Wash.—Forquer v. Hidden, 71 P.2d 1000, 191 Wash. 638—Shea v. Yellow Cab Co. of Spokane, 49 P.2d 925, 184 Wash. 109—Child v. Hill, 283 P. 1076, 155 Wash. 133—Child v. Hill, 271 P. 266, 149 Wash. 468.
W.Va.—Myers v. Charleston Transit Co., 37 S.E.2d 281, 128 W.Va. 564.
(2) Contributory negligence of, or duties owed by, pedestrian.
Ala.—Cooper v. Auman, 122 So. 351, 219 Ala. 336.
Cal.—Ducat v. Goldner, 175 P.2d 914, 77 Cal.App.2d 332—Jones v. Bayley, 122 P.2d 293, 49 Cal.App.2d 617—Cotton v. Kerns, 10 P.2d 1036, 123 Cal.App. 94.
Ill.—Turzinski v. Pam, 73 N.E.2d 162, 33 Ill.App. 413, appeal transferred 64 N.E.2d 726, 392 Ill. 471—Pillow v. Long, 20 N.E.2d 896, 299 Ill.App. 542.
Iowa.—Orr v. Hart, 258 N.W. 84, 219 Iowa 408.
Ky.—Smith v. Goodwin, 165 S.W.2d 976, 292 Ky. 37.
Md.—Chasanow v. Smouse, 178 A. 846, 168 Md. 629.
Mich.—Mullaney v. Woodruff, 273 N.W. 395, 280 Mich. 66.
Mo.—Smart v. Raymond, App., 142 S.W.2d 100—Zeller v. Wolff-Wilson Drug Co., App., 51 S.W.2d 881.
Neb.—Soulek v. City of Omaha, 299 N.W. 368, 140 Neb. 151.
N.J.—Costanza v. Cavanaugh, 35 A.

2d 612, 131 N.J. Law 175—Henry v. Ehrlich Transfer & Trucking Co., 196 A. 444, 119 N.J. Law 493.
Or.—Zahara v. Brandl, 94 P.2d 718, 162 Or. 666—Vandevert v. Youngson, 12 P.2d 1029, 140 Or. 77—Houston v. Maunula, 255 P. 477, 121 Or. 552.
Vt.—French v. Nelson, 17 A.2d 323, 111 Vt. 386—Duchaine v. Ray, 6 A. 2d 28, 110 Vt. 313.
Wash.—Reitan v. Crooks, 279 P. 97, 153 Wash. 75.
72. Mo.—Kimbrough v. Chervitz, 186 S.W.2d 461, 353 Mo. 1154.
73. Conn.—Kucinski v. Davey, 197 A. 688, 123 Conn. 662—Hizam v. Blackman, 131 A. 415, 103 Conn. 547.
Iowa.—Orth v. Gregg, 250 N.W. 113, 217 Iowa 516.
74. Conn.—Kucinski v. Davey, 197 A. 688, 123 Conn. 662.
75. Wash.—Schwalen v. Fuller, 182 P. 592, 187 P. 367, 107 Wash. 476, 10 A.L.R. 296.
76. Wash.—Schwalen v. Fuller, supra.
77. Ky.—Straughan's Adm'r v. Fendley, 191 S.W.2d 391, 301 Ky. 209—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.
Circumstances not warranting instruction
A "sudden appearance" instruction for automobile driver is not warranted where driver has been aware of person's presence, or should have been aware of it in exercise of care which law places on him, for an appreciable length of time prior to action on his part to avert a collision.—Likins' Adm'r v. Solinger, 190 S.W.2d 564, 300 Ky. 824.
78. Ky.—Straughan's Adm'r v. Fendley, 191 S.W.2d 391, 301 Ky. 209—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 189.

tributory negligence of the pedestrian need not necessarily set out his specific duties.⁷⁹

Right of way. The giving of an instruction as to the right of way of a pedestrian at a public crossing is justified by evidence showing that plaintiff, a pedestrian, was upon or very near a street crossing at the time of the accident;⁸⁰ but it is proper to refuse to give a requested instruction as to the right of way between pedestrians and automobiles at a place other than a street crossing where it does not appear from the evidence that there are any defined pedestrians' crossings over the way on which the accident occurred.⁸¹ In order to authorize an instruction on the duty of a motorist to yield the right of way to a pedestrian in a crosswalk as required by statute, the averments of the pedestrian's complaint should bring the case within the statutory provisions or should state the facts so fully that from the facts pleaded it readily appears that the case falls within the statute and discloses the duty owed by the motorist to the pedestrian without indulging in speculation or depending on doubtful inference.⁸²

Instructions involving the question of right of way in actions for injuries to pedestrians should correctly set forth the law.⁸³ It may be appropri-

ate under the circumstances for an instruction on the right of way as between motor vehicles and pedestrians to include an explanation that a vehicle driver who is entitled to the right of way is not thereby excused from the duty to exercise ordinary care.⁸⁴ An instruction on the right-of-way rule should not be stated in language so abstract and laconic as to leave the jury free to believe that a pedestrian struck outside of a pedestrian crossing must have been guilty of failing to yield the right of way and consequently guilty of contributory negligence.⁸⁵ It has been held that, in order to avoid misapprehension and confusion, the expression "yielding the right of way" should be used in an instruction only in the statutory sense.⁸⁶

§ 543. — Injury to Passenger, Guest, or Occupant

Instructions involving the right or duties of a passenger or guest in a motor vehicle should correctly set forth the law applicable to the issues in the case.

Where the issues in the case so warrant, instructions should be given as to the duties or care owed by or to a passenger, guest, or occupant who is suing for injuries sustained by him as a result of the operation of a motor vehicle.⁸⁷ Such instructions

79. Ky.—*Ramsey v. Sharpley*, 171 S. W.2d 427, 294 Ky. 286.

80. Wash.—*Yanase v. Seattle Taxicab, etc., Co.*, 157 P. 1076, 91 Wash. 415.

81. Md.—*Opecello v. Meads*, 135 A. 488, 152 Md. 29.

82. Ind.—*Fields v. Hahn*, 57 N.E.2d 955, 115 Ind.App. 365, petition dismissed 59 N.E.2d 359, 223 Ind. 178.

83. **Instructions held sufficient, not erroneous, or improperly refused**
Cal.—*La Branch v. Scott*, 185 P.2d 823, 82 Cal.App.2d 1.

D.C.—*Steger v. Cameron*, 109 F.2d 347, 71 App.D.C. 202.

Ky.—*Louisville Taxicab & Transfer Co. v. Byrnes*, 178 S.W.2d 4, 296 Ky. 560.

Md.—*York Ice Machinery Corporation v. Sachs*, 173 A. 240, 167 Md. 113—*Schapiro v. Meyers*, 153 A. 27, 160 Md. 208.

Mich.—*Moore v. Noorthoek*, 273 N.W. 758, 280 Mich. 431.

N.Y.—*D'Alcorno v. Goldbach*, 10 N.Y.S.2d 23, 256 App.Div. 948.

Or.—*Maneff v. Lamer*, 54 P.2d 287, 152 Or. 619—*Maneff v. Lamer*, 36 P.2d 336, 148 Or. 455—*Hansen v. Bedell Co.*, 285 P. 823, 132 Or. 332.

Pa.—*Webb v. Hess*, 6 A.2d 829, 335 Pa. 401—*Clarke v. Hughes*, 165 A. 532, 108 Pa.Super. 586.

Va.—*Lucas v. Craft*, 170 S.E. 836, 161 Va. 228.

Wash.—*Miller v. Edwards*, 171 P.2d 821, 25 Wash.2d 635—*Lund v.*

Western Union Telegraph Co., 74 P.2d 220, 192 Wash. 579—*Libbee v. Handv.*, 1 P.2d 312, 163 Wash. 410—*Child v. Hill*, 283 P. 1076, 155 Wash. 133.

Wis.—*Kelcher v. Michael*, 220 N.W. 179, 196 Wis. 305.

Instructions held erroneous or properly refused

Cal.—*Passarelli v. Souza*, 98 P.2d 809, 37 Cal.App.2d 1.

Colo.—*Stahl v. Cooper*, 190 P.2d 891, 117 Colo. 468.

Ky.—*Pryor's Adm'r v. Otter*, 105 S.W.2d 564, 268 Ky. 602.

Md.—*Thursby v. O'Rourke*, 23 A.2d 656, 180 Md. 223.

N.Y.—*Schaffer v. Gambetta*, 24 N.Y.S.2d 674, 261 App.Div. 132, affirmed 40 N.E.2d 654, 287 N.Y. 796.

Or.—*Maneff v. Lamer*, 36 P.2d 336, 148 Or. 455.

Wash.—*Stanley v. Allen*, 180 P.2d 90, 27 Wash.2d 770—*Lublimer v. Ruge*, 153 P.2d 694, 21 Wash.2d 881.

84. Cal.—*Foti v. Morrissey*, 134 P.2d 51, 57 Cal.App.2d 328.

85. Cal.—*Foti v. Morrissey*, *supra*.

86. Wis.—*Smith v. Superior & Duluth Transfer Co.*, 10 N.W.2d 153, 243 Wis. 292, rehearing denied 11 N.W.2d 95, 243 Wis. 292.

87. Colo.—*Wilson v. Hill*, 86 P.2d 1084, 103 Colo. 409.

Conn.—*Fitzpatrick v. Cinitis*, 139 A. 639, 107 Conn. 91.

Ga.—*Whitfield v. Wheeler*, 47 S.E.2d 658, 76 Ga.App. 857—*Blanchard v.*

Ogletree, 152 S.E. 116, 41 Ga.App. 4.

Ill.—*Palmer v. Miller*, 35 N.E.2d 104, 310 Ill.App. 582, reversed on other grounds 43 N.E.2d 973, 380 Ill. 256—*Holdoway v. Cholsner*, 27 N.E.2d 228, 305 Ill.App. 20—*Sullivan v. Heyer*, 21 N.E.2d 776, 300 Ill. App. 599.

Ind.—*Pierce v. Clemens*, 46 N.E.2d 836, 113 Ind.App. 65.

Iowa.—*Miller v. Mathis*, 8 N.W.2d 744, 233 Iowa 221—*Porter v. Decker*, 270 N.W. 897, 222 Iowa 1109—*Fry v. Smith*, 253 N.W. 147, 217 Iowa 1295.

Ky.—*Helton v. Prater's Adm'r*, 114 S.W.2d 1120, 272 Ky. 574—*New York Indemnity Co. v. Ewen*, 298 S.W. 182, 221 Ky. 114.

Mo.—*Carlton v. Stanek*, 38 S.W.2d 505, 225 Mo.App. 646.

N.H.—*Lafamme v. Lewis*, 192 A. 851, 89 N.H. 69.

N.D.—*Anderson v. Anderson*, 285 N.W. 294, 69 N.D. 229—*Billingsley v. McCormick Transfer Co.*, 228 N.W. 427, 58 N.D. 921.

Pa.—*Grutski v. Kline*, Com.Pl., 61 Montg.Co. 33, affirmed in part and reversed in part on other grounds 43 A.2d 142, 352 Pa. 401.

Tex.—*Scott v. Gardner*, Civ.App., 106 S.W.2d 1109, error dismissed—*Moncada v. Garcia*, Civ.App., 62 S.W.2d 215, reversed on other grounds *Garcia v. Moncada*, 94 S.W.2d 123, 127 Tex. 453.

Vt.—*Packard v. Quessel*, 22 A.2d 164,

should not be confusing or misleading,⁸⁸ and should | state the law correctly.⁸⁹ Also, instructions as to

112 Vt. 175—Landry v. Hubert, 137 A. 97, 100 Vt. 268.
Wash.—Alexiou v. Nockas, 17 P.2d 911, 171 Wash. 369.
W.Va.—Broyles v. Hagerman, 180 S. E. 99, 116 W.Va. 267.

Duties of host to guest or others

In automobile guest's action against host and another motorist for injuries sustained in collision, instructions must distinguish between duty host owes to guest and duty host owes to other users of highway, and must submit question whether host breached duty to guest.—Pierner v. Mann, 25 N.W.2d 83, 249 Wis. 469.

88. Instructions held misleading or confusing

Cal.—Walters v. Du Four, 22 P.2d 259, 132 Cal.App. 72, rehearing denied, Sup., 23 P.2d 1020, 132 Cal. App. 72—Dodds v. Gifford, 16 P. 2d 279, 127 Cal.App. 629.
Ill.—Ellinger v. Paulson, 15 N.E.2d 59, 295 Ill.App. 620.
Tex.—Scott v. Gardner, Civ App., 106 S.W.2d 1109, error dismissed.
Va.—Thomas v. Snow, 174 S.E. 837, 162 Va. 654.

Instructions held not confusing or misleading

Ga.—Atlantic Ice & Coal Corporation v. Newlin, 192 S.E. 915, 56 Ga. App. 428.
Ill.—Burke v. Molloy, 14 N.E.2d 279, 294 Ill.App. 442.
Ky.—Sweazy v. King, 58 S.W.2d 659, 248 Ky. 432.
Minn.—Vondrashek v. Dignan, 274 N. W. 609, 200 Minn. 530.
Mo.—Davis v. Swenson, 46 S.W.2d 224, 226 Mo.App. 743.

Amendment of request

A requested instruction may be amended by the court before it is given to the jury where, as originally offered, the instruction might mislead the jury.—State for Use of Shipley v. Lupton, 181 A. 393, 163 Md. 180.

89. Cal.—Haney v. Takakura, 37 P. 2d 170, 2 Cal App 2d 1, amended on other grounds 38 P.2d 160, 2 Cal. App.2d 1.
Conn.—Connelly v. Deconinck, 155 A. 231, 113 Conn. 237.
Ind.—Jay v. Holman, 20 N.E.2d 656, 106 Ind.App. 413—Blair v. May, 19 N.E.2d 490, 106 Ind.App. 599.
Iowa.—Edwards v. Kirk, 288 N.W. 875, 227 Iowa 684.
Mo.—McCombs v. Ellaberry, 85 S.W. 2d 135, 331 Mo. 491.
N.H.—Hoen v. Haines, 154 A. 129, 85 N.H. 36.
N.Y.—Howard v. Reid, 233 N.Y.S. 381, 225 App.Div. 399.
Ohio.—Rogers v. Ziegler, App., 152 N.E. 781.
Wis.—Fontaine v. Fontaine, 238 N. W. 410, 205 Wis. 570.

Instructions held erroneous or properly refused

(1) Generally.
U.S.—Copp v. Van Hise, C.C.A.Mont., 119 F.2d 691.
Ala.—Baker v. Rainer, 124 So. 737, 220 Ala. 207.
Ark.—Shaver v. Nash, 79 S.W.2d 53, 190 Ark. 410—Black v. Goldweber, 291 S.W. 76, 172 Ark. 862.
Cal.—Musante v. Guerrini, 13 P.2d 965, 125 Cal.App. 556.
Conn.—Hubbs v. Edmond, 186 A. 496, 121 Conn. 506—Grant v. MacLeland, 147 A. 138, 109 Conn. 517.
Ga.—George A. Rheman Co v. May, 31 S.E.2d 738, 71 Ga.App. 651.
Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256—Keehn v. Braubach, 30 N.E.2d 156, 307 Ill.App. 339.
Ind.—Blair v. May, 19 N.E.2d 490, 106 Ind App 599.
Md.—Fegelow v. Johnson, 9 A.2d 645, 177 Md. 345.
Mo.—Eisenbarth v. Powell Bros Truck Lines, 125 S.W.2d 899, 235 Mo.App. 442, certiorari quashed State ex rel. Powell Bros. Truck Lines v. Hostetter, 137 S.W.2d 461, 345 Mo. 915—McCarty v. Bishop, 102 S.W.2d 126, 231 Mo.App. 604—Clifton v. Caraker, App., 50 S.W. 2d 758.
N.J.—Rottinger v. Friedhof, 56 A.2d 571, 136 N.J.Law 422, affirmed 62 A.2d 683.
N.Y.—Amann v. Thurston, 231 N.Y. S. 657, 133 Misc. 293, affirmed 230 N.Y.S. 794, 224 App.Div. 782.
Ohio.—Cousins v. Booksbaum, 200 N. E. 133, 51 Ohio App. 150, error dismissed Booksbaum v. Cousins, 199 N.E. 217, 130 Ohio St. 336.
Or.—Cook v. Portland-Gresham Stages, 299 P. 331, 136 Or. 378.
Pa.—Bernosky v. Greff, 38 A.2d 35, 350 Pa. 59.
Tenn.—Williamson v. Howell, 13 Tenn.App. 506.
Tex.—Scott v. Gardner, Civ.App., 106 S.W.2d 1109, error dismissed.
Va.—Gale v. Wilber, 175 S.E. 739, 163 Va. 211.
Wash.—De Nune v. Tibbitts, 73 P.2d 521, 192 Wash. 279.
Wis.—Grandhagen v. Grandhagen, 225 N.W. 935, 199 Wis. 315.
(2) Negligence or duties of passenger, guest, or occupant.
U.S.—Higgins v. Ledo, C.C.A.N.H., 66 F.2d 265.
Cal.—Baef v. Kleiber Motor Truck Co., 43 P.2d 575, 5 Cal.App.2d 746—Walters v. Du Four, 22 P.2d 259, 132 Cal.App. 72, hearing denied, Sup., 23 P.2d 1020, 132 Cal.App. 72—Dodds v. Gifford, 16 P.2d 279, 127 Cal.App. 629.
D.C.—Weber v. Eaton, 160 F.2d 577, 82 U.S.App.D.C. 66.
Ga.—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700.

Idaho.—McCoy v. Kregel, 17 P.2d 547, 52 Idaho 626.

Ill.—Stitzel v. Johnson, 73 N.E.2d 653, 331 Ill.App. 609—Bliss v. Knapp, 72 N.E.2d 566, 331 Ill.App. 45—Carroll v. Krause, 15 N.E.2d 323, 295 Ill.App. 552—Roedler v. Vandalia Bus Lines, 281 Ill.App. 520—Walsh v. Moore, 244 Ill.App. 458.
Ind.—Lindley v. Sink, 30 N.E.2d 456, 218 Ind. 1.
Iowa.—Miller v. Mathis, 8 N.W.2d 744, 233 Iowa 221—Teufel v. Kaufmann, 6 N.W.2d 850, 233 Iowa 443—Newland v. G. McClelland & Son, 250 N.W. 229, 217 Iowa 568—McQuillen v. Meyers, 241 N.W. 442, 213 Iowa 1366—Muirhead v. Chailis, 240 N.W. 912, 213 Iowa 1108.
Ky.—Wilkerson v. Sanderson, 26 S. W.2d 1, 233 Ky. 493.
Me.—Bubar v. Fisher, 180 A. 923, 134 Me. 10.
Mich.—Fabiano v. Carey, 271 N.W. 754, 279 Mich. 269.
Mo.—Eisenbarth v. Powell Bros. Truck Lines, App., 125 S.W.2d 899, certiorari quashed State ex rel. Powell Bros. Truck Lines v. Hostetter, 137 S.W.2d 461, 315 Mo. 915—Scism v. Alexander, 93 S.W.2d 26, 230 Mo.App. 1175—Carlton v. Stanek, 38 S.W.2d 505, 225 Mo.App. 646.
N.Y.—Zamenick v. Easman & Co., 290 N.Y.S. 766, 248 App.Div. 920.
N.C.—Stephenson v. Leonard, 181 S. E. 261, 208 N.C. 451.
Ohio.—Hughes v. Hanselman, 185 N. E. 852, 44 Ohio App. 516—Simensky v. Zwyer, 178 N.E. 422, 40 Ohio App. 275—Community Traction Co. v. Konte, 172 N.E. 533, 35 Ohio App. 361, affirmed 172 N.E. 442, 122 Ohio St. 514.
Pa.—Delling v. McKnight, 188 A. 853, 325 Pa. 251—Lloyd v. Noakes, 96 Pa.Super. 164—Reese v. Kegerreis, Com.Pl., 54 Dauph Co. 344.
Va.—Yorke v. Maynard, 3 S.E.2d 366, 173 Va. 183.
Wis.—Teas v. Elsenlord, 253 N.W. 795, 215 Wis. 455.
42 C.J. p 1276 note 7 [a].
(3) Assumption of risk.
Ala.—Dunklin v. Hanna, 156 So. 768, 229 Ala. 242.
Ga.—Horne v. Neill, 29 S.E.2d 275, 70 Ga App. 602, followed in 29 S.E.2d 280, 70 Ga App. 610.
N.H.—Woodman v. Peck, 7 A.2d 251, 90 N.H. 292, 122 A.L.R. 1402.
Instructions held sufficient, proper, or erroneously refused
(1) Generally.
U.S.—R. J. Reynolds Tobacco Co. v. Newby, C.C.A.Idaho, 145 F.2d 768—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.
Ala.—Harper v. Griffin Lumber Co., 34 So.2d 148, 250 Ala. 339.

the duties or care owed by or to a passenger, guest, and be warranted by, the pleadings⁹⁰ and evidence⁹¹ or occupant of a motor vehicle should conform to, in the case.

Ark.—Froman v. J. R. Kelley Stave & Heading Co., 120 S.W.2d 164, 196 Ark. 808—Lewis v. Prescott, 99 S. W.2d 590, 193 Ark. 379.

Cal.—Noble v. Key System, 51 P.2d 887, 10 Cal.App.2d 132—Queirolo v. Pacific Gas & Electric Co., 300 P. 487, 114 Cal.App. 510.

Conn.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355—Giddings v. Honan, 159 A. 271, 114 Conn. 473, 79 A.L.R. 1215.

D.C.—Danzansky v. Zimbolist, 105 F.2d 457, 70 App.D.C. 234.

Fla.—H. E. Wolfe Const. Co. v. Ellison, 174 So. 594, 127 Fla. 808.

Ga.—Eldson v. Felder, 25 S.E.2d 41, 69 Ga.App. 225.

Idaho.—Dawson v. Salt Lake Hardware Co., 136 P.2d 733, 64 Idaho 666.

Ind.—Blair v. May, 19 N.E.2d 490, 106 Ind.App. 599.

Iowa.—Skalla v. Daeges, 15 N.W.2d 638, 234 Iowa 1260—Greiner v. Hicks, 300 N.W. 727, 231 Iowa 141—Reed v. Pape, 284 N.W. 106, 226 Iowa 170—McQuillen v. Meyers, 241 N.W. 442, 213 Iowa 1366.

Ky.—Hollis v. Bourne, 167 S.W.2d 50, 292 Ky. 578—Buck v. Kleinschmidt, 131 S.W.2d 714, 279 Ky. 569—Dorris v. Stevens' Adm'r, 99 S.W.2d 755, 266 Ky. 602.

Md.—Yellow Cab Co. v. Bradin, 191 A. 717, 172 Md. 388.

Mich.—Slayton v. Boesch, 23 N.W.2d 134, 315 Mich. 1.

Minn.—Martin v. Schiska, 236 N.W. 312, 183 Minn. 256.

Mo.—McCarty v. Bishop, 102 S.W.2d 126, 231 Mo.App. 604—Greer v. St. Louis Public Service Co., App., 87 S.W.2d 240, followed in 87 S.W.2d 247.

Mont.—Batchoff v. Craney, 172 P.2d 308.

N.H.—Belanger v. Berube, 185 A. 898, 88 N.H. 191.

N.Y.—Mochnal v. Pegos, 12 N.Y.S.2d 414, 257 App.Div. 890, reargument denied 14 N.Y.S.2d 411, 257 App. Div. 1063.

N.C.—Speas v. City of Greensboro, 167 S.E. 807, 204 N.C. 239.

Tenn.—Wilkins v. Malone, 18 Tenn. App. 648.

Tex.—Kirkpatrick v. Neal, Civ.App., 153 S.W.2d 519, error refused.

Wash.—Manos v. James, 110 P.2d 887, 7 Wash.2d 695—Pickering v. Stearns, 46 P.2d 394, 182 Wash. 234—Dye v. City of Seattle, 24 P.2d 67, 173 Wash. 515—Wold v. Gardner, 8 P.2d 975, 167 Wash. 191.

W.Va.—Collar v. McMullin, 148 S.E. 496, 107 W.Va. 440.

Wis.—Campbell v. Spaeth, 250 N.W. 394, 213 Wis. 162.

42 C.J. p 1276 note 7 [b].

(2) Negligence or duties of passenger, guest, or occupant.

U.S.—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.

Ala.—Moore v. Cruitt, 191 So. 252, 238 Ala. 414—Dunklin v. Hanna, 156 So. 768, 229 Ala. 242.

Cal.—Valencia v. San Jose Scavenger Co., 69 P.2d 480, 21 Cal.App.2d 469—Edwards v. Bodenhamer, 46 P.2d 202, 7 Cal.App.2d 305.

Conn.—Fitzpatrick v. Cinitis, 139 A. 639, 107 Conn. 91.

Ga.—Eldson v. Felder, 25 S.E.2d 41, 69 Ga.App. 225.

Ill.—West v. Porritt, 48 N.E.2d 199, 318 Ill.App. 636.

Ind.—Bain v. Mattmiller, 13 N.E.2d 712, 213 Ind. 549—Kelley v. Dickerson, 13 N.E.2d 535, 213 Ind. 624—Swanson v. Slagel, 8 N.E.2d 993, 212 Ind. 394—Davis v. Dondanville, 26 N.E.2d 568, 107 Ind.App. 665.

Iowa.—McDougal v. Bormann, 234 N.W. 807, 211 Iowa 950.

Kan.—Dyer v. Keith, 14 P.2d 644, 136 Kan. 216.

Ky.—Watson v. Bailey, 132 S.W.2d 53, 279 Ky. 671—Dorris v. Stevens' Adm'r, 99 S.W.2d 755, 266 Ky. 602.

Me.—Keller v. Banks, 156 A. 817, 130 Me 397.

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Mass.—Bensley v. Salemm, 19 N.E.2d 75, 302 Mass. 188, 123 A.L.R. 1156.

Minn.—Vondrashek v. Dignan, 274 N. W. 609, 200 Minn. 630.

Mo.—Rosenblum v. Rosenblum, 96 S. W.2d 1082, 231 Mo.App. 276.

N.H.—Salvas v. Cantin, 160 A. 727, 85 N.H. 489.

N.Y.—Henze v. Fortune, 70 N.Y.S.2d 416, 272 App.Div. 857.

N.C.—King v. Pope, 163 S.E. 447, 202 N.C. 554.

Or.—Burns v. Coast Auto Lines, 292 P. 1038, 134 Or. 180.

Pa.—Winters v. York Motor Express Co., 176 A. 812, 116 Pa.Super. 421—Young v. Freeman, 164 A. 114, 108 Pa.Super. 399.

Tenn.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356.

Vt.—Higgins v. Metzger, 143 A. 394, 101 Vt. 285.

Wash.—Olson v. Rose, 151 P.2d 454, 21 Wash.2d 464—Newman v. Cogshall, 18 P.2d 850, 171 Wash. 609.

(3) Assumption of risk.

Mich.—Slayton v. Boesch, 23 N.W.2d 134, 315 Mich. 1.

Wis.—Helgestad v. North, 289 N.W. 822, 233 Wis. 349—Bourestom v. Bourestom, 285 N.W. 426, 231 Wis. 666.

(4) Compensation for ride.

Cal.—Duclos v. Tashjian, 90 P.2d 140,

32 Cal.App.2d 444—Yates v. J. H. Krumlinde & Co., 71 P.2d 298, 22 Cal.App.2d 387.

Conn.—Bree v. Lamb, 178 A. 919, 120 Conn. 1.

Instructions held not prejudicial

N.C.—York v. York, 194 S.E. 486, 212 N.C. 695.

90. Instructions held erroneous or properly refused under pleadings

Mo.—Clifton v. Caraker, App., 50 S. W.2d 758, writ quashed State ex rel. Caraker v. Becker, 62 S.W.2d 899, 333 Mo. 400—Allison v. Dittbrenner, App., 50 S.W.2d 199—Burgher v. Niedorp, App., 50 S.W. 2d 174, certiorari quashed State ex rel. Burger v. Trimble, 55 S.W.2d 422, 331 Mo. 748.

Or.—Loveland v. Plant, 287 P. 219, 132 Or. 619.

Instructions held proper or erroneously refused under pleadings

Conn.—Gilmartin v. D. & N. Transp. Co., 193 A. 726, 123 Conn. 127, 113 A.L.R. 1322.

D.C.—Danzansky v. Zimbolist, 105 F. 2d 457, 70 App.D.C. 234.

Ga.—Donahoo v. Goldin, 7 S.E.2d 820, 61 Ga.App. 841.

Idaho.—Evans v. Davidson, 77 P.2d 661, 58 Idaho 600.

Iowa.—Schuster v. Gillispie, 251 N. W. 735, 217 Iowa 386.

Ky.—Schilling v. Heringer, 67 S.W. 2d 979, 252 Ky. 624.

Mo.—Chamberlain v. Missouri-Arkansas Coach Lines, 173 S.W.2d 57, 351 Mo. 203—Brown v. Adams Transfer & Storage Co., App., 31 S. W.2d 117.

Or.—Smith v. Pacific Truck Express, 100 P.2d 474, 164 Or. 318.

Vt.—Bennett v. Robertson, 177 A. 625, 107 Vt. 202, 98 A.L.R. 152.

91. Ill.—Monroe v. Wear, 276 Ill. App. 570.

Ky.—Watson v. Bailey, 132 S.W.2d 53, 279 Ky. 671.

Pa.—Kovalish v. Smith, 53 A.2d 534, 357 Pa. 219.

Va.—Galnes v. Campbell, 166 S.E. 704, 159 Va. 504.

Wis.—Lang v. Baumann, 251 N.W. 461, 213 Wis. 258.

Applicability to pleadings and evidence in general see infra § 556.

Instructions held not warranted or required under evidence

(1) Generally.

Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247.

Ark.—Shaver v. Nash, 79 S.W.2d 53, 190 Ark. 410.

Cal.—Van Fleet v. Heyler, 125 P.2d 586, 51 Cal.App.2d 719—Sale v. Illinois Electric Co., 299 P. 561, 114 Cal.App. 71.

D.C.—Paxson v. Davis, 65 F.2d 492, 62 App.D.C. 146, certiorari denied

- 54 S.Ct. 61 (two cases), 290 U.S. 643, 78 L.Ed. 558.
- Ga.—Edwards v. Ford, 26 S.E.2d 306, 69 Ga.App. 578.
- Idaho.—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792.
- Ill.—Sarelas v. Meyer, 46 N.E.2d 140, 317 Ill.App. 382—Holdoway v. Cholsner, 27 N.E.2d 228, 305 Ill. App. 20.
- Iowa.—Skalla v. Daeges, 15 N.W.2d 638, 234 Iowa 1260—Greiner v. Hicks, 300 N.W. 727, 231 Iowa 141 —Schalk v. Smith, 277 N.W. 303, 224 Iowa 904.
- Ky.—Watson v. Bailey, 132 S.W.2d 53, 279 Ky. 671.
- Me.—Lynch v. Morris, 173 A. 348, 133 Me. 1.
- Mass.—Carpenter v. Anderson, 17 N. E.2d 898, 301 Mass 550.
- Minn.—Martin v. Schiska, 236 N.W. 312, 183 Minn 256.
- Mo.—Potashnick v. Pearlina, 43 S.W. 2d 790—Huger v. Doerr, App., 170 S.W.2d 689—Adams v. Le Row, 160 S.W.2d 826, 236 Mo.App. 899—Croak v. Croak, App., 33 S.W.2d 998.
- N.H.—Mooney v. Chapdelaine, 10 A. 2d 220, 90 N.H. 415, reheard 11 A.2d 713, 90 N.H. 415.
- N.J.—Chapman v. Burns, 166 A. 700, 11 N.J.Misc. 475.
- Ohio.—Dougherty v. Hall, 45 N.E.2d 608, 70 Ohio App. 163.
- Or.—Luebke v. Hawthorne, 192 P.2d 990—Smith v. Laflar, 20 P.2d 391, 143 Or. 65.
- Pa.—Kerstetter v. Elfman, 192 A. 663, 327 Pa. 17—Jones v. Rogers, 165 A. 509, 108 Pa Super. 517.
- Tenn.—Berryman v. Dilworth, 160 S. W.2d 899, 178 Tenn. 566.
- Va.—Bloxom v. McCoy, 17 S.E.2d 401, 178 Va. 343—Gale v. Wilber, 175 S. E. 739, 163 Va. 211—Miles v. Rose, 175 S.E. 230, 162 Va. 572.
- Vt.—Russell v. Pilger, 37 A.2d 403, 113 Vt. 537.
- Wash.—Dye v. City of Seattle, 24 P. 2d 67, 173 Wash. 515.
- Wis.—Hahn v. Smith, 254 N.W. 750, 215 Wis. 277.
- (2) Negligence or duties of passenger, guest, or occupant.
- Cal.—Stoneburner v. Richfield Oil Co. of California, 5 P.2d 436, 118 Cal. App. 449.
- Idaho.—Dillon v. Brooks, 6 P.2d 851, 51 Idaho 510.
- Ind.—Ridgway v. Yenny, 57 N.E.2d 581, 223 Ind. 16—Davis v. Dondanville, 26 N.E.2d 568, 107 Ind.App. 665.
- Ky.—Edmiston v. Robinson, 168 S. W.2d 740, 293 Ky. 273—Tipton v. Estill Ice Co., 132 S.W.2d 347, 279 Ky. 793—Trumble v. Baker, 116 S. W.2d 968, 273 Ky. 434—Hintermisch v. Brewsbaugh, 87 S.W.2d 934, 261 Ky. 432—C. L. & L. Motor Express Co. v. Achenbach, 82 S.W.2d 335, 259 Ky. 228.
- Md.—Montgomery Bus Lines v. Diehl, 148 A. 453, 158 Md. 233.
- Mo.—Reed v. Coleman, App., 167 S. W.2d 125.
- N.H.—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69.
- N.J.—Hala v. Worthington, 31 A.2d 844, 130 N.J.Law 162—Wassmer v. Public Service Electric & Gas Co., 5 A.2d 762, 122 N.J.Law 367—Wassmer v. Public Service Electric & Gas Co., 5 A.2d 794, 122 N.J.Law 367.
- Oh.—Metzger v. Yellow Taxicab Co., 193 N.E. 75, 48 Ohio App. 275.
- Or.—Flatman v. Lulay Bros Lumber Co., 154 P.2d 535, 175 Or. 495—Loveland v. Plant, 287 P. 219, 132 Or. 619.
- Va.—Bell v. Kenney, 23 S.E.2d 781, 181 Va. 24—Russell v. Kelly, 23 S. E.2d 124, 180 Va. 304—Morris v. Dame's Ex'r, 171 S.E. 662, 161 Va. 545.
- W.Va.—Herold v. Clendennen, 161 S. E. 21, 111 W.Va. 121.
- (3) Assumption of risk by passenger or guest.
- Ala.—Baker v. Rainer, 124 So. 737, 220 Ala 207.
- Neb.—Bailey v. Bryant, 257 N.W. 241, 127 Neb 843.
- Instructions held warranted or required under evidence**
- (1) Generally.
- Ala.—Thomas v. Carter, 117 So. 634, 218 Ala 55.
- Ariz.—Tenney v. Enkeball, 158 P.2d 519, 62 Ariz. 416.
- Ark.—Warren v. Hale, 158 S.W.2d 51, 203 Ark. 608—Shaver v. Nash, 79 S.W.2d 53, 190 Ark 410.
- Cal.—Nelson v. Westergaard, 19 P. 2d 867, 130 Cal.App. 79—Edgar v. Citraro, 297 P. 645, 112 Cal.App. 163, followed in 297 P. 651, 112 Cal. App. 764, and 297 P. 652, 112 Cal. App. 762.
- Colo.—Jaekel v. Funk, 138 P.2d 939, 111 Colo. 179.
- Conn.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355—Vultz v. Orange Volunteer Fire Ass'n, 172 A. 220, 118 Conn. 307—Lucas v. Hickcox, 169 A. 191, 117 Conn. 513.
- Ga.—Whitfield v. Wheeler, 47 S.E. 2d 658, 76 Ga.App. 857—Oast v. Mopper, 199 S.E. 249, 58 Ga.App. 506—Dixon v. Merry Bros. Brick & Tile Co., 193 S.E. 599, 56 Ga. App. 626—Smeltzer v. Atlanta Coach Co., 176 S.E. 846, 49 Ga.App. 755—Engle v. Finch, 140 S.E. 632, 37 Ga.App. 389.
- Ill.—Lawson v. Fisk, 45 N.E.2d 707, 316 Ill.App. 591.
- Iowa.—Band v. Reinke, 288 N.W. 629, 227 Iowa 458—Schuster v. Gillespie, 251 N.W. 735, 217 Iowa 386.
- Ky.—Turbin v. Scrivner, 178 S.W.2d 971, 297 Ky. 365.
- Minn.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125—Vondrashek v. Dignan, 274 N.W. 609, 200 Minn. 530.
- Mo.—Taylor v. Laderman, 161 S.W. 2d 253, 349 Mo. 415—Kourik v. English, 100 S.W.2d 901, 348 Mo. 367—Yawitz v. Novak, 286 S.W. 66.
- Mundinger v. Sewell, App., 40 S. W.2d 530—Brooks v. Menaugh, App., 10 S.W.2d 327.
- N.H.—Sanders v. H. P. Welch Co., 26 A.2d 34, 92 N.H. 74—Desrosiers v. Cloutier, 25 A.2d 123, 92 N.H. 100.
- N.Y.—Farrell v. Kory, 282 N.Y.S. 355, 245 App.Div. 901.
- N.C.—Gaffney v. Phelps, 178 S.E. 231, 207 N.C. 553.
- Or.—Smith v. Pacific Truck Express, 100 P.2d 474, 164 Or. 318.
- Pa.—Lobert v. Park, 9 A.2d 365, 337 Pa. 103—Peterson v. McCauslan, 170 A. 276, 314 Pa. 176—Gunther v. Arnstall, 165 A. 240, 310 Pa. 295—Sharkey v. Ramage, Com.Pl., 33 Luz Leg Reg. 417.
- Tex.—McMillian v. Sims, Civ.App., 112 S.W.2d 793, error granted.
- Vt.—Gould v. Gould, 6 A.2d 24, 110 Vt. 324.
- Va.—Lipscomb v. O'Brien, 25 S.E.2d 261, 181 Va. 471—Poole v. Kelley, 173 S.E. 537, 162 Va. 279.
- (2) Negligence or duties of passenger, guest, or occupant.
- Ark.—Dermott Grocery & Commission Co. v. Kennedy, 85 S.W.2d 705, 191 Ark. 211—Debin v. Texas Co., 81 S.W.2d 935, 190 Ark. 849.
- Cal.—Valencia v. San Jose Scavenger Co., 69 P.2d 480, 21 Cal.App.2d 469—Anderson v. Pickens, 4 P.2d 794, 118 Cal App. 212.
- D.C.—Weber v. Eaton, 160 F.2d 577, 82 U.S.App D.C. 66.
- Ga.—Horne v. Neill, 29 S.E.2d 275, 70 Ga.App. 602, followed in 29 S. E.2d 280, 70 Ga App. 610—Mann v. Harmon, 8 S.E.2d 549, 62 Ga App. 231—Donahoo v. Goldin, 7 S.E.2d 820, 61 Ga.App. 841—Crandall v. Sammons, 7 S.E.2d 575, 62 Ga.App. 1—Smeltzer v. Atlanta Coach Co., 176 S.E. 846, 49 Ga.App. 755.
- Idaho.—McCoy v. Krenkel, 17 P.2d 547, 52 Idaho 626—Dillon v. Brooks, 6 P.2d 851, 51 Idaho 510.
- Ill.—Tennes v. Tennes, 50 N.E.2d 132, 320 Ill.App. 19.
- Ind.—Pierce v. Clemens, 46 N.E.2d 836, 113 Ind.App. 65.
- Iowa.—Martin v. Momyer, 300 N.W. 310, 230 Iowa 1158.
- Ky.—Turpin v. Scrivner, 178 S.W.2d 971, 297 Ky. 365—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474—Mossbarger's Adm'x v. Louisville & N. R. Co., 130 S.W.2d 54, 279 Ky. 178—Mattingly v. Meuter, 121 S. W.2d 676, 275 Ky. 294—Toppass v. Perkins' Adm'x, 104 S.W.2d 423, 268 Ky. 186.
- Minn.—Vondrashek v. Dignan, 274 N. W. 609, 200 Minn. 530.
- Mo.—Lewis v. Kansas City Public Service Co., App., 17 S.W.2d 359.
- Pa.—Little v. Four Wheel Drive Sales Co., 179 A. 550, 319 Pa. 409.

§ 544. — Injury to Person Standing or Sitting on Highway

The general rules governing instructions apply in actions for injuries to persons standing or sitting upon the highway.

The general rules as to the necessity and propriety of instructions in actions for injuries arising out of the operation of motor vehicles have been applied in actions for injuries to persons standing or sitting upon the highway.⁹³

§ 545. — Injury to Person Moving to or from Streetcar

Instructions on the care owed by or to one moving to or from a streetcar should state the law correctly.

Instructions in an action for injuries arising out of the operation of a motor vehicle, as to the duty or care owed by or to a person moving to or from

a streetcar, should state the law correctly⁹³ and they should conform to and be warranted by the facts of the case.⁹⁴ It is not necessary for the court to give an instruction on the question of the contributory negligence of a person preparing to board a streetcar where it appears that such person was standing in a proper place and that there is no evidence to show any contributory negligence on his part.⁹⁵

§ 546. — Vehicles Stopping, Backing, or Turning

Appropriate instructions may be given in actions arising out of the stopping, backing, or turning of motor vehicles.

Instructions in actions arising out of the stopping, backing, or turning of motor vehicles should state the law correctly⁹⁶ and be applicable under the

Tenn.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356.
Va.—Miles v. Rose, 175 S.E. 230, 162 Va. 572.

(3) Assumption of risk.

Mich.—Slayton v. Boesch, 23 N.W.2d 134, 315 Mich. 1.

S.D.—Hall v. Hall, 258 N.W. 491.

92. Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App.2d 566.

Okl.—Tilbury v. Powell, 130 P.2d 830, 191 Okl. 435.

Instructions held erroneous or properly refused

Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App.2d 566.

Mo.—Duckworth v. Dent, App., 135 S.W.2d 28, reversed on other grounds 142 S.W.2d 85, 346 Mo. 518.

Instructions held proper or erroneously refused

Ariz.—Butane Corp. v. Kirby, 187 P.2d 325, 66 Ariz. 272.

Cal.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App.2d 566—Porter v. Rasmussen, 15 P.2d 888, 127 Cal.App. 405.

Ill.—Serio v. Bowman Dairy Co., 73 N.E.2d 160, 331 Ill.App. 414.

Iowa.—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771.

Or.—Zahara v. Brandli, 94 P.2d 718, 163 Or. 668.

93. **Instructions held erroneous or properly refused**

U.S.—Western Union Telegraph Co. v. Hudson, C.C.A.Cal., 82 F.2d 992.

Cal.—Morgan v. Los Angeles Rock & Gravel Corporation, 287 P. 152, 105 Cal.App. 224—Richmond v. Moore, 284 P. 681, 103 Cal.App. 173—Vedder v. Bireley, 267 P. 724, 92 Cal. App. 52—Wagnitz v. Scharetzg, 265 P. 318, 89 Cal.App. 511.

Conn.—Syssa v. Hemingway, 138 A. 223, 106 Conn. 499.

Mo.—Linders v. People's Motorbus Co. of St. Louis, 32 S.W.2d 580, 326 Mo. 695.

Instructions held sufficient, not erroneous, or improperly refused

Cal.—Coursault v. Schwebel, 5 P.2d 77, 118 Cal.App. 259—Morgan v. Los Angeles Rock & Gravel Corporation, 287 P. 152, 105 Cal.App. 224—Richmond v. Moore, 284 P. 681, 103 Cal.App. 173.

Ill.—Hurt v. Jurczicht, 57 N.E.2d 230, 324 Ill.App. 85.

Mo.—Gardner v. Burkart Mfg. Co., App., 7 S.W.2d 706.

Wash.—Tobin v. Goodwin, 290 P. 215, 157 Wash. 658.

Instruction held not prejudicial

Mo.—Welp v. Bogy, 8 S.W.2d 599, 320 Mo. 672.

94. **Instructions held erroneous or properly refused**

U.S.—Pierce v. Sanden, C.C.A.Minn., 29 F.2d 87.

Cal.—Walters v. Evick, 268 P. 1061, 93 Cal.App. 1.

Ky.—Likins' Adm'r v. Solinger, 190 S.W.2d 564, 300 Ky. 824.

N.J.—Rigg v. Lewis, 145 A. 223, 7 N.J.Misc. 290.

Instructions held not erroneous

Ind.—Conner v. Jones, 59 N.E.2d 577, 115 Ind.App. 660, rehearing denied 60 N.E.2d 534, 115 Ind.App. 660.

Mo.—Hart v. Weber, 53 S.W.2d 914—Walsh v. Drewes, App., 38 S.W.2d 271.

95. Ohio.—Denardo v. Pravc, 168 N.E. 225, 32 Ohio App. 445.

96. Ga.—Harwell v. Blue's Truck Line, 199 S.E. 739, 187 Ga. 78, mandate conformed to Blue's Truck Line v. Harwell, 200 S.E. 500, 59 Ga.App. 305—W. S. Dickey Clay Mfg. Co. v. Gregg, 198 S.E. 90, 58 Ga.App. 145.

Iowa.—Holub v. Fitzgerald, 243 N.W. 575, 214 Iowa 857.

Ky.—Perkins v. Stevenson, 105 S.W.2d 832, 268 Ky. 692.

Wash.—White v. Fenner, 133 P.2d 270, 16 Wash.2d 226.

Wis.—Gauthier v. Carbonneau, 277 N.W. 135, 226 Wis. 527—Czarnetzky v. Booth, 246 N.W. 574, 210 Wis. 536.

Instructions held erroneous or properly refused

Ill.—Gamble v. Hayes Transfer & Storage Co., 278 Ill.App. 365.

Ky.—Marsee v. Bates, 29 S.W.2d 632, 235 Ky. 60.

Mass.—McGaffee v. P. B. Mutrie Motor Transp., 42 N.E.2d 841, 311 Mass. 730.

Neb.—Taulborg v. Andresen, 228 N.W. 528, 119 Neb. 273, 67 A.L.R. 642.

N.H.—Demers v. Flack, 185 A. 896, 88 N.H. 184.

Ohio.—Pugh v. Akron-Chicago Transp. Co., 28 N.E.2d 501, 137 Ohio St. 164—Hankey Baking Co. v. Sheen, 11 N.E.2d 287, 57 Ohio App. 58.

Wis.—Czarnetzky v. Booth, 246 N.W. 574, 210 Wis. 536.

Instructions held sufficient, proper, or erroneously refused

Cal.—Miner v. Dabney-Johnson Oil Corporation, 28 P.2d 23, 219 Cal. 580.

Ill.—Bobalek v. Atlass, 42 N.E.2d 584, 315 Ill.App. 514.

Ind.—American Carloading Corporation v. Voight, 21 N.E.2d 453, 107 Ind.App. 267.

Iowa.—Johnston v. Johnson, 279 N.W. 139, 225 Iowa 77, 118 A.L.R. 233.

Mo.—Schroeder v. Rawlings, 155 S.W.2d 189, 348 Mo. 824—Wilks v. Gilliam, App., 80 S.W.2d 702.

Ohio.—Dye v. Spohn, App., 36 N.E.2d 425.

Pa.—Gyarmati v. Linde Air Products Co., 157 A. 485, 305 Pa. 183.

pleadings and evidence in the case.⁹⁷ It has been held that an instruction using the words of a statute, requiring a driver making a turn to see first that such movement can be made in safety, must be qualified with appropriate language relieving the driver of the burden of insuring the safety of his turn.⁹⁸

§ 547. — Vehicles Meeting

Instructions as to the rights and duties of the drivers

Wash.—Webber v. Park Auto Transp Co., 244 P. 718, 138 Wash. 325.

Wis.—Patterson v. Edgerton Sand & Gravel Co., 277 N.W. 636, 227 Wis. 11.

42 C.J. p 1275 note 97 [c].

Instructions held not prejudicial

Conn.—Rysczynski v. McCarthy Freight System, 26 A.2d 853, 129 Conn. 118.

Instructions held not misleading

Ariz.—Phoenix Baking Co. v. Vaught, 156 P.2d 725, 62 Ariz. 222.

97. Cal.—Ferrula v. Santa Fe Bus Lines, 189 P.2d 294, 83 Cal.App.2d 416—Huber v. Henry J. Kaiser Co., 162 P.2d 693, 71 Cal.App.2d 278.

Ill.—City of Lake Forest v. Janowitz, 14 N.E.2d 894, 295 Ill.App. 289

Ind.—Young v. Mader, 14 N.E.2d 329, 105 Ind.App. 532.

Ky.—Perkins v. Stevenson, 105 S.W.2d 832, 268 Ky. 692

Mo.—Rishel v. Kansas City Public Service Co., 129 S.W.2d 851.

Ment.—McCulloch v. Horton, 74 P.2d 1, 105 Mont. 531, 114 A.L.R. 823.

Ohio.—Blaine v. Yeager, App., 44 N.E.2d 481

Wash.—White v. Fenner, 133 P.2d 270, 16 Wash.2d 226

Applicability to pleadings and evidence in general see *infra* § 556

Instructions held proper or erroneously refused under pleadings or evidence

Ala.—Alabama Power Co. v. Buck, 35 So.2d 355, 250 Ala. 618.

Conn.—Kochler v. Kendall, 135 A.390, 105 Conn. 410

Iowa.—Huston v. Lindsay, 276 N.W.201, 224 Iowa 281.

Ky.—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8.

Mo.—Crites v. Kansas City Public Service Co., 190 S.W.2d 924—General Exchange Ins. Corp. v. Young, App., 206 S.W.2d 683, affirmed, Sup., 212 S.W.2d 396—Christman v. Reichholdt, App., 150 S.W.2d 527—Duke v. Brown Transfer & Storage Co., App., 133 S.W.2d 697—Ford v. Pieper, App., 24 S.W.2d 1054.

Pa.—Pavlak v. Schwartz, Com.Pl., 2 Fay.L.J. 60.

Va.—Virginia Stage Lines v. Spencer, 36 S.E.2d 822, 184 Va. 870.

Wash.—Gaches v. Daw, 10 P.2d 1111, 168 Wash. 162.

Wis.—Manitowoc Trust Co. v. Bouril, 265 N.W. 572, 220 Wis. 627.

98. Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181.

99. Cal.—Ferrula v. Santa Fe Bus Lines, 189 P.2d 294, 83 Cal.App.2d 416—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435.

Ga.—Roberts v. Phillips, 134 S.E. 837, 35 Ga.App. 743, affirmed Phillips v. Roberts, 144 S.E. 651, 166 Ga. 897.

Iowa.—Lang v. Siddall, 254 N.W. 783, 218 Iowa 263—Muithead v. Challis, 240 N.W. 912, 213 Iowa 1108—Sergeant v. Challis, 238 N.W. 442, 213 Iowa 57.

Ky.—Harlan Fruit Co. v. Kilbourne, 133 S.W.2d 730, 280 Ky. 511—Whitney Transfer Co. v. Smith's Adm'x, 77 S.W.2d 440, 256 Ky. 844.

Miss.—Priestley v. Hays, 112 So. 788, 147 Miss. 813.

Wis.—Gibson v. Streeter, 6 N.W.2d 662, 241 Wis. 600—Roellig v. Gear, 260 N.W. 232, 217 Wis. 651.

Basic instruction set forth

Ky.—Short v. Robinson, 134 S.W.2d 594, 280 Ky. 707.

1. Instructions held confusing or misleading

Ill.—Selman v. Midwest Haulers, 33 N.E.2d 140, 309 Ill.App. 154

Iowa.—Balik v. Flacker, 238 N.W. 467, 212 Iowa 1381.

Ky.—Buck v. Kleinschmidt, 131 S.W.2d 714, 279 Ky. 569.

Wash.—Barrett v. Powers, 290 P. 816, 158 Wash. 270.

Instructions held not confusing or misleading

Ky.—Sweazy v. King, 58 S.W.2d 659, 248 Ky. 432.

Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W.2d 780, 346 Mo. 321—Roberts v. Atlas Life Ins. Co., 163 S.W.2d 369, 236 Mo.App. 1162.

N.J.—Morris Tp., in Morris County, v. Joseph Harris & Sons, 143 A.817, 7 N.J.Misc. 17.

2. Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409—Jake-way v. Allen, 282 N.W. 374, 226 Iowa 13.

Instructions held erroneous or properly refused

(1) Generally.

U.S.—Petroleum Carrier Corp. v. Snyder, C.C.A.Ga., 161 F.2d 323.

Cal.—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272—Jackson v.

of motor vehicles which meet should correctly set forth the law applicable under the pleadings and proof, without being confusing or misleading.

It is proper and necessary for the court to give appropriate instructions on the issues raised with respect to the rights and duties of the drivers of motor vehicles meeting each other.⁹⁹ Such instructions should not be confusing or misleading,¹ and should state the law correctly,² and a request

Miller, 20 P.2d 113, 130 Cal.App. 427.

Conn.—Kurtz v. Morse Oil Co., 158 A.906, 114 Conn. 336

Ga.—La Hatt v. Walton, 184 S.E.742, 53 Ga.App. 6.

Ill.—Bunch v. McAllister, 266 Ill.App. 248.

Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409.

Ky.—Dixie Ohio Exp. Co. v. Vickery, 206 S.W.2d 821, 306 Ky. 171.

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md 424, and appeal dismissed American Oil Co. v Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Miss.—D'Antoni v. Teche Lines, 143 So. 415, 163 Miss. 668—Gardner v. Comer, 118 So. 300, 151 Miss 443.

Mo.—Collins v. Beckmann, 79 S.W.2d 1052.

S.D.—Stammerjohan v. Sims, 31 N.W.2d 449.

Wash.—O'Neill v. Gruhn, 85 P.2d 1064, 197 Wash. 557—Colvin v. Simonson, 16 P.2d 839, 170 Wash. 341.

(2) Keeping to the right.

U.S.—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.

Ala.—Harris v. Blythe, 130 So. 548, 222 Ala. 48.

Ark.—Riceland Petroleum Co. v. Moore, 12 S.W.2d 415, 178 Ark. 599.

Fla.—Zorn v. Britton, 162 So. 879, 120 Fla. 304—Florida Motor Lines v. Casad, 124 So 180, 98 Fla. 720, followed in 124 So. 181, 98 Fla. 726.

Ga.—Spalding Lumber Co. v. Hemphill, App., 47 S.E.2d 514.

Idaho.—Stuart v. McVey, 87 P.2d 446, 59 Idaho 740.

Iowa.—Bobst v. Hoxie Truck Line, 267 N.W. 673, 221 Iowa 823—Despain v. Ballard, 256 N.W. 426, 218 Iowa 863—Lang v. Siddall, 254 N.W. 783, 218 Iowa 263—Sergeant v. Challis, 238 N.W. 442, 213 Iowa 57—Cuthbertson v. Hoffa, 216 N.W. 733, 205 Iowa 666.

Ky.—Holles v. Bourne, 167 S.W.2d 50, 292 Ky. 578.

Miss.—D'Antoni v. Teche Lines, 143 So. 415, 163 Miss. 668—Boothe v. Teche Lines, 143 So. 418, 165 Miss. 343.

Mo.—Collins v. Beckmann, 79 S.W.2d 1052.

N.H.—Bennett v. Bennett, 31 A.2d 374, 92 N.H. 379.

to charge, although containing a correct principle of law, may nevertheless be properly refused where it is couched in language which is not calculated

to enlighten the jury.³ The instructions should be applicable under the pleadings,⁴ issues,⁵ and evidence⁶ in the case. Under the proof presented,

N.C.—Hoke v. Atlantic Greyhound Corp., 42 S.E.2d 593, 227 N.C. 412.

Pa.—Brown v. Bahl, 170 A. 346, 111 Pa.Super. 598.

Instructions held sufficient, not erroneous, or improperly refused

(1) Generally.

Ala.—Smith v. Baggett, 118 So. 283, 218 Ala. 227.

Cal.—Gutter v. Niesley, 36 P.2d 155, 1 Cal.App.2d 69—Cummins v. Yellow & Checker Cab Co., 15 P.2d 536, 127 Cal.App. 170—Elsev v. Domecq, 299 P. 794, 114 Cal.App. 42.

Conn.—Staplins v. Murphy, 183 A. 398, 121 Conn. 123—Klett v. Freneya, 149 A. 399, 111 Conn. 99.

Ind.—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585.

Iowa.—Yance v. Hoskins, 281 N.W. 489, 225 Iowa 1108, 118 A.L.R. 1186—Clark v. Berry Seed Co., 280 N.W. 505, 225 Iowa 262.

Ky.—Foley's Adm'r v. Witt, 172 S.W. 2d 81, 294 Ky. 498.

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Miss.—Chadwick v. Bush, 163 So. 823, 174 Miss. 75.

Mo.—Nelson v. Evans, 93 S.W.2d 691, 338 Mo. 991—Stone v. Garrett Const. Co., App., 92 S.W.2d 951—Windsor v. McKee, App., 22 S.W.2d 65.

N.H.—Sullivan v. Sullivan, 18 A.2d 828, 91 N.H. 341.

Okl.—Oklahoma Natural Gas Corporation v. Schwartz, 293 P. 1087, 146 Okl. 250.

S.D.—Pemberton v. Fritts, 228 N.W. 409, 56 S.D. 374.

Utah.—Thomas v. Sadleir, 162 P.2d 112, 108 Utah 552.

Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.

Wash.—Glick v. Ropes, 138 P.2d 858, 18 Wash.2d 260—Colvin v. Simonson, 16 P.2d 839, 170 Wash. 341.

(2) Keeping to the right.

Ark.—McNew v. Wood, 163 S.W.2d 314, 204 Ark. 530—Compressed Industrial Gases v. Todd, 129 S.W.2d 262, 198 Ark. 409.

Cal.—Elsev v. Domecq, 299 P. 794, 114 Cal.App. 42—Levy v. Berner, 293 P. 896, 110 Cal.App. 65.

Fla.—Zorn v. Britton, 162 So. 879, 120 Fla. 304.

Ind.—Ewing v. Duncan, 197 N.E. 901, 101 A.L.R. 554.

Iowa.—Young v. Hendricks, 283 N.W. 895, 226 Iowa 211—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23.

Ky.—Johnson v. Hopkins, 180 S.W.2d 287, 297 Ky. 406—Holllis v. Bourne, 167 S.W.2d 50, 292 Ky. 578—Huber & Huber v. Noe's Adm'r, 68 S.W.2d 406, 252 Ky. 779.

Mich.—Soule v. Grimshaw, 253 N.W. 237, 266 Mich. 117.

Minn.—Dohm v. R. N. Cardozo & Bro., 206 N.W. 377, 165 Minn. 193.

Mo.—Cantwell v. Cremins, 149 S.W.2d 343, 347 Mo. 836—King v. Friedrich, App., 43 S.W.2d 843.

N.Y.—Cardamona v. Hartigan, 70 N.Y.S.2d 158, 272 App.Div. 825.

N.C.—Queen City Coach Co. v. Lee, 11 S.E.2d 341, 218 N.C. 320—Gillis v. Transit Corporation of Norfolk, 137 S.E. 153, 193 N.C. 346.

Ohio.—Bennett v. Sinclair Refining Co., 57 N.E.2d 776, 144 Ohio St. 139—Scott v. Spaulding, App., 58 N.E.2d 815—Johnson v. Thompson, 172 N.E. 298, 35 Ohio App. 91.

S.C.—Foster v. Tate, 162 S.E. 456, 164 S.C. 432.

Va.—Chick Transit Corporation v. Edenton, 196 S.E. 648, 170 Va. 361.

Wash.—O'Connell v. Home Oil Co., 40 P.2d 991, 180 Wash. 461.

Wis.—Kull v. Advance-Rumely Thresher Co., 245 N.W. 589, 209 Wis. 565.

(3) Dimming of lights—Davis v. Farris, 1 Tenn.App. 144.

Instructions held not prejudicial

Ala.—Luquire Ins Co v. McCalla, 13 So.2d 865, 244 Ala. 479.

Cal.—Bennett v. Chandler, 126 P.2d 173, 52 Cal.App.2d 255.

Wis.—Peterson v. Jansen, 295 N.W. 30, 236 Wis. 292.

3. Ga.—Roberts v. Phillips, 134 S.E. 837, 35 Ga.App. 743, affirmed Phillips v. Roberts, 144 S.E. 651, 166 Ga. 897.

4. Mo.—Watts v. Moussette, 85 S.W. 2d 487, 337 Mo. 533.

Applicability to pleadings and evidence in general see *infra* § 556.

Instructions held erroneous or properly refused under pleadings

Ga.—La Hattie v. Walton, 184 S.E. 742, 53 Ga.App. 6.

Ill.—Walker v. Backus, 246 Ill.App. 382.

Miss.—Mississippi Power Co v. McWilliams, 121 So. 282, 154 Miss. 84.

Mo.—McCune v. Dinwiddie, App., 79 S.W.2d 484.

Instructions held proper under pleadings

Conn.—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49.

Ga.—La Hattie v. Walton, 184 S.E. 742, 53 Ga.App. 6.

Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409.

Mo.—Edwards v. Woods, 119 S.W.2d

359, 342 Mo. 1097—Pogue v. Rosegrant, 98 S.W.2d 528.

Utah.—Thomas v. Sadleir, 162 P.2d 112, 108 Utah 552.

5. Instruction held not required under issues

Mich.—Smith v. Maticka, 8 N.W.2d 900, 305 Mich. 32.

6. Instructions held erroneous or properly refused under evidence

(1) Generally.

Cal.—Falasco v. Hulen, 44 P.2d 469, 6 Cal App 2d 274.

Iowa.—Young v. Hendricks, 283 N.W. 895, 226 Iowa 211

Ky.—Rice v. Franklin Title & Trust Co., 184 S.W.2d 896, 299 Ky. 142—Silver Fleet Motor Express v. Casey, 155 S.W.2d 863, 288 Ky. 233—Itabold v. Gonyer, 148 S.W.2d 728, 285 Ky. 618—Commercial Carriers v. Small, 126 S.W.2d 143, 277 Ky. 189—Whitney Transfer Co v. Smith's Adm'r, 77 S.W.2d 440, 256 Ky. 844.

Mich.—Smith v. Maticka, 8 N.W.2d 900, 305 Mich. 32.

Miss.—Mississippi Power Co. v. McWilliams, 121 So. 282, 154 Miss. 84.

Mo.—Watts v. Moussette, 85 S.W.2d 487, 337 Mo. 533.

N.J.—Claypoole v. Motor Finance Corporation, 15 A.2d 794, 125 N.J. Law 440.

Utah.—Spencer v. Santa Fe Trail Transp. Co., 151 P.2d 461, 107 Utah 10.

Wash.—O'Connell v. Home Oil Co., 40 P.2d 991, 180 Wash. 461—Stubbs v. Allen, 10 P.2d 983, 168 Wash. 156—Barrett v. Powers, 290 P. 816, 158 Wash. 270.

(2) Keeping to the right.

U.S.—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.

Ariz.—Haner v. Wilson-Coffin Trading Co., 67 P.2d 487, 49 Ariz. 402.

Cal.—Jackson v. Miller, 20 P.2d 113, 130 Cal.App. 427.

Colo.—Parrish v. Smith, 78 P.2d 629, 102 Colo. 250, followed in Parrish v. Fey, 78 P.2d 633, 102 Colo. 258.

Ill.—Selman v. Midwest Haulers, 33 N.E.2d 140, 309 Ill.App. 154.

Iowa.—Young v. Hendricks, 283 N.W. 895, 226 Iowa 211—Christenson v. Northwestern Bell Telephone Co., 270 N.W. 394, 222 Iowa 808.

Miss.—Aycock v. Burnett, 128 So. 100, 157 Miss. 510—Priestley v. Hays, 112 So. 788, 147 Miss. 843.

Mo.—Long v. Binnicker, 63 S.W.2d 831, 228 Mo.App. 193—Wahlig v. Hill, App., 62 S.W.2d 1099—White v. Missouri Motors Distributing Co., 47 S.W.2d 245, 228 Mo.App. 453.

N.H.—Ross v. Burnham, 13 A.2d 733, 91 N.H. 80,

it may be necessary for the court to give instructions only on the general duties of a driver and his duties when meeting a motor vehicle coming from an opposite direction.⁷ It may be unnecessary for the court to define the statutory duties of the operators of motor vehicles involved in a collision where the presence and manner of operation of each vehicle were known to the driver of the other.⁸

§ 548. — Vehicles Crossing

Instructions as to the rights and duties of the drivers of motor vehicles crossing each other should correctly set forth the law applicable under the pleadings and evidence.

Appropriate instructions should be given on the issues raised in an action involving the rights and duties of the drivers of motor vehicles which cross each other at an intersection or elsewhere.⁹ Such instructions should not be confusing or misleading,¹⁰ and, likewise, under the decisions, such

N.J.—Claypoole v. Motor Finance Corporation, 15 A.2d 794, 125 N.J. Law 440—Kemp v. Bright, 141 A. 796, 104 N.J. Law 529.

N.C.—Gillis v. Transit Corporation of Norfolk, 137 S.E. 153, 193 N.C. 346.

Or.—Miller v. Service and Sales, 38 P.2d 995, 149 Or. 11, 96 A.L.R. 628.

Tenn.—Colonial Baking Co. v. Acquino, 103 S.W.2d 613, 20 Tenn.App. 695.

Utah.—Thomas v. Sadleir, 162 P.2d 112, 108 Utah 552.

Instructions held sufficient, proper, or erroneously refused, under evidence

(1) Generally.

Colo.—Parrish v. Smith, 78 P.2d 629, 102 Colo. 250, followed in Parrish v. Fey, 78 P.2d 633, 102 Colo. 258.

Ga.—Chandler v. Brittain, 172 S.E. 745, 48 Ga.App. 361—Roper v. Jones, 157 S.E. 367, 42 Ga.App. 686.

Ky.—Castle v. McGaffee, 154 S.W.2d 241, 287 Ky. 561—Paducah Coca-Cola Bottling Co. v. Reeves, 88 S.W.2d 39, 261 Ky. 539—Berryman v. Worthington, 43 S.W.2d 5, 240 Ky. 756.

Mo.—Cheffer v. Eagle Discount Stamp Co., 156 S.W.2d 591, 348 Mo. 1023—Pogue v. Rosegrant, 98 S.W.2d 528—Stanton v. Jones, 59 S.W.2d 648, 332 Mo. 631—Cox v. Frank L. Schaab Stove & Furniture Co., App., 83 S.W.2d 211.

N.J.—Van Brunt v. Wiener, 158 A. 923, 10 N.J. Misc. 298.

Ohio.—Patton Motor Trucking Co. v. Knapp, 157 N.E. 402, 25 Ohio App. 89.

Tex.—Tarver v. Vallance, Civ.App., 97 S.W.2d 748.

Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.

Va.—Hamrick v. Fahrney, 161 S.E. 43, 157 Va. 396.

(2) Keeping to the right.

Ark.—Ocker v. Nix, 155 S.W.2d 58, 202 Ark. 1064.

Cal.—Levy v. Berner, 293 P. 896, 110 Cal.App. 65.

Ga.—Railway Exp. Agency v. Standridge, 24 S.E.2d 504, 68 Ga.App. 836, followed in 24 S.E.2d 508, 68 Ga.App. 843—Morrow v. Southeastern Stages, 22 S.E.2d 336, 68 Ga.App. 142—Hornbrook v. Reed, 133 S.E. 264, 35 Ga.App. 425.

Idaho.—O'Connor v. Meyer, 154 P.2d 174, 66 Idaho 15.

Iowa.—Pierce v. Heusinkveld, 14 N.W.2d 275, 234 Iowa 1348—Bailey v. Fredericksburg Produce Ass'n, 295 N.W. 122, 229 Iowa 677.

Ky.—Bohn v. Sams, 193 S.W.2d 459, 302 Ky. 63.

Mo.—Stanton v. Jones, 59 S.W.2d 648, 332 Mo. 631—Johnessee v. Central States Oil Co., App., 200 S.W.2d 383—Roberts v. Atlas Life Ins. Co., 163 S.W.2d 369, 236 Mo.App. 1162—Goehring v. Beltz, App., 60 S.W.2d 665—King v. Friederich, App., 43 S.W.2d 843.

N.Y.—Callahan v. Terminal Cab Corporation, 181 N.E. 67, 259 N.Y. 112—Zinn v. Stiefvater, 245 N.Y.S. 422, 231 App.Div. 751, followed in 245 N.Y.S. 815, 231 App.Div. 751.

Ohio.—Dietz v. Chandler, App., 56 N.E.2d 937.

Okl.—Feuquay v. Ecker, 157 P.2d 745, 195 Okl. 285—Gibson Oil Co. v. Westbrook, 16 P.2d 127, 160 Okl. 26.

Or.—Mercer v. Risberg, 188 P.2d 632—Cavett v. Pacific Greyhound Lines, 167 P.2d 941, 178 Or. 363.

Pa.—Jones v. Bell Tel Co. of Pa., 49 A.2d 272, 159 Pa.Super. 556.

Utah.—Thomas v. Sadleir, 162 P.2d 112, 108 Utah 552.

Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.

Wash.—Hansen v. Coldwell, 73 P.2d 351, 192 Wash. 167.

7. Ky.—Buck v. Kleinschmidt, 131 S.W.2d 714, 279 Ky. 569.

8. Ky.—Consolidated Coach Corporation v. Rryant, 86 S.W.2d 88, 260 Ky. 452.

9. Cal.—Bramble v. McEwan, 104 P.2d 1054, 40 Cal.App.2d 400.

Conn.—Sparico v. Munzenmaier, 56 A.2d 165, 134 Conn. 194—Decker v. Roberts, 12 A.2d 541, 126 Conn. 478—Mathis v. Bzdula, 188 A. 264, 122 Conn. 202—Hall v. Root, 145 A. 86, 109 Conn. 33.

Ill.—Schluraff v. Shore Line Motor Coach Co., 269 Ill.App. 569.

Iowa.—Davis v. Hoskinson, 290 N.W. 497, 228 Iowa 193.

Kan.—Waugh v. Kansas City Public Service Co., 143 P.2d 788, 157 Kan. 690.

Ky.—Randle v. Mitchell, 142 S.W.2d 124, 283 Ky. 501.

Md.—Paolini v. Western Mill & Lumber Corporation, 166 A. 609, 165 Md. 45—Hendler Creamery Co. v. Friedman, 154 A. 93, 160 Md. 526.

Neb.—McCulley v. Anderson, 227 N.W. 321, 119 Neb. 105.

N.Y.—Scott v. City of New York, 19 N.Y.S.2d 443, 259 App.Div. 851—Ferraro v. Garden City Park Fire Comm's, 18 N.Y.S.2d 194, 259 App.Div. 121—Raufeisen v. Rochester Transit Corporation, 15 N.Y.S.2d 670, 258 App.Div. 846.

Ohio.—Watt v. Feuerlicht, App., 41 N.E.2d 719—Schmidt v. City Ice & Fuel Co., 19 N.E.2d 514, 60 Ohio App. 29.

Pa.—Weinberg v. Pavitt, 155 A. 867, 304 Pa. 312—Rigberg v. Truskey, 23 A.2d 244, 146 Pa.Super. 509—Hess v. Mumma, 7 A.2d 72, 136 Pa.Super. 58.

Utah.—Smith v. Lenzi, 279 P. 893, 74 Utah 362.

Va.—Owen v. Dixon, 175 S.E. 41, 162 Va. 601.

Wash.—Fetterman v. Levitch, 109 P.2d 1064, 7 Wash.2d 431—Webber v. Park Auto Transp. Co., 244 P. 718, 138 Wash. 325, 47 A.L.R. 590.

W.Va.—Collar v. McMullin, 148 S.E. 496, 107 W.Va. 440.

Wis.—Gibson v. Streeter, 6 N.W.2d 662, 241 Wis. 600.

Court's duty to reconcile regulations

In action for injuries sustained in collision between automobile entering intersection when signal turned green and automobile crossing intersection in funeral procession, trial court was held required to reconcile, as far as possible, statute requiring traffic to move when signal is green, and ordinance prohibiting vehicles from driving through procession, and to lay down rule applicable to facts.—Merkling v. Ford Motor Co., 296 N.Y.S. 393, 251 App.Div. 89.

10. Instructions held confusing or misleading

Ala.—Moore v. Cruitt, 191 So. 252, 238 Ala. 414.

Cal.—Galway v. Guggolz, 4 P.2d 290, 117 Cal.App. 639.

Or.—Vroman v. Upp, 77 P.2d 432, 158 Or. 597.

Pa.—Peters v. Shear, 41 A.2d 556, 351 Pa. 521.

instructions should set forth the law correctly.¹¹ | Where a rule governing the operation of motor

Vt.—Reid v. Abbiati, 32 A.2d 133, 113 Vt. 233.

Wash.—Mitchell v. Cadwell, 62 P.2d 41, 188 Wash. 257.

Wis.—Reynolds v. Madison Bus Co., 26 N.W.2d 653, 250 Wis. 294.

Instructions held not confusing or misleading

Ind.—Keltner v. Patton, 185 N.E. 270, 204 Ind. 550.

Mich.—Major v. Southwestern Motor Sales, 22 N.W.2d 96, 314 Mich. 122.

Mo.—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065.

Or.—Noble v. Sears, 257 P. 809, 122 Or. 162.

Wash.—Hirst v. Standard Oil Co. of California, 261 P. 405, 145 Wash. 597.

42 C.J. p 1278 note 49 [c] (13).

Instructions held not conflicting

Ky.—Gartrell v. Harris' Coadm'rs, 187 S.W.2d 1019, 300 Ky. 82.

11. Ala.—Sloss-Sheffield Steel & Iron Co. v. Allred, 25 So.2d 174, 32 Ala. App. 183, certiorari denied 25 So.2d 179, 247 Ala. 499.

Ill.—Schluraff v. Shore Line Motor Coach Co., 269 Ill.App. 569.

Pa.—Hess v. Mumma, 7 A.2d 72, 136 Pa.Super. 58.

Instructions held erroneous or properly refused

(1) Generally.

Ala.—Brown v. Standard Casket Mfg. Co., 175 So. 358, 234 Ala. 512—White v. Thorington, 120 So. 914, 219 Ala. 101.

Cal.—Lowenbruck v. Stiglmeier, 46 P. 2d 251, 7 Cal.App.2d 204.

Conn.—Lossier v. Consumers Petroleum Corporation, 38 A.2d 670, 131 Conn. 161—Penfield v. Hearing, 26 A.2d 791, 129 Conn. 169.

Ill.—Dina v. Passaglia, 23 N.E.2d 773, 302 Ill.App. 159—Roedler v. Vandalia Bus Lines, 281 Ill.App. 520.

Ind.—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind. App. 610.

Iowa.—Schwickerath v. Maas, 297 N.W. 248, 230 Iowa 329—Knutson v. Lurie, 251 N.W. 147, 217 Iowa 192—Newland v. G. McClelland & Son, 250 N.W. 229, 217 Iowa 568—Drouillard v. Rudolph, 228 N.W. 100, 207 Iowa 367.

Ky.—Willett v. Bradas & Gheens, 142 S.W.2d 139, 283 Ky. 525.

Me.—Keller v. Banks, 156 A. 817, 130 Me. 397.

Md.—Jackson v. Leach, 152 A. 813, 160 Md. 139.

Mass.—Stiles v. Wright, 32 N.E.2d 220, 308 Mass. 326.

Mich.—Bunker v. Reid, 238 N.W. 265, 255 Mich. 536.

Miss.—Genola v. Osburn, 11 So.2d 910, 194 Miss. 235.

Mo.—Hamre v. Conger, 209 S.W.2d

242—McCombs v. Ellisberry, 85 S.W.2d 135, 337 Mo. 491—Stakelback v. Neff, App., 13 S.W.2d 575.

Neb.—Nygaard v. Stull, 21 N.W.2d 595, 146 Neb. 736.

N.J.—Le Bavin v. Suburban Gas Co., 45 A.2d 664, 134 N.J. Law 10.

N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

N.Y.—Pesso v. Goodman, 240 N.Y.S. 730, 136 Misc. 277.

N.C.—Hill v. Lopez, 45 S.E.2d 539, 228 N.C. 433—Stephens v. Johnson, 1 S.E.2d 367, 215 N.C. 133—Sebastian v. Horton Motor Lines, 197 S.E.

539, 213 N.C. 770.

Ohio—Hamilton v. Gilkey, 10 N.E.2d 1014, 56 Ohio App. 438—Seekatz v. Sparks, 10 N.E.2d 1007, 56 Ohio App. 397—Metzger v. Yellow Taxi-

cab Co., 193 N.E. 75, 48 Ohio App. 275—Danner v. Avery, 168 N.E. 52,

32 Ohio App. 301—Adams v. Har-

vitt, 164 N.E. 773, 30 Ohio App. 211.

Or.—Vroman v. Up, 77 P.2d 432, 158 Or. 597—Williams v. Bryson, 40 P.

2d 61, 149 Or. 413—Karberg v. Leahy, 26 P.2d 56, 144 Or. 687—

Bowerman v. Columbia Gorge Motor Coach System, 284 P. 579, 132 Or. 106.

Pa.—Robinson v. Berger, 144 A. 899, 295 Pa. 95—Brown v. Jones, 10 A.

2d 839, 138 Pa.Super. 350.

Vt.—Elwell v. Barrows Coal Co., 136 A. 20, 100 Vt. 179.

Va.—Greenleaf v. Richards, 16 S.E.2d 374, 178 Va. 40.

Wash.—Warren v. Hynes, 102 P.2d 691, 4 Wash.2d 128.

Wis.—Gerbing v. McDonald, 229 N.W. 860, 201 Wis. 214, followed in 229 N.W. 864, 201 Wis. 222.

(2) Right of way.

U.S.—Williams v. Powers, C.C.A. Ohio, 135 F.2d 153.

Ala.—Brown v. Standard Casket Mfg. Co., 175 So. 358, 234 Ala. 512—Ehols v. Vinson, 124 So. 510, 220 Ala. 229.

Ark.—Jacks v. Culpepper, 37 S.W.2d 94, 183 Ark. 505—Herring v. Bol-

linger, 29 S.W.2d 676, 181 Ark. 925.

Cal.—Satterlee v. Orange Glenn School Dist. of San Diego County, 177 P.2d 279, 29 Cal.2d 629—Pettigrew v. O'Donnell, 90 P.2d 93, 32

Cal.App.2d 502—Jesse v. Giguliere, 74 P.2d 310, 24 Cal.App.2d 160—

Harkey v. Lucke, 65 P.2d 77, 19 Cal.App.2d 130—Morrow v. Mendle-

son, 58 P.2d 1302, 15 Cal.App.2d 15—Thompson v. Dentman, 21 P.2d

1009, 131 Cal.App. 680—Ekwall v. Los Angeles Hat Co., 287 P. 545,

105 Cal.App. 300—Hoffman v. McNamara, 282 P. 990, 102 Cal.App.

280.

Colo.—Potts v. Bird, 27 P.2d 745, 93 Colo. 547—Hicks v. Cramer, 288 P.

887, 87 Colo. 414.

Conn.—Ingeneri v. Makris, 37 A.2d

865, 131 Conn. 77—McNaught v. Smith, 17 A.2d 771, 127 Conn. 450—Hall v. Root, 145 A. 36, 109 Conn. 33.

Ill.—Alexander v. Sullivan, 78 N.E.2d 333, 334 Ill.App. 42—Rigdon v. Crosby, 66 N.E.2d 190, 328 Ill.App.

399—Wheeler v. Rudek, 65 N.E.2d 611, 328 Ill.App. 283, reversed on

other grounds 74 N.E.2d 601, 397 Ill. 438—Henderson v. Johnson, 21

N.E.2d 42, 300 Ill.App. 613—Riddle v. Munsager, 254 Ill.App. 68.

Ind.—Mattes v. Brugner, 159 N.E. 156, 88 Ind. App. 36.

Iowa.—Newland v. G. McClelland & Son, 250 N.W. 229, 217 Iowa 568.

Md.—Wagner v. Page, 20 A.2d 164, 179 Md. 465—Greenfeld v. Hook, 8

A.2d 888, 177 Md. 116, 136 A.L.R. 1485.

Mo.—Pappas Pie & Baking Co. v. Stroh Bros. Delivery Co., App., 67

S.W.2d 793.

Neb.—Spittler v. Callan, 255 N.W. 27, 127 Neb. 331.

N.H.—Gendron v. Glidden, 148 A. 461, 84 N.H. 162.

Ohio.—Blackford v. Kaplan, 20 N.E. 2d 522, 135 Ohio St. 268—Graft v.

Clark, App., 79 N.E.2d 166—Stuchel v. Cleveland Ry. Co., App., 58 N.

E.2d 430—Roberts v. Krasny, App., 40 N.E.2d 458—Schmidt v. City Ice

& Fuel Co., 19 N.E.2d 514, 60 Ohio App. 29—Seekatz v. Sparks, 10 N.

E.2d 1007, 56 Ohio App. 397—

Bloomgren v. Morris, 186 N.E. 404, 44 Ohio App. 451, affirmed Morris

v. Bloomgren, 187 N.E. 2, 127 Ohio St. 147, 89 A.L.R. 831—Kling v.

George Ast Candy Co., 168 N.E. 761, 33 Ohio App. 177, affirmed George

Ast Candy Co. v. Kling, 169 N.E. 292, 121 Ohio St. 362—Danner v.

Avery, 168 N.E. 52, 32 Ohio App. 301—Fairlawn Supply & Coal Co. v.

Jones, 165 N.E. 853, 30 Ohio App. 497.

Va.—Independent Cab Ass'n v. Barksdale, 15 S.E.2d 112, 177 Va. 587.

Wash.—Warren v. Hynes, 102 P.2d 691, 4 Wash.2d 128—Comfort v.

Penner, 6 P.2d 604, 166 Wash. 177—

Martin v. Hadenfeldt, 289 P. 533, 157 Wash. 563.

42 C.J. p 1276 note 10 [b] (1).

(3) Effect of traffic lights.

Ala.—Sloss-Sheffield Steel & Iron Co. v. Allred, 25 So.2d 174, 32 Ala.App.

183, certiorari denied 25 So.2d 179, 247 Ala. 499.

Ind.—Beard v. Ball, 182 N.E. 102, 96 Ind.App. 156.

(4) Duty to proceed beyond, or to right of, center of intersection before turning.

Conn.—Decker v. Roberts, 3 A.2d 855, 125 Conn. 150.

Iowa.—Wilson v. Long, 266 N.W. 482, 221 Iowa 668.

vehicles at an intersection is correctly stated by | the court, a party desiring a fuller explanation of

- N.J.—Hixson v. Burns, 155 A. 771, 9 N.J.Misc. 681.
- Ohio.—P. D. Lawrence Electric Co. v. Enterprise Lumber Co., 162 N.E. 434, 28 Ohio App. 30.
- (5) What constitutes intersection. Cal.—Lowenbruck v. Stiglmeier, 46 P.2d 251, 7 Cal.App.2d 204—Tyson v. Burton, 294 P. 750, 110 Cal.App. 428.
- Iowa.—Hupp v. Doolittle, 285 N.W. 247, 226 Iowa 814.
- Ohio.—Schmidt v. City Ice & Fuel Co., 19 N.E.2d 514, 60 Ohio App. 29.
- (6) Place of stopping. Cal.—Galway v. Guggolz, 4 P.2d 290, 117 Cal.App. 639.
- Conn.—Olson v. Musselman, 15 A.2d 879, 127 Conn. 228.
- Wash.—Hamilton v. Cadwell, 81 P.2d 815, 195 Wash 683.
- Instructions held sufficient, not erroneous, or improperly refused**
- (1) Generally.
- U.S.—Dillon v. Evansville Refining Co., C.C.A.Ind., 127 F.2d 13.
- Ala.—McCa v. Thomas, 92 So. 414, 207 Ala. 211.
- Ariz.—Chapman v. Salazar, 11 P.2d 613, 40 Ariz. 215.
- Ark.—Harvey v. Kirk, 168 S.W.2d 827, 205 Ark. xix—Smith v. Arkansas Traveler Co. v. Simmons, 28 S.W.2d 1052, 181 Ark. 1024.
- Cal.—Clinkscales v. Carver, 136 P.2d 777, 22 Cal.2d 72—Ades v. Brush, 152 P.2d 519, 66 Cal.App.2d 436—Miller v. Cranston, 106 P.2d 963, 41 Cal.App.2d 470—Angelo v. Esau, 93 P.2d 205, 34 Cal.App.2d 130—Hollibaugh v. Kishero Ito, 69 P.2d 871, 21 Cal.App.2d 480—Gutter v. Niesley, 36 P.2d 155, 1 Cal.App.2d 69—Hepner v. Libby, McNeill & Libby, 300 P. 830, 114 Cal.App. 747—Daniel v. Asbill, 276 P. 149, 97 Cal.App. 731.
- Conn.—Rode v. Adley Express Co., 33 A.2d 329, 130 Conn. 274.
- Ga.—Adams v. Evans, 23 S.E.2d 507, 68 Ga.App. 544.
- Ill.—Thomas v. Buchanan, 277 Ill. App. 393.
- Iowa.—Connelly v. Nolte, 21 N.W.2d 311, 237 Iowa 114—Enfield v. Butler, 264 N.W. 546, 221 Iowa 615—Shuck v. Keefe, 218 N.W. 31, 205 Iowa 365.
- Ky.—Thomas v. Smith, 195 S.W.2d 274, 302 Ky. 636—Gartrell v. Harris' Coadm'rs, 187 S.W.2d 1019, 300 Ky. 82—Bryan v. Battoe, 160 S.W.2d 369, 290 Ky. 47—W. M. Abbott Transfer Co. v. Kruse, 114 S.W.2d 731, 272 Ky. 479—Lindig v. Breen, 103 S.W.2d 941, 268 Ky. 153—Coleman v. Nelson, 6 S.W.2d 454, 224 Ky. 460.
- Md.—Bode v. Carroll-Independent Coal Co., 191 A. 685, 172 Md. 406—American Stores Co. v. Elmore, 169 A. 310, 166 Md. 699.
- Mass.—Falk v. Carlton, 170 N.E. 51, 270 Mass. 213.
- Minn.—Bell v. Pickett, 227 N.W. 854, 178 Minn. 540.
- Mo.—Pogue v. Rosegrant, 98 S.W.2d 528—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065—Ross v. Wilson, 163 S.W.2d 342, 236 Mo.App. 1178—Riner v. Riek, App., 57 S.W.2d 724—Roberts v. Wilson, 33 S.W.2d 169, 225 Mo.App. 932—Bates v. Friedman, App., 7 S.W.2d 452—Myers v. Nissenbaum, App., 6 S.W.2d 993.
- Neb.—Meyer v. Platte Val. Const. Co., 25 N.W.2d 412, 147 Neb. 860.
- N.H.—Dimock v. Lussier, 163 A. 500, 86 N.H. 54.
- N.C.—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.
- Ohio.—Heidle v. Baldwin, 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186—Kessler v. Brown, App., 32 N.E.2d 68—Baltimore & O. R. Co. v. Miller, 156 N.E. 222, 23 Ohio App. 255.
- Or.—Black v. Stith, 100 P.2d 485, 164 Or. 117—Lee v. Hoff, 97 P.2d 715, 163 Or. 374—Cox v. Jones, 5 P.2d 102, 138 Or. 327—McCartney v. Westbrook, 286 P. 525, 132 Or. 488.
- Pa.—Weinberg v. Pavitt, 155 A. 867, 304 Pa. 312—Cunningham v. Spangler, 186 A. 173, 123 Pa.Super. 151.
- S.D.—Simmons v. Leighton, 244 N.W. 883, 60 S.D. 524.
- Tenn.—Central Produce Co. v. General Cab Co. of Nashville, 129 S.W.2d 1117, 23 Tenn.App. 209—Duling v. Burnett, 124 S.W.2d 294, 22 Tenn. App. 522.
- Tex.—Jimmie Guest Motor Co. v. Olcott, Civ.App., 26 S.W.2d 373, error dismissed.
- Vt.—Jasmin v. Parker, 148 A. 874, 102 Vt. 405.
- Va.—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570.
- Wash.—Leer v. Cohen, 116 P.2d 535, 10 Wash.2d 239—Hughes v. Wallace, 107 P.2d 910, 6 Wash.2d 396—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21—Cecchi v. Rosa, 57 P.2d 1064, 186 Wash. 205—Mathias v. Eichelberger, 45 P.2d 619, 182 Wash. 185—Weikert v. Daniels, 35 P.2d 22, 178 Wash. 416—Comfort v. Penner, 6 P.2d 604, 166 Wash. 177.
- Wis.—Nowicki v. Northwestern Nat. Casualty Co., 12 N.W.2d 918, 244 Wis. 632—Gerbing v. McDonald, 229 N.W. 860, 201 Wis. 214, followed in 229 N.W. 864, 201 Wis. 222—Zutter v. O'Connell, 229 N.W. 74, 200 Wis. 601.
- (2) Right of way.
- Ark.—Murray v. Jackson, 24 S.W.2d 960, 180 Ark. 1144.
- Cal.—Godfrey v. Brown, 29 P.2d 165, 220 Cal. 57, 93 A.L.R. 1092—John-
- son v. Johnson, 31 P.2d 237, 137 Cal.App. 701.
- Conn.—Krauss v. Crawford, 52 A.2d 1, 133 Conn. 430.
- Ga.—Hennemier v. Morris, 181 S.E. 602, 51 Ga.App. 760.
- Idaho.—Faris v. Burroughs Adding Mach. Co., 282 P. 72, 48 Idaho 310.
- Ill.—Partridge v. Enterprise Transfer Co., 30 N.E.2d 947, 307 Ill.App. 386.
- Iowa.—Pestotnik v. Balliet, 10 N.W.2d 99, 233 Iowa 1047—Rogers v. Jefferson, 272 N.W. 532, 223 Iowa 718—Melsha v. Dillon, 243 N.W. 295, 214 Iowa 1324.
- Ky.—Thomas v. Smith, 195 S.W.2d 274, 302 Ky. 636—Lindig v. Breen, 103 S.W.2d 941, 268 Ky. 153—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246 Ky. 758—Sharp v. Hawls, 28 S.W.2d 493, 234 Ky. 438.
- Md.—Yellow Cab Co. v. Bradin, 191 A. 717, 172 Md. 388.
- Mass.—Gray v. Kinnear, 194 N.E. 817, 290 Mass. 31.
- Mo.—Niehaus v. Schulthels, App., 17 S.W.2d 603.
- Mont.—Flynn v. Helena Cab & Bus Co., 21 P.2d 1105, 94 Mont. 204.
- Neb.—Meyer v. Platte Valley Const. Co., 25 N.W.2d 412, 147 Neb. 860.
- Ohio.—Heidle v. Baldwin, 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186—Graft v. Clark, App., 79 N.E.2d 166—Young v. Swartz, App., 34 N.E.2d 795—Stevens v. Lopley, 189 N.E. 260, 46 Ohio App. 445—Adams v. Harvitt, 164 N.E. 773, 30 Ohio App. 211—Baltimore & O. R. Co. v. Miller, 156 N.E. 222, 23 Ohio App. 255.
- Pa.—Zitkovic v. Handel, Com.Pl. 90 Pittsb.Leg.J. 532.
- Tex.—Dallas Ry. & Terminal Co. v. Orr, Civ.App., 210 S.W.2d 863, affirmed, Sup., 215 S.W.2d 862.
- Wash.—Glick v. Ropes, 138 P.2d 858, 18 Wash.2d 260—Warren v. Hynes, 102 P.2d 691, 4 Wash.2d 128—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.
- Wis.—Schmallenberg v. Smith, 296 N.W. 597, 237 Wis. 265.
- 42 C.J. p. 1276 note 10 [b] (2).
- (3) Effect of traffic lights.—Bryan v. Battoe, 160 S.W.2d 369, 290 Ky. 47.
- (4) Duty to pass beyond, or to right of, center of intersection before making left turn.
- Conn.—Heimer v. Salisbury, 142 A. 749, 108 Conn. 180.
- Wash.—Levine v. A. A. Owen Lumber Co., 84 P.2d 353, 196 Wash. 673.
- Instructions held not prejudicial**
- U.S.—Klas v. Yellow Cab Co., C.C.A. Ill., 106 F.2d 935.
- Ala.—Brown v. Standard Casket Mfg. Co., 175 So. 358, 234 Ala. 512.
- N.Y.—Bailey v. Herrmann, 1 N.Y.S.2d

the rule should make an appropriate request therefor, and, if he fails to do so, he cannot later attack the court's charge as given.¹² The propriety of instructions affecting the right of way at intersections depends on the special circumstances of the case;¹³ and failure of the court to instruct on the right of way at an intersection has been

held not to constitute error where no instruction on the point was requested.¹⁴ The court may modify a requested instruction by striking out an improper part thereof.¹⁵

The court need not and should not charge on matters having no application under the pleadings, evidence, or claims of proof of the parties.¹⁶ An

404, 253 App.Div. 125, followed in 1 N.Y.S.2d 405, 253 App.Div. 126.

Tenn.—Kroger Grocery & Baking Co. v. Addington, 74 S.W.2d 650, 18 Tenn.App. 191.

Wash.—Leer v. Cohen, 116 P.2d 535, 10 Wash.2d 239.

12. Minn.—Hayden v. Lundgren, 221 N.W. 715, 175 Minn. 449.

N.J.—Kemp v. Bright, 141 A. 796, 104 N.J.Law 529.

13. Md.—Yellow Cab Co. v. Bradin, 191 A. 717, 172 Md. 388.

Elements of right of way instruction set forth

Wash.—Martin v. Hadenfeldt, 289 P. 533, 157 Wash. 563.

14. Okl.—Oklahoma Natural Gas Corporation v. Schwartz, 293 P. 1087, 146 Okl. 250.

15. Tenn.—Kroger Grocery & Baking Co. v. Addington, 74 S.W.2d 650, 181 Tenn.App. 191.

16. Conn.—Bullard v. De Cordova, 175 A. 673, 119 Conn. 262.

Ill.—Scott v. Vurdulas, 264 Ill.App. 495.

Ky.—W. M. Abbott Transfer Co. v. Kruse, 114 S.W.2d 731, 272 Ky. 479.

Wash.—Bowen v. Odland, 93 P.2d 366, 200 Wash. 257.

Applicability to pleadings and evidence in general see *infra* § 556.

Instructions held erroneous under pleadings

Del.—Ellis v. Camper, 196 A. 155, 9 W.W.Harr. 14.

Mo.—Egan v. Palmer, 293 S.W. 460, 221 Mo.App. 823.

Instructions held not erroneous under pleadings

Iowa.—Melsha v. Dillon, 243 N.W. 295, 214 Iowa 1324.

Mo.—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065.

Instructions held sufficient, warranted, or erroneously refused under evidence

(1) Generally.

Ark.—Loda v. Raines, 100 S.W.2d 973, 193 Ark. 513.

Cal.—Benjamin v. Noonan, 277 P. 1045, 207 Cal. 279—Jennings v. Arata, 188 P.2d 298, 83 Cal.App.2d 143—Shifflette v. Walkup Drayage & Warehouse Co., 169 P.2d 996, 74 Cal.App.2d 903—Lenning v. Chilo, 147 P.2d 410, 63 Cal.App.2d 511—Miller v. Cranston, 106 P.2d 963, 41 Cal.App.2d 470—Setsuko Nitta v. Haslam, 83 P.2d 678, 138 Cal.App.

736—McNally v. Casner, 18 P.2d 94, 128 Cal.App. 680—Pinello v. Taylor, 17 P.2d 1039, 128 Cal.App. 508—Howard v. National Ice Cream Co., 2 P.2d 211, 115 Cal.App. 639.

Colo.—General Foods Sales Co. v. Smith, 97 P.2d 429, 105 Colo. 305.

Conn.—Mesite v. Kirchstein, 145 A. 753, 109 Conn. 77.

Ind.—H. E. McGonigal, Inc. v. Etherington, App., 79 N.E.2d 777—Earle v. Porter, 40 N.E.2d 381, 112 Ind.App. 71—Denmure v. Bray, 27 N.E.2d 135, 108 Ind.App. 60.

Iowa.—Kiesau v. Vangen, 285 N.W. 181, 226 Iowa 824.

Ky.—Arnold v. Sauer, 202 S.W.2d 1001, 305 Ky. 48.

Minn.—Odegard v. Connolly, 1 N.W. 2d 137, 211 Minn. 342—Kunkel v. Paulson, 266 N.W. 441, 197 Minn. 107—Eichhorn v. Lundin, 216 N.W. 537, 172 Minn. 591.

Mo.—Pogue v. Rosegrant, 98 S.W.2d 528—Davie v. Cape Yellow Cab Co., App., 191 S.W.2d 302—Zimmerman v. Salter, App., 141 S.W.2d 137—Vandenberg v. Snider, App., 88 S.W.2d 201.

N.J.—Rich v. Central Electrotape Foundry Corporation, 3 A.2d 584, 121 N.J.Law 481.

N.Y.—Same v. Davison, 1 N.Y.S.2d 374, 253 App.Div. 123.

N.C.—Pearson v. Luther, 193 S.E. 739, 212 N.C. 412.

Ohio.—Kessler v. Brown, App., 32 N.E.2d 68.

Or.—Kitchel v. Gallagher, 270 P. 488, 126 Or. 373.

Pa.—Eveready Oil Co. v. Orlovitz, 187 A. 813, 124 Pa.Super. 41.

Utah.—Collins v. Liddle, 247 P. 476, 67 Utah 242.

Vt.—Paul v. Brown, 189 A. 144, 108 Vt. 458, 109 A.L.R. 1085—Jasmin v. Parker, 148 A. 874, 102 Vt. 405.

Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320.

Wash.—Boyle v. Lewis, 193 P.2d 332—Brewer v. Berner, 131 P.2d 940, 15 Wash.2d 644—Karp v. Herder, 44 P.2d 808, 181 Wash. 583—Welkert v. Daniels, 35 P.2d 22, 178 Wash. 416.

(2) Right of way.

Ark.—Jacks v. Culpepper, 37 S.W.2d 94, 183 Ark. 505.

Cal.—De La Torre v. Johnson, 264 P. 485, 203 Cal. 374—Gulley v. Daggett, 182 P.2d 613, 80 Cal.App. 2d 784—Garland v. Hirsch, 169 P. 2d 405, 74 Cal.App.2d 629—Miller

v. Cranston, 106 P.2d 963, 41 Cal. App.2d 470—Cummins v. Yellow & Checker Cab Co., 15 P.2d 536, 127 Cal.App. 170.

Colo.—Rauserman v. White, 114 P.2d 557, 108 Colo. 101.

Ga.—O'Farrell v. Templeman, 146 S.E. 914, 39 Ga.App. 222.

Iowa.—Simanek v. Behel, 7 N.W.2d 792, 232 Iowa 1150—Stein v. Sharpe, 295 N.W. 155, 229 Iowa 812

Md.—Hazlitt v. Dewlow, 189 A. 213, 171 Md. 398—Jersey Ice Cream Co. v. Bach, 157 A. 277, 161 Md. 285—Taxicab Co. v. Ottenritter, 135 A. 587, 151 Md. 525.

Mich.—Michaels v. Smith, 216 N.W. 413, 240 Mich. 671.

Minn.—Schnore v. Baldwin, 14 N.W. 2d 447, 217 Minn. 394.

Mo.—Barr v. Nafziger Baking Co., 41 S.W.2d 559, 328 Mo. 423—Stone v. Garrett Const. Co., App., 92 S.W.2d 951.

N.J.—Craig v. Morgenweck, 194 A. 188, 15 N.J.Misc. 637.

N.C.—Piner v. Richter, 163 S.E. 561, 202 N.C. 573.

Ohio.—Kessler v. Brown, App., 32 N.E.2d 68.

Wash.—Strong v. Ernst, 14 P.2d 697, 169 Wash. 617—Burge v. Anderson, 3 P.2d 131, 164 Wash. 509.

(3) Signal for turn.

Minn.—Eichhorn v. Lundin, 216 N.W. 537, 172 Minn. 591.

Or.—Black v. Stith, 100 P.2d 485, 164 Or. 117.

Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181.

(4) Stop signs.

Cal.—Bauer v. Davis, 111 P.2d 715, 43 Cal.App.2d 764.

Ill.—Graham v. Dressen, 10 N.E.2d 843, 292 Ill.App. 15.

Mo.—Hartley v. McKee, App., 86 S.W.2d 359.

Tenn.—Atchley v. Sims, 128 S.W.2d 975, 23 Tenn.App. 167.

Instructions held not warranted or required under evidence

(1) Generally.

Ala.—White v. Thorington, 120 So. 914, 219 Ala. 101—L. Hammel Dry Goods Co. v. Hinton, 112 So. 638, 216 Ala. 127.

Cal.—Carlin v. Prickett, 184 P.2d 945, 81 Cal.App.2d 688—Reilly v. California St. Cable R. Co., 173 P.2d 872, 76 Cal.App.2d 620—Elmore v. Lassen County, 51 P.2d 481, 10 Cal. App.2d 229—Lowenbruck v. Stiglmeier, 46 P.2d 251, 7 Cal.App.2d

instruction pointing out the rule relative to deception is authorized only when the evidence shows or justifies an inference that the disfavored driver was deceived by the actions of the favored driver and had reasonable grounds for going forward.¹⁷ The reciprocal rights and duties of motorists, one traveling on a state highway and the other on an intersecting road, may be covered by separate instructions.¹⁸

§ 549. — Vehicles Following, Overtaking, or Passing

Appropriate instructions should be given in actions for injuries arising out of the following, overtaking, or passing of one vehicle by another.

Appropriate instructions on the issues should be given in an action for injuries arising out of the following, overtaking, or passing of one vehicle by another.¹⁹ Such instructions, under the con-

204—Markham v. Hancock Oil Co., 37 P.2d 1087, 2 Cal.App.2d 392.

Fla.—City of Tallahassee v. Ashmore, 27 So.2d 660.

Ind.—Standard Oil Co of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind. App. 610.

Iowa—Judd v. Rudolph, 222 N.W. 416, 207 Iowa 113, 62 A.L.R. 1174.

Md.—Greenfield v. Hook, 8 A.2d 888, 177 Md 116, 136 A.L.R. 1485.

Mich.—Bunker v. Reid, 238 N.W. 265, 255 Mich 536.

Minn.—Anderson v. Gray, 288 N.W. 704, 206 Minn. 367.

Mo.—Feeherty v. Sullivan, App., 129 S.W.2d 926.

N.C.—Sebastian v. Horton Motor Lines, 197 S.E. 539, 213 N.C. 770.

Ohio.—Gustely v. Bowman, App. 34 N.E.2d 784—Adams v. Harvitt, 164 N.E. 773, 30 Ohio App 211.

Or.—Black v. Stith, 100 P.2d 185, 164 Or. 117—Rex v. Dorn, 85 P.2d 1031, 160 Or 368.

Pa.—Clee v. Brinks, Inc., 5 A.2d 387, 135 Pa Super 345—Follweiler v. Pennsylvania Power & Light Co., Com Pl., 20 Lehigh 409.

S.D.—Smith v. Aspaas, 21 N.W.2d 878.

Va.—Hatfield v. Thomas, 41 S.E.2d 460, 186 Va. 7—Brown v. Wallace, 35 S.E.2d 793, 184 Va. 570—Scott v. Cunningham, 171 S.E. 104, 161 Va 367.

Wash.—Plenderheth v. McGuire, 180 P.2d 808—Portland-Seattle Auto Freight v. Jones, 131 P.2d 736, 15 Wash 2d 603—Leer v. Cohen, 116 P.2d 535, 10 Wash.2d 239.

(2) Definition of "intersection."—Herring v. Bollinger, 29 S.W.2d 676, 181 Ark. 925.

(3) Right of way.—Colo.—Johnsen v. Baugher, 22 P.2d 856, 92 Colo. 588.

Fla.—City of Tallahassee v. Ashmore, 27 So.2d 660.

Ga.—Smeltzer v. Atlanta Coach Co., 160 S.E. 665, 44 Ga App. 53—C. J. Kamper Grocery Co. v. Sauls, 144 S.E. 403, 38 Ga.App. 487.

Ill.—Greene v. Noonan, 23 N.E.2d 720, 372 Ill. 286.

Ind.—Mattes v. Brugner, 159 N.E. 156, 88 Ind.App. 36.

Iowa.—Bletzer v. Wilson, 276 N.W. 836, 224 Iowa 884.

Kan.—Heiserman v. Aikman, 186 P.2d 252, 183 Kan. 700.

Ky.—Walton v. Grant, 194 S.W.2d 366, 302 Ky. 194.

Me.—Hill v. Janson, 31 A.2d 236, 139 Me. 344.

Md.—Yellow Cab Co. v. Bradin, 191 A.2d 717, 172 Md. 388.

Mich.—Silkworth v. Fitzgerald, 272 N.W. 702, 279 Mich 349.

Minn.—Kunkel v. Paulson, 266 N.W. 441, 197 Minn. 107.

Mo.—Bramblett v. Harlow, App., 75 S.W.2d 626.

N.H.—Adams v. Landry, 35 A.2d 510, 93 N.H. 74.

Ohio.—Williaman v. Graber, 11 N.E.2d 710, 57 Ohio App 39.

Or.—Winters v. Bissailon, 54 P.2d 1169, 152 Or 578.

Pa.—Hostetler v. Kniseley, 185 A.2d 300, 322 Pa. 248.

S.D.—Stammerjohan v. Sims, 31 N.W.2d 449.

Tex.—Karger v. Rio Grande Valley Citrus Exchange, Civ App., 179 S.W.2d 816, error refused.

Wash.—Bowen v. Odland, 93 P.2d 366, 200 Wash 257.

Wis.—Roellig v. Gear, 260 N.W. 232, 217 Wis. 651.

(4) Stopping.

Ill.—Wever v. Staggs, 264 Ill.App. 556.

Iowa.—Amelsburg v. Lunning, 14 N.W.2d 680, 234 Iowa 852.

N.J.—Yates v. Madigan, 171 A. 679, 112 N.J. Law 443, affirmed 176 A. 362, 114 N.J. Law 258.

17. Wash.—Cramer v. Bock, 149 P.2d 525, 21 Wash.2d 13.

18. Neb.—Schrage v. Miller, 242 N.W. 649, 123 Neb. 266.

19. U.S.—Shell Pipe Line Co. v. Robinson, C.C.A.Okl., 66 F.2d 861.

Iowa.—Sanford v. Nesbit, 11 N.W.2d 695, 234 Iowa 14—Harrington v. Fortman, 8 N.W.2d 713, 233 Iowa 92.

Ky.—Pedigo v. Osborne, 129 S.W.2d 996, 279 Ky. 85—Prichard v. Collins, 15 S.W.2d 497, 228 Ky. 635.

Minn.—Dziewczynski v. Lodermeier, 259 N.W. 65, 193 Minn. 580.

Mo.—Mann v. Payne, 159 S.W.2d 602, 349 Mo. 89.

Ohio.—Thompson v. Kerr, App., 51 N.E.2d 742.

Tenn.—Talley v. Dalton, 10 Tenn. App. 597.

Tex.—J. M. Radford Grocery Co. v. Andrews, 5 S.W.2d 1010, reversed on other grounds, Com.App., 15 S.W.2d 218.

Wash.—Zurfluh v. Lewis County, 91 P.2d 1002, 199 Wash. 378.

Wis.—Geason v. Schaefer, 281 N.W. 681, 229 Wis. 8.

Instructions held erroneous or properly refused

U.S.—Shell Pipe Line Co. v. Robinson, C.C.A.Okl., 66 F.2d 861.

Ala.—Buffalo Rock Co. v. Davis, 154 So. 556, 228 Ala. 603—Brasfield v. Hood, 128 So. 433, 221 Ala. 240—Jones v. Colvard, 109 So. 877, 215 Ala 216.

Ark.—Oster v. Jones, 84 S.W.2d 604, 191 Ark 246.

Cal.—Spear v. Leuenberger, 112 P.2d 43, 44 Cal App 2d 236—Collins v. Hodgson, 42 P.2d 700, 5 Cal App 2d 366—Putnam v. Pickwick Stages, Northern Division, 276 P. 1055, 98 Cal App 268.

Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn 670.

Ga.—Farrar v. Farrar, 152 S.E. 278, 41 Ga.App. 120.

Ill.—Hanusiak v. Hanlon, 258 Ill.App. 114.

Iowa.—Voiles v. Hunt, 240 N.W. 703, 213 Iowa 1234—Looney v. Parker, 230 N.W. 570, 210 Iowa 85.

Ky.—C. L. & L. Motor Express v. Lyons, 53 S.W.2d 978, 245 Ky 611.

Md.—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md 528.

Mo.—Stermolle v. Brulnard, App., 24 S.W.2d 712—Rowles v. Eisenmayer, App., 22 S.W.2d 884.

N.J.—Goolsby v. Public Service Coordinated Transport, 157 A. 124, 9 N.J. Misc 1158.

N.Y.—Hebeck v. Hess, 239 N.Y.S. 200, 228 App Div. 194.

Ohio.—Marchal v. Frankman, App., 58 N.E.2d 679.

Or.—Bly v. Moores Motor Co., 28 P.2d 627, 145 Or. 528.

Pa.—Kelly v. Crawford, 8 A.2d 449, 137 Pa.Super. 197—McCauliff v. Griffith, 168 A. 536, 110 Pa.Super. 522.

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

Wash.—Zurfluh v. Lewis County, 91 P.2d 1002, 199 Wash. 378—Fawcett v. Manny, 19 P.2d 934, 172 Wash. 212, followed in Mercer v. Lovering, 19 P.2d 936, 172 Wash. 700.

trolling decisions on the question, should be applicable under the pleadings²⁰ and evidence,²¹ and,

Instructions held sufficient, proper, or erroneously refused

- Ala.—Brasfield v. Hood, 128 So. 433, 221 Ala. 240.
- Ark.—Southwestern Bell Telephone Co. v. Balcsh, 76 S.W.2d 291, 189 Ark. 1085.
- Cal.—Petersen v. Devine, 156 P.2d 936, 68 Cal.App.2d 387—Spear v. Leuenberger, 112 P.2d 43, 44 Cal. App.2d 236—Fauer v. Davis, 111 P.2d 715, 43 Cal.App.2d 764—Duncan v. Corder & Son, 78 P.2d 739, 28 Cal.App.2d 46—Butcher v. Thornhill, 58 P.2d 179, 14 Cal.App.2d 149—Ackles v. Lane, 35 P.2d 200, 140 Cal.App. 188—Webster v. Harris, 6 P.2d 88, 119 Cal.App. 46—Schatte v. Maurice, 2 P.2d 489, 116 Cal. App. 161.
- Conn.—Madison v. Morovitz, 188 A. 665, 122 Conn. 208—Ghent v. Stevens, 159 A. 94, 114 Conn. 415.
- Iowa.—Anderson v. Strack, 17 N.W. 2d 719, 236 Iowa 1—Steen v. Hunt, 11 N.W.2d 690, 234 Iowa 38—Bohst v. Hoxie Truck Line, 267 N.W. 673, 221 Iowa 823—Scott v. H'mman, 249 N.W. 249, 216 Iowa 1126—Johnson v. McVicker, 247 N.W. 488, 216 Iowa 654—Dillon v. Diamond Products Co., 245 N.W. 725, 215 Iowa 440.
- Ky.—McFarland v. Bruening, 185 S.W.2d 247, 299 Ky. 267—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474—Consolidated Coach Corporation v. Saunders, 17 S.W.2d 233, 229 Ky. 284.
- Md.—Christy v. Hammond, 155 A. 322, 161 Md. 139—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.
- Mass.—Mansell v. Larsen, 42 N.E.2d 520, 311 Mass. 607.
- Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—McGrath v. Hargraves, 17 N.W.2d 733, 310 Mich. 510.
- Minn.—Stone v. Sigel, 248 N.W. 285, 189 Minn. 47.
- Miss.—Hammond v. Morris, 126 So. 906, 156 Miss. 803.
- Mo.—Slak v. Industrial Track Const. Co., 295 S.W. 751, 316 Mo. 1143—Sloan v. Farmer, App., 168 S.W.2d 467—Christman v. Reichholdt, App., 150 S.W.2d 527—Junk v. Tucker Transp. Co., App., 52 S.W.2d 570—Berthold v. Danz, App., 27 S.W.2d 448.
- N.Y.—Rutledge v. City of New York, 10 N.Y.S.2d 417, 256 App.Div. 515.
- N.C.—Holland v. Strader, 5 S.E.2d 311, 216 N.C. 436—Murphy v. Asheville-Knoxville Coach Co., 156 S.E. 550, 200 N.C. 92.
- N.D.—Schulkey v. Brown, 230 N.W. 6, 59 N.D. 345.
- Or.—French v. Christner, 143 P.2d 674, 173 Or. 158—Bly v. Moores Motor Co., 28 P.2d 627, 145 Or. 528.
- Pa.—Vierling v. Fry, 46 A.2d 473, 364 Pa. 66—Jinks v. Currie, 188 A. 356, 324 Pa. 532.
- Va.—Drumwright v. Walker, 189 S.E. 310, 167 Va. 307.
- Wash.—Devereaux v. Blanchard, 26 P.2d 82, 174 Wash. 673—Jacklin v. North Coast Transp. Co., 5 P.2d 325, 165 Wash. 236—Stanhope v. Strang, 250 P. 351, 140 Wash. 693.
20. Mo.—Bach v. Diekroeger, App., 184 S.W.2d 755.
- Applicability to pleadings and evidence in general see *infra* § 556.
- Instructions held proper under pleadings**
- Ga.—Simpson Grocery Co. v. Holley, 180 S.E. 501, 51 Ga.App. 355.
- Ill.—Leideck v. City of Chicago, 248 Ill.App. 545.
- Mo.—Bowman v. Moore, 167 S.W.2d 675, 237 Mo.App. 1163—Setzer v. Ulrich, App., 90 S.W.2d 154.
- Okl.—Indian Territory Illuminating Oil Co. v. Johnson, 58 P.2d 888, 177 Okl. 288.
21. **Instructions held erroneous or properly refused under evidence**
- U.S.—Acme Freight Lines v. Blackmon, C.C.A. Ga., 131 F.2d 62—Cram v. Evcloff, C.C.A. Minn., 127 F.2d 486—Dromey v. Inter State Motor Freight Service, C.C.A. Ill., 121 F.2d 361.
- Cal.—Ellford v. Hiltabrand, 146 P.2d 510, 63 Cal.App.2d 65—Moore v. Miller, 125 P.2d 576, 51 Cal.App.2d 674—Collins v. Hodgson, 42 P.2d 700, 5 Cal.App.2d 366.
- Colo.—Consolidated Truck Co. v. Jones, 25 P.2d 721, 93 Colo. 297.
- Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.
- Ill.—Sheridan v. Fullerton, 18 N.E.2d 741, 298 Ill.App. 622.
- Iowa.—Gehlbach v. McCann, 249 N.W. 144, 216 Iowa 296.
- Kan.—Cathcart v. Dunn, 69 P.2d 698, 146 Kan. 193.
- Ky.—Elliot v. Drury's Adm'x, 200 S.W.2d 141, 304 Ky. 93—Fahrenholtz v. Loomis, 132 S.W.2d 307, 280 Ky. 9—Wright v. Clausen, 92 S.W.2d 93, 263 Ky. 298—Wright v. Clausen, 69 S.W.2d 1062, 253 Ky. 498, 104 A.L.R. 480—United Coach Corporation v. Finley, 49 S.W.2d 544, 243 Ky. 658.
- Mass.—Buda v. Foley, 19 N.E.2d 537, 302 Mass. 411.
- Mich.—Michigan Fire & Marine Ins. Co. v. Pretty Lake Vacation Camp, 25 N.W.2d 166, 316 Mich. 197—Felsenfeld v. Chattaway, 253 N.W. 280, 266 Mich. 234.
- Minn.—Zobel v. Boutelle, 238 N.W. 49, 184 Minn. 172.
- Miss.—Rhodes v. Fullilove, 134 So. 840, 161 Miss. 41.
- Mo.—Schroeder v. Rawlings, 127 S.W.2d 673, 344 Mo. 430—Felts v. Spesia, App., 61 S.W.2d 402.
- N.H.—Cutler v. Young, 6 A.2d 162, 90 N.H. 303.
- Ohio.—Marchal v. Frankman, App., 58 N.E.2d 679—Carle v. Courtright, 40 N.E.2d 431, 69 Ohio App. 69, rehearing denied 43 N.E.2d 296, 69 Ohio App. 69.
- Va.—Scott v. Cunningham, 171 S.E. 104, 161 Va. 367.
- Wash.—Hook v. Kirby, 27 P.2d 587, 175 Wash. 352—Curtis v. Perry, 13 P.2d 840, 171 Wash. 542—Barnett v. Bull, 250 P. 955, 141 Wash. 139.
- Wis.—Spice v. Kuxman, 239 N.W. 497, 206 Wis. 293.
- Instructions held warranted, required, or erroneously refused under evidence**
- U.S.—Kleibor v. Colonial Stores, C.C. A.N.C., 159 F.2d 894.
- Ariz.—Webb v. Hardin, 89 P.2d 30, 53 Ariz. 310.
- Ark.—Crown Coach Co. v. Palmer, 102 S.W.2d 853, 193 Ark. 739.
- Cal.—Petersen v. Devine, 156 P.2d 936, 68 Cal.App.2d 387—Butcher v. Thornhill, 58 P.2d 179, 14 Cal.App.2d 149—Coppock v. Pacific Gas & Electric Co., 30 P.2d 549, 137 Cal. App. 80—Schatte v. Maurice, 2 P.2d 489, 116 Cal.App. 161—Williams v. Pickwick Stages System, 297 P. 98, 112 Cal.App. 597.
- Ga.—Eldson v. Felder, 25 S.E.2d 41, 69 Ga.App. 225—Simpson Grocery Co. v. Holley, 180 S.E. 501, 51 Ga.App. 355—Idle Hour Club v. Robinson, 157 S.E. 125, 42 Ga.App. 660.
- Ill.—Gleason v. Cunningham, 44 N.E.2d 940, 316 Ill.App. 286—Leideck v. City of Chicago, 248 Ill.App. 545.
- Ind.—Gulley v. Hamm, 73 N.E.2d 188, 117 Ind.App. 593.
- Iowa.—Anderson v. Strack, 17 N.W.2d 719, 236 Iowa 1—Momen v. Jewel Tea Co., 288 N.W. 637, 227 Iowa 547—Reardon v. Hermansens, 275 N.W. 6, 223 Iowa 1207—McCoy v. Cole, 249 N.W. 213, 216 Iowa 1320—Kuhn v. KJose, 248 N.W. 230, 216 Iowa 36.
- Ky.—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474—Vale v. Illinois Pipe Line Co., 134 S.W.2d 940, 281 Ky. 1—Rose v. Edmonds, 111 S.W.2d 427, 271 Ky. 36.
- Md.—Greer Transp. Co. v. Knight, 146 A. 851, 157 Md. 528.
- Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—Hietler v. Holtrop, 281 N.W. 434, 285 Mich. 570.
- Minn.—Schmitt v. Emery, 2 N.W.2d 418, 211 Minn. 547, 139 A.L.R. 1242—Dziewczynski v. Lodermeier, 259 N.W. 65, 193 Minn. 580.
- Mo.—Chamberlain v. Missouri-Arkansas Coach Lines, 173 S.W.2d 57, 351 Mo. 203—Hornsby v. Fisher, 85 S.W.2d 589—Bach v. Diekroeger, App., 184 S.W.2d 755—Christman v.

in accordance with general rules, should not be confusing or misleading.²²

§ 550. — Vehicles at Rest or Unattended

Appropriate instructions should be given in actions for injuries involving motor vehicles which were at rest or unattended.

Proper and correct instructions on the issues should be given in actions for injuries involving motor vehicles which were at rest or unattended.²³

The instructions in such actions should be applicable under the pleadings and evidence²⁴ and should

- Reichholdt, App., 150 S.W.2d 527—Fawkes v. National Refining Co., 130 S.W.2d 684, 235 Mo.App. 433, certiorari quashed State ex rel. National Refining Co. v. Shain, 139 S.W.2d 995, 346 Mo. 224—Gravemann v. Huncker, App., 71 S.W.2d 59—Schlue v. Missouri Pacific Transp. Co., App., 62 S.W.2d 934—Wilson v. Blick, App., 60 S.W.2d 673.
- N.H.—Bouvier v. Allen, 174 A. 783, 87 N.H. 119.
- N.D.—Schulkey v. Brown, 230 N.W. 6, 59 N.D. 345.
- Ohio.—Thompson v. Kerr, App., 51 N.E.2d 742.
- Okl.—Belford v. Allen, 80 P.2d 671, 183 Okl. 256—Cushing Refining & Gasoline Co. v. Deshan, 300 P. 312, 149 Okl. 225.
- Or.—Heinrich v. Booth, 73 P.2d 696, 158 Or. 16—Goebel v. Vaught, 269 P. 491, 126 Or. 332.
- Pa.—Jones v. Bell Tel. Co. of Pa., 49 A.2d 272, 159 Pa.Super. 556.
- S.D.—Wallace v. Brande, 292 N.W. 870, 67 S.D. 326.
- Va.—Isenhour v. McGranighan, 17 S.E.2d 383, 178 Va. 365.
- Wash.—Grapp v. Peterson, 168 P.2d 400, 25 Wash.2d 44—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010—Farmer v. School Dist. No. 214, King County, 17 P.2d 899, 171 Wash. 278.
- 22. Instructions held confusing or misleading**
- Ala.—Townsend v. Adair, 134 So. 637, 223 Ala. 150—Strickland v. Davis, 128 So. 233, 221 Ala. 247.
- Mo.—Felts v. Spesia, App., 61 S.W.2d 402.
- Instructions held not confusing or misleading**
- Conn.—Amato v. Desenti, 169 A. 611, 117 Conn. 612.
- Mo.—Bowman v. Moore, 167 S.W.2d 675, 237 Mo.App. 1163.
- Instructions held ambiguous**
- Cal.—Collins v. Hodgson, 42 P.2d 700, 5 Cal.App.2d 366.
23. Ark.—H. L. Wilson Lumber Co. v. Koen, 151 S.W.2d 681, 202 Ark. 576.
- Ga.—Phillips v. Roberts, 144 S.E. 651, 166 Ga. 897—Blue's Truck Line v. Harwell, 194 S.E. 399, 57 Ga.App. 136, reversed on other grounds Harwell v. Blue's Truck Line, 199 S.E. 739, 187 Ga. 78, mandate conformed to Blue's Truck Line v. Harwell, 200 S.E. 500, 59 Ga.App. 305.
- Ky.—McLellan v. Threlkeld, 129 S.W.2d 977, 279 Ky. 114.
- N.C.—Clarke v. Martin, 8 S.E.2d 230, 217 N.C. 440.
- Tex.—Herman Lumber Co. v. Belser, Civ.App., 30 S.W.2d 409, affirmed Belser v. Herman Lumber Co., Com.App., 41 S.W.2d 208.
- Instructions held proper or erroneously refused**
- Ala.—Littlejohn v. Staggers, 125 So. 61, 23 Ala.App. 322.
- Ariz.—Dennis v. Stukey, 294 P. 276, 37 Ariz. 239, rehearing denied 295 P. 971, 37 Ariz. 510.
- Cal.—Callison v. Dondero, 124 P.2d 852, 51 Cal.App.2d 403—Hunton v. California Portland Cement Co., 123 P.2d 947, 50 Cal.App.2d 684—Christiansen v. Hollings, 112 P.2d 723, 41 Cal.App.2d 332—Fleming v. Flick, 35 P.2d 210, 140 Cal.App. 14—Silvey v. Harm, 8 P.2d 570, 120 Cal.App. 561.
- Conn.—Evans v. Byrrolly Transp. Co., 197 A. 758, 124 Conn. 10—De Lucia v. Kneeland, 142 A. 742, 108 Conn. 191—Doerr v. Woodland Transp. Co., 136 A. 693, 105 Conn. 689.
- Fla.—Allen v. Hooper, 171 So. 513, 126 Fla. 458.
- Iowa.—Havungs v. Falk, 27 N.W.2d 15, 238 Iowa 285—Smith v. Pust, 6 N.W.2d 315, 232 Iowa 1194.
- Kan.—Sponable v. Thomas, 33 P.2d 721, 139 Kan. 710.
- Ky.—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533.
- Minn.—Ball v. Gessner, 240 N.W. 100, 185 Minn. 105—Edblad v. Brower, 227 N.W. 493, 178 Minn. 465.
- Mo.—Crites v. Kansas City Public Service Co., 190 S.W.2d 924—Herrington v. Hoey, 139 S.W.2d 477, 345 Mo. 1108.
- N.J.—Schadel v. Honig, 131 A. 624, 4 N.J.Misc. 56.
- Ohio.—Ewing v. Burkhardt Brewing Co., 15 N.E.2d 160, 57 Ohio App. 463.
- Or.—Ceccacci v. Garre, 76 P.2d 283, 158 Or. 466.
- Wash.—Neeley v. Bock, 50 P.2d 524, 184 Wash. 135—Gaches v. Daw, 10 P.2d 1111, 168 Wash. 162.
- Wis.—Butts v. Ward, 279 N.W. 6, 227 Wis. 387, 116 A.L.R. 1441.
- Wyo.—Jackson v. W. A. Norris, Inc., 93 P.2d 498, 54 Wyo. 403.
- Instructions held erroneous or properly refused**
- Ala.—Chambers v. Cox, 130 So. 416, 222 Ala. 1.
- Ark.—Floyd v. Johnston, 100 S.W.2d 975, 193 Ark. 518.
- Cal.—Beck v. Azcarate, 122 P.2d 933, 50 Cal.App.2d 264—Fleming v. Flick, 35 P.2d 210, 140 Cal.App. 14.
- Fla.—C. W. Zaring & Co. v. Dennis, 19 So.2d 701, 155 Fla. 150.
- Ga.—Kelly v. Locke, 198 S.E. 754, 186 Ga. 620, mandate conformed to 199 S.E. 544, 58 Ga.App. 558—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700.
- Kan.—Berry v. Weeks, 73 P.2d 1086, 146 Kan. 969.
- Md.—Peoples Drug Stores v. Windham, 12 A.2d 532, 178 Md. 172.
- Mass.—Baggs v. Hirschfield, 199 N.E. 136, 293 Mass. 1.
- Minn.—Mechler v. McMahon, 239 N.W. 605, 184 Minn. 476.
- Mo.—Redsaul v. Feeback, 106 S.W.2d 431, 341 Mo. 50—Clason v. Lenz, 61 S.W.2d 727, 332 Mo. 1113—McGrory v. Thurnau, App., 84 S.W.2d 147.
- N.H.—Berounsky v. Ogden, 9 A.2d 510, 90 N.H. 334—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69.
- N.Y.—Teich v. Ruppert, 194 N.Y.S. 645, 201 App.Div. 682.
- N.C.—Webb v. Hutchins, 44 S.E.2d 350, 228 N.C. 1—Leary v. Norfolk Southern Bus Corporation, 18 S.E.2d 426, 220 N.C. 745.
- Ohio.—Pugh v. Akron-Chicago Transp. Co., 28 N.E.2d 1015, 64 Ohio App. 479, affirmed 28 N.E.2d 501, 137 Ohio St. 164—Leonard v. Kreider, 1 N.E.2d 956, 51 Ohio App. 474—Ashdown v. Treaise, 160 N.E. 502, 26 Ohio App. 575, affirmed Treaise v. Ashdown, 160 N.E. 898, 118 Ohio St. 307, 58 A.L.R. 1476.
- Okl.—Farmers' Union Co-op. Gin Co. v. Squyres, 145 P.2d 949, 193 Okl. 578.
- Or.—Ceccacci v. Garre, 76 P.2d 283, 158 Or. 466—Hickerson v. Jorrev, 282 P. 768, 131 Or. 612, rehearing denied 283 P. 1119, 131 Or. 612.
- Vt.—Hunter v. Preston, 166 A. 17, 105 Vt. 327.
- Va.—Armstrong v. Rose, 196 S.E. 613, 170 Va. 190.
- Wis.—Devine v. Bischel, 254 N.W. 521, 215 Wis. 331.
- Instructions held not prejudicial**
- Ill.—Barnstable v. Calandro, 270 Ill. App. 57.
- Iowa.—Hayungs v. Falk, 27 N.W.2d 15, 238 Iowa 285.
- Mo.—Crites v. Kansas City Public Service Co., 190 S.W.2d 924.
- 24. Instructions held proper**
- Cal.—Ouchida v. Potter, App., 192 P.

not be confusing or misleading.²⁵

§ 551. — Identity and Status of Operator

The general rules governing the necessity of appropriate and correct instructions on the issues in actions for injuries have been applied to instructions involving the identity and status of the operator of a motor vehicle.

The general rules respecting the giving of ap-

propriate instructions on the issues in actions for injuries, and the necessity that instructions correctly set forth the law applicable under the pleadings and evidence, have been applied to matters involving the identity of the operator of a motor vehicle,²⁶ and his status,²⁷ such as his status as a servant or employee,²⁸ or his status as an agent,²⁹ a

2d 493—Barone v. Jones, 177 P.2d 30, 77 Cal.App.2d 656.
 Colo.—Calnon v. Sorel, 119 P.2d 615, 108 Colo. 467.
 Fla.—Baggett v. Davis, 169 So. 372, 124 Fla. 701.
 Ind.—Swanson v. Slagal, 8 N.E.2d 993, 212 Ind. 394—Gerlot v. Swartz, 7 N.E.2d 960, 212 Ind. 292.
 Iowa.—Hayungs v. Falk, 27 N.W.2d 15, 238 Iowa 285—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771.
 Mich.—Reid v. Coon, 219 N.W. 613, 243 Mich. 37.
 Mo.—Crites v. Kansas City Public Service Co., 190 S.W.2d 924—Herrington v. Hoey, 139 S.W.2d 477, 345 Mo. 1108—Day v. Banks, App. 143 S.W.2d 68.
 Neb.—Folken v. Petersen, 1 N.W.2d 916, 140 Neb. 800.
 N.H.—Sanders v. H. P. Welch Co., 26 A.2d 34, 92 N.H. 74.
 N.C.—Lambert v. Caronna, 175 S.E. 303, 206 N.C. 616.
 Pa.—Struppler v. Rexford, 192 A. 886, 326 Pa. 545.
 Wash.—Gaches v. Daw, 10 P.2d 1111, 168 Wash. 162.
Instructions held erroneous or properly refused
 Ark.—Floyd v. Johnston, 100 S.W.2d 975, 193 Ark. 518—Coca Cola Bottling Co. of Blytheville v. Doud, 76 S.W.2d 87, 189 Ark. 986.
 Cal.—Fennessey v. Pacific Gas & Electric Co., 124 P.2d 51, 20 Cal. 2d 141.
 Ga.—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700.
 Ill.—Russell v. Consolidated Forwarding Corp., 71 N.E.2d 853, 330 Ill.App. 529—Pearlman v. W. O. King Lumber Co., 23 N.E.2d 826, 302 Ill.App. 190—McLaren v. F. Byrd, Inc., 15 N.E.2d 993, 296 Ill. App. 345.
 Ky.—Basham's Adm'r v. Witt, 159 S.W.2d 990, 289 Ky. 639—Tucker v. Ragland-Potter Co., 148 S.W.2d 691, 285 Ky. 533—McLellan v. Threlkeld, 129 S.W.2d 977, 279 Ky. 114.
 Mich.—Patt v. Dilley, 283 N.W. 749, 273 Mich. 601.
 Mo.—Brinkley v. United Biscuit Co. of America, 164 S.W.2d 325, 349 Mo. 1227—State ex rel. Anderson v. Hostetter, 140 S.W.2d 21, 346 Mo. 249—Anderson v. Kraft, App. 129 S.W.2d 85, certiorari quashed State ex rel. Anderson v. Hostetter, 140 S.W.2d 21, 346 Mo. 249—Jackson v. City of Malden, App. 72 S.W.2d

850—Hollenshe v. Pevely Dairy Co., App. 38 S.W.2d 273.
 N.H.—Adams v. Severance, 41 A.2d 233, 93 N.H. 289—Laflamme v. Lewis, 192 A. 851, 89 N.H. 69.
 N.J.—Perry v. Public Service Coordinated Transport, 56 A.2d 617, 136 N.J. Law 398.
 Ohio—McIntire v. Wallace, App. 64 N.E.2d 66—Kern v. Contract Cartage Co., 9 N.E.2d 869, 55 Ohio App. 481.
 Or.—Frame v. Arrow Towing Service, 64 P.2d 1312, 155 Or. 522—Hickerson v. Jossey, 282 P. 768, 131 Or. 612, rehearing denied 283 P. 1119, 131 Or. 612.
 Tenn.—Garis v. Eberling, 71 S.W.2d 215, 18 Tenn.App. 1.
 Wis.—Hauer v. Bahr, 2 N.W.2d 698, 240 Wis. 129.
25. Ala.—McBride v. Baggett Transp. Co., 35 So.2d 101—Chambers v. Cox, 130 So. 416, 222 Ala. 1.
26. Instructions held proper
 Ark.—Kurry v. Frost, 162 S.W.2d 48, 204 Ark. 386.
 Cal.—Tsirlis v. Standard Oil Co. of California, 90 P.2d 128, 32 Cal.App. 2d 469.
 Conn.—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483.
 D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.
 Mo.—Johnessee v. Central States Oil Co., App. 200 S.W.2d 383.
Instruction held erroneous
 Cal.—Simmons v. Lamb, 94 P.2d 814, 35 Cal.App.2d 109.
27. Instructions held proper or erroneously refused
 (1) Generally.
 Ala.—Spurling v. Fillingim, 12 So.2d 740, 244 Ala. 172.
 Ariz.—Selaster v. Simmons, 7 P.2d 258, 39 Ariz. 432.
 N.J.—Wasserman v. Schnoll, 28 A.2d 883, 129 N.J. Law 224, affirmed Wasserman v. Schwartz, 31 A.2d 820, 130 N.J. Law 176.
 Ohio.—General Exchange Ins. Co. v. Elizer, App. 31 N.E.2d 147.
 (2) Control over driver or vehicle.
 U.S.—Jackson v. Blue, C.C.A.Va., 152 F.2d 67.
 Mo.—Haynie v. Jones, 127 S.W.2d 105, 233 Mo.App. 948—Counts v. Thomas, App. 63 S.W.2d 416.
 Tenn.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356.

Instructions held erroneous or properly refused

(1) Generally.
 Ill.—Kinsman v. Peterson, 8 N.E.2d 957, 291 Ill.App. 1.
 Tenn.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356.
 (2) Control over driver or vehicle.
 U.S.—McCoy v. Universal Carloading & Distributing Co., C.C.A. Ohio, 82 F.2d 342.
 Md.—Brawner v. Hooper, 135 A. 420, 151 Md. 579.
 Mo.—Ridge v. Jones, 71 S.W.2d 713, 335 Mo. 219.
28. N.C.—Robinson v. Standard Transp. Co., 199 S.E. 725, 214 N.C. 489.
Instructions held proper or erroneously refused
 U.S.—Montgomery v. Hutchins, C. C.A. Cal., 118 F.2d 661—Silent Automatic Sales Corporation v. Stayton, C.C.A. Mo., 45 F.2d 471.
 Cal.—Pignet v. City of Santa Monica, 115 P.2d 194, 45 Cal.App.2d 766—Lowell v. Harris, 74 P.2d 551, 24 Cal.App.2d 70—Valencia v. San Jose Scavenger Co., 69 P.2d 480, 21 Cal.App.2d 469.
 Ind.—Van Drake v. Thomas, 38 N.E. 2d 878, 110 Ind.App. 586.
 Iowa.—Glass v. Hutchinson Ice Cream Co., 243 N.W. 352, 214 Iowa 825.
 N.D.—Leonard v. North Dakota Co-Op. Wool Marketing Ass'n, 6 N.W. 2d 576, 72 N.D. 310.
 S.C.—Brown v. Tweed Lumber Co., 166 S.E. 401, 167 S.C. 383.
Instructions held erroneous or properly refused
 Ala.—Duke v. Williams, 32 So.2d 362.
 Cal.—Peters v. United Studios, 277 P. 156, 98 Cal.App. 373.
 Ill.—Richardson v. Franklin, 235 Ill. App. 440.
 Iowa.—Christenson v. Northwestern Bell Telephone Co., 270 N.W. 394, 222 Iowa 808.
 Mo.—King v. Riehl, 108 S.W.2d 1, 341 Mo. 467.
 N.Y.—Gutov v. Krasne, 42 N.Y.S.2d 20, 266 App.Div. 302, affirmed 55 N.E.2d 372, 292 N.Y. 602.
 Tex.—West Texas Produce Co. v. Pate, Civ.App., 64 S.W.2d 381.
29. U.S.—R. J. Reynolds Tobacco Co. v. Newby, C.C.A. Idaho, 145 F.2d 768.
 Conn.—Whipple v. Fardig, 146 A. 847, 109 Conn. 460.

bailee,³⁰ or an independent contractor,³¹ and such rules have also been applied to instructions involving the family purpose doctrine,³² joint enterprise,³³ and, in general, the operation of a vehicle with the consent, or in the business or scope of employment, of another.³⁴

N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618.

Instructions held proper or erroneously refused

U.S.—L. A. Wood & Co. v. Taylor, C. C.A.Ga., 154 F.2d 548.

Cal.—Pignet v. City of Santa Monica, 115 P.2d 194, 45 Cal.App.2d 766—Martin v. Miqueu, 98 P.2d 816, 37 Cal.App.2d 133.

Conn.—Rinalli v. Kurtz, 166 A. 916, 117 Conn. 165.

Idaho.—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792.

Ky.—Wilson v. Deegan's Adm'r, 139 S.W.2d 58, 282 Ky. 547.

Instructions held erroneous or properly refused

Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336.

Idaho.—Hopkins v. Pfeffer, 74 P.2d 97, 58 Idaho 396—Gorton v. Doty, 69 P.2d 136, 57 Idaho 792.

Md.—Pennsylvania R. Co. v. Lord, 151 A. 400, 159 Md. 518.

Mass.—Simmons v. Rabinowitz, 164 N.E. 806, 266 Mass. 109.

Minn.—Novotny v. Bouley, 27 N.W.2d 813, 223 Minn. 592

Mo.—Mulanix v. Reeves, 112 S.W.2d 100, 233 Mo.App. 143, certiorari quashed State ex rel and to Use of Reeves v. Shain, 122 S.W.2d 885, 343 Mo. 550.

Ohio.—Homlar v. Great Lakes Towing Co., 57 N.E.2d 792, 74 Ohio App. 110—Alloy Cast Steel Co. v. Arthur, 179 N.E. 743, 40 Ohio App. 503.

Tenn.—Gulf Refining Co. v. Frazier, 15 Tenn App. 662.

Instructions held confusing or misleading

Ill.—Smoot v. Hollingsworth, 265 Ill. App. 447.

Instructions held not misleading

Ark.—Gurdin v. Fisher, 18 S.W.2d 345, 179 Ark. 742.

Instructions held not prejudicial

W.Va.—Ercole v. Daniel, 141 S.E. 631, 105 W.Va. 118.

30. Instruction held erroneous

N.Y.—Knapp v. Gould Automobile Co., 299 N.Y.S. 688, 252 App.Div. 430.

31. U.S.—Stanolind Oil & Gas Co. v. Trosclair, C.C.A.Ind., 166 F.2d 220, certiorari denied Trosclair v. Stanolind Oil & Gas Co., 68 S.Ct. 1086, 334 U.S. 820, 92 L.Ed. —

Ind.—Jones v. Bergman, 15 N.E.2d 740, 105 Ind.App. 429.

Ohio.—Cushman Motor Delivery Co. v. Bernick, 8 N.E.2d 446, 55 Ohio App. 31.

Instructions held not erroneous

Ind.—Van Drake v. Thomas, 38 N.E. 2d 878, 110 Ind.App. 586.

Pa.—Kissell v. Motor Age Transit Lines, 53 A.2d 593, 357 Pa. 204.

Instructions held properly refused

Ala.—Hackney v. Dudley, 113 So. 401, 216 Ala. 400.

32. Ill.—Williams v. Stearns, 256 Ill. App. 425.

42 C.J. p 1278 note 49 [b] (5).

Instructions held proper

D.C.—Smith v. Doyle, 98 F.2d 341, 69 App.D.C. 60.

Utah.—Mehar v. Child, 61 P.2d 624, 90 Utah 348.

Instructions held erroneous or properly refused

Ga.—Mitchell v. Mullen, 164 S.E. 278, 45 Ga App. 285.

Neb.—Piechota v. Rapp, 27 N.W.2d 682, 149 Neb. 442.

Or.—Foster v. Farra, 243 P. 778, 117 Or. 286.

W Va.—Jenkins v. Swank, 180 S.E. 10, 116 W.Va. 116.

33. Instruction held proper

Or.—Schairer v. Johnson, 272 P. 1027, 128 Or. 409.

34. Cal.—Schellenberg v. Southern California Music Co., 35 P.2d 156, 139 Cal.App. 777

Ga.—Abelman v. Ormond, 187 S.E. 393, 53 Ga App. 753—Yellow Cab Co. v. Nelson, 134 S.E. 822, 35 Ga. App. 694

Iowa.—Allbaugh v. Ashby, 284 N.W. 816, 226 Iowa 574.

NY—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 37 N.Y.S.2d 910, 254 App. 560.

Okl.—Barall Food Stores v. Bennett, 153 P.2d 106, 194 Okl. 508.

Wash.—Bradley v. S. L. Savidge, Inc., 152 P.2d 149, 21 Wash.2d 556.

Instructions held proper or erroneously refused

U.S.—Jones v. Weaver, C.C.A.Ariz., 123 F.2d 403—Kopycinski v. Farrar, D.C.N.D., 63 F.Supp. 857, appeal dismissed, C.C.A., 155 F.2d 725.

Ark.—Richards v. McCall, 58 S.W.2d 432, 187 Ark. 61.

Cal.—Tuderios v. Hertz Div. v. self Stations, 160 P.2d 554, 70 Cal.App. 2d 192—Alberts v. Lytle, 37 P.2d 705, 1 Cal.App.2d 682.

Conn.—Matulis v. Gans, 141 A. 870, 107 Conn. 562.

D.C.—Jones v. King, 113 F.2d 522, 72 App.D.C. 257.

Ga.—Atlanta Laundries v. Goldberg, 30 S.E.2d 349, 71 Ga.App. 130—

Parker v. Smith, 18 S.E.2d 559, 66 Ga.App. 567—American Fidelity & Casualty Co. v. McWilliams, 191 S.E. 191, 55 Ga.App. 658—C. J. Kamper Grocery Co. v. Sauls, 144 S.E. 403, 38 Ga.App. 487.

Ind.—Van Drake v. Thomas, 38 N.E.

2d 878, 110 Ind.App. 586—Vincennes Packing Corporation v. Trosper, 23 N.E.2d 624, 108 Ind.App. 7.

Iowa.—Hoover v. Haggard, 260 N.W. 540, 219 Iowa 1232.

Kan.—Hausam v. Poehler, 242 P. 449, 120 Kan. 119.

Ky.—Wilson v. Deegan's Adm'r, 139 S.W.2d 58, 282 Ky. 547.

Md.—Great Atlantic & Pacific Tea Co. v. Noppenberger, 189 A. 434, 171 Md. 378—Dippel v. Juliano, 137 A. 514, 152 Md. 694.

Mich.—Tanis v. Eding, 273 N.W. 761, 280 Mich. 440.

Mo.—Berry v. Emery, Bird, Thayer Dry Goods Co., 211 S.W.2d 35—

Rath v. Knight, 55 S.W.2d 682—Brucker v. Gambaro, 9 S.W.2d 918

—Nagle v. Alberter, App., 53 S.W. 2d 289

Neb.—Dafoe v. Grantski, 9 N.W.2d 488, 143 Neb. 344

N.J.—Auer v. Sinclair Refining Co., 137 A. 555, 103 N.J.Law 372, 54 A. L.R. 623.

N.Y.—Meyers v. Meyers, 38 N.Y.S. 2d 461, 265 App.Div. 939.

SC—Stevens v. Moore, 46 S.E.2d 73, 211 S.C. 498—Holder v. Haynes, 7 S.E.2d 833, 193 S.C. 176

Va.—U-Run-It Co. v. Merryman, 153 S.E. 664, 154 Va. 467—Crowell v. Duncan, 134 S.E. 576, 145 Va. 489, 50 A.L.R. 1425.

Wash.—Carlson v. Wolski, 147 P.2d 291, 20 Wash.2d 323—Mattson v. Cragin, 272 P. 36, 149 Wash. 638.

Wis.—Christiansen v. Schenkenberg, 236 N.W. 109, 204 Wis. 323—Zedler v. Goelzer, 211 N.W. 140, 191 Wis. 378.

Instructions held erroneous or properly refused

U.S.—National Battery Co. v. Levy, C.C.A.Minn., 126 F.2d 33, certiorari denied Levy v. National Battery Co., 62 S.Ct. 1294, 316 U.S. 697, 86 L.Ed. 1767.

Ala.—Harris v. Bell, 176 So. 469, 234 Ala. 679.

Cal.—Tsirlis v. Standard Oil Co. of California, 90 P.2d 128, 32 Cal.App. 2d 469.

Conn.—Tierney v. Correia, 180 A. 282, 120 Conn. 140.

Ga.—Jordan v. Thompson, 198 S.E. 302, 58 Ga.App. 199—Bunch v. McLeskey, 161 S.E. 382, 44 Ga.App. 268.

Ill.—Vukovich v. Sleboda, 261 Ill. App. 416.

Ind.—Bryan v. Pommert, 37 N.E.2d 720, 110 Ind.App. 61.

Iowa.—Gehlbach v. McCann, 249 N.W. 144, 216 Iowa 296—Waldman v. Sanders Motor Co., 243 N.W. 555, 214 Iowa 1139.

Ky.—Euster v. Vogel, 13 S.W.2d 1028, 227 Ky. 785.

§ 552. — Competency of Operator

Instructions as to the competency of the operator of a motor vehicle by reason of age, intoxication, or otherwise are governed by the general rules applicable to instructions in civil actions.

The general rules governing instructions in civil actions have been applied to instructions involving the competency of the operator of a motor vehicle,³⁵ including instructions involving the age³⁶ or intoxication³⁷ of such an operator, or his operation of a motor vehicle without a proper license.³⁸

Md.—Great Atlantic & Pacific Tea Co. v. Noppenberger, 189 A. 434, 171 Md. 378—O'Dell v. Barrett, 163 A. 191, 163 Md. 342.

Mich.—Karl v. Gary, 238 N.W. 629, 255 Mich. 621.

Mo.—Kaufman v. Baden Ice Cream Mfrs., App., 7 S.W.2d 298.

N.Y.—Houlihan v. Selengut, 42 N.Y. S.2d 457, 266 App Div 489, reargument denied 45 N.Y.S.2d 116, 266 App Div. 993.

N.C.—White v. McCabe, 180 S.E. 704, 208 N.C. 301.

Ohio.—Homlar v. Great Lakes Towing Co., 57 N.E.2d 792, 74 Ohio App 110—Lytle v. Union Gas & Electric Co., 157 N.E. 804, 24 Ohio App. 314.

Tenn.—Silver Fleet Motor Express v. Bilbrey, 120 S.W.2d 997, 22 Tenn. App. 244.

W.Va.—Hammond v. Thacker Coal & Coke Co., 143 S.E. 91, 105 W.Va. 423.

Instructions held confusing or misleading

Fla.—Western Union Telegraph Co. v. Michel, 163 So. 86, 120 Fla. 511.

Mo.—Bobos v. Krey Packing Co., 296 S.W. 157, 317 Mo. 108.

Instructions held not confusing or misleading

Conn.—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483.

Ind.—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585.

Iowa.—McQuillen v. Meyers, 241 N.W. 442, 213 Iowa 1366.
42 C.J. p 1278 note 49 [c] (7), (8).

Instructions held not prejudicial

Pa.—French v. Benischeck, Com.Pl., 63 Montg.Co.L.R. 194.

W.Va.—Stone v. Rudolph, 32 S.E.2d 742, 127 W.Va. 335.

35. Cal.—Shiffette v. Walkup Drayage & Warehouse Co., 169 P.2d 996, 74 Cal App.2d 903.

N.J.—Hala v. Worthington, 31 A.2d 844, 130 N.J.Law 162.

Wis.—Kaboath v. Schrewe, 247 N.W. 835, 211 Wis. 280.

Instruction held not prejudicial

Va.—P. L. Farmer, Inc., v. Cimino, 41 S.E.2d 1, 185 Va. 965.

36. Instructions held erroneous or properly refused

Cal.—Hobbs v. Transport Motor Co., 141 P.2d 738, 22 Cal.2d 773, prior opinion 134 P.2d 489.

Ga.—Mitchell v. Mullen, 164 S.E. 276, 45 Ga App. 282.

Mass.—Conrad v. Mazman, 191 N.E. 765, 287 Mass. 229.

Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1—Collins v. Liddle, 247 P. 476, 67 Utah 242.

Instructions held not erroneous

Or.—Miller v. Semler, 2 P.2d 233, 137 Or. 610, rehearing denied Millar v. Semler, 3 P.2d 987, 137 Or. 610.

Tex.—Seinsheimer v. Burkhardt, 122 S.W.2d 1063, 132 Tex. 336.

37. Ky.—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474.

Instructions held proper or warranted

Idaho.—Jones v. Mikesch, 95 P.2d 575, 60 Idaho 680—Packard v. O'Neill, 262 P. 881, 45 Idaho 427, 56 A.L.R. 317.

Ind.—Jones v. Cary, 37 N.E.2d 944, 219 Ind. 268.

Iowa.—Martin v. Mommyer, 300 N.W. 310, 230 Iowa 1158.

Okl.—Western States Grocery Co. v. Mirt, 123 P.2d 266, 190 Okl. 299.

Or.—Willoughby v. Driscoll, 120 P.2d 768, 168 Or. 187, affirmed 121 P.2d 917, 168 Or. 187.

Wash.—Garcia v. Moran, 77 P.2d 988, 194 Wash. 328.

Instructions held erroneous or properly refused

Conn.—Giddings v. Honan, 159 A. 271, 114 Conn. 473, 79 A.L.R. 1215.

Ky.—Sanders v. Lakes, 109 S.W.2d 36, 270 Ky. 98.

Mo.—Blackburn v. Ready-Mixed Concrete Co., App., 188 S.W.2d 526.

Neb.—Hackbart v. Rohrig, 287 N.W. 665, 136 Neb. 825.

Tex.—Schroeder v. Whisenant, Civ. App., 98 S.W.2d 571, error granted.

38. Instructions held erroneous

Conn.—Morosini v. Davis, 148 A. 371, 110 Conn. 358.

Mass.—Kenyon v. Hathaway, 174 N.E. 463, 274 Mass. 47, 73 A.L.R. 156.

Instruction held not erroneous

Cal.—Shiffette v. Walkup Drayage &

§ 553. — Lights and Equipment

Appropriate instructions under the issues may be given with respect to the brakes, headlights, rear lights, steering apparatus, or other equipment on a motor vehicle involved in a collision.

Where the issues are properly raised, appropriate instructions correctly setting forth the law should be given with respect to the necessity, adequacy, or operation of particular equipment or mechanisms on a motor vehicle,³⁹ such as the brakes,⁴⁰ and particular equipment or mechanisms

Warehouse Co., 169 P.2d 996, 74 Cal.App.2d 903.

39. Instructions held proper

Cal.—Alward v. Paola, 179 P.2d 5, 79 Cal App. 1—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624.

Conn.—Malon v. Adley Express Co., 173 A. 159, 118 Conn. 565.

Ind.—Daugherty v. Hunt, 38 N.E.2d 250, 110 Ind.App. 264.

Iowa.—McCarthy v. Mandery, 294 N.W. 583, 229 Iowa 372.

Or.—Cosgrove v. Tricev, 64 P.2d 1321, 156 Or. 1—McCallister v. Ferra, 243 P. 735, 117 Or. 278.

Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

Instruction held properly refused

Or.—Poster v. Farra, 243 P. 778, 117 Or. 286.

Instruction held not misleading

Okl.—Bowring v. Denco Bus Lines, 162 P.2d 525, 196 Okl. 1.

Instruction held not prejudicial

U.S.—Dryfoos v. Scavenger Service Corporation, C.C.A.Ill., 115 F.2d 637.

40. Neb.—Knoche v. Pease Grain & Seed Co., 277 N.W. 798, 134 Neb. 130.

Wash.—Petersen v. Seattle Automobile Co., 271 P. 1001, 149 Wash. 648.

Instructions held proper or erroneously refused

Cal.—Astone v. Oldfield, 155 P.2d 398, 67 Cal.App.2d 702—Vedder v. Bireley, 267 P. 724, 92 Cal.App. 52.

Colo.—Parker v. Ullom, 271 P. 187, 84 Colo. 433.

Ga.—Harper v. Hall, 46 S.E.2d 201, 76 Ga.App. 441—Railway Exp. Agency v. Standridge, 24 S.E.2d 504, 68 Ga. App. 836, followed in 24 S.E.2d 508.

68 Ga.App. 843—Eddleman v. Askew, 179 S.E. 247, 50 Ga.App. 540—

Folds v. City Council of Augusta, 151 S.E. 685, 40 Ga.App. 827—C. J. Kamper Grocery Co. v. Sauls, 144 S.E. 403, 38 Ga.App. 487—Orange

Crush Bottling Co. v. Smith, 132 S.E. 259, 35 Ga.App. 92.

Ind.—Rentschler v. Hall, 69 N.E.2d 619, 117 Ind.App. 255.

Iowa.—Pierce v. Heusinkveld, 14 N.W.2d 275, 284 Iowa 1348.

Kan.—Dick's Transfer Co. v. Miller, 119 P.2d 454, 154 Kan. 574.

such as headlights,⁴¹ rear lights or taillights,⁴² or clearance lights,⁴³ the accelerator,⁴⁴ steering apparatus,⁴⁵ windshield,⁴⁶ windshield wiper,⁴⁷ wheels or tires,⁴⁸ or chains,⁴⁹ also, with respect to knowledge or notice of defects,⁵⁰ such as knowledge or notice of defective brakes.⁵¹

§ 554. — Lookout, Signals, and Warnings

Appropriate instructions warranted by the pleadings

and evidence may be given on the duty or failure of the operator of a motor vehicle to maintain a proper lookout and to give a signal or warning of his approach.

An instruction on the duty or failure of the operator of an automobile to give a signal or warning of its approach may be properly given under the evidence of some cases,⁵² even though the evidence

Ky.—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474.

Minn.—Heath v. Wolesky, 233 N.W. 239, 181 Minn. 492.

Mo.—Fortner v. Kelly, 60 S.W.2d 642, 227 Mo.App. 933.

Neb.—Herman v. Firestone, 21 N.W. 2d 444, 146 Neb. 730.

Wash.—Jacklin v. North Coast Transp. Co., 5 P.2d 325, 165 Wash. 236.

Instructions held erroneous or properly refused

Ind.—Hoesel v. Cain, 53 N.E.2d 769, 222 Ind. 330.

Ky.—Wornack v. Ison, 95 S.W.2d 277, 264 Ky. 640.

Wash.—Hellenenthal v. Edmonson, 290 P. 831, 158 Wash. 276—Petersen v. Seattle Automobile Co., 271 P. 1001, 149 Wash. 648.

Instruction held misleading

Ind.—Hoesel v. Cain, 53 N.E.2d 769, 222 Ind. 330.

41. Ga.—Harwell v. Blue's Truck Line, 199 S.E. 739, 187 Ga. 78, mandate conformed to 200 S.E. 500, 59 Ga.App. 305.

Or.—Cecacci v. Garre, 76 P.2d 283, 158 Or. 466.

Instructions held sufficient, proper, or erroneously refused

Cal.—Chalmers v. Hawkins, 248 P. 727, 78 Cal.App. 733.

Idaho.—Geist v. Moore, 70 P.2d 403, 58 Idaho 149.

Kan.—Sponable v. Thomas, 33 P.2d 729, 139 Kan. 725.

Ky.—Allender Co. v. Browning's Adm'r, 46 S.W.2d 116, 242 Ky. 273.

Minn.—Heath v. Wolesky, 233 N.W. 239, 181 Minn. 492.

Mo.—Counts v. Thomas, App., 63 S.W.2d 416.

N.Y.—Holland v. Peterkin, 216 N.Y.S. 464, 217 App.Div. 57.

Ohio.—Darby v. Jarrett, 159 N.E. 858, 26 Ohio App. 194.

Or.—Schrunk v. Hawkins, 289 P. 1073, 133 Or. 160.

R.I.—Little v. Rubin, 6 A.2d 683, 62 R.I. 438.

Wash.—Gooschin v. Ladd, 33 P.2d 653, 177 Wash. 625.

Instructions held erroneous or properly refused

Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal.App. 399.

Colo.—Zang v. Wright, 23 P.2d 580, 93 Colo. 80.

Ga.—Kelly v. Locke, 194 S.E. 595, 57 Ga.App. 78, reversed on other grounds 198 S.E. 754, 186 Ga. 620, mandate conformed to 199 S.E. 544, 58 Ga.App. 558, vacated 199 S.E. 544, 58 Ga.App. 558.

Ill.—Miller v. Burch, 254 Ill.App. 387.

Ky.—McCulloch's Adm'r v. Abell's Adm'r, 115 S.W.2d 386, 272 Ky. 756.

Mass.—Lockling v. Wiswell, 61 N.E. 2d 15, 318 Mass. 160.

Miss.—Marx v. Berry, 168 So. 61, 176 Miss. 1.

Wash.—Barer v. Pattee, 287 P. 886, 156 Wash. 637.

Instruction held misleading

Cal.—White v. Davis, 284 P. 1086, 103 Cal.App. 531.

Instruction held not misleading

Cal.—Katz v. T. I. Butler Co., 254 P. 679, 81 Cal.App. 747.

42. Ga.—Harwell v. Blue's Truck Line, 199 S.E. 739, 187 Ga. 78, mandate conformed to 200 S.E. 500, 59 Ga.App. 305.

Mo.—Cox v. East St. Louis City Lines, App., 181 S.W.2d 193.

Wash.—Rowe v. Safeway Stores, 128 P.2d 293, 14 Wash.2d 363.

Instructions held sufficient or proper

Ga.—Juhan v. Roberts, 140 S.E. 46, 37 Ga.App. 310.

Iowa.—Kisling v. Thierman, 243 N.W. 552, 214 Iowa 911.

Mo.—Cox v. East St. Louis City Lines, App., 181 S.W.2d 193.

Neb.—Hilf v. Roberts Dairy Co., 296 N.W. 331, 138 Neb. 885.

Wash.—Pozar v. Blankenship, 282 P. 52, 154 Wash. 261.

Instructions held erroneous

Ark.—Floyd v. Johnston, 100 S.W.2d 975, 193 Ark. 518.

Cal.—Mahar v. Mackay, 132 P.2d 42, 55 Cal.App.2d 869.

Ill.—McDermott v. McKeown Transp. Co., 263 Ill.App. 325—Mowat v. Sandel, 262 Ill.App. 395.

Vt.—Packard v. Quesnel, 22 A.2d 164, 112 Vt. 175.

Instructions held not misleading

Ky.—Fry & Kain v. Keen, 59 S.W.2d 3, 248 Ky. 548.

Wash.—Rowe v. Safeway Stores, 128 P.2d 293, 14 Wash.2d 363.

43. **Instruction held not misleading**

Pa.—Nevin Bus Line v. Paul R. Hostetter Co., 155 A. 872, 305 Pa. 72.

44. **Instruction held properly refused**

Minn.—Stoker v. Anderson, 238 N.W. 655, 184 Minn. 339.

45. **Instruction held not erroneous**

Or.—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1.

46. **Instruction held properly refused**

Cal.—Neff v. Kern County, 134 P.2d 44, 57 Cal.App.2d 86.

47. **Instruction held not erroneous**

Wash.—Gooschin v. Ladd, 33 P.2d 653, 177 Wash. 625.

Instruction held erroneous

N.H.—Lafamme v. Lewis, 192 A. 851, 89 N.H. 69.

48. **Instruction held proper**

U.S.—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8, certiorari denied Milburn v. Heald, 62 S.Ct. 1267, 316 U.S. 681, 86 L.Ed. 1754, and 62 S.Ct. 1268, 316 U.S. 681, 86 L.Ed. 1754.

Instructions held properly refused

Ala.—Motor Terminal & Transportation Co. v. Millican, 12 So.2d 96, 244 Ala. 39.

Colo.—Edelen v. Simpson, 144 P.2d 986, 112 Colo. 1.

49. **Instruction held not erroneous**

R.I.—United Electric Rys. Co. v. Pennsylvania Petroleum Products Co., 192 A. 749, 58 R.I. 305.

50. **Instruction held proper**

Or.—Cosgrove v. Tracey, 64 P.2d 1321, 156 Or. 1.

Instruction held properly refused

Ala.—Motor Terminal & Transportation Co. v. Millican, 12 So.2d 96, 244 Ala. 39.

51. **Instructions held sufficient or proper**

Ark.—Cox v. Divine, 63 S.W.2d 982, 187 Ark. 1162.

Cal.—Walters v. Du Four, 22 P.2d 259, 132 Cal.App. 72, hearing denied 23 P.2d 1020, 132 Cal.App. 72.

Conn.—Hageman v. Freeburg, 162 A. 21, 115 Conn. 469.

Instruction held erroneous

N.Y.—Schaeffer v. Caldwell, 78 N.Y. S.2d 652, 273 App.Div. 263.

52. **Mo.—Andrews v. Parker, App., 259 S.W. 807.**

N.J.—Graff v. Louis Stern Sons, Inc., 135 A. 335, 103 N.J.Law 13.

Applicability to pleadings and evidence in general see infra § 556.

of the necessity⁵³ or failure⁵⁴ to give warning is of a negative character. However, an instruction on this subject should not be given where it is not warranted by the evidence in the case.⁵⁵ Thus an instruction on the failure to give a warning or signal should not be given where the evidence shows that there was no necessity for giving a warning or signal,⁵⁶ or that the failure to give it could not have been the proximate cause of the collision or accident,⁵⁷ as where the evidence shows that the vehicle was seen at a sufficient distance away for the accident to have been avoided.⁵⁸ Where there is evidence that the driver of the automobile shouted, it may be error to instruct that

warning must be given by some signal device on the automobile.⁵⁹

Instructions as to the duty to give⁶⁰ or heed⁶¹ a warning or signal should correctly set forth the law, and, moreover, they should be applicable under the pleadings.⁶² An instruction on the duty to give a signal should not be so general and vague as to allow the jury too much room for speculation and conjecture.⁶³

Lookout. Instructions on the duty of a motorist to maintain a proper lookout may be appropriate under the circumstances of the case.⁶⁴ Such instructions should set forth the law correctly⁶⁵

Instructions held proper under evidence

Ala.—Bradford v. Carson, 137 So. 426, 223 Ala. 594.

Cal.—Petersen v. Devine, 156 P.2d 936, 68 Cal.App.2d 387.

Iowa.—Grissell v. Johnson, 294 N.W. 618, 229 Iowa 364.

Mo.—Rosenkoetter v. Fleer, 155 S.W. 2d 157.

Ohio.—Sweeney v. Schneider, 53 N.E. 2d 820, 73 Ohio App. 157.

53. Ky.—Carr v. Warford, 249 S.W. 1024, 198 Ky. 690.

41 C.J. p 1283 note 28.

54. Ill.—Noonan v. Maus, 197 Ill. App. 103.

55. Ky.—Field v. Collins, 92 S.W.2d 793, 263 Ky. 474.

R.I.—Little v. Rubin, 6 A.2d 683, 62 R.I. 438.

Instructions held erroneous or properly refused under evidence

U.S.—Sprinkle v. Davis, C.C.A. Va., 111 F.2d 925, 128 A.L.R. 1101.

Fla.—Strayer v. Johnston, 21 So.2d 593, 155 Fla. 791.

Ill.—Delach v. Schuberth, 45 N.E.2d 198, 316 Ill.App. 452.

N.C.—Kjellander v. Piedmont Baking Co., 148 S.E. 40, 197 N.C. 206.

56. Pa.—Rose v. Quaker City Cab Co., 69 Pa.Super. 208.

Wash.—Barton v. Van Gesen, 157 P. 215, 91 Wash. 94.

57. Cal.—Zaferis v. Bradley, 82 P.2d 70, 28 Cal.App.2d 188.

42 C.J. p 1283 note 31.

58. Ky.—Southeastern Greyhound Lines v. Buckles, 183 S.W.2d 965, 298 Ky. 681—Field v. Collins, 92 S.W.2d 793, 263 Ky. 474.

42 C.J. p 1283 note 32.

59. Ill.—Shaw v. Corrington, 171 Ill. App. 232.

60. Cal.—Ketchum v. Pattee, 98 P. 2d 1051, 37 Cal.App.2d 122.

Ky.—Chappell v. Doepel, 192 S.W.2d 809, 301 Ky. 622.

Instructions held erroneous or properly refused

Ala.—Schrimsner v. Carroll, 142 So. 547, 225 Ala. 188.

Ill.—Gamble v. Hayes Transfer & Storage Co., 278 Ill.App. 365

Iowa.—Lawson v. Fordyce, 21 N.W.2d 69, 237 Iowa 28.

Mass.—Di Rienzo v. Goldfarb, 153 N.E. 784, 257 Mass. 272.

Minn.—Modrinich v. Loyal Order of Moose, No 1117, of Virginia, 227 N.W. 207, 178 Minn. 382.

Miss.—Reid v. McDevitt, 140 So. 722, 163 Miss. 226.

Mo.—Nance v. Lansdell, App. 73 S.W.2d 346.

N.J.—Costanza v. Cavanaugh, 35 A.2d 612, 131 N.J. Law 175.

Or.—Gano v. Zidell, 10 P.2d 365, 140 Or. 11, rehearing denied 12 P.2d 1118, 140 Or. 11.

Vt.—Mooney v. McCarthy, 181 A. 117, 107 Vt. 425

Instructions held not erroneous

Cal.—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382.

Ga.—Huckabee v. Grace, 173 S.E. 744, 48 Ga App. 621.

Iowa.—Thordson v. McKelghan, 16 N.W.2d 607, 235 Iowa 409.

Ky.—Kelly v. Marshall's Adm'r, 120 S.W.2d 142, 274 Ky. 666—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246 Ky. 758.

N.C.—Gloss v. Williams, 145 S.E. 169, 196 N.C. 213.

42 C.J. p 1275 note 97 [c], p 1276 note 9 [b] (3).

Instruction held not misleading

Wash.—Curtis v. Perry, 18 P.2d 840, 171 Wash. 542.

Instruction held not prejudicial

Cal.—Dullanty v. Smith, 265 P. 814, 203 Cal. 621.

61. Instruction held not erroneous

Mont.—Buatz v. Noble, 69 P.2d 579, 105 Mont. 59.

62. Instruction held proper under pleadings

Or.—Weinstein v. Wheeler, 295 P. 196, 135 Or. 518, rehearing denied 296 P. 1079, 135 Or. 518.

63. Ky.—Southeastern Greyhound Lines v. Buckles, 183 S.W.2d 965, 298 Ky. 681.

64. Wis.—Ruka v. Zierer, 218 N.W. 358, 195 Wis. 285.

Applicability to pleadings and evidence in general see *infra* § 556.

Instructions held required or justified under evidence

Ark.—Cox v. Divine, 63 S.W.2d 982, 187 Ark. 1162.

Ga.—Minnick v. Jackson, 13 S.E.2d 891, 64 Ga App. 554

Ill.—Quirk v. Schramm, 77 N.E.2d 417, 333 Ill.App. 293.

Mich.—Gallagher v. Walter, 299 N.W. 811, 299 Mich. 69

Mo.—Nelson v. Evans, 93 S.W.2d 691, 338 Mo. 991.

N.C.—Baird v. Baird, 28 S.E.2d 225, 223 N.C. 730.

Or.—Haltom v. Fellows, 73 P.2d 680, 157 Or. 514.

Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

Instructions held not required or warranted under evidence

Iowa.—Gregory v. Suhr, 277 N.W. 721, 224 Iowa 954.

Utah.—Morrison v. Perry, 140 P.2d 772, 104 Utah 151.

65. Instructions held erroneous or properly refused

Ky.—Dixie Ohio Exp. Co. v. Vickery, 206 S.W.2d 821, 306 Ky. 171—Lehman v. Patterson, 182 S.W.2d 897, 298 Ky. 360.

Instructions held not erroneous

U.S.—Cope v. Heath, C.C.A.Ark., 108 F.2d 854.

Cal.—Freeman v. Churchill, 183 P. 2d 4, 30 Cal.2d 512—Angelo v. Esau, 93 P.2d 205, 34 Cal.App.2d 130—Berlin v. Violet, 18 P.2d 737, 129 Cal.App. 337.

Conn.—Miller v. Stamford Transit Co., 32 A.2d 53, 130 Conn. 63.

Ky.—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246 Ky. 758.

Tenn.—Wilkins v. Malone, 13 Tenn. App. 648.

Tex.—Southern Motor Lines v. Creamer, Civ.App., 113 S.W.2d 624, error dismissed.

42 C.J. p 1276 note 9 [b] (2).

and should not be given if inapplicable under the evidence in the case.⁶⁶

§ 555. — Speed and Control

Appropriate instructions correctly setting forth the law as to the speed or control of motor vehicles should be given where warranted by the issues in the case.

It may be proper or necessary for the court to give, and error for it to refuse, instructions on the speed or control of a motor vehicle involved in an accident.⁶⁷ Such instructions should correctly set forth the law;⁶⁸ and, where a requested instruction does not set forth the law correctly, the court

Instructions held misleading

Ala.—Pure Milk Co. v. Salter, 140 So. 386, 224 Ala. 417.

Instruction held not prejudicial

Ind.—Pfeister v. Key, 33 N.E.2d 330, 218 Ind. 521.

66. Iowa.—Gregory v. Suhr, 277 N.W. 721, 224 Iowa 954.

67. U.S.—Swiderski v. Moodenbaugh, C.C.A.Or., 143 F.2d 212—Nussbaum v. Atlas Laundry Co., C.C.A.Ohio, 10 F.2d 353.

Ga.—George A. Rheman Co. v. May, 31 S.E.2d 738, 71 Ga.App. 651—Awbrey v. Johnson, 165 S.E. 816, 45 Ga.App. 663—Hill v. Kirk, 159 S.E. 724, 43 Ga.App. 549.

Ky.—Lieberman v. McLaughlin, 26 S.W.2d 753, 233 Ky. 763.

Mass.—Bogert v. Thompson, 156 N.E. 884, 260 Mass. 206.

Mo.—Gardner v. Turk, 123 S.W.2d 158, 343 Mo. 899.

Ohio.—Marchal v. Frankman, App., 58 N.E.2d 679—Dye v. Spohn, App., 36 N.E.2d 425—Liberty Highway Co. v. Callahan, 157 N.E. 708, 24 Ohio App. 374.

Tenn.—Herstein v. Kemker, 94 S.W.2d 76, 19 Tenn.App. 681.

Wash.—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881.

W.Va.—Becher v. Spencer, 170 S.E. 900, 114 W.Va. 75.

42 C.J. p. 1272 note 64, p. 1273 note 74 [b] (7).

Suggested forms of instruction set forth

Ky.—Gorman v. Berry, 158 S.W.2d 155, 289 Ky. 88—Short v. Robinson, 134 S.W.2d 594, 280 Ky. 707—Nowak v. Joseph, 121 S.W.2d 939, 275 Ky. 470.

68. U.S.—McCrate v. Morgan Packing Co., C.C.A.Ohio, 117 F.2d 702.

Iowa.—Holub v. Fitzgerald, 243 N.W. 575, 214 Iowa 857.

Ky.—Knapp v. Gibbs, 277 S.W. 259, 211 Ky. 278.

Instructions held erroneous or properly refused

(1) Generally.

U.S.—Smith v. Town of Orangetown, C.C.A.N.Y., 150 F.2d 782, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462—Blaszky v. Eastern Auto Forwarding Co., C.C.A.N.Y., 134 F.2d 600—Linde Air Products Co. v. Cameron, C.C.A.W.Va., 82 F.2d 22.

Ariz.—Butane Corp. v. Kirby, 187 P.2d 325, 66 Ariz. 272.

Ark.—Coca Cola Bottling Co. of Blytheville v. Doud, 76 S.W.2d 87,

189 Ark. 986—Herring v. Bollinger, 29 S.W.2d 676, 181 Ark. 925.

Cal.—McCoulou v. Vejar, 297 P. 534, 212 Cal. 49—Bennett v. Robertson, 150 P.2d 547, 65 Cal.App.2d 278—Soda v. Marriott, 5 P.2d 675, 118 Cal.App. 635—Armstrong v. Day, 284 P. 1083, 103 Cal.App. 465—Wright v. Salzberger & Sons, 254 P. 671, 81 Cal.App. 690.

Ga.—George A. Rheman Co. v. May, 31 S.E.2d 738, 71 Ga.App. 651—Minick v. Jackson, 13 S.E.2d 891, 64 Ga.App. 551—Batchelor v. Anglin, 13 S.E.2d 110, 64 Ga.App. 342.

Ind.—Illinois Bell Telephone Co. v. Pappadakis, 17 N.E.2d 494, 106 Ind.App. 504—Mattes v. Brugner, 159 N.E. 156, 88 Ind.App. 36.

Iowa.—White v. Zell, 276 N.W. 76, 224 Iowa 359—Codner v. Stowe, 208 N.W. 330, 201 Iowa 800.

Kan.—Hamilton v. Harrison, 268 P. 119, 126 Kan. 188.

Ky.—Miles v. Southeastern Motor Truck Lines, 173 S.W.2d 990, 295 Ky. 156—National Linen Supply Co. v. Snowden, 156 S.W.2d 186, 288 Ky. 374—Vinson v. Kissinger's Adm'r, 119 S.W.2d 628, 274 Ky. 606—Padiucah Coca-Cola Bottling Co. v. Reeves, 88 S.W.2d 39, 261 Ky. 539—Utilities Appliance Co. v. Toon's Adm'r, 45 S.W.2d 478, 241 Ky. 823—Summers v. Spivey's Adm'r, 43 S.W.2d 666, 241 Ky. 213—Fullenwider v. Brawner, 6 S.W.2d 264, 224 Ky. 274—Knapp v. Gibbs, 277 S.W. 259, 211 Ky. 278.

Miss.—Robinson v. Haydel, 171 So. 7, 177 Miss. 233—Meridian Coca-Cola Co. v. Watson, 134 So. 824, 161 Miss. 108.

Mo.—Cramer v. Parker, App., 100 S.W.2d 640.

Neb.—Melcher v. Murphy, 31 N.W.2d 411, 149 Neb. 541.

N.H.—Bennett v. Bennett, 31 A.2d 374, 92 N.H. 379—Gagnon v. Krikorian, 31 A.2d 49, 92 N.H. 344.

N.M.—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.

N.C.—James v. Carolina Coach Co., 178 S.E. 607, 207 N.C. 742—Whitaker v. Carpenter Motor Car Co., 147 S.E. 729, 197 N.C. 83.

Ohio.—Graft v. Clark, App., 79 N.E.2d 166.

Okl.—Townsend v. Cotten, 68 P.2d 790, 180 Okl. 128.

Pa.—Logan, to Use of Butz, v. City of Bethlehem, 187 A. 389, 324 Pa. 7.

Wash.—Jacklin v. North Coast Transp. Co., 5 P.2d 325, 165 Wash. 236.

Wis.—Schulz v. General Casualty Co., 288 N.W. 803, 233 Wis. 118—Hamus v. Weber, 226 N.W. 392, 199 Wis. 320—Grandhagen v. Grandhagen, 225 N.W. 935, 199 Wis. 315.

(2) Speed as prima facie unlawful or unreasonable.

Cal.—Akers v. Cowan, 80 P.2d 143, 26 Cal.App.2d 694.

Idaho.—Hopkins v. Pfeffer, 74 P.2d 97, 58 Idaho 396.

Ky.—Thomas v. Dahl, 170 S.W.2d 337, 293 Ky. 808—National Linen Supply Co. v. Snowden, 156 S.W.2d 186,

288 Ky. 374—Willett v. Bradas & Gheens, 142 S.W.2d 139, 283 Ky. 525—Wright v. Clausen, 92 S.W.2d 93, 263 Ky. 298—Diamond Taxicab Co. v. McDaniel, 80 S.W.2d 562, 258 Ky. 478.

Mass.—Kohutynski v. Kohutynski, 5 N.E.2d 345, 296 Mass. 74.

N.C.—Woods v. Freeman, 195 S.E. 812, 213 N.C. 314—Latham v. Elizabeth City Orange Crush Bottling Co., 195 S.E. 372, 213 N.C. 158.

Ohio.—McKinnon v. Pettibone, 184 N.E. 707, 44 Ohio App. 147, affirmed Pettibone v. McKinnon, 183 N.E. 786, 125 Ohio St. 605.

(3) Assured clear distance.

Iowa.—Groshens v. Lund, 268 N.W. 496, 222 Iowa 49—Townsend v. Armstrong, 260 N.W. 17, 220 Iowa 396.

Mich.—Rossien v. Berry, 9 N.W.2d 895, 305 Mich. 693.

Ohio.—Blackford v. Kaplan, 20 N.E.2d 522, 135 Ohio St. 268—Marchal v. Frankman, App., 58 N.E.2d 679—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335.

(4) Repealed or abrogated statute or ordinance.

Kan.—Harshaw v. Kansas City Public Service Co., 119 P.2d 459, 154 Kan. 481.

Ky.—Schulze Baking Co. v. Daniel's Adm'r, 112 S.W.2d 1011, 271 Ky. 717—Nehi Bottling Co. v. Flannery, 94 S.W.2d 297, 264 Ky. 68.

(5) Speed as cause of, or contributing to, accident.

Ky.—Electric Bakeries v. Stacy's Adm'r, 94 S.W.2d 977, 264 Ky. 431.

Mo.—Long v. Mild, 149 S.W.2d 853, 347 Mo. 1002—Disano v. Hall, App., 14 S.W.2d 483.

Wash.—Van Cello v. Clark, 289 P. 19, 157 Wash. 321, followed in Parsons v. Clark, 289 P. 22, 157 Wash. 697.

(6) Crossings or intersections.

Ga.—Huckabee v. Grace, 173 S.E. 744, 48 Ga.App. 621—Pybus v. Goldstein, 165 S.E. 866, 45 Ga.App. 669.

may modify it before giving it to the jury.⁶⁹ In- | not be confusing or misleading,⁷⁰ or indefinite and
structions on the subject of speed or control should |

Md.—Greenfeld v. Hook, 8 A.2d 888, 177 Md. 116, 136 A.L.R. 1485.

N.H.—Feuerstein v. Grady, 169 A. 622, 86 N.H. 406.

Or.—Vroman v. Upp, 77 P.2d 432, 158 Or. 597.

Wash.—Tosto v. City of Seattle, 171 P.2d 194, 25 Wash.2d 281—Lubliner v. Ruge, 153 P.2d 694, 21 Wash.2d 881.

Instructions held sufficient or not erroneous

(1) Generally.

U.S.—Pryor v. Strawn, C.C.A.Neb., 73 F.2d 595.

Ala.—Ashley v. McMurray, 130 So. 401, 222 Ala. 32.

Ark.—Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597, 197 Ark. 425—Hammond v. Hamby, 87 S.W.2d 1000, 191 Ark. 780—Sutton v. Webb, 39 S.W.2d 314, 183 Ark. 865—Jacks v. Culpepper, 37 S.W.2d 94, 183 Ark. 505—Smith Arkansas Traveler Co. v. Simmons, 28 S.W.2d 1052, 181 Ark. 1024.

Cal.—Perry v. McLaughlin, 297 P. 554, 212 Cal. 1—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421—Douglass v. Crabtree, 134 P.2d 912, 157 Cal.App.2d 568—Smith v. Pacific Greyhound Corporation, 35 P.2d 169, 139 Cal.App. 696—Walters v. Du Four, 22 P.2d 259, 132 Cal. App. 72, hearing denied, Sup. 23 P.2d 1020, 132 Cal App 72—Thompson v. Dentman, 21 P.2d 1009, 131 Cal.App. 680—Handley v. Lombardi, 9 P.2d 867, 122 Cal.App. 22—Loggie v. Interstate Transit Co., 291 P. 618, 108 Cal.App. 165.

Conn.—Johnson v. Fiske, 6 A.2d 354, 125 Conn. 445—De Antonio v. New Haven Dairy Co., 136 A. 567, 105 Conn. 663.

Ga.—Huckabee v. Grace, 173 S.E. 744, 48 Ga.App. 621—Atlanta Coach Co. v. Curtis, 157 S.E. 344, 42 Ga.App. 639.

Iowa.—Luse v. Nickoley, 3 N.W.2d 503—Band v. Reinke, 288 N.W. 629, 227 Iowa 458—Rogers v. Lagomarcino-Grupe Co., 248 N.W. 1, 215 Iowa 1270.

Kan.—Briley v. Nussbaum, 252 P. 223, 122 Kan. 438, modified on other grounds 254 P. 351, 123 Kan. 58.

Ky.—Ligon v. Redding, 188 S.W.2d 483, 300 Ky. 329—Knight v. Silver Fleet Motor Express, 159 S.W.2d 1002, 289 Ky. 661—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8—Kennedy Transfer Co. v. Greenfield's Adm'r, 59 S.W.2d 978, 248 Ky. 708—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246 Ky. 758—Lally v. Cochran, 21 S.W.2d 272, 231 Ky. 211—Hornek Bros. v. Strubel, 279 S.W. 1087, 212 Ky. 631.

Mich.—Moore v. Noorthoek, 273 N.W.

758, 280 Mich. 431—Breen v. Smart, 232 N.W. 226, 251 Mich. 679.

Mo.—Loveless v. Berberich Delivery Co., 73 S.W.2d 790, 335 Mo. 650—Dickens v. Heitman, App. 141 S.W.2d 183—Lach v. Buckner, 86 S.W.2d 954, 229 Mo.App. 1066—Benzel v. Anishanzlin, App., 297 S.W. 180—Dauber v. Josephson, 237 S.W. 149, 209 Mo.App. 531.

N.J.—Eastmond v. Wachstein, 135 A. 67, 4 N.J.Misc. 966.

N.C.—Glosson v. Trollinger, 40 S.E.2d 606, 227 N.C. 84—Baird v. Baird, 28 S.E.2d 225, 223 N.C. 730—Tarrant v. Pepsi Cola Bottling Co., 20 S.E.2d 565, 221 N.C. 390.

Ohio.—Bruce v. Cook, 171 N.E. 424, 34 Ohio App. 563.

Wash.—Robinson v. Ebert, 39 P.2d 992, 180 Wash. 387.

Wis.—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341.

(2) Speed as proximate or contributing cause of accident.

Ind.—Cousins v. Glassburn, 24 N.E. 2d 1013, 216 Ind. 431.

Iowa.—Luse v. Nickoley, 3 N.W.2d 503—Waldman v. Sanders Motor Co., 243 N.W. 555, 214 Iowa 1139. N.H.—Sullivan v. Sullivan, 18 A.2d 828, 91 N.H. 341.

Va.—Masters v. Cardi, 42 S.E.2d 203, 186 Va. 261.

(3) Ability to stop vehicle or avoid collision.

U.S.—Cope v. Heath, C.C.A.Ark., 108 F.2d 854.

Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381, 60 Ariz. 354—Dennis v. Stukey, 294 P. 276, 37 Ariz. 299, rehearing denied 295 P. 971, 37 Ariz. 510.

Ark.—Compressed Industrial Gases v. Todd, 129 S.W.2d 262, 198 Ark. 409.

Cal.—Lenning v. Chilo, 147 P.2d 410, 63 Cal.App.2d 511—Hilton v. Carey, 106 P.2d 944, 41 Cal.App.2d 375—Berlin v. Violet, 18 P.2d 737, 129 Cal.App. 337.

D.C.—Steger v. Cameron, 109 F.2d 347, 71 App.D.C. 202.

Pa.—Frew v. Barto, Com.Pl., 52 Dauph.Co. 147, affirmed 26 A.2d 905, 345 Pa. 217.

Tenn.—Faulk v. McPherson, 182 S.W.2d 130, 27 Tenn.App. 506.

(4) "Presumptive" or "prima facie" evidence of negligence or unreasonableness.

Ark.—Coffee v. Arkansas Power & Light Co., 113 S.W.2d 1100, 195 Ark. 559—Hammond v. Hamby, 87 S.W.2d 1000, 191 Ark. 780.

Ind.—Rentschler v. Hall, 69 N.E.2d 619, 117 Ind.App. 255.

Mo.—Long v. Binnicker, 63 S.W.2d 831, 228 Mo.App. 193.

N.D.—Kohler v. Stephens, 24 N.W.2d 64, 74 N.D. 655.

Ohio.—Reed v. Hensel, 159 N.E. 843, 28 Ohio App. 79.

(5) Residence or business district. Ala.—Utility Trailer Works v. Phillips, 29 So.2d 289, 249 Ala. 61.

Ark.—Herring v. Bollinger, 29 S.W.2d 676, 181 Ark. 925.

(6) Crossings or intersections.

Cal.—Olson v. Union Oil Co. of California, 78 P.2d 446, 25 Cal.App.2d 627.

Ill.—Derango v. Rubin, 34 N.E.2d 719, 310 Ill.App. 536.

Kan.—Briley v. Nussbaum, 252 P. 223, 122 Kan. 438, modified on other grounds 254 P. 351, 123 Kan. 58.

Mo.—Stevens v. Westport Laundry Co., 25 S.W.2d 491, 224 Mo.App. 955.

(7) Obstructed view.—Fitzpatrick v. Haskell, 4 P.2d 580, 117 Cal.App. 684—Dougherty v. Ellingson, 275 P. 456, 97 Cal.App. 87.

(8) Assured clear distance.

Iowa.—Remer v. Takin Bros Freight Lines, 289 N.W. 477, 227 Iowa 903—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771.

Ohio.—Schwab v. Keeler, 79 N.E.2d 176, 81 Ohio App. 291—Manchester v. Starr Transfer Co., App., 67 N.E.2d 133—Jones v. Butler, 52 N.E.2d 347, 72 Ohio App. 335

Instructions held not prejudicial

Cal.—Anderson v. Freis, 142 P.2d 330, 61 Cal App 2d 159—Fleming v. Flick, 35 P.2d 210, 140 Cal App. 14.

Iowa.—Shutes v. Weeks, 262 N.W. 518, 220 Iowa 616—Duncan v. Rhomborg, 236 N.W. 638, 212 Iowa 389.

Ohio.—Weaver v. Liberty Cabs, App., 33 N.E.2d 853.

Wash.—Hamilton v. Cadwell, 81 P.2d 815, 195 Wash. 683.

Wis.—Schmallenberg v. Smith, 296 N.W. 597, 237 Wis. 285.

69. Ky.—R. B. Tyler Co. v. Curd, 42 S.W.2d 298, 240 Ky. 253.

70. Instructions held confusing or misleading

Ala.—Streetman v. Bowdon, 194 So. 831, 239 Ala. 359.

Iowa.—Swan v. Dailey-Luce Auto Co., 265 N.W. 143, 221 Iowa 842. Ky.—Buck v. Kleinschmidt, 131 S.W.2d 714, 279 Ky. 569.

Mo.—Robinson v. Ross, App., 47 S.W.2d 122.

Neb.—Allen v. Clark, 28 N.W.2d 439, 148 Neb. 627.

N.Y.—Freire v. Kaupman, 272 N.Y.S. 816, 241 App.Div. 541.

Or.—Zeek v. Bicknell, 78 P.2d 620, 159 Or. 167—Keys v. Griffith, 55 P.2d 15, 153 Or. 190.

42 C.J. p 1278 note 49 [b] (13).

incomplete,⁷¹ or so general as to bear no relation to the problems to be solved by the jury.⁷² In a case where a violation of speed regulations involves the question whether the accident occurred in a closely built-up portion of a municipality, it may be the duty of the court to instruct the jury as to the proper definition of a closely built-up portion of a municipality.⁷³ It has been considered that it is better to omit from the instructions any mention of the speeds indicated by the statutes for business and residence districts and outside such districts, and, rather, to define the meaning of the basic rule requiring a reasonable and prudent speed in the light of the existing conditions.⁷⁴ The giving of an instruction stating the substance

of a statutory provision to the effect that a speed of more than a prescribed rate should be prima facie evidence that it is unreasonable was held to be error, where the provision was intended to be a rule for the guidance of the court only, and not a rule of evidence to be given to the jury.⁷⁵ It has been held that an instruction on a law declaring a certain speed prima facie evidence of negligence should be separate from an instruction enumerating the driver's duties generally.⁷⁶

Instructions on the subject of speed or control should be applicable under the issues and theories of the case,⁷⁷ and under the pleadings⁷⁸ and also under the evidence⁷⁹ therein. Thus, an instruction as to an unlawful or unreasonable rate of speed

Instructions held not confusing or misleading

- Ark.—Hammond v. Hamby, 87 S.W. 2d 1000, 191 Ark. 780.
Cal.—Huber v. Scott, 10 P.2d 150, 122 Cal.App. 334.
Ill.—Harper v. Malandrone, 48 N.E. 2d 789, 319 Ill.App. 247—Schoenbacher v. Kadetsky, 7 N.E.2d 768, 290 Ill.App. 28.
71. W.Va.—Mercer Funeral Home v. Addison Bros. & Smith, 163 S.E. 439, 111 W.Va. 616—Morrison v. Roush, 158 S.E. 514, 110 W.Va. 398.
72. Cal.—Redwing v. Moncravie, 21 P.2d 986, 131 Cal.App. 569.
73. Ohio—Hamilton v. Gilkey, 10 N.E.2d 1014, 56 Ohio App. 438.
74. Or.—Zeck v. Bicknell, 78 P.2d 620, 159 Or. 167.
75. Ill.—Harris v. Piggly Wiggly Stores, 236 Ill.App. 392, 42 C.J. p. 1279 note 66.
76. Ky.—Utilities Appliance Co. v. Toon's Adm'r, 45 S.W.2d 478, 241 Ky. 823.

77. Instructions held erroneous or properly refused under issues or theories

- Pa.—Mosely v. Connor, 177 A. 817, 318 Pa. 17.
Wis.—Culver v. Webb, 12 N.W.2d 731, 244 Wis. 478.

Instructions held proper or required under issues or theories

- Iowa.—Rebmann v. Heesch, 288 N.W. 695, 227 Iowa 566.
Mo.—Twigg v. Meyer, App., 285 S.W. 120.
N.M.—Clay v. Texas-Arizona Motor Freight, 159 P.2d 317, 49 N.M. 157.
Or.—Snabel v. Barber, 300 P. 331, 137 Or. 88—McCallister v. Farra, 243 P. 785, 117 Or. 278.
Pa.—Greth v. Ruth, Com.Pl., 48 Lanc. Rev. 67.
78. Idaho.—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.
Applicability to pleadings and evidence in general see *infra* § 556.

Instructions held erroneous under pleadings

- (1) Generally.
Ind.—Northern Indiana Public Service Co. v. Scherenberg, 14 N.E.2d 743, 105 Ind.App. 229.
Iowa.—Newland v. G. McClelland & Son, 250 N.W. 229, 217 Iowa 568—Holub v. Fitzgerald, 243 N.W. 575, 214 Iowa 857.
Ky.—O'Neil & Hearne v. Bray's Adm'x, 90 S.W.2d 353, 262 Ky. 377.
Miss.—Gulf Research Development Co. v. Linder, 170 So. 646, 177 Miss. 123.
Mo.—Reece v. Jefferson Transp. Co., App., 160 S.W.2d 789.
Mont.—Marinkovich v. Tierney, 17 P.2d 93, 93 Mont. 72.
Ohio—Marchal v. Frankman, App., 58 N.E.2d 679.
Or.—Vandevent v. Youngson, 12 P.2d 1029, 140 Or. 77.
Utah—Woodward v. Spring Canyon Coal Co., 63 P.2d 267, 90 Utah 578.
(2) Assured clear distance
Iowa.—Davis v. Hoskinson, 290 N.W. 497, 228 Iowa 193.
Ohio.—Thompson v. Kerr, App., 51 N.E.2d 742.

Instructions held proper under pleadings

- Conn.—De Antonio v. New Haven Dairy Co., 136 A. 567, 105 Conn. 663.
Ga.—McKinney & Co. v. Darby, 193 S.E. 594, 56 Ga.App. 621.
Ill.—Schoenbacher v. Kadetsky, 7 N.E.2d 768, 290 Ill.App. 28—Leideck v. City of Chicago, 248 Ill.App. 545.
Iowa.—Engle v. Ungles, 273 N.W. 879, 223 Iowa 780—Jarvis v. Stone, 247 N.W. 393, 216 Iowa 27.
Mo.—Hoffman v. People's Motorbus Co. of St. Louis, App., 288 S.W. 948.
Neb.—Whinnery v. Interstate Transit Lines, 252 N.W. 466, 126 Neb. 61.
Okla.—Stroud v. Tompkins, 145 P.2d 396, 193 Okl. 483.
Tenn.—Goebel v. Fleming, 13 Tenn. App. 473.

- Utah.—Balle v. Smith, 17 P.2d 224, 81 Utah 179.

79. Idaho.—Asumendi v. Ferguson, 65 P.2d 713, 57 Idaho 450.
Ky.—Willett v. Bradas & Gheens, 142 S.W.2d 139, 283 Ky. 525.

Instructions held not required or warranted under evidence

- (1) Generally.
Colo.—Interstate Motor Lines v. Neal, 179 P.2d 665, 116 Colo. 242.
Ky.—Hatfield v. Sargent's Adm'x, 209 S.W.2d 306, 306 Ky. 782—Lehman v. Patterson, 182 S.W.2d 897, 298 Ky. 360—Fahrenholtz v. Loomis, 132 S.W.2d 307, 280 Ky. 9—Buck v. Kleinschmidt, 131 S.W.2d 714, 279 Ky. 569—Womack v. Ison, 95 S.W. 2d 277, 264 Ky. 640.
Md.—Coplan v. Warner, 149 A. 1, 158 Md. 463.
Mass.—Conrad v. Mazman, 191 N.E. 765, 287 Mass. 229.
Mich.—Patt v. Dilley, 263 N.W. 749, 273 Mich. 601—Barriger v. Ziegler, 216 N.W. 417, 241 Mich. 83.
Mo.—Rosenkoetter v. Fleer, 155 S.W. 2d 157—Renfro v. Central Coal & Coke Co., 19 S.W.2d 766, 223 Mo. App. 1219.
Neb.—Doan v. Hoppe, 277 N.W. 64, 133 Neb. 767.
N.Y.—Akin v. Pruyn Lumber & Supply Co., 4 N.Y.S.2d 370, 254 App. Div. 34.
Ohio.—Fightmaster v. Mode, 167 N.E. 407, 31 Ohio App. 273.
Or.—Bracht v. Palace Laundry Co., 65 P.2d 1039, 156 Or. 151.
Pa.—Curley v. Edwin A. Smith & Sons, 31 A.2d 113, 346 Pa. 489.
Tenn.—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn.App. 379—Caldwell v. Hodges, 77 S.W.2d 817, 18 Tenn.App. 355.
Wash.—Peterson v. Mayham, 116 P. 2d 259, 10 Wash.2d 111—Lindsey v. Elkins, 283 P. 447, 154 Wash. 588.
W.Va.—Haldren v. Berryman, 155 S.E. 125, 109 W.Va. 403.
Wis.—McCumber v. Rovelsky, 233 N.W. 627, 203 Wis. 158.

may and should be omitted where there is no evidence that the motor vehicle in question was operated at an unlawful or unreasonable rate of speed.⁸⁰ Likewise, in the absence of evidence showing or tending to show that the speed of the automobile contributed to, or had anything to do with, the collision or accident, the court may prop-

erly omit or refuse to give an instruction on the subject⁸¹ or it may instruct the jury to disregard the matter of speed.⁸²

Of course, the evidence in a particular case may be sufficient to justify an instruction on control, or negligence in operating a motor vehicle at an excessive rate of speed,⁸³ and this is true, even

(2) Assured clear distance.
Iowa.—Gregory v. Suhr, 277 N.W. 721, 224 Iowa 954—Rich v. Herry, 269 N.W. 489, 222 Iowa 465—Lukin v. Marvel, 259 N.W. 782, 219 Iowa 773—Dennis v. Merrill, 257 N.W. 322, 218 Iowa 1259.
Ohio.—Stuchel v. Cleveland Ry. Co., App., 58 N.E.2d 430.

(3) Prima facie evidence of improper speed or driving.
Ky.—Miles v. Southeastern Motor Truck Lines, 173 S.W.2d 990, 295 Ky. 156—Fenton Dry Cleaning & Dyeing Co. v. Hamilton, 11 S.W.2d 409, 226 Ky. 580.
Mass.—Conrad v. Mazman, 191 N.E. 765, 287 Mass. 229.

(4) Business or residential district.
Cal.—Berlin v. Violet, 18 P.2d 737, 129 Cal.App. 337.
Ill.—Riddle v. Mansager, 254 Ill.App. 68.
Ky.—Cundiff v. Nave, 39 S.W.2d 471, 240 Ky. 47.
Mich.—Richardson v. Williams, 228 N.W. 766, 249 Mich. 350.
N.C.—Woods v. Freeman, 195 S.E. 812, 213 N.C. 314.

Instructions held sufficient, warranted, or required under evidence

(1) Generally
Ariz.—Butane Corp. v. Kirby, 187 P.2d 325, 66 Ariz. 272.
Ark.—Holmes v. Lee, 184 S.W.2d 957, 208 Ark. 114.
Cal.—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal.App.2d 477—McVea v. Nickols, 286 P. 761, 105 Cal.App. 28.
Conn.—Doerr v. Woodland Transp. Co., 136 A. 693, 105 Conn. 689.
Ga.—Rutland v. Dean, 5 S.E.2d 601, 60 Ga.App. 896—Chitwood v. Stoner, 4 S.E.2d 605, 60 Ga.App. 599—Wells v. Steinek, 176 S.E. 42, 49 Ga.App. 482.
Ill.—Nordman v. Carlson, 10 N.E.2d 53, 291 Ill.App. 438.
Ind.—Gulley v. Hamm, 73 N.E.2d 188, 117 Ind.App. 593—Bond v. Coats, 199 N.E. 874, 101 Ind.App. 526—Mattes v. Brugner, 159 N.E. 156, 88 Ind.App. 36.
Iowa.—Pierce v. Heusinkveld, 14 N.W.2d 275, 234 Iowa 1348—Bachelder v. Woodside, 9 N.W.2d 464, 233 Iowa 987—Reardon v. Hermansen, 275 N.W. 8, 223 Iowa 1207.
Ky.—Kentucky Virginia Stages v. Tackett's Adm'r, 171 S.W.2d 4, 294 Ky. 188—Short Way Lines v. Sutton's Adm'r, 164 S.W.2d 809, 291

Ky. 541—McCulloch's Adm'r v. Abell's Adm'r, 115 S.W.2d 386, 272 Ky. 756—Leming's Adm'r v. Leachman, 105 S.W.2d 1043, 268 Ky. 781.
Mass.—Dean v. Bolduc, 4 N.E.2d 441, 296 Mass. 15.
Mich.—Hettler v. Holtrop, 281 N.W. 434, 245 Mich. 570.
Mo.—Loveless v. Berberich Delivery Co., 73 S.W.2d 790, 335 Mo. 650—Johnessee v. Central States Oil Co., App., 200 S.W.2d 383—Cramer v. Parker, App., 100 S.W.2d 640.
Neb.—Folken v. Petersen, 1 N.W.2d 916, 140 Neb. 800.
Ohio.—Martin v. Hioffsletter, App., 42 N.E.2d 556—Community Traction Co. v. Konte, 172 N.E. 533, 35 Ohio App. 361, affirmed 172 N.E. 412, 122 Ohio St. 514.
Okla.—Shayler v. West, 185 P.2d 957, 199 Okl. 386—Kellogg Sales Co. v. Holroyd, 73 P.2d 139, 181 Okl. 82.
Or.—Mercer v. Risberg, 188 P.2d 632—Burnett v. Weinstein, 59 P.2d 258, 154 Or. 308—Cockerham v. Potts, 20 P.2d 423, 143 Or. 80—Kahafate v. De Cook, 18 P.2d 593, 141 Or. 576—Turner v. McMillan, 14 P.2d 294, 140 Or. 407.

Pa.—Geiger v. Pennsylvania R. Co., 30 Pa.Dist. & Co. 107—Heffelfinger v. Schell, Com.Pl., 50 Dauph. Co. 1.
S.C.—Parker v. Simmons, 161 S.E. 169, 163 S.C. 42.
Tex.—Justiss v. Naquin, Civ.App., 137 S.W.2d 72, error dismissed, judgment correct.
Vt.—Emerson v. Hickens, 164 A. 381, 105 Vt. 197.
Va.—Hague v. Valentine, 28 S.E.2d 720, 182 Va. 256—Bell v. Kenney, 23 S.E.2d 781, 181 Va. 24—Gaines v. Campbell, 166 S.E. 704, 159 Va. 504—Hamrick v. Fahrney, 161 S.E. 43, 157 Va. 396.
Wash.—Jacklin v. North Coast Transp. Co., 5 P.2d 325, 165 Wash. 236.

(2) Crossing or intersection.
Ark.—Livingston v. Baker, 155 S.W.2d 340, 202 Ark. 1097.
Cal.—Hasty v. Trevillian, 283 P. 148, 102 Cal.App. 405.
D.C.—Gutshall v. Wood, 123 F.2d 174, 74 App.D.C. 379.
Ga.—A. G. Boone Co. v. Owens, 187 S.E. 899, 54 Ga.App. 379—Petty v. Moore, 159 S.E. 728, 43 Ga.App. 629.
Ky.—Lindig v. Breen, 103 S.W.2d 941, 268 Ky. 153.
Mass.—Tookmanian v. Fanning, 31 N.E.2d 536, 308 Mass. 162.

Miss.—B. Kullman & Co. v. Samuels, 114 So. 807, 148 Miss. 871.
Mo.—Davie v. Cape Yellow Cab Co., App., 191 S.W.2d 302.
Wash.—Leer v. Cohen, 116 P.2d 535, 10 Wash.2d 239—Mattson v. Cragin, 272 P. 36, 149 Wash. 638.
(3) Obstructed view.
Cal.—Hamm v. San Joaquin & Kings River Canal Co., 111 P.2d 940, 44 Cal.App.2d 47—McVea v. Nickols, 286 P. 761, 105 Cal.App. 28.
Or.—Sylvius v. Hays, 6 P.2d 1098, 138 Or. 418.

(4) Proximate or contributing cause.
Ariz.—Brooks v. Neer, 47 P.2d 452, 46 Ariz. 144.
Va.—Hague v. Valentine, 28 S.E.2d 720, 182 Va. 256.
Wash.—Hansen v. Coldwell, 73 P.2d 351, 192 Wash. 167.

(5) Assured clear distance.
Iowa.—Pierce v. Dencker, 294 N.W. 781, 229 Iowa 479—Albert v. Maher Bros Transfer Co., 243 N.W. 561, 215 Iowa 197.
Ohio.—Hunter v. Brumby, 3 N.E.2d 353, 131 Ohio St. 443.

80. Ky.—Willett v. Bradas & Cheens, 142 S.W.2d 139, 283 Ky. 525.
Minn.—Bird v. Johnson, 272 N.W. 168, 199 Minn. 252.
Wash.—O'Connell v. Home Oil Co., 40 P.2d 991, 180 Wash. 461.
42 C.J. p 1284 note 45.

81. Cal.—Arundel v. Turk, 60 P.2d 486, 16 Cal.App.2d 293—Rinker v. Carl, 283 P. 317, 102 Cal.App. 436.
Iowa.—Bailey v. Fredericksburg Produce Ass'n, 295 N.W. 122, 229 Iowa 677.
Pa.—Conrad v. Gollub, Com.Pl., 21 Lehigh Co.L.J. 387.
Va.—Lavenstein v. Maille, 132 S.E. 844, 146 Va. 789.

82. Wash.—Burlie v. Stephens, 193 P. 684, 113 Wash. 182.

83. Ky.—White v. Saunders, 158 S.W.2d 893, 289 Ky. 268.
42 C.J. p 1284 note 48.

Instructions held improperly refused under evidence

U.S.—Swiderski v. Moodenbaugh, C. C.A.Or., 143 F.2d 212.
Cal.—Ferrula v. Santa Fe Bus Lines, 189 P.2d 294, 83 Cal.App.2d 416—Burch v. Valley Motor Lines, 179 P.2d 47, 78 Cal.App.2d 834.
Iowa.—Hoover v. Haggard, 260 N.W. 540, 219 Iowa 1283.

though the exact rate of speed,⁸⁴ as well as its being the proximate cause of the collision,⁸⁵ is a matter of inference rather than of direct testimony. Where a witness has testified as to the speed at which a motor vehicle was traveling, it has been held not erroneous to charge that the jury can find a greater speed from the circumstantial evidence, such as the distance the vehicle went after the brakes were applied,⁸⁶ but that the jury could not merely surmise or guess that it was going faster.⁸⁷

Where the undisputed evidence shows that defendant's automobile was driven at a rate of speed constituting a violation of an ordinance and negligence per se, an instruction clearly submitting to the jury the question whether the violation of the ordinance was the proximate cause of the collision is sufficient,⁸⁸ even though it does not require the jury to find the rate of speed at which the automobile was driven⁸⁹ or that the violation of the ordinance constituted negligence.⁹⁰ It has been held that a charge characterizing any definite speed as legal can be sustained only when the circumstances of the case are such that all reasonable men must agree that such a speed was reasonable and proper under the circumstances;⁹¹ and in the event of such a situation arising, it has been said that the better practice would be to tell the jury directly that there is no issue of undue speed for their consideration.⁹² An instruction is not necessarily erroneous for its failure to submit the particular rate of speed mentioned in the petition.⁹³

§ 556. — Applicability to Pleadings and Evidence in General

- a. In general
- b. Issues, theories, or claims
- c. Instructions as to existence or weight of facts or evidence

a. In General

The instructions in an action for injuries arising out of the operation of a motor vehicle should, in general, be such and only such as are applicable under the pleadings and evidence in the case.

In general, the trial court may and should give instructions which are warranted by both the pleadings and the evidence,⁹⁴ and plaintiff is privileged to submit his case on any one or all of the charges of negligence which are supported by evidence.⁹⁵ On the other hand, only such instructions as are applicable to the pleadings and evidence should be given,⁹⁶ and the court need not and should not give instructions which are not warranted by either the pleadings or the evidence,⁹⁷ although the latter rule should not be rigidly applied to general instructions intended to clarify the minds of the jurymen,⁹⁸ and it may not be error to give an instruction assuming a certain fact which, although not specifically alleged in the complaint or brought out in evidence, was assumed on the trial.⁹⁹

Pleadings. The instructions should be applicable under the pleadings in the case,¹ and various instructions have been held erroneous as ignoring or failing properly to present the matters set forth in the allegations of the petition,² as sub-

Ky.—Southern Oxygen Co. v. Martin, 163 S.W.2d 459, 291 Ky. 235—Nowak v. Joseph, 121 S.W.2d 939, 275 Ky. 470.

Minn.—Kunkel v. Paulson, 266 N.W. 441, 197 Minn. 107.

N.M.—Clay v. Texas-Arizona Motor Freight, 159 P.2d 317, 49 N.M. 157
Pa.—Weinberg v. Pavitt, 155 A. 867, 304 Pa. 312.

S.D.—Carlson v. Johnke, 234 N.W. 25, 57 S.D. 544, 73 A.L.R. 1352.

84. Wash.—Goninon v. Lee, 206 P. 2, 119 Wash. 471.
42 C.J. p 1284 note 49.

85. Mo.—D'Wolf v. Stix-Baer, etc., Dry Goods Co., App., 273 S.W. 172.

86. Conn.—Petrillo v. Kolbay, 165 A. 346, 116 Conn. 389.

87. Conn.—Petrillo v. Kolbay, supra.

88. Mo.—Rooney v. Yellow Cab, etc., Co., App., 269 S.W. 669.

89. Mo.—Rooney v. Yellow Cab, etc., Co., supra.

90. Mo.—Rooney v. Yellow Cab, etc., Co., supra.

91. N.H.—Feuerstein v. Grady, 169 A. 622, 86 N.H. 406.

92. N.H.—Feuerstein v. Grady, supra.

93. Mo.—Agee v. Herring, 298 S.W. 250, 221 Mo.App. 1022.

94. Ill.—Rzeszewski v. Barth, 58 N.E.2d 269, 324 Ill.App. 345.

Ind.—Davis v. Dondanville, 26 N.E.2d 568, 107 Ind.App. 665.

Iowa.—Foster v. Flaugh, 271 N.W. 503, 223 Iowa 40.

Mo.—Steinman v. Brownfield, App., 18 S.W.2d 528.
42 C.J. p 1280 note 71.

95. Mo.—Reece v. Jefferson Transp. Co., App., 160 S.W.2d 789.

96. Iowa.—Faatz v. Sullivan, 200 N.W. 321, 199 Iowa 875.

42 C.J. p 1279 note 70.

97. Mass.—Puro v. Heikkinen, 55 N.E.2d 762, 316 Mass. 262.

Tenn.—Williamson v. Howell, 13 Tenn.App. 506.
42 C.J. p 1280 note 72.

98. Cal.—Idemoto v. Scheidecker, 226 P. 922, 193 Cal. 653.

99. Wash.—Anderson v. Kinnear, 141 P. 1151, 80 Wash. 638.

42 C.J. p 1285 note 82.

1. Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508.

Mo.—Uitz v. Pollard, App., 159 S.W.2d 687.

Negligence or nuisance

Where recovery was sought on ground of negligence, and plaintiffs did not allege any cause of action for nuisance arising out of operation of unregistered automobile, plaintiffs were not entitled to an instruction that they could recover independently of negligence.—Puro v. Heikkinen, 55 N.E.2d 762, 316 Mass. 262.

2. Ga.—Carpenter v. Grenade, 1 S.E.2d 589, 59 Ga.App. 540—Bales v. Wright, 200 S.E. 192, 59 Ga.App. 191.

Mo.—Young v. Dunlap, 190 S.W. 1041, 195 Mo.App. 119.

N.C.—Shipp v. United Stage Lines, 135 S.E. 339, 192 N.C. 475.

mitting matters not alleged in the petition,³ or not restricting the jury to the grounds of negligence alleged in the complaint or petition.⁴ Other instructions, however, have been held sufficient to present the contentions made in the pleadings,⁵ to be authorized or warranted by the pleadings,⁶ or not to be broader than the allegations of the pleadings.⁷ Where the answer contains a general denial of all the material allegations of the petition, it is prejudicial for the court to state in its charge that defendant has not specifically denied certain matters.⁸ Where two grounds of negligence are alleged, it is proper to give an instruction that a finding for defendant on one ground shall be con-

fined to that ground.⁹ It is proper to refuse to give a requested instruction which does not conform or is not confined to the matters alleged in the pleadings.¹⁰

Evidence. The court need not and should not give instructions which ignore material evidence or exclude it from consideration by the jury, or which are contrary or inapplicable to, or are not based on, the evidence in the case.¹¹ An instruction may be authorized by negative testimony¹² or inferences derivable from the evidence,¹³ and sometimes an instruction stating a certain rule may be not erroneous as given, in view of the absence of evidence showing the application of a qualification of

2. Iowa.—Phelan v. Foutz, 204 N. W. 240, 200 Iowa 237.

42 C.J. p 1281 note 99.

4. Tenn.—Roddy Mfg. Co. v. Dixon 105 S.W.2d 513, 21 Tenn.App. 81 42 C.J. p 1281 note 1.

5. Conn.—Buonanno v. Cameron, 41 A.2d 107, 131 Conn. 513.

Tenn.—Smith v. Fisher, 11 Tenn App. 273

42 C.J. p 1281 note 95.

6. Conn.—Grzys v. Connecticut Co., 198 A. 259, 123 Conn. 605

Ga.—A. G. Boone Co. v. Owens, 187 S.E. 899, 54 Ga.App. 379.

Ind.—Van Drake v. Thomas, 38 N.E. 2d 878, 110 Ind.App. 586.

Iowa.—Buchanan v. Hurd Creamery Co., 246 N.W. 41, 215 Iowa 415.

Mo.—Cable v. Johnson, App., 63 S. W.2d 433.

Pa.—Heffelfinger v. Schell, Com.Pl., 50 Dauph.Co. 1—Mellon v. Singer Sewing Mach. Co., Com.Pl., 22 Wash.Co. 75, affirmed 25 A.2d 807, 344 Pa. 390.

42 C.J. p 1281 note 96.

7. Mo.—Peck v. W. F. Williamson Advertising Service in St. Louis, App., 68 S.W.2d 847.

42 C.J. p 1281 note 97.

8. Ohio.—Reese v. Waltz, 14 Ohio App. 295, 32 O.C.A. 97

9. Iowa.—Dice v. Johnson, 199 N. W. 346, 198 Iowa 1093.

42 C.J. p 1282 note 3.

10. D.C.—Coleman v. Chudnow, Mun.App., 35 A.2d 925.

42 C.J. p 1282 notes 4, 5.

11. U.S.—Ivins v. Jacob, D.C.Pa., 245 F. 892, affirmed 250 F. 431, 162 C.C.A. 501.

42 C.J. p 1282 notes 6-8, p 1285 notes 80, 81.

Instructions held not warranted or required under evidence

Ala.—W. M. Templeton & Son v. David, 173 So. 231, 233 Ala. 616—International Harvester Co. v. Williams, 138 So. 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595.

Cal.—Riley v. Berkeley Motors, 36 P. 2d 398, 1 Cal App 2d 217—Poncino v. Reid-Murdoch & Co., 28 P.2d 932, 136 Cal.App. 223—Depauli v. Claus, 293 P. 881, 110 Cal.App. 145.

Colo.—Interstate Motor Lines v. Neal, 179 P.2d 665, 116 Colo. 242.

Iowa.—Lawson v. Fordyce, 21 N.W. 2d 69, 237 Iowa 28.

Ky.—Womack v. Ison, 95 S.W.2d 277, 264 Ky. 640—Big Sandy Bus Line Co. v. Williams, 56 S.W.2d 346, 246 Ky. 758—Mann v. Woodward, 290 S.W. 333, 217 Ky. 491.

Md.—Greenfield v. Hook, 8 A.2d 888, 177 Md. 116, 136 A.L.R. 1485.

Mass.—Rolf v. Walsh, 64 N.E.2d 16, 318 Mass. 733.

Mich.—Gallagher v. Walter, 299 N. W. 811, 299 Mich. 69—Spillman v. Welmaster, 265 N.W. 787, 275 Mich. 93.

Minn.—Novotny v. Bouley, 27 N.W. 2d 813, 223 Minn. 592—Jannette v. M. F. Patterson Dental Supply Co., 258 N.W. 31, 193 Minn. 153.

Miss.—Gulf Refining Co. v. Miller, 116 So. 295, 150 Miss. 68.

Mo.—Felts v. Spesia, App., 61 S.W.2d 402—Schmitt v. Shuplak, App., 42 S.W.2d 959.

Or.—Roemhild v. Home Ins. Co., 278 P. 87, 130 Or. 50.

Pa.—Clee v. Brinks, Inc., 5 A.2d 387, 135 Pa.Super. 345.

R.I.—Muscente v. R. S. Brine Transp. Co., 196 A. 259, 59 R.I. 482.

Tenn.—Chattanooga Ice Delivery Co. v. George F. Burnett Co., 147 S.W. 2d 750, 24 Tenn.App. 535.

Tex.—J. Lee Vilbig & Co. v. Lucas, Civ.App., 23 S.W.2d 516, error dismissed.

Utah.—Morrison v. Perry, 140 P.2d 772, 104 Utah 151.

Wash.—Leer v. Cohen, 116 P.2d 535, 10 Wash.2d 239—Hughes v. Wallace, 107 P.2d 910, 6 Wash.2d 396.

42 C.J. p 1282 note 8 [a].

Instructions held justified or required under evidence

Ala.—Castleberry v. Morgan, 178 So. 823, 28 Ala.App. 70.

Cal.—Yack v. Tiffin, 158 P.2d 620, 69 Cal.App.2d 226—Pinello v. Taylor, 17 P.2d 1039, 128 Cal App 518.

Ga.—A. G. Boone Co. v. Owens, 187 S.E. 899, 54 Ga.App. 379.

Ill.—Selman v. Midwest Haulers, 33 N.E.2d 140, 309 Ill App 154—Watson v. Trinz, 274 Ill App. 379.

Ind.—Cousins v. Glassburn, 24 N.E. 2d 1013, 216 Ind. 431.

Iowa.—Stillson v. Ellis, 225 N.W. 346, 208 Iowa 1157.

Ky.—Foley's Adm'r v. Witt, 172 S. W.2d 81, 294 Ky. 498—Mann v. Woodward, 290 S.W. 333, 217 Ky. 491.

Mass.—Puro v. Heikkinen, 55 N.E.2d 762, 316 Mass. 262—Bagley v. Kimball, 167 N.E. 661, 268 Mass. 440.

Mich.—Gauflin v. Valind, 256 N.W. 335, 268 Mich. 269.

Mo.—Powell v. Brosnahan, 115 S.W. 2d 140, 232 Mo.App. 1161, opinion quashed on other grounds State ex rel. Brosnahan v. Shan, 126 S.W. 2d 1193, 344 Mo. 404—Bramblett v. Harlow, App., 75 S.W.2d 626—Robertson v. Scoggins, App., 73 S.W.2d 430.

N.J.—Schadel v. Honig, 131 A. 624, 4 N.J.Misc. 56, affirmed 134 A. 919, 103 N.J.Law 203.

N.Y.—Sacks v. Philips, 40 N.Y.S.2d 125, 266 App Div. 675, motion denied 50 N.E.2d 252, 290 N.Y. 873, affirmed 50 N.E.2d 1017, 291 N.Y. 631—Sherman v. Millard, 259 N.Y.S. 415, 144 Misc. 748, reversed on other grounds Sherman v. Leicht, 264 N.Y.S. 492, 238 App.Div. 271.

Or.—Peters v. Johnson, 264 P. 459, 124 Or. 237.

Va.—Temple v. Moses, 8 S.E.2d 262, 175 Va. 320.

Wash.—Brewer v. Berner, 131 P.2d 940, 15 Wash.2d 644.

42 C.J. p 1282 note 8 [b].

12. Ill.—Noonan v. Maus, 197 Ill. App. 303.

13. Cal.—Dallas v. De Yoe, 200 P. 361, 53 Cal.App. 452.

42 C.J. p 1282 note 10.

the rule¹⁴ or the application of a different rule.¹⁵

The court is not under any duty to model its instructions solely on the evidence given on behalf of plaintiff.¹⁶ It is not error to give an instruction based on evidence admitted without objection,¹⁷ or to refuse to give a requested instruction based on excluded evidence.¹⁸ Where certain evidence introduced was admissible, if at all, only for the purpose of contradicting a witness, an instruction which gives the impression that the jury may consider it as substantive proof of negligence is erroneous.¹⁹

Matters pleaded but not proved. In some jurisdictions it is held that the trial court need not, and should not, instruct the jury as to matters which have been pleaded but in respect of which no evidence has been introduced,²⁰ and that, where the allegations of negligence are more comprehensive than the proof, the instructions on negligence should be restricted to the evidence.²¹ However, it has also been held not improper to instruct the jury on an issue presented by the pleadings, even though no evidence thereon has been offered by either party.²²

Matters proved but not pleaded. The giving of an instruction on a matter not pleaded is error where evidence relating thereto has been erroneously admitted over objection,²³ but not where evidence bearing thereon has been introduced without objection²⁴ and the case has been tried

on the theory that the matter was in issue.²⁵ Thus, a defense which appears in the evidence and has been urged on the trial may justify an instruction thereon, even though it was not specifically pleaded.²⁶

b. Issues, Theories, or Claims

The instructions should present and cover the issues in the case and the reasonable theories of the parties which find support in the evidence.

The instructions may and should present and cover the issues,²⁷ be based or predicated thereon,²⁸ and be adapted²⁹ and applicable or pertinent thereto;³⁰ they need not and should not ignore issues,³¹ submit to the jury a matter which is not in issue,³² or deal with a matter which is beyond or not confined to the issues.³³ The instructions should correctly state the law as to the matters to be proved.³⁴ An instruction which is in the language of a motor vehicle statute and which is correct as far as it purports to state the law is not erroneous because it omits a portion of the statute, where, in view of the issue on which the case was tried, the omitted portion would not be helpful for any purpose.³⁵

While it is not error to fail to charge on a theory not involved in the case³⁶ or to fail to give an instruction which is not in accord with any theory of the case,³⁷ the court may and should give instructions expounding the law on every reasonable and legitimate theory,³⁸ according to the judicial deci-

14. Mo.—Majors v. White, App., 247 S.W. 233—Long v. Nuth, 100 S.W. 511, 123 Mo.App. 204.

15. Md.—Clark v. United R., etc., Co., 111 A. 829, 137 Md. 159.

16. Cal.—Raymond v. Hill, 143 P. 743, 168 Cal. 473.

17. Wash.—Kane v. Nakamoto, 194 P. 381, 113 Wash. 476.

18. Mo.—Nufziger v. Mahan, App., 191 S.W. 1080.

19. Pa.—Buchanan v. Flinn, 51 Pa. Super. 145.
42 C.J. p 1282 note 16.

20. Wash.—Shipley v. Nelson, 207 P. 1046, 121 Wash. 39.
42 C.J. p 1285 note 66.

21. Mo.—James v. Mott, App., 215 S.W. 913.

Wash.—Van Dyke v. Johnson, 144 P. 540, 82 Wash. 377.

22. S.D.—Christenson v. Harnes, 161 N.W. 343, 38 S.D. 360.

23. Ala.—Chase Nursery Co. v. Bennett, 87 So. 610, 205 Ala. 202.

24. Wash.—Kolbe v. Public Market Delivery, etc., Co., 226 P. 1021, 130 Wash. 302.

42 C.J. p 1285 note 70.

25. Cal.—Wlezorek v. Ferris, 167 P. 234, 176 Cal. 353.

Mo.—D'Wolf v. Stix-Baer, etc., Dry Goods Co., App., 273 S.W. 172.

26. Ariz.—Webb v. Hardin, 89 P.2d 30, 53 Ariz. 310.

Contributory negligence

Ohio.—Misrach v. Epperson, 168 N.E. 230, 32 Ohio App. 451—Rogers v. French Bros.—Bauer Co., 166 N.E. 427, 31 Ohio App. 77.

27. N.Y.—Meltzer v. Hill, 253 N.Y. S. 343, 233 App. Div. 503.

42 C.J. p 1280 note 76.

28. Ala.—Roach v. Wright, 70 So. 271, 195 Ala. 333.

Mo.—Evans v. Klusmeyer, 256 S.W. 1036, 301 Mo. 352.

29. Conn.—Pietrycka v. Simolan, 120 A. 310, 98 Conn. 490.

30. Wash.—Simonson v. Huff, 215 P. 49, 124 Wash. 549.

42 C.J. p 1280 note 79.

Instruction held within issues

Okl.—Bowring v. Denco Bus Lines, 162 P.2d 525, 196 Okl. 1.

31. Ala.—Louis Plitz Dry Goods Co. v. Cusimano, 91 So. 779, 206 Ala. 689.

42 C.J. p 1280 note 80.

32. Wash.—Anlonetani v. Green, 238 P. 633, 135 Wash. 689.

42 C.J. p 1280 note 81.

33. Idaho.—Nelson v. Johnson, 243 P. 647, 41 Idaho 697.

42 C.J. p 1280 note 82.

34. Iowa.—Codner v. Stowe, 208 N.W. 330, 201 Iowa 800.

42 C.J. p 1276 note 5.

35. Cal.—Dewhirst v. Leopold, 229 P. 30, 194 Cal. 424.

36. Ga.—White v. Knapp, 120 S.E. 796, 31 Ga. App. 344.

42 C.J. p 1281 note 84.

37. Cal.—Dewhirst v. Leopold, 229 P. 30, 194 Cal. 424.

38. Cal.—Raymond v. Hill, 143 P. 743, 168 Cal. 473.

42 C.J. p 1281 note 86.

Instructions held not erroneous

D.C.—Danzansky v. Zimolist, 105 F.2d 457, 70 App. D.C. 234.

Tenn.—Kroger Grocery & Baking Co. v. Addington, 74 S.W.2d 650, 18 Tenn. App. 191.

Va.—Russell v. Kelly, 23 S.E.2d 124, 180 Va. 304.

Instructions held not prejudicial

Tenn.—Davis v. Farris, 1 Tenn. App. 144.

sions on the question, either of plaintiff³⁹ or of defendant⁴⁰ which finds support in the evidence. Also, while it is proper to refuse to give a requested instruction which is not applicable to any claim made in the case,⁴¹ the court should give an instruction on a claim made by plaintiff,⁴² and it should not give instructions which ignore a defense,⁴³ such as contributory negligence,⁴⁴ which is supported by the evidence.

c. Instructions as to Existence or Weight of Facts or Evidence

While the instructions may state the degree of proof required, they should not invade the province of the jury by charging as to the weight to be accorded to particular evidence.

The instructions should correctly state the law as to the degree of proof required,⁴⁵ but should not invade the province of the jury⁴⁶ by charging on the weight to be accorded to, or the sufficiency of, particular evidence.⁴⁷ Also, the instructions must not single out and emphasize or give undue prominence to some particular part or phase of the evidence,⁴⁸ and a requested instruction which does so is properly refused.⁴⁹ In an action against two defendants, an instruction requiring plaintiff to show by his own evidence that one defendant was guilty of negligence is erroneous⁵⁰ and peculiarly harmful to plaintiff where each defendant has introduced evidence tending to show negligence on the part of the other.⁵¹ While the instructions given by the court should not assume the existence or nonexistence of material controverted facts⁵² and it is proper to refuse to give a requested instruction containing such an assumption,⁵³ it is prop-

er for the court in its instructions to assume the existence of a fact shown by undisputed evidence,⁵⁴ and the assumption of an immaterial fact is not prejudicial.⁵⁵

A remark made by the court, in the course of its instructions to the jury, about automobiles generally has been held not to be objectionable as a comment on any fact in the case⁵⁶ or as an expression of opinion as to whether a fact is fully or sufficiently proved.⁵⁷ Also, a reference by the court, in one of its instructions, to the place where the accident happened as being in a thickly settled part of a city is not such a comment on the facts as to constitute error where the place of the accident does not appear to be material.⁵⁸ The failure of the court to give an instruction with reference to circumstantial evidence is not error where the case does not depend on circumstantial evidence alone.⁵⁹

Credibility of witnesses. An instruction that a witness false in one part of his testimony is to be distrusted in others, required by statute to be given on all proper occasions, should be given where plaintiff and some of his witnesses testified that defendant's automobile was running at the time of the accident, and defendant and some of his witnesses testified that the automobile was standing still and that plaintiff was not struck by it but fell in front of it.⁶⁰ Where the evidence clearly shows that the driver had not violated a statute in respect of stopping and rendering assistance after an accident, it is prejudicial error to instruct that his driving away from the place of the accident may be considered as bearing on his credibility as a witness.⁶¹

39. U.S.—Hower v. Roberts, C.C.A. Mo., 153 F.2d 726.

Okl.—Skaggs v. Gypsy Oil Co., 36 P. 2d 865, 169 Okl. 209.

42 C.J. p 1281 note 87.

40. Okl.—Skaggs v. Gypsy Oil Co., supra.

42 C.J. p 1281 note 88.

41. Cal.—Medlin v. Spazier, 137 P. 1078, 23 Cal.App. 242.

42. N.Y.—Jacobs v. Richard Carvel Co., Inc., 159 N.Y.S. 196, 95 Misc. 252.

Instruction held proper

Tenn.—Caldwell v. Hodges, 77 S.W. 2d 817, 18 Tenn.App. 355.

43. Miss.—McDonald v. Collins, 110 So. 663, 144 Miss. 820.

42 C.J. p 1281 note 92.

44. Conn.—Roth v. Chatlos, 116 A. 332, 97 Conn. 282, 22 A.L.R. 1554.

42 C.J. p 1281 note 93.

45. Ill.—Fickerle v. Herman Seekamp, Inc., 274 Ill.App. 310—Reed v. Zellers, 273 Ill.App. 18.

Pa.—Hess v. Mumma, 7 A.2d 72, 136 Pa.Super 58.

42 C.J. p 1276 note 6.

46. Ala.—Feore v. Trammel, 104 So. 808, 213 Ala. 293.

42 C.J. p 1285 note 72.

47. Or.—West v. Jaloff, 232 P. 642, 113 Or. 184, 36 A.L.R. 1391.

42 C.J. p 1285 note 73.

48. Mass.—Conant v. Constantin, 141 N.E. 587, 247 Mass. 76.

42 C.J. p 1285 note 74.

49. Ala.—Galloway v. Perkins, 73 So. 956, 198 Ala. 658.

Mass.—Neafsey v. Szemeta, 126 N.E. 368, 235 Mass. 160.

50. Mo.—Bradley v. Becker, 246 S.W. 561, 296 Mo. 548.

51. Mo.—Bradley v. Becker, supra.

52. Ill.—Monroe v. Wear, 276 Ill.App. 570—Streeter v. Humrichouse, 261 Ill.App. 556.

42 C.J. p 1285 note 76.

53. Mass.—Walner v. Sorentino, 192 N.E. 503, 288 Mass. 75—Dupuis v. Town of Billerica, 157 N.E. 339, 260 Mass. 210.

42 C.J. p 1285 note 77.

54. Wash.—Stanhope v. Strang, 250 P. 351, 140 Wash. 693.

42 C.J. p 1285 note 78.

55. Wash.—Brammer v. Percival, 233 P. 311, 133 Wash. 126.

56. Wash.—Domke v. Gunning, 114 P. 436, 62 Wash. 629.

57. N.C.—Davis v. Long, 126 S.E. 321, 189 N.C. 129.

58. Wash.—Sheffield v. Union Oil Co., 144 P. 529, 82 Wash. 386.

59. Iowa.—Pazen v. Des Moines Transp. Co., 272 N.W. 126, 223 Iowa 23.

60. Cal.—Medlin v. Spazier, 137 P. 1078, 23 Cal.App. 242.

61. Mich.—Simmons v. Petersen, 174 N.W. 536, 207 Mich. 508.

§ 557. — Presumptions and Burden of Proof

Instructions on presumptions and the burden of proof should be appropriate under the issues in the case and should correctly set forth the law.

The general rules as to the propriety of instructions under the issues presented, and the necessity

that instructions correctly set forth the law, have been applied to instructions on or involving presumptions or inferences,⁶² such as presumptions or inferences as to contributory negligence,⁶³ responsibility of the owner of a motor vehicle for an injury arising out of the operation thereof by another person,⁶⁴ or, likewise, presumptions or in-

62. U.S.—Peterson v. Sheridan, C.C. A.Iowa, 115 F.2d 121.

Ark.—Lambert v. Saunders, 170 S.W. 2d 375, 205 Ark. 717.

Cal.—Barry v. Maddalena, 146 P.2d 974, 63 Cal.App.2d 302—Kelley v. City and County of San Francisco, 137 P.2d 719, 58 Cal.App.2d 872—Miller v. Cranston, 106 P.2d 963, 41 Cal.App.2d 470—Kinnear v. Martinehl, 258 P. 686, 84 Cal.App. 721.

Tenn.—Herstein v. Kemker, 94 S.W. 2d 76, 19 Tenn.App. 681.

Wis.—Schulz v. General Casualty Co., 288 N.W. 803, 233 Wis. 118
42 C.J. p 1276 notes 2, 3.

Instructions held sufficient, proper, or erroneously refused

(1) Generally.

Cal.—Martin v. Nelson, 187 P.2d 78, 82 Cal.App.2d 733—Moore v. Miller, 125 P.2d 576, 51 Cal.App.2d 674—Church v. Payne, 97 P.2d 819, 36 Cal.App.2d 382—Baldridge v. Cunningham, 87 P.2d 369, 31 Cal.App.2d 128—Harlan v. Taylor, 33 P.2d 422, 139 Cal.App. 30—Kanananaka v. Badalamente, 6 P.2d 338, 119 Cal.App. 231—Tanaka v. Graneli, 290 P. 515, 107 Cal.App. 547.

Iowa.—McMahon v. Rauch, 298 N.W. 908, 230 Iowa 674 Sergeant v. Challis, 238 N.W. 442, 213 Iowa 57.

Mo.—Gardner v. Turk, 123 S.W.2d 158, 343 Mo. 899.

Wash.—Karp v. Herder, 44 P.2d 808, 181 Wash. 583.

42 C.J. p 1276 note 2 [a].

(2) Exercise of due care or prudence.

Cal.—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421—Dawson v. Boyd, 143 P.2d 373, 61 Cal.App.2d 471—Maaskant v. Matsui, 123 P.2d 853, 50 Cal.App.2d 819—Whicker v. Crescent Auto Co., 66 P.2d 749, 20 Cal.App.2d 240—Geisler v. Rugh, 66 P.2d 671, 19 Cal.App.2d 738—Hellman v. Bradley, 56 P.2d 607, 13 Cal.App.2d 159—White v. Barker Bros., 55 P.2d 248, 12 Cal.App.2d 164—Stealey v. Chessum, 11 P.2d 428, 123 Cal.App. 446—Ackerman v. Griggs, 293 P. 115, 109 Cal.App. 365—Ramsey v. Pasini, 291 P. 884, 108 Cal.App. 527.

Idaho.—Geist v. Moore, 70 P.2d 403, 58 Idaho 149.

Mass.—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448—Brown v. Henderson, 189 N.E. 41, 285 Mass. 193.

Instructions held erroneous or properly refused

(1) Generally.

U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 89 F.2d 557, certiorari denied Thompson v. Falstaff Brewing Corporation, 58 S.Ct. 28, 302 U.S. 709, 82 L.Ed. 547.
Cal.—La Fleur v. Hernandez, 191 P. 2d 95, 84 Cal.App.2d 569—De Priest v. City of Glendale, 169 P.2d 17, 74 Cal.App.2d 464—Corbin v. Bedel, 158 P.2d 221, 69 Cal.App.2d 60—Jones v. Bayley, 122 P.2d 293, 49 Cal.App.2d 647—Clary v. Lindley, 86 P.2d 920, 30 Cal.App.2d 571—Butcher v. Thornhill, 58 P.2d 179, 14 Cal.App.2d 149—Olden v. Babicota Development Co., 290 P. 1062, 107 Cal.App. 399.

Ill.—Alexander v. Sullivan, 78 N.E. 2d 333, 334 Ill.App. 42—Walsh v. Moore, 244 Ill.App. 458.

Mass.—Brown v. Henderson, 189 N.E. 41, 285 Mass. 192.

Mich.—Billingsley v. Gulick, 233 N.W. 225, 252 Mich. 235.

Minn.—Timmerman v. March, 271 N.W. 697, 199 Minn. 376.

Mo.—Harke v. Haase, 75 S.W.2d 1001, 335 Mo. 1104—Stitzell v. Arthur Morgan Trucking Co., App., 118 S.W.2d 49.

N.H.—Adams v. Severance, 41 A.2d 233, 93 N.H. 289.

Or.—McVay v. Byars, 138 P.2d 210, 171 Or. 449.

Pa.—Logan, to Use of Butz, v. City of Bethlehem, 187 A. 389, 324 Pa. 7.

Wash.—Sweazey v. Valley Transport, 107 P.2d 567, 6 Wash.2d 324, 140 A.L.R. 1, opinion adhered to 111 P.2d 1010, 6 Wash.2d 324, 140 A.L.R. 20.

(2) Conclusive presumptions.

Cal.—Krause v. Rarity, 293 P. 62, 210 Cal. 644, 77 A.L.R. 1327—Azarzo v. O'Connell, 9 P.2d 345, 121 Cal.App. 617—Hayes v. Emerson, 294 P. 765, 110 Cal.App. 470.

(3) Due care by pedestrian.

Ark.—Sylvester v. U-Drive-Em System, 90 S.W.2d 232, 192 Ark. 75.

Cal.—Varnor v. Skov, 67 P.2d 123, 20 Cal.App.2d 232—Morris v. Purity Sausage Co., 38 P.2d 193, 2 Cal.App.2d 536.

Ind.—Conner v. Jones, 59 N.E.2d 577, 115 Ind.App. 660, rehearing denied 60 N.E.2d 534, 115 Ind.App. 660.

Mass.—Brown v. Henderson, 189 N.E. 41, 285 Mass. 192.

Mich.—Billingsley v. Gulick, 233 N.W. 225, 252 Mich. 235.

N.D.—Hausken v. Coman, 268 N.W. 430, 66 N.D. 633.

(4) Driving on wrong side of road.
Cal.—Roberts v. Salmon, 151 P.2d 556, 66 Cal.App.2d 22.

Iowa.—Fry v. Smith, 253 N.W. 147, 217 Iowa 1235.

(5) Excessive speed.

Cal.—Harkey v. Lucke, 65 P.2d 77, 19 Cal.App.2d 130—Tyson v. Burton, 294 P. 750, 110 Cal.App. 428.

Ky.—Summerville v. Waller, 90 S.W.2d 65, 262 Ky. 343.

(6) Intoxication.—Myers v. Charleston Transit Co., 37 S.E.2d 281, 128 W.Va. 564.

Instruction held confusing or misleading

Mo.—Harke v. Haase, 75 S.W.2d 1001, 335 Mo. 1104.

Instructions held not prejudicial

Cal.—Tuderious v. Hertz Drivervelf Stations, 160 P.2d 554, 70 Cal.App.2d 192—Stroh v. Bauman, 99 P.2d 337, 37 Cal.App.2d 241.

Wash.—Erickson v. Barnes, 107 P.2d 348, 6 Wash.2d 251.

63. Iowa.—Flickinger v. Phillips, 267 N.W. 101, 221 Iowa 837.

Instruction held proper

N.J.—Long v. Yellow Cab Co. of Camden, 29 A.2d 887, 129 N.J.Law 560.

64. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 89 F.2d 557, certiorari denied Thompson v. Falstaff Brewing Corporation, 58 S.Ct. 28, 302 U.S. 709, 82 L.Ed. 547.

Tenn.—Auburn Nashville Co. v. Graham, 13 Tenn.App. 444.

Instructions held not erroneous

U.S.—Montgomery v. Hutchins, C.C. A.Cal., 118 F.2d 661.

Ala.—Jefferson County Burial Soc. v. Cotton, 133 So. 256, 222 Ala. 578.

Ark.—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 192 Ark. 380.

Idaho.—Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 367.

Instructions held erroneous or properly refused

Cal.—Goss v. Pacific Motor Co., 269 P. 455, 85 Cal.App. 455.

D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.

Mo.—Murphy v. Tumbrink, App., 25 S.W.2d 133.

ferences on the question of innocence of crime,⁶⁵ or the effect of a failure to introduce evidence at one's disposal;⁶⁶ and the general rules have also been

applied to instructions on or involving the burden of proof,⁶⁷ such as instructions on or involving the burden of proof as to contributory negligence,⁶⁸

65. Vt.—Clark v. Demars, 146 A. 812, 102 Vt. 147.

66. Instruction held proper

Ga.—Blanchard v. Ogletree, 152 S.E. 116, 41 Ga.App. 4.

67. Cal.—Cavalli v. Luckett, 104 P. 2d 708, 40 Cal.App.2d 250.

Ill.—Burns v. Storchak, 73 N.E.2d 168, 331 Ill.App. 347.

Md.—Bode v. Carroll-Independent Coal Co., 191 A. 685, 172 Md. 406.

Tex.—Owl Taxi Service v. Saludis, Civ.App., 122 S.W.2d 225, error dismissed—Gulf Refining Co. v. Youngblood, Civ.App., 23 S.W.2d 522.

Wash.—Fetterman v. Levitch, 109 P. 2d 1064, 7 Wash.2d 431.

42 C.J. p 1272 note 58, p 1273 note 74 [b] (1).

Instructions held sufficient or not erroneous

(1) Generally.

Cal.—Barone v. Jones, 176 P.2d 392, 77 Cal.App.2d 656, rehearing denied and opinion modified on other grounds 177 P.2d 30, 77 Cal.App.2d 656—Comstock v. Morse, 290 P. 108, 107 Cal.App. 71.

Conn.—Wolfe v. Ives, 76 A. 526, 83 Conn. 174, 19 Ann.Cas. 752.

D.C.—Paxson v. Davis, 65 F.2d 492, 62 App.D.C. 146, certiorari denied 54 S.Ct. 61, two cases, 290 U.S. 643, 78 L.Ed. 558—Brophy v. Weschler, D.C., 36 F.Supp. 635.

Ga.—Kelly v. Locke, 194 S.E. 595, 57 Ga.App. 78, reversed on other grounds 198 S.E. 754, 186 Ga. 620, mandate conformed to 199 S.E. 544, 58 Ga.App. 558.

Ind.—Hoepfner v. Saltzgaber, 200 N. E. 458, 102 Ind.App. 458.

Iowa.—Swan v. Dailey-Luce Auto Co., 293 N.W. 468, 228 Iowa 880—Jakeway v. Allen, 290 N.W. 507, 227 Iowa 1182—Usher v. Stafford, 288 N.W. 432, 227 Iowa 443—Schalk v. Smith, 277 N.W. 303, 224 Iowa 904.

Me.—Keller v. Banks, 156 A. 817, 130 Me. 397.

Mo.—Crawford v. Byers Transp. Co., 201 S.W.2d 971—Buck v. Thatcher, 7 S.W.2d 398, 222 Mo.App. 1036.

N.D.—Jondahl v. Campbell, 238 N.W. 697, 61 N.D. 555.

Ohio.—Martin v. Hooftstetter, App., 42 N.E.2d 556.

Or.—Foster v. Farra, 243 P. 778, 117 Or. 286.

Wash.—Devereaux v. Blanchard, 26 P.2d 82, 174 Wash. 673.

(2) Operation of vehicle on wrong side of road.—Olson v. Rose, 151 P. 2d 454, 21 Wash.2d 464—Thomas v. Adams, 24 P.2d 432, 174 Wash. 118.

(3) Lights on vehicle.—Gerlot v. Swartz, 7 N.E.2d 960, 212 Ind. 292.

Instructions held erroneous or properly refused

Ark.—Burnett v. Seventh St. Produce Co., 47 S.W.2d 38, 185 Ark. 367.

Cal.—Jackson v. Miller, 20 P.2d 113, 130 Cal.App. 427.

Fla.—Alachua Lake Corporation v. Jacobs, 9 So.2d 631, 151 Fla. 309.

Ga.—Reese v. Haggard, 44 S.E.2d 290, 75 Ga.App. 654—Wells v. Steinek, 176 S.E. 42, 49 Ga.App. 482.

Ill.—Burns v. Storchak, 73 N.E.2d 168, 331 Ill.App. 347.

Iowa.—Rich v. Herny, 269 N.W.2d 489, 222 Iowa 465.

Md.—State for Use of Shipley v. Lupton, 161 A. 393, 163 Md. 180.

Mich.—Heiman v. Kolle, 27 N.W.2d 92, 317 Mich. 548.

Minn.—Anderson v. Ambroise, 219 N. W. 769, 174 Minn. 481.

Mo.—Bellovich v. Griese, 100 S.W.2d 261—Nelson v. Evans, 93 S.W.2d 691, 338 Mo. 991—Koebel v. Tie-

man Coal & Material Co., 85 S.W. 2d 519, 337 Mo. 561—Tabler v. Perry, 85 S.W.2d 471, 337 Mo. 154—

Werminghaus v. Eberle, 81 S.W.2d 607—McAboy v. Hulett, App., 112 S.W.2d 86.

N.Y.—Meloche v. Johnson, 68 N.Y.S. 2d 367, 271 App.Div. 1037.

Ohio.—Foust v. Derenberger, 173 N. E. 740, 37 Ohio App. 3.

Okl.—Banta v. Hestand, 75 P.2d 415, 181 Okl. 551.

Or.—Gwin v. Crawford, 100 P.2d 1012, 164 Or. 215.

Wash.—Cramer v. Bock, 149 P.2d 525, 21 Wash.2d 13—Perren v. Press, 81 P.2d 867, 196 Wash. 14.

Instructions held confusing or misleading

Mo.—Harke v. Haase, 75 S.W.2d 1001, 335 Mo. 1104.

42 C.J. p 1278 note 49 [b] (2).

Instructions held not confusing or misleading

Ga.—Kinney v. Turnipseed, 164 S.E. 225, 45 Ga.App. 269.

42 C.J. p 1278 note 49 [c] (2).

68. Iowa.—Schelldorf v. Cherry, 264 N.W. 54, 220 Iowa 1101.

Neb.—Carlson v. Roberts, 274 N.W. 473, 133 Neb. 166.

N.J.—Hartwyk v. Shea, 176 A. 390, 114 N.J.Law 235.

Utah.—Morgan v. Bingham Stage Lines Co., 283 P. 160, 75 Utah 87.

Instructions held correct, sufficient, or not erroneous

Ark.—Albritton v. C. M. Ferguson & Son, 122 S.W.2d 620, 197 Ark. 436.

—Self v. Kirkpatrick, 110 S.W.2d

13, 194 Ark. 1014—Murphy v. Clayton, 15 S.W.2d 391, 179 Ark. 225.

Cal.—Petersen v. Devine, 156 P.2d 936, 68 Cal.App.2d 387—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal.App.2d 477—Richmond v. Moore, 284 P. 681, 103 Cal.App. 173.

Conn.—Smirnoff v. McNerney, 152 A. 399, 112 Conn. 421.

Fla.—Heitman v. Davis, 172 So. 705, 127 Fla. 1.

Ind.—Bodner v. La Fleur, 161 N.E. 696, 87 Ind.App. 291.

Iowa.—Westman v. Bingham, 300 N. W. 525, 230 Iowa 1298.

Md.—Thursby v. O'Rourke, 23 A.2d 656, 180 Md. 223.

Mo.—Cornwell v. Highway Motor Freight Line, 152 S.W.2d 10, 348 Mo. 19—Mendenhall v. Neyer, 149 S.W.2d 366, 347 Mo. 881—Carle v. Akin, 87 S.W.2d 406—Johnessee v. Central States Oil Co., App., 200 S.W.2d 383—Eisenbarth v. Powell Bros. Truck Lines, 125 S.W.2d 899, 235 Mo.App. 442, certiorari quashed State ex rel. Powell Bros. Truck Lines v. Hostetter, 137 S.W.2d 461, 345 Mo. 915.

Mont.—Marinkovich v. Tierney, 17 P. 2d 93, 93 Mont. 72.

Okl.—Morris v. White, 60 P.2d 1031, 177 Okl. 489.

S.D.—Pemberton v. Fritts, 238 N.W. 409, 56 S.D. 374.

42 C.J. p 1276 note 4 [b].

Instructions held erroneous

Ark.—England v. White, 155 S.W.2d 576, 202 Ark. 1155.

Conn.—Voronelis v. White Line Bus Corporation, 192 A. 265, 123 Conn. 25—Grant v. MacLelland, 147 A. 138, 109 Conn. 517.

Md.—Wintrobe v. Hart, 13 A.2d 365, 178 Md. 289.

Mich.—Socony Vacuum Oil Co. v. Marvin, 21 N.W.2d 841, 313 Mich. 528.

Mo.—Szuch v. Ni Sun Lines, 58 S.W. 2d 471, 332 Mo. 469—Kenney v. Hoerr, 23 S.W.2d 96, 324 Mo. 368.

Neb.—Robison v. Union Transfer Co., 4 N.W.2d 558, 141 Neb. 574.

N.C.—Stewart v. Yellow Cab Co., 42 S.E.2d 405, 227 N.C. 368—Ogle v. Gibson, 198 S.E. 598, 214 N.C. 127.

Ohio.—Woodward v. Gray, 188 N.E. 304, 46 Ohio App. 177.

Utah.—Martin v. Sheffield, 189 P.2d 127.

Va.—Marks v. Ore, 45 S.E.2d 894, 187 Va. 146.

42 C.J. p 1276 note 4 [a].

Instruction held misleading

Ohio.—Sharp v. Russell, 174 N.E. 617, 87 Ohio App. 306.

acts in emergencies,⁶⁹ sole or proximate cause,⁷⁰ new and independent cause,⁷¹ liability of one person, such as the owner of the motor vehicle, for injuries arising out of the operation thereof by another person,⁷² or shifting of the burden.⁷³

An instruction that there is a presumption that every person exercises ordinary care for his own safety and that he obeys the law may be proper under the circumstances of some cases, as where a participant in an accident is dead or, for any other reason, is unable to give an account of what occurred, and his side of the case is not fully covered by the testimony of witnesses called on his behalf;⁷⁴ but such an instruction should not be given in a case where all the parties are alive and the facts are placed before the jury by the testimony of the parties and the witnesses.⁷⁵ An instruction in favor of a party that there is a pre-

sumption that every man obeys the law is properly refused where it appears that such party was guilty of negligence as a matter of law.⁷⁶ An instruction which requires plaintiff to prove at least one of the material allegations of the complaint, but which does not inform the jury what constitutes the material allegations thereof, has been held improper.⁷⁷

Res ipsa loquitur. The general rules as to the applicability of an instruction under the facts of the case, and the necessity that it set forth the law correctly, have been applied to instructions involving the doctrine of *res ipsa loquitur*.⁷⁸

§ 558. Verdict and Findings

- a. In general
- b. Construction, operation, and effect
- c. Consistency

69. Instructions held erroneous

Cal.—Stealey v. Chessum, 11 P.2d 428, 123 Cal App 446

Iowa—Bletzer v. Wilson, 276 NW 836, 224 Iowa 884—McKeev v. Batcheler, 257 N.W. 567, 219 Iowa 93

70. Instructions held erroneous

Cal.—Harrison v. Harter, 18 P.2d 436, 129 Cal App. 22

Okl.—Winn v. Corey, 65 P.2d 522, 179 Okl. 305

Instructions held not erroneous

Ind.—Bain v. Mattniller, 13 N.E.2d 712, 213 Ind 549

Neb.—Spaulding v. Howard, 27 N.W. 2d 832, 148 Neb 496.

71. Instruction held proper

Tex.—North East Texas Motor Lines v. Hodges, Civ.App., 141 S.W.2d 386, affirmed 158 S.W.2d 487, 138 Tex. 280.

72. Instructions held proper or authorized

Ga.—Atlanta Laundries v. Goldberg, 30 S.E.2d 349, 71 Ga.App. 130.

Ind.—Van Drake v. Thomas, 38 N.E.2d 878, 110 Ind.App. 586

N.Y.—Barber v. Jewel Tea Co., 300 N.Y.S. 302, 252 App.Div. 362, affirmed 16 N.E.2d 94, 278 N.Y. 540.

Instructions held erroneous

Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 101 Colo 34.

Iowa.—Allbaugh v. Ashby, 284 N.W. 816, 228 Iowa 574.

73. Instructions held erroneous or properly refused

Mich.—Weaver v. Motor Transit Management Company (Greyhound Lines), 233 N.W. 178, 252 Mich. 64.

Minn.—Lestic v. Kuehner, 283 N.W. 122, 204 Minn. 125.

Or.—Haltom v. Fellows, 73 P.2d 680, 157 Or. 514.

Wash.—Hemsworth v. Shoemaker, 261 P. 84, 145 Wash. 520.

Instruction held not erroneous

N.C.—Grier v. Woodside, 158 S.E. 491, 200 N.C. 759.

74. Cal.—Roselle v. Beach, 125 P.2d 77, 51 Cal App.2d 579—Jones v. Heinrich, 122 P.2d 304, 49 Cal. App 2d 702.

Instructions held sufficient, proper, or erroneously refused

(1) Use of ordinary care for one's own safety—Kelley v. City and County of San Francisco, 137 P.2d 719, 58 Cal.App.2d 872—Maaskant v. Matsui, 123 P.2d 853, 50 Cal App.2d 819—Wheeler v. Brown, 117 P.2d 707, 47 Cal.App.2d 239—Schulman v. Los Angeles Ry. Corporation, 111 P.2d 924, 44 Cal App.2d 122—Broun v. Blair, 80 P.2d 95, 26 Cal.App.2d 613—Killough v. Lee, 40 P.2d 897, 4 Cal. App 2d 309.

(2) Obedience to the law.—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421—Borges v. Pacific Greyhound Lines, 51 P.2d 1146, 10 Cal.App.2d 450.

75. Cal.—Stevenson v. Fleming, 117 P.2d 717, 47 Cal.App.2d 225—Warwick v. Maneely, 104 P.2d 831, 40 Cal.App.2d 235, followed in 104 P.2d 838, two cases, 40 Cal.App.2d 812 and 104 P.2d 838, 40 Cal.App.2d 813—Kelly v. Fretz, 65 P.2d 914, 19 Cal.App.2d 356—Lewin v. Margolis, 59 P.2d 153, 14 Cal.App.2d 746.

Limiting scope of presumption

Requested instruction that at the outset each party was entitled to the presumptions that every person takes ordinary care of his own concerns and obeys the law should not have extended the presumption to defendant motorist, who testified as to his actions, although the giving of such an instruction is not necessarily prejudicial error.—Jones v. Heinrich, 122 P.2d 304, 49 Cal.App.2d 702.

76. Cal.—Traylen v. Citraro, 297 P. 649, 112 Cal App. 172, followed in 297 P. 652, 112 Cal App. 763.

77. Ind.—Neal v. Stafford, 18 N.E. 2d 960, 106 Ind App 189.

78. Instructions held sufficient, proper, or justified

Ariz.—Tenney v. Enkeball, 158 P.2d 519, 62 Ariz 416.

Cal.—Weddle v. Loges, 125 P.2d 914, 52 Cal App.2d 115—Ellis v. Jewett, 64 P.2d 432, 18 Cal App 2d 629—Creamer v. Cerrato, 36 P.2d 1094, 1 Cal App.2d 441.

Idaho.—Curtis v. Ficken, 16 P.2d 977, 52 Idaho 426.

Iowa.—Mein v. Reed, 278 N.W. 307, 224 Iowa 1274.

Ky.—Schechter v. Hann, 205 S.W.2d 690, 305 Ky. 794.

Vt.—Healy v. Moore, 187 A. 679, 108 Vt. 324, followed in 187 A. 692, 108 Vt. 351.

Wash.—D'Amico v. Conguista, 167 P. 2d 157, 24 Wash.2d 674.

Instructions held erroneous, unnecessary, or properly refused

Ark.—Saunders v. Lambert, 188 S.W. 2d 633, 208 Ark. 990.

Cal.—Blanton v. Curry, App., 121 P. 2d 125, affirmed and supplemented 129 P.2d 1, 20 Cal.2d 793—Harlan v. Taylor, 33 P.2d 422, 139 Cal.App. 30.

Conn.—Staplines v. Murphy, 183 A. 398, 121 Conn. 123.

Iowa.—Harvey v. Borg, 257 N.W. 190, 218 Iowa 1228.

Minn.—Heffter v. Northern States Power Co., 217 N.W. 102, 173 Minn. 215.

Mo.—Tabler v. Perry, 85 S.W.2d 471, 337 Mo. 154.

Instructions held erroneous under pleadings

Cal.—Porter v. Rasmussen, 15 P.2d 888, 127 Cal.App. 405.

a. In General

The general rules governing the form and sufficiency of verdicts or findings in civil actions, and their responsiveness to the pleadings, issues, and evidence, apply in actions for injuries arising out of the operation of motor vehicles.

General rules control as to the form and sufficiency of the verdict⁷⁹ or findings by the jury or trial court⁸⁰ in actions for injuries occasioned by the operation of motor vehicles. The verdict or findings should be definite and certain;⁸¹ and they should be responsive to, and supported by, the pleadings,⁸² issues,⁸³ and evidence.⁸⁴ A verdict is not necessarily void simply because the jury has returned a special verdict separating the expenses from the other items of damages.⁸⁵

The usual rules prevail as to the propriety and necessity of the submission of special issues⁸⁶ and as to the necessity of findings on special issues submitted.⁸⁷ In an action by a guest against his host, if the host's conduct with respect to control of the vehicle was negligent, a finding which would determine whether such negligence was the result of a lack of skill or judgment on the one hand, or of inadvertence on the other, may be essential.⁸⁸

Requests for rulings or special findings. The general rules as to special findings prevail with respect to the accuracy,⁸⁹ form,⁹⁰ and conformity to issues⁹¹ of requests for such findings. It may be proper for the trial court, under the circumstances of the case, to refuse particular requests for find-

79. Cal.—Crain v. Sumida, 211 P. 479, 59 Cal.App. 590.
42 C.J. p 1286 note 86.

Verdict held not contrary to charge
Ala.—Clark v. Farmer, 159 So. 47, 229 Ala. 596.

80. Conn.—Jones v. Madison, 137 A. 753, 106 Conn. 264.

Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, Com App., 7 S.W.2d 521—Hankins v. Harlan, Civ App., 114 S.W.2d 588, error dismissed—Munves v. Buckley, Civ App., 70 S.W.2d 605, error dismissed.

Wis.—Forbes v. Forbes, 277 N.W. 112, 226 Wis. 477.
42 C.J. p 1286 notes 87, 88.

81. Or.—Klein v. Miller, 77 P.2d 1103, 159 Or. 27, 116 A.L.R. 820.
42 C.J. p 1286 note 89.

Verdict for plaintiff for "no" damages

A verdict which states that it is in favor of plaintiff, but for "no" damages, is uncertain; it is not in favor of defendant, and its assessment of "no" damages nullifies its effect as a verdict in favor of plaintiff; and such a verdict is not rendered valid by the fact that contributory negligence was one of the defenses in the case.—Klein v. Miller, *supra*.

Ground of negligence

Finding that collision was due to reckless and negligent driving was held sufficient, as against objection that it was too general in not specifically stating that negligence consisted of excessive speed.—Shurtleff v. Wynns, 300 P. 890, 114 Cal.App. 653, followed in 300 P. 892, 114 Cal.App. 768.

82. Iowa.—Wells v. Wildin, 277 N.W. 308, 224 Iowa 913, 115 A.L.R. 169.

Pa.—Henry v. Beck, 56 York Leg.Rec. 209, affirmed 36 A.2d 734, 154 Pa. Super. 585.

Findings held not erroneous under pleadings

Colo.—Henry v. Strobel, 31 P.2d 319, 94 Colo. 492.

Fla.—Smith v. Hickson, 157 So. 416, 117 Fla. 122.

Kan.—Burnett v. Kansas City Public Service Co., 72 P.2d 72, 146 Kan. 474—Hamilton v. Lanoue, 87 P.2d 574, 145 Kan. 768—Coffman v. Shearer, 34 P.2d 97, 140 Kan. 176.
Mo.—Thorn v. Cross, App., 201 S.W.2d 492.

83. Wis.—Mauermann v. Dixon, 258 N.W. 352, 217 Wis. 29—Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 214 Wis. 519, 92 A.L.R. 680.
42 C.J. p 1286 note 90.

Findings held immaterial

Cal.—Rapolla v. Goulart, 287 P. 562, 105 Cal.App. 417.

Tex.—White v. Munson, Civ.App., 162 S.W.2d 429—Ben E. Keith Co. v. Minor, Civ.App., 103 S.W.2d 241—Duncan Coffee Co. v. Haddock, Civ. App., 51 S.W.2d 437.

Wis.—Hohensee v. Acheson, 251 N.W. 234, 213 Wis. 316.

84. Ky.—Drury v. Franke, 57 S.W.2d 969, 247 Ky. 758, 88 A.L.R. 917.

Tex.—Gillette Motor Transport Co. v. Whitfield, Civ.App., 160 S.W.2d 290.

Va.—Lough v. Price, 172 S.E. 269, 161 Va. 811.

42 C.J. p 1020 note 66 [a], p 1286 note 91.

Variance as to servant involved

The fact that one servant is named as the driver of defendant's vehicle and the evidence shows another has been held not sufficient to defeat a verdict against the owner or employer.—A. C. Motor Freight Lines v. Shingledecker, C.C.A.Ind., 70 F.2d 827.

Held not supported by evidence

Mass.—Friedman v. Berthiaume, 21 N.E.2d 261, 303 Mass. 159.

N.J.—Rich v. Inter-City Transp. Co., 165 A. 296, 11 N.J.Misc. 243.

Pa.—Henry v. Beck, 56 York Leg.Rec. 209, affirmed 36 A.2d 734, 154 Pa. Super. 585.

Tex.—Papin v. Japhet, Civ.App., 74 S.W.2d 737, error dismissed.

Held supported by evidence

Ark.—Green v. West Memphis Lumber Co., 91 S.W.2d 261, 192 Ark. 1177.

Cal.—Jennings v. Day, 46 P.2d 193, 7 Cal.App.2d 555—Williamson v. Fitzgerald, 2 P.2d 201, 116 Cal.App. 19.

Fla.—Smith v. Hickson, 157 So. 416, 117 Fla. 122.

Ind.—Superior Meat Products v. Holloway, 48 N.E.2d 83, 113 Ind.App. 320.

Tex.—Holland v. De Leon, Civ App., 118 S.W.2d 489, error refused.

42 C.J. p 907 note 89 [c].

85. Tenn.—Talley v. Dalton, 10 Tenn.App. 597.

86. Tex.—West Texas Coaches v. Madi, Civ.App., 26 S.W.2d 199.

42 C.J. p 1286 note 99.

87. R.I.—Pimpare v. McNamara, 193 A. 513, 58 R.I. 515.

42 C.J. p 1286 note 1.

Status as licensee

A specific finding as to whether a decedent was a licensee at the time of the accident was held not essential under the particular circumstances.—Gay v. Cadwallader-Gibson Co., 93 P.2d 1051, 34 Cal.App.2d 566.

88. Wis.—Young v. Nunn, Bush & Weldon Shoe Co., 249 N.W. 278, 212 Wis. 403.

89. Tex.—Alamo Iron Works v. Prado, Civ.App., 220 S.W. 282.

90. Ind.—Cole Motor Car Co. v. Ludorff, 111 N.E. 447, 61 Ind.App. 119.
42 C.J. p 1286 note 97.

91. R.I.—Muscente v. R. S. Brine Transp. Co., 196 A. 259, 59 R.I. 482.
Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, Civ.App., 280 S.W. 882.

ings or rulings.⁹³ Thus the refusal of a requested ruling has been held not error where the application of such ruling to the facts of the case is not clear.⁹³ The failure to submit to the jury a question so framed as to elicit a finding on the crucial issue of whether a host breached any duty he owed to his guest has been held error even though no request was made to submit to the jury a question to produce a finding on the host-guest relationship.⁹⁴

b. Construction, Operation, and Effect

The construction, operation, and effect of verdicts or findings in actions for injuries arising out of the operation of motor vehicles are governed by the usual rules applicable in civil actions.

The general rules as to the construction, opera-

tion, and effect of verdicts or findings have been applied in actions for injuries arising out of the operation of motor vehicles.⁹⁵ The verdict or findings may be construed in connection with the instructions to the jury,⁹⁶ and should be construed broadly in support of the judgment.⁹⁷ A general verdict or finding for plaintiff ordinarily imports that he exercised due care under the circumstances,⁹⁸ that defendant or one for whose actions he is responsible was negligent,⁹⁹ and that such negligence caused the accident.¹ A finding of gross negligence² or willful and wanton misconduct³ on the part of defendant may establish, or be equivalent to a finding of, negligence on his part. A verdict of no cause of action for defendant on his counterclaim means that defendant was guilty of contributory negligence, where under the testi-

92. Mass.—Kohutynski v Kohutynski, 5 N.E.2d 345, 296 Mass. 74.

Proximate cause

The refusal of the trial court to rule that, if the state of the proof renders it impossible to determine which of two independent acts was the proximate cause of the injuries, then plaintiff has failed to sustain the burden of proof, was held not error where it was evident from other rulings that the court did not find that the acts involved were independent of each other as causes—Morrison v Medaglia, 191 N.E. 133, 287 Mass. 46.

93. Mass.—Morrison v. Medaglia, *supra*.

94. U.S.—Maruska v. Maruska, C.C. A.Wis., 155 F.2d 302.

95. Cal.—Shurtliff v Wynns, 300 P. 890, 114 Cal App. 653, followed in 300 P. 892, 114 Cal App 768—City of Sacramento v. Illunger, 249 P. 223, 79 Cal App 234.

Conn.—D'Amato v. English, 188 A. 663, 122 Conn. 259.

Del.—Lynch v. Lynch, 195 A. 799, 9 W.W.Harr. 1.

Ind.—Brown v. Greenwood, 60 N.E. 2d 152, 116 Ind.App. 112.

Kan.—Lapo v. Naillieux, 29 P.2d 1093, 139 Kan. 23—Stout v. Galle-more, 26 P.2d 573, 138 Kan. 385.

La.—Manley v. Hammons, App., 20 So.2d 817—Penton v. Sears, Roebuck & Co., App., 4 So.2d 547.

Mass.—Fine v. Kahn, 170 N.E. 462, 270 Mass. 557.

N.J.—Kluber v. Pferdecoert, 188 A. 735, 15 N.J.Misc. 17, reversed on other grounds 194 A. 154, 15 N.J.Misc. 651, affirmed 199 A. 26, 120 N.J.L. 190.

Tex.—Cook v. Mann, Com.App., 40 S.W.2d 72—White's Auto Stores v. Boaz, Civ.App., 166 S.W.2d 942, reversed on other grounds Boaz v.

White's Auto Service, 172 S.W.2d 481, 141 Tex. 366—Childers v Eureka Laundry & Dye Works, Civ App., 33 S.W.2d 784, error refused—De Leon v. Longoria, Civ App., 4 S.W.2d 222, error dismissed.

Wis.—Burant v. Studzinski, 291 N.W. 390, 234 Wis 385—Wedel v. Klein, 282 N.W. 606, 229 Wis. 419 42 C.J. p 1286 notes 93, 2.

Verdict as based on respondent superior

Where the jury could have imposed liability on the owner of the vehicle either under the doctrine of respondent superior or under a statute limiting liability to a specified amount, and the verdict is for a larger sum than the statutory amount, the jury will be held to have returned its verdict under the doctrine of respondent superior—Daniel v. Jones, 35 P.2d 193, 140 Cal App. 145.

Driver as servant of owner or hirer

Where the owner of a motor vehicle is sued jointly with the hirer thereof for personal injuries resulting from the negligence of the driver, a verdict finding that the driver was the servant of the hirer, and also finding in favor of the owner, was held to mean that the driver was not the servant of the owner.—Gorman v. A. R. Jackson Kansas City Showcase Works Co., Mo.App., 19 S.W.2d 559.

Truth of allegations of answer

A finding that all the allegations of a particular paragraph in defendant's answer were not true was held not equivalent to a finding that some of the allegations were true, where the paragraph stated a single affirmative defense of contributory negligence.—Hicks v. Reis, 134 P.2d 788, 21 Cal.2d 654.

Findings held mere conclusions

Kan.—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320.

Utah—Piper v. Eakle, 2 P.2d 909, 78 Utah 342.

96. N.J.—Palocz v. E. & S Transp. Co., 133 A. 80, 4 N.J.Misc. 416. Tex.—Southland-Greyhound Lines v. Richardson, Com.App., 86 S.W.2d 731.

Status as passenger

Where there was testimony from which jury might infer that deceased was in automobile by invitation, or as a passenger, and trial court submitted question with instruction that if he was, the driver's contributory negligence would not affect administrator's recovery, and where jury found for plaintiff, there was a legal inference that they must have found that deceased was a passenger.—Tronto v. Reo Motor Co., 106 A. 383, 92 N.J.Law 595.

97. Cal.—Heslop v. Kinvoun, 136 P. 2d 621, 58 Cal.App.2d 287.

98. Cal.—Von Arx v. City of Burlingame, 60 P.2d 305, 16 Cal App.2d 29.

Mass.—Harlow v. Corcoran, 195 N.E. 108, 290 Mass. 289.

99. Ind.—Gatewood v. Lynch, 23 N.E.2d 289, 107 Ind.App. 168.

1. Mass.—Royal Steam Heater Co. v. Hilehey, 154 N.E. 335, 257 Mass 512.

New and independent cause

Where acts of a third person were claimed by defendant to have constituted a new and independent cause, a verdict for plaintiff was equivalent to a finding against defendant on such defense.—Baker v. Corse, Tex.Civ.App., 120 S.W.2d 817, error dismissed.

2. Mass.—Semons v. Towne, 188 N.E. 605, 285 Mass. 96.

3. Ill.—Heneghan v. Goldberg, 16 N.E.2d 139, 296 Ill.App. 253.

mony in the case it could not mean that the jury considered neither party to have been negligent.⁴

A verdict or finding that defendant was not negligent renders immaterial the issue of contributory negligence⁵ and the legal status of injured occupants of a vehicle involved in the accident;⁶ and it precludes a recovery by an injured child's parent for expenses incurred in treating the injuries. Further, where the jury has found defendant guilty of negligence, but has also found plaintiff guilty of contributory negligence, plaintiff cannot recover, since the finding of contributory negligence renders immaterial all findings of primary negligence on the part of defendant.⁷ A statement in the findings of fact of the trial court that the court is unable to find that plaintiff's negligence was a contributing cause of the collision is in effect a statement that he is in doubt on the issue, and such a

negative finding is not a finding that plaintiff was free from fault.⁸

In accordance with the general rules governing the construction, operation, and effect of verdicts or findings, particular verdicts or findings have been construed or held to authorize or support a recovery by plaintiff, or not to authorize judgment against him, or not to require a judgment for defendant;⁹ to justify or require a judgment for defendant, or not to authorize a recovery by plaintiff;¹⁰ to justify judgment against cross claimants;¹¹ to establish the existence of, or not to establish the freedom from, negligence of a defendant or a driver for whose actions defendant was liable;¹² to establish freedom from, or not to establish the existence of, causal negligence of a particular defendant or a person for whose actions defendant was responsible;¹³ to establish that de-

4. NJ—Stone v. Dewarns, 147 A. 455, 7 N.J.Misc. 871.
5. Cal.—Dawson v. Boyd, 143 P.2d 373, 61 Cal.App.2d 471.
- Tex.—Dixie Service Co. v. Leaverton, Civ.App., 76 S.W.2d 530.
- Wash.—Edwards v. Washkuhn, 119 P.2d 905, 11 Wash.2d 425.
6. Wash.—Edwards v. Washkuhn, supra.
7. Tex.—Robertson v. Buck X-Ograph Co., Civ.App., 114 S.W.2d 308.
8. Vt.—Wright v. Godin, 182 A. 189, 108 Vt. 23.
9. Cal.—Backus v. Sessions, 110 P.2d 51, 17 Cal.2d 380.
- Ind.—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind. App. 610.
- Kan.—Long v. Shafer, 174 P.2d 88, 162 Kan. 21—Lord v. Hercules Powder Co., 167 P.2d 299, 161 Kan. 268—Harshaw v. Kansas City Public Service Co., 119 P.2d 459, 154 Kan. 481—Atkinson v. Cardinal Stage Lines Co., 66 P.2d 553, 145 Kan. 639—Gardner v. Leighton, 58 P.2d 1111, 144 Kan. 335—Shrout v. Bird, 9 P.2d 673, 135 Kan. 218—Webb v. Lipperd, 8 P.2d 381, 134 Kan. 764.
- Nev.—Burlington Transp. Co. v. Wilson, 114 P.2d 1094, 61 Nev. 22.
- Pa.—Pranskevich v. Hippensteel, 36 Luz.Leg.Reg. 344.
- Tex.—Montgomery v. Houston Electric Co., 144 S.W.2d 261, 135 Tex. 538—Bowen Motor Coaches v. Young, Civ.App., 138 S.W.2d 145—McClelland v. Mounser, Civ.App., 107 S.W.2d 901, error dismissed by agreement—Williams v. Long, Civ. App., 106 S.W.2d 378, error dismissed—Papin v. Japhet, Civ.App., 74 S.W.2d 737, error dismissed—Marx v. Leverkuhn, Civ.App., 73 S.W.2d 949, error dismissed—Loving

- v. Laird, Civ.App., 42 S.W.2d 483, modification denied 50 S.W.2d 260 122 Tex. 18, modified on other grounds Com.App., 61 S.W.2d 812—Texas Landscape Co. v. Longoria, Civ.App., 30 S.W.2d 423, error dismissed—McCoy v. Beach-Wittman Co., Civ.App., 22 S.W.2d 714, error dismissed
- Wash.—Bennett v. McKellips, 111 P.2d 558, 8 Wash.2d 176—McDonnell v. Wilson, 57 P.2d 1044, 186 Wash. 297.
- W.Va.—Sigmon v. Mundy, 25 S.E.2d 636, 125 W.Va. 591
- Wis.—Balzer v. Caldwell, 263 N.W. 705, 220 Wis. 270—Mauermann v. Dixon, 258 N.W. 352, 217 Wis. 29—Hohensee v. Acheson, 251 N.W. 234, 213 Wis. 316.
10. Cal.—City of Sacramento v. Hunger, 249 P. 223, 79 Cal.App. 234
- Conn.—Archambault v. Holmes, 4 A.2d 420, 125 Conn. 167—D'Amato v. English, 188 A. 663, 122 Conn. 259—Sadinsky v. Coughlin, 159 A. 492, 114 Conn. 585.
- Kan.—Brugh v. Albers, 40 P.2d 380, 141 Kan. 233—McCabe v. Standard Oil Co., 251 P. 1088, 122 Kan. 365.
- Mass.—Hebert v. Hicks, 13 N.E.2d 428, 299 Mass. 538.
- N.J.—Palocz v. E. & S. Transp. Co., 133 A. 80, 4 N.J.Misc. 416
- N.Y.—Schaeffer v. Caldwell, 78 N.Y.S.2d 652, 273 App.Div. 263.
- Tex.—McFall v. Fletcher, 157 S.W.2d 131, 138 Tex. 93—Southern Pine Lumber Co. v. Andrade, 124 S.W.2d 334, 132 Tex. 373—Southland-Greyhound Lines v. Richardson, Com. App., 86 S.W.2d 731—Munves v. Buckley, Civ.App., 70 S.W.2d 605, error dismissed—West Texas Produce Co. v. Pate, Civ.App., 64 S.W.2d 381—De Leon v. Longoria, Civ. App., 4 S.W.2d 222, error dismissed—Whitson v. Nichols, Civ.App., 299 S.W. 911, affirmed, Com.App., 12 S.

- W.2d 556—Ball v. Youngblood, Civ. App., 252 S.W. 872, error denied
- Youngblood v. Ball, 278 S.W. 1115, 114 Tex. 582.
- Wash.—Marich v. Moe, 103 P.2d 362, 4 Wash.2d 343—Brotherton v. Day & Night Fuel Co., 73 P.2d 788, 192 Wash. 362—Nagler v. Youmans, 41 P.2d 791, 180 Wash. 681.
- Wis.—Bohren v. Lautenschlager, 1 N.W.2d 792, 239 Wis. 400—Clark v. Bolton, 246 N.W. 326, 210 Wis. 631.

Proximate cause

Finding of jury that certain acts of plaintiff in automobile collision case constituted contributory negligence as defined in charge was finding that such acts were proximate causes of plaintiff's injuries, where proximate cause was essential element of contributory negligence as defined in charge, so as to require rendition of judgment for defendant.—Southland-Greyhound Lines v. Richardson, Tex.Com.App., 86 S.W.2d 731.

11. Va.—Saunders v. Hall, 11 S.E.2d 592, 176 Va. 526.
12. Conn.—Jones v. Madison, 137 A. 753, 106 Conn. 264.
- Ind.—Gatewood v. Lynch, 23 N.E.2d 289, 107 Ind.App. 168.
- Kan.—Lord v. Hercules Powder Co., 167 P.2d 299, 161 Kan. 268—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320—Dick's Transfer Co. v. Miller, 119 P.2d 454, 154 Kan. 574.
- Mass.—Di Donato v. Renzi, 3 N.E.2d 239, 295 Mass. 113.
- Wis.—State ex rel. Litzen v. Dillett, 9 N.W.2d 80, 242 Wis. 107.
13. Cal.—Watts v. Peers, 260 P. 932, 86 Cal.App. 451.
- Conn.—Burns v. Reardon, 168 A. 878, 117 Conn. 679.
- Ohio.—Wills v. Anchor Cartage & Storage Co., 176 N.E. 680, 38 Ohio App. 358.

fendant was¹⁴ or was not¹⁵ guilty of gross negligence; to establish that a driver was guilty of reckless and wanton misconduct;¹⁶ to establish that a driver was acting within the scope of his employment;¹⁷ to establish the existence, or not to establish the absence, of contributory negligence on the part of the injured person;¹⁸ or to establish freedom from, or not to establish the existence of, contributory negligence on the part of the injured person.¹⁹

Individual and joint verdict. It has been held that when a verdict is returned against the driver, and an amount is also assessed against the driver

and owner, the verdict may be termed to be individual and joint.²⁰

c. Consistency

- (1) In general
- (2) As to several defendants

(1) In General

Special verdicts or findings should not be conflicting or inconsistent with each other or with a general verdict or finding; and under the practice in some jurisdictions special findings control in the event of irreconcilable conflict between them and a general verdict.

Special verdicts or findings must not be conflicting or inconsistent with each other,²¹ and the

Wis.—Butts v. Ward, 279 N.W. 6, 227 Wis. 387, 116 A.L.R. 1441

14. Wis.—Good v. Schlitz, 218 N.W. 727, 195 Wis. 481.

15. Mich.—Case v. Klute, 278 N.W. 721, 283 Mich. 581.

Gross negligence as proximate cause
Verdict of jury against the host was held conclusive of the fact that the driver of the other automobile was not guilty of such gross negligence as constituted his action the sole proximate cause of the accident—Garrison v. Burns, 16 S.E.2d 306, 178 Va. 1.

16. Conn.—Kakluskas v. Somers Motor Lines, 54 A.2d 592, 134 Conn. 35

17. Cal.—Reed v. Parra, 264 P. 757, 203 Cal. 430.

18. Cal.—Le Blond v. Townsley, 290 P. 1051, 108 Cal.App. 81

Kan.—Craig v. Sturgeon, 98 P.2d 139, 151 Kan. 208—Hamilton v. Lanoue, 67 P.2d 574, 145 Kan. 768. Va.—Saunders v. Hall, 11 S.E.2d 592, 176 Va. 526.

Co-operation in negligent act

A special finding of the jury that plaintiff without protest co-operated with defendant in the act which the jury specifically designated as the negligence of the defendant was held in legal effect a finding that plaintiff was guilty of contributory negligence.—Bryant v. Marshall, 10 P.2d 868, 135 Kan. 348.

19. Conn.—Stabile v. D. & N. Transp. Co., 26 A.2d 12, 129 Conn. 11.

Ind.—Brown v. Greenwood, 60 N.E.2d 152, 116 Ind.App. 112.

Kan.—Damitz v. Christian, 21 P.2d 324, 137 Kan. 582.

Mich.—Rollin v. Van Tine, 278 N.W. 48, 283 Mich. 208.

Tex.—Duncan Coffee Co. v. Haddock, Civ.App., 51 S.W.2d 437.

20. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

21. Conflict or inconsistency held shown

(1) Generally.

Kan.—Green v. Hutson, 32 P.2d 490, 139 Kan. 475.

Tex.—Wright v. Carey, Civ.App., 169 S.W.2d 749—Dallas Railway & Terminal Co. v. Walsh, Civ.App., 156 S.W.2d 320, affirmed Walsh v. Dallas Railway & Terminal Co., 167 S.W.2d 1018, 140 Tex. 385—Edson v. Perry-Foley Funeral Home, Civ. App., 132 S.W.2d 282, error dismissed, judgment correct—Hankins v. Harlan, Civ.App., 114 S.W.2d 588, error dismissed—Merritt v. Phoenix Refining Co., Civ.App., 103 S.W.2d 415—English v. Terry, Civ. App., 85 S.W.2d 1063, error granted—City of Amarillo v. Rust, Civ. App., 64 S.W.2d 821.

Wis.—Wedel v. Klein, 282 N.W. 606, 229 Wis. 419—Georgeson v. Nielsen, 252 N.W. 576, 214 Wis. 191—Harter v. Dickman, 245 N.W. 157, 209 Wis. 283—Stuart v. Collins, 229 N.W. 533, 201 Wis. 170.

42 C.J. p. 1286 note 3 [b].

(2) Causal connection; proximate cause.

Iowa.—Stanbery v. Johnson, 254 N.W. 303, 218 Iowa 160.

Tex.—Terry v. English, 112 S.W.2d 446, 130 Tex. 632—J. M. Radford Grocery Co. v. Andrews, Com.App., 15 S.W.2d 218—Williams v. Zang, Com.App., 279 S.W. 815—Dallas Railway & Terminal Co. v. Walsh, Civ.App., 156 S.W.2d 320, affirmed Walsh v. Dallas Railway & Terminal Co., 167 S.W.2d 1018, 140 Tex. 385—Neely v. Woolley, Civ. App., 154 S.W.2d 973—Jones Fine Bread Co. v. Cook, Civ.App., 154 S.W.2d 889—Hankins v. Harlan, Civ. App., 114 S.W.2d 588, error dismissed—Haney v. Yarbrough, Civ. App., 112 S.W.2d 1074—Wright v. McCoy, Civ.App., 110 S.W.2d 223—Duff v. Roesser & Pendleton, Civ. App., 96 S.W.2d 682—Cook v. Chapman, Civ.App., 45 S.W.2d 797, error refused—Muckleroy v. C. S. Hamilton Motor Co., Civ.App., 33 S.W.2d 260—Humble Pipe Line Co. v. Kincaid, Civ.App., 19 S.W.2d 144,

error refused—Jackson v. Parish, Civ.App., 4 S.W.2d 87, error dismissed.

Wis.—Nemeth v. Farmers Co-op Elevator Co., 31 N.W.2d 569, 252 Wis. 290.

(3) New and independent cause.—State v. Dickey, Tex.Civ.App., 158 S.W.2d 844, error refused—Southern Transp. Co. v. Adams, Tex.Civ.App., 141 S.W.2d 739, error dismissed, judgment correct—English v. Terry, Tex.Civ.App., 85 S.W.2d 1063, error granted.

(4) Failure to yield right of way.—Smith v. Superior & Duluth Transfer Co., 10 N.W.2d 153, 243 Wis. 292, rehearing denied 11 N.W.2d 95, 243 Wis. 292—Rosenow v. Schmidt, 285 N.W. 755, 232 Wis. 1.

(5) Independent contractor—Dr. Pepper Bottling Co. v. Rainboldt, Tex.Civ.App., 40 S.W.2d 827, error dismissed.

(6) Sudden emergency.—Hankins v. Harlan, Tex.Civ.App., 114 S.W.2d 588, error dismissed.

(7) Unavoidable accident.

Tex.—Bransford v. Pageway Coaches, 104 S.W.2d 471, 129 Tex. 327—Christopherson v. Whittlesey, Tex. Civ.App., 197 S.W.2d 384, error refused, no reversible error—Anding v. Queener, Tex.Civ.App., 138 S.W.2d 126, error dismissed, judgment correct—Hancock v. Hoegmeyer, Tex.Civ.App., 119 S.W.2d 141—Merritt v. Phoenix Refining Co., Tex. Civ.App., 103 S.W.2d 415—Mays v. Smith, Tex.Civ.App., 95 S.W.2d 1342, error dismissed—Ford Rent Co. v. Hughes, Tex.Civ.App., 90 S.W.2d 290—Pageway Coaches v. Bransford, Tex.Civ.App., 71 S.W.2d 561, error granted—Lighthall v. Wilson, Tex.Civ.App., 15 S.W.2d 690.

Irreconcilable conflict or inconsistency not shown

(1) Generally.

U.S.—Jayne v. Mason & Dixon Lines, C.C.A.N.Y., 124 F.2d 317—Montgomery v. Hutchins, C.C.A.Cal., 118 F.2d 661.

general verdict must not be inconsistent with the special findings or the answers given by the jury to interrogatories.²² Under the practice in some

jurisdictions, in the event of a conflict between special findings, on the one hand, and a general verdict or finding, on the other, the special findings

Cal.—Swaney v. Black, 79 P.2d 176, 26 Cal.App.2d 314—Williamson v. Fitzgerald, 2 P.2d 201, 116 Cal.App. 19.

Conn.—Catania v. Conforte, 32 A.2d 646, 130 Conn. 178—D'Amato v. English, 188 A. 663, 122 Conn. 259. Ind.—Jay v. Holman, 20 N.E.2d 656, 106 Ind.App. 413.

Kan.—Rasing v. Healer, 142 P.2d 832, 157 Kan. 516—Rainman v. National Mut. Casualty Co., 133 P.2d 145, 156 Kan. 294—Jacobs v. Hobson, 79 P.2d 861, 148 Kan. 107—Cooper v. Kansas City Public Service Co., 73 P.2d 1092, 146 Kan. 961—Cathcart v. Dunn, 69 P.2d 698, 146 Kan. 193—Hamilton v. Lanoue, 67 P.2d 574, 145 Kan. 768—Forsberg v. Snow, 22 P.2d 421, 137 Kan. 886—Carligen v. Saindon, 283 P. 620, 129 Kan. 475, rehearing denied 284 P. 623, 130 Kan. 1.

Mass.—Litos v. Sullivan, 76 N.E.2d 557—Patrican v. Garvey, 190 N.E. 9, 287 Mass. 62.

R.I.—Radocchia v. Goodrich Oil Co., 6 A.2d 746, 63 R.I. 58—Bourre v. Texas Co., 154 A. 82, 51 R.I. 254.

Tex.—Walsh v. Dallas Railway & Terminal Co., 167 S.W.2d 1018, 140 Tex. 385—Montgomery v. Houston Electric Co., 144 S.W.2d 251, 135 Tex. 538—Southland-Greyhound Lines v. Richardson, Com.App., 86 S.W.2d 731—Smallwood v. Parr, Civ.App., 174 S.W.2d 610, error refused—Friske v. Graham, Civ.App., 128 S.W.2d 139—Monte Carlo Distributing Co. v. Rossas, Civ.App., 127 S.W.2d 334, error dismissed, judgment correct—Texas Electric Service Co. v. Kinkead, Civ.App., 84 S.W.2d 567, error dismissed—Austin v. De George, Civ.App., 55 S.W.2d 585, error dismissed—Bragg v. Hughes, Civ.App., 53 S.W.2d 151—Owings v. Commerce Farm Credit Co., Civ.App., 29 S.W.2d 871—De Leon v. Longoria, Civ.App., 4 S.W.2d 222, error dismissed.

Vt.—Brooks v. Holmes, 35 A.2d 374, 113 Vt. 466.

Wis.—Braun v. Baudhuin, 9 N.W.2d 596, 243 Wis. 107—Trastek v. Dahlem, 262 N.W. 609, 219 Wis. 249.

42 C.J. p 1286 note 3 [a].

(2) Causal connection or proximate cause generally.—Walsh v. Dallas Railway & Terminal Co., 167 S.W.2d 1018, 140 Tex. 385—Liberty Film Lines v. Porter, 146 S.W.2d 982, 136 Tex. 49—Dallas Railway & Terminal Co. v. Starling, 110 S.W.2d 557, 130 Tex. 379—Herrin v. Falcon, Tex. Civ.App., 198 S.W.2d 117—Porter v. Polia, Tex.Civ.App., 169 S.W.2d 216, error refused—Friske v. Graham,

Tex.Civ.App., 128 S.W.2d 139—Missouri-Kansas-Texas R. Co. of Texas v. McKinney, Civ.App., 126 S.W.2d 789, affirmed Missouri, K. & T. R. Co. of Texas v. McKinney, 145 S.W.2d 1081, 136 Tex. 75—Kindle v. Armstrong Packing Co., Tex.Civ.App., 103 S.W.2d 471—Duff v. Roeser & Pendleton, Tex.Civ.App., 96 S.W.2d 682—Stinson v. Boulevard Undertaking Co., Tex.Civ.App., 91 S.W.2d 1172.

(3) Contributory negligence.

Ark.—St. Louis S. F. Ry. Co. v. Perryman, 211 S.W.2d 647.

Kan.—Carligen v. Saindon, 283 P. 620, 129 Kan. 475, rehearing denied 284 P. 623, 130 Kan. 1.

Tex.—Southland-Greyhound Lines v. Richardson, Com.App., 86 S.W.2d 731—Thompson v. Railway Exp. Agency, Civ.App., 206 S.W.2d 134—Getzwiller v. Ferguson, Civ.App., 145 S.W.2d 913—Lewis v. Martin, Civ.App., 120 S.W.2d 910, error refused—Townsend v. Young, Civ.App., 114 S.W.2d 296—Williams v. Long, Civ.App., 106 S.W.2d 378, error dismissed—Foster v. Beckman, Civ.App., 85 S.W.2d 789, error refused—Fischer v. McMaster, Civ.App., 73 S.W.2d 554—Orchin v. Fort Worth Poultry & Egg Co., Civ.App., 43 S.W.2d 308, reformed on other grounds 53 S.W.2d 103—Toney v. Herman Hale Lumber Co., Civ.App., 36 S.W.2d 234, error dismissed. Wis.—Hanson v. Matas, 249 N.W. 505, 212 Wis. 275, 93 A.L.R. 546—Schneider v. Nedry, 228 N.W. 509, 201 Wis. 111—Crombie v. Powers, 227 N.W. 278, 200 Wis. 299.

(4) Emergency.—Phenix Dairy v. White, Tex.Civ.App., 169 S.W.2d 492, error refused—Barrington v. Duncan, Civ.App., 162 S.W.2d 1025, reversed on other grounds 169 S.W.2d 462, 140 Tex. 510—White v. Munson, Tex.Civ.App., 162 S.W.2d 429.

(5) Right of way.

Ohio.—Elho v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 363.

Tex.—Walker v. Houston Electric Co., Civ.App., 155 S.W.2d 973, error refused—Tinker v. Yellow Cab Co., Civ.App., 74 S.W.2d 521, error dismissed—Stehling v. Johnston, Civ.App., 32 S.W.2d 696, error refused.

(6) Speed as proximate cause.—Akers v. Epperson, Civ.App., 172 S.W.2d 512, certified question answered 171 S.W.2d 483, 141 Tex. 189, 156 A.L.R. 1028—Rankin v. Joe D. Hughes, Inc., Tex.Civ.App., 161 S.W.2d 883, error refused—Jackson v. McCrary, Tex.Civ.App., 148 S.W.2d 942, error refused—Smith v. Young, Tex.Civ.App., 147 S.W.2d 859—Jewell v. El Paso Electric Co., Tex.Civ.App., 47 S.W.2d 328, error dismissed—Magouirk

v. Cantrell, Tex.Civ.App., 16 S.W.2d 337.

(7) Unavoidable accident.—Kindy v. Willingham, Tex.Civ.App., 205 S.W.2d 435, reversed on other grounds 209 S.W.2d 585—Karger v. Rio Grande Valley Citrus Exchange, Tex. Civ.App., 179 S.W.2d 816, error refused—Calhoun v. Grant, Tex.Civ.App., 129 S.W.2d 752.

22. Kan.—Green v. Hutson, 32 P.2d 490, 139 Kan. 475.

42 C.J. p 1286 note 4.

Special findings held inconsistent with general verdict

Kan.—Craig v. Sturgeon, 98 P.2d 139, 151 Kan. 208—Green v. Hutson, 32 P.2d 490, 139 Kan. 475.

Ohio.—Hartsack v. George, 17 N.E.2d 667, 59 Ohio App. 249.

Irreconcilable conflict with general verdict not shown

Ind.—Long v. Archer, 46 N.E.2d 818, 221 Ind. 186—Ball v. McPheeters, 5 N.E.2d 885, 211 Ind. 157—Brown v. Greenwood, 60 N.E.2d 152, 116 Ind.App. 112—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507—Drewrys Limited, U. S. A., v. Crippen, 44 N.E.2d 1006, 113 Ind.App. 120—Gatewood v. Lynch, 23 N.E.2d 289, 107 Ind.App. 168—Pennsylvania Ice & Coal Co. v. Elischer, 21 N.E.2d 436, 106 Ind.App. 613—Armstrong v. Rinzer, 199 N.E. 863, 102 Ind.App. 497—Vockel v. Rhynearson, 197 N.E. 705, 101 Ind.App. 637, rehearing denied 199 N.E. 162—Baker v. Pritchard, 194 N.E. 781, 100 Ind.App. 509.

Kan.—Rainman v. National Mut. Casualty Co., 133 P.2d 145, 156 Kan. 294—Dick's Transfer Co. v. Miller, 119 P.2d 454, 151 Kan. 574—Darrington v. Campbell, 94 P.2d 305, 150 Kan. 407—Cooper v. Kansas City Public Service Co., 73 P.2d 1092, 146 Kan. 961—Hamilton v. Lanoue, 67 P.2d 574, 145 Kan. 768—McGinley v. City of Cherryvale, 40 P.2d 377, 141 Kan. 155—Forsberg v. Snow, 22 P.2d 421, 137 Kan. 886—Shrout v. Bird, 9 P.2d 673, 135 Kan. 218—Webb v. Lippard, 8 P.2d 881, 134 Kan. 764—Baladrán v. Compton, 7 P.2d 510, 134 Kan. 542. Mich.—Gleason v. Hanafin, 13 N.W.2d 196, 308 Mich. 31—Farr v. Haggerty, 263 N.W. 739, 273 Mich. 547—Izzo v. Weiss, 259 N.W. 295, 270 Mich. 372.

N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

Ohio.—Betras v. G. M. McKelvey Co., 76 N.E.2d 280, 148 Ohio St. 523—Eversole v. Seelbach, App., 73 N.E.2d 223.

Or.—Heinrichs v. Carstens Packing Co., 270 P. 486, 127 Or. 108.

42 C.J. p 1286 note 4 [a].

control,²³ and the special findings may, for example, entitle defendant to a judgment notwithstanding a general verdict for plaintiff;²⁴ but under some circumstances a finding of the jury in answer to a special interrogatory may not control a general verdict.²⁵

Findings of ultimate facts may be controlling over merely evidentiary findings or probative facts which, although inconsistent therewith, are not shown to be the only facts furnishing the basis for the ultimate facts;²⁶ and in some cases the conclusions or findings of ultimate facts have been held not inconsistent with subsidiary facts found.²⁷ A finding absolving a driver from negligence in one respect does not necessarily preclude finding him otherwise negligent;²⁸ and the fact that the jury, in answer to a special question on what negligence it based its verdict, gave a particular answer which, standing alone, would absolve defendant, does not preclude reliance by plaintiff on another ground of negligence alleged in the petition and fairly included in an answer to other special questions submitted.²⁹

Negligence and willful misconduct. A finding that the driver of a motor vehicle was guilty of

negligence and willful misconduct is not necessarily inconsistent where the evidence supports the finding of willful misconduct and the finding of negligence can be treated as surplusage.³⁰

In case of several plaintiffs, findings in behalf of some and not of others are not necessarily inconsistent.³¹ However, in an action brought by the owner of a motor vehicle for property damage and a passenger therein for personal injuries against other vehicles involved in a collision, a verdict against the injured passenger was held inconsistent with a verdict in favor of the owner of the vehicle in which the passenger was riding.³²

Finding for or against both parties. Where a counterclaim, cross complaint, or the like is filed, a verdict or finding is not inconsistent which finds for defendant on the complaint and for plaintiff on defendant's claim, where there is evidence from which the jury might find that the collision was due to an accident or that both parties were negligent.³³ However, a verdict in favor of plaintiff against defendant for plaintiff's damages is inconsistent with a verdict in favor of defendant against plaintiff for defendant's damages.³⁴

23. Kan.—Fisher v. Wichita Transp. Corporation, 134 P.2d 393, 156 Kan. 500—*Rlerson v. Southern Kansas Stage Lines Co.*, 69 P.2d 1, 146 Kan. 30—*Koster v. Matson*, 30 P.2d 107, 139 Kan. 124—*Lathrop v. Miller*, 295 P. 722, 132 Kan. 425.

Speed

Where the jury have found that the operator of a motor vehicle was driving in excess of a certain speed in violation of statute, which violation constituted negligence per se, the court may properly ignore a general finding that the operator was not driving faster than a person of ordinary care and prudence would have driven under the same or similar circumstances—*Greaser v. Coca-Cola Bottling Works of Dallas, Tex. Civ.App.*, 98 S.W.2d 1028, error dismissed.

Finding held not general

Jury's negative answer to special question whether plaintiff was guilty of contributory negligence, as defined in court's instructions, was held not general finding, and hence did not yield to jury's detailed findings, in answer to other questions, that accident would not have occurred had plaintiff alighted on right side and that he should have done so in exercise of due care.—*Schroeder v. Nelson*, 139 P.2d 868, 157 Kan. 320.

Conclusion held not warranted by subordinate findings

Conn.—Riccio v. Waterbury Foundry Co., 173 A. 106, 118 Conn. 468.

D C—Rosasco v. Sowder, Mun.App., 31 A.2d 687.

24. Kan.—Rasing v. Healzer, 142 P. 2d 832, 157 Kan. 516—*Harrison v. Travelers Mut. Casualty Co.*, 134 P. 2d 681, 156 Kan. 492—*Sayeg v. Kansas Gas & Electric Co.*, 131 P. 2d 648, 156 Kan. 65—*Marley v. Wichita Transp. Corporation*, 96 P.2d 877, 150 Kan. 818—*Eldredge v. Sargent*, 96 P.2d 870, 150 Kan. 824—*Blosser v. Wagner*, 59 P.2d 37, 144 Kan. 318—*Hagaman v. Manley*, 42 P.2d 946, 141 Kan. 647—*Cherry v. Hays*, 41 P.2d 746, 141 Kan. 346—*Lahmeyer v. Massey*, 21 P.2d 380, 137 Kan. 566.
Mich.—Hartley v. A. I. Rodd Lumber Co., 276 N.W. 712, 282 Mich. 652.
N.M.—Pettes v. Jones, 66 P.2d 967, 41 N.M. 167.

25. Parked vehicle

Where plaintiff contended that collision occurred when defendant backed automobile from driveway onto highway, and defendant contended that his automobile had stopped on highway because of engine trouble, finding of jury, in answer to special interrogatory, that defendant's automobile had been parked on highway did not control general verdict for plaintiff where jury was not given opportunity to indicate that defendant's automobile was parked for sufficient time to invoke the assured-clear-distance-ahead rule.—*Hartsock*

v. George, 17 N.E.2d 667, 59 Ohio App. 249.

26. Cal.—Turner v. Clennell, 50 P.2d 851, 9 Cal.App.2d 736.

27. Conn.—D'Amato v. English, 188 A. 663, 122 Conn. 259.
Mass.—Luklowsky v. Kuporotz, 186 N.E. 560, 283 Mass. 524.
Utah—Farrell v. Cameron, 94 P.2d 1068, 98 Utah 68.

28. Wis.—Lurie v. Nickel, 289 N.W. 686, 233 Wis. 420.

29. Kan.—Harshaw v. Kansas City Public Service Co., 139 P.2d 141, 157 Kan. 95—*Harshaw v. Kansas City Public Serv. Co.*, 119 P.2d 459, 154 Kan. 481.

30. Cal.—Barcroft v. Adkins, 44 P. 2d 379, 6 Cal.App.2d 180.

31. N.J.—Dumphy v. Thompson, 130 A. 639, 3 N.J.Misc. 1086, 42 C.J. p 1287 note 6.

32. N.Y.—Ziemann v. Miller, 217 N. Y.S. 761, 217 App.Div. 819.

33. Conn.—Mercer v. Panella, 124 A. 240, 100 Conn. 579.
La.—Blakenship v. Meador, 126 So. 563, 12 La.App. 523.
N.J.—Jensen v. Kinsley, 150 A. 924, 8 N.J.Misc. 534.

N.Y.—Hough v. Doersch, 12 N.Y.S.2d 50, 257 App.Div. 842, appeal dismissed 23 N.E.2d 807, 282 N.Y. 675.

34. Tenn.—Penley v. Glover, App., 205 S.W.2d 757.

(2) As to Several Defendants

While in some cases a verdict may allow a recovery against one defendant and exonerate another, the general rule is that an owner or employer whose liability can arise only by virtue of the negligence of the driver cannot be held liable where the verdict is in favor of the driver.

In an action against several defendants, where the pleading and evidence warrant it, a verdict may be rendered in favor of plaintiff as against one or more defendants and in favor of the other defendants as against plaintiff.³⁵ Thus, in an action brought by an injured person against the owners or operators of two vehicles involved in a collision, the exoneration of the owner or operator of one of the vehicles is not inconsistent with a finding of liability on the part of the owner or operator of the other vehicle.³⁶ A finding of negligence on the part of all defendants in an action against the owners or operators of two vehicles may be improper where defendants have offered two distinct versions of the accident which cannot be reconciled with each other.³⁷

Failure to hold driver liable. As a general rule, the owner of the vehicle or the employer of the driver cannot be held liable in an action based

solely on the negligence of the driver where the finding is in favor of the driver.³⁸ According to some authorities, where the action is against the driver and his employer, a verdict against the employer only, which is silent as to the driver, is equivalent to a verdict in favor of the driver, and hence cannot stand;³⁹ but other authorities hold that, in an action against the driver and his employer, a verdict against the employer only is not a verdict in favor of the driver, but merely indicates a failure to find on the issue of the driver's negligence,⁴⁰ and hence that a verdict against the owner, which is silent as to the driver, is not void.⁴¹ Likewise, it has been held that, where liability is sought to be imposed on a parent under a statute making a parent who signs the application for a license for his minor child liable for the negligence of the minor, a verdict which is against the parent only, and which is silent concerning the liability of the child, may be upheld.⁴²

The employer or owner may be held liable, and the driver exonerated, where the owner or employer was a joint tort-feasor or guilty of personal negligence⁴³ or where his liability is not based solely on the negligence of the exonerated driver

35. Cal.—Ohlson v. Frazier, 39 P.2d 429, 2 Cal.App.2d 708.

42 C.J. p 1287 note 7.
Joint and several liability see supra § 427.

Verdict against two defendants

Pa.—Ohlson v. Lamoreaux, Com.Pl. 33 Del.Co 251.

36. Cal.—Ohlson v. Frazier, 39 P.2d 429, 2 Cal.App.2d 708

Minn.—Szyperski v. Swift & Co., 269 N.W. 401, 198 Minn. 154.

Mo.—Dennis v. Creck, App., 211 S.W.2d 59—Brooks v. Menaugh, App. 10 S.W.2d 327.

37. N.Y.—Dorochuk v. Skrobot, 248 N.Y.S. 367, 231 App.Div. 660, motion denied 177 N.E. 174, 256 N.Y. 641, affirmed 178 N.E. 781, 257 N.Y. 530.

38. Ala.—Hawkins v. Barber, 163 So. 608, 231 Ala. 53.

Ga.—Kall v. Spivey, 27 S.E.2d 475, 70 Ga.App. 84.

Ill.—J. F. Martin Cartage Co. v. Dempster Bros., 35 N.E.2d 391, 311 Ill.App. 70.

Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508—Holbrook v. Nolan, 10 N.E.2d 744, 105 Ind.App. 75.

Iowa.—Glass v. Hutchinson Ice Cream Co., 243 N.W. 352, 214 Iowa 825.

Mo.—Ruehling v. Pickwick-Greyhound Lines, 85 S.W.2d 602, 337 Mo.App. 196—Stevens v. D. M. Oberman Mfg. Co., 79 S.W.2d 516, 229 Mo.App. 33.

N.J.—Prendergast v. Jacobs, 166 A. 94, 110 N.J.Law 435—Hummers v. Public Service Electric & Gas Co. 151 A. 383, 8 N.J. Misc. 689, affirmed 156 A. 423, 108 N.J.Law 196.

N.Y.—Bourcier v. Peryor, 46 N.Y.S. 2d 767, 267 App.Div. 932, affirmed 59 N.E.2d 175, 293 N.Y. 806—Thibodeau v. Gerosa Haulage & Warehouse Corporation, 300 N.Y.S. 686, 252 App.Div. 615, affirmed 16 N.E.2d 98, 278 N.Y. 551—Shortell v. Goldsmith, 239 N.Y.S. 58, 136 Misc. 138—Zimmer v. Lehnert, 238 N.Y.S. 88, 135 Misc. 270.

Okla.—Anthony v. Covington, 100 P.2d 461, 187 Okl. 27.

S.C.—Greer v. State Highway Department, 159 S.E. 35, 160 S.C. 510.
Tenn.—Summers v. Bond-Chadwell Co., 145 S.W.2d 7, 24 Tenn.App. 357.

Va.—Lough v. Price, 172 S.E. 269, 161 Va. 811.

42 C.J. p 1287 note 9.

Verdict against master only in action against master and servant see Master and Servant § 619 b.

Dismissal of action as to operator

Where jury returned verdict in favor of operator, judgment against owner was not authorized, notwithstanding plaintiff dismissed cause of action as to operator after the verdict.—Holbrook v. Nolan, 10 N.E.2d 744, 105 Ind.App. 75.

In Kentucky

(1) The rule in the text is now followed.—Lyons v. Great Atlantic &

Pacific Tea Co., 193 S.W.2d 450, 301 Ky. 827—Dillion v. Harkleroad, 174 S.W.2d 419, 295 Ky. 308.

(2) Early authority was to the effect that the owner could be held liable notwithstanding the driver was exonerated.—Weil v. Hagan, 179 S.W. 835, 166 Ky. 750.

39. Ind.—Holbrook v. Nolan, 10 N.E.2d 744, 105 Ind.App. 75.

40. Cal.—Lloyd v. Boulevard Express, 249 P. 837, 79 Cal.App. 406.

41. Cal.—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App. 2d 256—Maberto v. Wolfe, 289 P. 218, 106 Cal.App. 202.

N.J.—Sanford v. Charles H. Totty Co., 164 A. 458, 110 N.J.Law 262.

Utah.—Anderson v. Salt Lake City, 10 P.2d 927, 79 Utah 324.

42. Cal.—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App. 2d 256—Bosse v. Marye, 250 P. 693, 80 Cal.App. 109.

43. Ind.—Holbrook v. Nolan, 10 N.E.2d 744, 105 Ind.App. 75.

N.J.—Feury v. Reid Ice Cream Co., 126 A. 462, 2 N.J. Misc. 1008.

Absence of issue as to owner's negligence

Verdict holding owner liable while exonerating driver could not be sustained on ground that owner was negligent, independently of any act or omission of driver, in that truck was overloaded and equipped with insufficient brakes, where such negligence was neither pleaded nor proved

but on the negligence of some other person for whose actions he is responsible.⁴⁴ Thus, where a plaintiff has based his claim on the driver's negligence and also on the ground that the lights of the vehicle were not in working order, a verdict against the employer only is not invalid, since the jury could have found that the accident was caused not by any negligence of the driver but by that of the employer in not having the lights in working condition,⁴⁵ although in such a case the employer has a right to ascertain from the jury whether the verdict was based on the driving or the lights, since if it was based on the driving the employer would have a right of recovery over against the driver.⁴⁶ In an action against the operator of a motor vehicle and the owner thereof, whose agent was teaching the operator how to drive, a finding that the operator was not negligent in attempting to operate the vehicle does not imply a finding that the instructor was not negligent in permitting an inexperienced driver to operate on a busy street;⁴⁷ and a finding that the inexperienced operator was not negligent in attempting to operate the vehicle does not imply a finding that he operated the vehicle with due care, with respect to the liability of the owner;⁴⁸ hence a verdict for the inexperienced operator is not inconsistent with a verdict against the owner.⁴⁹

The inconsistency in a verdict holding the owner liable while exonerating the driver has been held not to affect the propriety of the jury's finding in favor of the owner of another vehicle involved in the accident.⁵⁰ The owner cannot complain of a verdict which, although expressly finding the driver negligent, awards damages against the owner only, the error in such case being one of which plaintiff alone may complain.⁵¹

Holding driver but not general master. A verdict against the driver, but in favor of the driver's

general master, is not void as contradictory where there is evidence that the general master had hired the vehicle and driver to a third person and that the driver was subject to the complete control of the hirer at the time of the accident.⁵²

Exoneration of vehicle. Where, in an action against the owner of the vehicle, the alleged offending vehicle was itself made a party defendant under statute, a verdict exonerating the vehicle was held not to preclude recovery against the owner, the action against the vehicle being in rem and merely affording an additional remedy for collection of the judgment.⁵³

Amount as against each defendant. In an action brought against the operator of a vehicle and another person, the liability of such other person being predicated solely on the negligence of the driver and the status of such other person as the owner of the vehicle or the employer of the driver, a verdict against defendants should be for the same sum,⁵⁴ and a verdict against the owner or employer for a larger sum than against the driver is improper.⁵⁵ Likewise, in an action by a passenger against the owners or operators of two vehicles involved in an accident, a verdict against defendants ordinarily should be a single verdict against both for such sum as the more culpable ought to pay.⁵⁶ Where the jury has assessed damages against both the owner and the driver in a specified total sum, an arbitrary division thereof by the jury, assessing damages separately against each defendant, is not in accordance with the law, but is mere surplusage which the trial court should refuse to effectuate.⁵⁷ A stipulation that the jury shall find whether defendants shall be held jointly liable or whether only one shall be held liable does not permit the jury to render separate verdicts in different amounts against two defendants.⁵⁸

and jury were not instructed on such issue.—*Pittman-Rice Coal Co. v. Hansen*, 72 N.E.2d 364, 117 Ind App. 508.

44. Okl.—*Southern Kansas Stage Lines Co. v. Crain*, 89 P.2d 968, 185 Okl. 1.

Taxi engaged by employee

Where an employee on instructions from his employer engaged a taxi, and told the taxi driver to drive at a rapid rate, a verdict in favor of the taxi driver was held not to preclude a verdict against the employer, since plaintiff did not rely solely on the negligence of the taxi driver but also claimed negligence of the employee.—*Southern Kansas Stage Lines Co. v. Crain*, 89 P.2d 968, 185 Okl. 1.

45. Pa.—*East Broad Top Transit Co. v. Flood*, 192 A. 401, 326 Pa. 353.

46. Pa.—*East Broad Top Transit Co. v. Flood*, *supra*.

47. Ill.—*Kelly v. Powers*, 25 N.E.2d 125, 303 Ill.App. 198.

N.H.—*Greenie v. Nashua Buick Co.*, 158 A. 817, 85 N.H. 316.

48. N.H.—*Greenie v. Nashua Buick Co.*, *supra*.

49. N.H.—*Greenie v. Nashua Buick Co.*, *supra*.

50. N.Y.—*Zimmer v. Lehnert*, 238 N.Y.S. 88, 135 Misc. 270.

51. Mich.—*Schultz v. Frost*, 293 N.W. 716, 294 Mich. 457.

52. Mo.—*Roman v. Hendricks*, App. 80 S.W.2d 907.

53. S.C.—*Le Gette v. Carolina Butane Gas Co.*, 43 S.E.2d 472, 210 S.C. 504.

54. Cal.—*Sparks v. Berntsen*, 121 P.2d 497, 19 Cal.2d 308—*Daniel v. Jones*, 35 P.2d 198, 140 Cal.App. 145—*Bradford v. Brock*, 34 P.2d 1048, 140 Cal.App. 47.

55. Cal.—*Daniel v. Jones*, 35 P.2d 198, 140 Cal.App. 145.

56. Pa.—*O'Hara v. Milliren*, 49 Pa. Dist. & Co. 100.

57. Cal.—*Sparks v. Berntsen*, 121 P.2d 497, 19 Cal.2d 308.

58. Or.—*Holmboe v. Morgan*, 138 P. 1084, 69 Or. 395.

§ 559. Judgment, Review, and Costs

The general rules governing judgments in civil actions apply in actions for injuries arising out of the operation of motor vehicles. The successful party ordinarily is entitled to costs.

The general rules governing judgments in civil actions have been applied in actions for injuries arising out of the operation of motor vehicles.⁵⁹ In an action brought against both the driver and the owner of a motor vehicle, where the jury have found that the driver was guilty of gross negligence, but have made no such finding as to the owner, the judgment should not include a statement that the owner was guilty of gross negligence.⁶⁰ In the absence of evidence rebutting a statutory presumption that a wife in driving a motor vehicle owned by her husband was acting as his agent, a judgment in favor of a guest injured in an accident should run against both the husband and wife.⁶¹

As to damages. Where, in an action against each of two motorists, who contributed to the injury, a verdict is entered for plaintiff in each case, a judgment may be rendered against each defendant for the full amount of the damages.⁶² In an action wherein liability is established against both the owner and the operator of a motor vehicle, the judgment against the operator should be for the full amount of the damages sustained,⁶³ and a judgment cannot stand where its effect would be to permit a recovery against the owner in addition to, and in excess of, the amount awarded against the operator.⁶⁴ Under a statute limiting the amount for which the owner of a motor vehicle can be held liable where his vehicle was operated

by another, an owner against whom a verdict has been rendered for an amount in excess of the statutory limit is entitled to have the judgment thereon limited, as against him, to the statutory amount.⁶⁵ Where the court is permitted by statute to allow double or treble damages where the sole cause of the injury is a violation of the "law of the road," and the complaint in the action alleges also other causes or grounds of injury and a general verdict is rendered for plaintiff, without a showing that the verdict was based on a violation of such law, the court cannot render a judgment for double or treble damages.⁶⁶

Recourse against operator's property first. Under some statutes, where an injured person recovers a judgment against both the operator of a motor vehicle and the owner thereof, it is sometimes required that, in satisfying the judgment, recourse be had first against the property of the operator;⁶⁷ and under such a statute the judgment creditor may not, by means of a writ of execution, first have access or resort to the automobile owner's property as a source of help or supply, or as an expedient means for attaining the desired end of satisfying the judgment.⁶⁸

Review. The principles governing the review of actions for injuries arising out of the operation of motor vehicles are considered in Appeal and Error.

Costs. As in other actions for damages, the judgment ordinarily,⁶⁹ although not invariably,⁷⁰ carries with it costs in favor of the successful party. In an action brought by the owner and by a passenger, in which the passenger was found entitled to recover, but the owner was not, thus in-

59. Cal.—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal. App.2d 188.

Ill.—Granlie v. Valha, 37 N.E.2d 931, 312 Ill.App. 181.

Correction nunc pro tunc

Where, in an action against the driver and owner of a motor vehicle involved in an accident the clerk has inadvertently entered a several judgment, instead of a joint and several judgment, the mistake may be corrected by an order nunc pro tunc.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

Affidavit as to repairs

Judgment for plaintiff in an action to recover damages to plaintiff's automobile may be entered on an affidavit showing the nature of the necessary repairs and that they had been performed by plaintiff in his own shop; plaintiff need not attach a receipt that he has paid himself.—

Stauffer v. Moriarity, 40 Pa Dist & Co. 439, 43 Lack.Jur. 18.

60. Mich.—Wieczorek v. Merskin, 13 N.W.2d 239, 308 Mich. 145.

61. Conn.—Smith v. Furness, 166 A. 759, 117 Conn. 97.

62. Mass.—Corey v. Havener, 65 N. E. 69, 182 Mass 250.

Single satisfaction see supra § 427.

63. Cal.—O'Neill v. Williams, 15 P. 2d 879, 127 Cal.App. 385.

64. Cal.—O'Neill v. Williams, supra.

65. Cal.—Sparks v. Bernsten, 121 P. 2d 497, 19 Cal.2d 308—Harvold v. Milani, 36 P.2d 393, 1 Cal.App.2d 157.

66. Conn.—Tillinghast v. Leppert, 105 A. 615, 93 Conn. 247—Dunbar v. Jones, 87 A. 787, 87 Conn. 253.

67. Cal.—Cook v. Superior Court in and for Los Angeles County, 55 P. 2d 1227, 12 Cal.App.2d 608.

68. Cal.—Cook v. Superior Court in

and for Los Angeles County, supra.

69. U.S.—Nettles v. Southwest Telephone Co., D.C.Ark. 26 F.Supp 12, appeal dismissed, C.C.A., Nettle v. Southwest Telephone Co, 106 F.2d 1010.

70. Decision overruling prior rule

Where verdict exonerating motorist from liability for death of guest passenger in another automobile on ground that negligence of driver of such automobile was imputable to passenger was directed before rendition of supreme court decision overruling prior rule as to imputed negligence and motorist did not contest appeal from judgment entered on such verdict, it was held that no costs would be allowed in either trial or supreme court to either plaintiff or defendant.—Herman v. Metal Office Furniture Co., 26 N.W.2d 752, 317 Mich. 185.

dicating that both drivers involved in the accident were negligent, defendants were held not entitled to costs.⁷¹

§ 560. Damages

a. In general

b. Exemplary or punitive damages

a. In General

Recovery for injuries arising out of the operation of a motor vehicle ordinarily should be for such amount as will justly compensate the injured person. The statutory liability imposed in certain cases on the owner of a vehicle or the parent or guardian of a minor driver is sometimes limited to a specified amount.

The law furnishes no exact standard by which to measure the compensation to which a successful party is entitled in an action for injuries sustained in a motor vehicle accident.⁷² Ordinarily, and in the absence of any question of exemplary damages, the damages allowable are such as will justly compensate the parties for the injuries sustained,⁷³ and no more.⁷⁴

Statutory limitation of liability. Under some statutes the owner of a motor vehicle driven with his permission or consent, but not in his employment or business, can be held liable for no more than the amounts set forth in the statutes;⁷⁵ and some statutes imposing liability for a minor's negligence on the parent or guardian who signed the minor's application for a license likewise limit the liability of the parent or guardian to specified

amounts, at least where the minor was not operating the vehicle as a servant or agent of the parent or guardian.⁷⁶ Under such statutes, unless the verdict or judgment is in excess of the statutory limit, the liability of the owner is in the same amount as that of the operator.⁷⁷

Penalty. Under some statutory provisions the owner of a motor vehicle who is sought to be held liable for the negligence of a driver can be held liable for a penalty prescribed in the statute only if the injury resulted from the negligence of the driver while in charge of the vehicle as a driver, and not, for example, for an injury resulting from inadequate supervision, inspection, or repair of the vehicle by others.⁷⁸

b. Exemplary or Punitive Damages

In general, exemplary or punitive damages are not recoverable for ordinary negligence in the operation of a motor vehicle, although they may be awarded for wantonness, willfulness, or the like. There is some conflict as to the right to predicate punitive damages on the intoxication of a driver or his failure to stop after the accident as required by law.

In general, exemplary damages may not be recovered in a case involving an ordinary collision caused by negligence on a highway, in the absence of any intentional, malicious, or willful act.⁷⁹ In proper cases, however, punitive damages may be allowed as a means of enforcing the rules governing the use of the highways by the drivers of motor vehicles,⁸⁰ and such damages have been per-

71. N.Y.—*Boldin v. Smith*, 291 N.Y. S. 832, 161 Misc. 696.

72. Tenn.—*Wilson v. Mullen*, 11 Tenn. App. 319.

Excessive award of damages held not shown

U.S.—*Foresman v. Peplin*, D.C.Pa., 71 F.Supp. 772, affirmed, C.C.A., 161 F.2d 872.

Conn.—*Hageman v. Freeburg*, 162 A.21, 115 Conn. 469.

Ga.—*Rutland v. Dean*, 5 S.E.2d 601, 60 Ga.App. 896.

Mich.—*Anderson v. Conterio*, 5 N.W.2d 572, 303 Mich. 75.

Va.—*Remine v. Whited*, 21 S.E.2d 743, 180 Va. 1.

73. Cal.—*Robbins v. Roques*, 16 P.2d 695, 128 Cal.App. 1.

Damages to father of minor injured while gratuitous occupant of automobile not legally registered were held not too remote for recovery.—*Balian v. Ogassian*, 179 N.E.232, 277 Mass. 525, 78 A.L.R. 1021.

74. Cal.—*Robbins v. Roques*, 16 P.2d 695, 128 Cal.App. 1.

Credit for amount received from insurer

Amount collected by plaintiff on

receivership claim against insolvent insurer of owner of truck for injuries sustained in highway collision with truck operated by motor carrier to whom owner had loaned truck should be credited on judgment which plaintiff sought to recover against operator and driver of truck.—*Hudson v. Ketchum*, 133 P.2d 171, 156 Kan. 332.

75. Cal.—*Sparks v. Berntsen*, 121 P.2d 497, 19 Cal.2d 308—*Peccolo v. City of Los Angeles*, 66 P.2d 651, 8 Cal.2d 532—*Bayless v. Mull*, 122 P.2d 608, 50 Cal.App.2d 66—*Montanya v. Brown*, 88 P.2d 745, 31 Cal.App.2d 642—*Moniz v. Betten-court*, 76 P.2d 535, 24 Cal.App.2d 718—*Carnes v. Pacific Gas & Electric Co.*, 69 P.2d 998, 21 Cal.App.2d 568, rehearing denied 70 P.2d 717, 21 Cal.App.2d 568—*Ingram v. Wessendorf*, 57 P.2d 989, 14 Cal.App.2d 16—*Webster v. Harris*, 6 P.2d 88, 119 Cal.App. 46.

Statutory liability see supra § 442.

Double liability not permitted

A judgment of ten thousand dollars rendered against automobile owners who had also signed minor

operator's driver's license was excessive by five thousand dollars, since legislature intended to fix limited liability of five thousand dollars for imputed negligence against owner and signer or either of them and not to double liability where one person owns automobile and also signs license.—*Rogers v. Poppiano*, 72 P.2d 239, 23 Cal.App.2d 87.

77. Cal.—*Sparks v. Berntsen*, 121 P.2d 497, 19 Cal.2d 308—*King v. Unger*, 94 P.2d 1010, 35 Cal.App.2d 192.

78. Mo.—*Chamberlain v. Missouri Arkansas Coach Lines*, 173 S.W.2d 57, 351 Mo. 203.

79. U.S.—*Walsh v. Segale*, C.C.A. Vt., 70 F.2d 698.

Circumstances held not to warrant punitive damages

U.S.—*Walsh v. Segale*, supra.

Okl.—*Clanton v. Chrisman*, 51 P.2d 748, 174 Okl. 425.

80. Ala.—*Jones v. Colvard*, 109 So. 877, 215 Ala. 216.

Excessive speed at intersection

Miss.—*Galtney v. Wood*, 115 So. 117, 149 Miss. 56.

mitted for recklessness, wantonness, or willfulness on the part of the operator of a motor vehicle,⁸¹ and also for gross negligence.⁸²

Intoxication of driver. While some authorities have refused to permit an award of punitive damages to be predicated merely on the intoxication of the operator of a motor vehicle,⁸³ other authorities have upheld the right to recover punitive damages against an intoxicated driver.⁸⁴

Failure to stop after accident. It has been held that the conduct of a driver of a motor vehicle in failing to stop and give his name or to render assistance to the person injured after the accident, when taken in connection with all the circum-

stances, may authorize a finding of such an entire want of care, conscious indifference to consequences, and aggravating circumstances as will authorize a recovery of punitive damages.⁸⁵ However, a recovery of punitive damages has been held not allowable merely because of the failure of the operator of a motor vehicle to stop after the accident as required by statute, in the absence of any showing of wrongful motive or intent.⁸⁶

Liability of municipality. There is authority indicating that a municipality may be held liable for punitive or exemplary damages for injuries resulting from the operation of motor vehicles by its officers or employees;⁸⁷ but there is also authority denying such liability.⁸⁸

K. LIEN FOR DAMAGES CAUSED IN OPERATION

§ 561. In General

Under some statutes a claim for damages from the negligent operation of a motor vehicle is a lien thereon which, when judicially determined by a court of competent jurisdiction, dates back to the time of the injury.

Under some statutes, which have been held constitutional and valid,⁸⁹ a claim for damages resulting from the negligent operation of a motor vehicle is a lien on the vehicle,⁹⁰ the purpose of such a statute being to afford a sure remedy to the injured party in instances where the damage comes within the purview of the statute.⁹¹ Such a statute does not relieve the person whose negligence caused the injury of personal liability therefor⁹² or subject the owner to any personal liability merely because of his ownership;⁹³ but the lien

attaches regardless of any personal liability for the injury.⁹⁴

The lien exists only if there are present the essential elements prescribed in the statutes.⁹⁵ Depending on the terms of the statute, the lien may be limited to cases where the automobile was operated by the owner or with his consent⁹⁶ or may extend to all cases in which the car causes injury.⁹⁷ Under some statutes, before plaintiff is entitled to a lien, there must be a showing that the vehicle was being operated in excess of a prescribed speed limit and in willful violation of the statute.⁹⁸

Nature or character of lien. The lien is one of statutory creation;⁹⁹ it is of fortuitous origin, not arising out of contract or created in aid of in-

81. Ala.—Barrett v. McFerren, 165 So. 226, 231 Ala. 382—Smith v. Clemmons, 112 So. 442 216 Ala. 52 Pa.—Heffelfinger v. Schell, Com Pl., 50 Dauph Co. 1.

SC—Dickson v. Inter-Carolinas Motor Bus Co., 159 S.E. 625, 161 S.C. 297.

82. Miss.—Hadar v. Lockeby, 169 So. 691, 176 Miss. 660.

83. Cal.—Strauss v. Buckley, 65 P. 2d 1352, 20 Cal.App.2d 7.

D.C.—Giddings v. Zellan, 160 F.2d 585, 82 U.S.App. Div. 92, certiorari denied Zellan v. Giddings, 68 S.Ct. 61, 332 U.S. 759, 92 L.Ed. —.

84. Ariz.—Ross v. Clark, 274 P. 639, 35 Ariz. 60.

Ark.—Miller v. Blanton, 210 S.W.2d 293.

85. Ga.—Battle v. Kilcrease, 189 S.E. 573, 54 Ga.App. 808.

86. Md.—Davis v. Gordon, 36 A.2d 699, 183 Md. 129, 156 A.L.R. 1109.

87. Fla.—City of Miami v. McCorkle, 199 So. 575, 145 Fla. 109.

88. S.C.—Lineberger v. City of Greenville, 182 S.E. 101, 178 S.C. 47.

89. S.C.—Merchants', etc., Bank v. Brigman, 91 S.E. 332, 106 S.C. 362, L.R.A.1917E 925.

42 C.J. p 1185 note 82.

90. Tenn.—Lynde v. Browning, 2 Tenn.Civ.App. 262.

42 C.J. p 1185 note 83.

Lien confined to injured person

Before amendment, the statute creating lien and right of attachment against motor vehicles for injury or damage done gave such right only to the person who received the injury, but no lien or right of action was given in favor of the father and mother or other beneficiaries under the terms of Lord Campbell's Act.—Hunter v. Boyd, 28 S.E.2d 412, 203 S.C. 518.

91. S.C.—Tolbert v. Buick Car, 140 S.E. 693, 142 S.C. 362.

No extraterritorial effect

Statute is a police regulation, de-

signed to promote the safety of inhabitants of the state, and was not intended to be given extraterritorial effect so as to be applicable where automobile was driven into another state and therein involved in an accident.—C. I. T. Corporation v. Guy, 195 S.E. 659, 170 Va. 16.

92. S.C.—Hall v. Locke, 110 S.E. 385, 118 S.C. 267.

93. S.C.—Hall v. Locke, supra.

94. S.C.—Hall v. Locke, supra.

95. S.C.—State v. Campbell, 155 S.E. 750, 159 S.C. 128.

Tenn.—Hinkle v. Smith, 65 S.W.2d 581, 16 Tenn.App. 593.

96. Tenn.—Lynde v. Browning, 2 Tenn.Civ.App. 262.

97. S.C.—Denny v. Doe, 108 S.E. 95, 116 S.C. 307.

42 C.J. p 1185 note 86.

98. Tenn.—Kittrell v. Holden, 5 Tenn.App. 592.

99. Tenn.—Parker-Harris Co. v. Tate, 188 S.W. 54, 135 Tenn. 509, L.R.A.1916F 935.

dustry or trade,¹ and liens created in favor of landlords, mechanics, agistors, and the like furnish no clear analogy since the injured person asserting the lien against the vehicle has contributed nothing to the value or security of the property subject to the lien.²

Time lien attaches. A judicial determination by a court of competent jurisdiction that the essential elements of the lien are present, with a fixing of the amount of damages by a final judgment of such court, is also a judicial determination that, under the statute, a lien on the offending vehicle came into existence and attached to the vehicle at the moment the injury was inflicted;³ in such case the whole world is put on notice, referable to the time of the accident, of the existence of such lien.⁴ In other words, when the existence and amount of the lien have been judicially determined and fixed by a final judgment of a court of competent jurisdiction, such lien dates back to the moment of the injury and attaches to the offending vehicle from that time.⁵

Vehicles owned and operated by governmental agencies. A statute imposing a lien on the vehicle, although couched in general terms, has been held not to include vehicles owned and operated by governmental agencies of the state for public purposes.⁶

Lien for damages to highway. Under some statutes a vehicle operated in violation of specified statutes is subject to a lien for the amount of damages caused by it to the highway,⁷ and the validity of such statutes has been upheld.⁸

§ 562. Priority

The priority of the lien with respect to other liens, or

with respect to the rights of a bona fide purchaser of the vehicle, depends on the terms of the statute creating the lien.

The lien for damages resulting from the negligent operation of the motor vehicle does not take precedence over a prior contractual lien⁹ unless such is the clear intention of the statute.¹⁰ It may, however, be given priority over other liens.¹¹

Bona fide purchasers. Under some statutes the lien subsists and renders the vehicle subject to attachment, even though it has been sold to one who has no knowledge of the accident.¹² Under other statutes, which do not speak affirmatively with respect to the conflicting rights of the lienor and a bona fide purchaser of the vehicle, the rights of the purchaser acquired in good faith prior to institution of the suit to enforce the lien are held superior to the lien claimed by the injured person,¹³ although in such a case, where the owner has sold the vehicle to a bona fide purchaser after the accident, thus preventing the injured person from enforcing and satisfying his lien, the injured person may be entitled to recover from the owner the value of the lien.¹⁴

§ 563. Enforcement

- a. In general
- b. Action as in rem or in personam

a. In General

A lien against a motor vehicle for damages arising out of its operation may, in the absence of statute providing otherwise, be foreclosed by a bill in equity. Under some statutes a person entitled to a lien may attach the vehicle.

In the absence of statutory provision prescribing any particular means of enforcing a lien against a motor vehicle for damages arising out of its

1. Tenn.—Rent-A-Car Co. v. Bel-ford, 45 S.W.2d 49, 163 Tenn. 590.
2. Tenn.—Rent-A-Car Co. v. Bel-ford, *supra*.
3. S.C.—Waldrop v. M. & J. Finance Corporation, 183 S.E. 460, 178 S.C. 527—State v. Campbell, 155 S.E. 750, 159 S.C. 128.
4. S.C.—Waldrop v. M. & J. Finance Corporation, 183 S.E. 460, 178 S.C. 527—State v. Campbell, 155 S.E. 750, 159 S.C. 128.
5. S.C.—State v. Campbell, *supra*.

Trover and conversion

Lienholder who obtained judgment could recover in trover and conversion against chattel mortgagee of automobile to whom mortgagor surrendered automobile after lienholder sustained his injuries.—Waldrop v. M. & J. Finance Corporation, 183 S.E. 460, 178 S.C. 527.

6. SC.—Brooks v. One Motor Bus Carrying 1937-38 South Carolina License V 1357, Motor No. 45590, Serial No. 40476, 3 S.E.2d 42, 190 S.C. 379.

7. Ill.—Mammina v. Alexander Auto Service Co., 164 N.E. 173, 333 Ill. 158, 61 A.L.R. 649.

8. Ill.—Mammina v. Alexander Auto Service Co., *supra*.

Damage to ornamental light post between curb and sidewalk was held damage to "public highway" within statute giving lien against motor vehicle causing such damage.—Mammina v. Alexander Auto Service Co., *supra*.

9. Tenn.—Parker-Harris Co. v. Tate, 188 S.W. 54, 135 Tenn. 509, L.R.A. 1916F 935.
- 42 C.J. p 1185 note 91.

10. Tenn.—Parker-Harris Co. v. Tate, *supra*.

11. S.C.—Williams v. Garlington, 127 S.E. 20, 131 S.C. 289.
- 42 C.J. p 1186 note 93.

12. S.C.—Tate v. Brazier, 105 S.E. 413, 115 S.C. 283.

13. Tenn.—Rent-A-Car Co. v. Bel-ford, 45 S.W.2d 49, 163 Tenn. 590.

Reason for rule

Enforcement of the lien against a bona fide purchaser would only cause pecuniary loss to him, in an effort to compensate another for a wrong for which such purchaser is not responsible, either directly or indirectly, and in the correction of one wrong another of equal injustice would result.—Rent-A-Car Co. v. Bel-ford, *supra*.

14. Tenn.—Rent-A-Car Co. v. Bel-ford, *supra*.

operation, it has been held that foreclosure of the lien should be by a bill in equity.¹⁵ Under a statute giving a lien for damages to the public highway, discussed supra § 561, it has been held that where the public authorities have acquired possession of the vehicle by voluntary act of the driver, and without any unlawful act on their part, they have a right to hold it for the lien.¹⁶

Under some statutes the person entitled to a lien on the vehicle is given a right to attach the vehicle,¹⁷ in which case the attachment may be made in the manner provided for attachments generally,¹⁸ except that, under some statutes creating the lien, it is not necessary to show one of the general grounds of attachment prescribed in the general attachment statutes, such as departure of defendant, or removal of property, from the state.¹⁹ However, an attachment is not necessary to create the lien,²⁰ the office of the attachment being merely to seize the property and place it in the custody of the court.²¹

Waiver or abandonment of attachment. The rendition of a personal judgment against defendant has been held not a waiver of the attachment.²² The fact that the trial court did not order the attached vehicle sold does not necessarily operate as an abandonment of the attachment.²³

Claim of homestead. The lien may be enforced

notwithstanding the owner's claim that the vehicle is part of his homestead.²⁴

b. Action as in Rem or in Personam

An action by one having a lien against a motor vehicle for damages may be maintained in rem against the vehicle, or in personam against those responsible for the damages, or jointly against the vehicle and the individuals.

Under statutes giving the injured person a lien and the right to attach the vehicle, such injured person has an action in rem against the vehicle.²⁵ He may maintain such an action in rem against the vehicle alone, without joining the owner or operator of the vehicle as a party defendant,²⁶ although in such case no personal judgment is recoverable.²⁷ The injured person is not precluded, however, from joining as a party defendant anyone responsible for the injury,²⁸ and he may proceed at the same time against the motor vehicle in rem and the motorist in personam,²⁹ although he is not obliged to bring a joint action against the owner and the vehicle,³⁰ but may bring an action solely in personam against the motorist.³¹

Venue. Under some statutes, the proceedings in rem against the vehicle may be instituted in the county in which the injury occurred and where the vehicle may be found;³² but, where the action is also brought against an owner or driver who

15. Ill.—*Mammina v. Alexander Auto Service Co.*, 164 N.E. 173, 333 Ill. 158, 61 A.L.R. 649.

16. Ill.—*Mammina v. Alexander Auto Service Co.*, supra.

17. S.C.—*Richbourg v. Ragin*, 138 S.E. 801, 140 S.C. 250.

Ancillary attachment

The lien can be enforced by an ancillary attachment and not only by an original attachment—*Sadler v. Murphy*, 77 S.W.2d 70, 18 Tenn.App. 340.

Bond for release of attachment

Where a bond has been given for the release of the vehicle, after its attachment, a judgment may be rendered on the bond.—*Gemmell Bros. Co. v. Durham*, 11 Tenn.App. 97.

18. S.C.—*Richbourg v. Ragin*, 138 S.E. 801, 140 S.C. 250.

42 C.J. p 1186 note 94.

Attachment held proper

Ancillary attachment against automobile in action against motorist for injuries was not void where affidavit and attachment writ stated that suit had been commenced by summons upon warrant before justice of peace, amount of claim laid being under five hundred dollars, and that claim was just.—*Sadler v. Murphy*, 77 S.W.2d 70, 18 Tenn.App. 340.

19. S.C.—*Richbourg v. Ragin*, 138 S.E. 801, 140 S.C. 250.

20. S.C.—*Waldrop v. M. & J. Finance Corporation*, 183 S.E. 460, 178 S.C. 527.

Tenn.—*Keller v. Federal Bob Brannon Truck Co.*, 269 S.W. 914, 151 Tenn. 427—*Sadler v. Murphy*, 77 S.W.2d 70, 18 Tenn.App. 340.

21. Tenn.—*Keller v. Federal Bob Brannon Truck Co.*, 269 S.W. 914, 151 Tenn. 427—*Sadler v. Murphy*, 77 S.W.2d 70, 18 Tenn.App. 340—*Kittrell v. Holden*, 5 Tenn.App. 592.

22. Tenn.—*Sadler v. Murphy*, 77 S.W.2d 70, 18 Tenn.App. 340.

23. Tenn.—*Sadler v. Murphy*, supra.

Attachment sustained

Ancillary attachment against automobile was not abandoned because justice did not order attached property sold, where justice, in addition to rendering personal judgment against defendant, adjudged that attachment be sustained and on trial de novo circuit court sustained attachment and ordered its enforcement.—*Sadler v. Murphy*, supra.

24. S.C.—*In re McFadden*, 99 S.E. 838, 112 S.C. 258.

25. S.C.—*Mahon v. Burkett*, 158 S.E. 141, 160 S.C. 48—*Tolbert v. Buick Car*, 140 S.E. 693, 142 S.C. 362.

Appearance and representation of vehicle

In an action in rem the vehicle sued may be represented and appear in court and defend and exercise all rights it may have.—*Weatherford v. Radcliffe*, D.C.S.C., 63 F.Supp. 107.

26. S.C.—*Tolbert v. Buick Car*, 140 S.E. 693, 142 S.C. 362.

Assumption as to owner's knowledge

It is not incumbent on plaintiff to find and notify the owner of his intentions; it is to be assumed that the owner of the vehicle will keep track thereof, and there is nothing to prevent the owner from intervening and setting up his rights to the attached vehicle.—*Tolbert v. Buick Car*, supra.

27. S.C.—*Raines v. Poston*, 38 S.E. 2d 145, 208 S.C. 406.

28. S.C.—*Tolbert v. Buick Car*, 140 S.E. 693, 142 S.C. 362.

29. U.S.—*Weatherford v. Radcliffe*, D.C.S.C., 63 F.Supp. 107. S.C.—*Raines v. Poston*, 38 S.E.2d 145, 208 S.C. 406.

30. U.S.—*Weatherford v. Radcliffe*, D.C.S.C., 63 F.Supp. 107.

31. S.C.—*Raines v. Poston*, 38 S.E. 2d 145, 208 S.C. 406.

32. S.C.—*Mahon v. Burkett*, 158 S.E. 141, 160 S.C. 48.

resides in another county, the proper venue, in so far as the action is in personam against the individual defendant, is the county of defendant's residence.³³ One who has attached the vehicle and also joined defendants in person may waive any personal judgment and proceed in rem in the county where the accident happened and the attachment was made.³⁴

Failure to name vehicle in summons. Where an action is brought against the driver of the motor vehicle and the personal defendant is duly served

with the summons and complaint, and the damage-feasant vehicle is seized under a warrant of attachment regularly issued, such a suit includes an action in rem against the vehicle, although the vehicle is not named as a party defendant in the summons,³⁵ particularly where such vehicle is named in the captions of the complaint and of the affidavits and bond on which the warrant of attachment was issued;³⁶ under such circumstances the jurisdiction of the damage-feasant motor vehicle is acquired by its seizure under the attachment proceedings.³⁷

IX. OTHER INJURIES TO MOTOR VEHICLES OR OCCUPANTS THEREIN

§ 564. In General

- a. In general
- b. Injuries from defects in private premises

a. In General

A municipality is not liable for injuries to motor vehicles or occupants thereof occasioned by the failure of its police officers to prevent such injuries, and a purchaser of a motor vehicle is generally not responsible for injuring the vehicle prior to purchase.

In accordance with the principle that a municipal corporation is not responsible for injuries to third persons caused by its police officers when acting in an official capacity, as discussed in the C.J.S. title Municipal Corporations § 775, also 43 C.J. p 964 note 50—p 967 note 67, a municipal corporation may not be held liable for failure of its police to prevent injury to a motorist from acts of third persons.³⁸ Where a prospective purchaser of a motor vehicle injures the car while learning to operate it under the guidance of the owner's agent, the law will not put the purchaser to the hazard of

liability for such damage in the absence of positive negligence.³⁹

b. Injuries from Defects in Private Premises

An owner of private premises generally is not liable for injury to a motor vehicle or its occupant unless there is negligence or a breach of duty, but liability may accrue by reason of the maintenance of property adjacent to a public way in a defective or dangerous condition.

In the absence of a breach of duty or willful negligence, there is no liability for an injury to a motor vehicle or to its occupants from defects in private premises.⁴⁰ However, the general rule that owners of property abutting on, or adjacent to, highways or streets are liable for injuries on the private premises to passers-by arising from a defective or dangerous condition, as discussed in the C.J.S. title Negligence § 77, also 45 C.J. p 859 notes 58–69, applies to a motorist injured on private premises adjacent to a highway or street,⁴¹ but the rule is applicable only when such premises are so closely adjacent that a traveler by a slight deviation might suffer injury.⁴²

33. S.C.—Mahon v. Burkett, *supra*.

34. S.C.—Williams v. Garlington, 127 S.E. 20, 131 S.C. 289.

35. S.C.—Raines v. Poston, 38 S.E.2d 145, 208 S.C. 406.

36. S.C.—Raines v. Poston, *supra*.

37. S.C.—Raines v. Poston, *supra*.

38. Pa.—Brogan v. City of Philadelphia, 29 A.2d 671, 346 Pa. 208.

Splashing mortar

A municipality is not liable because its police failed to prevent children from throwing objects into a mortar box adjoining the street, which mortar injured a passing motorist.—Brogan v. City of Philadelphia, *supra*.

39. Wash.—Bertrand v. Hunt, 154 P. 804, 89 Wash. 475.

40. N.Y.—Bennett v. City of Mt.

Vernon, 276 N.Y.S. 205, 243 App. Div. 119.

Governmental function

A township is not liable for injuries to a driver of its truck on private premises while engaged in work involving a governmental function.—Casey v. Bridgewater Tp., Somerset County, 161 A. 603, 107 N.J.Law 163.

41. Kan.—Durst v. Wareham, 297 P. 675, 132 Kan. 785.

Guard rail or barrier

Unless an excavation has been made on the adjacent property by the owners, or unless they have created a dangerous condition, they have no legal obligation to maintain a guard rail or barrier at the lot line to protect travelers along the public way.—Kimball v. City of Sioux Falls, S.D., 20 N.W.2d 873.

Traveler is not a trespasser so as to prevent liability.—Durst v. Wareham, 297 P. 675, 132 Kan. 785.

42. Basis of liability is not the closeness of the danger on the private premises to the highway or street, but the danger to travelers on the public way.—Durst v. Wareham, *supra*.

Seventy-five feet

Where excavation on land, into which automobile fell, causing injury to occupants, was seventy-five feet from highway, county in possession of land during course of transforming it to park uses was not liable notwithstanding private road led from street.—Bennett v. City of Mt. Vernon, 276 N.Y.S. 205, 243 App. Div. 119.

The duty owed by the owner of the private premises to the traveler varies somewhat with the status of the traveler. In the case of a trespassing motorist, the only duty owed to him is to refrain from active negligence and willful injury,⁴³ but, where a former highway is acquired by private owners, a duty exists to warn all travelers in some appropriate and unmistakable manner that they have no right to proceed on such premises.⁴⁴ A motorist who is a mere licensee must take private premises as he finds them, and is not entitled to have the premises maintained in good condition.⁴⁵

Where the owner of private premises by invitation, express or implied, induces the use by motorists of a passageway over his premises, he is bound to use ordinary care to keep it safe for passage,⁴⁶ and liability attaches when an invitee is injured as a result of a breach of such duty.⁴⁷ While there is no duty to warn an invitee of apparent defects or obstructions,⁴⁸ a failure to give proper warning, when coupled with other negligence, constitutes a violation of duty.⁴⁹ While proper guard rails, signals, or barriers may be required as to

invitees, there is no duty to furnish a rail or barrier sufficient against all contingencies,⁵⁰ and, where the proximate cause of the injury is the driving at illegal speed, rather than a defect in the guard rail, there is no liability.⁵¹

Contributory negligence. If carelessness of plaintiff causes or efficiently contributes to his injury, his contributory negligence bars his recovery,⁵² and, where the negligence of plaintiff is the sole or contributing cause of the injury, liability does not attach.⁵³ An invitee, however, is entitled to assume that the premises are free from dangerous obstructions.⁵⁴ The rule that an automobile driver is required to drive at night at such a rate of speed that he can stop within the distance within which his headlights will disclose objects ahead, as discussed supra § 293, has been held to be inapplicable to constitute contributory negligence on the part of a driver proceeding at night at slow speed on private premises.⁵⁵

Procedure. Under evidence showing that the injuries complained of were due to dangers on de-

43. Md.—Susquehanna Power Co. v. Jeffress, 150 A. 788, 159 Md. 465, 71 A.L.R. 1198.

Authorized removal of former highway bridge by private owner does not breach any duty to a motorist.—Susquehanna Power Co. v. Jeffress, supra.

Hazards of nature, such as nighttime or fog, do not impose liability to a trespassing motorist.—Susquehanna Power Co. v. Jeffress, supra.

Trespasses by others does not enlarge a trespasser's rights.—Susquehanna Power Co. v. Jeffress, supra.

44. Md.—Susquehanna Power Co. v. Jeffress, supra.

Extent of warning

There is no duty to make further progress along the abandoned highway impossible.—Susquehanna Power Co. v. Jeffries, supra.

Place of warning

The required warning should be at a great enough distance from the end of the highway to prevent any danger to a traveler of ordinary prudence who in the exercise of reasonable care and caution should observe and heed suitable and adequate notice.—Susquehanna Power Co. v. Jeffress, supra.

45. N.Y.—Bennett v. City of Mt. Vernon, 276 N.Y.S. 205, 243 App. Div. 119.

46. Kan.—Glenn v. Montgomery Ward & Co., 163 P.2d 427, 160 Kan. 483.

Mich.—Girard v. Auto Specialties

Athletic Ass'n, 1 N.W.2d 538, 300 Mich. 272.

N.Y.—Standard Acc. Ins. Co. of Detroit, Mich., v. Sanco Piece Dye Works, Inc., 64 N.Y.S.2d 585.

R.I.—Reddington v. Getchell, 101 A. 123, 40 R.I. 463

Va.—Acme Markets v. Remschel, 24 S.E.2d 430, 181 Va. 171.

Obstructions

An owner of a private road is liable for injuries to a motorist caused by obstructions placed by an independent contractor.—Westmoreland Heights v. Martin, 13 Tenn.App. 142.

Private toll bridge

Wash.—Overton v. Wenatchee Beebe Orchard Co., 183 P.2d 473, 28 Wash. 2d 377, 173 A.L.R. 616.

47. Va.—Acme Markets v. Remschel, 24 S.E.2d 430, 181 Va. 171.

48. Mass.—Partridge v. United Elastic Corporation, 192 N.E. 460, 288 Mass. 138.

In daylight warning of absence of guard or railing of bridge is not required.—Partridge v. United Elastic Corporation, supra.

49. Mass.—Partridge v. United Elastic Corporation, supra.

Small steel cable or wire

(1) A contractor who places a small steel cable or wire across a private road without any warning is liable for injuries to a motorist who runs into such cable or wire at night.—Westmoreland Heights v. Martin, 13 Tenn.App. 142.

(2) Liability for the negligence of the contractor extends to the owner of

such road who must respond for the injuries caused by the independent contractor.—Westmoreland Heights v. Martin, supra.

Turning off lights at night without warning violates a duty owed to an invitee.—Partridge v. United Elastic Corporation, 192 N.E. 460, 288 Mass. 138.

50. Wash.—Overton v. Wenatchee Beebe Orchard Co., 183 P.2d 473, 28 Wash. 2d 377, 173 A.L.R. 616.

Anticipation of unusual accident

An owner of private premises has no duty to anticipate an accident caused by a motorist illegally speeding and losing control of the car.—Overton v. Wenatchee Beebe Orchard Co., supra.

Maintenance of proper barrier, signal, or marker prevents liability.—Fricke v. St. Louis Bridge Co., 32 N.E.2d 1016, 309 Ill.App. 279.

51. Wash.—Overton v. Wenatchee Beebe Orchard Co., 183 P.2d 473, 28 Wash. 2d 377, 173 A.L.R. 616.

52. Va.—Acme Markets v. Remschel, 24 S.E.2d 430, 181 Va. 171.

53. Ill.—Fricke v. St. Louis Bridge Co., 32 N.E.2d 1016, 309 Ill.App. 279.

Plaintiff held not negligent

N.Y.—Giardina v. Garnerville Holding Corporation, 38 N.Y.S.2d 913, 265 App.Div. 1004, affirmed 50 N.E.2d 1015, 291 N.Y. 619.

54. Va.—Acme Markets v. Remschel, 24 S.E.2d 430, 181 Va. 171.

55. Tenn.—Westmoreland v. Martin, 13 Tenn.App. 142.

defendant's premises, of which dangers defendant had prior knowledge, it is then incumbent on defendant to furnish evidence of his exercise of proper care to prevent injury to others.⁵⁶ The general rules of evidence in civil actions govern as to the admissibility⁵⁷ and weight and sufficiency⁵⁸ of the evidence. In accordance with the rules applicable in civil actions generally involving negligence, as discussed in the C.J.S. title Negligence §§ 252-263, also 45 C.J. p 1279 note 29-p 1316 note 8, questions of plaintiff's status,⁵⁹ defendant's negligence,⁶⁰ and plaintiff's contributory negligence⁶¹ are questions for the jury. Where a verdict is not sustained by the evidence, proper judgment may be entered notwithstanding the verdict.⁶²

§ 565. Injuries by Animals

- a. Liability
- b. Actions

56. Pa.—Brogan v. City of Philadelphia, 29 A.2d 671, 346 Pa. 208.

57. Evidence held admissible
Mass.—Partridge v. United Elastic Corporation, 192 N.E. 460, 288 Mass. 138.

Evidence held inadmissible
Mo.—Fishang v. Eyermann Contracting Co., 63 S.W.2d 30, 333 Mo. 874.

58. Evidence held sufficient
(1) To warrant finding of negligence.
Mass.—Partridge v. United Elastic Corporation, 192 N.E. 460, 288 Mass. 138.

Mo.—Fishang v. Eyermann Contracting Co., 63 S.W.2d 30, 333 Mo. 874
(2) To sustain finding that defendant's employee acted within the scope of his employment—Fishang v. Eyermann Contracting Co. supra.

(3) To support finding of prima facie case in favor of plaintiff—Brogan v. City of Philadelphia, 29 A.2d 671, 346 Pa. 208.

(4) To warrant finding that plaintiff was an invitee—Partridge v. United Elastic Corporation, supra.

59. N.J.—Miller v. Evergreen Cemetery Co., 166 A. 924, 11 N.J.Misc. 558.

Plaintiff as invitee
N.J.—Miller v. Evergreen Cemetery Co., supra.

Extent of invitation
R.I.—Reddington v. Getchell, 101 A. 123, 40 R.I. 463.

Evidence held sufficient to take question to jury
Me.—Beckwith v. Somerset Theatres, 27 A.2d 596, 139 Me. 65.

60. Kan.—Durst v. Wareham, 297 P. 675, 132 Kan. 785.

Pa.—Brogan v. City of Philadelphia, 29 A.2d 671, 346 Pa. 208.

Proximate cause
Kan.—Durst v. Wareham, 297 P. 675, 132 Kan. 785.

Evidence held sufficient to take question to jury
Me.—Beckwith v. Somerset Theatres, 27 A.2d 596, 139 Me. 65.

Evidence held insufficient to take question to jury
Md.—Susquehanna Power Co. v. Jeffress, 150 A. 788, 159 Md. 465, 71 A.L.R. 1198.

61. Ill.—Moore v. Ohio Oil Co., 241 Ill.App. 388
Mass.—Partridge v. United Elastic Corporation, 192 N.E. 460, 288 Mass. 138
Mo.—Fishang v. Eyermann Contracting Co., 63 S.W.2d 30, 333 Mo. 874
R.I.—Reddington v. Getchell, 101 A. 123, 40 R.I. 463.

Evidence held sufficient to take question to jury
Me.—Beckwith v. Somerset Theatres, 27 A.2d 596, 139 Me. 65.

62. Ill.—Fricke v. St. Louis Bridge Co., 32 N.E.2d 1016, 309 Ill.App. 279.
Judgment for defendant
Ill.—Fricke v. St. Louis Bridge Co., supra.

63. Ala.—Pelham v. Spears, 132 So. 886, 222 Ala. 365.
Iowa.—Strait v. Bartholomew, 191 N.W. 811, 195 Iowa 377.
La.—Demarco v. Gober, 140 So. 64, 19 La.App. 236.
N.Y.—Carpenter v. Bledkapp, 61 N.Y.S.2d 419, 186 Misc. 5
Pa.—Tassoni v. LeBoutillier, 196 A. 534, 130 Pa.Super. 303.
Common-law right of owner to per-

a. Liability

- (1) In general
- (2) Animals driven along public way
- (3) Injuries by dogs
- (4) Runaways
- (5) Contributory negligence

(1) In General

The owner or keeper of domestic animals permitted to be at large is not liable for injuries by such animals to motor vehicles or occupants thereof in the absence of negligence, violation of statute, or knowledge or notice of a vicious or mischievous propensity.

The general rule is that, in the absence of negligence, violation of regulatory provisions, or the presence of a vicious or mischievous propensity of which defendant has knowledge or notice, the owner of domestic animals permitted to be at large on a public way is not liable for injuries sustained by a motor vehicle or its occupants through a collision with such animals.⁶³ So, if some act on the

mit animal on public highway see Animals § 107.

Liability generally for injuries by domestic animals see Animals § 145

American Law Institute Restatement, Torts

(1) The rule that "one who possesses or harbors a domestic animal, which he does not have reason to know to be abnormally dangerous but which is likely to do harm unless controlled, is subject to liability for harm done by such animal if, but only if, (a) he fails to exercise reasonable care to confine or otherwise control it, and (b) the harm is of a sort which it is normal for animals of its class to do," stated in Restatement, Torts § 518 (1), has been held applicable to the liability of owners of animals running at large for injuries resulting from a collision between such animals and a motor vehicle, the reason being the widespread use of motor vehicles.—Bender v. Welsh, 25 A.2d 182, 344 Pa. 392.

(2) An unattended horse on the highway at night is in obvious danger of becoming involved in a collision with an automobile which is being carefully driven, within the rule as to harm necessary.—Bender v. Welsh, supra.

Act in emergency

Instinctive act of owner, confronted by his approaching animal on a highway, in throwing up his hands, does not charge him with either fault or negligence.—Demarco v. Gober, 140 So. 64, 19 La.App. 236.

Lack of control of animal by owner indicates absence of negligence.—Demarco v. Gober, supra.

part of an animal running at large is brought about by an agency over which the owner had no control, and that which the animal did was not what its natural instincts or habit would cause it to do, or the act was one which its owner would not reasonably have anticipated on account of its natural disposition, no liability of the owner to respond in damages for injuring a motor vehicle or its occupant results.⁶⁴

Liability has been deemed to exist under a general statute imposing liability on everyone for want of ordinary care or skill in the management of property or person.⁶⁵ Where the owner of domestic animals negligently permits them to be at large in violation of law, he may be liable for injuries sustained by a motor vehicle or its occupants through a collision with them,⁶⁶ but the general rule of negligence that, unless the injury complained of is the proximate result thereof, and the person injured a member of the class intended to be protected by the statute and the injury of the kind

the statute intended to prevent, the violation of a statute does not constitute actionable negligence, as discussed in the C.J.S. title Negligence § 19, also 45 C.J. p 726 note 75—p 730 note 9, applies.⁶⁷ A statutory provision that the owner or keeper of animals running at large is not liable for injuries caused by such animals when the owner or keeper has no knowledge that the animals are at large and has used reasonable care in restraining the animal has been held applicable to collisions between animals running at large and motor vehicles.⁶⁸

While no liability attaches by reason of the mere fact that an animal escapes from an enclosure in the absence of negligence,⁶⁹ even in the absence of statute, it has been held that his liability may be predicated on negligence where he places animals in an insufficient inclosure from which they stray on the highway, regardless of whether there is a known vicious propensity,⁷⁰ provided such negligence is the proximate cause of the injury.⁷¹

Fact that animal approached public way from owner's premises does not indicate owner's negligence.—Cusimano v. Giannobile, La.App., 15 So 2d 87.

Foreseeable injury

Owner, in exercise of care, foreseeing that injury would result from mule running at large near highway, would be negligent.—Lins v. Boeckeler Lumber Co., 299 S.W. 150, 221 Mo. App. 181.

Owner's duty

The owner of a horse had the duty to look after it and to use due care to control it; otherwise he was liable for damages horse caused when it ran into automobile upon a public highway.—Tassoni v. LeBoutillier, 196 A. 534, 130 Pa.Super. 303.

64. Ind.—Dyer v. Noll, 14 NE 2d 760, 105 Ind.App. 241.

65. U.S.—Bartlett v. Galleppi Bros., D.C.Cal., 33 F.Supp. 277, affirmed, C.C.A., Galleppi Bros. v. Bartlett, 120 F.2d 208.

Cal.—Jackson v. Hardy, 160 P.2d 161, 70 Cal App 2d 6.

66. Mo.—Moss v. Bonne Terre Farming & Cattle Co., 10 S.W.2d 338, 222 Mo.App. 808.

42 C.J. p 828 note 61.

Liability for negligent injury by animals generally see Animals § 149. Statutory regulation of animals running at large in general see Animals §§ 108–111.

Person exercising acts of ownership and control, even though not legally the owner, is liable.—Abraham v. Castille, La.App., 158 So. 650.

Prima facie negligence

An owner failing to "restrain" a

boar running at large on the highway in violation of statute is prima facie negligent as to the driver of an automobile colliding with the animal.—Hansen v. Kemmish, 208 N.W. 277, 201 Iowa 1008, 45 A.L.R. 498.

67. Ala.—Crittenden v. Speake, 198 So. 137, 240 Ala. 133

Statutes held inapplicable

(1) A statute imposing liability on animal owners for damages to property from permitting animals to go at large on premises of another has no application to highways so as to impose liability for injuries by animals running at large upon highways to motor vehicles or occupants thereof.

Ala.—Crittenden v. Speake, supra—Pelham v. Spears, 132 So. 886, 222 Ala. 365.

(2) So, a statute of similar nature is deemed intended to protect agricultural crops from the ravages of straying domestic animals and not motorists upon the highways.—Champlin Refining Co. v. Cooper, 86 P.2d 61, 184 Okl. 153.

(3) Statute imposing liability on stock owner for knowingly, voluntarily, negligently, or willfully permitting an animal to go at large in stock law precinct controls, rather than subsequently enacted statute.—Crittenden v. Speake, supra.

68. Ill.—Fugett v. Murray, 35 N.E. 2d 946, 311 Ill.App. 323.

69. N.C.—Bethune v. Bridges, 45 S. E.2d 711, 228 N.C. 623.

Absence of foreseeable neglect by owner indicates absence of negligence.—Bethune v. Bridges, supra.

Absence of duty to fence

Owners of pasture lands had absolute right to pasture their cattle on such lands without fencing lands from public highway.—Gholson v. Parrish, Tex.Civ.App., 92 S.W.2d 1113.

70. Ohio.—Hugfelder v. Convent of the Good Shepherd, Toledo, Ohio, 9 N.E.2d 4, 55 Ohio App. 158.

Pa.—Lutz v. Frey, 10 Pa Dist. & Co. 215, 40 Lanc L Rev 521, 75 Pittsb Leg J. 456, 41 York Leg Rec. 60.

42 C.J. p 828 note 62.

Duty of owner to inclose domestic animals generally see Animals § 185.

Law of suretyship inapplicable

Owner's liability for damage to automobile caused by animals which had gone astray was to be measured by law of negligence rather than that of suretyship.—Bethune v. Bridges, 46 S.E.2d 711, 228 N.C. 623.

Care required

The owner of a calf is bound to exercise ordinary care and prudence to keep and maintain a fence around the pasture in which it was confined, and to adopt means that are reasonably suitable to prevent it from getting upon the highway.—Strait v. Bartholomew, 191 N.W. 811, 195 Iowa 377.

71. Wis.—Fox v. Koehnig, 209 N.W. 708, 190 Wis. 528.

42 C.J. p 829 note 63.

Held not proximate cause

Even though an insufficient barnyard fence resulted in a horse running loose upon a highway, such negligence was not the proximate cause of injury to a motor vehicle and occupants resulting from a collision

However, where liability is charged for violation of statute in that an insufficient fence was maintained, where the escape was due to acts of an independent agency over which the owner of the animal had no control and the situation was one which he could not have foreseen, the owner is not liable.⁷²

Injury to owner of animals. Where plaintiff, owner of animals being transported, engaged a trucker to transport the animals and assisted the trucker in course of transit but was injured when an animal fell from the truck onto him, the standard of care imposed on the trucker was that which a reasonably prudent person would have employed under the same or similar circumstances.⁷³

Wild animals. Since, as stated in Highways § 177, the construction, improvement, and repair of public highways is a governmental function primarily belonging to the state, failure of the state to provide suitable guards, railings, or fences so as to prevent access of wild animals on the highways does not impose liability on the state for injuries to a motorist caused by a collision between the motor vehicle and a wild animal.⁷⁴

(2) Animals Driven along Public Way

In the absence of a breach of a legal duty, the owner or keeper of domestic animals being driven along or across a public way is not liable for injuries occasioned to motor vehicles or occupants thereof.

with the horse which was obscured by dust—Fox v. Koehning, *supra*.

72. La.—Abraham v. Castille, App., 158 So 650.

Statute construed

The term "fence," in provision that no person owning or controlling livestock shall willfully or negligently permit such livestock to stray upon a public highway both sides of which are adjoined by property separated from such highway by a fence, is liberally construed in a civil action in determining whether such a fence exists and requisites thereof—Jackson v. Hardy, 160 P.2d 161, 70 Cal App.2d 6.

73. Minn.—Anderson v. Hegna, 2 N. W.2d 820, 212 Minn. 147.

74. N.Y.—Mann v. State, 47 N.Y.S. 2d 553.

75. Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal. App. 399.

76. Cal.—Olden v. Babicora Development Co., *supra*.

Liability generally in driving domestic animals along a public highway see Animals § 149 a.

Injuries to guest

Cal.—Olden v. Babicora Development Co., *supra*.

77. Herders

(1) A statute, prohibiting a person to feed, pasture, camp, or drive any livestock upon, over, or across any public highway between sunset and sunrise without a sufficient number of herders on continual duty to open the road so as to permit the passage of vehicles, has been construed to imply a requirement of a larger number of herders at night than in the daytime—Olden v. Babicora Development Co., *supra*.

(2) The statutory requirement is deemed to be that the herders should actually open the road for vehicles and within a reasonable time or there should be a reasonable attempt to do so.—Olden v. Babicora Development Co., *supra*.

(3) Such statute does not do away with the general rules of negligence, but merely adds a further obligation when the act is performed at night.—Olden v. Babicora Development Co., *supra*.

78. Cal.—Olden v. Babicora Development Co., *supra*.

While a person engaged in driving domestic animals along a public way has been held to have a higher duty of care in the modern motor age than in the days of horse-drawn vehicles,⁷⁵ no liability attaches because of a collision between the animals and a motor vehicle, in the absence of a breach of legal duty owed the owner, driver, or occupant of the motor vehicle.⁷⁶ On the other hand, liability may attach for breach of a statutory duty,⁷⁷ unless the proximate cause of the injury is an intervening act of a third person;⁷⁸ and even in the absence of statute a duty exists to exercise ordinary care in such use of the way as not to endanger others,⁷⁹ the question of what constitutes ordinary care being affected by the conditions prevailing at the time of the injury.⁸⁰ In the absence of statutory or ordinance requirement, there is no duty to have a light in driving animals along a public way after dark,⁸¹ although it has been held that whether the absence of a light in such circumstance constitutes negligence depends on the facts of the particular case.⁸²

(3) Injuries by Dogs

At common law the owner of a dog is not liable for injuries by such animal to motor vehicles or the occupants thereof, in the absence of notice or knowledge of vicious propensities of the animal.

The rule at common law is that no liability attaches to the owner of a dog for injuries caused to a motor vehicle or its occupants by such animal

79. Mo.—Yerger v. Smith, 89 S.W.2d 66, 338 Mo. 140.

80. Mo.—Yerger v. Smith, *supra*.

81. La.—Pollet v. Robinson Lumber Co., 123 So. 155, 10 La App 760.

Requirement of lights in leading animals along highway at night generally see Highways § 240 a.

82. Mo.—Yerger v. Smith, 89 S.W.2d 66, 338 Mo. 140.

Concurrent causes

Even if inadequacy of automobile lights was one of direct contributing causes of passenger's injury when automobile struck mule which was near middle of four-lane highway, defendant owner and rider of mule was not relieved of liability to passenger if defendants' negligence was also one of direct contributing causes.—Yerger v. Smith, *supra*.

Duty to keep animal on shoulder

(1) Where the owner has a statutory right to drive the animal along the public way, no duty exists to keep the animal on the shoulder of the way.—Yerger v. Smith, *supra*.

(2) Right to drive domestic animals along highway generally see Highways § 240 a.

in the absence of vicious propensities causing the injury, of which propensities the owner had knowledge.⁸³ However, where by statute an owner or harbinger of a dog is liable for injuries occasioned by the animal, liability may attach for injuries to a motor vehicle or occupants proximately caused by the dog,⁸⁴ as in the case of statutory liability of a parent for injuries caused by a dog owned by a minor.⁸⁵ A statutory liability for the acts of dogs has been construed to be confined to vicious or mischievous acts and to be inapplicable to innocent acts.⁸⁶

(4) Runaways

In the absence of negligence, neither the owner nor the person in charge of a runaway horse or team is liable for injuries occasioned by such animals to a motor vehicle or an occupant thereof.

Where an injury to a motor vehicle or its occupants is sustained through a collision with a runaway horse or team, no liability is imposed on the owner of the horse or team or the person in charge thereof in the absence of a showing of negligence.⁸⁷ The fact that an animal is left unattended and unsecured upon a public way,⁸⁸ or in the care of an incompetent driver,⁸⁹ may constitute negligence, particularly where such conduct constitutes a violation of a city ordinance,⁹⁰ or where the owner has knowledge of the tendency of the animal to run away,⁹¹ although knowledge of a propensity

to run away is not essential to liability.⁹² One whose act frightens horses and causes them to run away and damage a motor vehicle is not liable for such injury where the particular consequence of the alleged negligent act could not reasonably have been anticipated.⁹³ The rule stated in Master and Servant § 322 a, that the fellow-servant rule does not absolve a master for the act of a servant in negligently damaging the property, rather than injuring the person, of a fellow servant, applies to render the master liable for a collision between a runaway in charge of one employee with the personal automobile of a fellow employee.⁹⁴

(5) Contributory Negligence

Contributory negligence may bar a recovery for damages arising from a collision between a motor vehicle and a domestic animal.

The driver of a motor vehicle cannot recover damages arising from a collision with a domestic animal where his own negligence was a proximate contributing cause of the accident.⁹⁵ Accordingly, a failure to reduce speed in case of obscured vision has been held the proximate cause of a collision with animals so as to bar recovery.⁹⁶ The "radius of lights" rule, as discussed supra § 201, has been applied in determining the negligence of the driver of a motor vehicle, precluding a recovery for injury sustained by striking animals upon the road.⁹⁷

83. Iowa.—Mellicker v. Sedlacek, 179 N.W. 197, 189 Iowa 946, 11 A.L.R. 259.

Common-law rule of owner's liability for injuries by dogs generally see Animals § 151 a.

Right of dog on public way

A dog which is not vicious has a right to be on a public way.—Mellicker v. Sedlacek, supra.

Mere barking at cars or attempting to bite wheel shows no vicious tendency.—Mellicker v. Sedlacek, supra.

84. Mass.—Williams v. Brennan, 99 N.E. 516, 213 Mass. 28. 42 C.J. p 829 note 69.

Statutory liability for injuries by dogs generally see Animals § 151 b.

85. Conn.—Granniss v. Weber, 141 A. 877, 107 Conn. 622.

Statutory liability of parent generally for injuries by minor's dog see Animals § 165 b.

86. Wis.—Schraeder v. Koopman, 209 N.W. 714, 190 Wis. 459.

87. Mich.—Stueh v. Town, 144 N.W. 833, 178 Mich. 477. 42 C.J. p 829 note 71.

Liability generally for injuries from runaway horses:

Upon highways see Highways § 241.

Upon streets see the C.J.S. title Municipal Corporations § 1783, also 44 C.J. p 1056 note 41-p 1057 note 65.

88. Kan.—Phillips v. Meyer Sanitary Milk Co., 281 P. 895, 129 Kan. 45.

Negligence in leaving horse unhitched and unattended on public highway generally see Highways § 244 c.

Proximate cause

Even though the driver of a motor vehicle attempted to avoid a collision with a runaway by changing the course of the vehicle, the proximate cause of the injury was the unsecured animal.—Marshall v. Suburban Dairy Co., 114 A. 750, 96 N.J.Law 81—42 C.J. p 829 note 74.

89. Mass.—Woodman v. Haynes, 193 N.E. 570, 289 Mass. 114.

90. Ala.—Hill v. Condon, 70 So. 208, 14 Ala.App. 332.

La.—Salvant v. Estate of Frank Newfield, Inc., 128 So. 320, 13 La. App. 410.

91. N.J.—Marshall v. Suburban Dairy Co., 114 A. 750, 96 N.J.Law 81.

42 C.J. p 829 note 72.

92. Mass.—Woodman v. Haynes, 193 N.E. 570, 289 Mass. 114.

93. Mass.—Sabin v. Cambridge Iron Works, 120 N.E. 664, 231 Mass. 511.

42 C.J. p 830 note 76.

94. N.Y.—Setzkorn v. Buffalo, 215 N.Y.S. 584, 126 Misc. 858.

95. Conn.—Granniss v. Weber, 141 A. 877, 107 Conn. 622.

Or.—Schrunk v. Hawkins, 289 P. 1073, 133 Or. 160.

96. La.—Cook v. Tooke, 135 So. 917, 17 La.App. 307.

97. La.—Pollet v. Robinson Lumber Co., 123 So. 155, 10 La.App. 760. Ohio.—Webster v. Pollock, 15 Ohio St. 102.

Illumination to side

The fact that the statute specifying lights for motorcycle did not provide for illumination to left did not excuse motorcyclist from seeing

and it has been applied, although the driver has been required by the operation of a statute to dim his lights at the time of or immediately before the accident.⁹⁸ The negligence of the driver of the motor vehicle in failing to have lights complying with the statutory requirements, however, will not bar his recovery for a collision with an animal upon the highway where the failure to have lights was not shown to have contributed to his injury.⁹⁹ The maintenance of a reasonable driving speed at night is not contributory negligence, even though the driver is driving in an area in which he knows cattle are at large.¹ The driver of a motor truck, seeing a runaway horse approaching in a zigzag course, is not guilty of contributory negligence in turning first to the right and then to the left in an effort to avoid a collision;² nor is the driver of a motor vehicle, injured by a collision with a runaway team, guilty as a matter of law of contributory negligence because of his failure to stop when blinded by a light shining in his face, preventing him from seeing the team where he was upon the right side of the road and driving slowly.³ The driver of a motorcycle is not guilty of contributory negligence as a matter of law precluding a recovery for an injury sustained by being kicked by one of the mules, where he attempts to pass a horse-drawn vehicle to the rear of which two mules are tied, although the driver of the vehicle has failed to drive to the right of the center of the road as required by statute.⁴ In determining the issue of contributory negligence statutes relating to a general rule of care and to prima facie speed limits, inapplicable to civil actions, need not be considered.⁵

b. Actions

The general rules with respect to civil actions apply to

actions for injuries by animals to motor vehicles or occupants thereof.

Following the general rules of pleading in civil actions generally, the declaration, petition, or complaint in an action for damages for injury by an animal to a motor vehicle or its occupant must state a cause of action.⁶ Thus, where damages are sought for a collision with animals running at large while a general allegation of negligence may be sufficient,⁷ the declaration, petition, or complaint must contain some charge of negligence, general or specific.⁸ Where the action is based on a statutory prohibition as to animals running at large, it is unnecessary to plead or refer to the statute relied on⁹ and an allegation that a particular statutory provision was violated is redundant and surplusage,¹⁰ although an allegation that the cause of action is based on violation of statute is essential.¹¹ While facts must be pleaded which show that defendant should have anticipated that his acts or omissions might reasonably have been expected to result in injuries to persons on the public way,¹² a petition, based on a violation of statute, need not allege that defendant knew that the animals were at large, or that he had reasonable cause to believe such fact, or that by the exercise of ordinary care defendant could have known the probability that the animals might go upon the public way;¹³ but, where the action is based on the premise of mere negligence, a declaration, petition, or complaint which fails to allege that the injury was such as was likely to arise from the animal in question and that the owner of the animal knew of such propensities of the animal is demurrable.¹⁴ Every essential allegation of plaintiff's pleading must be supported by appropriate proof.¹⁵

horses to left of motorevele —
Schrunk v. Hawkins, 289 P. 1073, 133
Or. 160.

98. Ohio—Webster v. Pollock, 15
Ohio App. 102.

99. Collision with boar

Iowa.—Hansen v. Kenmish, 208 N.
W. 277, 201 Iowa 1008, 45 A.L.R.
498.

1. U.S.—Galeppi Bros. v. Bartlett,
C.C.A.Cal., 120 F.2d 208.

2. N.J.—Marshall v. Suburban Dairy
Co., 114 A. 750, 96 N.J. Law 81.

3. Colo.—Denver Alfalfa Milling,
etc., Co. v. Erickson, 239 P. 17, 77
Colo. 583.

4. Mo.—Roy v. North Kansas City
Dev. Co., App., 209 S.W. 990, record
quashed on certiorari State
ex rel. North Kansas City Develop-

ment Co. v. Ellison, 222 S.W. 783,
282 Mo. 660, and reheard Roy v.
North Kansas City Development
Co., App., 226 S.W. 965.

5. U.S.—Galeppi Bros. v. Bartlett,
C.C.A.Cal., 120 F.2d 208.

6. Ind.—Dyer v. Noll, 14 N.E.2d 760,
105 Ind.App. 241.

Vt.—Granger v. Tremblay, 28 A.2d
696, 113 Vt. 34.

7. N.Y.—Carpenter v. Biedekapp, 61
N.Y.S.2d 419, 186 Misc. 5

8. N.Y.—Carpenter v. Biedekapp,
supra.

9. Cal.—Jackson v. Hardy, 160 P.2d
161, 70 Cal.App.2d 6.

10. Cal.—Jackson v. Hardy, supra.

11. N.Y.—Carpenter v. Biedekapp,
61 N.Y.S.2d 419, 186 Misc. 5.

12. W.Va.—Smith v. Whitlock, 19 S.

E.2d 617, 124 W.Va. 224, 140 A.L.
R. 737.

Pleading held demurrable

W.Va.—Smith v. Whitlock, supra.

13. Mo.—Moss v. Bonne Terre
Farming & Cattle Co., 10 W.2d
338, 222 Mo. App. 808.

W.Va.—Smith v. Whitlock, 19 S.E.2d
617, 124 W.Va. 224, 140 A.L.R. 737.

14. Ala.—Pelham v. Spears, 132 So.
886, 222 Ala. 365.

15. Ala.—Pelham v. Spears, supra.

Knowledge of animal's propensities
Where damages are sought because
of the negligence of the owner of an
animal in permitting it to run at
large, it must be proved that the
animal was of such nature that the
injury done was likely to arise from
such animal and that the owner

Evidence. Plaintiff has the burden of proving defendant's negligence,¹⁶ that is, plaintiff has the burden of proving that defendant owed him a duty, that defendant violated such duty, that such violation caused plaintiff's injury, and that plaintiff sustained actual damage as a result thereof.¹⁷ The burden of proving plaintiff's contributory negligence rests with defendant.¹⁸ Where defendant's animals are at large in violation of statute, plaintiff has no duty to show how the animals came to be loose or who permitted them to go upon the public way;¹⁹ but proof of ownership raises a prima facie presumption of negligence of defendant and shifts the burden of offering evidence to the owner,²⁰ although, where the statute alleged to have been violated has no application to injuries to motorists, mere proof of the presence of the animals upon the public way does not avoid plaintiff's burden of proving defendant's negligence.²¹ Where a rebuttable presumption of defendant's negligence is raised, defendant has the burden of proving freedom from fault.²² Where defendant desires the benefit of a statute providing that the owner or keeper of domestic animals shall not be liable for damages due to such animals running at large when he has no knowledge of the running at large and has used reasonable restraint of the animals, he has the burden of proving his lack of knowledge of the running at large and his use of reasonable restraint of the animals, since such facts are peculiarly within his own knowledge.²³

Where plaintiff has made out a prima facie case of negligence as to injury from defendant's runaway team, the burden of showing freedom from negligence or fault is cast on defendant.²⁴

Under some statutes no presumption or inference exists in civil actions against the owner of domestic animals for damages caused by a collision between a motor vehicle and such animal,²⁵ but generally the leaving of an animal such as a horse unattended on a city street and not under the control of a driver raises a presumption of negligence.²⁶ Evidence that defendant's property was enclosed but that he was replacing a gate with a cattle guard through which opening his animals escaped to the public way has been held to create a rebuttable presumption of some defect in the construction of the cattle guard or in the state in which it was left at the time of the accident.²⁷ The doctrine of *res ipsa loquitur* has been held to apply,²⁸ but it has also been held that the doctrine does not apply where a motor vehicle was struck by a domestic animal running at large upon the public highway,²⁹ and the mere fact that there was a runaway has been held not necessarily to imply negligence.³⁰

The rules as to the admissibility of evidence in civil actions generally, and particularly the rules in actions for negligence, apply in actions for injuries by animals to motor vehicles or occupants thereof.³¹ Accordingly, irrelevant³² is not admis-

knew of the propensity.—*Pelham v Spears*, *supra*.

16. Pa.—*Bender v. Welsh*, 25 A 2d 182, 344 Pa. 392—*Ronnie v Scheppe*, 146 A. 261, 297 Pa. 39—*Tassoni v. LeBoutillier*, 196 A. 531, 130 Pa. Super. 303.

17. Minn.—*Anderson v. Hegna*, 2 N. W. 2d 820, 212 Minn. 147.

18. Statutory rule as to actions for injuries to person or property held applicable.—*Woodman v. Haynes*, 193 N.E. 570, 289 Mass. 114.

19. Cal.—*Kenney v. Antonetti*, 295 P. 341, 211 Cal. 336.

20. Cal.—*Anderson v. I. M. Jameson Corporation*, 59 P.2d 962, 7 Cal. 2d 60.

Pa.—*Tassoni v. LeBoutillier*, 196 A. 534, 130 Pa. Super. 303.

Tex.—*Adamcik v. Knight*, Civ. App., 170 S.W. 2d 521.

21. Okl.—*Champlin Refining Co. v. Cooper*, 86 P.2d 61, 184 Okl. 153.

22. La.—*Boudreau v. Louviere*, App., 178 So. 173.

23. Ill.—*Fugett v. Murray*, 35 N.E. 2d 946, 311 Ill. App. 323.

24. La.—*Salvant v. Estate of Frank*

Newfield, Inc., 128 So. 320, 13 La. App. 410.

Pa.—*Evans v. Scott Powell Dairies*, 26 A 2d 449, 344 Pa. 595.

25. U.S.—*Bartlett v. Galleppi Bros.*, D.C. Cal., 33 F. Supp. 277, affirmed, C.C.A., *Galleppi Bros. v. Bartlett*, 120 F.2d 208.

Effect

The fact that there is no presumption or inference of negligence on part of owner of livestock because of collision between motor vehicle and livestock on highway does not entitle owner of cattle to maintain cattle with such want of ordinary care or skill as to cause injury to another.—*Bartlett v. Galleppi Bros.*, D.C. Cal., 33 F. Supp. 277, affirmed, C.C.A., *Galleppi Bros. v. Bartlett*, 120 F.2d 208.

26. Pa.—*Evans v. Scott Powell Dairies*, 26 A 2d 449, 344 Pa. 595.

27. La.—*Boudreau v. Louviere*, App., 178 So. 173.

In California

(1) In an action for violation of former Motor Vehicle Act § 151 the doctrine of *res ipsa loquitur* was held applicable.—*Kenney v. Antonetti*, 295 P. 341, 211 Cal. 336.

(2) Even though, in reenacting such section as Agricultural Code § 423, the legislature expressly provided that there should be no presumption that the collision was due to negligence of the owner of the animal, the sole effect was to abolish the effect of the doctrine of *res ipsa loquitur*, and not the doctrine.

U.S.—*Galleppi Bros. v. Bartlett*, C.C. A. Cal., 120 F.2d 208.

Cal.—*Jackson v. Hardy*, 160 P.2d 161, 70 Cal. App. 2d 6.

(3) So it has been held that, even under such reenactment, reliance may be made on the doctrine.—*Anderson v. I. M. Jameson Corporation*, 59 P.2d 962, 7 Cal. 2d 60.

29. N.C.—*Gardner v. Black*, 9 S.E.2d 10, 217 N.C. 573.

30. N.Y.—*Schneiderman v. Mother's Friend's Wet Wash Laundry*, 243 N.Y.S. 207, 230 App. Div. 197, reversed on other grounds 175 N.E. 321, 255 N.Y. 580.

31. Mass.—*Verna v. Boston Transcript Co.*, 192 N.E. 502, 288 Mass. 160.

32. Ill.—*Guffey v. Gale*, 74 N.E.2d 730, 332 Ill. App. 207.

sible, and, likewise, remote evidence³³ and immaterial evidence³⁴ is not admissible. The general rule that the practice of an individual cannot be admitted in evidence either on the question of negligence or for the purpose of showing a general custom or usage relative to negligence, as considered in the C.J.S. title Negligence § 232, also 45 C.J. p 1243 notes 16-18, applies to render inadmissible evidence of defendant's custom to graze animals in the particular location without injury to motor vehicles or occupants thereof.³⁵

In an action for simple negligence in permitting the animal to do the injury, the negligence must be proved by a preponderance of the evidence.³⁶ The mere presence of domestic animals at large and unattended on a public way, in violation of statute which is inapplicable to drivers of motor vehicles, does not amount to prima facie evidence of negligence,³⁷ but the contrary is true where the statute violated is applicable to motorists;³⁸ and evidence of presence of unattended animals, together with other evidence, may establish a prima

facie case for plaintiff.³⁹ Where plaintiff proves that the cause of injury was defendant's runaway team, it has been held that he establishes a prima facie case of negligence,⁴⁰ although it has been held that the mere presence of a runaway horse and vehicle on a public way is not prima facie evidence of negligence on the part of the person in control.⁴¹

Questions of law and fact. Under the rules applicable as to the province of the court and jury with regard to questions of negligence generally, questions of negligence in actions for injuries occasioned by animals are ordinarily for the jury,⁴² as, for example, the question of negligence of an owner in permitting an animal to escape from its inclosure and be upon the highway,⁴³ or in permitting an animal to be at large upon the highway in violation of a statute requiring his restraint,⁴⁴ or in leaving a team to remain unfastened and unattended in an open yard whence it ran away from a highway,⁴⁵ or in driving animals upon the public

Mass.—Verna v. Boston Transcript Co., 192 N.E. 502, 288 Mass. 160

33. Ill.—Guffey v. Gale, 74 N.E.2d 730, 332 Ill. App. 207

34. Evidence held material

Minn.—Anderson v. Hegna, 2 N.W. 2d 820, 212 Minn. 147.

35. Utah—Caperon v. Tuttle, 116 P.2d 402, 100 Utah 476, 135 A.L.R. 1399

36. La.—Salvant v. Estate of Frank Newfield, Inc., 128 So. 320, 13 La. App. 410.

Circumstantial evidence held sufficient

Cal.—Jackson v. Hardy, 160 P.2d 161, 70 Cal. App. 2d 6.

Pa.—Tassoni v. LeBoutillier, 196 A. 534, 130 Pa. Super. 303.

Evidence held sufficient

Cal.—Anderson v. I. M. Jameson Corporation, 59 P.2d 962, 7 Cal. 2d 60 —Jackson v. Hardy, 160 P.2d 161, 70 Cal. App. 2d 6.

Kan.—Phillips v. Meyer Sanitary Milk Co., 281 P. 895, 129 Kan. 45

La.—Cusimano v. Giannobile, App. 15 So. 2d 87.

Minn.—Wedel v. Johnson, 264 N.W. 689, 196 Minn. 170.

Neb.—Schindler v. Mulhair, 273 N.W. 217, 132 Neb. 809.

S.D.—Aaker v. Quissell, 244 N.W. 889, 60 S.D. 513.

Tex.—Wilkinson v. Paschall, Civ. App., 210 S.W.2d 215.

Va.—John T. Griffin Truck Corporation v. Smith, 142 S.E. 385, 150 Va. 95.

Wash.—Schouten v. Jacobs, 175 P.2d 627, 26 Wash.2d 798.

Evidence held insufficient

US.—Bartlett v. Galleppi Bros., D. C. Cal., 33 F.Supp. 277, affirmed, C. C. A., Galleppi Bros. v. Bartlett, 120 F.2d 208

Iowa.—Mellicker v. Sedlacek, 179 N.W. 197, 189 Iowa 946, 11 A.L.R. 259

La.—Abraham v. Castille, App., 158 So. 650

Mass.—Karp v. Whiting Milk Co., 30 N.E.2d 828, 308 Mass. 60

N.C.—Gardner v. Black, 9 S.E.2d 10, 217 N.C. 573

Okl.—Champlin Refining Co. v. Cooper, 86 P.2d 61, 181 Okl. 153.

Pa.—Hennie v. Schepps, 146 A. 261, 297 Pa. 39.

37. Okl.—Champlin Refining Co. v. Cooper, 86 P.2d 61, 184 Okl. 153

38. Mo.—Moss v. Bonne Terre Farming & Cattle Co., 10 S.W.2d 338, 222 Mo. App. 808.

39. Cal.—Kenney v. Antonetti, 295 P. 341, 211 Cal. 336

Evidence held sufficient

Cal.—Kenney v. Antonetti, supra.

40. La.—Salvant v. Estate of Frank Newfield, Inc., 128 So. 320, 13 La. App. 410.

N.Y.—Setzkorn v. Buffalo, 215 N.Y. S. 584, 126 Misc. 858

Pa.—Tassoni v. LeBoutillier, 196 A. 534, 130 Pa. Super. 303.

41. Mass.—Verna v. Boston Transcript Co., 192 N.E. 502, 288 Mass. 160.

42. Iowa.—Stewart v. Wild, 208 N.W. 303, 202 Iowa 357.

Minn.—Anderson v. Hegna, 2 N.W. 2d 820, 212 Minn. 147.

Pa.—Bender v. Welsh, 25 A.2d 182,

314 Pa. 392.—Tassoni v. LeBoutillier, 196 A. 534, 130 Pa. Super. 303. Utah—Caperon v. Tuttle, 116 P.2d 402, 100 Utah 476, 135 A.L.R. 1399.

Evidence held sufficient to require submission to jury

N.J.—Grav v. Sheffield Farms Co., 180 A. 403, 13 N.J. Misc. 635.

Pa.—Bender v. Welsh, 25 A.2d 182, 314 Pa. 392.

Tex.—Hodges v. Alford, Civ. App., 194 S.W.2d 293

43. Cal.—Jackson v. Hardy, 160 P.2d 161, 70 Cal. App. 2d 6

Mo.—Lins v. Doekeler Lumber Co., 299 S.W. 150, 221 Mo. App. 181.

Neb.—Trall v. Ostermeier, 300 N.W. 375, 140 Neb. 432.

Ohio.—Flugfelder v. Convent of the Good Shepherd, Toledo, Ohio, 9 N.E.2d 4, 55 Ohio App. 158.

42 C.J. p 830 note 87.

Evidence held insufficient to require submission to jury

N.C.—Bethune v. Bridges, 46 S.E.2d 711, 228 N.C. 623.

Wis.—Schraeder v. Koopman, 209 N.W. 714, 190 Wis. 459.

44. Ill.—Pugett v. Murray, 35 N.E.2d 946, 311 Ill. App. 323.

Iowa.—Hansen v. Kemmish, 208 N.W. 277, 201 Iowa 1008, 45 A.L.R. 498.

Kan.—Phillips v. Meyer Sanitary Milk Co., 281 P. 895, 129 Kan. 45.

Evidence held insufficient to require submission to jury

Vt.—Granger v. Tremblay, 28 A.2d 696, 113 Vt. 34.

45. Colo.—Denver Alfalfa Milling, etc., Co. v. Erickson, 239 P. 17, 77 Colo. 583.

N.Y.—Schneiderman v. Mother's

highway at night.⁴⁶ Whether laws requiring the keeping of animals in inclosures have been violated is also a question for the jury.⁴⁷ In like manner, it is ordinarily a question for the jury whether plaintiff has been guilty of contributory negligence,⁴⁸ as, for example, in driving without proper lights,⁴⁹ or in failing to see the animal in time to avoid the accident.⁵⁰

Ordinarily, the question of proximate cause is one of fact for the jury.⁵¹ There is some conflict of authority as to whether negligence of the owner of horses in turning them into an insufficiently fenced field may be regarded as the proximate cause of a collision between them and a motor vehicle when they subsequently escape upon the highway, it having been held that it may be determined as a matter of law that the injury is not such as the owner is bound to anticipate;⁵² and it has also been held to the contrary that it is a question of fact whether the owner could not have reasonably anticipated such result where he turns them loose into a defectively fenced field adjacent to a much traveled highway.⁵³ Where damages are

sought for injuries from a collision between a motor vehicle and animals being driven along a public way, it cannot be said as a matter of law that the negligence of the driver of the vehicle was the proximate cause of the injury.⁵⁴ On conflicting evidence, the question of ownership of animals, collision with which occasions the injury to a motor vehicle complained of, is for the jury.⁵⁵ Where by application of the doctrine of *res ipsa loquitur* plaintiff establishes a *prima facie* case, a motion for nonsuit is properly denied,⁵⁶ and, likewise, where the evidence supports a finding of defendant's negligence, his motion for directed verdict is properly denied.⁵⁷

Instructions. As in other civil actions, the instructions must be in conformity with the evidence,⁵⁸ and must not be misleading.⁵⁹ The instructions must be responsive to the issues,⁶⁰ and requested instructions on immaterial issues need not be given.⁶¹ It is not error to refuse requested instructions sufficiently covered by other instructions.⁶²

Friend's Wet Wash Laundry Co., 175 N.E. 321, 255 N.Y. 580.

Pa.—Evans v. Scott Powell Dairies, 26 A.2d 449, 344 Pa. 595.

46. Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal. App. 399.

Mo.—Yerger v. Smith, 89 S.W.2d 66, 338 Mo. 140.

Ohio.—Webster v. Pollock, 15 Ohio App. 102.

Utah.—Caperon v. Tuttle, 116 P.2d 402, 100 Utah 476, 135 A.L.R. 1399.

47. Mo.—Moss v. Bonne Terre Farming & Cattle Co., 10 S.W.2d 338, 222 Mo.App. 808.

48. Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal. App. 399.

Ill.—Fugott v. Murray, 35 N.E.2d 946, 311 Ill. App. 323.

Minn.—Wedel v. Johnson, 264 N.W. 689, 196 Minn. 170.

Neb.—Traill v. Ostermeier, 300 N.W. 375, 140 Neb. 432.

Ohio.—Pflugfelder v. Convent of the Good Shepherd, Toledo, Ohio, 9 N.E.2d 4, 55 Ohio App. 158.

Utah.—Caperon v. Tuttle, 116 P.2d 402, 100 Utah 476, 135 A.L.R. 1399.

42 C.J. p. 830 note 91.

Held not matter of law

Plaintiff's failure to stop her automobile in time to avoid a collision with a runaway team, when blinded by a light from defendant's premises, is not contributory negligence as a matter of law.—Denver Alfalfa Milling, etc., Co. v. Erickson, 239 P. 17, 77 Colo. 583.

49. Cal.—Anderson v. I. M. Jame-

son Corporation, 59 P.2d 962, 7 Cal. 2d 60.

Iowa.—Hansen v. Kemmish, 208 N.W. 277, 201 Iowa 1008, 45 A.L.R. 498.

50. Pa.—Evans v. Scott Powell Dairies, 26 A.2d 449, 344 Pa. 595.

51. Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal. App. 399.

Conn.—Granniss v. Weber, 141 A. 877, 107 Conn. 622.

Iowa.—Dennis v. Merrill, 257 N.W. 322, 218 Iowa 1259—Stewart v. Wild, 195 N.W. 266, 196 Iowa 678.

Minn.—Serr v. Biwabik Concrete Aggregate Co., 278 N.W. 355, 202 Minn. 165, 117 A.L.R. 1009.

Utah.—Caperon v. Tuttle, 116 P.2d 402, 100 Utah 476, 135 A.L.R. 1399.

Collision with hog

It cannot be said as a matter of law that a collision between a motor vehicle and a hog unlawfully running at large on the highway is an event too remote to be deemed the proximate result of defendant's negligence, if any.—Stewart v. Wild, 195 N.W. 266, 196 Iowa 678.

52. Wis.—Fox v. Koehnig, 209 N.W. 708, 190 Wis. 528.

42 C.J. p. 830 note 95.

53. Ohio.—Drew v. Gross, 147 N.E. 757, 112 Ohio St. 485.

54. Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal. App. 399.

55. Iowa.—Stewart v. Wild, 208 N.W. 303, 202 Iowa 357.

56. Cal.—Anderson v. I. M. Jame-

son Corporation, 59 P.2d 962, 7 Cal.2d 60.

57. Cal.—Anderson v. I. M. Jameson Corporation, *supra*.

58. Iowa.—Flesch v. Schlue, 191 N.W. 63, 194 Iowa 1200.

Instructions held required

(1) As to deficient brakes—Bradley v. Kerns, 138 A. 130, 106 Conn. 383.

(2) Statutory speed limitation—Bradley v. Kerns, *supra*.

(3) As to statutory liability. Iowa.—Flesch v. Schlue, 191 N.W. 63, 194 Iowa 1200.

Minn.—Serr v. Biwabik Concrete Aggregate Co., 278 N.W. 355, 202 Minn. 165, 117 A.L.R. 1009.

Instructions held not supported by evidence

Mo.—Carr v. Threlkeld, App., 31 S.W.2d 592.

Instructions held properly refused

Cal.—Olden v. Babicora Development Co., 290 P. 1062, 107 Cal. App. 399.

59. Conn.—Bradley v. Kerns, 138 A. 130, 106 Conn. 383.

60. Concurrent acts of negligence

Where the pleading and evidence present the possibility that the injury in question was caused by concurrent acts of negligence, an instruction should be given on such issue.—Caperon v. Tuttle, 116 P.2d 402, 100 Utah 476, 135 A.L.R. 1399.

61. Conn.—Bradley v. Kerns, 138 A. 130, 106 Conn. 383.

S.D.—Aeker v. Quissell, 244 N.W. 889, 60 S.D. 613.

62. S.D.—Aeker v. Quissell, *supra*.

Judgment. Where the findings are in irreconcilable conflict, no judgment may be entered thereon.⁶³

§ 566. Injuries by Vehicle Other than Motor Vehicle

One whose negligence in the management or control of a horse-drawn or other vehicle, not a motor vehicle, occasions injury to a motor vehicle may be held liable for the damages so occasioned.

One whose negligence in the management or control of a horse-drawn or other vehicle, not a motor vehicle, occasions injury to a motor vehicle may be held liable for the damages so occasioned;⁶⁴ liability may also attach for the negligent acts of an agent, servant, or employee within the scope of their employment,⁶⁵ although, in accordance with the general rules discussed in Master and Servant § 566 c, where a team and a driver are hired and the hirer is not vested with exclusive control, the owner, and not the hirer, must respond for injuries occasioned third persons.⁶⁶ Where the combined negligence of the operator of a motor vehicle and the operator of a horse-drawn vehicle united to cause injury to an occupant of the motor vehicle, the injured person may recover against the

owner of the horse-drawn vehicle, provided there is no contributory negligence.⁶⁷

The rights and duties of the driver of a team and the driver of a motor vehicle are reciprocal and each is required to obey the law of the road.⁶⁸ No duty rests with plaintiff to anticipate a sudden violation of a law of the road.⁶⁹ There must be a compliance with governmental regulations.⁷⁰

Proximate cause. Liability may attach for an injury to a motor vehicle or its occupants, even though the injury resulted from the inherent nature of a horse drawing the colliding vehicle.⁷¹ However, if the act complained of was accidental or beyond the control of defendant and without any negligence on his part but resulting from an inherent tendency of the horse, liability does not attach.⁷²

Contributory negligence. Violation of regulations may constitute contributory negligence which, if a contributing proximate cause of the injury, will bar recovery.⁷³ Failure of a motorist to exercise an opportunity to avoid a collision with a horse-drawn vehicle emerging onto the street from private premises has been held to constitute contributory negligence.⁷⁴ Various acts have been

63. Tex.—Kilgore v. Howe, Civ. App., 204 S.W.2d 1005

64. Mo.—Hag v. Cohen, 229 S.W.2d 296, 207 Mo.App. 36.
42 C.J. p 831 note 7

Liability of street railroad for injuries to motor vehicle or occupants see the C.J.S. title Street Railroads §§ 226-243, also 60 C.J. p 415 n 86-p 441 n 27.

Projecting articles

The rule of liability has been held to extend to injuries occasioned by projecting articles—Denny v. Strauss, 109 N.Y.S. 26.

65. Mich.—Zullo v. Detroit Creamery Co., 275 N.W. 730, 281 Mich. 678.
42 C.J. p 831 note 7.

Absence of negligence

Where a motor vehicle struck a horse-drawn vehicle which was on its proper side of the street, the driver of the vehicle struck was held not negligent.—Zullo v. Detroit Creamery Co., supra.

Where relationship of agency or employee does not exist, owner is not liable for injuries occasioned by another.—Powers v. Wheelless, 9 S.E.2d 129, 193 S.C. 364.

66. Wis.—Wagner v. Larsen, 182 N.W. 336, 174 Wis. 26.

67. Ohio.—Comer v. Werner, 8 N.E.2d 455, 54 Ohio App. 547.

68. Pa.—Sprout v. Kirk, 80 Pa.Super. 514.

69. Pa.—Sprout v. Kirk, supra.

Sudden change of course without warning

The driver of a motor vehicle passing a horse-drawn vehicle is not bound to anticipate a sudden deflection of the horse-drawn vehicle from the right of the road toward the left—Sprout v. Kirk, supra.

Assumption

Plaintiff riding on step of truck could assume that ice wagon driver would take care not to collide with him.—Robinson v. American Ice Co., 141 A. 244, 292 Pa. 366.

70. Regulation of turning

(1) An ordinance requiring that in making a left turn the vehicle turning must pass to the right of and beyond the street intersection is not violated by a sudden and sharp turn to the left without intending to turn left—Squier v. Davis Standard Bread Co., 185 P. 391, 181 Cal. 533.

(2) However, the ordinance relates to the act of turning from its beginning, rather than the passing of the center of the intersection, so that, if a turn is intentionally begun so as to place the center of the intersection on the right, the ordinance is violated even if the turn is corrected so as to pass the intersection properly.—Squier v. Davis Standard Bread Co., supra.

(3) An ordinance providing that a vehicle turning from one side of the

street to the other shall do so only by going to the intersection and turning to the left past the center of the intersection is violated by a turning left other than at the intersection in order to enter a private driveway.—Ford v. Des Moines Ice, etc., Co., 174 N.W. 486, 187 Iowa 729.

(4) Even though an ordinance requires a signal for turning, failure of a driver of a horse-drawn vehicle to comply with such ordinance does not amount to negligence as to a motorist who had ample opportunity to observe the vehicle.—Daniels v. Langensand, 96 S.W.2d 911, 231 Mo. App. 777.

Exemption

Statute exempting hay wagon from statutory duty of displaying lights does not relieve operator thereof from common-law liability for negligence in collision with automobile.—Comer v. Werner, 8 N.E.2d 455, 54 Ohio App. 547.

71. Tex.—Wells, etc., Express v. Keeler, Civ.App., 173 S.W. 926.

72. Pa.—Sprout v. Kirk, 80 Pa.Super. 514.

73. Ill.—Adolphson v. Russell, 25 N.E.2d 120, 303 Ill.App. 225.

Excessive speed

Ohio.—Michael v. Saul, App., 42 N.E.2d 219.

74. Mich.—Steinberg v. Builders' Lumber & Wrecking Co., 212 N.W. 960, 238 Mich. 181.

held not to amount to contributory negligence.⁷⁵ The mere fact that plaintiffs approached the point of accident by means of a way not open to public travel is immaterial as to the question of their contributory negligence.⁷⁶

§ 567. — Actions in General

The general rules applicable to civil actions govern questions of the right to sue, pleading, and verdict in actions for injuries to motor vehicles or occupants thereof by vehicles other than motor vehicles.

Except where the right to sue has been conferred on another, an action for injuries to a motor vehicle or its occupants by a vehicle other than a motor vehicle should be brought by the person injured by defendant's negligence.⁷⁷

Pleading. Following the general rules of pleading in civil actions generally, the declaration, petition, or complaint in an action for injuries to a motor vehicle or occupants therein by a vehicle other than a motor vehicle must state a cause of action.⁷⁸ Where defendant's vehicle was being operated at the time of the injury by defendant's agent or employee, a general allegation of such operation within the scope of the employment, without a specific allegation of the details of the employment, is sufficient,⁷⁹ since the general allegation is sufficient to create a presumption that the agent or employee was acting in behalf of defendant and in discharge of his duties,⁸⁰ so as to permit denial by defendant.⁸¹ It has been held that the petition, declaration, or complaint need

not negative contributory negligence,⁸² but, if it affirmatively shows that plaintiff's contributory negligence was the proximate cause of the injury, it is defective.⁸³ An allegation that plaintiff's negligence was the sole cause of the accident and a prayer for dismissal on that ground have been held to be sufficient to raise the issue of contributory negligence.⁸⁴ Where a defense of contributory negligence in violating a regulation is raised, in order for plaintiff to rebut such contention by showing the invalidity of such regulation he must aver the invalidity in his reply, provided a reply is permissible.⁸⁵ Every essential element of the pleadings must be supported by appropriate proof.⁸⁶

Verdict. The general rule in civil actions that the verdict must respond to the issues raised by the pleadings and evidence applies to actions of this character.⁸⁷

§ 568. — Evidence

The general rules as to evidence in civil actions govern as to presumptions, burden of proof, admissibility, and weight and sufficiency of evidence in actions for injuries to motor vehicles or occupants thereof by vehicles other than motor vehicles.

Ordinarily, the mere fact of damage or injury to a motor vehicle or its occupants by a vehicle not a motor vehicle is not a sufficient basis for a presumption or inference that defendant was negligent.⁸⁸ Plaintiff has the burden of proving all the facts essential to his recovery.⁸⁹ The rules applicable in the case of civil actions generally apply in determining the admissibility⁹⁰ and weight

75. Particular acts

(1) Standing upon the running board of stationary automobile.—*Oppenheimer v. American R. Express Co.*, 181 N.Y.S. 195.

(2) Turning to the right of a vehicle ahead in a situation of peril under circumstances in which a reasonably careful man would have done the same.—*Sculer v. Davis Standard Bread Co.*, 185 P. 391, 181 Cal. 533.

76. N.H.—*Everett v. Littleton Const. Co.*, 46 A.2d 317, 94 N.H. 43.

77. Ala.—*Wycker v. Texas Co.*, 79 So. 7, 201 Ala. 585, L.R.A.1918F, 142.

Partial subrogation

Notwithstanding the owner has been partially reimbursed for the loss suffered by an insurer who is subrogated to the rights of the owner to the extent of the payment for such partial reimbursement, the owner may maintain an action in his own name.—*Wycker v. Texas Co.*, supra.

78. La.—*Le Blanc v. Olivier*, App., 5 So.2d 170.

79. La.—*Le Blanc v. Olivier*, supra.

Inconsistent allegations

An allegation that defendant's vehicle was being operated by defendant's employee in the course of his employment is not destroyed by an additional allegation that the operation was with the express consent and approval of defendant, since it is made in the alternative.—*Le Blanc v. Olivier*, supra.

80. La.—*Le Blanc v. Olivier*, supra.

81. La.—*Le Blanc v. Olivier*, supra.

82. La.—*Le Blanc v. Olivier*, supra.

83. La.—*Le Blanc v. Olivier*, supra.

Petition held proper

La.—*Le Blanc v. Olivier*, supra.

84. La.—*Lipscomb v. Standard Highway Co.*, 124 So. 156, 11 La. App. 508.

85. Mo.—*Roper v. Greenspon*, 198 S. W. 1107, 272 Mo. 288, L.R.A.1918D 126.

Waiver

Where the reply avers that the regulation is in force, plaintiff waives alleged invalidity of the regulation and cannot raise such con-

tention when the regulation is offered in evidence.—*Roper v. Greenspon*, supra.

86. Pa.—*Johnson v. American Reduction Co.*, 158 A. 153, 305 Pa. 537.

87. Verdict held responsive

Mo.—*Hang v. Cohen*, 229 S.W. 296, 207 Mo.App. 36.

88. Mo.—*Haag v. Cohen*, 229 S.W. 296, 207 Mo.App. 36.

89. N.Y.—*Willie v. Luczka*, 184 N. Y.S. 751, 193 App.Div. 826, 42 C.J. p 832 note 25.

90. Evidence held admissible

(1) Evidence of habit of speeding.—*Boone v. Bank of America Nat. Trust & Savings Ass'n*, 29 F.2d 409, 220 Cal. 93.

(2) To show that wagon driver acted within the scope of his employment.—*Vincennes Packing Corporation v. Trosper*, 23 N.E.2d 624, 108 Ind.App. 7.

(3) To show defendant's willfulness.—*Westbrook v. Jefferies*, 175 S. E. 433, 173 S.C. 172.

and sufficiency⁹¹ of the evidence.

§ 569. — Questions of Law and Fact

In actions for injuries to motor vehicles or occupants thereof by vehicles other than motor vehicles, questions of negligence, contributory negligence, and proximate cause are ordinarily for the jury.

Questions of law and fact. Under the rules applicable in other civil actions involving issues of negligence, as discussed in the C.J.S. title Negligence §§ 252-263, also 45 C.J. p 1279 note 29-p 1316 note 8, questions of negligence⁹² and of contributory negligence⁹³ are ordinarily questions of fact for the jury. The same is true as to the ques-

tion of what was the proximate cause of the injury.⁹⁴ On the other hand, it cannot be said as a matter of law that the blocking of a street intersection at night during the time of continuous use without warning or signal is not negligence.⁹⁵ Plaintiff's failure to comply with a regulation of sounding his horn before attempting to pass another vehicle cannot be held to amount to contributory negligence as a matter of law where plaintiff had no immediate intention of passing;⁹⁶ nor does plaintiff's violation of an order prohibiting use of a road under construction amount to contributory negligence as a matter of law in the absence of a legislative intent that violation of such order

Evidence held inadmissible

S.C.—Westbrook v. Jeffries, *supra*

91. Prima facie evidence

In an action for injuries to an automobile from a collision with a wagon, where it appeared that a defendant's name was on the wagon, and that one of its occupants was in defendant's employ, defendant was prima facie sufficiently connected with the accident.—Lawson v. Wells, 113 N.Y.S. 647.

Evidence held sufficient

(1) To support finding of negligence of defendant or an employee Cal.—Schurman v. Los Angeles Creamery Co., 254 P. 681, 81 Cal App. 758

N.Y.—Lawson v. Wells, 113 N.Y.S. 647.

Pa.—Robinson v. American Ice Co., 141 A. 244, 292 Pa. 366

Wis.—Van Gilder v. Gugel, 265 N.W. 706, 220 Wis. 612, 105 A.L.R. 824—Bruins v. Brandon Canning Co., 257 N.W. 35, 216 Wis. 387

(2) To rebut presumption that defendants' employee exercised due care—Latella v. Breyer Ice Cream Co., 87 Pa. Super. 325

(3) To sustain finding that defendant was not negligent—Schwingel v. Boyd, 284 N.W. 28, 230 Wis. 336.

(4) To show contributory negligence.

Ill.—Adolphson v. Russell, 25 N.E. 2d 120, 303 Ill. App. 235

La.—Lipscomb v. Standard Highway Co., 124 So. 156, 11 La. App. 508.

(5) To show absence of contributory negligence.—Lawson v. Wells, 113 N.Y.S. 647.

Evidence held insufficient

(1) To raise the issue of contributory negligence of the owner of a motor vehicle which, when standing still, was backed into by a horse-drawn vehicle.—Wells v. Keeler, Tex. Civ. App., 173 S.W. 926.

(2) To show willful or wanton conduct by defendant's employee.

Ill.—Adolphson v. Russell, 25 N.E. 2d 120, 303 Ill. App. 235.

Pa.—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537.

(3) To show relationship between defendant and the driver of the horse-drawn vehicle—Powers v. Wheelless, 9 S.E.2d 129, 193 S.C. 364.

92. Ky.—Lexington Ice Co. v. Williams' Adm'r, 33 S.W.2d 14, 236 Ky. 318

Minn.—Weirick v. Thornton Bros. Co., 210 N.W. 399, 168 Minn. 465.

42 C.J. p 832 note 33.

Particular matters

(1) Generally.

Minn.—Weirick v. Thornton Bros. Co., *supra*.

N.J.—Egan v. Sheffield Farms Co., 151 A. 853, 107 N.J. Law 325

N.Y.—Manton v. Loomis Sanatorium, 117 N.Y.S. 761, 162 App. Div. 421, affirmed 116 N.E. 1059, 220 N.Y. 697

42 C.J. p 832 note 33 [a].

(2) Effect of instructions given defendant's driver on scope of employment.—Vincennes Packing Corporation v. Trosper, 23 N.E.2d 624, 108 Ind. App. 7.

(3) Violation of requirement of driving on the right.

Neb.—Burkamp v. Roberts Sanitary Dairy, 219 N.W. 805, 117 Neb. 60.

Pa.—Hough v. American Reduction Co. of Pittsburgh, 172 A. 722, 315 Pa. 234.

(4) Violation of requirement of lights.—Burkamp v. Roberts Sanitary Dairy, *supra*.

(5) Whether defendant's negligence caused plaintiff's injury.—Weirick v. Thornton Bros. Co., 210 N.W. 399, 168 Minn. 465.

Evidence held sufficient to take case to jury

(1) Generally.—Lexington Ice Co. v. Williams' Adm'r, 33 S.W.2d 14, 236 Ky. 318—42 C.J. p 832 note 27 [a] (2)-(6), (9).

(2) Failure to comply with requirements as to lights and reflectors.

Ind.—Vincennes Packing Corpora-

tion v. Trosper, 23 N.E.2d 624, 108 Ind. App. 7.

Minn.—Smith v. Carlson, 296 N.W. 132, 209 Minn. 208.

(3) Negligence of defendant's driver.—Pfaffinger v. Seely, 291 P. 1015, 134 Or. 512.

(4) Scope of employment of defendant's driver.

Ind.—Vincennes Packing Corporation v. Trosper, *supra*.

Or.—Pfaffinger v. Seely, *supra*.

Evidence held insufficient to take case to jury

Ohio—Comer v. Werner, 8 N.E.2d 455, 54 Ohio App. 547.

93. Minn.—Weirick v. Thornton Bros. Co., 210 N.W. 399, 168 Minn. 465.

42 C.J. p 833 note 34.

Evidence held sufficient to take case to jury

(1) Generally.—Stefanacci v. Borden's Farms Products Co., 125 A. 129, 100 N.J. Law 160—42 C.J. p 832 note 27 [a] (1), (7), (8).

(2) Failure of motorist to see defendant's vehicle in time to avoid accident—Everett v. Littleton Const. Co., 46 A.2d 317, 94 N.H. 43.

(3) Failure of passenger in car to warn his driver—Everett v. Littleton Const. Co., *supra*.

94. Iowa—Schevers v. American R. Express Co., 192 N.W. 255, 195 Iowa 423.

42 C.J. p 833 note 35.

Evidence held sufficient to go to jury Ky.—Lexington Ice Co. v. Williams' Adm'r, 33 S.W.2d 14, 236 Ky. 318.

Evidence held insufficient to go to jury

Mo.—Vassila v. Highland Dairy Farms Co., 104 S.W.2d 686, 232 Mo. App. 886.

95. Mo.—Roper v. Greenspon, 198 S.W. 1107, 272 Mo. 288, L.R.A.1918D 126—Roper v. Greenspon, App., 210 S.W. 922.

96. Cal.—Squier v. Davis Standard Bread Co., 185 P. 391, 181 Cal. 533.

should constitute contributory negligence;⁹⁷ and a motorcyclist is not guilty of contributory negligence as a matter of law in traveling at a lawful speed so as to preclude his recovery in case of a collision with a horse-drawn vehicle making a sharp turn in front of him.⁹⁸ Likewise, an act of plaintiff in an emergency in passing defendant's vehicle on the wrong side has been held not to be negligence as a matter of law.⁹⁹

§ 570. — Instructions

Questions as to construction and scope of instructions in actions for injuries to motor vehicles or occupants thereof by vehicles other than motor vehicles are governed by the general rules of instructions in civil actions.

Under the rules applicable to instructions in civil actions generally, the instructions should be construed as a whole,¹ should confine the jury to the issues,² and should not assume controverted facts.³

X. RACES AND SPEED TRIALS

A. RACES OR TESTS UPON HIGHWAYS OR STREETS

§ 571. Authority to Permit

Local authorities may be authorized to permit speed races or tests over public ways.

An exception to legislative speed regulations exists, under some statutes, in that local authorities are authorized to set aside for a given time a specified public highway for speed races or tests.⁴ However, an ordinance or resolution authorizing use of a specified street by a particular body for automobile racing has been held illegal as violating the municipality's delegated power to regulate speed of motor vehicles, as an unauthorized grant of the use of a street for private purposes so as to exclude the public, and as operating as a participation by the city in the commission of an unlawful act.⁵

§ 572. Liability of Public Authorities

Generally a municipal corporation is not liable for injuries to the public from the running of a speed race or test along public ways, although under some statutes such liability may exist.

In the absence of a statute imposing liability on a municipal corporation for its negligent exercise or negligent discharge of purely governmental functions⁶ it cannot be held liable to one injured by a motor vehicle in a race in a public street by reason of the negligence of its officials in allowing the race to be run and in not providing police protection.⁷ So a municipality is not liable for injuries to a spectator by reason of its illegal authorization of the use of a street for automobile racing,⁸ although it has been said that it may well be that the municipality in such case of illegal authorization would be absolutely liable to a trav-

97. N.H.—Everett v. Littleton Const. Co., 46 A 2d 317, 94 N.H. 43.

98. Cal.—Squier v. Davis Standard Bread Co., 185 P. 391, 181 Cal. 533.

99. N.J.—Barry v. Borden Farm Products Co., 125 A. 37, 100 N.J. Law 106.

1. N.Y.—Lawson v. Wells, 113 N.Y. S. 647.
42 C.J. p 833 note 36.

2. Conn.—Matyewski v. Wheeler, 117 A. 545, 97 Conn. 593.

Mich.—Zullo v. Detroit Creamery Co., 275 N.W. 730, 281 Mich. 678.
42 C.J. p 833 note 37.

Instruction held supported by pleading

Where an injury results when there is a collision between a taxicab and a stalled wagon, and another wagon belonging to defendant is near the stalled wagon, an instruction authorizing a verdict for plaintiff as for the negligence of both of the drivers of such wagons is supported by a petition charging that plaintiff's injury was due to the negligence of defendants, their servants, and em-

ployees—Roper v. Greenspon, Mo. App., 210 S.W. 922.

3. Conn.—Matyewski v. Wheeler, 117 A. 545, 97 Conn. 593.
42 C.J. p 833 note 38.

4. N.Y.—Morrell v. Skene, 119 N.Y. S. 28, 64 Misc. 185.
Legislative regulation of speed generally see *supra* § 29.

Statute construed

"Local authorities," within such provision, mean only such local authorities whose districts would be injured by the wear and tear and perhaps benefited by commercial advantages from the race.—Morrell v. Skene, *supra*.

Under a former statute, authorizing the state engineer to make necessary rules for the protection of state highways, a rule by such official requiring a specified deposit for races on highways as a condition thereto was construed to be unauthorized.—Morrell v. Skene, *supra*.

5. N.Y.—Bogart v. New York, 93 N.E. 937, 200 N.Y. 379, 21 Ann.Cas. 466—Johnson v. New York, 78 N.E.

715, 186 N.Y. 139, 116 Am.S.R. 545, 9 Ann.Cas. 824.

6. Kan.—Rose v. Gypsum City, 179 P. 348, 104 Kan. 412.

Statutory liability

Under a statute rendering municipalities liable for injuries to person or property through a defect in a street, a city is liable to a person struck by an automobile running upon a street at terrific speed in testing the car for hill-climbing ability.—Burnett v. Greenville, 91 S.E. 203, 106 S.C. 255, Ann.Cas.1918C 363.

7. Kan.—Rose v. Gypsum City, 179 P. 348, 104 Kan. 412.
42 C.J. p 1300 note 95.

Liability of municipal corporation for negligence of its officers and agents in exercise of governmental powers generally see the C.J.S. title Municipal Corporations § 759, also 43 C.J. p 940 note 79—p 942 note 87.

8. N.Y.—Bogart v. New York, 93 N.E. 937, 200 N.Y. 379, 21 Ann.Cas. 466—Johnson v. New York, 78 N.E. 715, 186 N.Y. 139, 116 Am.S.R. 545, 9 Ann.Cas. 824.

eler, to occupants of adjoining land, and to persons seeking evidence for prosecution, regardless of the skill or care exercised.⁹

§ 573. Liability of Participants

Both civil and criminal liability may be imposed on persons promoting, aiding, or abetting speed races or tests along public ways.

Those who promote, aid, or abet a motor vehicle race upon a public highway, whether public officials or private persons, may be personally liable to a bystander or spectator injured by their negligence,¹⁰ although it has been intimated that their liability, at least as to spectators, does not extend to liability other than for negligence.¹¹ Where a race is held under an illegal permit from the municipal authorities, such fact alone, regardless of negligence or misconduct, is not sufficient to impose liability as to a spectator who is at the scene of the race expressly to witness it and enjoy the pleasure that the contest offers,¹² although it has been said that it may well be that the participants in such case would be absolutely liable to a traveler, to occupants of adjoining lands, and to persons seeking evidence for prosecution, regardless of the skill or care exercised.¹³ Moreover, where by statute a street obstruction amounting to a nuisance is made a crime, as discussed in the C.J.S. title Municipal Corporations § 1756, also 44 C.J. p 1024 note 95—p 1025 note 7, a race or speed contest held under such illegal authorization is an unlawful use and obstruction of the street so as to constitute a nuisance per se within the criminal statute.¹⁴ The owner of a vehicle occasioning the injury cannot be held liable for damages without a showing that it was entered

in the race with his authority and with his sanction.¹⁵

§ 574. Trespass by Spectator

The right of a spectator to recover for injuries because of a speed contest along a public way is not affected by the fact that he is a trespasser on land adjacent to the highway.

The fact that one injured while a spectator of a speed contest upon a public highway is a trespasser in entering on land adjacent to the highway has no bearing on his right to recover if defendants were guilty of negligence or other fault.¹⁶

§ 575. Contributory Negligence

Contributory negligence of a spectator at speed races or tests along a public way bars recovery.

A spectator injured at a road race cannot recover against the owner of a car taking part in the race where he has been guilty of contributory negligence.¹⁷

§ 576. Actions

General rules of procedure govern actions for injuries resulting from speed races and tests along public highways and streets.

The general rules of evidence apply in actions for damages for injuries from racing or tests of automobiles upon highways or streets.¹⁸ Where a speed contest is conducted upon a public highway, the question whether it, as conducted, was in fact a nuisance,¹⁹ or whether the persons conducting it were guilty of negligence in the management of the race,²⁰ or whether a spectator was guilty of contributory negligence,²¹ is a question of fact for the jury.

9. N.Y.—Bogart v. New York, 93 N.E. 937, 200 N.Y. 379, 21 Ann.Cas. 466—Johnson v. New York, 78 N.E. 715, 186 N.Y. 139, 116 Am.S.R. 545, 9 Ann.Cas. 824.

10. Kan.—Rose v. Gypsum City, 179 P. 348, 104 Kan. 412.
42 C.J. p 1301 note 5.
Liability for casual racing upon highways causing injury see supra § 297.

11. Cal.—Johnson v. Reliance Auto. Co., 137 P. 603, 23 Cal.App. 222.
42 C.J. p 1301 note 6.

12. N.Y.—Johnson v. New York, 78 N.E. 715, 186 N.Y. 139, 116 Am.S.R. 545, 9 Ann.Cas. 824.
42 C.J. p 1301 note 7.

13. N.Y.—Johnson v. New York, supra.

14. N.Y.—Johnson v. New York, supra.

15. Cal.—Johnson v. Reliance Auto. Co., 137 P. 603, 23 Cal.App. 222.
42 C.J. p 1301 note 10.

16. N.Y.—Johnson v. New York, 78 N.E. 715, 186 N.Y. 139, 116 Am.S.R. 545, 9 Ann.Cas. 824.

17. N.Y.—Baldwin v. Locomobile Co. of America, 128 N.Y.S. 429, 143 App.Div. 599.
42 C.J. p 1301 note 12.

18. Burden of proof

Where plaintiff seeks to recover damages from defendant on the theory that defendant owned the automobile entered in the race and that the car was driven at the time by defendant's agent, servant, or employee acting within the scope of his employment, plaintiff has the burden

of establishing such issues.—Johnson v. Reliance Auto Co., 137 P. 603, 23 Cal.App. 222.

Evidence held insufficient

(1) To show negligence of defendant's agent, servant, or employee driving defendant's car in a race—Johnson v. Reliance Auto Co., supra.

(2) To sustain finding that plaintiff at the time of the accident was a traveler upon the highway—Bogart v. New York, 93 N.E. 937, 200 N.Y. 379, 21 Ann.Cas. 466.

19. N.Y.—Johnson v. New York, 78 N.E. 715, 186 N.Y. 139, 116 Am.S.R. 545, 9 Ann.Cas. 824.

20. N.Y.—Johnson v. New York, supra.

21. N.Y.—Johnson v. New York, supra.

B. RACES AND TESTS UPON TRACKS AND SPEEDWAYS

§ 577. Duties and Liabilities of Persons Conducting or Promoting

Public authorities and private persons who maintain race tracks and speedways for automobile or similar racing are liable for injuries due to their negligence.

One who invites the public to attend a race between motor vehicles and charges an admission fee is bound to exercise reasonable care to make the place provided for spectators reasonably safe,²² but, although a spectator is injured, no liability may be imposed on the persons conducting the races, in the absence of a showing of negligence on their part.²³

Where the state permits a motor vehicle race upon a track owned by it without the exercise of reasonable care to provide against accidents to spectators from the vehicles leaving the track, it is liable in the same manner as a private individual,²⁴ since, where it invites the attendance of the public and charges an admission fee, with resulting profit, it is acting as the proprietor of a race track and not in a governmental capacity.²⁵

Acts of independent contractor. An association which is giving an exhibition upon grounds in its possession to which it charges an admission, which has offered a prize for a speed and endurance contest between automobiles upon a track upon its grounds, cannot, although one of the contestants was negligent and a spectator was thereby injured, escape liability on the ground that the participant inflicting the injury acted independently of the association in the manner of staging the attraction.²⁶ So, although races held upon a track located upon a state fair ground are conducted by an independent contractor, the state may be liable for its negligence in permitting such a race to be held upon a track owned by it, without reasona-

ble precautions to protect those who have been invited by the state to witness the exhibition and who have paid the state for the privilege.²⁷

§ 578. Duties and Liabilities of Owners of Participating Vehicles

Liability for the acts of the driver attaches to the owner of a vehicle participating in a motor vehicle race upon a track or speedway.

The owner of a motor vehicle who permits another to use it in connection with racing in contemplation of some benefit to be derived from its use to the business of the owner is liable for the acts of the person so using it.²⁸

§ 579. Duties and Liabilities of Race Drivers

Racing drivers participating in motor vehicle racing upon tracks and speedways must exercise care to avoid injury to licensees and invitees.

Where, after the close of automobile races, the spectators go upon the track, they are licensees,²⁹ and a racing driver who continues to drive around the track owes to such licensees, when he knows or has good reason to expect them to be upon the track, the duty of exercising ordinary care to avoid injury.³⁰ As to a licensee who is injured by racing drivers during a practice run, the drivers owe a duty to exercise reasonable care and prudence for his safety and to refrain from wanton or reckless acts.³¹ A driver whose gross negligence causes another driver to injure such licensee is liable therefor,³² provided such gross negligence was the proximate cause of the injury.³³ The duty owed by a driver of a racing car to an invitee riding with him in a race is greater than merely the duty to refrain from willful or intentional injury;³⁴ the duty is that of reasonable care,³⁵

22. Ill.—Jerrrell v. Harrisburg Fair, etc., Ass'n, 215 Ill.App. 273.

42 C.J. p 1301 note 16.
Agricultural society's duty as to invitees at races see Agriculture § 14 b.

23. Ill.—Harms v. Lee County Fair Ass'n, 209 Ill.App. 103.

24. N.Y.—Arnold v. State, 148 N.Y. S. 479, 163 App.Div. 253.

25. N.Y.—Arnold v. State, supra.
Liability of state for torts generally see the C.J.S. title States § 130, also 59 C.J. p 194 note 34—p 196 note 57.

26. Ill.—Jerrrell v. Harrisburg Fair, etc., Ass'n, 215 Ill.App. 273.

27. N.Y.—Arnold v. State, 148 N.Y. S. 479, 163 App.Div. 253.

Status as independent contractor

A state employee engaged to manage an automobile racing performance on behalf of the state but without absolute control of the work of putting on and conducting the race is not an independent contractor.—Arnold v. State, supra.

28. Wash.—Maskell v. Alexander, 157 P. 872, 91 Wash. 363.

29. Cal.—Colgrove v. Lompoc Model T Club, 124 P.2d 128, 51 Cal.App.2d 18.

30. Cal.—Colgrove v. Lompoc Model T Club, supra.

31. Wash.—Maskell v. Alexander, 157 P. 872, 91 Wash. 363.

Special policeman

Wash.—Maskell v. Alexander, supra.

32. Crowding driver off path

A motorcycle rider practicing for a race, who, notwithstanding he has ample room upon the beaten path to pass another rider also practicing, crowds him off the beaten path and crosses in front of him so closely as to cause him to lose control of his machine, is guilty of gross negligence.—Maskell v. Alexander, supra.

33. Wash.—Maskell v. Alexander, supra.

34. Mont.—Liston v. Reynolds, 223 P. 507, 69 Mont. 480.

35. Mont.—Liston v. Reynolds, supra.

and what is meant by reasonable or ordinary care must be determined in connection with the circumstances and surroundings of the particular case.³⁶ This duty continues when, after finishing the race, the driver continues to drive at high speed.³⁷

§ 580. Duty toward Trespassers

Persons owning and driving vehicles entered in races are bound only to refrain from willfully injuring a trespasser.

One who is a trespasser at an automobile race at a track or speedway is entitled only to have the owners of the racing cars and the drivers abstain from willfully injuring him.³⁸

§ 581. Contributory Negligence and Assumption of Risk

Application of the doctrines of contributory negligence and assumption of risk to liability for injuries in motor vehicle racing upon tracks and speedways is discussed *infra* §§ 582-584.

Examine Pocket Parts for later cases.

§ 582. — Spectators

A recovery by a spectator at a motor vehicle race upon a track or speedway may be precluded by his contributory negligence.

Under the general rules of contributory negligence applicable to actions based on negligence, as discussed in the C.J.S. title Negligence §§ 116-173, also 45 C.J. p 941 note 27-p 1013 note 60, a recovery by a spectator injured at a motor vehicle race upon a track or speedway may be precluded by his contributory negligence;³⁹ but he is not guilty of contributory negligence in occupying a place in which spectators are allowed and expected to stand without warning of danger.⁴⁰

§ 583. — Participants

A participant in a motor vehicle race upon a track or speedway may assume the risk of injury.

36. Mont.—Liston v. Reynolds, *supra*.

37. Mont.—Liston v. Reynolds, *supra*.

38. Status as trespasser

Where motor vehicle races are being held upon grounds to which an admission fee is charged, one who knowingly enters an area reserved for those who have paid an admission fee without paying it is a trespasser.—Aughtrey v. Wiles, 91 S.E. 303, 106 S.C. 416.

39. Kan.—Scott v. Kansas State Fair Ass'n, 171 P. 634, 102 Kan. 658.

Occupation of a dangerous place after repeated warnings may amount to contributory negligence.—Scott v. Kansas State Fair Ass'n, *supra*.

40. N.Y.—Arnold v. State, 148 N.Y. S. 479, 163 App Div. 253.

41. Ind.—National Motor Vehicle Co. v. Kellum, 109 N.E. 196, 184 Ind. 457.

42. Ky.—Toole v. Erlanger Fair Ass'n, 269 S.W. 523, 207 Ky. 441.

43. Wash.—Maskell v. Alexander, 157 P. 872, 91 Wash. 363.

44. Declaration, petition, or complaint held sufficient

A mechanic riding an automobile in a race does not assume the risk of a latent defect in the track, where he had not discerned, and had no opportunity to discover, such defect, it not being his duty to inspect the roadway.⁴¹ One who intends to take part in motorcycle races to be held at the conclusion of horse races upon a race track, who takes a position of danger inside the track and is injured by a bolting horse, assumes the risk of injury.⁴²

§ 584. — Special Policemen or Others Rightfully upon Track

A person rightfully upon a motor vehicle track or speedway ordinarily is not guilty of contributory negligence.

Under the rule that one doing what it is his right to do in the discharge of his duty is not guilty of contributory negligence as a matter of law, if he exercises ordinary care and prudence, although the result shows that he imperiled his personal safety, as discussed in the C.J.S. title Negligence § 126, also 45 C.J. p 969 note 53, a special policeman or watchman at a race track which is being used by motorcycleists practicing for a race, whose duty is to prevent children and other spectators from getting upon the track, was not guilty of contributory negligence in taking a position between the gate posts of a gate in a fence surrounding the track and within the fence.⁴³

§ 585. Pleading

The general rules of pleading in civil actions apply in actions for injuries at a motor vehicle track or speedway.

Following the general rules of pleading in civil actions generally, the declaration, petition, or complaint in an action for damages for injuries at a race track or speedway must state a cause of action.⁴⁴ The general rules relating to issues, proof, and variance in pleadings in civil actions apply in actions for injuries from races and tests upon tracks and speedways.⁴⁵

Ill.—Jerrrell v. Harrisburg Fair, etc., Ass'n, 215 Ill.App. 273.

Mont.—Liston v. Reynolds, 223 P. 507, 69 Mont. 480.

Status of plaintiff

In an action against one driving a car in a race, it is sufficiently alleged that one riding with him occupied the position of an invitee, where it is alleged that he occupied the car at the special instance and request of defendant.—Liston v. Reynolds, *supra*.

45. Evidence admissible under issues

(1) Where a spectator sues for

§ 586. Evidence

The general rules of evidence in civil actions govern matters of evidence in actions for injuries at a motor vehicle track or speedway.

The weight and sufficiency of evidence in actions for injuries from races and tests upon tracks and speedways are determined in accordance with the general rules of evidence.⁴⁶

§ 587. Trial

In actions for injuries caused by a motor vehicle racing upon a track or speedway, questions of law and fact,

nonsuit, instructions, and findings are governed by the rules applicable to civil actions generally.

The general rules applicable in civil actions as to questions of law⁴⁷ and fact,⁴⁸ and nonsuit,⁴⁹ apply in actions for injuries from racing and tests upon tracks and speedways.

Instructions must not be misleading,⁵⁰ must not invade the province of the jury,⁵¹ and must be applicable to the evidence.⁵²

Findings. A failure to find one of two independent acts of negligence alleged will not prevent a recovery.⁵³

XI. OFFENSES AND PROSECUTIONS

A. IN GENERAL

§ 588. In General

Violation of statutory regulations as to motor vehicles may be made a felony or misdemeanor. Questions relating to indictments and informations, defenses, jury trials, evidence, and questions of law and fact in criminal prosecutions for such offenses are governed by general rules.

In some jurisdictions a violation of statutory regulations with respect to motor vehicles is made

a criminal offense.⁵⁴ The motor vehicle regulatory statutes and ordinances have been construed to be penal⁵⁵ and quasi-criminal⁵⁶ in nature. Statutes denouncing such offenses should be given a reasonable construction,⁵⁷ but should not be enlarged by intendment, in that, where there is an ambiguity, such ambiguity must be resolved against the penalty and only those cases brought within

an injury sustained through a racing motor vehicle leaving the track under an allegation that the particular place in which plaintiff was had been allotted for spectators, it may be shown that the place had been used for spectators on former occasions without proof of the elements necessary to establish a custom.—*Jerrell v. Harrisburg Fair, etc., Ass'n*, 215 Ill.App. 273.

(2) Under an allegation of want of ordinary care, evidence of gross negligence is admissible.—*Liston v. Reynolds*, 223 P. 507, 69 Mont. 480—42 C.J. p 1303 note 44.

46. Evidence held sufficient

(1) To warrant a finding that decedent had no knowledge of defects in the speedway.—*National Motor Vehicle Co. v. Kellum*, 109 N.E. 196, 184 Ind. 457.

(2) To warrant a finding that decedent was employed by defendant to ride in such race.—*National Motor Vehicle Co. v. Kellum*, supra.

(3) To show that status of mechanic was that of invitee.—*Liston v. Reynolds*, 223 P. 507, 69 Mont. 480.

47. S.D.—*Endorf v. Johnson*, 241 N. W. 519, 59 S.D. 549.

48. Contributory negligence is a question of fact to be determined by the jury.—*Scott v. Kansas State Fair Ass'n*, 171 P. 634, 102 Kan. 653.

Evidence held sufficient to go to jury trial.—*Liston v. Reynolds*, 223 P. 507, 69 Mont. 480.

Wash.—*Maskell v. Alexander*, 157 P. 872, 91 Wash. 363.

42 C.J. p 1302 note 23 [a], 28 [c].

49. Consent held proper as to injured trespasser.—*Aughtrey v. Wiles*, 91 S.E. 303, 106 S.C. 416.

50. Instructions held not misleading

Ill.—*Jerrell v. Harrisburg Fair, etc., Ass'n*, 215 Ill.App. 273.

51. Ill.—*Jerrell v. Harrisburg Fair, etc., Ass'n*, supra.

52. Instructions held based on evidence

Ill.—*Jerrell v. Harrisburg Fair, etc., Ass'n*, supra.

53. Ind.—*National Motor Vehicle Co. v. Kellum*, 109 N.E. 196, 184 Ind. 457.

43 C.J. p 1303 notes 47, 48.

54. Ohio.—*State v. Saam*, Com.Pl., 75 N.E.2d 824.

Offenses by garage keepers see infra § 722.

Validity of such statutes see Criminal Law § 24.

Classification

Under Uniform Traffic Act, there are two general classes of penal statutes: those making penal the doing or refraining from doing of a definite act specified in a statute imposing an absolute duty and violation of which constitutes a criminal act of itself, as operating a vehicle while

in a state of intoxication and requiring motor vehicles to be driven on the right side of the highway except under certain conditions, and, those making penal the failure to observe a general rule of conduct such as speed regulations and prohibiting starting from parking position unless such movement can be made with reasonable safety.—*State v. Saam*, supra.

Not crimes

Traffic infractions have been expressly declared by some statutes not to be crimes.—*McDonald v. Central School Dist. No. 3 of Towns of Romulus, Varick and Fayette, Seneca County*, 39 N.Y.S.2d 103, 179 Misc. 333, affirmed 36 N.Y.S.2d 438, 284 App.Div. 943, affirmed 47 N.E.2d 50, 289 N.Y. 800.

55. Ga.—*Thomas v. State*, 38 S.E. 2d 188, 73 Ga.App. 803.

Ind.—*Hargiss v. State*, 44 N.E.2d 807, 220 Ind. 429.

N.J.—*State v. Rowe*, 181 A. 706, 116 N.J.Law 48, affirmed 5 A.2d 697, 122 N.J.Law 466—*Watt v. Wallerius*, 123 A. 723, 99 N.J.Law 370.

56. Mo.—*City of St. Louis v. Cain*, App., 137 S.W.2d 603.

N.J.—*State v. Rowe*, 181 A. 706, 116 N.J.Law 48, affirmed 5 A.2d 697, 122 N.J.Law 466—*Watt v. Wallerius*, 123 A. 723, 99 N.J.Law 370.

57. Ind.—*Hargis v. State*, 44 N.E.2d 807, 220 Ind. 429.

the statute which are clearly within its meaning and intention.⁵⁸ By the enactment creating them, the violation of these regulations is frequently made a misdemeanor,⁵⁹ and in some cases, a felony.⁶⁰ In accordance with the general principles discussed in Criminal Law § 25, the failure of a motor vehicle act to provide a penalty, although it provides that certain acts shall constitute a felony, will not preclude such acts from constituting a crime or public offense where resort may be had to a general statute for the purpose of fixing the penalty,⁶¹ and this is true, although the maximum penalty provided by such general statute might be severe, where the imposition of the maximum penalty is not imperative.⁶² While it has been said that provisions of general criminal statutes do not apply to violations of statutory regulations of motor vehicles,⁶³ nevertheless, in addition to offenses growing out of violations of regulations peculiar to the ownership and management of motor vehicles, offenses of general cognizance in the criminal law may sometimes involve a motor vehicle either as to the subject matter of the offense or the agency by which it is committed, and to such extent such offenses are hereinafter specifically treated.

With respect to conflicting ordinances, statutory provisions are controlling in cases of offenses cover-

ed by such law,⁶⁴ but, under a statutory prohibition of local ordinances as to motor vehicle regulations except as to cities of specified classes, a city within such excepted classes has power to enact penal ordinances as to motor vehicles.⁶⁵

Information to accused. In some jurisdictions the court has a mandatory⁶⁶ duty to inform a person accused of an offense relating to motor vehicles that in case of conviction he will be subject to a penalty and to suspension or revocation of his certificate of registration and driver's license.⁶⁷ Noncompliance with such requirement renders the judgment of conviction void and subject to collateral attack,⁶⁸ or the judgment may be reversed.⁶⁹

Indictments and informations. The general rules relating to indictments and informations control as to indictments, informations, and complaints charging offenses in connection with motor vehicles.⁷⁰

Defenses. Neither negligence nor contributory negligence of a person injured by accused constitutes a defense to a prosecution for a statutory offense.⁷¹

Jury trial. In some jurisdictions an express statutory requirement exists that in prosecutions for offenses relating to motor vehicles the right to trial by jury shall be preserved.⁷²

58. Ind.—Hargis v. State, 44 N.E.2d 307, 220 Ind. 429.

59. Ga.—Thomas v. State, 38 S.E.2d 188, 73 Ga. App. 803.

Ind.—Hargis v. State, 44 N.E.2d 307, 220 Ind. 429.
42 C.J. p. 1309 note 74.

Violation of rules of boards and officials regulating motor vehicles is not a misdemeanor.—People v. Gillette, 16 N.Y.S.2d 361, 172 Misc. 847.

60. Cal.—Ex parte Gohlke, 237 P. 779, 72 Cal. App. 536.

61. Cal.—In re Gohlke, supra.

62. Cal.—In re Gohlke, supra.

63. N.Y.—People v. Buerkert, 33 N.Y.S.2d 523.

64. N.Y.—People v. Marcello, 25 N.Y.S.2d 533.

Effect on conflicting ordinance

Under a statutory prohibition of ordinances restricting motor vehicles other than as specified, a provision of local law that any person violating any city ordinance should be guilty of misdemeanor is modified or suspended as far as necessary to give effect to the statute.—People v. Kittenbaugh, 77 N.Y.S.2d 321, 190 Misc. 410.

65. N.Y.—People v. City of New York, 280 N.Y.S. 438, 245 App. Div.

77, affirmed 5 N.E.2d 355, 272 N.Y. 608.

66. N.Y.—People v. Sutcliffe, 7 N.Y.S.2d 431, 255 App. Div. 299.

67. N.Y.—People v. Stoner, 7 N.Y.S.2d 510, 169 Misc. 469.

When required

Legislature did not intend to require magistrate to give an accused such information unless the offense with which he was charged was of such nature that, on conviction, his license might be suspended or his certificate of registration revoked.—People v. Stoner, supra.

68. N.Y.—McCord v. Fletcher, 44 N.Y.S.2d 89, 182 Misc. 447—Nervo v. Mealey, 25 N.Y.S.2d 632, 175 Misc. 952—Sitts v. Mealey, 17 N.Y.S.2d 165, 173 Misc. 82—Ohmann v. Harnett, 6 N.Y.S.2d 199, 168 Misc. 521.

The absence of a specific notation on criminal docket that accused was informed that on conviction his operator's license and certificate of registration might be suspended or revoked was not fatal to judgment of conviction so as to entitle accused to remission of fine, where affidavit of the judge stated that he so informed accused in compliance with statute.—In re Albroza, 19 N.Y.S.2d 329, 173 Misc. 385—Compitello v.

Mealey, 17 N.Y.S.2d 50, 173 Misc. 30.

69. N.Y.—People v. Sutcliffe, 7 N.Y.S.2d 431, 255 App. Div. 299.

Relief awarded

(1) Failure to comply with the requirement justifies reinstatement of license and remission of fine.—People v. Sutcliffe, supra.

(2) On proceeding for remission of fine, conflict between petitioner and judge as to whether the required information had been given will be determined in favor of the judge.—In re Albroza, 19 N.Y.S.2d 329, 173 Misc. 385.

70. Mo.—Cape Girardeau v. Bennett, App., 27 S.W.2d 447.

Charging in language of statute

Pa.—Commonwealth v. Fusco, Com. Pl., 32 Del. Co. 110.

Indictment, information, or complaint held sufficient

Mo.—Cape Girardeau v. Bennett, App., 27 S.W.2d 447.

71. Ohio.—State v. Saam, Com. Pl., 75 N.E.2d 824.

72. Statute construed

Statute conferring county-wide jurisdiction on all courts of record to hear and determine cases arising under provisions of the driver's license law, and providing that such

Evidence. In prosecutions for a violation of the traffic laws, a presumption has been said to exist that a person acts for his own safety.⁷³ In accordance with the general rule that the legislature has power to declare what shall be prima facie evidence in criminal proceedings, as discussed in Constitutional Law § 128 d, a municipality may provide by ordinance that violation of traffic ordinances by motor vehicle shall be prima facie evidence that the violation was by or with the authority or permission of the owner of the vehicle.⁷⁴ The general rule that in order to sustain a conviction on circumstantial evidence all the circumstances proved must be inconsistent with every other reasonable hypothesis except that of guilt, as considered in Criminal Law § 907 c, applies in prosecutions relating to motor vehicles.⁷⁵

Questions of law and fact. Where intent is essential to an offense relating to motor vehicles, and such intent is supplied by the operation of the vehicle in a manner prohibited by law, whether the operation constituted culpable negligence is a question of fact.⁷⁶

§ 589. Capacity to Commit Crime

The capacity to commit, and responsibility for, crimes generally is discussed in Criminal Law §§ 55-72.

Examine Pocket Parts for later cases.

§ 590. Parties to Offense

Generally, criminal responsibility does not attach to the owner of a motor vehicle for acts of others in operating the vehicle.

As a general rule a person who neither owned

the motor vehicle nor had control of the driver may not be held criminally responsible for the negligence or wantonness of the driver,⁷⁷ and a motor vehicle is not a dangerous instrument per se so as to render the owner criminally responsible for its operation by another.⁷⁸ So the mere fact of ownership of the motor vehicle⁷⁹ or mere presence of the owner in the vehicle⁸⁰ does not impose criminal responsibility on the owner for the acts of another person driving the vehicle. The owner, however, is liable for his own operation of the vehicle,⁸¹ and he has also been held responsible when the vehicle is operated under his control;⁸² and it has been held that he is liable in all cases when he is present at the time, unless his instructions are disobeyed by the driver.⁸³ Under the rule that all who participate in the commission of a misdemeanor are principals and may be charged as such, as discussed in Criminal Law § 81 b, where the offense is a misdemeanor, the owner of the car or one having such special property as gives him the right to control it, who is occupying it but not driving it, may be guilty as a principal.⁸⁴

Exemptions. While the traffic laws usually contain express exemptions of various public vehicles, such as fire, police, and ambulances, such provisions are to be extended with the greatest of caution,⁸⁵ and the exemption usually is limited to the discharge of functions vitally connected with public safety or to those of public importance.⁸⁶

§ 591. Knowledge, Intent, and Malice

Unless required by statute, a criminal intent is not an essential element of an offense relating to motor vehicles.

In accordance with the general principle that a

action shall be commenced by the filing of an affidavit and the right of trial by jury as provided by law shall be preserved, preserves the right to trial by jury and does not create the right in a case where it would not otherwise exist.—City of Cincinnati v. Wright, 67 N.E.2d 358, 77 Ohio App. 261.

73. Utah.—State v. Busby, 131 P.2d 510, 102 Utah 416, 144 A.L.R. 1468.

Inference of negligence

The presumption that a person was exercising due care at the time he met his death lends no basis for inferring that defendant was negligent.—Commonwealth v. Hipple, Pa. Quar.Sess., 57 Dauph Co. 156.

Res ipsa loquitur

The mere fact that a person is struck by an automobile on a public highway does not establish that the driver was at fault.—Commonwealth v. Hipple, *supra*.

74. Ky.—Commonwealth v. Kroger, 122 S.W.2d 1006, 276 Ky 20.

75. Ga.—Hampton v. State, 131 S.E. 688, 34 Ga App. 699.

76. Okl.—Beck v. State, 119 P.2d 865, 730 Okl Cr. 229—Lamb v. State, 105 P.2d 799, 70 Okl Cr. 236—Winkler v. State, 283 P. 591, 45 Okl.Cr. 322.

77. N.C.—State v. Trott, 130 S.E. 627, 190 N.C. 674, 42 A.L.R. 1114.

78. Tex.—Schorr v. State, 132 S.W.2d 898, 137 Tex.Cr. 625
Dangerous character of motor vehicle generally see *supra* § 12.

79. N.C.—State v. Spruill, 198 S.E. 611, 214 N.C. 123—State v. Creech, 188 S.E. 316, 210 N.C. 700.

80. N.C.—State v. Spruill, 198 S.E. 611, 214 N.C. 123.

81. Ala.—Goodman v. State, 102 So. 486, 20 Ala.App. 392.

Nonresident motor vehicle operator is subject to traffic regulations and punishable for negligence or other infractions of the law.—Fred v. District of Columbia, 33 F.2d 375, 59 App.D.C. 79, reversed on other grounds 50 S.Ct. 163, 281 U.S. 49, 74 L.Ed. 694—King v. District of Columbia, 277 F. 862, 51 App.D.C. 160.

82. Ala.—Goodman v. State, 102 So. 486, 20 Ala.App. 392.

83. Ala.—Goodman v. State, *supra*.

84. Mass.—Commonwealth v. Sherman, 78 N.E. 98, 191 Mass. 439, 42 C.J. p 1310 note 3.

85. N.Y.—City of Rochester v. Lindner, 4 N.Y.S.2d 4, 167 Misc. 790.

86. N.Y.—City of Rochester v. Lindner, *supra*.

Game warden is not exempt within the meaning of exemption of police vehicles.—City of Rochester v. Lindner, *supra*.

legislature may forbid the doing of, or the failure to do, an act and make its commission or omission criminal without regard to the intent or knowledge of the doer, as discussed in Criminal Law § 30, it is not arbitrary or unreasonable to impose a fine and imprisonment for a violation of the law as to motor vehicles on a citizen who acted without any criminal intent and in ignorance of any violation of law.⁸⁷ Specific intent is unnecessary as an ingredient of the offense involved in a violation of a motor vehicle law unless it is made so by statute.⁸⁸ However, a statute providing that a person shall not be convicted of a crime or misdemeanor committed by misfortune or accident where it satisfactorily appears there was no evil design, intention, or culpable neglect applies to offenses relating to motor vehicles,⁸⁹ as does a statutory requirement that in order to constitute a crime or misdemeanor there shall be a union or joint operation of act and intention, or criminal negligence.⁹⁰ Where intent is made an essential element of an offense relating to motor vehicles, the operation of such vehicle in a manner prohibited by law takes the place of, and supplies, the required intent.⁹¹

§ 592. Jurisdiction in General

Statutes and ordinances usually regulate questions of jurisdiction of particular courts as to criminal prosecutions for offenses relating to motor vehicles.

Courts have the duty of supplementing the enforcement of traffic laws and regulations relating to motor vehicles by the police in such fashion as to reduce accidents and alleviate the effects caused

by traffic accidents.⁹² The question of what court has jurisdiction over criminal offenses involving motor vehicles usually depends on provisions of statutes and ordinances.⁹³ The criminal jurisdiction of justices of the peace, police justices, and similar officers as to offenses under motor vehicle laws is stated in Criminal Law § 125 b, and jurisdiction in summary proceedings is discussed in Criminal Law § 379.

§ 593. Arrest and Bail or Deposit in General

Matters dealing with arrest for violation of laws with respect to the operation of motor vehicles are discussed in Arrest. Admission to bail by a committing magistrate is discussed in Criminal Law § 348, and the legality of bail taken on Sunday is treated in the C.J.S. title Sunday § 48, also 60 C.J. p 1142 note 6-p 1143 n 17.

§ 594. Punishment in General

The punishment to be imposed for an offense relating to motor vehicles usually is regulated by statute.

The punishment to be imposed following conviction of an offense involving a motor vehicle is usually regulated by statute,⁹⁴ and in some jurisdictions the punishment cannot be in excess of that recommended by the jury.⁹⁵ A fine imposed must not exceed that authorized by the statute;⁹⁶ nor can it exceed the jurisdiction of the court, although its amount is authorized by the statute creating the offense.⁹⁷ In some jurisdictions statutes have been held to authorize the probation of persons convicted of offenses relating to motor vehicles,⁹⁸ and in such case a fine may be imposed as

87. Ill.—*People v. Billardello*, 149 N. E. 781, 319 Ill. 124, 42 A.L.R. 1146. Iowa.—*State v. Dunn*, 211 N.W. 850, 202 Iowa 1188.

88. Mass.—*Commonwealth v. Coleman*, 147 N.E. 552, 252 Mass. 241. 42 C.J. p 1310 note 7.

89. Ga.—*Nelson v. State*, 107 S.E. 400, 27 Ga.App. 50.

90. Ga.—*Nelson v. State*, *supra*.

91. N.C.—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69.

Okl.—*Beck v. State*, 119 P.2d 865, 73 Okl.Cr. 229—*Lamb v. State*, 105 P.2d 799, 70 Okl.Cr. 236—*Winkler v. State*, 283 P. 591, 45 Okl.Cr. 322.

Reckless operation

Autoist injuring another while violating motor vehicle statute with reckless disregard of consequences or heedless indifference to others' safety, and with reasonable foresight that injury would probably result, would be criminally culpable.—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69.

92. N.Y.—*City of Rochester v. Al-ling*, 10 N.Y.S.2d 373, 170 Misc. 477.

93. Ind.—*Basson v. State*, 187 N.E. 314, 205 Ind. 532.

N.Y.—*People v. Gilberg*, 21 N.Y.S. 2d 920.

94. Cal.—*Ex parte Montague*, 278 P. 1061, 99 Cal.App. 576.

Applicability of general statute

(1) A statute specifying punishment for misdemeanors generally has been held to include punishment for statutory misdemeanors relating to motor vehicles.—*Bopp v. Murphy*, 168 A. 129, 11 N.J.Misc. 747.

(2) However, a general statute does not apply where a statute relating to punishment for offenses as to motor vehicles exists.—*Ex parte Borah*, 24 P.2d 841, 134 Cal.App. 14.

General provision construed

Under a statute relating to offenses involving motor vehicles, a provision for punishment for violation of "any of the other provisions of this article" means the same article of the

statute relating to motor vehicles and such sections therein not otherwise providing for punishment.—*State v. Ball*, Mo.App., 171 S.W.2d 787.

Statute punishing misdemeanors does not apply to felonies.—*Ex parte Borah*, 24 P.2d 841, 134 Cal.App. 14.

95. Cal.—*Ex parte Montague*, 278 P. 1061, 99 Cal.App. 576.

96. N.Y.—*People v. Carrie*, 204 N.Y. S. 759, 122 Misc. 753.

Amount of fine as limited to amount prescribed by law generally see **Fines** § 5.

Punishment held excessive

Sentence, forbidding accused to drive automobile for balance of year, was illegal, under ordinance prescribing fine or twenty days on streets.—*Dwight v. City of Dalton*, 140 S.E. 403, 37 Ga.App. 385.

97. N.Y.—*People v. DeGrath*, 107 N.Y.S. 1038, 56 Misc. 429.

98. Cal.—*Ex parte McVeity*, 277 P. 745, 98 Cal.App. 723.

a condition of probation, provided it does not amount to the imposition of a punishment in excess of the punishment recommended by the jury.⁹⁹

Effect of amendment as to place of imprisonment. The validity of a conviction under a statute punishing offenses in relation to motor vehicles is not affected by an amendatory act expressly providing that imprisonment on conviction shall be in the

county jail, where such would have been the place of imprisonment in the absence of any express provision therefor.¹

§ 595. Costs

Matters relating to costs in criminal cases generally are discussed in Costs §§ 435-480.

Examine Pocket Parts for later cases.

B. PARTICULAR OFFENSES

§ 596. Alteration of Numbers or Identification Marks

The kind of motor vehicle or other contrivance or apparatus contemplated by statutes making it an offense to alter or remove identifying numbers or marks thereon depends on the wording of the particular statute involved. General rules govern in respect of prosecutions for such offenses.

Under statutes providing that anyone who willfully removes, defaces, covers, alters, or destroys the manufacturer's serial number or any other distinguishing number or identification mark on any motor vehicle or on any mechanical device is guilty of a crime, the term "motor vehicle" has been construed as referring to what is generally known as an automobile and nothing else;² and the term "mechanical device" has been held to apply only to automobiles and mechanical devices used on automobiles.³ Where a statute makes it a crime to remove or alter numbers or marks "upon any machine or other apparatus," it has been held that an automobile tire is a machine or other apparatus within the meaning of the statute so as to make removal or alteration of identifying numbers or

marks from such tires an offense.⁴

Prosecution. In accordance with general rules, evidence offered on prosecutions for alteration or removal of identifying numbers or marks from motor vehicles has been held admissible⁵ or inadmissible,⁶ and such rules have been applied in determining the sufficiency of the evidence to sustain a conviction,⁷ and the propriety of instructions.⁸

§ 597. Assault and Battery; Aggravated Assaults

- a. In general
- b. Collision or striking
- c. Intent
- d. Proximate cause and contributory negligence

a. In General

A motor vehicle may be the instrument of an assault and battery or of a statutory aggravated assault.

A motor vehicle may be the instrument of an assault and battery,⁹ or of certain statutory aggravated assaults, as, for example, where so used as to

Imprisonment under probation order

Statute was held to prohibit court from imprisoning defendant under probation order for longer period than fixed by jury's verdict.—*Ex parte Montague*, 278 P. 1061, 99 Cal. App. 576.

99. Cal.—*Ex parte McVeity*, 277 P. 745, 98 Cal. App. 723.

Statutes jointly construed

Statute limiting authority to impose sentence after jury's recommendation and statute authorizing court granting probation to impose fine must be construed together.—*Ex parte McVeity*, supra.

1. N.J.—*State v. Rosenblum*, 126 A. 852, 100 N.J. Law 240—*State v. Bailey*, 128 A. 389, 3 N.J. Misc. 297.

2. N.Y.—*People v. Congress Radio*, 232 N.Y.S. 647, 133 Misc. 542, affirmed 234 N.Y.S. 860, 226 App. Div. 784, affirmed 168 N.E. 432, 251 N.Y. 572.

Possession of motor vehicle with alteration marks altered or removed as offense see *infra* § 688.

Sale of motor vehicle with identification marks altered or removed as offense see *infra* § 714 d

3. N.Y.—*People v. Congress Radio*, supra.

4. Pa.—*Commonwealth v. Rutt*, 44 Pa. Dist. & Co. 224, 48 Lanc. L. Rev. 43, 4 Monroe L. R. 59.

5. Iowa.—*State v. Dunn*, 211 N.W. 850, 202 Iowa 1188.

Pa.—*Commonwealth v. Davis*, Quar. Sess., 52 Dauph. Co. 113.

6. Ind.—*Wolf v. State*, 151 N.E. 731, 198 Ind. 261.

Pa.—*Commonwealth v. Davis*, Quar. Sess., 52 Dauph. Co. 113.

Bill of sale

In a prosecution for destroying the engine number of an alleged stolen automobile, exclusion of the bill of sale of the alleged stolen automobile is not error, where, on objection because of discrepancy in model number, defendant fails to identify the automobile described in the bill of sale as one which was stolen, and on

which defendant was alleged to have altered the number.—*Wolf v. State*, 151 N.E. 731, 198 Ind. 261.

7. Evidence held sufficient

Ga.—*Mitchem v. State*, 185 S.E. 367, 53 Ga. App. 280.

Ind.—*Wolf v. State*, 151 N.E. 731, 198 Ind. 261.

42 C.J. p 1315 note 22 [a].

8. Ky.—*Bailey v. Commonwealth*, 174 S.W.2d 719, 295 Ky. 441.

Instruction held improper

In prosecution under indictment charging that defendant alone committed offense of altering automobile motor serial number, court erred in instructing jury to find defendant guilty if he aided and abetted others in committing such offense, although he was not taken by surprise by such instruction.—*Bailey v. Commonwealth*, supra.

9. Cal.—*People v. Vasquez*, 250 P. 1005, 85 Cal. App. 575.

Ga.—*Tift v. State*, 88 S.E. 41, 17 Ga. App. 663.

constitute a deadly weapon,¹⁰ when so operated as to show an intent to inflict bodily harm or death,¹¹ or operated with culpable negligence,¹² or willfully driven in a manner involving reckless disregard for the safety of others lawfully upon the highway.¹³

Injury. In order to establish the offense of assault and battery by motor vehicle, it is essential that someone be hurt, however slightly, as a result of the collision.¹⁴ The driver of a motor vehicle may be guilty of an aggravated assault under a general law by which an assault becomes aggravated when serious bodily injury is inflicted on the person assaulted.¹⁵

Ind.—*Singer v. State*, 142 N.E. 864.
194 Ind. 397—*Bleiweiss v. State*, 119 N.E. 375, rehearing overruled 122 N.E. 577, 188 Ind. 184.
Miss.—*Woodward v. State*, 144 So. 895, 164 Miss. 468.
N.J.—*State v. Schutte*, 96 A. 659, 88 N.J. Law 396.
Ohio—*Keuhn v. State*, 174 N.E. 606, 37 Ohio App. 217—*State v. Fishwick*, 10 Ohio N.P. 110.
5 C.J. p 727 note 14.
Assault with motor vehicle with intent to kill see *infra* § 657.

Statute held not invalid

Statute held not invalid, as against contention that it does not contain definition of negligence applicable to prosecutions for assault with motor vehicle—*Young v. State*, 47 S.W.2d 320, 120 Tex. Cr. 39.

Similar to striking with club

"Assault and battery" may be committed by striking another unlawfully with an automobile as with a club.—*Keuhn v. State*, 174 N.E. 606, 37 Ohio App. 217.

Former jeopardy

Under the rule that in order to constitute former jeopardy the offenses charged in a prior prosecution and in the instant one must be the same in law and in fact, a penalty imposed on a defendant for driving at an excessive rate of speed is not a prior conviction within the meaning of a plea of *autrefois* convict in a prosecution for assault and battery committed by striking another with his automobile at the time of the speeding for which such penalty was imposed.—*State v. Albertalli*, N.J. Sup., 112 A. 724.

10. Particular statutory provisions

Under statutes providing that any person who shall assault another with a gun, revolver, pistol, knife, an iron bar, a club, brass knuckles, or other dangerous weapon shall be guilty of a felony, it is not essential that the "other dangerous weapon" referred to be one of the same category or kind as those enumerated,

and, therefore, an automobile may be a dangerous weapon within the meaning of the statute so as to support a conviction of a motorist who drove his car over the foot of a police officer at an intersection after telling him to get out of the way and in reckless disregard of the officer's safety.

Ariz.—*Brimhall v. State*, 255 P. 165, 31 Ariz. 522, 53 A.L.R. 231.
Fla.—*Williamson v. State*, 111 So. 124, 92 Fla. 980, 53 A.L.R. 250.
Ill.—*People v. Benson*, 152 N.E. 514, 321 Ill. 605, 46 A.L.R. 1056—*People v. Anderson*, 229 Ill. App. 315—*People v. Clink*, 216 Ill. App. 357.
Mich.—*People v. Goolsby*, 279 N.W. 867, 284 Mich. 375.
N.C.—*State v. Sudderth*, 114 S.E. 828, 184 N.C. 753, 27 A.L.R. 1180.
Okla.—*Heck v. State*, 119 P.2d 865, 73 Okl. Cr. 229.

Standing car

An automobile while standing is not a "dangerous weapon," but may be so used as to become one, as by driving it against another.

Mich.—*People v. Goolsby*, 279 N.W. 867, 284 Mich. 375.
Mo.—*State v. Brinkley*, 193 S.W.2d 49, 354 Mo. 1061.

11. Ga.—*Dennard v. State*, 81 S.E. 378, 14 Ga. App. 485.

Ill.—*People v. Clink*, 216 Ill. App. 357.

12. N.Y.—*People v. Saroff*, 237 N.Y.S. 73, 227 App. Div. 114.
42 C.J. p 1315 note 32.

13. Pa.—*Commonwealth v. Cocodralli*, 74 Pa. Super. 324.
42 C.J. p 1315 note 33.

14. Pa.—*Commonwealth v. Herr*, 22 Pa. Dist. & Co. 21, 44 Lanc. L. Rev. 298.

15. Tex.—*Coffey v. State*, 200 S.W. 384, 82 Tex. Cr. 481.

Nature of injuries

One willfully or recklessly driving an automobile along the public highway in such manner as to cause injury to others lawfully using it is

b. Collision or Striking

An assault and battery by a motor vehicle may be committed by striking either the person of the victim or the vehicle in which he is riding.

A collision or striking by a motor vehicle is contemplated by a statute relating to the offense of assault and battery.¹⁶ An assault and battery may be committed with a motor vehicle by striking a person.¹⁷ The application of the force need not, however, be direct; nor need there be contact with the body of the person assaulted;¹⁸ the offense may be committed by striking another vehicle in or on which the victim is riding, so that injury results to him.¹⁹

guilty of assault and battery or aggravated assault and battery, according to the nature of the injuries inflicted.—*Commonwealth v. Kline*, 9 Pa. Dist. & Co. 448, 19 Berks Co. 312.

16. Tex.—*McDuffey v. State*, Cr., 206 S.W.2d 601.

Threat to run over another

It has been held that driving a vehicle across another's land and directly toward him while the latter was engaged in building a fence in such a way as to lead the latter to believe that he would be run over "constituted an assault, or at least constituted such a demonstration" as justified such resistance as might appear reasonably necessary.—*Bryson v. State*, Tex. Cr., 20 S.W.2d 1047.

Causing other cars to collide

Pa.—*Commonwealth v. Pagano*, Quar. Sess., 33 Berks Co. L.J. 233.

17. Ga.—*Webb v. State*, 23 S.E.2d 578, 68 Ga. App. 466—*Maloney v. State*, 195 S.E. 209, 57 Ga. App. 265—*Henry v. State*, 174 S.E. 183, 49 Ga. App. 80.

Miss.—*Corpus Juris* cited in *Woodward v. State*, 144 So. 895, 896, 164 Miss. 468.

Tex.—*Schultz v. State*, 128 S.W.2d 36, 137 Tex. Cr. 164.
42 C.J. p 1315 note 25.

18. N.C.—*State v. Sudderth*, 114 S.E. 828, 184 N.C. 753, 27 A.L.R. 1180.
42 C.J. p 1316 notes 56, 57.

19. Ga.—*Webb v. State*, 23 S.E.2d 578, 68 Ga. App. 466—*Maloney v. State*, 195 S.E. 209, 57 Ga. App. 265—*Henry v. State*, 174 S.E. 183, 49 Ga. App. 80.

Miss.—*Corpus Juris* cited in *Woodward v. State*, 144 So. 895, 896, 164 Miss. 468.

Mo.—*State v. Carlson*, 29 S.W.2d 135, 325 Mo. 698.

Tex.—*Schultz v. State*, 128 S.W.2d 36, 137 Tex. Cr. 164.

42 C.J. p 1315 note 26, p 1316 note 59.

Hitting bicycle

The offense may be committed by striking a bicycle, whereby the rider

c. Intent

The intent to injure another is an essential element of assault or assault and battery with a motor vehicle, but such intent may be inferred from conduct showing a reckless disregard for the safety of others.

One may be guilty of assault and battery when he injures another by intentionally driving his car against the person of his victim or the vehicle in which the latter is riding²⁰ and the intent to injure need not be specifically directed against the particular person who is injured.²¹ An intent to injure or its equivalent is essential to criminal responsibility for assault or assault and battery by use of a motor vehicle,²² and, in the absence of intentional performance of an illegal, reckless, or wanton act, an intention to inflict bodily injury is of the essence of the offense.²³

The intent essential to conviction of assault or assault and battery with a motor vehicle may be inferred from conduct so reckless, wanton, and willful as to show an utter disregard for human life or safety,²⁴ or from the fact that the injury is the direct result of intentional acts done under

circumstances showing a reckless disregard for the safety of others and a willingness to inflict the injury,²⁵ as in the case of intentional violation of statutes regulating the operation of motor vehicles upon public highways,²⁶ and may be supplied by the commission of an unlawful act which leads directly and naturally to the injury,²⁷ unless, according to some authorities, the unlawful act is merely *malum prohibitum*.²⁸ The intention to injure may be inferred in law from the consequences that are naturally to be apprehended as the result of the intentional doing of a particular act,²⁹ especially where the driver's act is *malum in se*.³⁰ On the other hand, the essential intent may not be inferred from mere negligence on the part of the driver,³¹ from his failure to exercise ordinary care,³² or from any negligence falling short of a reckless, willful, and wanton disregard of consequences to others.³³

Speed. The speed at which a motorist is driving may, if sufficiently excessive, reveal the essential criminal intent so as to justify his conviction of an assault and battery, aggravated assault, or sim-

is injured.—*Luther v. State*, 98 N.E. 640, 177 Ind. 619.

20. Ga.—*Webb v. State*, 23 S.E.2d 578, 68 Ga.App. 466—*Tift v. State*, 88 S.E. 41, 17 Ga.App. 663.

Ky.—*Commonwealth v. Temple*, 39 S.W.2d 228, 239 Ky. 188.

Miss.—*Corpus Juris* cited in *Woodward v. State*, 144 So. 895, 896, 164 Miss. 468.

Va.—*Davis v. Commonwealth*, 143 S.E. 641, 150 Va. 611.

21. N.J.—*State v. Schutte*, 93 A. 112, 87 N.J.Law 15, affirmed 96 A. 659, 88 N.J.Law 396.
42 C.J. p 1316 note 51.

22. Ind.—*Radley v. State*, 150 N.E. 97, 197 Ind. 200—*Luther v. State*, 98 N.E. 640, 177 Ind. 619.
N.C.—*State v. Agnew*, 164 S.E. 578, 202 N.C. 755.

23. Colo.—*People v. Hopper*, 169 P. 152, 69 Colo. 124.
42 C.J. p 1315 note 41.

24. Ariz.—*Brimhall v. State*, 255 P. 165, 31 Ariz. 522, 53 A.L.R. 231.
Del.—*State v. Hamburg*, 143 A. 47, 4 W.W.Harr. 62.

Ga.—*Webb v. State*, 23 S.E.2d 578, 68 Ga.App. 466.

Ky.—*Commonwealth v. Temple*, 39 S.W.2d 228, 239 Ky. 188.

Miss.—*Corpus Juris* cited in *Woodward v. State*, 144 So. 895, 896, 164 Miss. 468.

N.C.—*State v. Cope*, 167 S.E. 456, 204 N.C. 28—*State v. Sudderth*, 114 S.E. 828, 184 N.C. 753.

Ohio.—*State v. Fishwick*, 10 Ohio N.P. 110.

Pa.—*Commonwealth v. Dever*, 44 Pa. Dist. & Co. 34—*Commonwealth v. Nottage*, 13 Pa. Dist. & Co. 448—*Commonwealth v. Kline*, 9 Pa. Dist. & Co. 418, 19 Berks Co. 312.

Va.—*Davis v. Commonwealth*, 143 S.E. 641, 150 Va. 611.

42 C.J. p 1315 note 28, p 1316 note 45.

Grossly negligent use

The grossly negligent use of a potentially "dangerous instrument" like an automobile, in wanton disregard of the safety of others lawfully upon the highway, may be sufficient to warrant an inference of an intent to injure, and justify a conviction of "assault and battery"—*Commonwealth v. Ireland*, 27 A.2d 746, 149 Pa.Super. 298.

25. Ind.—*Singer v. State*, 142 N.E. 864, 194 Ind. 397.
42 C.J. p 1316 note 44.

26. N.C.—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69.

27. Del.—*State v. Hamburg*, 143 A. 47, 4 W.W.Harr. 62.

Ohio.—*Keuhn v. State*, 174 N.E. 606, 37 Ohio App. 217—*Fishwick v. State*, 10 Ohio N.P.N.S. 110, affirmed 14 Ohio Cir.Ct.N.S., 368, 33 Ohio Cir.Ct. 63.

Pa.—*Commonwealth v. Butler*, Quar. Sess., 48 Lack.Jur. 217.

42 C.J. p 1316 note 46.

28. N.C.—*State v. Rawlings*, 131 S.E. 632, 191 N.C. 265.

42 C.J. p 1316 note 47.

29. N.J.—*State v. Schutte*, 93 A. 112, 87 N.J.Law 15, affirmed 96 A. 659, 88 N.J.Law 396.

42 C.J. p 1316 note 51.

30. Tenn.—*King v. State*, 11 S.W.2d 904, 157 Tenn. 635.

31. Miss.—*Corpus Juris* cited in *Woodward v. State*, 144 So. 895, 896, 164 Miss. 468.

Va.—*Davis v. Commonwealth*, 143 S.E. 641, 150 Va. 611.

42 C.J. p 1315 note 38.

In Texas

(1) The rule is otherwise under a statute defining aggravated assault with a motor vehicle.—*McDuffey v. State*, Cr., 206 S.W.2d 601—*Guajardo v. State*, 139 S.W.2d 85, 139 Tex.Cr. 201.

(2) In a case decided under the law as it existed prior to the enactment of such statute, it was held that a defendant whose negligence without intent to commit an assault brought about an accident injuring another could not be convicted under the then existing statute of assault and battery and aggravated assault.—*Coffey v. State*, 200 S.W. 384, 82 Tex.Cr. 481.

Gross negligence

Under a statute punishing injury through gross negligence and recklessness, mere negligence is insufficient—*State v. Dean*, 98 So. 82, 154 La. 671.

32. Ind.—*Luther v. State*, 98 N.E. 640, 177 Ind. 619.
42 C.J. p 1315 note 43.

33. Mich.—*People v. Goolsby*, 279 N.W. 867, 284 Mich. 375.

Pa.—*Commonwealth v. Donnelly*, 172 A. 190, 113 Pa.Super. 173.

42 C.J. p 1315 note 39.

ilar crime in injuring another person as a result of the operation of his motor vehicle;³⁴ and the intentional operation of a motor vehicle at a high rate of speed is a willful act, as distinguished from merely negligent conduct.³⁵ The mere fact that an automobile was exceeding the statutory speed limit is not, however, the controlling factor, and is only a circumstance to be considered as to whether the driver was operating the car at a rate which, under the existing conditions, was obviously dangerous.³⁶ Thus, evidence that accused was driving at a speed which is declared by statute to be prima facie unreasonable and imprudent is not in itself conclusive of his guilt;³⁷ nor does the mere fact that he was slightly exceeding a speed limit of ten miles an hour show conclusively such recklessness and willfulness as to make the act criminal when he strikes another person.³⁸

Malice, as an element of aggravated assault, may be implied from the fact that accused was operating a motor vehicle in such a manner as to be manifestly dangerous to persons lawfully using the street.³⁹

Culpable negligence. Under a statute making it assault in the third degree to operate a motor vehicle with culpable negligence to the injury of another, one may not be convicted on proof of ordinary negligence merely sufficient to support a civil action,⁴⁰ and in order to constitute culpable negligence there must be coupled with the negligent act a reckless and wanton disregard of the rights of others⁴¹ sufficient to amount to an intent to inflict the injury or at least an indifference as to whether or not the injury happened.⁴² A defendant may, however, be convicted where he was guilty of culpable negligence.⁴³ Under a statute punishing culpable negligence, such negligence consists in the omission to do an act which a reasonably careful and prudent man would do under like cir-

cumstances or the doing of some act which under like circumstances such a man would not do.⁴⁴

Intent to do great bodily harm. In a proper case the specific intent in a prosecution for assault with intent to do great bodily harm may be inferred from reckless negligence in the operation of a car,⁴⁵ although it has been held that such negligence will not sustain a finding of the specific intent in the absence of knowledge on the part of the driver that any person is present upon the highway or is struck by the car.⁴⁶

d. Proximate Cause and Contributory Negligence

In order to sustain a conviction of assault or assault and battery with a motor vehicle, the act of the accused need not be the sole cause of injury provided it was the proximate cause thereof. The contributory negligence of the victim may be considered but will not necessarily afford a defense.

In order to sustain a conviction, the gross negligence or recklessness of accused need not be the sole cause of the collision or accident, if it is a direct and proximate cause.⁴⁷ A defendant may be guilty, although he could not by ordinary care prevent the collision after he had discovered the danger,⁴⁸ or although the collision was accidental or unintentional,⁴⁹ if brought about by his gross or willful negligence.

The contributory negligence of the victim is not a defense to the prosecution if all elements of the offense are present;⁵⁰ but contributory negligence is a circumstance for consideration in determining whether or not all elements of the offense were present,⁵¹ and, if the heedlessness of the victim was the cause of the accident, it may, unless some flagrant conduct be shown on the part of defendant driver, absolve him from that willful or wanton disregard of the safety of others from which his intent to injure and his malice could be inferred.⁵²

34. Ill.—People v. Benson, 152 N.E. 514, 321 Ill. 605, 46 A.L.R. 1056.
Okla.—Winkler v. State, 283 P. 591, 45 Okl.Cr. 322.

35. Pa.—Commonwealth v. Nottage, 13 Pa.Dist. & Co. 448.
42 C.J. p 1316 note 52.

36. Colo.—People v. Hopper, 169 P. 152, 69 Colo. 124.
Pa.—Commonwealth v. Butler, Quar. Sess., 48 Lack Jur. 217.
42 C.J. p 1316 note 53.

37. Ind.—Singer v. State, 142 N.E. 864, 194 Ind. 397.

38. IM.—People v. Anderson, 141 N.E. 727, 310 Ill. 889.

Tex.—Wright v. State, 235 S.W. 886, 90 Tex.Cr. 435.

39. Pa.—Commonwealth v. Cocodrilli, 74 Pa.Super. 324.

40. N.Y.—People v. Bioecchio, 18 N.Y.S.2d 786, 259 App.Div. 267—People v. Waxman, 249 N.Y.S. 180, 232 App.Div. 90.

41. N.Y.—People v. Waxman, supra.

42. N.Y.—People v. Waxman, supra.

43. N.Y.—People v. Saroff, 237 N.Y.S. 73, 227 App.Div. 114.

Turning against light

N.Y.—People v. Saroff, supra.

44. Mo.—State v. Miller, 234 S.W. 813.

45. Iowa—State v. Richardson, 162 N.W. 28, 179 Iowa 770, L.R.A.1917D 944.

46. Iowa—State v. Richardson, supra.

47. Tex.—Ebbs v. State, 279 S.W. 829, 103 Tex.Cr. 49.

48. Tex.—Ebbs v. State, supra.

49. Tex.—Ebbs v. State, supra.

50. Pa.—Commonwealth v. Ireland, 27 A.2d 746, 149 Pa.Super. 298.

51. Pa.—Commonwealth v. Ireland, supra.

52. Pa.—Commonwealth v. Ireland, supra.

§ 598. — Complaint, Information, or Indictment

General rules govern the sufficiency of complaints, indictments, and informations charging assault or assault and battery with a motor vehicle.

The general rules, as discussed in Assault and Battery §§ 103-112, control in determining the sufficiency of a complaint, indictment, or information charging assault or assault and battery by use of a motor vehicle.⁵³ The indictment is ordinarily deemed sufficient if it follows the language of the statute.⁵⁴ It has been held that allegations are sufficient, although charging defendant with "willfully committing the assault and at the same time negligently committing the same,"⁵⁵ and that, under a statute defining the offense in the disjunctive, allegations are sufficient, although stated in the conjunctive.⁵⁶

A simple assault is included within an assault with intent to do bodily injury by striking another with an automobile,⁵⁷ and an indictment or information for the latter offense will support a conviction of the former;⁵⁸ similarly, an indictment for aggravated assault and battery with a motor vehicle will support a conviction of assault and battery or of assault,⁵⁹ and an indictment purporting to charge assault with a motor vehicle with intent to kill but insufficient for this purpose may nevertheless be sufficient to authorize defendant's trial for assault and battery.⁶⁰ However, an indictment charging that defendant, with a motor vehicle as a deadly weapon, unlawfully made an assault on another with intent to commit a bodily injury

on him, will not support a conviction for assault and battery, since it does not charge a battery.⁶¹

§ 599. — Issues, Proof, and Variance

A charge that the accused in committing an assault and battery with a motor vehicle acted willfully and with negligence may be supported by proof of either willfulness or gross negligence, and allegations that his car collided with the victim may be sustained by proof that it struck the victim or the vehicle in which he rode.

In accordance with general rules the allegata and the probata must agree,⁶² and under an indictment alleging assault and battery by an automobile there can be no conviction in the absence of proof that the victim was injured.⁶³ Failure to prove the name of the victim as alleged in the complaint and information has been held a fatal defect.⁶⁴ However, a charge that a motor vehicle struck a named person and proof that it struck a vehicle in which such person was riding to his injury does not present a variance,⁶⁵ and it has been held that such a charge may be sustained by proof that defendant's car struck that of a third person causing the latter to collide with the victim to his injury.⁶⁶ A charge that defendant committed an assault by means of a motor vehicle "willfully and with negligence" may be sustained by proof of either willfulness or gross negligence.⁶⁷ An allegation that an assault with a truck took place upon a highway is sufficiently supported by proof that the accident occurred upon a public highway under construction where gates across it had been opened and such portion of the highway was in general use.⁶⁸

53. Tex.—Curtis v. State, 284 S.W. 950, 104 Tex. Cr. 473.

42 C.J. p 1317 note 70.

Certainty

In prosecution for aggravated assault by willfully and with negligence operating an automobile, complaint which alleged that defendant "unlawfully and with negligence" collided with person involved was not uncertain.—Warren v. State, 143 S.W. 2d 620, 140 Tex. Cr. 119.

Allegations held sufficient

(1) In general.

Okl.—Beck v. State, 119 P.2d 865, 73 Okl. Cr. 229.

Tex.—Clifton v. State, 135 S.W.2d 115, 138 Tex. Cr. 258—Huff v. State, 58 S.W.2d 113, 123 Tex. Cr. 238—Young v. State, 47 S.W.2d 320, 120 Tex. Cr. 39—Hernandez v. State, 16 S.W.2d 817, 112 Tex. Cr. 363.

42 C.J. p 1317 note 70 [a] (3).

(2) To allege act of negligence.—Franz v. State, 117 S.W.2d 97, 135 Tex. Cr. 47.

(3) To apprise accused of the charge against him.—Balsden v.

State, 68 S.W.2d 1044, 125 Tex. Cr. 480.

(4) Although failing to aver specific intent.—Brimhall v. State, 255 P. 165, 31 Ariz. 522, 53 A.L.R. 231.

Allegations held insufficient

Tex.—McDuffey v. State, Cr., 206 S.W.2d 601—Brumley v. State, 27 S.W.2d 810, 115 Tex. Cr. 362.

42 C.J. p 1317 note 70 [a] (1), (2).

54. Tex.—Curtis v. State, 284 S.W. 950, 104 Tex. Cr. 473.

42 C.J. p 1317 notes 71, 72.

55. Tex.—Clifton v. State, 135 S.W.2d 115, 138 Tex. Cr. 258—Young v. State, 47 S.W.2d 320, 120 Tex. Cr. 39.

56. Tex.—Schultz v. State, 128 S.W.2d 36, 137 Tex. Cr. 164.

57. Colo.—People v. Hopper, 169 P. 152, 69 Colo. 124.

58. Colo.—People v. Hopper, supra.

59. Pa.—Commonwealth v. Bergdoll, 55 Pa. Super. 186.

60. Ga.—Wright v. State, 148 S.E. 731, 168 Ga. 690, decision con-

formed to 149 S.E. 153, 40 Ga. App. 118.

Indictments for assault with intent to kill by motor vehicle generally see *infra* § 664.

61. Colo.—People v. Hopper, 169 P. 152, 69 Colo. 124.

62. Pa.—Commonwealth v. Herr, 22 Pa. Dist. & Co. 21, 44 Lanc. L. Rev. 298.

63. Pa.—Commonwealth v. Herr, supra.

64. Tex.—Phelps v. State, 97 S.W.2d 174, 131 Tex. Cr. 126.

65. Mo.—State v. Carlson, 29 S.W.2d 135, 325 Mo. 698.

Tex.—Warren v. State, 143 S.W.2d 620, 140 Tex. Cr. 119.

66. Tex.—Swift v. State, 158 S.W.2d 775, 143 Tex. Cr. 351.

67. Tex.—Overmire v. State, 152 S.W.2d 769, 142 Tex. Cr. 346—Carlton v. State, 48 S.W.2d 273, 120 Tex. Cr. 12.

68. Tex.—Balsden v. State, 68 S.W.2d 1044, 125 Tex. Cr. 480.

§ 600. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

The burden rests on the prosecution to prove the essential elements of assault or assault and battery by means of a motor vehicle; intent may be presumed from circumstances indicating reckless disregard for the safety of others.

In prosecutions for assault or assault and battery by use of a motor vehicle the burden rests on the state to prove the essential elements of the crime, such as that accused acted willfully or intentionally, or with a reckless disregard for the safety of others.⁶⁹ However, one driving at a dangerous rate of speed with a reckless disregard for the safety of others is presumed to have intended the natural and probable consequences of his act, so as to render him guilty of a criminal assault when he strikes any person.⁷⁰

b. Admissibility

General rules determine the admissibility of evidence in prosecutions for assault or assault and battery with a motor vehicle.

The general rules, as discussed in Assault and Battery §§ 115-123, ordinarily govern the admissibility of evidence in prosecutions for assault or assault and battery by use of a motor vehicle.⁷¹ In a prosecution for assault and battery committed by gross negligence in the operation of an auto-

mobile, evidence that defendant was in an intoxicated condition is admissible on the question of his negligence,⁷² and in showing the general circumstances surrounding the accident evidence is admissible that an officer took intoxicating liquor from defendant's companion.⁷³ In prosecutions of this character it is also competent to show that accused was driving in excess of the statutory speed limit,⁷⁴ and evidence of witnesses at a distance may be admissible where it tends to show that the speed was continued to the point of collision.⁷⁵ The testimony of a witness who came upon the scene of the assault soon after it had occurred is competent as to the conditions upon the ground and the wrecked condition of defendant's car, as bearing on the circumstances of the accident, and the guilt of defendant.⁷⁶ It is proper to admit evidence showing that injuries were suffered by the victim of the assault;⁷⁷ and in a prosecution for an assault by colliding with a vehicle in which persons were riding and causing injury to a person named, the fact that other persons in such vehicle were injured may properly be shown as a part of the res gestae.⁷⁸

c. Weight and Sufficiency

The guilt of one accused of assault or assault and battery by a motor vehicle must be proved beyond a reasonable doubt to warrant his conviction.

The proof must show the guilt of defendant beyond a reasonable doubt in order to convict him,⁷⁹ as for aggravated assault⁸⁰ predicated on culpable

69. N.C.—State v. Agnew, 164 S.E. 578, 202 N.C. 755.

Pa.—Commonwealth v. Kalb, 195 A. 128, 129 Pa.Super. 241—Commonwealth v. Amatucci, Quar. Sess., 29 Del.Co. 160.

Va.—Davis v. Commonwealth, 143 S.E. 641, 150 Va. 611.

70. Ill.—People v. Clink, 216 Ill.App. 357.

Ind.—Bleiweiss v. State, 119 N.E. 375, 122 N.E. 577, 188 Ind. 184.

71. Mo.—State v. Carlson, 29 S.W. 2d 135, 325 Mo. 698.

Identification

Evidence of witness accompanying defendant was held admissible as circumstance in identifying defendant charged with running over certain persons.—Ferrell v. State, 9 S.W.2d 15, 177 Ark. 742.

72. Pa.—Commonwealth v. Gayton, 69 Pa.Super. 513.

73. Mo.—State v. Carlson, 29 S.W.2d 135, 325 Mo. 698.

74. Colo.—People v. Hopper, 169 P. 152, 69 Colo. 124.

75. Mo.—State v. Carlson, 29 S.W.2d 135, 325 Mo. 698.

76. Pa.—Commonwealth v. Bergdoll, 55 Pa.Super. 186.

77. Tex.—Garza v. State, 277 S.W. 382, 102 Tex.Cr. 241.

78. Tex.—Ehbs v. State, 279 S.W. 829, 103 Tex.Cr. 49.

79. Del.—State v. Hamburg, 143 A. 47, 4 W.W.Harr. 62.

Ill.—People v. Benson, 237 Ill.App. 467, affirmed 152 N.E. 514, 321 Ill. 605, 46 A.L.R. 1056.
42 C.J. p 1317 note 85.

Evidence held sufficient

(1) To sustain conviction.

Cal.—People v. Fox, 187 P.2d 924, 82 Cal.App.2d 913—People v. Orona, 180 P.2d 694, 79 Cal.App.2d 820.

Ga.—Walker v. State, 39 S.E.2d 716, 74 Ga.App. 305—Webb v. State, 23 S.E.2d 578, 68 Ga.App. 466.

Ohio.—Keuhn v. State, 174 N.E. 606, 37 Ohio App. 217.

Pa.—Commonwealth v. Muska, 92 Pa. Super. 121—Commonwealth v. Amatucci, Quar.Sess., 29 Del.Co. 160.

42 C.J. p 1317 note 85 [a].

(2) To support finding of negligence—Pierce v. Commonwealth, 283 S.W. 418, 214 Ky. 454.

(3) To show collision—People v. Benson, 152 N.E. 514, 321 Ill. 605, 46 A.L.R. 1056—42 C.J. p 1317 note 85 [e].

(4) To show criminal intent—Commonwealth v. Raspa, 9 A.2d 925, 138 Pa.Super. 26

Evidence held insufficient

(1) To sustain conviction—Thomas v. State, 137 S.E. 916, 36 Ga.App. 662—42 C.J. p 1317 note 85 [b].

(2) To show criminal intent. Ind.—Tadley v. State, 150 N.E. 97, 197 Ind. 200.

Pa.—Commonwealth v. Ireland, 27 A. 2d 746, 149 Pa.Super. 298—Commonwealth v. Kalb, 195 A. 428, 129 Pa.Super. 241—Commonwealth v. Butler, Quar.Sess., 48 Lack.Jur. 217, 42 C.J. p 1317 note 85 [b].

80. Evidence held sufficient

Ariz.—Brimhall v. State, 255 P. 165, 31 Ariz. 522, 53 A.L.R. 231.

Cal.—People v. Vasquez, 259 P. 1005, 85 Cal.App. 575.

negligence.⁸¹

§ 601. — Questions of Law and Fact

Questions of fact arising in a prosecution for assault or assault and battery with a motor vehicle should be submitted to the jury on conflicting evidence.

In accordance with the general rules, as discussed in Assault and Battery § 127, on conflicting evidence it is for the jury to determine questions of fact,⁸² such as criminal intent⁸³ or intoxication.⁸⁴ In a prosecution founded on alleged gross negligence in the operation of an automobile, the negligence of defendant and the cause of the collision are questions for the jury.⁸⁵ It is a question of fact whether one is criminally negligent in undertaking to drive a motor vehicle upon the public highway at a high rate of speed when he knows that he is subject to sudden attacks of vertigo

which render him unable to control a car.⁸⁶

§ 602. — Instructions

General rules ordinarily control in respect of instructions in prosecutions for assault or assault and battery by a motor vehicle.

The general rules, as discussed in Assault and Battery § 128, govern the matter of instructions in prosecutions for assault or assault and battery with a motor vehicle,⁸⁷ subject to such differences as may arise from the nature of an assault by a motor vehicle,⁸⁸ and, in accordance with these principles, the courts have held particular instructions given or requested to be proper⁸⁹ or improper.⁹⁰ It has been held that the jury's attention may be called to a statute regulating motor vehicles, the violation of which is not of itself wantonness or gross neg-

Pa.—Commonwealth v. Dever, 44 Pa. Dist. & Co. 34.

S.C.—State v. Sussewell, 146 S.E. 697, 149 S.C. 128.

Tex.—Overmire v. State, 152 S.W.2d 769, 142 Tex.Cr. 346—Warren v. State, 143 S.W.2d 620, 140 Tex.Cr. 119—Schultz v. State, 128 S.W.2d 36, 137 Tex.Cr. 164—Franz v. State, 117 S.W.2d 97, 135 Tex.Cr. 47—Young v. State, 47 S.W.2d 320, 120 Tex.Cr. 39.

Evidence held insufficient

Tex.—Boyd v. State, 90 S.W.2d 253, 129 Tex.Cr. 538—Brumley v. State, 27 S.W.2d 810, 115 Tex.Cr. 362.

81. N.Y.—People v. Waxman, 249 N.Y.S. 180, 232 App.Div. 90.

Evidence held sufficient

Mo.—State v. Armbruster, 63 S.W.2d 144.

N.Y.—People v. Bongiorno, 32 N.Y.S.2d 618, 263 App.Div. 863.

Evidence held insufficient

Mo.—State v. Sawyers, 80 S.W.2d 164, 336 Mo. 614.

N.Y.—People v. Ricca, 75 N.Y.S.2d 61, 273 App.Div. 779—People v. Bloccio, 18 N.Y.S.2d 786, 259 App.Div. 267—People v. Waxman, 249 N.Y.S. 180, 232 App.Div. 90.

82. N.C.—State v. Wilson, 178 S.E. 226, 207 N.C. 865.

Tex.—Wilson v. State, 184 S.W.2d 838, 148 Tex.Cr. 61.

Wis.—State v. Galle, 252 N.W. 277, 214 Wis. 46.

Hacking car

In prosecution for aggravated assault, guilt of defendant hacking car out of parking place and striking complaining witness as he stepped out of automobile stopping in traffic lane was held for jury.—Huff v. State, 58 S.W.2d 113, 123 Tex.Cr. 238.

Unavoidable accident

Question whether defendant was guilty of aggravated assault with

truck upon public highway, or whether collision was result of unavoidable accident, was held for jury.—Baisden v. State, 68 S.W.2d 1044, 125 Tex.Cr. 480

Evidence held sufficient to carry case to jury

Ky.—Commonwealth v. Temple, 39 S.W.2d 228, 239 Ky. 188.

Evidence held insufficient to carry case to jury

Pa.—Commonwealth v. Ireland, 27 A.2d 746, 149 Pa.Super. 298—Commonwealth v. Donnelly, 172 A. 190, 113 Pa.Super. 173.

83. Miss.—Woodward v. State, 144 So. 895, 164 Miss. 468

N.Y.—People v. Standish, 267 N.Y.S. 76, 149 Misc. 32.

Va.—Davis v. Commonwealth, 143 S.E. 641, 150 Va. 611.

42 C.J. p 1318 note 87.

84. N.Y.—People v. Standish, 267 N.Y.S. 76, 149 Misc. 32

85. Tex.—Rathiff v. State, 254 S.W. 965, 95 Tex.Cr. 511.

42 C.J. p 1318 note 88.

86. Ga.—Tift v. State, 88 S.E. 41, 17 Ga.App. 663.

87. Mo.—State v. Miller, 234 S.W. 813.

42 C.J. p 1318 note 90.

Necessity for charge as to malice

As in the case of other crimes of like nature, in the prosecution of a defendant for aggravated assault and battery with a motor vehicle, the jury must be told that malice is essential to conviction, but they should also be told that the defendant's malice need not be expressly directed against the party injured, but may be implied from the willful and wanton operation of an automobile in a manner which manifestly and necessarily imperiled the lives and limbs of persons lawfully upon the street and showed a wanton dis-

regard of their safety.—Commonwealth v. Ireland, 27 A.2d 746, 149 Pa.Super. 298.

88. Pa.—Commonwealth v. Ireland, supra.

Stressing intent

In ordinary assault and battery cases, where defendant's intent to inflict injury is plainly apparent, it is not necessary for trial judge in his charge to lay stress on intent, but, in automobile injuries and similar cases, intent becomes important, since the intention to commit the "assault and battery" is the very gist of the offense.—Commonwealth v. Ireland, supra.

89. Ariz.—Brinham v. State, 255 P. 165, 31 Ariz. 522, 53 A.L.R. 231.

Tex.—Baisden v. State, 68 S.W.2d 1044, 125 Tex.Cr. 480.

42 C.J. p 1318 note 90 [b].

Unavoidable accident

In prosecution for aggravated assault by negligently driving automobile to collide with plaintiff's automobile, defendant's testimony that something gave way in his steering gear and caused automobile to turn directly in front of plaintiff's automobile called for charge on unavoidable accident.—Wilson v. State, 184 S.W.2d 838, 148 Tex.Cr. 61.

90. Miss.—Woodward v. State, 144 So. 895, 164 Miss. 468.

Mo.—State v. Carlson, 29 S.W.2d 135, 325 Mo. 698

N.C.—State v. Lancaster, 180 S.E. 577, 208 N.C. 349

Or.—State v. Stringer, 13 P.2d 340, 140 Or. 452.

Tex.—Gujardo v. State, 139 S.W.2d 85, 139 Tex.Cr. 201.

Va.—Davis v. Commonwealth, 143 S.E. 641, 150 Va. 611

42 C.J. p 1318 note 90 [c].

Instruction held misleading

Or.—State v. Stringer, 13 P.2d 340, 140 Or. 452.

ligence,⁹¹ although there is also authority to the contrary.⁹² The jury may properly be charged on a statutory definition of a crime or misdemeanor as consisting of a violation of a public law in which there is a union or joint operation of act and intention or criminal negligence.⁹³

§ 603. — Verdict and Findings

Acquittal of a charge of reckless driving precludes conviction under a count in the same indictment charging assault based on the theory of reckless driving.

Under an indictment which, in separate counts, charges an assault with an automobile as a deadly weapon, and operating an automobile recklessly, an acquittal of the latter charge precludes a conviction of an assault based on the theory of reckless driving.⁹⁴

§ 604. — Judgment, Sentence, and Punishment

A judgment of conviction may be sufficient, although not expressly stating that the accused is found guilty of the offense charged. Sentence and punishment should accord with the general rules.

A judgment of conviction in a prosecution for assault or assault and battery with a motor vehicle may be sufficient, although it does not state in express terms that accused is found guilty of the offense charged.⁹⁵ The propriety of the sentence and punishment imposed on conviction of an assault or assault and battery with a motor vehicle will be determined in accordance with general rules.⁹⁶

§ 605. — Appeal and Error

Under the general rules, a conviction of assault or of assault and battery with a motor vehicle will not be reversed because of rulings committed to the discretion of the trial court, or for harmless error.

Under the general rules, as discussed in Crim-

inal Law § 1623 et seq, a conviction will not be reversed for rulings resting in the discretion of the trial court where such discretion has not been abused,⁹⁷ or for error which is not prejudicial or harmful to accused.⁹⁸

§ 606. Carrying Person in Front of Operator

An ordinance making it an offense to carry another on a motor vehicle in front of the operator thereof has been held a valid exercise of municipal police power and to apply to all persons operating motorcycles.

An ordinance making it an offense for one operating a motor vehicle to carry another person on it in front of the operator, applicable to any person operating a motorcycle, has been held to be general with respect to all persons who operate motorcycles,⁹⁹ founded on a reasonable basis,¹ and a valid exercise of the police power of the municipality.²

§ 607. Driving or Operating Unlicensed or Unregistered Vehicle

It has been broadly stated that all manner of things connected with the presence and use of motor vehicles upon the highways are embraced within the meaning of "operating" such a vehicle in violation of statutes forbidding their operation if unlicensed, and that any vehicle propelled by power other than muscular is a motor vehicle within the contemplation of the statutes.

In statutes making it an offense to operate an unlicensed motor vehicle upon the highway, the word "operate" has been construed to include attempts to operate and to embrace all matters and things connected with the presence and use of motor vehicles upon the highway, whether in motion or at rest,³ and, generally speaking, the term "motor vehicle" includes all vehicles propelled by power other than muscular power,⁴ even though they may be temporarily unable to operate on their own power.⁵ Statutes making it a crime to operate

91. Pa.—Commonwealth v. Gayton, 69 Pa.Super. 513.

92. Tex.—Wright v. State, 235 S.W. 886, 90 Tex.Cr. 435.

93. Ga.—Tift v. State, 88 S.E. 41, 17 Ga.App. 663.

94. N.C.—State v. Rawlings, 131 S.E. 632, 191 N.C. 265.

95. Tex.—Swift v. State, 158 S.W. 2d 775, 143 Tex.Cr. 351.

Necessary implication

Where prosecution was brought under statute relating to offense of aggravated assault by automobile, and judgment stated that trial court found that defendant had committed an assault by means of an automobile, judgment in effect found defendant guilty of an "aggravated assault," especially in view of punish-

ment imposed—Swift v. State, supra.

96. Okl.—Beck v. State, 119 P.2d 865, 73 Okl.Cr. 229.

97. Fla.—Williamson v. State, 111 So. 124, 92 Fla. 980, 53 A.L.R. 250. 42 C.J. p 4318 note 97.

98. Tex.—Williams v. State, 279 S.W. 466, 102 Tex.Cr. 648. 42 C.J. p 1318 note 96.

99. Neb.—In re Wickstrum, 138 N.W. 733, 92 Neb. 523, 42 L.R.A.,N.S., 1068.

1. Neb.—In re Wickstrum, supra.

2. Neb.—In re Wickstrum, supra.

3. Vt.—State v. Lansing, 184 A. 692, 108 Vt. 218.

Coasting

Acts of defendant in steering auto-

mobile, temporarily unable to be operated under its own power, and regulating its speed by applying brakes while automobile was rolling down hill from point upon public highway to which it had been pushed to point from which it was towed, were held to constitute "operation" of motor vehicle within statute prohibiting operation of unregistered motor vehicle upon public highway.—State v. Lansing, supra.

4. Vt.—State v. Lansing, supra.

5. "Tractor crane" or "truck crane"

A motor truck on which is permanently mounted a large crane and which is capable of speed of thirty miles an hour is not a "tractor crane" within statute exempting tractor cranes from license requirements, but is a "truck crane," and hence op-

a motor vehicle without a license mean operation without the appropriate license prescribed by law,⁶ and should be strictly construed.⁷ An operator of a motor vehicle may be proceeded against regardless of the fact that he is merely an agent of the owner,⁸ and, where the owner of a motor vehicle permits its improper operation by another on dealers' plates, such owner may be convicted for violation of general statutes forbidding operation of motor vehicles without the required registration despite the fact that he obtained no remuneration from the use of his vehicle.⁹

Vehicle licensed in wrong weight class. Under statutes making it an offense to operate a motor vehicle upon a public highway under a license for a class other than that to which such vehicle properly belongs, it is a violation of the statute either to under-register¹⁰ or over-register¹¹ a vehicle. There is a conflict among the authorities as to whether operation of a motor vehicle with a greater load than that called for by the license constitutes a violation of statutes of this character.¹² Some authorities hold that the operation of the vehicle with a load in excess of that for which it is licensed, in and of itself, constitutes an offense in

violation of the statute,¹³ even though the license purchased corresponds to the capacity of the vehicle as rated by the manufacturer;¹⁴ but other authority has held that purchase of a license which corresponds to the rated capacity of the vehicle complies with the law regardless of the load actually carried,¹⁵ so that, where one has purchased a license corresponding with the manufacturer's rated capacity, he is not guilty of violating the statute, even though he operates the vehicle with a load in excess thereof.¹⁶ Under statutes of this character the owner is the person in whose name the vehicle is registered.¹⁷ Under reciprocity statutes an out-of-state vehicle is protected where it carries a load permitted under the license of its home state,¹⁸ but, where it carries a load in excess thereof, it is not duly registered for operation in the state of the forum and, therefore, violates the laws of the latter even after giving effect to the obligations of reciprocity.¹⁹

Permit to move contrivance dangerous to road surface. Under a statute providing that no vehicle, engine, or contrivance of whatever weight shall be moved on or over any way or bridge which has any flange, rib, clamp, or other object attached like-

eration thereof without license upon public highway is in violation of statute.

N.Y.—*People v. P. T. Cox Const. Co.*, 15 N.Y.S.2d 756, 172 Misc.2d 214, affirmed 19 N.Y.S.2d 115, 259 App. Div. 707.

Vt.—*State v. Lansing*, 184 A. 692, 108 Vt. 218.

Poor mechanical condition

Automobile which was in poor mechanical condition and temporarily unable to be operated under its own power was held "motor vehicle" within statute prohibiting operation of unregistered motor vehicle upon public highway.—*State v. Lansing*, supra.

6. N.C.—*Patterson v. Southern Ry. Co.*, 198 S.E. 364, 214 N.C. 38.

Change of engine

Where chauffeur was in lawful possession of truck which was properly licensed and chauffeur had certificate of registration establishing such fact but engine number was incorrectly stated in certificate because engine had been replaced and correction of records was in progress, chauffeur, who produced duplicate certificate showing that correction had been made in respect of engine number, did not violate the statute relating to registration of motor vehicles.—*People v. Palter*, 66 N.Y.S.2d 388, 271 App. Div. 882.

Prior to amendment

Persons operating semitrailers be-

fore statutory amendment fixing amount of license fee cannot be convicted of misdemeanor in failing to pay license fee.—*People v. Patten*, 170 N.E. 280, 338 Ill. 385.

7. Mass.—*Peabody v. Currier*, 190 N.E. 521, 286 Mass. 295.

8. Ala.—*Opdyke v. Anniston*, 78 So. 634, 16 Ala. App. 436.

Ga.—*Davis v. State*, 135 S.E. 916, 163 Ga. 247.

9. N.Y.—*People v. Christensen & Weiss*, 294 N.Y.S. 591, 250 App. Div. 470.

10. Tex.—*Cook v. State*, 128 S.W.2d 48, 137 Tex. Cr. 54.

11. Tex.—*Cook v. State*, supra.

12. Iowa.—*State v. Robbins*, 15 N.W. 2d 877, 235 Iowa 602.

13. Ark.—*State v. Formby*, 114 S. W.2d 5, 195 Ark. 746.

Iowa.—*State v. Robbins*, 15 N.W.2d 877, 235 Iowa 602.

Basis of license cost

The cost of license of a truck which is used upon the highways as a place of business is based largely on the servitude to which the road is subjected by the weight of vehicle and its load.—*State v. Robbins*, supra.

14. Ark.—*Commercial Warehouse v. State*, 62 S.W.2d 20, 187 Ark. 837.

15. Ala.—*Waters v. State*, 142 So. 113, 25 Ala. App. 144.

16. Ala.—*Waters v. State*, supra.

Okla.—*State v. Noble*, 22 P.2d 931, 54 Okl. Cr. 391.

17. N.J.—*General Motors Acceptance Corporation v. Hayes Motor Co.*, 172 A. 343, 12 N.J. Misc. 384.

Rights of third person following seizure of vehicle

(1) Conditional seller's assignee, although "owner" within Conditional Sales Act, was held not "owner" within Motor Vehicle Act; hence, as against company, truck seized for overloading could not be detained until payment of fine, and garageman storing truck seized for overloading had no storage lien.—*General Motors Acceptance Corporation v. Hayes Motor Co.*, supra.

(2) Where truck conditionally sold is seized for overloading, state is not "purchaser" or "creditor acquiring lien" within statute invalidating conditional sales contracts not filed.—*General Motors Acceptance Corporation v. Hayes Motor Co.*, supra.

(3) Statute barring replevin in case of distress for tax or fine is inapplicable to case of person not subject to tax; hence, it did not preclude replevin by conditional seller's assignee for truck seized for overloading.—*General Motors Acceptance Corporation v. Hayes Motor Co.*, supra.

18. Iowa.—*State v. Robbins*, 15 N.W.2d 877, 235 Iowa 602.

19. Iowa.—*State v. Robbins*, supra.

ly to injure the surface of such way or bridge, without a permit, it is an offense to move over a highway without a permit a gasoline shovel of caterpillar type, the propulsive power of which is exercised by means of a flexible band, if such contrivance is so constructed that it has a flange or other object attached likely to injure the surface of the way when moved over it,²⁰ and the fact that such machines are exempted by other statutory provisions from procuring permits as to weight is immaterial,²¹ but, if such contrivance is not so constructed or equipped that its movement over the highway is likely to injure the surface, there is no violation of the statute in moving it without a permit.²²

Indictment or information. In accordance with general rules, an indictment or information under such statutes must allege every fact necessary to constitute the offense charged and to bring accused within the statutory provisions.²³ Indictments or informations charging the operation of unregistered vehicles need not negative the exceptions made by the statute in favor of nonresidents;²⁴ nor is it necessary to set forth in the indictment or information matters of defense only,²⁵ or facts of which the court will take judicial notice.²⁶ Un-

der a statute which forbids the operation of a motor vehicle anywhere in the state without its having been registered, an indictment need not charge that the operation complained of was upon a street, road, highway, or other public thoroughfare.²⁷

Under a charge of operating a motor vehicle not properly registered a defendant may not be convicted on proof that, while the vehicle had been properly registered, the license plates thereon were actually those of the former owner.²⁸

Evidence and trial. General rules apply in prosecutions for violations of such statutes,²⁹ and in accordance therewith proof beyond a reasonable doubt is required to sustain a conviction.³⁰

§ 608. Driving or Using without Required Lights or with Improper Lights

Statutes sometimes create offenses with respect to lights to be used or displayed on motor vehicles.

Various statutes regulating the use and operation of motor vehicles make it an offense to fail to display certain specified lights on vehicles in use upon the streets or highways during certain hours,³¹ or to use headlights which interfere with the sight of or temporarily blind the drivers of vehicles ap-

20. Me.—State v. Hughes, 152 A. 315, 129 Me 378.

21. Me.—State v. Hughes, supra.

22. Me.—State v. Hughes, supra.

23. Vt.—State v. Caplan, Vt., 135 A. 705, 100 Vt. 140.

42 C.J. p 1320 note 26.

Following language of statute

Ga.—Hawkins v. State, 198 S.E. 551, 58 Ga App 386.

Accusation held sufficient

Ga.—Davis v. State, 135 S.E. 916, 163 Ga. 247—Cumble v. State, 145 S.E. 667, 38 Ga.App. 744.

Me.—State v. Hughes, 152 A. 315, 129 Me 378.

Tex.—Mosley v. State, 141 S.W.2d 595, 139 Tex Cr. 433—Cook v. State, 128 S.W.2d 48, 137 Tex Cr. 54.

Accusation held insufficient

Tex.—George v. State, 145 S.W.2d 187, 140 Tex Cr. 362—Bassett v. State, 139 S.W.2d 267, 139 Tex Cr. 65.

24. Okl.—State v. Shafer, 179 P. 782, 15 Okl.Cr. 610.

25. Vt.—State v. Caplan, 135 A. 705, 100 Vt. 140.

42 C.J. p 1320 note 30.

26. Vt.—State v. Caplan, supra.

42 C.J. p 1320 note 31.

27. Tenn.—State v. Seinknecht, 188 S.W. 534, 136 Tenn. 130.

28. Pa.—Commonwealth v. Beckwith, 36 Pa.Dist. & Co 687, 22 Erie Co. 64, 88 Pittsb Leg.J. 198.

29. **Evidence held admissible**

Tex.—Mosley v. State, 141 S.W.2d 595, 139 Tex Cr. 433.

Instructions

Ga.—Cumble v. State, 145 S.E. 667, 38 Ga App. 744.

Evidence held sufficient to carry case to jury

Mass.—Commonwealth v. Henrich, 161 N.E. 815, 263 Mass. 579.

30. Me.—State v. Hughes, 152 A. 315, 129 Me 378.

Tex.—Long v. State, 113 S.W.2d 1244, 134 Tex.Cr. 45.

Evidence held insufficient

(1) In general—Long v. State, 113 S.W.2d 1244, 134 Tex.Cr. 45.

(2) Evidence that truck was licensed at weight of eighteen thousand pounds, that load was set by law at seven thousand pounds, thereby leaving eleven thousand pounds as registered and licensed weight of truck, and that at time state weight inspector weighed truck and load its gross weight was thirty thousand eight hundred pounds, was insufficient to support conviction of operating the truck under a license for a class other than that to which truck properly belonged, notwithstanding proof of overload, in absence of proof as to what the proper registration of vehicle should have been.—Mosley v. State, 141 S.W.2d 595, 139 Tex.Cr. 433.

31. Ala.—Brown v. Ace Motor Co., 8 So 2d 585, 30 Ala App. 479, certiorari denied 8 So 2d 588, 243 Ala 92

Ohio Mossman v. City of Cincinnati, App. 34 N.E.2d 246—Kern v. Contract Cartage Co., 9 N.E.2d 869, 55 Ohio App. 481.

42 C.J. p 1320 note 33.

Validity of regulations with respect to lights generally see supra § 26.

Defense

Fact that highway patrolman generally issued only a warning tag to first offenders for driving a motor vehicle with only one light burning and that accused would not have been arrested therefore had the patrolman not found intoxicating liquor in motor vehicle would not preclude conviction of a first offender for operating a motor vehicle upon a state highway in the nighttime with only one headlight burning—Brown v. State, 125 P.2d 235, 74 Okl.Cr. 249.

Evidence held sufficient

To sustain conviction.

N.Y.—People v. Killmeyer, 13 N.Y.S. 2d 839, 171 Misc. 778

Okl.—Brown v. State, 125 P.2d 235, 74 Okl.Cr. 249.

Pa.—Commonwealth v. Bailey, 91 Pa. Super. 17.

Instruction to jury that it was unlawful to drive motor vehicle at night with only one headlight burning was proper.—Loudermilk v. State, 152 S.E. 593, 41 Ga.App. 286.

proaching from the opposite direction,³² or which have not been tested or approved by particular agencies.³³ While a statute or ordinance requiring specified lights on motor vehicles upon streets and highways does not apply to vehicles left standing at the side of streets or highways,³⁴ other statutes are applicable to parked vehicles.³⁵ Failure to have a motor vehicle equipped with reflectors does not constitute an offense where the omission occurs in the daytime and the statutory requirement, as to reflectors, applies only between sunset and sunrise.³⁶

Under a statute providing that every motor vehicle while in use during certain hours shall display certain lights, the person in control of the motor vehicle at the time of its use and violation of the statute is responsible,³⁷ and, if such person is the owner, he alone is liable.³⁸ While criminal intent is an essential element of the offense of driving without proper lights,³⁹ this intent is merely an intent to do the act which results in the violation of the law, and not an intent to commit the crime itself.⁴⁰ Where specific criminal intent is not made an essential element of the offense by the terms of such statutes, proof thereof is generally held to be unnecessary to sustain a conviction,⁴¹ and where such act is done voluntarily and deliberately, the offense cannot be said to have been

committed by misfortune or accident: within the meaning of a statutory provision that a person shall not be found guilty of any crime or misdemeanor committed by "misfortune or accident."⁴² Where the lights on a vehicle become suddenly extinguished, it is the duty of the driver to stop and not drive further upon a public highway.⁴³

Appeal and error. Where there was competent and relevant evidence to support a finding against accused, which was based on conflicting evidence, the appellate court will not consider the credibility of the witnesses and the contradictions in their testimony.⁴⁴

§ 609. Driving Recklessly; Endangering Public

- a. General considerations
- b. Essentials of, and acts constituting, offense

a. General Considerations

Various statutes, the validity of which has been upheld, have defined the offense of reckless driving.

The reckless operation of a motor vehicle in a public place is punishable under some statutes, the statutes, although varying somewhat in the description of the offense, being alike as to its gist, which lies in reckless driving.⁴⁵ It has been held

32. Iowa.—State v. Claiborne, 170 N. W. 417, 185 Iowa 170, 3 A.L.R. 392. 42 C.J. p 1320 note 35.

33. Cal.—In re Hinkelman, 191 P. 682, 183 Cal. 392, 11 A.L.R. 1222. 42 C.J. p 1320 note 36.

34. Iowa.—Harlan v. Kraschel, 146 N.W. 463, 164 Iowa 667. 42 C.J. p 1321 note 37.

35. Pa.—Commonwealth v. Leavitt, 36 Pa.Dist. & Co. 126, 31 Mun.L.R. 91. 42 C.J. p 1321 note 38.

36. N.Y.—People v. Palmiter, 15 N.Y.S.2d 858.

37. R.I.—State v. Myette, 76 A. 664, 30 R.I. 556. 42 C.J. p 1321 note 39.

38. R.I.—State v. Myette, *supra*.

39. Ga.—Nelson v. State, 107 S.E. 400, 27 Ga.App. 50.

40. Ga.—Nelson v. State, *supra*. 42 C.J. p 1310 note 10.

41. Kan.—Hays v. Schuler, 193 P. 311, 107 Kan. 635. 42 C.J. p 1321 note 41.

42. Ga.—Nelson v. State, 107 S.E. 400, 27 Ga.App. 50.

43. Ga.—Fuller v. State, 126 S.E. 302, 33 Ga.App. 372—Nelson v. State, 107 S.E. 400, 27 Ga.App. 50.

44. Pa.—Commonwealth v. Bailey, 91 Pa.Super. 17.

45. Md.—State v. Magaha, 32 A.2d 477, 182 Md 122. 42 C.J. p 1321 note 43.

Nature or grade of offense

(1) Under some statutes, reckless driving is not a mere traffic violation, but is a crime.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266.—Sheridan v. Fletcher, 58 N.Y.S.2d 466, 270 App.Div. 29—People v. Rosenthal, 14 N.Y.S.2d 794, 171 Misc. 954—Luckie v. Goddard, 13 N.Y.S.2d 808, 171 Misc. 774—People v. Sandner, 229 N.Y.S. 545, 162 Misc. 41—People v. Kasloff, 54 N.Y.S.2d 455.

(2) It is a misdemeanor and not one of the minor offenses dealt with summarily by magistrates.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—People v. Rosenthal, *supra*—People v. Sandner, 229 N.Y.S. 545, 162 Misc. 41.

(3) It has also been stated that the offense of reckless driving is not of the grade above a misdemeanor.—People ex rel. Cooley v. Wilder, 255 N.Y.S. 218, 234 App.Div. 256.

Repeal of statute

(1) The statute, penalizing operation of motor vehicle upon state highways recklessly or so as to en-

danger property, or the life or limb, of any person was repealed by subsequent statute, defining and penalizing reckless driving.—Flournoy v. State, 2 So.2d 329, 30 Ala.App. 154—Anthony v. State, 186 So. 185, 28 Ala.App. 415—Pate v. State, 143 So. 208, 25 Ala.App. 208.

(2) In such case a prosecution or conviction under the repealed statute was regarded as improper and ineffective.—Flournoy v. State, *supra*—Anthony v. State, *supra*—Pate v. State, *supra*.

(3) Act amending repealing clause of act which repealed conflicting provisions of act providing for regulation of traffic upon highways, so as to repeal all conflicting laws or parts thereof, "especially all provisions of" certain acts "in conflict herewith," repealed merely conflicting provisions of enumerated statutes, and hence did not repeal provision of one of them making it misdemeanor to injure person by gross recklessness in operating automobile.—State v. Dietrich, 162 So. 186, 182 La. 581.

Operation in careful and prudent manner

In a case in which a conviction under a municipal ordinance was upheld, it was stated that a prosecution will lie for violation of ordi-

that the act of driving recklessly so as to injure persons upon the highway is an offense under a statute penalizing a breach of the peace by "tumultuous and offensive carriage."⁴⁶ It has, however, been held that there can be no conviction of operating a motor vehicle at such a reckless speed as to endanger the safety of others under a municipal ordinance which was clearly intended to apply only to those conveyances which are drawn by horses, mules, or other beasts.⁴⁷

Offenses under statutes which refer solely to speed and which do not characterize excessive speed as reckless driving are considered *infra* §§ 641-650, notwithstanding such statutes may be referred to as "reckless-driving" statutes.

Validity of regulation. The validity of statutes defining the offense of reckless driving,⁴⁸ or the offense of operating a motor vehicle in a manner which would endanger the lives or safety of the public,⁴⁹ has been upheld, on the ground that such a statute constitutes a valid exercise of the police power,⁵⁰ and as against the objection that the particular statute is vague, uncertain, or indefinite,⁵¹ that it penalizes a mere state of mind,⁵² or that it violates a constitutional provision that accused shall be fully and plainly informed of the character and cause of the accusation.⁵³ A municipal ordinance penalizing reckless driving has been declared invalid, however, on the ground that the subject is of state-wide concern and that the legislature had appropriated the field by the enactment of a penal statute applicable to reckless driving.⁵⁴

Distinct offenses. While it has been held that accused cannot be convicted of reckless driving

for a failure to turn to the right when signaled from the rear by one desiring to pass where such conduct constitutes a distinct offense differently punishable,⁵⁵ the view has apparently been taken that the fact that making a left turn without signaling constitutes the violation of a specific statute in that regard does not necessarily prevent a prosecution based on such act under the reckless-driving statute.⁵⁶ Under some circumstances the same act may constitute a violation of a statute directed against reckless driving and also a violation of a municipal ordinance directed against speeding.⁵⁷ Some statutes penalize as distinct offenses the act of driving a motor vehicle recklessly and the operation of such a vehicle in a manner so as to endanger the lives or safety of the public,⁵⁸ and a person may commit such offenses at the same time.⁵⁹

Under some statutes the offense of reckless driving or operation,⁶⁰ or the offense of operation so as to endanger the property, life, or limb of any person,⁶¹ is distinct from the offense of driving while under the influence of intoxicating liquor, and, even though a statute penalizes the operation of a motor vehicle recklessly or while under the influence of intoxicating liquor, so that the lives or safety of the public is in danger, the act of reckless driving is a distinct offense and is punishable without regard to whether or not the person is intoxicated.⁶²

The statutory offense of operating a motor vehicle negligently, so that the lives or safety of the public might be in danger, is separate and distinct from the offense of manslaughter,⁶³ even though

nances requiring operation of motor vehicles in a careful and prudent manner—*City of Cape Girardeau v. Bennett*, Mo.App., 27 S.W.2d 447.

46. *VI.*—*State v. Boyd*, 99 A. 515, 91 *VI.* 88.

47. *OKI.*—*Shawnee v. Landon*, 106 P. 652, 3 *OKI Cr.* 440.

48. *CAL.*—*People v. Steel*, 92 P.2d 815, 35 *CAL.App.2d Supp.* 748.

ILL.—*People v. Green*, 13 N.E.2d 278, 368 *ILL.* 242, 115 A.L.R. 348.

49. *MASS.*—*Commonwealth v. Pentz*, 143 N.E. 322, 247 *MASS.* 500, 509, 42 C.J. p 1321 note 44 [a], [c].

50. *CONN.*—*State v. Andrews*, 142 A. 840, 108 *CONN.* 209.

ILL.—*People v. Green*, 13 N.E.2d 278, 368 *ILL.* 242, 115 A.L.R. 348.

51. *CAL.*—*People v. Smith*, 92 P.2d 1039, 36 *CAL.App.2d Supp.* 748.

CONN.—*State v. Andrews*, 142 A. 840, 108 *CONN.* 209.

ILL.—*People v. Green*, 13 N.E.2d 278, 368 *ILL.* 242, 115 A.L.R. 348.

OKI.—*Ex parte Daniels*, 273 P. 1010, 41 *OKI Cr.* 339.

TEX.—*Ex parte Mooney*, 291 S.W. 246, 106 *TEX Cr.* 156.

42 C.J. p 1321 note 44 [b].

52. *CAL.*—*People v. McNutt*, 105 P.2d 657, 40 *CAL.App.2d Supp.* 835—*People v. Smith*, 92 P.2d 1039, 36 *CAL.App.2d Supp.* 748.

53. *W.VA.*—*State v. Mangus*, 198 S. E 872, 120 *W.VA.* 415.

54. *ARIZ.*—*Keller v. State*, 47 P.2d 442, 46 *ARIZ.* 106.

Power not reserved to municipality

Proviso, in section dealing with width of highways in chapter of statutes constituting highway code, which excluded portions of highways within city limits from provisions of chapter, did not leave subject of reckless driving within city limits under control of city, since word "chapter" was intended to be "section," and proviso affected only width of highways.—*Keller v. State*, *supra*.

55. *NY.*—*People v. Aldrich*, 191 N. Y.S. 899.

56. *PA.*—*Commonwealth v. Diehl*, 35 *PA Dist. & Co.* 503.

57. *NY.*—*People v. Fitzgerald*, 168 N.Y.S. 930, 101 *Misc.* 695.

58. *CONN.*—*State v. Andrews*, 142 A. 840, 108 *CONN.* 209.

MASS.—*Commonwealth v. Guillemette*, 137 N.E. 700, 243 *MASS.* 346.

42 C.J. p 1321 note 44.

59. *MASS.*—*Commonwealth v. Guillemette*, *supra*.

42 C.J. p 1321 note 49.

60. *CONN.*—*State v. Andrews*, 142 A. 840, 108 *CONN.* 209.

N.M.—*State v. Sisneros*, 82 P.2d 274, 42 *N.M.* 500.

61. *CONN.*—*State v. Andrews*, 142 A. 840, 108 *CONN.* 209.

62. *ME.*—*State v. Derry*, 108 A. 568, 118 *ME.* 431.

63. *MASS.*—*Commonwealth v. Maguire*, 48 N.E.2d 665, 313 *MASS.* 669.

both offenses originate in the same act.⁶⁴ Where a statute which prohibits reckless driving defines the offense separately with respect to speed permitted in specified areas, each provision creates a separate offense independent of the other and is punishable as such.⁶⁵

b. Essentials of, and Acts Constituting, Offense

The essential elements of the offense of reckless or dangerous driving, as prescribed by the statute or other regulation defining the offense, must exist in order to render a person guilty of the offense. Usually the determination of guilt is to be made in the light of the surrounding circumstances.

The elements which constitute the offense of reckless driving depend largely on the statutory definition of the offense,⁶⁶ and, in order to render a person guilty of reckless or dangerous driving, the essential elements as prescribed by the statute or other regulation defining the offense must exist.⁶⁷ Under some statutes the operation charged must have been upon a highway or in a place to which the public has access in order to render accused guilty,⁶⁸ and interference with the free and proper use of the highway or endangering of us-

ers of the highway must be unreasonable.⁶⁹

Any one of several specified acts, omissions, or manners of driving may constitute the offense,⁷⁰ and the designation "reckless driving" in some of the statutes is merely a name for the offense.⁷¹ Accused must have done something more than merely commit an error of judgment,⁷² or something more than merely make a mistake while learning to operate a motor vehicle.⁷³ The fact that the conduct of accused might render him liable in a civil action for damages is not in itself sufficient to render him guilty of reckless driving.⁷⁴ Among particular acts or types of conduct which have been regarded as not in themselves rendering accused guilty of reckless driving are mere violation of a traffic regulation,⁷⁵ evasion of a red light,⁷⁶ failure to use chains,⁷⁷ and driving a vehicle while under the influence of intoxicating liquor.⁷⁸ It has been said, however, that reckless driving may be based on violations of rules of the road,⁷⁹ although all such violations may not be reckless driving.⁸⁰

Subject to the effect of a statute penalizing as reckless driving the operation of a motor vehicle

64. Mass.—Commonwealth v. Maguire, *supra*.

65. N.C.—State v. Mills, 106 S.E. 677, 181 N.C. 530, 534.
42 C.J. p 1322 note 52.

66. N.C.—State v. Sullivan, 227 N.W. 230, 231, 58 N.C. 732.

67. N.C.—State v. Folger, 191 S.E. 747, 211 N.C. 695.

Nature of vehicle

A trolley bus was not a "motor vehicle," within meaning of the section of a municipal code providing that, whoever operates a motor vehicle without due regard for safety and right of pedestrians and drivers and occupants of other vehicles, and so as to endanger life, limb, or property, shall be deemed guilty of a misdemeanor, and conviction could not be had thereunder of one operating a trolley bus.—City of Dayton v. De Brosse, 23 N.E.2d 647, 62 Ohio App. 232.

68. Mass.—Commonwealth v. Maguire, 48 N.E.2d 665, 313 Mass. 669.

Purpose of statute

Reckless driving statute was enacted for the protection of other motorists, pedestrians, and property upon the highway.—Gause v. State, Miss., 34 So.2d 729.

Highway partially closed

Where the state has duly closed a highway to the public and has provided a detour, the portion so closed is not a highway, and a conviction for allegedly reckless driving there-

on is not permissible.—Commonwealth v. Diehl, 35 Pa. Dist. & Co. 503

69. N.Y.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266
—People v. Sas, 16 N.Y.S.2d 380, 172 Misc. 815—People v. Higgins, 2 N.Y.S.2d 345, 165 Misc. 503.

70. Iowa.—Neessen v. Armstrong, 239 N.W. 56, 213 Iowa 378.
N.C.—State v. Folger, 191 S.E. 747, 211 N.C. 695.

Tenn.—Barkley v. State, 54 S.W.2d 944, 165 Tenn. 309.

In Pennsylvania

(1) It has been held that the statute, providing that reckless driving shall include "any person who drives any vehicle . . . upon a highway carelessly and wilfully, or wantonly disregarding the rights or safety of others, or in a manner so as to endanger any person or property," describes but a single offense and that the gravamen of such offense is wilfully or wantonly endangering any person or property.—Commonwealth v. Michalls, 43 Pa. Dist. & Co. 221.

(2) The view has been taken that such statute does not define three separate offenses but, at most, defines two acts which would constitute reckless driving.—Commonwealth v. Frisch, 41 Pa. Dist. & Co. 266, 57 Montg. Co. 158—Commonwealth v. Trisch, 41 Pa. Dist. & Co. 221—Commonwealth v. Shriver, 35 Pa. Dist. & Co. 1.

(3) The view has also been expressed that such statute describes

three phases of one offense rather than three separate and distinct offenses.—Commonwealth v. Kline, 35 Pa. Dist. & Co. 19—Commonwealth v. Douglas, 31 Pa. Dist. & Co. 231.

71. Iowa.—Neessen v. Armstrong, 239 N.W. 56, 213 Iowa 378.

72. N.Y.—People v. Whitby, 44 N.Y.S.2d 76—People v. Davis, 9 N.Y.S.2d 620.

73. Ill.—People v. Rubstein, 234 Ill. App. 440.

74. N.C.—State v. Ogle, 31 S.E.2d 444, 224 N.C. 468.

75. N.C.—State v. Ogle, *supra*.

Danger to life, limb, or property not involved

N.C.—State v. Cope, 167 S.E. 456, 204 N.C. 28.

76. N.Y.—People v. Sweet, 225 N.Y.S. 182, 130 Misc. 612.

77. Pa.—Commonwealth v. Shriver, 35 Pa. Dist. & Co. 1.

78. Conn.—State v. Licari, 43 A.2d 450, 132 Conn. 220.

N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

79. Miss.—Crystal v. State, 112 So. 687, 147 Miss. 40.

N.Y.—People v. Kosik, 258 N.Y.S. 70, 144 Misc. 403—People v. McKeon, 236 N.Y.S. 591, 134 Misc. 697.

N.D.—State v. Sullivan, 227 N.W. 230, 58 N.D. 732.

Pa.—Commonwealth v. Diehl, 35 Pa. Dist. & Co. 503.

80. N.D.—State v. Sullivan, 227 N.W. 230, 58 N.D. 732.

in excess of the speed limit, as discussed *infra* § 610, the question whether the offense has been committed must usually be determined in the light of the surrounding circumstances in the case of the offense of operating a motor vehicle recklessly or heedlessly,⁸¹ or in such a manner as to endanger the lives and safety of the public.⁸² Accordingly, in determining the guilt of accused, his manner of driving has to be considered with respect to the time when,⁸³ and place where,⁸⁴ the alleged violation occurred, the condition of the vicinity as to light or darkness,⁸⁵ the width of the highway,⁸⁶ the amount of traffic thereon at the time,⁸⁷ the position of other vehicles,⁸⁸ the right of way as between vehicles,⁸⁹ the condition of the motor vehicle and the brakes with which it is equipped,⁹⁰ the weight of the vehicle,⁹¹ the opportunity for observation,⁹² the chance of being able to stop or avoid a collision,⁹³ and driving by accused while under the influence of intoxicating liquor.⁹⁴

Accident or injury. Under some statutes, it is essential that an accident or injury should occur in order to render accused guilty.⁹⁵ Under other statutes, however, it is not essential that a person should be injured in order to constitute the offense.⁹⁶ Conversely, the mere fact that an acci-

dent or collision occurred does not render accused guilty of reckless driving.⁹⁷

Speed. Subject to the effect of a statute making the operation of an automobile in excess of a specified rate of speed an offense of reckless or dangerous driving, as discussed *infra* § 610, recklessness or heedlessness in the operation of a motor vehicle is not determined alone by the rate of speed or velocity with which a car is traveling,⁹⁸ and the fact alone that the vehicle is operated at a high rate of speed does not constitute reckless operation.⁹⁹ However, the question of speed may be an important element in determining whether the driving of the person charged was reckless or dangerous,¹ and is one of the many circumstances that may be considered in connection with the issues of each case.² Mere speed in excess of that allowed by statute is not of itself sufficient to render accused guilty of reckless driving under some statutes;³ reckless or dangerous driving may be established without regard to the speed limit.⁴ So, one may be guilty of reckless driving, although traveling at less than the rate permitted by the speed regulations,⁵ where a statute provides that driving in excess of a certain speed shall be presumptive evidence of driving at a speed which is not careful and prudent, merely exceeding such

81. *Mass.—Commonwealth v. Gull-lomette*, 137 N.E. 700, 243 Mass. 346.

42 C.J. p 1322 note 62.

82. *Mass.—Commonwealth v. Gurney*, 158 N.E. 832, 261 Mass. 309. 42 C.J. p 1322 note 63.

83. *Hawaii.—Territory v. McGregor*, 22 Hawaii 786.

84. *Hawaii.—Territory v. McGregor*, *supra*.

85. *Hawaii.—Territory v. McGregor*, *supra*.

86. *Hawaii.—Territory v. McGregor*, *supra*.

87. *Hawaii.—Territory v. McGregor*, *supra*.

88. *Mass.—Commonwealth v. Gurney*, 158 N.E. 832, 261 Mass. 309.

89. *N.Y.—People v. Kosik*, 258 N.Y.S. 70, 144 Misc. 403.

90. *Hawaii.—Territory v. McGregor*, 22 Hawaii 786.

91. *Mass.—Commonwealth v. Gurney*, 158 N.E. 832, 261 Mass. 309.

92. *Mass.—Commonwealth v. Gurney*, *supra*.

93. *Hawaii.—Territory v. McGregor*, 22 Hawaii 786.

Mass.—Commonwealth v. Gurney, 158 N.E. 832, 261 Mass. 309.

94. *N.M.—State v. Sisneros*, 82 P.2d 274, 42 N.M. 500.

95. *Mont.—State v. Bierling*, 107 P.2d 876, 111 Mont. 237.

Cripple

The word "cripple" in statute declaring person driving vehicle carelessly and heedlessly in manner injuring so as to cripple any person guilty of felonious driving was not used in sense of "maim," and person totally disabled for four months because of inability to use one arm following fracture of collar bone was "crippled" within such statute—*People v. Lockwood*, 14 N.W.2d 517, 308 Mich. 618.

96. *Ill.—People v. Boryszewski*, 47 N.E.2d 343, 917 Ill.App. 656.

N.D.—State v. Sullivan, 227 N.W.230, 58 N.D. 732.

97. *Hawaii.—Territory v. McGregor*, 22 Hawaii 786.

N.Y.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—*Sheridan v. Fletcher*, 58 N.Y.S.2d 466, 270 App.Div. 29—*People v. Sandner*, 292 N.Y.S. 545, 162 Misc. 41—*People v. Whitby*, 44 N.Y.S.2d 76—*People v. Quintano*, 25 N.Y.S.2d 269—*People v. Davis*, 9 N.Y.S.2d 620.

Striking and running over pedestrian
Fact that automobile strikes and passes over pedestrian does not necessarily mean that the driver is

guilty of violation of reckless driving statute—*State v. Beshara*, 274 N.W. 836, 65 S.D. 445.

98. *Conn.—State v. Andrews*, 142 A.840, 108 Conn. 209.

42 C.J. p 1323 notes 83, 85 [a].

99. *Conn.—State v. Liearl*, 43 A.2d 450, 132 Conn. 220.

1. *Cal.—People v. Nowell*, 114 P.2d 81, 45 Cal.App.2d Supp. 811.

Mass.—Commonwealth v. Leone, 146 N.E. 26, 250 Mass. 512.

42 C.J. p 1323 note 84.

2. *Cal.—People v. Nowell*, 114 P.2d 81, 45 Cal.App.2d Supp. 811.

Ind.—Roby v. State, 17 N.E.2d 800, 215 Ind. 55.

Mass.—Commonwealth v. Gurney, 158 N.E. 832, 261 Mass. 309.

Va.—Salzer v. Commonwealth, 181 S.E. 435, 165 Va. 744.

42 C.J. p 1323 note 85.

3. *N.Y.—People v. Grogan*, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—*People v. Higgins*, 2 N.Y.S.2d 345, 165 Misc. 502.

Pa.—Commonwealth v. Amatucci, *Quar.Sess.*, 29 Del.Co. 160.

4. *N.Y.—People v. Schulz*, 197 N.Y.S. 888, 80 N.Y.Cr. 429.

5. *N.C.—State v. Mills*, 106 S.E. 677, 181 N.C. 530.

Pa.—Commonwealth v. Amatucci, *Quar.Sess.*, 29 Del.Co. 160.

speed does not render accused guilty where it appears that under the circumstances the rate of speed was not reckless or imprudent.⁶

Prosecutions for exceeding lawful speed are discussed generally infra §§ 641-650.

§ 610. — Exceeding Lawful Speed Distinguished

Under some statutes a person may be guilty of the offense of speeding without being guilty of the offense of reckless driving, but other statutes or regulations constitute operation in excess of a specified speed reckless or dangerous driving.

In view of the method of defining the offense, under some statutes, a person may be guilty of the offense of speeding without being guilty of the offense of reckless driving,⁷ but under other statutes or regulations, the act of unlawful speeding itself constitutes reckless or dangerous driving.⁸ Some statutes or regulations which in terms render the operation of a motor vehicle in excess of specified rates of speed a violation of the statute or regulation do not, however, restrict the application of the statute to acts of unlawful speeding,⁹ and a person may drive recklessly or heedlessly without neces-

sarily driving with excessive speed,¹⁰ although of course, if one does exceed the speed limit under such a statute or regulation, he commits the offense of reckless or dangerous driving.¹¹ Prosecutions for exceeding lawful speed are discussed generally infra §§ 641-650.

§ 611. — Intent

The willful or wanton disregard for the safety or rights of persons or for the safety of property is an element of the offense of reckless driving. The intent with which the act was done, or knowledge or ignorance of its criminal character, is not material.

Under some statutes, the willful or wanton disregard for the safety or rights of persons or for the safety of property is an element of the offense of reckless driving;¹² the recklessness contemplated has been regarded as an intentional course of conduct wholly disregarding of the rights of others,¹³ and "reckless" has been regarded as meaning a disregard of the consequences which may ensue from the act and indifference to the rights of others.¹⁴ In order to render accused guilty, a guilty mind, in the sense of an active intent, is not essential.¹⁵ Intent refers or relates to dis-

6. N.Y.—*People v. Markatos*, 54 N.Y.S.2d 857.

42 C.J. p 1323 note 93.

Speed alone is not the test of careless driving under the statute—*People*, on Complaint of *Lucius*, v. *Herman*, 20 N.Y.S.2d 149, 174 Misc. 235.

7. Cal.—*People v. Nowell*, 114 P.2d 81, 45 Cal.App.2d Supp. 811.

8. Fla.—*State v. Brogden*, 94 So. 653, 84 Fla. 520.

42 C.J. p 1322 notes 54, 59.

Four-lane highway

A provision, which characterizes as reckless driving speeding up or refusing to give half the highway to a driver overtaking and desiring to pass, does not apply to a four-lane highway.—*Lee Bros v Jones*, 54 N.E.2d 108, 114 Ind.App. 688.

9. N.C.—*State v. Mills*, 106 S.E. 677, 181 N.C. 530.

42 C.J. p 1322 note 58.

10. N.C.—*State v. Mills*, supra.

11. Fla.—*State v. Brogden*, 94 So. 653, 84 Fla. 520.

42 C.J. p 1322 note 59.

12. Cal.—*People v. Dawes*, 98 P.2d 787, 37 Cal.App.2d 44—*People v. Smith*, 92 P.2d 1039, 36 Cal.App.2d Supp. 748—*People v. Steel*, 92 P.2d 815, 35 Cal.App.2d Supp. 748.

Ill.—*People v. Boryszewski*, 47 N.E.2d 343, 317 Ill.App. 656.

Pa.—*Commonwealth v. Mechalls*, 43 Pa.Dist. & Co. 221—*Commonwealth v. Shriver*, 35 Pa.Dist. & Co. 1—

Commonwealth v. Douglas, 31 Pa. Dist. & Co. 234.

Tenn.—*Barkley v. State*, 54 S.W.2d 911, 165 Tenn. 309.

Reckless driving; willful misconduct

The term "reckless driving" as used in section of Vehicle Code defining reckless driving, and the term "willful misconduct," as used in automobile guest statute, have similar meaning.—*People v. Young*, 129 P.2d 353, 20 Cal.2d 832—*People v. Nowell*, 114 P.2d 81, 45 Cal.App.2d Supp. 811—*People v. McNutt*, 105 P.2d 657, 40 Cal.App.2d Supp. 835.

Definition in guest statute

The definition of "recklessness" used in civil cases under the automobile guest statute is not applicable in prosecution for reckless driving.—*State v. Jacobsmeier*, 294 N.W. 920, 229 Iowa 878.

13. Ala.—*Hill v. State*, 169 So. 21, 27 Ala.App. 202.

14. Iowa.—*State v. Jacobsmeier*, 294 N.W. 920, 229 Iowa 878.

N.Y.—*Hart v. Menley*, 38 N.E.2d 121, 287 N.Y. 39—*People v. Grogan*, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—*Application of Kafka*, 71 N.Y.S.2d 179, 272 App.Div. 364—*Sheridan v. Fletcher*, 58 N.Y.S.2d 466, 270 App.Div. 29—*People v. Gardner*, 8 N.Y.S.2d 917, 255 App.Div. 683—*People v. Whithy*, 44 N.Y.S.2d 76.

Intention to harm others not essential

Iowa.—*State v. Hill*, 32 N.W.2d 398.

15. N.H. *State v. Yosua*, 16 A.2d 370, 91 N.H. 181.

Intention or indifference

Conduct of a truck driver is "willful and wanton" within reckless driving criminal statute if he willfully intends to inflict injury or is reckless or indifferent to consequences.—*Riggs v. Watson*, Ga App., 47 S.E.2d 900.

Knowledge

(1) The statute defining "reckless driving" as driving in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property means conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others.

Iowa.—*State v. Hill*, 32 N.W.2d 398. Minn.—*State v. Bolsinger*, 21 N.W.2d 480, 221 Minn. 151.

(2) "Wantonness" includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of consequences.—*People v. McNutt*, 105 P.2d 657, 40 Cal.App.2d Supp. 835.

(3) One driving automobile in manner showing wanton and reckless disregard of possible consequences to persons or property may be found guilty of reckless driving, even though it may not be a fact, and so he may not know, that probable result of such driving would be to

regard of safety and not merely to the act done in disregard of safety.¹⁶ So a statute penalizing the operation of a motor vehicle so as to endanger the lives or safety of the public places the burden on the individual of ascertaining at his peril whether his conduct comes within the scope of the statute¹⁷ and the question of the intent with which the act was done¹⁸ or the knowledge or ignorance of its criminal character¹⁹ is immaterial on the question of guilt, since it is the act of operating a motor vehicle in violation of the statute which constitutes the offense.²⁰

Under a regulation which penalizes reckless or dangerous driving and prohibits the owner of a motor vehicle, who is riding therein, from causing or permitting such vehicle to be operated in violation of the regulation, the offense is complete if the owner while a passenger either causes or permits the commission of the offense, regardless of the owner's knowledge or intent.²¹

§ 612. — Negligence

In a prosecution for reckless or dangerous driving, under some statutes, mere negligence of accused does not render him guilty, but negligence comes within the definition of "reckless driving" contained in other statutes.

Under some statutes, "reckless driving" means more than mere negligence,²² or want of ordinary care,²³ and mere negligence of accused does not render him guilty.²⁴ Even gross negligence does not necessarily render accused guilty,²⁵ unless it is of such a character as to evince a willful or wanton disregard for the safety of persons or property upon highways.²⁶ However, reckless driving may sometimes be based on negligence,²⁷ or so-called "wanton negligence."²⁸ According to some decisions, a person may be guilty of reckless driving, even though he did not see anyone upon the street,²⁹ and even though he exercised all possible care after the specific danger was actually discovered.³⁰

In the absence of a provision indicating the contrary, under a statute penalizing the operation of a motor vehicle so that the lives or safety of the public might be endangered, criminal liability does not depend on negligence³¹ or want of care.³² Under a statute defining "reckless driving" as driving in such a manner as to endanger or inconvenience unnecessarily other users of the highway, the view apparently has been taken that gross negligence, in the sense of want of even slight

injure person or property.—People v. Nowell, 114 P.2d 81, 45 Cal.App.2d Supp. 811.

(4) However, a motorist was held not guilty where there was nothing to show that motorist was guilty of deliberate, intentional, or wanton conduct with knowledge or appreciation of the fact that danger was likely to result.—People v. Thompson, 108 P.2d 105, 41 Cal.App.2d Supp. 965.

16. Cal.—People v. McNutt, 105 P.2d 657, 40 Cal.App.2d Supp. 835.

17. Mass.—Commonwealth v. Pentz, 143 N.E. 322, 247 Mass. 500.

18. Mass.—Commonwealth v. Vartanian, 146 N.E. 682, 251 Mass. 355.—Commonwealth v. Pentz, 143 N.E. 322, 247 Mass. 500.

19. Mass.—Commonwealth v. Vartanian, 146 N.E. 682, 251 Mass. 355.—Commonwealth v. Pentz, 143 N.E. 322, 247 Mass. 500.

20. Mass.—Commonwealth v. Vartanian, 146 N.E. 682, 251 Mass. 355.—Commonwealth v. Pentz, 143 N.E. 322, 247 Mass. 500.

42 C.J. p 1322 note 76.

21. N.Y.—People v. Harrison, 170 N.Y.S. 876, 183 App.Div. 812.

42 C.J. p 1324 note 8.

22. N.Y.—People v. Grogan, 183 N.Y.S. 273, 260 N.Y. 138, 86 A.L.R. 1266.—Application of Kafku, 71 N.Y.S. 2d 179, 272 App.Div. 364.—Sheridan v. Fletcher, 58 N.Y.S.2d 466, 270

App.Div. 29.—In re Lipschitz, 20 N.Y.S.2d 299, 259 App.Div. 610.—People v. Whitby, 44 N.Y.S.2d 76.

Error of judgment see supra § 609 b.

The word "reckless" is but an intensive expression of the word "careless," meaning rashly negligent or utterly careless, as if heedless or as if indifferent to, or regardless of, consequences.—State v. Mills, 106 S.E. 677, 181 N.C. 530.

23. N.Y.—Sheridan v. Fletcher, 58 N.Y.S.2d 466, 270 App.Div. 29.

In order to be punishable criminally for reckless driving, the acts of a driver must so widely depart from the exercise of due care as to amount to reckless operation.—Swango v. Commonwealth, 124 S.W.2d 768, 276 Ky. 467.

24. Cal.—People v. Thompson, 108 P.2d 105, 41 Cal.App.2d Supp. 965.—People v. McNutt, 105 P.2d 657, 40 Cal.App.2d Supp. 835.

Del.—State v. Elliott, 8 A.2d 873, 1 Terry 250.

Miss.—Sanford v. State, 16 So.2d 628, 195 Miss. 896.

N.Y.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266.—People v. Whitby, 44 N.Y.S.2d 76.

Tenn.—Barkley v. State, 51 S.W.2d 944, 165 Tenn. 309.

In addition to mere carelessness or simple negligence, willful or wanton disregard of the rights or safety of others is required.—Commonwealth

v. Shriver, 35 Pa. Dist. & Co. 1.—Commonwealth v. Howe, 1'a.Com.Pl., 89 Pittsb.Leg.J. 621.

Type of negligence

It has been stated that the phrase "willfully or wantonly disregarding the rights or safety of others" was used to define or explain the type of negligence that was to be punishable.—Commonwealth v. Michalls, 43 Pa. Dist. & Co. 221.

25. Cal.—People v. Thompson, 108 P.2d 105, 41 Cal.App.2d Supp. 965.—People v. McNutt, 105 P.2d 657, 40 Cal.App.2d Supp. 835.

Miss.—Sanford v. State, 16 So.2d 628, 195 Miss. 896.

26. Miss.—Sanford v. State, supra.

27. Iowa.—Neessen v. Armstrong, 239 N.W. 56, 213 Iowa 378 N.D.—State v. Sullivan, 227 N.W. 230, 58 N.D. 732.

28. Cal.—People v. McNutt, 105 P.2d 657, 40 Cal.App.2d Supp. 835.

29. Mass.—Commonwealth v. Horsfall, 100 N.E. 362, 213 Mass. 232, Ann.Cas.1914A 682.

30. Mass.—Commonwealth v. Horsfall, supra.
42 C.J. p 1323 note 80.

31. Mass.—Commonwealth v. Gurney, 158 N.E. 832, 261 Mass. 309.
42 C.J. p 1322 note 78.

32. Mass.—Commonwealth v. Gurney, supra.

care, is not essential.³³ It has been held that, in order to render accused guilty of the offense of unlawfully and with gross negligence driving a motor vehicle and colliding with and causing injury to a person, the gross negligence need not be the sole cause of the collision.³⁴

§ 613. — Person or Property Endangered

According to some, but not all, authorities, a statute prohibiting reckless driving is not violated where there are neither persons nor property upon the highway susceptible to injury.

On the theory that the general purpose of all laws regulating traffic is not primarily to protect the fast driver from the consequences of his own folly, but rather to protect the life and property of others lawfully using the highways,³⁵ the view has been taken that there can be no violation of a provision prohibiting reckless driving where there were neither persons nor property upon the highway to be injured.³⁶ The identity of a person who is struck by the vehicle of accused is not an element of the offense of reckless driving under some statutes.³⁷ However, according to other authority, a person might be guilty of reckless driving, although no one was upon the street at the time,³⁸ and, under a statute directed against the operation of a vehicle so as to endanger the life, limb, or property of any person lawfully using the highway, the words "any person" include a person who, with the driver's consent, is an occupant of the vehicle which is being driven in violation of the statute,³⁹ but there is not a violation of the statute where the person injured is, at the time of the injury, unlawfully using the highway.⁴⁰

§ 614. — Persons Liable

A person may commit the offense of reckless driving notwithstanding he is not actually in control of the motor vehicle.

It has been held that a person may commit the offense of reckless driving, even though not actually in control of the motor vehicle at the time of the alleged violation.⁴¹ Under a governmental regulation which penalizes reckless or dangerous driving and prohibits the owner of a motor vehicle, who is riding therein, from causing or permitting such vehicle to be operated in violation of the regulation, the offense is complete if the owner, while a passenger, either causes or permits the commission of the offense by his chauffeur,⁴² irrespective of the owner's knowledge or intent, as shown supra § 611.

§ 615. — Defenses

In a prosecution for reckless or dangerous driving, the negligence of a person who was injured or who was the driver of a motor vehicle with which accused's vehicle collided does not constitute a defense; nor does the fact that such driver was guilty of a like offense constitute a defense.

The negligence of a person injured is not a defense either to the charge of reckless driving⁴³ or of operating a motor vehicle so that the lives or safety of the public might be endangered;⁴⁴ nor is the fact that the person injured was operating an automobile without a license.⁴⁵ So, also, it is not a defense to a charge of reckless driving that the driver of a motor vehicle with which the vehicle driven by accused collided was negligent⁴⁶ or was guilty of a like offense.⁴⁷

The fact that accused when in a position of peril committed an error of judgment as to distance does not constitute a defense to a charge of operating a motor vehicle in a manner which might endanger the lives and safety of the public.⁴⁸ In a prosecution for driving a motor vehicle unlawfully and with gross negligence, the fact that accused at the time of collision with another and after the danger was discovered could not, by the use

33. Wash.—State v. Birch, 49 P.2d 921, 183 Wash. 670.

34. Tex.—Ebbs v. State, 279 S.W. 829, 103 Tex.Cr. 49.

35. N.Y.—People v. Carrie, 204 N.Y. S. 759, 122 Misc. 753.

36. N.Y.—People v. Carrie, supra.

37. Ill.—People v. Boryszewski, 47 N.E.2d 343, 317 Ill.App. 656.

38. Mass.—Commonwealth v. Horsfall, 100 N.E. 362, 213 Mass. 232, Ann.Cas.1914A 682.

39. Ohio.—State v. Wells, 64 N.E.2d 593, 146 Ohio St. 131.

Va.—Salzer v. Commonwealth, 181 S.E. 435, 165 Va. 744.

40. Ohio.—State v. Sanders, 41 N.E. 2d 713, 68 Ohio App. 419.

41. S.C.—State v. Davis, 70 S.E. 811, 88 S.C. 229, 34 L.R.A.N.S., 295.

42 C.J. p 1323 note 81.

42. N.Y.—People v. Harrison, 170 N.Y.S. 876, 183 App.Div. 812.

42 C.J. p 1323 note 2.

43. Mass.—Commonwealth v. Guillemette, 137 N.E. 700, 243 Mass. 346.

Rights of pedestrians

In a prosecution for unlawful and reckless driving in violation of a municipal ordinance, in which it was said that a person who was injured seemed to have exercised the ordinary care of a pedestrian crossing a city street, the view was stated that a pedestrian entering street crossing,

exercising ordinary care, has right to continue to cross, exercising such care, and is not obliged to run, jump, or dodge traffic—Keuhn v. State, 174 N.E. 606, 37 Ohio App. 217.

44. Mass.—Commonwealth v. Guillemette, 137 N.E. 700, 243 Mass. 346.

45. Mass.—Commonwealth v. Guillemette, supra.

46. S.D.—State v. Blake, 255 N.W. 108, 62 S.D. 538.

47. N.D.—State v. Sullivan, 227 N.W. 230, 58 N.D. 732.

S.D.—State v. Blake, 255 N.W. 108, 62 S.D. 538.

48. Mass.—Commonwealth v. Gurney, 158 N.E. 832, 261 Mass. 309.

of ordinary care, have avoided the collision does not necessarily constitute a defense;⁴⁹ nor does the fact that in such case the collision occurred by accident or without intent.⁵⁰ Where a regulation imposes liability on the owner of a car who while riding therein permits it to be operated recklessly or dangerously, it is no defense that the owner did not give attention to the manner in which his chauffeur was driving the car and did not know whether it was going fast or not.⁵¹

The fact that the reckless driving was the result of an attempt by accused to elude an officer trying to serve a warrant on him does not necessarily constitute a defense,⁵² but the fact that the allegedly reckless driving was the result of compulsion and duress, in that certain police officers, in attempting unlawfully to arrest accused, had ambushed and fired on him, has been held to constitute a defense.⁵³

§ 616. — Jurisdiction

The question what court has jurisdiction of a prosecution for reckless driving depends on the local practice and statutes.

The question what court has jurisdiction of a prosecution for reckless driving depends on the local statutes and practice.⁵⁴ A children's court, having jurisdiction to try offenses committed by adults where such offenses necessarily involve a child, does not thereby have jurisdiction over an adult for a violation of an ordinance prohibiting reckless driving merely because a child was injured as a result of the act.⁵⁵

In some jurisdictions, accused does not neces-

sarily waive a defect in process in a summary prosecution for reckless driving by waiving a summary hearing and giving bond to appear in court.⁵⁶ Process is not fatally defective in such case where accused has received all necessary information and has voluntarily submitted to the jurisdiction of the court, notwithstanding the purported copy of the information, which is mailed to accused, is not an exact or full copy of the original.⁵⁷

§ 617. — Indictment, Information, or Complaint

- a. General considerations
- b. Following language of statute
- c. Particular averments
- d. Waiver of defects

a. General Considerations

Generally speaking, a charge for reckless, dangerous, or careless driving must set forth the essential elements of the offense.

While it has been held or recognized that a charge for reckless driving filed in a justice's court or other court of inferior or limited jurisdiction need not be drawn with the same technical accuracy as an indictment,⁵⁸ and that a charge which states the facts constituting the offense in ordinary and concise language and in such a manner as to enable accused to know and understand what is intended by the charge is sufficient,⁵⁹ generally speaking, all the essential elements of the crime as defined by statute or other regulation must be alleged⁶⁰ with certainty and precision⁶¹ and not by inference.⁶² While the accusation need not be in any particular form or set of words,⁶³ there

49. Tex.—*Ebbs v. State*, 279 S.W. 829, 103 Tex. Cr. 49.

50. Tex.—*Ebbs v. State*, *supra*.

51. N.Y.—*People v. Harrison*, 170 N.Y.S. 876, 183 App. Div. 812, 42 C.J. p 1324 note 3 [a].

52. Me.—*State v. Freeman*, 119 A. 668, 122 Me. 294, 29 A.L.R. 881.

53. Ala.—*Browning v. State*, 13 So. 2d 54, 31 Ala. App. 137.

54. Pa.—*Commonwealth v. Hall*, 34 Pa. Dist. & Co. 278.

N.C.—*State v. Johnson*, 199 S.E. 96, 214 N.C. 319.

Court of special sessions

N.Y.—*People v. Grogan*, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—*People ex rel. Cooley v. Wilder*, 255 N.Y.S. 218, 234 App. Div. 256—*People v. Sandner*, 292 N.Y.S. 545, 162 Misc. 41.

Police court

Conviction of reckless driving which was invalid under ordinance

under which conviction was had was not valid on theory that complaint stated public offense under state statute penalizing reckless driving and that accused was convicted in court of competent jurisdiction, where prosecution was commenced in city police court and taken to superior court on appeal and charter defining jurisdiction of city court did not include criminal proceedings for violation of state laws.—*Keller v. State*, 47 P.2d 442, 46 Ariz. 106.

55. N.Y.—*People v. Zmudzinski*, 141 N.Y.S. 542, 80 Misc. 28.

56. Pa.—*Commonwealth v. Hinkle*, 20 Pa. Dist. & Co. 340, 43 Lanc. L. Rev. 697.

57. Pa.—*Commonwealth v. Hinkle*, *supra*.

58. N.Y.—*People v. Payne*, 129 N.Y.S. 1007, 71 Misc. 72.

Complaint or information in summary criminal prosecution generally see Criminal Law §§ 373-377.

Information instead of indictment

The offense of reckless driving is prosecuted on information instead of indictment under some statutes.—*People v. Grogan*, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—*People v. Sandner*, 292 N.Y.S. 545, 162 Misc. 41.

59. Ala.—*Terrell v. State*, 167 So. 611, 27 Ala. App. 160.

60. N.Y.—*People v. Grogan*, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266.

42 C.J. p 1324 note 13.

61. Fla.—*Robinson v. State*, 152 So. 717, 113 Fla. 854.

N.Y.—*People v. Grogan*, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—*Luckie v. Goddard*, 13 N.Y.S.2d 808, 171 Misc. 774—*People v. Kasloff*, 54 N.Y.S.2d 455.

42 C.J. p 1324 note 14.

62. N.Y.—*People v. Payne*, 129 N.Y.S. 1007, 71 Misc. 72.

63. N.Y.—*People v. Payne*, *supra*.

must be at least a substantial statement of the offense charged,⁶⁴ and the facts must be set forth with such accuracy that accused may know the offense which it is claimed that he has committed, and so enable him to prepare his defense.⁶⁵

A charge merely for "reckless driving" is fatally defective on its face because it does not charge an offense, in the absence of any definite provision of law making "reckless driving" an offense.⁶⁶ A charge does not state an offense where it is based on a statute which was repealed when the alleged offense was committed.⁶⁷ Failure of the person who makes the affidavit on which the case is prosecuted to allege that he has probable cause to believe, and does believe, the matters alleged may render the affidavit insufficient under some statutes.⁶⁸ Where the information does not state facts showing the commission of an offense by accused, no jurisdiction is acquired by the court to hear and determine the cause⁶⁹ and accused cannot be called on to make any defense.⁷⁰

Title of action. Where a prosecution for the violation of a municipal ordinance prohibiting reckless driving is in the nature of a criminal action it must, by virtue of express statutory provision in some jurisdictions, be brought in the name of the people of the state.⁷¹ However, the fact that the action was brought in the name of a municipality will not be fatal, under a statute rendering defects immaterial if they do not prejudice the substantial rights of defendant, where the nature

of the action was well understood by the parties.⁷² It has been held that a prosecution for reckless driving in the District of Columbia is properly maintained in the name of the District by the corporation counsel.⁷³

Conjunctive allegation. Under a statute punishing the operation of a motor vehicle in such a manner that the lives or safety of the public might be endangered, the offense may be charged in the conjunctive as operating it so that the lives and safety of the public might be endangered.⁷⁴

Conviction under indictment for manslaughter or assault and battery. In some jurisdictions accused may not be convicted for reckless driving on a trial under an indictment for involuntary manslaughter or for assault and battery, since reckless driving is not an indictable offense and is punishable only on summary conviction.⁷⁵

b. Following Language of Statute

While charges for reckless driving which follow, substantially or specifically, the language of some statutes defining the offense may be sufficient, a charge in the language of the statute is not necessarily sufficient.

Under some statutes, an indictment or complaint for reckless or dangerous driving is sufficient if it embodies in substance the words of the statute creating the offense,⁷⁶ or if it follows the exact language of the statute.⁷⁷ A charge in the language of the statute in some jurisdictions is not necessarily sufficient, however,⁷⁸ as, for example,

64. N.Y.—People v. Payne, *supra*.

Charge held insufficient

(1) In general.—Robinson v. State, 152 So 717, 113 Fla 854

(2) Complaint not stating chapter or section numbers.—People v. Daus, 237 N.Y.S. 511, 135 Misc. 41.

Charge held sufficient

Ill.—People v. Boryszewski, 47 N.E. 2d 343, 317 Ill App. 656—People v. Allegretti, 5 N.E.2d 618, 287 Ill. App 631.

Mo.—State v. Ball, App., 171 S.W.2d 787—City of Cape Girardeau v. Bennett, App., 27 S.W.2d 447.

N.Y.—People v. Bruno, 43 N.Y.S.2d 942.

65. N.H.—State v. Gilbert, 194 A. 728, 89 N.H. 134.

W.Va.—State v. Mangus, 198 S.E. 872, 120 W.Va. 415.

42 C.J. p 1324 note 18.

Charge held sufficient

Ill.—People v. Kobylak, 50 N.E.2d 465, 383 Ill. 432.

N.Y.—People v. Bruno, 43 N.Y.S.2d 942.

42 C.J. p 1324 note 18 [a].

66. W.Va.—Town of Hartford v. Davis, 150 S.E. 141, 107 W.Va. 693

67. Ala.—Flournoy v. State, 2 So 2d 329, 30 Ala App. 151

68. Ala.—Slaton v. State, 170 So. 83, 27 Ala App 243.

69. N.Y.—People v. Fuchs, 129 N.Y. S 1012, 71 Misc 69, 42 C.J. p 1324 note 19

70. N.Y.—People v. Payne, 129 N.Y. S. 1007, 71 Misc. 72.

71. N.Y.—Buffalo v. Neubeck, 204 N.Y.S. 737, 209 App Div 386

72. N.Y.—Buffalo v. Neubeck, *supra*.

73. D.C.—District of Columbia v. Moyer, 93 F.2d 527, 68 App D.C. 98.

74. Mass.—Commonwealth v. Mara, 153 N.E. 793, 257 Mass. 198.

75. Pa.—Commonwealth v. Bergen, 4 A.2d 164, 134 Pa Super. 62.

76. Fla.—State v. Andres, 5 So.2d 7, 148 Fla. 742.

N.C.—State v. Wilson, 12 S.E.2d 654, 218 N.C. 769.

42 C.J. p 1324 note 26.

Charge held sufficient

N.C.—State v. Wilson, *supra*.

Where there was no substantial variance between the language of the complaint and the language of the statute defining the offense, the complaint was not treated as insufficient after conviction.—Commonwealth v. Gurney, 158 N.E. 832, 261 Mass. 309.

In Pennsylvania

(1) The sufficiency of an information substantially following the language of the reckless-driving statute has been recognized.—Commonwealth v. Michaels, 43 Pa Dist. & Co. 221—Commonwealth v. Puff, 42 Pa Dist. & Co. 603—Commonwealth v. Stiver, 32 Pa. Dist. & Co. 319.

(2) The sufficiency of such an information has, however, been denied.—Commonwealth v. Douglas, 31 Pa. Dist. & Co. 234.

77. Ala.—Britton v. State, 182 So. 95, 28 Ala.App. 251—Terrell v. State, 167 So 611, 27 Ala.App. 160.

78. Ill.—People v. Green, 13 N.E.2d 278, 368 Ill. 242, 115 A.L.R. 348.

N.H.—State v. Gilbert, 194 A. 728, 89 N.H. 134.

W.Va.—State v. Mangus, 198 S.E. 872, 120 W.Va. 415.

42 C.J. p 1325 note 29.

where the allegations do not charge, expressly or by necessary implication, every fact necessary to constitute the offense,⁷⁹ do not inform accused of the nature of the charge against him so as to enable him to prepare his defense,⁸⁰ or are not sufficiently definite to be the basis of a bar to further prosecution.⁸¹

Where a statute contains a provision that persons operating motor vehicles shall exercise due care and take proper precaution to insure the safety of lives and property and contains subdivisions referring to specific violations, it has been held that a complaint following the language of the general provisions of the statute is not sufficient to charge an offense but it is necessary to allege also that accused committed some act in violation of one or more of the several specific provisions of the statute.⁸²

c. Particular Averments

Under some statutes a charge for reckless driving must allege the acts that constitute the alleged violation of the statute and must allege the manner and effect of operation where such manner and effect are elements of the offense.

A charge for reckless driving under some statutes must state the acts that constitute the alleged violation of the statute.⁸³ In a prosecution under a statute or other regulation prohibiting the reckless or dangerous driving of motor vehicles, however, it is not essential that the charge contain an

allegation as to the rate of speed prohibited⁸⁴ or the motive power of the vehicle,⁸⁵ and, under a definition of reckless driving contained in some statutes, allegations may be sufficient without any allegation as to speed.⁸⁶ However, where the prosecution is under a statute which prohibits careless or imprudent driving and makes the operation of a motor vehicle in excess of a stated speed for a specified distance a prima facie violation of the statute, an information which merely charges that accused was driving in excess of the speed fixed in the statute without alleging that he was driving carelessly or at the excessive speed for the distance required by the statute charges no offense.⁸⁷

It has been held or recognized that it is essential to allege the manner and effect of operation where such manner and effect are essential elements of the offense of reckless driving.⁸⁸ So, it has been held under a statute prohibiting the operation of a motor vehicle in a careless or negligent manner that the particular manner of driving alleged to be a violation of the statute must be set forth,⁸⁹ and that a complaint which merely alleges the offense in the language of the statute is insufficient in that it does not sufficiently show wherein defendant's operation of the car was careless or negligent.⁹⁰ However, where the prosecution is under a statute which provides that no person shall operate a motor vehicle recklessly or so as to endanger the life or limb of any person, a

79. Vt.—State v. Aaron, 97 A. 659, 90 Vt. 183.

Sufficiency of charge in language of statute generally see *Indictments & Informations* § 139.

80. Ga.—Carter v. State, 78 S.E. 205, 12 Ga. App. 430.

Ill.—People v. Green, 13 N.E.2d 278, 368 Ill. 242, 115 A.L.R. 348.

N.H.—State v. Gilbert, 194 A. 728, 89 N.H. 134.

81. Ill.—People v. Green, 13 N.E.2d 278, 368 Ill. 242, 115 A.L.R. 348.

82. Puerto Rico—People v. Matlenzo, 27 Puerto Rico 838, 42 C.J. p. 1325 note 31.

83. Ill.—People v. Green, 13 N.E.2d 278, 368 Ill. 242, 115 A.L.R. 348.

N.H.—State v. Langelier, 58 A.2d 315, 95 N.H. 105—State v. Gilbert, 194 A. 728, 89 N.H. 134.

N.Y.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—Luckie v. Goddard, 13 N.Y.S.2d 808, 171 Misc. 774—People v. Kasloff, 54 N.Y.S.2d 455.

W.Va.—State v. Mangus, 198 S.E. 872, 120 W.Va. 415.

In Pennsylvania

(1) It has been held that the fact that an information under the reckless-driving statute fails to particu-

larize wherein accused was guilty of reckless driving does not render the information insufficient.—Commonwealth v. Michaels, 43 Pa. Dist. & Co. 221—Commonwealth v. Puff, 42 Pa. Dist. & Co. 603.

(2) Under the same statute, however, it has been held that it is essential to allege the particular act or acts of accused which constituted the offense.—Commonwealth v. Douglas, 31 Pa. Dist. & Co. 231—Commonwealth v. Wagner, Pa. Com. Pl., 3 Monroe L.R. 39.

84. N.Y.—People v. Schulz, 197 N.Y. S. 888, 80 N.Y. Cr. 429.

85. Ga.—Carter v. State, 78 S.E. 205, 12 Ga. App. 430.

86. Ind.—Spittler v. State, 46 N.E.2d 591, 221 Ind. 107.

87. N.Y.—People v. Payne, 129 N.Y. S. 1007, 71 Misc. 72, 42 C.J. p. 1325 note 35.

88. N.Y.—People v. Moore, 36 N.Y. S.2d 328, 178 Misc. 750—People v. Sas, 16 N.Y.S.2d 380, 172 Misc. 845—People v. Higgins, 2 N.Y.S.2d 345, 165 Misc. 503—People v. Davis, 9 N.Y.S.2d 620.

In Pennsylvania

(1) It has been held that an information under the reckless-driving statute was insufficient where it failed to allege carelessness, willfulness, or wantonness with respect to accused's operation of vehicle, the disregard of the rights or safety of others, or the endangering of any person or property.—Commonwealth v. Alford, 41 Pa. Dist. & Co. 475—Commonwealth v. Fye, 40 Pa. Dist. & Co. 508.

(2) It has also been held, however, that an information, charging reckless driving, which sets forth that defendant operated a motor vehicle "in such a manner as to endanger the lives and property of other people" is sufficient, and that it is not necessary, under a proper interpretation of the statute, that the words "carelessly, wilfully, or wantonly disregarding the rights or safety of others" be set forth.—Commonwealth v. Greene, 40 Pa. Dist. & Co. 546, 57 Montg. 68.

89. Vt.—State v. Aaron, 97 A. 659, 90 Vt. 183.

90. Vt.—State v. Aaron, *supra*.

complaint which alleges that the acts were done unlawfully and recklessly is sufficiently descriptive of the manner in which defendant drove his motor vehicle so as to charge an offense under the statute.⁹¹

Person or property endangered. An accusation, under a statute prohibiting the operation of an automobile "so as to endanger the life and limb of persons and the safety of property," must allege what person or property was endangered by the running of the automobile, and a charge which merely alleges the offense in the language of the statute is on this ground insufficient and subject to special demurrer.⁹² It has been held, however, that, in a prosecution for reckless driving by passing through a red light and striking a pedestrian, it is not essential to allege the identity of the pedestrian.⁹³

Place of offense. It is ordinarily sufficient to allege the place where an offense is said to have been committed with particularity enough to show jurisdiction over it,⁹⁴ but, where the act is criminal only when done at a particular place, the place becomes a matter of essential description, and must be alleged with reasonable certainty.⁹⁵ Thus, where the act of operating an automobile carelessly is a crime only where it is done on a way laid out by statutory authority, it is not sufficient to charge the offense as having been committed in a named city and upon a public highway laid out by authority of statute,⁹⁶ but the particular street referred to should be alleged by name.⁹⁷ So, it may be necessary to allege the place of commission of the offense charged in order to give accused sufficient information to prepare his defense and to constitute the charge the basis of a bar to further prosecution.⁹⁸

Referring to statute or other regulation. A ref-

erence to a statute which is fairly comprehensible is sufficient,⁹⁹ and a mere inaccuracy in a reference to a statute or ordinance, when not misleading, is not ground for dismissal of the charge¹ and does not render a conviction ineffective.² Where a statute provides that all courts in the city shall take judicial notice of city ordinances, an ordinance prohibiting reckless driving need not be specially pleaded.³

d. Waiver of Defects

A plea of guilty does not waive jurisdictional defects in the charge and does not bar a motion in arrest of judgment based on a claim that the charge does not state facts constituting an offense.

A plea of guilty to an information does not waive jurisdictional defects,⁴ such as where the information fails to set forth an offense,⁵ and such a plea is no bar to a motion in arrest of judgment based on the ground that the facts stated in the information do not constitute a crime.⁶

§ 618. — Issues, Proof, and Variance

Only evidence of such facts as are within the charge is admissible on behalf of the prosecution.

In a prosecution for operating a motor vehicle so as to endanger the lives or safety of the public, the only fact to be determined is whether accused did the prohibited act, and this is the issue raised under the indictment.⁷ A conviction for reckless driving may be sustained without proof of the rate of speed prohibited by an ordinance;⁸ and, where city courts are required by statute to take judicial notice of municipal ordinances, an ordinance prohibiting reckless driving need not be proved.⁹

The evidence must sustain the charge as made,¹⁰ and generally speaking only evidence of facts which are within the range and scope of the charge is ad-

91. R.I.—State v. Welford, 72 A. 396, 29 R.I. 450.

42 C.J. p 1325 note 38.

92. Ga.—Carter v. State, 78 S.E. 205, 12 Ga.App. 430.

42 C.J. p 1325 note 39.

93. Ill.—People v. Boryszewski, 47 N.E.2d 343, 317 Ill.App. 656.

94. Vt.—State v. Aaron, 97 A. 659, 90 Vt. 183.

95. Vt.—State v. Aaron, supra.

96. Vt.—State v. Aaron, supra.

97. Vt.—State v. Aaron, supra. 42 C.J. p 1325 note 44.

98. Ill.—People v. Green, 13 N.E.2d 278, 368 Ill. 242, 115 A.L.R. 348.

99. N.Y.—People v. Payne, 129 N.Y.S. 1007, 71 Misc. 72.

1. N.Y.—People v. Payne, supra. 42 C.J. p 1326 note 46.

2. N.Y.—People v. Curtin, 255 N.Y.S. 78, 142 Misc. 567.

Reference by initials

Information charging defendant with driving vehicle with willful or wanton disregard for safety of persons or property, in language of reckless driving statute, stated an offense sufficiently to uphold a conviction, notwithstanding use of initials U. A. R. T. to refer to statute. —People v. Sprague, 6 N.E.2d 296, 288 Ill.App. 360.

3. N.Y.—People v. Schulz, 197 N.Y.S. 888, 80 N.Y.Cr. 429.

4. N.Y.—People v. Fuchs, 129 N.Y.S. 1012, 71 Misc. 69.

5. N.Y.—People v. Fuchs, supra.

6. N.Y.—People v. Fuchs, supra.

7. Mass.—Commonwealth v. Pentz, 143 N.E. 322, 247 Mass. 500.

8. N.Y.—People v. Schulz, 197 N.Y.S. 888, 80 N.Y.Cr. 429.

9. N.Y.—People v. Schulz, supra.

10. N.Y.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—People v. Carrie, 204 N.Y.S. 759, 122 Misc. 753.

Pa.—Commonwealth v. Catania, 13 Pa.Dist. & Co. 264, 20 Del.Co. 197.

No fatal variance

Ga.—Soles v. State, 171 S.E. 462, 47 Ga.App. 758.

missible on behalf of the prosecution.¹¹ There is no fatal variance between a charge that a motor vehicle ran into a team and proof showing that it ran into an express wagon,¹² but, where the evidence tended to prove a violation of a part of the statute relating to reckless driving and the charge was under another provision of the statute, there could be no conviction for reckless driving.¹³

§ 619. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

The burden is on the prosecution to prove the offense of reckless or dangerous driving beyond a reasonable doubt. Driving at excessive speed may, under some circumstances, authorize an inference of reckless driving, but, under some statutes, such driving merely raises a presumption of imprudent driving which may be rebutted.

In accordance with the general rule applicable in criminal prosecutions, as discussed in Criminal Law § 566, the burden is on the prosecution to prove the commission of an offense of reckless or dangerous driving beyond a reasonable doubt,¹⁴ but in general accused has the burden of presenting evidence tending to establish a defense.¹⁵ While inferences may be indulged with respect to reckless driving,¹⁶ as, for example, the inference of reckless driving from proof of excessive speed under the circumstances,¹⁷ where a statute provides that driving in excess of a certain speed

shall be presumptive evidence of driving at a speed which is not careful and prudent, mere proof that accused exceeded the prescribed speed simply raises the presumption of imprudent driving which may be overcome by evidence,¹⁸ or, as sometimes stated, merely shifts the burden of proof so as to require accused to show that under the circumstances he was not driving in a careless or imprudent manner.¹⁹

b. Admissibility

Generally evidence of all facts which are connected with the occurrence is admissible in a prosecution for reckless or dangerous driving, but, the evidence must be of facts which are relevant and material.

The principles governing the admissibility of evidence in criminal cases generally, as discussed in Criminal Law §§ 600-899, apply in prosecutions for reckless or dangerous driving.²⁰ Broadly speaking, all the facts connected with the incident are pertinent and evidence of such facts is admissible.²¹ Evidence of facts which are irrelevant and immaterial is not admissible, however,²² and, where the prosecution is under a statute which prohibits careless or imprudent driving and provides that driving in excess of a certain speed is a violation of the statute and the charge is for exceeding the prescribed speed, the question as to whether the machine was being operated in a careful manner under the circumstances is properly excluded.²³ So, it is proper to exclude evidence calling for conclusions which are solely within the province of the jury²⁴ or evidence which would be purely specu-

11. Ala.—*Browning v. State*, 13 So. 2d 54, 31 Ala App. 137.

12. R.I.—*State v. Welford*, 72 A. 396, 29 R.I. 450.

13. N.Y.—*People v. Carrie*, 204 N.Y. S. 759, 122 Misc. 753.

14. Mo.—*City of St. Louis v. Judd*, App., 193 S.W.2d 917—*City of St. Louis v. Cain*, App., 137 S.W.2d 603. N.C.—*State v. Folger*, 191 S.E. 747, 211 N.C. 695.

Pa.—*Commonwealth v. Howe*, 89 Pittsb. Leg J. 621.

S.C.—*State v. Davis*, 70 S.E. 811, 88 S.C. 229, 34 L.R.A.N.S., 295.

15. Mo.—*City of St. Louis v. Judd*, App., 193 S.W.2d 917.

16. Miss.—*Sanford v. State*, 16 So.2d 623, 195 Miss. 896.

N.Y.—*People v. Whitby*, 44 N.Y.S.2d 76.

17. N.Y.—*People v. Devoe*, 159 N.E. 682, 246 N.Y. 636—*People v. Whitby*, 44 N.Y.S.2d 76.

18. N.Y.—*People v. Carrie*, 204 N.Y. S. 759, 122 Misc. 753.

42 C.J. p 1326 note 68.

19. N.Y.—*People*, on Complaint of Lucius v. Herman, 20 N.Y.S.2d 149, 174 Misc. 235. 42 C.J. p 1326 note 64.

20. Mass.—*Commonwealth v. Mara*, 153 N.E. 793, 257 Mass. 198.

42 C.J. p 1326 notes 66, 68, p 1327 note 71.

21. Mass.—*Commonwealth v. Gullett*, 137 N.E. 700, 243 Mass. 346.

42 C.J. p 1326 note 68.

Condition, conduct, and movements of accused

Ga.—*Huff v. State*, 24 S.E.2d 227, 68 Ga.App. 799.

Evidence held admissible

Iowa.—*State v. Hill*, 32 N.W.2d 398. Mass.—*Commonwealth v. Klosek*, 160 N.E. 252, 262 Mass. 416.

42 C.J. p 1326 note 68 [a]—[d].

22. Ala.—*Howard v. State*, 132 So. 459, 24 Ala App. 191.

Mass.—*Commonwealth v. Klosek*, 160 N.E. 252, 262 Mass. 416.

Mo.—*City of St. Louis v. Cain*, App., 137 S.W.2d 603.

Pa.—*Commonwealth v. Howe*, 89 Pittsb. Leg J. 621.

42 C.J. p 1327 note 71.

Evidence inadmissible or properly excluded

(1) Evidence as to speed at which accused was operating vehicle before accident and before he turned around and returned to scene of accident.—*Commonwealth v. Klosek*, 160 N.E. 252, 262 Mass. 416.

(2) Question to accused whether he did everything in his power to avoid accident.—*Commonwealth v. Klosek*, supra.

(3) Question on cross-examination of witness as to reason for going to town hall.—*Commonwealth v. Klosek*, supra.

23. N.Y.—*People v. Ruetiman*, 148 N.Y.S. 612, 85 Misc. 233, affirmed 155 N.Y.S. 1133, 171 App Div. 912.

24. Mass.—*Commonwealth v. Mara*, 153 N.E. 793, 257 Mass. 198.

42 C.J. p 1327 note 72.

lative.²⁵ Where the alleged driving in a reckless manner so that the lives or safety of the public was endangered took place in connection with an attempt of a sheriff and his deputies to intercept accused for the purpose of apprehending him, a question as to whether the deputy personally had the warrant when he attempted to intercept the car is properly excluded,²⁶ and what the officers were doing or the manner in which they did it by way of obstructing the passage of accused is not material.²⁷

c. Weight and Sufficiency

The evidence in a prosecution for reckless or danger-

ous driving must be sufficient to establish the guilt of accused beyond a reasonable doubt.

Under the rules applicable in criminal prosecutions generally, the evidence in a prosecution for reckless or dangerous driving must be sufficient to establish the guilt of accused beyond a reasonable doubt.²⁸ A conviction must be based on substantial evidence,²⁹ and cannot rest on mere speculation or supposition.³⁰ In order to authorize or support a conviction, the evidence must show more than a mere error of judgment³¹ or, under some statutes, more than mere negligence,³² on the part of accused, and, under some statutes,

25. Mass.—Commonwealth v. Mara, supra.

26. Me.—State v. Freeman, 119 A. 668, 122 Me. 294, 29 A.L.R. 881.

27. Me.—State v. Freeman, supra.

28. Mass.—Commonwealth v. Maguire, 48 NE 2d 665, 313 Mass. 669 N.Y.—People v. Quintano, 25 N.Y.S. 2d 269.

Pa.—Commonwealth v. Hughes, 22 Pa. Dist. & Co. 377. 42 C.J. p 1327 note 79.

Want of testimony of injured person

In prosecution for reckless driving where sufficient evidence to support conviction was deduced from two eyewitnesses and any evidence which the injured pedestrian could have given would have been merely cumulative, trial court did not err in allowing the case to go to judgment without having the pedestrian in court.—People v. Boryszewski, 47 N.E. 2d 343, 317 Ill. App. 656.

Effect of evidence as to result of civil action

In proceeding by city against motorist for violation of traffic ordinance arising out of automobile collision, defendant's testimony that in a civil suit growing out of same accident a judgment was rendered in his favor, although not binding, was significant on question of whether defendant was guilty of charge placed against him.—City of St. Louis v. Cain, Mo App., 137 S.W.2d 603.

Evidence held sufficient

(1) To authorize or support conviction generally.

Ala.—Hill v. State, 169 So. 21, 27 Ala. App. 202—Monroe v. State, 126 So. 614, 23 Ala. App. 441.

Cal.—People v. Peet, 288 P. 44, 108 Cal. App., Supp., 775.

Ga.—Newmans v. State, 16 S.E. 2d 87, 65 Ga. App. 288—Williams v. City of Valdosta, 171 S.E. 869, 48 Ga. App. 90.

Ill.—People v. Allegretti, 5 N.E. 2d 618, 287 Ill. App. 631.

Mo.—City of St. Louis v. Diehman, App., 135 S.W. 2d 6—City of Cape

Girardeau v. Bennett, App., 27 S. W. 2d 117.

N.Y.—People v. Kosik, 258 N.Y.S. 70, 144 Misc. 403—People v. McKeon, 236 N.Y.S. 591, 134 Misc. 697—People v. Lifshin, 21 N.Y.S. 2d 539.

N.C.—State v. Steelman, 46 S.E. 2d 815, 228 N.C. 634.

N.D.—State v. Boehm, 279 N.W. 824, 68 N.D. 340, 116 A.L.R. 547—State v. Lyon, 230 N.W. 1, 59 N.D. 374.

Ohio—City of Cincinnati v. Cipriani, App., 36 NE 2d 296—Kuhn v. State, 174 NE 606, 37 Ohio App. 217.

Pa.—Commonwealth v. Stiver, 32 Pa. Dist. & Co. 319.

S.D.—State v. Blake, 255 N.W. 108, 62 S.D. 538.

Tenn.—Scales v. State, 181 S.W. 2d 621, 181 Tenn. 440—Usary v. State, 112 S.W. 2d 7, 172 Tenn. 305, 114 A.L.R. 1401.

Tex.—Ehbs v. State, 279 S.W. 829, 103 Tex. Cr. 49.

Va.—Maugh's v. City of Charlottesville, 23 S.E. 2d 787, 181 Va. 117.

42 C.J. p 1327 note 79 [d] (1).

(2) To establish a prima facie case.—City of St. Louis v. Judd, Mo. App., 193 S.W. 2d 917.

(3) To raise an inference that the street upon which the automobile was operated was a "way" within the meaning of the statute.—Commonwealth v. Mara, 153 NE 793, 257 Mass. 198—Commonwealth v. Leone, 146 NE. 26, 250 Mass. 512.

(4) To show that operator of vehicle with which accused's vehicle collided had right of way.—People v. Kosik, 258 N.Y.S. 70, 144 Misc. 403.

Evidence held insufficient

(1) To authorize or support conviction generally.

Ala.—Robison v. State, 200 So. 626, 30 Ala. App. 12, certiorari denied 200 So. 629, 240 Ala. 638.

Cal.—People v. Thompson, 108 P. 2d 105, 41 Cal. App. 2d Supp. 965.

Ill.—People v. Lockfefer, 26 N.E. 2d 892, 304 Ill. App. 586—People v. Trekalotis, 8 N.E. 2d 388, 290 Ill. App. 605.

Iowa—State v. Jacobsmeier, 294 N. W. 920, 229 Iowa 878.

Miss.—Sanford v. State, 16 So. 2d 628, 195 Miss. 896.

Mo.—City of St. Louis v. Cain, App., 137 S.W. 2d 603.

Mont.—State v. Biering, 107 P. 2d 876, 111 Mont. 237.

N.Y.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—People v. Sandner, 292 N.Y.S. 545, 162 Misc. 41—People v. Whitby, 44 N.Y.S. 2d 76—People v. Quintano, 25 N.Y.S. 2d 269.

Ohio—State v. Barmann, App., 58 NE 2d 691—Busch v. City of Cincinnati, 30 Ohio N.P., N.S., 183.

Okl.—Simpson v. City of Tulsa, 93 P. 2d 539, 67 Okl. Cr. 224.

Pa.—Commonwealth v. Frisch, 41 Pa. Dist. & Co. 266, 57 Montg. Co. 158—Commonwealth v. Hughes, 22 Pa. Dist. & Co. 377.

S.D.—State v. Beshara, 274 N.W. 836, 65 S.D. 415.

Tex.—Williams v. State, 279 S.W. 466, 102 Tex. Cr. 618.

(2) To show that allegedly reckless driving caused accident.—State v. Biering, 107 P. 2d 876, 111 Mont. 237.

29. S.D.—State v. Beshara, 274 N.W. 836, 65 S.D. 415.

30. N.Y.—People v. Whitby, 44 N.Y.S. 2d 76.

31. N.Y.—People v. Sandner, 292 N.Y.S. 545, 162 Misc. 41—People v. Whitby, 44 N.Y.S. 2d 76—People v. Davis, 9 N.Y.S. 2d 620.

32. Cal.—People v. Thompson, 108 P. 2d 105, 41 Cal. App. 2d Supp. 965—People v. McNutt, 105 P. 2d 657, 40 Cal. App. 2d Supp. 835.

Miss.—Sanford v. State, 16 So. 2d 628, 195 Miss. 896.

N.Y.—People v. Grogan, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—People v. Whitby, 44 N.Y.S. 2d 76.

Pa.—Commonwealth v. Michaels, 43 Pa. Dist. & Co. 221—Commonwealth v. Howe, Co., 89 Pittsb. Leg. J. 621. Whether negligence sufficient or necessary to constitute offense generally see supra § 612.

the evidence must establish beyond a reasonable doubt that accused failed to exercise the care of a reasonably prudent man and thus unreasonably endangered users of the highway.³³

Under some statutes or ordinances, mere proof that accused did not drive as a reasonably prudent and cautious man is not necessarily sufficient to authorize a conviction,³⁴ and mere evidence that an accident or collision occurred is not sufficient.³⁵ In order to authorize a conviction under a statute providing that a person shall be guilty of reckless driving if he drives upon a highway in a manner to indicate either a willful or a wanton disregard for the safety of persons or property, there must be such evidentiary relation between the manner of driving and the described state of mind, that is to say, willful or wanton disregard for the safety of persons or property, as to permit the inference by the judge or jury of such state of mind from the manner of driving;³⁶ under such statute, evidence which indicates to the judge or jury beyond a reasonable doubt that there was a willful or wanton disregard for the safety of persons or property is sufficient to show guilt.³⁷

Proof of speed so excessive as to constitute proof of the essential elements of the offense of reckless driving may be sufficient to support a conviction.³⁸ However, where a statute, which declares that every person operating a motor vehicle shall drive it in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person, pro-

vides that the driving in excess of a specified speed shall be presumptive evidence of driving which is not careful and prudent, mere evidence of speed in excess of the prescribed speed is not sufficient to authorize or sustain a conviction, but there should be evidence of other facts and circumstances showing that this rate of speed was reckless and that the person or property of others were being endangered.³⁹

The offense of reckless driving and the offense of driving while under the influence of intoxicating liquors are established by different evidence.⁴⁰ While evidence of intoxication may bear on the question whether accused is guilty of reckless driving,⁴¹ it does not necessarily prove such driving.⁴²

§ 620. — Questions of Law and Fact

In a prosecution for reckless or dangerous driving questions of fact and the guilt or innocence of accused are determinable by the jury or other trier of the facts where the evidence is sufficient to raise issues of fact.

In a prosecution for reckless or dangerous driving in which the evidence is conflicting or is such as to authorize varying inferences and is generally sufficient to authorize the consideration of matters involved as questions of fact, it is the province of the jury or other trier of the facts to determine all questions of fact and the guilt or innocence of accused.⁴³ Accordingly, where there is sufficient evidence to sustain a verdict of guilty, it is not error for the court to refuse to direct a verdict for accused,⁴⁴ or to refuse to grant ac-

33. N.Y.—*People v. Sandner*, 292 N. Y.S. 515, 162 Misc. 41.

34. Tenn.—*Barkley v. State*, 54 S.W. 2d 941, 165 Tenn. 309.

35. Hawaii—*Territory v. McGregor*, 22 Hawaii 786.

Mo.—*City of St. Louis v. Judd*, App., 193 S.W.2d 917.

N.Y.—*People v. Grogan*, 183 N.E. 273, 260 N.Y. 138, 86 A.L.R. 1266—*People v. Sandner*, 292 N.Y.S. 545, 162 Misc. 41—*People v. Whitby*, 44 N.Y.S.2d 76—*People v. Quintano*, 25 N.Y.S.2d 269—*People v. Davis*, 9 N.Y.S.2d 620.

S.D.—*State v. Beshara*, 274 N.W. 836, 65 S.D. 445.

36. Cal.—*People v. Smith*, 92 P.2d 1039, 36 Cal.App.2d Supp. 748.

37. Cal.—*People v. Steel*, 92 P.2d 815, 35 Cal.App.2d Supp. 748.

38. Cal.—*People v. Nowell*, 114 P.2d 81, 45 Cal.App.2d Supp. 811.

39. N.Y.—*People v. Carrie*, 204 N.Y.S. 759, 122 Misc. 753—*People v.*

Mellen, 172 N.Y.S. 165, 104 Misc. 355.

12 C.J. p. 1327 note 81.

40. N.M.—*State v. Sisneros*, 82 P.2d 274, 42 N.M. 500.

41. N.M.—*State v. Sisneros*, supra.

42. N.M.—*State v. Sisneros*, supra.

43. Ala.—*Browning v. State*, 13 So. 2d 54, 31 Ala. App. 137—*Hill v. State*, 169 So. 21, 27 Ala. App. 202. N.C.—*State v. Newton*, 177 S.E. 184, 207 N.C. 323.

Tenn.—*Usary v. State*, 112 S.W.2d 7, 172 Tenn. 305, 114 A.L.R. 1101.

Va.—*Maughs v. City of Charlottesville*, 23 S.E.2d 787, 181 Va. 117.

Wash.—*State v. Birch*, 49 P.2d 921, 183 Wash. 670.

42 C.J. p. 1327 note 88.

All the surrounding circumstances are for the consideration of the jury in determining the guilt or innocence of accused and whether he violated the statute involved—*Commonwealth v. Gurney*, 158 N.E. 832, 261 Mass. 309.

Evidence held sufficient to authorize submission of case or question to jury

Iowa—*State v. Hill*, 32 N.W.2d 398.

Mo.—*City of St. Louis v. Diechman*, App., 135 S.W.2d 6.

N.C.—*State v. Steelman*, 46 S.E.2d 845, 228 N.C. 634—*State v. Holbrook*, 46 S.E.2d 843, 228 N.C. 620—

State v. Finchem, 44 S.E.2d 724, 228 N.C. 149—*State v. Cody*, 31 S.E. 2d 445, 224 N.C. 470—*State v. Wilson*, 12 S.E.2d 654, 218 N.C. 769—

State v. Murchison, 184 S.E. 495, 209 N.C. 849—*State v. Newton*, 177 S.E. 184, 207 N.C. 323—*State v.*

Mickle, 140 S.E. 150, 194 N.C. 808.

Wash.—*State v. Birch*, 49 P.2d 921, 183 Wash. 670.

Evidence held insufficient to authorize submission of case to jury

N.C.—*State v. Ogle*, 31 S.E.2d 444, 224 N.C. 468.

44. Iowa.—*State v. Hill*, 32 N.W.2d 398.

Tex.—*Ebbs v. State*, 279 S.W. 829, 103 Tex.Cr. 49.

42 C.J. p. 1328 note 89.

cused's motion for a nonsuit.⁴⁵ By a demurrer to the evidence, accused admits all the material facts shown by the evidence introduced by the prosecution,⁴⁶ and in determining such demurrer it is necessary to interpret such evidence in the light most favorable to the prosecution.⁴⁷

§ 621. — Instructions

In a prosecution for reckless or dangerous driving, the court should submit the case to the jury with full and accurate instructions applicable to the issues.

In accordance with the rules applicable to instructions in criminal prosecutions generally, as discussed in Criminal Law §§ 1189-1323, the court, in a prosecution for reckless or dangerous driving, should submit the case to the jury with full and accurate instructions applicable to the issues,⁴⁸ and, since the case is for the jury on the whole evidence, the court is under no obligations to select a part of the evidence for instruction.⁴⁹ In determining whether particular instructions are misleading, the instructions must be judged as a whole and not by a particular extract.⁵⁰ In stating a distinction between reckless operation of a vehicle and so operating it that the lives and safety of the public might be endangered, the court may properly use illustrations which are to be considered by the jury only as illustrations.⁵¹ However, the court is not obliged, the charge being otherwise complete, to give additional illustrations showing circumstances under which accused is entitled to acquittal.⁵²

Requested instructions. It is proper to refuse

requested instructions which are not in proper form,⁵³ or which incorrectly state the law,⁵⁴ or which are inapplicable to the issues in the case,⁵⁵ or applicable only to parts of the evidence,⁵⁶ or which are misleading.⁵⁷ Generally, however, requested instructions which correctly state the law should be given,⁵⁸ but it is not error to refuse a request for a proper instruction when the question of law presented by the requested instruction is covered by other instructions given by the court to the jury.⁵⁹

§ 622. — Verdict and Findings

Conviction of an offense not stated in the charge is not permissible. Generally, it is proper to render a separate verdict on each of several counts of a charge which set forth distinct offenses.

Accused cannot be convicted of an offense not stated in the charge.⁶⁰ Where in a prosecution for reckless driving the indictment contains several counts, each charging distinct offenses under the statute, each count is in fact and theory a separate indictment and it is proper for the jury to give a separate verdict on each count.⁶¹

§ 623. — Judgment, Sentence, and Punishment

The punishment or penalty to be imposed for reckless or dangerous driving depends largely on statutory provisions.

The punishment or penalty to be imposed for reckless or dangerous driving is dependent on the provisions of the statutes or ordinances.⁶² A punishment or penalty imposed which is excessive or unauthorized cannot be enforced.⁶³ However, the

45. N.C.—State v. Holbrook, 46 S.E. 2d 843, 228 N.C. 620—State v. Flinchum, 44 S.E.2d 724, 228 N.C. 149—State v. Murchison, 184 S.E. 495, 209 N.C. 849—State v. Newton, 177 S.E. 184, 207 N.C. 323—State v. Mickie, 140 S.E. 150, 194 N.C. 808.

46. Mo.—City of St. Louis v. Judd, App., 193 S.W.2d 917.

47. Mo.—City of St. Louis v. Judd, supra.

48. Conn.—State v. Kolbarsh, 199 A. 558, 124 Conn. 265.

N.D.—State v. Sullivan, 227 N.W. 230, 58 N.D. 732.

42 C.J. p 1328 note 91.

Instructions held proper or not erroneous

Conn.—State v. Kolbarsh, 199 A. 558, 124 Conn. 265.

42 C.J. p 1328 note 91 [a].

Instruction held erroneous

N.C.—State v. Folger, 191 S.E. 747, 211 N.C. 695.

49. Mass.—Commonwealth v. Mara, 153 N.E. 793, 257 Mass. 198.

50. S.C.—State v. Davis, 70 S.E. 811, 88 S.C. 229, 34 L.R.A., N.S., 295.

42 C.J. p 1328 note 93.

51. Mass.—Commonwealth v. Mara, 153 N.E. 793, 257 Mass. 198.

52. Mass.—Commonwealth v. Mara, supra.

53. Hawaii.—Territory v. McGregor, 22 Hawaii 786.

54. Mass.—Commonwealth v. Gurney, 158 N.E. 832, 261 Mass. 309.

Tex.—Ebbs v. State, 279 S.W. 829, 103 Tex.Cr. 49.

42 C.J. p 1328 note 97, p 1322 note 78 [a].

55. Mass.—Commonwealth v. Gurney, 158 N.E. 832, 261 Mass. 309.

42 C.J. p 1328 note 98.

56. Mass.—Commonwealth v. Mara, 153 N.E. 793, 257 Mass. 198.

42 C.J. p 1328 note 99.

57. Mass.—Commonwealth v. Vartanian, 146 N.E. 682, 251 Mass. 355.

42 C.J. p 1328 note 1.

58. Ala.—Browning v. State, 13 So. 2d 54, 31 Ala.App. 137.

Conn.—State v. Kolbarsh, 199 A. 558, 124 Conn. 265.

Hawaii.—Territory v. McGregor, 22 Hawaii 786.

59. Conn.—State v. Kolbarsh, 199 A. 558, 124 Conn. 265.

Hawaii.—Territory v. McGregor, 22 Hawaii 786.

Mass.—Commonwealth v. Mara, 153 N.E. 793, 257 Mass. 198.

Tex.—Ebbs v. State, 279 S.W. 829, 103 Tex.Cr. 49.

60. N.Y.—People v. Carrie, 204 N.Y. S. 759, 122 Misc. 753.

61. N.C.—State v. Mills, 106 S.E. 677, 181 N.C. 530.

62. Mo.—State v. Ball, App., 171 S.W.2d 787.

N.C.—State v. Cody, 31 S.E.2d 445, 224 N.C. 470.

42 C.J. p 1329 note 6.

63. N.C.—State v. Cody, supra. 42 C.J. p 1329 note 7.

Period of confinement excessive

N.C.—State v. Cody, supra—State v. Crews, 200 S.E. 378, 214 N.C. 705.

fact that a statute provides for the revocation of the operator's license of one guilty of reckless driving does not restrict the penalty which may be imposed to such revocation, where the right to impose other penalties is indicated and may be clearly inferred from a consideration of the statute as a whole.⁶⁴ In the case of a conviction for reckless driving under some municipal ordinances, the court may suspend the driving rights of accused for a limited period in addition to imposing other penalties.⁶⁵

Where a defendant is convicted on several counts in one indictment, each charging a separate offense, the sentence on each count may properly be made to begin at the expiration of a preceding one.⁶⁶ In imposing punishment in a case of clear and uncontroverted guilt, the court may take into consideration, as an extenuating circumstance, the fact that all damages for injuries resulting from the occurrence involved have been paid.⁶⁷

§ 624. — Appeal and Error

In general, in the absence of prejudicial error, a conviction on sufficient evidence will be affirmed.

In general, an appellate court will review a conviction for reckless or dangerous driving which is sustained by evidence, only to ascertain whether defendant had a fair and impartial trial or whether there were prejudicial errors or mistakes requiring a new trial in the interest of justice,⁶⁸ and, in the absence of prejudicial errors, a conviction on

sufficient evidence will be affirmed.⁶⁹ Where, however, accused has been charged, tried, and convicted under a statute which had been superseded and repealed by a later statute, the judgment of conviction will be reversed.⁷⁰ A conviction will be set aside on certiorari where the record returned by the trial magistrate does not disclose that he had jurisdiction to try the case.⁷¹

A plea of guilty does not constitute a waiver of the right to raise on appeal the objection that the information is not sufficient to charge a crime.⁷² Similarly, where an information fails to charge an offense, accused, by proceeding with the case, after the denial of his motion to dismiss, does not waive the right to maintain his objection to the sufficiency of the information on appeal.⁷³

§ 625. Driving While under Influence of Intoxicants or Drugs

- a. In general
- b. Nature and grade of offense
- c. Elements of offense

a. In General

Where a statute or ordinance so provides, it is an offense to drive a motor vehicle while intoxicated or while under the influence of intoxicating liquor or narcotic drugs.

Under many statutes and ordinances it is an offense for one to operate or drive a motor vehicle while intoxicated, or under the influence of intoxicating liquor,⁷⁴ or when addicted to, or un-

Punishment held not excessive

Ill.—People v. Boryszewski, 47 N.E. 2d 343, 317 Ill.App. 656.

N.C.—State v. Wilson, 12 S.E.2d 654, 218 N.C. 769—State v. Mickle, 140 S.E. 150, 194 N.C. 808.

64. Cal.—In re Von Perhacs, 212 P. 689, 190 Cal. 364.

65. Ohio.—City of Cincinnati v. Sandow, 179 N.E. 151, 40 Ohio App. 319, error dismissed Sandow v. City of Cincinnati, 181 N.E. 880, 124 Ohio St. 656.

66. N.C.—State v. Mills, 106 S.E. 677, 181 N.C. 530.

67. Ohio.—State v. Barmann, App., 58 N.E.2d 691.

68. N.Y.—People v. Ruetiman, 148 N.Y.S. 612, 85 Misc. 233, affirmed 155 N.Y.S. 1133, 171 App.Div. 912, 42 C.J. p 1329 note 11.

69. Hawaii.—Territory v. McGregor, 22 Hawaii 786, 42 C.J. p 1329 note 12.

Fine not excessive

A fine of one hundred dollars and costs for reckless driving of automobile in violation of city ordinance, imposed by corporation court of city

on appeal from police justice, would not be set aside as excessive although greatly in excess of fine of ten dollars imposed by police justice, where fine was within limits prescribed in ordinance—Maugh's v. City of Charlottesville, 23 S.E.2d 787, 181 Va. 117.

70. Ala.—Anthony v. State, 186 So. 185, 28 Ala.App. 415

71. Pa.—Commonwealth v. Weltner, 58 Pa.Dist. & Co. 426—Commonwealth v. Hall, 34 Pa.Dist. & Co. 278.

72. N.Y.—People v. Fuchs, 129 N.Y. S. 1012, 71 Misc. 69.

73. N.Y.—People v. Payne, 129 N.Y. S. 1007, 71 Misc. 72.

74. Ind.—Derry v. State, 182 N.E. 701, 204 Ind. 21.

Ky.—Commonwealth v. Black, 20 S. W.2d 741, 230 Ky. 677.

Miss.—Williams v. State, 137 So. 106, 161 Miss. 406.

N.M.—State v. Tinsley, 283 P. 907, 34 N.M. 458.

Utah.—State v. Johnson, 287 P. 909, 76 Utah 84.

42 C.J. p 1329 note 13.

Driving while intoxicated as negligence see supra § 265.

Reason and purpose of statutes

(1) Protection of the safety of the general public.—Cordell v. State, 198 S.E. 572, 58 Ga.App. 388.

(2) To prevent accidents and preserve persons from injury on highways.

Ark.—Benson v. State, 208 S.W.2d 767, 212 Ark. 905.

Mich.—People v. Townsend, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902. S.C.—State v. Long, 195 S.E. 624, 186 S.C. 439.

Tex.—Blackburn v. State, Cr., 204 S. W.2d 619—Johnson v. State, 147 S. W.2d 811, 141 Tex.Cr. 175.

(3) To penalize anyone guilty of prohibited act, regardless of how slight influence of intoxicating liquor may be.—Weston v. State, 65 P.2d 652, 49 Ariz. 183.

(4) Other reasons and purposes see 42 C.J. p 1329 note 13 [b].

Reckless driving distinguished

(1) Driving recklessly, driving so as to endanger life, limb, or property, and driving under influence of

der the influence of, narcotic drugs.⁷⁵

The validity of these statutes and ordinances has frequently been sustained⁷⁶ and the power of the state or municipality to prohibit such operation and to make violation of the prohibition an offense

has been sustained under the police power.⁷⁷ However, unless authorized so to do by charter or statute,⁷⁸ a municipality has no power to enact an ordinance creating such an offense where the matter is covered by state statute,⁷⁹ nor, unless it is so empowered,⁸⁰ can it prescribe a punishment

liquor are not identical offenses.—*State v. Andrews*, 142 A. 840, 108 Conn. 209.

(2) Reckless driving is a distinct offense, established by different evidence, from the crime of driving an automobile while under the influence of intoxicating liquor.—*State v. Sisneros*, 82 P.2d 274, 42 N.M. 500.

Amendment of statute

(1) Statute penalizing driving under influence of liquor was held to amend by implication act relating to drunken driving.—*Daniels v. State*, 296 S.W. 20, 155 Tenn. 549.

(2) Statute defining offense of driving an automobile while intoxicated was held "amended" and not "repealed" by later act defining the offense but prescribing a different punishment, offenses committed prior to the amendment being governed by the earlier statute.—*Bedwell v. State*, 155 S.W.2d 930, 142 Tex.Cr. 599—*Davis v. State*, 155 S.W.2d 801, 142 Tex.Cr. 602—*Jones v. State*, 104 S.W.2d 871, 132 Tex.Cr. 445.

Repeals of Eighteenth Amendment and state prohibition act were held not to require adoption of more liberal view of crime of driving automobile while intoxicated, statute defining such crime not being changed by such repeals.—*People v. Fellows*, 34 P.2d 177, 139 Cal.App. 337.

75. Ariz.—*Weston v. State*, 65 P.2d 652, 149 Ariz. 183.
Cal.—*People v. Berner*, 82 P.2d 617, 28 Cal.App.2d 392.
Ind.—*Derry v. State*, 182 N.E. 701, 204 Ind. 21.
N.M.—*State v. Tinsley*, 283 P. 907, 34 N.M. 458.

76. Ariz.—*Weston v. State*, 65 P.2d 652, 149 Ariz. 183.
Cal.—*People v. Berner*, 82 P.2d 617, 28 Cal.App.2d 392.
Ind.—*Basson v. State*, 187 N.E. 344, 205 Ind. 532—*Derry v. State*, 182 N.E. 701, 204 Ind. 21.
La.—*State v. Pierce*, 121 So. 870, 168 La. 291—*State v. Dudley*, 106 So. 364, 159 La. 872.
Minn.—*State v. Carroll*, 31 N.W.2d 44, 225 Minn. 384—*State v. Graham*, 222 N.W. 909, 176 Minn. 164.
N.M.—*State v. Tinsley*, 283 P. 907, 34 N.M. 458.
Or.—*State v. Boag*, 59 P.2d 396, 154 Or. 354.
Tex.—*Herring v. State*, 35 S.W.2d 731, 117 Tex.Cr. 211.
42 C.J. p 639 note 34 [a], [b].

Causing injury to another

Statute making it a felony to drive vehicle while under influence of intoxicating liquor so that his act or neglect proximately causes bodily injury to another, even though same act by sober operator would constitute a misdemeanor only, has been held constitutional.—*People v. Chat-ham*, 110 P.2d 704, 43 Cal.App.2d 298

"To any degree"

Phrase "to any degree under influence of intoxicating liquor" in statute was held not to invalidate statute.—*Nunn v. State*, 26 S.W.2d 618, 114 Tex.Cr. 487—*Williams v. State*, 271 S.W. 628, 100 Tex.Cr. 50

Punishment as affecting validity

Statute providing that intoxicated operator of motor vehicle causing physical injuries to another "may" be imprisoned with or without hard labor was held not unconstitutional as not compelling but merely permitting imposition of penalty, statute meaning that offender shall be imprisoned and that imprisonment may be either with or without hard labor, in judge's discretion.—*State v. Hill*, 177 So. 421, 188 La. 444.

Change in punishment

Statute penalizing driving automobile while intoxicated and amendment thereto providing that on conviction accused should be prohibited from driving automobile for period fixed by jury was held not violative of penal code that no penalty affixed to offense by one law should be cumulative of penalties under former law.—*Haworth v. State*, 88 S.W.2d 115, 129 Tex.Cr. 428.

Voluntary intoxication

The statute creating offense of operating motor vehicle while intoxicated is constitutional as contemplating only voluntary intoxication resulting from imbibing alcoholic liquors.—*People ex rel. Seagrist v. Mederer*, 33 N.Y.S.2d 114.

77. Ariz.—*Weston v. State*, 65 P.2d 652, 149 Ariz. 183.
Cal.—*People v. Berner*, 82 P.2d 617, 28 Cal.App.2d 392.
Ill.—*People v. Stacker*, 153 N.E. 354, 322 Ill. 232.
Or.—*State v. Boag*, 59 P.2d 396, 154 Or. 354.
Tenn.—*Bostwick v. State*, 285 S.W. 49, 154 Tenn. 1.
Utah.—*Salt Lake City v. Kusse*, 93 P.2d 671, 97 Utah 113.
Va.—*Shaw v. City of Norfolk*, 189 S.E. 335, 167 Va. 346.
42 C.J. p 639 note 34.

Reason for rule

An automobile is a "dangerous instrumentality" and in the hands of a drunken man is likely to become a "deadly weapon"—*People v. Chat-ham*, 110 P.2d 704, 43 Cal.App.2d 298.

After conviction

The legislature, under its police power, may also make it a penal offense to drive a motor vehicle within a prescribed period after a conviction for driving while intoxicated.—*State v. Campbell*, 107 So. 788, 21 Ala.App. 303.

78. Ill.—*Village of Winnetka v. Sinnett*, 272 Ill.App. 143.
Minn.—*State v. Hughes*, 233 N.W. 874, 182 Minn. 141.
Neb.—*State v. Hauser*, 288 N.W. 518, 137 Neb. 138—*Gumbler v. City of Seward*, 285 N.W. 542, 136 Neb. 196, modified on other grounds 288 N.W. 545, 136 Neb. 916.
Utah.—*Salt Lake City v. Kusse*, 93 P.2d 671, 97 Utah 113.
Va.—*Shaw v. City of Norfolk*, 189 S.E. 335, 167 Va. 346.
Power derived from general statutes
Utah.—*Salt Lake City v. Kusse*, 93 P.2d 671, 97 Utah 113.

79. Ariz.—*Clayton v. State*, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in *Price v. State*, 3 P.2d 1114, 39 Ariz. 59.
ND.—*City of Fargo v. Glaser*, 244 N.W. 905, 62 N.D. 673.

Reason for rule

Driving automobile while under influence of intoxicating liquor is matter of state-wide importance and not mere regulation of motor traffic within jurisdiction of municipality.—*City of Fargo v. Glaser*, supra.

As affected by punishment

Ordinance providing for imprisonment other than as an alternative to nonpayment of a fine was held invalid as constituting punishment for a crime, a matter beyond the power of a municipality.—*City of Racine v. Woitschek*, 29 N.W.2d 752, 251 Wis. 404—*State ex rel. Keefe v. Schmlege*, 28 N.W.2d 345, 251 Wis. 79.

80. Minn.—*State v. Weeks*, 12 N.W.2d 493, 216 Minn. 279—*State v. Hughes*, 233 N.W. 874, 182 Minn. 144.
Ohio.—*Kistler v. City of Warren*, 16 N.E.2d 948, 58 Ohio App. 531.

Lesser penalty

Ill.—*Village of Winnetka v. Sinnett*, 272 Ill.App. 143.

therefor different from that prescribed by statute for the same offense;⁸¹ but it has been held that the state may declare such act to be a felony, even though it is committed upon the streets of a municipality, which has charter powers, and which has declared such act to be a misdemeanor.⁸²

While, as discussed *infra* § 633, a provision in such a regulation that having intoxicating liquor on or about the person of the driver or in his vehicle is *prima facie* evidence of a violation of the statute creates an arbitrary and unreasonable presumption and is invalid, this invalidity does not affect the validity of the remainder of the statute.⁸³

Permitting operation by intoxicated person. Under some statutes it is an offense for any person to permit another who is under the influence of intoxicating liquor to operate a motor vehicle which is owned by the former or is in his custody or control.⁸⁴

Repeal of statute or ordinance. A statute with respect to the offense of driving in an intoxicated condition is not repealed by the enactment of a subsequent statute on the same subject unless there is an irreconcilable conflict between the two.⁸⁵ Accordingly, such a statute has been held not to be repealed by a subsequent statute authorizing municipalities to regulate automobile operation and parking within their corporate limits⁸⁶ or by a

statute authorizing municipalities to prohibit drunken driving on the city streets.⁸⁷ Similarly, a statute prohibiting driving while in an intoxicated condition or under the influence of intoxicating liquor is not repealed by a subsequent statute prohibiting driving while intoxicated on highways outside incorporated municipalities⁸⁸ or by a statute providing punishment for appearing in a public place while intoxicated.⁸⁹ Of course, where an ordinance of the kind under consideration is annulled by statute, a conviction thereunder is invalid,⁹⁰ but the repeal of a statute which is substantially re-enacted at the same time, except for a change in the penalty, has been held not to constitute a repeal in effect, so as to bar prosecution for the offense committed before such repeal.⁹¹

Construction. Although it has been held that a statute denouncing the offense of driving while under the influence of intoxicants is a penal statute and must be strictly construed,⁹² it has also been held that such a statute, since it is designed to protect the public, should be liberally or reasonably construed⁹³ in order to effect its purpose⁹⁴ and to reduce the hazard of prohibited operation of a motor vehicle to a minimum.⁹⁵ Such a regulation is not retroactive, so as to warrant the conviction of a person for driving while intoxicated before the regulation went into effect.⁹⁶

Va.—*Shaw v. City of Norfolk*, 189 S. E. 335, 167 Va. 346.

Absence of option between fine and imprisonment

Ordinance providing for a maximum penalty imprisonment for the same period of time as the maximum imprisonment provided by state law for such offense was not invalid as providing for a greater penalty than that of the state law, even though ordinance did not give court option of imposing a jail sentence or a fine as did state law.—*State v. Weeks*, 12 N.W.2d 493, 216 Minn. 279

81. W.Va.—*State v. Robinson*, 123 S. E. 575, 96 W.Va. 556.

82. Cal.—*Helmer v. Sacramento County Super. Ct.*, 191 P. 1001, 48 Cal. App. 140.
42 C.J. p. 639 note 35.

83. Okl.—*Simpkins v. State*, 249 P. 168, 35 Okl. Cr. 143.

84. Pa.—*Commonwealth v. Pollinger*, 45 Pa. Dist. & Co. 689, 58 Montg. Co. 386.

Specific statute

Where act or conduct charged against defendant is prohibited specifically by vehicle code, prosecution must be brought under section containing such specific prohibition, and

not under the general provisions—*Commonwealth v. Pollinger*, *supra*.

Joint prosecution

Where the offenses of operating a motor vehicle under influence of intoxicating liquor and permitting another to operate a motor vehicle while under the influence of intoxicating liquor are committed at one and the same time, and grow out of one and the same transaction, one return, one complaint, one warrant, and one hearing are sufficient to promote the due administration of justice.—*Commonwealth v. Hasko*, 46 Pa. Dist. & Co. 359, 59 Montg. Co. 1, 56 York Leg. Rec. 194.

85. Mont.—*State v. Schnell*, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 1082

Limited repeal

Penal code punishing as misdemeanor offense of driving motor vehicle while intoxicated was held no longer in force, in view of subsequent motor vehicle acts, except with respect to offenses not covered by such acts, such as driving of a motor vehicle on private grounds by one who is intoxicated.—*People v. Lewis*, 37 P.2d 752, 4 Cal. App. 2d Supp. 775.

86. N.M.—*State v. Tinsley*, 283 P. 907, 34 N.M. 458.

87. N.D.—*State v. Colohan*, 286 N. W. 888, 69 N.D. 316.

88. Mont.—*State v. Schnell*, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 1082.

89. W.Va.—*Richardson v. Charnock*, 150 S.E. 530, 108 W.Va. 168.

90. Minn.—*State v. Mandehr*, 209 N. W. 750, 168 Minn. 139

91. Pa.—*Commonwealth v. Beattie*, 93 Pa. Super. 404—*Commonwealth v. McNamara*, 93 Pa. Super. 267.

92. N.Y.—*People v. Rue*, 2 N.Y.S.2d 939, 166 Misc. 845.

93. N.Y.—*People v. Strauss*, 22 N.Y. S.2d 880, 260 App. Div. 880—*People v. Rue*, 2 N.Y.S.2d 939, 166 Misc. 845.

Tex.—*Blackburn v. State*, Cr., 204 S.W.2d 619.

94. Okl.—*Luellen v. State*, 81 P.2d 323, 64 Okl. Cr. 382.

Every reasonable intentment should be given in aid of strict observance of statute penalizing driving of automobiles while under influence of intoxicating liquor.—*Thomason v. State*, 72 S.W.2d 598, 126 Tex. Cr. 554.

95. Me.—*State v. Roberts*, 29 A.2d 457, 139 Me. 273.

96. Mo.—*State v. Criddle*, 259 S.W. 429, 302 Mo. 634.

Persons liable. Any person who comes within the terms of the statute denouncing the offense is subject to prosecution thereunder.⁹⁷ The fact that a person is an employee of another does not excuse a violation of the statute.⁹⁸ Where aiders or abettors are indictable as principals, one who does not drive, but who aids and abets an intoxicated driver, may be charged with the offense.⁹⁹

Defenses. The fact that the driver of the vehicle with which accused's vehicle collided might also have been guilty does not exonerate accused of the offense of driving while intoxicated.¹

b. Nature and Grade of Offense

The grade of the offense of driving while under the influence of intoxicants depends on the terms of the statute or ordinance denouncing the offense.

The offense of drunken driving has been held to be not only *malum prohibitum* but also *malum in se*.² Under some statutes the driving of a motor vehicle while intoxicated is in the nature of a minor³ or petty⁴ offense, such as disorderly con-

duct,⁵ and in some jurisdictions this is true because it is created by municipal ordinance and is in the nature of a police regulation.⁶ In some jurisdictions, however, the offense constitutes a felony, either because of an express declaration in the statute to this effect⁷ or because of the nature of the penalty authorized.⁸ Thus, where the statute permits a punishment of one year's imprisonment, which must under the general penal law be in the state prison, the offense is a statutory felony⁹ and as such constitutes an infamous crime.¹⁰ The offense is also a felony where the statute provides for imprisonment in a penitentiary, although it carries the alternative of imprisonment in a county jail.¹¹ Under some statutes the offense of driving while intoxicated or under the influence of intoxicating liquor is a misdemeanor,¹² or the offense may be a misdemeanor or a felony, depending on the circumstances of the particular case.¹³ Accordingly, where the statute so provides, it is a felony to inflict property damage or bodily injury on another while driving in an intoxicated condition¹⁴ if the bodily injury is proximately caused

97. Wash.—State v. Crothers, 203 P. 74, 118 Wash. 226.

"Employees"

Statute providing that a "person who, being employed upon a railway," or being a driver on any public highway, shall be intoxicated "while in the discharge of any such duties" shall be guilty of a gross misdemeanor applies to any person driving on a public highway while intoxicated, even though he is not driving as an employee, notwithstanding headnote to the section reading "Intoxication of Employees," since the word "employed" is used in the sense of being engaged in the enterprise referred to and not in the sense of employment by another for wages.—State v. Crothers, supra.

98. U.S.—Lanham v. Cline, D.C. Idaho, 44 F.Supp. 897.

Scope of authority

An agent cannot escape liability on the ground that he was acting within the scope of his authority.—Lanham v. Cline, supra.

99. Iowa.—State v. Storms, 10 N.W. 2d 53, 233 Iowa 655—State v. Myers, 223 N.W. 166, 207 Iowa 555. Kan.—State v. Cook, 87 P.2d 648, 149 Kan. 481. N.C.—State v. Gibbs, 44 S.E.2d 201, 227 N.C. 677.

Owner permitting offense

Automobile owner who placed his automobile in the hands of an intoxicated driver, sat by the side of the driver, and without protest permitted him to operate the automobile

on the public highway was guilty of the offense—State v. Gibbs, supra.

1. Ala.—Holley v. State, 144 So 535, 25 Ala App 260, certiorari denied 144 So. 537, 225 Ala. 597.

2. Mich.—People v. Townsend, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

S.C.—State v. Long, 195 S.E. 624, 186 S.C. 439.

Tenn.—McGoldrick v. State, 21 S.W. 2d 390, 159 Tenn. 667—King v. State, 11 S.W.2d 904, 157 Tenn. 635.

3. N.J.—Latimer v. Wilson, 134 A. 750, 103 N.J.Law 159—State v. Rodgers, 102 A. 433, 91 N.J.Law 212.

Held not indictable offense

N.J.—Latimer v. Wilson, 134 A. 750, 103 N.J.Law 159.

4. Neb.—State v. Hauser, 288 N.W. 518, 137 Neb. 138.

5. N.J.—State v. Blaine, 140 A. 566, 104 N.J.Law 325—State v. Rodgers, 102 A. 433, 91 N.J.Law 212.

6. Ariz.—Ex parte Davis, 236 P. 715, 28 Ariz. 312.

7. Mo.—State v. Criddle, 259 S.W. 429, 302 Mo. 634.

42 C.J. p 1330 note 31.

8. Me.—State v. Vashon, 123 A. 511, 123 Me. 412.

Tex.—McFadden v. State, 300 S.W. 54, 108 Tex.Cr. 166.

Penalty as determining grade of offense generally see Criminal Law §§ 5-7.

9. Me.—State v. Vashon, 123 A. 511, 123 Me. 412.

10. Me.—State v. Vashon, supra.

11. Tex.—McFadden v. State, 300 S.W. 54, 108 Tex.Cr. 166.

12. Ala.—O'Reilly v. State, 179 So. 263, 235 Ala. 328.

Ga.—Trippe v. State, 36 S.E.2d 121, 73 Ga App 322.

Mich.—People v. Townsend, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

Miss.—Cutshall v. State, 4 So.2d 289, 191 Miss 764.

N.Y.—People v. Koch, 294 N.Y.S. 987, 250 App Div 623—People v. Rue, 2 N.Y.S.2d 939, 166 Misc. 845—People v. Dennis, 230 N.Y.S. 510, 132 Misc 410.

Va.—Shaw v. City of Norfolk, 189 S.E. 335, 167 Va. 346.

W.Va.—State ex rel. Mullins v. McClung, 17 S.E.2d 621, 123 W.Va. 682.

Second or subsequent offense

Va.—Young v. Commonwealth, 156 S.E. 565, 155 Va. 1152.

Gross misdemeanor

Wash.—State v. Crothers, 203 P. 74, 118 Wash. 226.

13. Cal.—People v. Levens, 82 P.2d 698, 28 Cal.App.2d 455—People v. Freeman, 60 P.2d 333, 16 Cal.App. 2d 101.

14. N.Y.—People v. Howe, 218 N.Y.S. 361, 218 App.Div. 273.

In Louisiana

An earlier statute making it a misdemeanor to drive a motor vehicle while intoxicated, was superseded by a statute making it a felony to drive a motor vehicle while intoxicated whereby injury to person or property results.—State v. Dudley, 106 So. 364, 159 La. 872.

by an act forbidden by law or by neglect of a duty imposed by law.¹⁵

Addiction to drugs. Under some statutes driving on a highway while addicted to, or under the influence of, narcotic drugs constitutes a felony.¹⁶

c. Elements of Offense

- (1) In general
- (2) Intoxication or under influence of intoxicating liquor

(1) In General

The elements of the offense of driving while under the influence of intoxicants are determined from the statute creating it.

The elements of the offense of driving while under the influence of intoxicants are determined by the terms of the statutes or ordinances which create it.¹⁷ A statute which is complete and sufficient in itself to define the offense has been held not to be dependent on, or governed by, definitions contained in general provisions of the motor vehicle law.¹⁸ All elements of the offense must be present in order to justify conviction.¹⁹

The essential elements of the offense, under statutes prohibiting the operation of a motor vehicle upon any public street or highway while intoxicated or under the influence of intoxicating liquors, are driving or operating an automobile, discussed infra § 628, upon a public street or highway, infra § 629,

while intoxicated or under the influence of intoxicating liquors, infra subdivision c (2) of this section. Where all the elements of the offense are present, it is punishable without regard to whether the driving or operation is negligently or recklessly done²⁰ and without regard to whether anyone has been injured thereby.²¹ Under some statutes, however, it is necessary to constitute the offense, not only that the motor vehicle was operated by the person charged while he was in an intoxicated condition, but also that such operation resulted in injury to person or property,²² proximately caused by some act forbidden by law or neglect of duty imposed by law.²³

Intent has been held to be no factor in a prosecution for operating a motor vehicle while under the influence of intoxicating liquor,²⁴ nor is ownership of the vehicle involved an element of the offense.²⁵

(2) Intoxication or under Influence of Intoxicating Liquor

The accused must be intoxicated or under the influence of intoxicating liquor to be guilty of the offense of driving while intoxicated or under the influence of intoxicating liquor.

In order to justify conviction for the offenses of driving while intoxicated or while under the influence of intoxicating liquor, it is essential to establish that accused was intoxicated or under the

15. Cal.—People v. Graybehl, 153 P. 2d 771, 67 Cal App 2d 210—Ex parte Ryan, 142 P.2d 769, 61 Cal App. 2d 310—People v. Chatham, 110 P. 2d 704, 43 Cal App 2d 298—People v. Levens, 82 P.2d 698, 28 Cal.App. 2d 455—People v. Freeman, 60 P. 2d 333, 16 Cal App 2d 101.

Power of legislature

The legislature may increase the punishment for an unlawful act committed by an intoxicated driver over one not in such condition, as by making it a felony in such a case—People v. Chatham, 110 P.2d 704, 43 Cal. App.2d 298.

16. Cal.—People v. Berner, 82 P.2d 617, 28 Cal.App.2d 392.

17. N.J.—State v. O'Grady, 21 A.2d 864, 19 N.J.Misc. 559.

N.Y.—People v. Rue, 2 N.Y.S.2d 939, 166 Misc. 845.

18. Me.—State v. Cormier, 43 A.2d 819, 141 Me 307.

19. Tex.—Snider v. State, 165 S.W.2d 904, 145 Tex.Cr. 59.

20. Va.—Spickard v. City of Lynchburg, 6 S.E.2d 610, 174 Va. 502.

21. Ga.—Cordell v. State, 198 S.E. 572, 58 Ga.App. 388.

Miss.—Cutshall v. State, 4 So 2d 289, 191 Miss. 764.

Or.—State v. Boag, 59 P.2d 396, 154 Or 354.

22. Ia.—State v. Hill, 177 So. 421, 188 Ia. 444—State v. Pierce, 121 So 870, 168 La. 291.
42 C.J. p 1329 note 19, p 1330 note 44.

23. Cal.—People v. Graybehl, 153 P. 2d 771, 67 Cal App 2d 210—Ex parte Ryan, 142 P.2d 769, 61 Cal App 2d 310—People v. Boulware, 106 P. 2d 436, 41 Cal App 2d 268—People v. Levens, 82 P.2d 698, 28 Cal.App. 2d 455.

Defective windshield

In driving automobile with windshield in defective condition because of dust and rain spots, accused committed an act forbidden by law and neglected duty imposed by law within statute covering offense of causing bodily injury to another as proximate result of neglecting duty imposed by law or doing act forbidden by law while driving while intoxicated.—People v. Graybehl, 153 P.2d 771, 67 Cal.App.2d 210.

Reckless driving

Driving, while intoxicated, in a

manner indicating a willful disregard for safety of persons or property justified conviction for injuring third person while operating automobile under influence of liquor.—People v. Dawes, 98 P.2d 787, 37 Cal. App 2d 44.

Unlawful speed

In order for speed to constitute an unlawful act within the statute, the criterion must be the reasonableness of the speed in relation to the physical facts surrounding the highway and its use at the particular time. Under this test one driving at an estimated speed of fifty-five miles per hour momentarily driving onto the left portion of a highway and then back again to the right side and ultimately over an embankment, killing a guest passenger, was held not to have violated the statute.—Ex parte Ryan, 142 P.2d 769, 61 Cal.App. 2d 310.

24. Vt.—State v. Hedding, 42 A.2d 438, 114 Vt. 212—State v. Storrs, 163 A. 560, 105 Vt. 180.

25. Va.—Blakey v. Commonwealth, 29 S.E.2d 863, 182 Va. 614.

influence of intoxicating liquor,²⁶ although the degree of intoxication is immaterial.²⁷

The phrase "under the influence of liquor" as used in the statutes under consideration is a very elastic term²⁸ and has been construed as being substantially synonymous with such words as "intoxicated," "intoxication," or "drunkenness,"²⁹ and with the terms "in an intoxicated condition"³⁰ and "in a drunken or partly drunken condition,"³¹ but as not synonymous with "while intoxicated."³² However, the driver of a motor vehicle need not be in a state of drunkenness to be "under the influence of intoxicating liquor," within the meaning of such term as used in a statute.³³ On the other hand, where the statute makes it unlawful to drive an automobile upon a public street if the driver is either in an intoxicated condition or under the influence of intoxicating liquor, it has been held that the two phrases as used in such a statute are not synonymous in meaning,³⁴ although there is an offense within the contemplation of the statute whether the driver is drunk, and so is in an intoxicated condition, or is merely under the influence of intoxicating liquor

and not actually drunk or intoxicated.³⁵

One is intoxicated, within a statute prohibiting driving while intoxicated, when he does not have the normal use of his physical and mental faculties by reason of the use of intoxicating liquor,³⁶ or when, by reason of such use, he is incapable of driving with the care essential to the safety of occupants of the vehicle and others.³⁷

Although it is not any and every "influence" produced by intoxicants that will subject one to a penalty under a statute prohibiting the operation of a motor vehicle while under the influence of intoxicating liquor,³⁸ the expression "under the influence of intoxicating liquor" covers not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging to any degree in intoxicating liquors, and which tends to deprive a driver of that clearness of intellect and control of himself which he would otherwise possess.³⁹ Accordingly, if intoxicating liquor has so far affected the nervous system, brain, or muscles of a driver of an automobile as to impair, to an appreciable degree,⁴⁰ his ability to op-

26. Ala.—*Rainey v. State*, 12 So 2d 106, 31 Ala.App. 66.
Iowa.—*State v. Boyle*, 297 N.W. 312, 230 Iowa 305.
Or.—*State v. Boag*, 59 P 2d 396, 154 Or. 354.
Tex.—*Snider v. State*, 165 S.W.2d 904, 145 Tex.Cr. 59.
42 C.J. p 1330 note 40.

27. Ala.—*Rainey v. State*, 12 So.2d 106, 31 Ala.App. 66—*Holley v. State*, 144 So. 535, 25 Ala.App. 260, certiorari denied 144 So. 537, 225 Ala. 597.

28. Cal.—*People v. Dingle*, 205 P. 705, 56 Cal.App. 445.

29. Ala.—*Rainey v. State*, 12 So.2d 106, 31 Ala.App. 66—*Sexton v. State*, 196 So. 742, 29 Ala.App. 742, certiorari granted on other grounds 196 So. 744, 239 Ala. 287, certiorari denied 196 So. 746, 239 Ala. 662.

Cal.—*People v. Dingle*, 205 P. 705, 56 Cal.App. 445.

Tex.—*Jones v. State*, 104 S.W.2d 871, 132 Tex.Cr. 445—*Muedgen v. State*, 104 S.W.2d 518, 132 Tex.Cr. 397.

30. La.—*State v. Dudley*, 106 So. 364, 159 La. 872.

31. N.C.—*State v. Carroll*, 37 S.E.2d 688, 226 N.C. 237.

Tenn.—*Daniels v. State*, 296 S.W. 20, 155 Tenn. 549.

32. N.C.—*State v. Carroll*, 37 S.E.2d 688, 226 N.C. 237.

33. Ga.—*Durham v. State*, 144 S.E. 109, 166 Ga. 561—*Kea v. State*, 182 S.E. 802, 52 Ga.App. 211—*Wallace*

v. State, 162 S.E. 162, 44 Ga.App. 532—*Chapman v. State*, 151 S.E. 410, 40 Ga.App. 725

Ind.—*Klaser v. State*, 166 N.E. 21, 89 Ind.App. 561.

Kan.—*State v. Hayden*, 271 P. 291, 126 Kan. 799.

42 C.J. p 1330 note 48.

Partly drunken condition is sufficient—*Daniels v. State*, 296 S.W. 20, 155 Tenn. 519.

Under influence to any extent has been held sufficient—*Wallace v. State*, 162 S.E. 162, 44 Ga.App. 532—*Chapman v. State*, 151 S.E. 410, 40 Ga.App. 725.

34. Or.—*State v. Noble*, 250 P. 833, 119 Or. 674.

35. Or.—*State v. Noble*, *supra*.

36. Tex.—*Cox v. State*, 150 S.W.2d 85, 141 Tex.Cr. 561.

37. Miss.—*Williams v. State*, 137 So. 106, 161 Miss. 406.

38. Cal.—*People v. Dingle*, 205 P. 705, 56 Cal.App. 445.

39. Ariz.—*Weston v. State*, 65 P 2d 652, 49 Ariz. 183—*Hasten v. State*, 280 P. 670, 35 Ariz. 427.

Minn.—*State v. Graham*, 222 N.W. 909, 176 Minn. 164.

N.C.—*State v. Carroll*, 37 S.E.2d 688, 226 N.C. 237.

Pa.—*Commonwealth v. Long*, 198 A. 474, 131 Pa.Super. 28—*Commonwealth v. Buoy*, 193 A. 144, 128 Pa. Super. 264.

Vt.—*State v. Storrs*, 163 A. 560, 105 Vt. 180.

Va.—*Harrell v. City of Norfolk*, 21 S.E.2d 733, 180 Va. 27, 142 A.L.R. 550

42 C.J. p 1331 note 58.

Interference with coordination

In order to convict of operating automobile while under influence of intoxicating liquor, it need not be proved that accused's mental faculties were not functioning normally, interference with co-ordination of sensory and motor nerves is sufficient—*State v. Taylor*, 163 A. 777, 131 Me. 438.

Quantity of liquor

Question is not how much accused has drunk but whether he has imbibed enough alcoholic drink to affect his faculties to such an extent that the jury could reasonably conclude that he was under the influence of intoxicating liquor—*Grooms v. State*, 142 P.2d 862, 77 Okl.Cr. 448.

40. Conn.—*State v. Andrews*, 112 A. 840, 108 Conn. 209.

N.C.—*State v. Carroll*, 37 S.E.2d 688, 226 N.C. 237.

Okl.—*Luellen v. State*, 81 P.2d 323, 64 Okl.Cr. 382.

Or.—*State v. Noble*, 250 P. 833, 119 Or. 674.

Pa.—*Commonwealth v. DeLong*, Quar.Sess., 54 Montg.Co. 81.

42 C.J. p 1331 note 59.

Slightest degree

Person under influence of intoxicating liquor in slightest degree is within statutory prohibition.—*State v. Hedding*, 42 A.2d 438, 114 Vt. 212

erate his car in the manner in which an ordinarily prudent and cautious man, in the full possession of his faculties and using reasonable care, would operate or drive a similar vehicle under like conditions, such driver is "under the influence of intoxicating liquor" within the meaning of the statute.⁴¹ However, it is not essential, in order to be under the influence of intoxicating liquor, that the driver of the automobile should be so intoxicated that he cannot safely drive a car,⁴² or that he do or fail to do an act or thing which he would not have done but for the drinking of the intoxicants,⁴³ for one who drives an automobile upon a public street while under the influence of intoxicating liquor offends against a statute prohibiting such operation, even though he drives so slowly and so skillfully and carefully that the public is not annoyed or endangered,⁴⁴ and it is immaterial whether he exercised due care to avoid injury to other travelers,⁴⁵ as he may be convicted of the offense even though there were no travelers on the street.⁴⁶

"In an intoxicated condition." Under a statute penalizing the operation of a motor vehicle while in an intoxicated condition it is essential to establish that the driver was in such condition while he was operating the vehicle.⁴⁷ Although it is not essential, under such a statute, that the driver be in a state of drunkenness,⁴⁸ neither, on the other hand, is it sufficient to constitute an intoxicated condition within the meaning of the statute that the mind of the driver is slightly stimulated or exhilarated as a result of his drinking of intoxicants;⁴⁹ but the test of intoxication as contemplated by such statute depends on the impairment to some

extent, however slight it may be, of the judgment or mental or physical faculties of a driver to operate an automobile as a result of drinking an alcoholic beverage.⁵⁰ Accordingly, a person is intoxicated for the purposes of this statute when he has imbibed enough liquor to render him incapable of giving that attention and care to the operation of his automobile that a man of prudence and reasonable intelligence would give.⁵¹ Voluntary intoxication is contemplated by the statute,⁵² not intoxication resulting from an overdose of drugs prescribed by a physician.⁵³

Cause of intoxication. A statute prohibiting operation while under the influence of intoxicating liquor or a narcotic drug or a habit-producing drug has been held to state but a single offense of driving while intoxicated, whether the intoxication be caused by drinking intoxicating liquors or by a narcotic or habit-producing drug.⁵⁴ Similarly, the gravamen of the offense of driving while under the influence of intoxicating liquor or of any drug has been held to be driving under the influence of either of the substances named.⁵⁵ The term "intoxicated," as used in a provision against driving while in an intoxicated condition, has been held to include intoxication produced by excessive use of agencies other than alcoholic liquors voluntarily taken.⁵⁶

Intoxicating liquor within the intent of these statutes has been held to be any liquor which in fact is capable of subjecting a person to its alcoholic influence, and so does, regardless of the per cent of its alcoholic content;⁵⁷ definitions of what

--State v. Storrs, 163 A 560, 105 Vt 180

41. Okl.—Luellen v. State, 81 P.2d 323, 61 Okl.Cr. 382.
42 C.J. p 1331 note 60.

Similar statements

Ariz.—State v. Duguid, 72 P.2d 435.
50 Ariz 276—Hasten v. State, 280 P. 670, 35 Ariz 427.
N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.
N.C.—State v. Carroll, 37 S.E.2d 688, 226 N.C. 237.

42. Ala.—McMurry v. State, 184 So. 42, 28 Ala App. 253, certiorari denied 184 So. 43, 236 Ala. 589.
42 C.J. p 1330 note 53.

Intention of the legislature in enacting statute making it unlawful for any person to drive an automobile while under the influence of intoxicating liquor was to prohibit any person under the influence of liquor, however slight, from operating an automobile on any highway in the

State --State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

43. Tex.—Stewart v. State, 299 S.W. 646, 108 Tex.Cr. 199.

Reason for rule

The law does not withhold its forbiddance until an intoxicated man on the highway kills somebody or wrecks his own or some other vehicle—Stewart v. State, 299 S.W. 646, 108 Tex.Cr. 199.

44. Conn.—State v. Andrews, 142 A. 810, 108 Conn. 209.
N.J.—State v. Rodgers, 102 A. 433, 91 N.J. Law 212—State v. O'Grady, 21 A.2d 864, 19 N.J.Misc. 559.

45. Mass.—Commonwealth v. Lyseth, 146 N.E. 18, 250 Mass. 555.

Freedom from negligence does not establish innocence—Holley v. State, 144 So. 535, 25 Ala App. 260, certiorari denied 144 So. 537, 225 Ala. 597

46. Mass.—Commonwealth v. Lyseth, 146 N.E. 18, 250 Mass. 555.

47. Mo.—State v. Kissinger, 123 S.W.2d 81, 343 Mo. 781.

48. N.Y.—People v. Weaver, 177 N.Y.S. 71, 188 App.Div. 395.

49. N.Y.—People v. Weaver, supra.

50. Mo.—State v. Raines, 62 S.W.2d 727, 333 Mo. 538.

N.Y.—People v. Weaver, 177 N.Y.S. 71, 188 App.Div. 395.

51. N.Y.—People v. Weaver, supra.

52. N.Y.—People v. Koch, 294 N.Y.S. 987, 250 App.Div. 623.

53. N.Y.—People v. Koch, supra.

54. Pa.—Commonwealth v. Schuler, 43 A.2d 646, 157 Pa.Super. 442.

55. Conn.—State v. Jones, 2 A.2d 374, 124 Conn. 664.

56. N.Y.—People v. Koch, 294 N.Y.S. 987, 250 App.Div. 623.

57. Mass.—Commonwealth v. Bridges, 189 N.E. 616, 285 Mass. 572.
Okl.—Drew v. State, 112 P.2d 429, 71 Okl.Cr. 415—Foglesong v. State, 103 P.2d 106, 69 Okl.Cr. 360—Cur-

constitutes intoxicating liquor in a statute requiring a liquor license or in a tax statute are held inapplicable in the enforcement of statutes prohibiting operation of a motor vehicle while under the influence of intoxicating liquor.⁵⁸

§ 626. — Distinguished from Public Nuisance

The statutory offense of driving a motor vehicle on a public street while under the influence of intoxicating liquor differs from a common-law or public nuisance.

The driving of a motor vehicle on a public street while under the influence of intoxicating liquor is not a public or common nuisance indictable at common law.⁵⁹ It differs from a public nuisance in that the statutory offense of driving while intoxicated is complete when the act prohibited has been done, whether with or without inconvenience or annoyance to the public, while a nuisance is not committed unless and until there is an inconvenience or annoyance to the public.⁶⁰ Accordingly, a statute which declares that any person who shall operate an automobile over any public street or highway while under the influence of intoxicating liquor shall be punished as a disorderly person does not describe a public nuisance.⁶¹

His v. State, 101 P.2d 1062, 69 Okl. Cr. 278—*Daniels v. State*, 98 P.2d 68, 68 Okl. Cr. 324—*Ashcraft v. State*, 98 P.2d 60, 68 Okl. Cr. 308—*Odom v. State*, 95 P.2d 916, 68 Okl. Cr. 117—*Ashcraft v. State*, 94 P.2d 939, superseded 98 P.2d 60, 68 Okl. Cr. 308.
R.I.—*State v. Parquette*, 172 A. 613, 54 R.I. 283.

58. *Mass.—Commonwealth v. Bridges*, 189 N.E. 616, 285 Mass. 572.
Okl.—*Drew v. State*, 112 P.2d 429, 71 Okl. Cr. 415—*Foglesong v. State*, 103 P.2d 106, 69 Okl. Cr. 360—*Curtis v. State*, 101 P.2d 1062, 69 Okl. Cr. 278—*Daniels v. State*, 98 P.2d 68, 68 Okl. Cr. 324—*Ashcraft v. State*, 98 P.2d 60, 68 Okl. Cr. 308.
R.I.—*State v. Parquette*, 172 A. 613, 54 R.I. 283.

Beer

Where defendant is actually under the influence of beer of three and two tenths per cent or less alcoholic content, he comes within the statute although a statute requiring a license or imposing a tax declares such beer to be nonintoxicating liquor.

Mass.—Commonwealth v. Bridges, 189 N.E. 616, 285 Mass. 572.
Okl.—*Drew v. State*, 112 P.2d 429, 71 Okl. Cr. 415—*Foglesong v. State*, 103 P.2d 106, 69 Okl. Cr. 360—*Curtis v. State*, 101 P.2d 1062, 69 Okl. Cr. 278—*Daniels v. State*, 98 P.2d 68, 68 Okl. Cr. 324—*Ashcraft v. State*, 98 P.2d 60, 68 Okl. Cr. 308—

Odom v. State, 95 P.2d 916, 68 Okl. Cr. 117.
R.I.—*State v. Parquette*, 172 A. 613, 54 R.I. 283.

59. *N.J.—State v. Rodgers*, 102 A. 433, 91 N.J. Law 212.

60. *N.J.—State v. Rodgers*, *supra*.
42 C.J. p 1330 note 21.

61. *N.J.—Latimer v. Wilson*, 134 A. 750, 103 N.J. Law 159—*State v. Rodgers*, 102 A. 433, 91 N.J. Law 212.

62. *Iowa—State v. Garcia*, 200 N.W. 201, 198 Iowa 744.

Statutory and charter provisions compared

There is no inconsistency or duplication between a charter provision penalizing intoxication which violates public decency, without referring to motor vehicles, and state statutes governing drunken driving—*People v. City of Hornell*, 8 N.Y.S.2d 976, 256 App.Div. 113, affirmed 9 N.Y.S.2d 792, 256 App.Div. 113, appeal denied 11 N.Y.S.2d 551, 256 App.Div. 1055, affirmed 24 N.E.2d 982, 282 N.Y. 555.

63. *Iowa—State v. Garcia*, 200 N.W. 201, 198 Iowa 744.

Intoxication or drunkenness as a crime generally see *Drunkards* §§ 13–15.

64. *Iowa—State v. Garcia*, *supra*.

65. *Ala.—Underwood v. State*, 182 So. 606, 24 Ala.App. 191.

Conn.—State v. Jones, 2 A.2d 374, 124 Conn. 664.

§ 627. — Distinguished from Intoxication

The statutory offenses of intoxication and of driving an automobile while intoxicated are separate offenses.

The statutory offenses of intoxication and of driving an automobile while intoxicated are separate and distinct crimes.⁶² In order to sustain a conviction for the former it is only necessary to show that accused was intoxicated, it being wholly immaterial what he was doing, whether operating a motor vehicle or doing something else,⁶³ while in the offense under consideration it is necessary not only to show that accused was intoxicated, but that he was operating a motor vehicle while intoxicated.⁶⁴

§ 628. — Operation or Driving

Under most of the statutes driving or operating a motor vehicle is an essential element of the offense of driving while under the influence of intoxicants.

Driving or operating a motor vehicle is an essential element of the offense of driving a motor vehicle while intoxicated.⁶⁵ One is not guilty of the offense merely because he was intoxicated and rode in a motor vehicle;⁶⁶ it must appear that

Iowa—State v. Boyle, 297 N.W. 312, 230 Iowa 305.

Mo.—*State v. Kissinger*, 123 S.W.2d 81, 343 Mo. 781.

Or.—*State v. Boag*, 59 P.2d 396, 154 Or. 354.

Pa.—*Commonwealth v. Fox*, 17 Pa. Dist. & Co. 491, 43 Lanc.L.Rev. 246.

66. *Wash.—State v. Williams*, 251 P. 126, 141 Wash. 165.

Riding with unlicensed driver

(1) Under a statute permitting the operation of motor vehicles by unlicensed persons if riding with, or accompanied by, a licensed operator, but also providing that such licensed operator shall be liable for violations of the law committed by such unlicensed operator, in order to avoid the statutory penalty a licensed operator riding with a person who was intoxicated did not have the burden of ascertaining whether such person's purported license was in effect.—*Commonwealth v. Sabeau*, 176 N.E. 523, 275 Mass. 546.

(2) Accused was not guilty of operating truck while under the influence of intoxicating liquor, because of his presence as a licensed operator in the truck being driven by an unlicensed driver, even though under statute accused would be liable for a violation of law by the companion if accused knowingly consented to operation of truck by companion, under the protection of accused's license.—*Commonwealth v. Jordan*, 37

accused actually drove such vehicle⁶⁷ simultaneously with being in the prohibited condition.⁶⁸

While it has been held that an automobile is not being operated or driven where it remains stationary during the entire time and no attempt is made to move it,⁶⁹ operation is not required to be complete or extended to come within the prohibition of the statute,⁷⁰ nor need the automobile be actually in motion to constitute operation,⁷¹ since it is sufficient operation if accused set in motion the operative machinery of the vehicle⁷² for the purpose of putting the vehicle in motion.⁷³ Thus the fact that the automobile was not put in motion because the motor was not powerful enough to force it over a curb without stalling is no defense.⁷⁴ It is not even necessary that the engine be running in order to constitute the operation of a vehicle within the meaning of such a statute.⁷⁵

Actual physical control of automobile. A statute making it an offense for one under the influence of

intoxicating liquor to operate or be in actual physical control of any motor vehicle has been held to create two separate offenses, one for operating the vehicle and another for being in actual physical control of the vehicle.⁷⁶ Actual physical control within such a statute has been held to have a broader meaning than an ability to stop the vehicle.⁷⁷

§ 629. — Place of Operation

Where the statute so provides, operation of a vehicle on a public street or highway is an essential element of the offense, but operation of a vehicle in a private place is sufficient to constitute the offense where the statute penalizes the operation of a motor vehicle while intoxicated.

Under statutes, which are part of the general law regulating the use of the roads,⁷⁸ and which penalize the driving of a motor vehicle while intoxicated on a public street or highway, the commission of the prohibited act on the public street or highway is an essential element of the offense.⁷⁹

N.E.2d 123, 310 Mass. 85, 137 A.L.R. 474.

67. Wash.—State v. Williams, 251 P. 126, 141 Wash. 165.
42 C.J. p 1331 note 66.

"Operator"

The statutory definition of "operator," for the purpose of the statute relating to operators' and chauffeurs' automobile licenses is not applicable to criminal statute making it an offense to operate an automobile while intoxicated.—State v. Thomason, 276 N.W. 619, 224 Iowa 499.

Operation

The word "operates" was held to refer to the actual physical handling of the controls of the vehicle and it is not satisfied by merely consenting, while under influence of intoxicating liquor, to stand as sponsor, under statute, for another, who is not licensed, and who does the actual operating, even if the licensee knowingly consents to stand in that relation.—Commonwealth v. Jordan, 37 N.E.2d 123, 310 Mass. 85, 137 A.L.R. 474.

Backing to disengage vehicle

An intoxicated person's conduct, after collision, in backing automobile four or five feet in order to disengage it from other automobile and to park it, was not "driving on the highway" within terms of statute.—People v. Kelley, 70 P.2d 276, 27 Cal. App.2d Supp. 771.

68. N.Y.—People v. Strauss, 22 N.Y. S.2d 880, 260 App.Div. 880.
Tex.—Snider v. State, 185 S.W.2d 904, 145 Tex.Cr. 59.

69. Ala.—Underwood v. State, 132 So. 606, 24 Ala.App. 191.

Preventing movement of car

Holding automobile still on hill by placing foot on brake while driver worked on carburetor was not operating automobile.—State v. Hatcher, 185 S.E. 435, 210 N.C. 55

70. Me.—State v. Roberts, 29 A.2d 457, 139 Me. 273.

Driving short distance

Motorist driving but a few yards when arrested was held within statute.—Austin v. State, 170 S.E. 86, 47 Ga.App. 191.

71. Iowa.—State v. Webb, 210 N.W. 751, 202 Iowa 633.

Mass.—Commonwealth v. Uski, 160 N.E. 305, 263 Mass. 22.
42 C.J. p 1331 note 66 [b] (1).

72. Mass.—Commonwealth v. Uski, supra.

42 C.J. p 1331 note 66 [b] (2).

73. Mass.—Commonwealth v. Uski, supra.

N.Y.—People v. Domagala, 206 N.Y. S. 288, 123 Misc. 757.

74. N.Y.—People v. Domagala, supra.
42 C.J. p 1331 note 67.

75. Vt.—State v. Storrs, 163 A. 560, 105 Vt. 180.—State v. Tacey, 150 A. 68, 102 Vt. 439, 68 A.L.R. 1353.
42 C.J. p 1331 note 68.

Turning of ignition switch, which had effect of operating self-starter was held operating motor vehicle.—State v. Storrs, 163 A. 560, 105 Vt. 180.

Automobile being pushed or towed

(1) One who guides or steers an automobile, the engine of which is not running, while it is being towed or pushed by another automobile has been held to be driving or operating the vehicle within the statute.

Pa.—Commonwealth v. Richl, 23 Pa. Dist & Co. 110, 44 Lanc.L.Rev. 481.
Tex.—Rogers v. State, 183 S.W.2d 572, 147 Tex.Cr. 602.

(2) This has been held to be so where the statute provides that the term "motor vehicle" shall include all vehicles being propelled by power other than muscular.—State v. Tacey, 150 A. 68, 102 Vt. 439, 68 A.L.R. 1353.

(3) Where only rear wheels of automobile being towed up icy grade had contact therewith, an intoxicated person who ran motor of towed automobile to assist towing vehicle was guilty of operating a motor vehicle, although direction of neither vehicle was thereby affected.—State v. Roberts, 29 A.2d 457, 139 Me. 273.

76. Ohio.—Ohio v. Wilgus, 17 Ohio Supp. 34.

77. Ohio.—Ohio v. Wilgus, supra.

Dictionary definitions do not limit the court in determining meaning of term.—Ohio v. Wilgus, supra.

Sitting behind wheel of automobile with motor idling

Defendant who for two hours was asleep and alone and under the influence of intoxicating liquor while sitting behind steering wheel in automobile on public highway, with his feet on pedals and his arms, shoulders, and head slouched over steering wheel with motor running, was in "actual physical control" of motor vehicle within statute.—Ohio v. Wilgus, supra.

78. Wis.—State v. Groh, 207 N.W. 950, 189 Wis. 440.

79. Ala.—Rainey v. State, 12 So.2d 106, 31 Ala.App. 66.

Every public road or thoroughfare is a public highway within the meaning of such a statute,⁸⁰ whether in an incorporated or unincorporated town or village,⁸¹ and may be shown to be such by proof that it is used as such by the public.⁸² Hence driving in a public park while intoxicated constitutes an offense thereunder,⁸³ as does driving on a roadway within fair grounds.⁸⁴ A public road within the statute is not limited to an official road or one established by prescriptive use.⁸⁵ On the other hand, a statute which provides that no person shall operate a motor vehicle while in the prohibited condition does not require, as an element of the offense, that the driving should be done on a public highway.⁸⁶ Under such a statute commission of the offense in a private place has been held to be within its terms.⁸⁷

Where the offense under the statute consists in driving an automobile within the limits of any incorporated city, town, or village while intoxicated, the driving in such a condition in an incorporated municipality is an integral part of the offense.⁸⁸

§ 630. — Attempts to Commit Offense

In order to convict one of an attempt to commit the offense of operating a motor vehicle while under the influence of intoxicating liquor, it is necessary that an overt act have been done with an intent to operate the vehicle in violation of the statute.

Under permissive statutes, one charged with, and tried for, operating a motor vehicle while under the influence of intoxicating liquor may properly be convicted of an attempt to commit the offense,⁸⁹

Or.—State v. Boag, 59 P.2d 396, 154 Or. 354.

Tex.—Snider v. State, 165 S.W.2d 904, 145 Tex.Cr. 59—Turner v. State, 5 S.W.2d 513, 109 Tex.Cr. 508—McFadden v. State, 300 S.W. 54, 108 Tex.Cr. 166.

42 C.J. p 1331 note 69.

Distinguished from private roads

Words "public road or highway" in act were used to differentiate such highways from private roads—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219.

80. Ark.—Canard v. State, 298 S.W. 24, 174 Ark. 918.

N.J.—State v. Sakowicz, 125 A. 322, 98 N.J.Law 905.

Tex.—Anderson v. State, 195 S.W.2d 368, 149 Tex.Cr. 423—Blackman v. State, Cr., 20 S.W.2d 783.

The word "way," as used in statute penalizing operation of motor vehicle upon any way while operator is intoxicated, includes all kinds of public ways, save where context indicates otherwise—State v. Peterson, 4 A.2d 835, 136 Me. 165.

81. Tex.—Blackburn v. State, Cr. 204 S.W.2d 619—Parsons v. State, 194 S.W.2d 560, 149 Tex.Cr. 395—Broughton v. State, 188 S.W.2d 393, 148 Tex.Cr. 445—Lamkin v. State, 123 S.W.2d 662, 136 Tex.Cr. 99.

82. Tex.—Anderson v. State, 195 S.W.2d 368, 149 Tex.Cr. 423.

83. N.J.—State v. Sakowicz, 125 A. 322, 98 N.J.Law 905.

84. Ark.—Canard v. State, 298 S.W. 24, 174 Ark. 918.

Road through private park donated as fair ground

Tex.—Wood v. State, 45 S.W.2d 599, 119 Tex.Cr. 352.

85. Tex.—Wood v. State, supra.

86. Ala.—O'Reilly v. State, 179 So. 363, 235 Ala. 328.

Iowa.—State v. Dowling, 216 N.W. 271, 204 Iowa 977.

Minn.—State v. Carroll, 31 N.W.2d 41, 225 Minn. 384.

Mo.—State v. Weston, 202 S.W.2d 50—State v. Davis, 143 S.W.2d 244—State v. Pike, 278 S.W. 725, 312 Mo. 27—State v. Hatcher, 259 S.W. 467, 303 Mo. 13.

N.Y.—Corpus Juris quoted in People v. Rue, 2 N.Y.S.2d 939, 942, 166 Misc. 345

Pa.—Corpus Juris cited in Commonwealth v. Oakley, 36 Pa.Dist. & Co. 326, 329—Commonwealth v. Campbell, 28 Pa.Dist. & Co. 260, 84 Pittsb. Leg. J. 681.

Wash.—Town of Tenino v. Hyde, 244 P. 550, 138 Wash. 251.

Reason for rule

Statute which merely provides that no person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs, is not a road regulation but a prohibition against an intoxicated person operating an automobile—State v. Pike, 278 S.W. 725, 312 Mo. 27.

Legislative intent

Statute was held to manifest legislative intent that the operation of the statute was not to be confined to public places in view of history of legislation and the omission of the words "public street or highway" contained in the antecedent act, where it was apparent that the legislature designedly omitted the quoted words in order to enlarge the scope of the statute—State v. O'Grady, 21 A.2d 864, 19 N.J.Misc. 559.

"Any other place"

Amendment to the traffic law, which restated the prohibition against operating a motor vehicle on any way, bridge, public park, or public parkway while under the influence of intoxicating liquor or drugs and added a prohibition of op-

eration, when intoxicated, of a vehicle in any other place where life or safety of any other person is in danger, disclosed legislative purpose to protect the lives and safety of persons at any place where drunken driving would constitute a menace—State v. Cormier, 43 A.2d 819, 141 Me. 307.

Place where vehicles are normally driven

A statute making it an offense to operate a motor vehicle while under the influence of intoxicating liquor regardless of whether or not the operation is on a public highway, but expressing in the title to the act as its subject "the protection of public safety", must be construed to limit the offense to driving in a place where other vehicles are normally driven.—Commonwealth v. Goldscheider, 57 Pa.Dist. & Co. 490.

87. N.J.—State v. O'Grady, 21 A.2d 864, 19 N.J.Misc. 559

Pa.—Commonwealth v. Oakley, 36 Pa.Dist. & Co. 326—Commonwealth v. Campbell, 28 Pa.Dist. & Co. 260, 84 Pittsb. Leg. J. 681.

Private roadway

Minn.—State v. Carroll, 31 N.W.2d 44, 225 Minn. 384.

Ferryboat and dock

Statute was held to authorize the conviction of defendant who drove an automobile from a ferryboat onto a privately-owned dock—State v. O'Grady, 21 A.2d 864, 19 N.J.Misc. 559.

88. Tex.—Pool v. State, 278 S.W. 212, 102 Tex.Cr. 451.

Limitation by implication

The ordinance was operative only within city limits by implication, notwithstanding ordinance failed expressly to provide that it was applicable only within city.—City of Duluth v. La Fleaur, 272 N.W. 389, 199 Minn. 470.

89. Pa.—Commonwealth v. Under-

and a separate indictment charging an attempt to commit the offense is not necessary.⁹⁰ In accordance with the general rules pertaining to criminal attempts, however, as discussed in Criminal Law § 75, there can be no conviction of an attempt unless the overt acts were done with the intent to operate the motor vehicle in violation of the statute,⁹¹ and hence an indictment which charges such offense must sufficiently allege that the overt acts were done with the intent to commit the principal offense.⁹²

§ 631. — Jurisdiction

The jurisdiction of particular courts over prosecutions for driving a motor vehicle while intoxicated is governed by the statute creating the offense, or, in the absence of provision therein, by the general statutes conferring jurisdiction over criminal offenses.

The jurisdiction of particular courts over prosecutions for driving a motor vehicle while intoxicated is governed by the statute creating the offense, or, in the absence of provision therein, by the general statutes conferring jurisdiction over criminal offenses,⁹³ it sometimes being vested in justices of the peace or similar magistrates.⁹⁴ However, where, under constitutional provisions,

the nature of the offense is such as requires prosecutions therefor to be by indictment, as discussed in Indictments and Informations § 9, municipal and police courts and trial justices have no jurisdiction thereof,⁹⁵ and a statute is invalid which attempts to give them even concurrent jurisdiction with the supreme and superior courts.⁹⁶ If the jurisdiction of the inferior court is limited to offenses of a specified nature which do not include offenses of the class into which driving while intoxicated falls, such a court does not have jurisdiction of the offense.⁹⁷ Thus if the offense as charged is in the nature of a felony, an inferior court whose jurisdiction is limited to the trial of misdemeanors is without jurisdiction to try the case.⁹⁸

The jurisdiction of an inferior court, conferred by statute, to try one for the offense and assess the penalty has been held unaffected by further provisions authorizing the court to recommend suspension of defendant's license on conviction and requiring the court to report the conviction to the motor vehicle authorities, notwithstanding the limitations imposed on the inferior courts with respect to the punishment and penalties which they may assess.⁹⁹

koffler, Quar Sess, 32 Pa Dist & Co. 183.

Starting engine unnecessary

An intoxicated person who enters an automobile and seats himself behind the steering wheel in furtherance of a previously formed intention to operate the car, attempts to operate it while intoxicated and it is not necessary that he start the engine.—*Commonwealth v. Underkoffler*, supra.

90. Pa.—*Commonwealth v. Underkoffler*, supra.

91. Me.—*State v. Jones*, 130 A. 737, 125 Me. 42.

92. Me.—*State v. Jones*, supra. 42 C.J. p 1331 note 76.

93. Ind.—*Basson v. State*, 187 N.E. 344, 205 Ind. 532.

Ky.—*Commonwealth v. Harris*, 128 S.W.2d 579, 278 Ky. 218.

N.J.—*Tomcich v. Norton*, 48 A.2d 752, 134 N.J.Law 411.

N.Y.—*People v. Dennis*, 230 N.Y.S. 510, 132 Misc. 410.

42 C.J. p 1332 note 77.

Prospective amendment

Amendatory statute providing that the first offense of driving an automobile while under the influence of intoxicating liquor shall be a misdemeanor and lodging jurisdiction for such offense in the county court operates prospectively, and hence, where accused had allegedly driven

an automobile on a public highway while under the influence of intoxicating liquor prior to the effective date of the amendatory statute, district court had jurisdiction to enforce conviction therefor under amended statute.—*Billbrey v. State*, 135 P.2d 999, 76 Okl.Cr. 249.

94. Ky.—*Commonwealth v. Harris*, 128 S.W.2d 579, 278 Ky. 218.

N.J.—*Groskr v. McGovern*, 44 A.2d 39, 133 N.J.Law 277.

42 C.J. p 1332 note 78.

Jurisdiction in criminal cases of justices of the peace, police justices, and other officers generally see Criminal Law §§ 125, 126.

Town mayor

A town mayor's warrant for arrest of one charged with violating traffic code by operating automobile on town streets while intoxicated charged violation of town ordinance, not state statute, so as to give mayor jurisdiction to try accused.—*Felder v. Town of Vinton*, 1 S.E.2d 303, 172 Va. 608.

"Nearest" justice

(1) Under statute requiring one arrested for the offense without a warrant to be brought before nearest justice for trial, justice of peace was held, on timely objection, not to have jurisdiction of prosecution of motorist for operating motor vehicle while under influence of intoxicating liquor, where motorist was arrested without

warrant, and justice's office was further from point of arrest than another justice's office.—*State v. Johnson*, Del Gen.Sess., 46 A.2d 641.

(2) However, failure of accused to object on this account in due season was held to constitute a waiver thereof, the right to be tried by the nearest justice being intended for the sole benefit of accused.—*State v. Guessford*, 192 A. 612, 8 W.V.Harr. Del., 357.

95. Iowa.—*State v. Garcia*, 200 N.W. 201, 198 Iowa 744.

42 C.J. p 1332 note 81.

96. Me.—*State v. Vashon*, 123 A. 511, 123 Me. 412.

97. N.C.—*State v. Johnson*, 199 S.E. 96, 214 N.C. 319.

Mayor's court

Where the mayor's court had no jurisdiction conferred on it by statute over operating a motor vehicle while under influence of intoxicating liquor, the jurisdiction of the mayor over such offenses was limited to that of a committing magistrate.—*State v. Johnson*, supra.

98. Cal.—*People v. Lewis*, 37 P.2d 752, 4 Cal.App.2d Supp. 775.

99. Ky.—*Commonwealth v. Harris*, 128 S.W.2d 579, 278 Ky. 218.—*Commonwealth v. Burnett*, 118 S.W.2d 558, 274 Ky. 231.

Reason for rule

Suspension of a license is not part

Mode of acquiring jurisdiction. Jurisdiction of the court to try and punish an offender for driving an automobile while intoxicated must be acquired in the mode prescribed by law.¹ Under some statutes such jurisdiction is invoked by a verified complaint and warrant which appear regular in all respects;² the court is without jurisdiction of the subject matter if there is no duly verified complaint on which a warrant can issue,³ notwithstanding the appearance of accused in court.⁴ Defects in form in the complaint, however, do not affect the jurisdiction of the court.⁵

It has been held that jurisdiction is not divested because of the manner in which the arrest of accused was made,⁶ as, for example, where it was illegal where the offense was not committed in the presence of the officer making the arrest.⁷

Transfer of cause. Where a prosecution for driving while intoxicated is instituted in a court which, because of the punishment permitted by

the statute, is not within the court's jurisdiction, the cause may properly be transferred for trial to the court having jurisdiction of the offense.⁸

§ 632. — Indictment, Information, or Complaint

- a. Requisites and sufficiency
- b. Issues, proof, and variance

a. Requisites and Sufficiency

The indictment, information, or complaint must allege all of the facts necessary to constitute the offense, with such particularity and certainty as to enable the accused to prepare his defense.

The indictment, information, or complaint must allege all the facts necessary to constitute the offense,⁹ and otherwise comply with statutory requirements.¹⁰ The charge must be sufficient to apprise accused of the nature and cause of the accusation¹¹ and the elements of the offense must be set

of the punishment or penalty which the court may assess—Commonwealth v. Harris, 128 S.W.2d 579, 278 Ky. 218—Commonwealth v. Burnett, 118 S.W.2d 558, 274 Ky. 231.

1. N.J.—Grosky v. McGovern, 44 A. 2d 39, 133 N.J.Law 277.
N.Y.—People v. Dennis, 226 N.Y.S. 689, 131 Misc. 62.

2. N.J.—Tomicich v. Norton, 48 A. 2d 752, 134 N.J.Law 411—State v. Filon, 46 A. 2d 61, 134 N.J.Law 113

Formal requirements of complaint see infra § 632.

Complaint must precede warrant
N.J.—Townsley v. State, 175 A. 149, 12 N.J.Misc. 747.

Who may take complaint

(1) Clerk of police justice court was held authorized to take complaint.—Townsley v. State, supra.

(2) Fact that such clerk acted in name of magistrate rather than own name was not prejudicial.—Townsley v. State, supra.

Jurisdiction of person

The making and verification of complaint charging defendant with operating motor vehicle while intoxicated invested the trial court with jurisdiction of the person of defendant.—State v. Filon, 46 A. 2d 61, 134 N.J.Law 113.

3. N.J.—Grosky v. McGovern, 44 A. 2d 39, 133 N.J.Law 277.

Verification by unauthorized person

Complaint not verified by person designated in the statute is not duly verified complaint on which a warrant could issue.—Grosky v. McGovern, supra.

4. N.J.—Grosky v. McGovern, supra.

5. N.J.—State v. Filon, 46 A. 2d 61,

134 N.J.Law 113—Townsley v. State, 175 A. 149, 12 N.J.Misc. 747.

Signing before judge

Fact that complaint was not signed in presence of the judge goes to form and not substance, and hence does not affect court's jurisdiction—Tomicich v. Norton, 48 A. 2d 752, 134 N.J.Law 411.

Signing subsequent to warrant

Fact that warrant for violation of motor vehicle act was issued for service after complaint was signed and sworn to but before clerk taking complaint signed jurat was held not error—Townsley v. State, 175 A. 149, 12 N.J.Misc. 747.

6. N.J.—State v. De Hart, 129 A. 427, 3 N.J.Misc. 71.

7. N.J.—State v. De Hart, supra.
42 C.J. p 1332 note 84.

8. Wis.—Degutes v. State, 207 N.W. 948, 189 Wis. 435.

9. Ga.—Langford v. State, 26 S.E.2d 385, 69 Ga.App. 619.

Me.—State v. Peterson, 4 A. 2d 835, 136 Me. 165.

42 C.J. p 1333 notes 24–37.

Operation as driving

An indictment charging defendant with "operating" a motor vehicle was not deficient in light of statute prohibiting the "driving" of a vehicle, since the words "operate a motor vehicle" include the driving of such vehicle—Ferguson v. State, 23 So. 2d 687, 197 Miss. 825.

Indictment held sufficient

To charge offense or violation of law.

Ala.—Saliba v. State, 186 So. 787, 28 Ala.App. 460.

Ga.—Stewart v. State, 171 S.E. 833, 48 Ga.App. 93.

Me.—State v. Jones, 130 A. 737, 125 Me. 42

Information held sufficient

(1) To charge a violation of statute prohibiting driving while intoxicated.—State v. Pike, 278 S.W. 725, 312 Mo. 27.

(2) To state facts sufficient to constitute public offense.—State v. Mills, 279 P. 759, 52 Nev. 10.

Complaint held sufficient

(1) In general.

Mont.—State v. Schnell, 88 P. 2d 19, 107 Mont. 579, 121 A.L.R. 1082.

N.J.—Janos v. State, by Belli, 198 A. 382, 120 N.J.Law 135—State v. Paerles, 159 A. 701, 10 N.J.Misc. 355—State v. Ray, 133 A. 486, 4 N.J.Misc. 493—Newbury v. Lawrence, 132 A. 306, 4 N.J.Misc. 267, affirmed 134 A. 918, 103 N.J.Law 199.

Tenn.—Daniels v. State, 296 S.W. 20, 155 Tenn. 549.

Tex.—Tijernia v. State, 132 S.W. 2d 120, 137 Tex.Cr. 478.

42 C.J. p 1333 note 24 [a].

(2) As against demurrer.—O'Reilly v. State, 190 So. 305, 28 Ala.App. 589, certiorari dismissed 191 So. 260, 238 Ala. 461.

10. N.Y.—People v. Dennis, 226 N.Y.S. 689, 131 Misc. 62.

Substantial compliance with statute is sufficient.—State v. Andres, 5 So. 2d 7, 148 Fla. 742.

11. Me.—State v. Peterson, 4 A. 2d 835, 136 Me. 165.

N.J.—Diamant v. Novaria, 199 A. 625, 120 N.J.Law 317—Kluczek v. State, 178 A. 632, 115 N.J.Law 105.

W.Va.—State v. Stollings, 37 S.E. 2d

forth with such particularity and certainty as will enable accused to prepare his defense.¹² Accordingly, the charge must allege that accused was intoxicated or under the influence of intoxicating liquor,¹³ and where the prosecution is under a statute penalizing the operation of a motor vehicle while intoxicated, so as to cause injury to person or property, the indictment must allege not only that the motor vehicle was operated by the one charged while he was in an intoxicated condition, but also that such operation resulted in injury to person or property.¹⁴ An allegation that the vehicle involved was a motor vehicle without other-

wise describing it has been held sufficient.¹⁵

Allegation of place. A charge, under a statute prohibiting the operation of a motor vehicle while intoxicated, need not allege where or at what place the unlawful driving occurred,¹⁶ or that it occurred upon a public highway,¹⁷ it being sufficient if it alleges the acts as done within the county.¹⁸ However, where the statute makes the driving upon a public highway or street an element of the offense, the acts must be charged as done upon a public way or street,¹⁹ in a particular county, where necessary to lay the venue,²⁰ although neither the particular road or street²¹ nor the incorporation of

98, 128 W.Va. 483—State v. Keller, 191 S.E. 201, 118 W.Va. 296.
42 C.J. p 1333 note 27.

Indictment held sufficient

Ga.—Stewart v. State, 171 S.E. 833, 48 Ga.App. 93.

Information held sufficient

Ill.—People v. Kobylak, 50 N.E.2d 465, 383 Ill. 432.

Mo.—State v. Pike, 278 S.W. 725, 312 Mo. 27.

Use of word "unlawfully"

Indictment for drunken driving was not void for failure to allege that defendant "unlawfully" drove and operated automobile—Boyd v. State, 292 S.W. 1112, 106 Tex.Cr. 492.

Complaint held sufficient

N.J.—State v. Gavin, 54 A.2d 236, 136 N.J.Law 47.

Second conviction

(1) Indictment charging accused with being a second offender was not required to set out prior conviction with same particularity as it was set out in original complaint or information, it being sufficient to charge that defendant had been convicted of an offense of like character prior to conviction of primary offense charged—Broughton v. State, 188 S.W.2d 393, 148 Tex.Cr. 445.

(2) Statute authorizing more severe punishment for second conviction and not requiring previous violation to be charged in second complaint was not unconstitutional on ground that it deprived accused of right to be informed of accusations against him, since such prosecution was not criminal prosecution and complaint under statute stated nature and cause of accusation with sufficient clarity—State v. Rowe, 181 A. 706, 116 N.J.Law 48, affirmed 5 A.2d 697, 122 N.J.Law 466.

Charge in disjunctive has been held not to vitiate the conviction where the record clearly showed the nature of the charge.—Payne v. Gardner, 147 A. 857, 7 N.J.Misc. 1091

12. N.J.—State v. Gavin, 54 A.2d 236, 136 N.J.Law 47.

Okl.—Gault v. State, 274 P. 687, 42 Okl.Cr. 89.

Misspelling word

Indictment for driving automobile on "Noth 8th Street" in designated city was sufficient to apprise accused that she was charged with driving automobile on "North 8th Street" in such city, and hence indictment was not demurrable—Smith v. State, 92 S.W.2d 1046, 130 Tex.Cr. 117.

13. Ga.—Langford v. State, 26 S.E. 2d 385, 69 Ga.App. 619.

Okl.—Bristow v. State, Cr., 189 P.2d 629.

Intoxicants

Information charging driving while "under the influence of intoxicants" sufficiently charged offense of driving under statute using words while "under the influence of intoxicating liquor."—Sudderth v. State, 282 P. 1109, 45 Okl.Cr. 260.

Degree of intoxication

(1) Indictment charging that accused operated automobile while accused was "in a degree under the influence of intoxicating liquor" was too vague, indefinite, and uncertain to charge an offense—Herwig v. State, 138 S.W.2d 549, 138 Tex.Cr. 645.

(2) Similarly, an indictment charging driving while "to some extent" under influence of intoxicating liquor, was insufficient to charge offense—Wilson v. State, 59 S.W.2d 399, 123 Tex.Cr. 415.

14. La.—State v. Johnson, 106 So. 844, 160 La. 247.
42 C.J. p 1333 note 26.

15. Tex.—Briggs v. State, Cr., 211 S.W.2d 180.

16. Ind.—Hicks v. State, 150 N.E. 759, 197 Ind. 294.

The particular road need not be specified—People v. Knight, 96 P.2d 173, 35 Cal.App.2d 472.

17. Ala.—Sexton v. State, 196 So. 742, 29 Ala.App. 336, certiorari granted on other grounds 196 So. 744, 239 Ala. 287, certiorari denied 196 So. 746, 239 Ala. 662.

Mo.—State v. Pike, 278 S.W. 725, 312 Mo. 27.

Operation causing injury to another

Under a statute making it a felony for one, while intoxicated, to drive a motor vehicle in an unlawful or negligent manner causing injury to another, the information need not charge that the vehicle was driven on a public highway.—People v. Stanley, 57 P.2d 146, 13 Cal.App.2d 559

Operation on highway prohibited

Under a statute prohibiting operation of the vehicle on a highway within the state, an information was not insufficient for failing to allege operation on a public highway.

Cal.—People v. Knight, 96 P.2d 173, 35 Cal.App.2d 472.

Okl.—King v. State, 121 P.2d 1017, 73 Okl.Cr. 404.

18. Ind.—Hicks v. State, 150 N.E. 759, 197 Ind. 294.

Mo.—State v. Pike, 278 S.W. 725, 312 Mo. 27.

19. Cal.—People v. Lewis, 37 P.2d 752, 4 Cal.App.2d Supp. 775.

Ga.—Langford v. State, 26 S.E.2d 385, 69 Ga.App. 619.

Nev.—State ex rel. Callahan v. Second Judicial Dist. Court in and for Washoe County, 18 P.2d 449, 51 Nev. 377.

Tex.—Johnson v. State, 72 S.W.2d 256, 126 Tex.Cr. 432.

42 C.J. p 1334 note 34.

Public square

Indictment for drunken driving on "public street" was not invalid in charging that defendant drove on "public square"—Inness v. State, 293 S.W. 821, 106 Tex.Cr. 524.

Complaints and indictments held sufficient

Ga.—Stewart v. State, 171 S.E. 833, 48 Ga.App. 93.

N.J.—State v. Sakowicz, 125 A. 322, 98 N.J.Law 905.

Tex.—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219.

20. Tex.—Allen v. State, 190 S.W.2d 569, 148 Tex.Cr. 606.

21. Tex.—Hadley v. State, Cr., 205 S.W.2d 374—Blackburn v. State, Cr., 204 S.W.2d 619—Allen v. State,

the municipality²² need be alleged thereunder. Where a statute makes it an offense for any person to drive an automobile upon any street of an incorporated town while intoxicated, no offense is charged unless the act is alleged to have been done in an incorporated town.²³

Where the statute prohibits operation of the vehicle on any way or in any other place, it has been held that the place where the offense was committed must be described with such definiteness and particularity as to enable accused to plead the case in bar on a subsequent prosecution for the same offense,²⁴ but the fact that the place is a public way or public place need not be alleged.²⁵

Language of statute. In conformity with the general rules, discussed in Indictments and Informations § 139, a charge substantially in the language of a statute which creates the offense and states what acts shall constitute a violation thereof is sufficient²⁶ unless the language of the statute is so general as to include cases falling within its literal terms but not within its meaning or spirit.²⁷ Where the statute makes it an offense to drive or operate a motor vehicle while intoxicated or under the influence of intoxicating liquor, drugs, or narcotics, an indictment following the language of the statute, but charging the offense in the dis-

junctive, has been held bad on demurrer, as setting forth several offenses.²⁸ Charging one with being under the influence of intoxicating liquor has been held to be equivalent to charging him with being intoxicated,²⁹ and, conversely, that charging one with being drunk is the equivalent of charging him with being under the influence of intoxicating liquor.³⁰

Recital of statute. It has been held that the statute alleged to be violated need not be specifically mentioned in the complaint.³¹ While accused must not be misled as to the true offense charged by an erroneous reference to the statute,³² a misrecital of the statute which is not misleading does not vitiate the complaint.³³ A complaint which sets forth the original statute alleged to be violated is sufficient, although it does not charge a violation of the statute as amended where such supplementary enactment does not make any substantial change in the nature of the offense.³⁴

Formal requisites. Where so required by statute, the complaint in a prosecution for operating or driving a motor vehicle while intoxicated or under the influence of intoxicating liquor must be verified or sworn to before an officer authorized to administer oaths,³⁵ and it has been held that the

197 S.W.2d 1013, 149 Tex.Cr. 612—*Bedwell v. State*, Cr., 155 S.W.2d 930, 142 Tex.Cr. 599.

Designation of county

Allegation that defendant operated automobile on public highway in named county was sufficient with respect to designation of location of highway.—*Pritchett v. State*, 129 S.W.2d 676, 137 Tex.Cr. 423—*White v. State*, 95 S.W.2d 429, 131 Tex.Cr. 69

22. Tex.—*Blackburn v. State*, Cr., 204 S.W.2d 619—*Parsons v. State*, 194 S.W.2d 560, 149 Tex.Cr. 395—*Carson v. State*, 94 S.W.2d 735, 130 Tex.Cr. 467—*Smith v. State*, 92 S.W.2d 1046, 130 Tex.Cr. 117.

23. Tex.—*Pool v. State*, 278 S.W. 212, 102 Tex.Cr. 451.

24. Me.—*State v. Peterson*, 4 A.2d 835, 136 Me. 165.

Route

A complaint charging that accused operated motor vehicle on "route 3 in Gray" while accused was intoxicated was insufficient to support conviction for operating motor vehicle upon any way while accused was intoxicated, a "route" having been defined as a way used in going from one place to another, but also used to distinguish a course, line of travel or transit.—*State v. Peterson*, supra.

25. Me.—*State v. Cormier*, 43 A.2d 819, 141 Me. 307.

26. Cal.—*People v. Knight*, 96 P.2d 173, 35 Cal.App.2d 472
Fla.—*State v. Andres*, 5 So.2d 7, 148 Fla. 742

Ill.—*People v. Poe*, 26 N.E.2d 415, 304 Ill.App. 601.

Ind.—*Hicks v. State*, 150 N.E. 759, 197 Ind. 294.

Ky.—*Commonwealth v. Black*, 20 S.W.2d 741, 230 Ky. 677.

Mo.—*State v. Hart*, 142 S.W.2d 18—*State v. Beckham*, 142 S.W.2d 13—*State v. Couch*, 124 S.W.2d 1091, 344 Mo. 78—*State v. Revard*, 106 S.W.2d 906, 341 Mo. 170—*State v. Johnson*, 55 S.W.2d 967—*State v. Relfsteck*, 295 S.W. 741, 317 Mo. 268

Words of similar import are sufficient.—*Sudderth v. State*, 282 P. 1109, 45 Okl.Cr. 260—*Gault v. State*, 274 P. 687, 42 Okl.Cr. 89.

27. Me.—*State v. Conant*, 126 A. 838, 124 Me. 198.

28. W.Va.—*State v. Stollings*, 37 S.E.2d 98, 128 W.Va. 483, disapproving *State v. Keller*, 191 S.E. 201, 118 W.Va. 296.

29. Ala.—*Sexton v. State*, 196 So. 742, 29 Ala.App. 336, certiorari granted on other grounds 196 So. 741, 239 Ala. 287, certiorari denied 196 So. 746, 239 Ala. 662—*Saliba v. State*, 186 So. 787, 28 Ala.App. 460
Tex.—*Compton v. State*, 109 S.W.2d

761, 133 Tex.Cr. 211—*Jones v. State*, 104 S.W.2d 871, 132 Tex.Cr. 445—*Muedgen v. State*, 104 S.W.2d 518, 132 Tex.Cr. 397.

No variance

Affidavit filed in common pleas court charging that defendant drove automobile while intoxicated and information filed in circuit court charging defendant, being under influence of intoxicating liquors, drove vehicle on highway were held sufficient and not at variance.—*Holley v. State*, 144 So. 535, 25 Ala.App. 260, certiorari denied 144 So. 537, 225 Ala. 597.

30. Okl.—*Gault v. State*, 274 P. 687, 42 Okl.Cr. 89.

31. N.J.—*Diamant v. Novaria*, 199 A. 625, 120 N.J.Law 317—*Janos v. State*, by Belli, 198 A. 382, 120 N.J.Law 135—*Kluczek v. State*, 178 A. 632, 115 N.J.Law 105.
42 C.J. p 1334 note 37.

32. N.J.—*Kluczek v. State*, supra.

33. N.J.—*Diamant v. Novaria*, 199 A. 625, 120 N.J.Law 317.

34. N.J.—*Kluczek v. State*, 178 A. 632, 115 N.J.Law 105.
42 C.J. p 1334 note 36.

35. Who may verify

Under some statutes the complaint may and must be duly verified by person who has knowledge of alleged offense, or by one of the designated

existence of such fact should be reflected in the jurat.³⁶

Surplusage. Surplusage in the complaint or information does not affect its sufficiency since it may be disregarded.³⁷

Amendments. Under some statutes the court may permit amendments to the charge if they do not charge a new offense or prejudice accused.³⁸

Bill of particulars. If accused believes the charge to be vague or indefinite, it has been held that he may ask for a bill of particulars.³⁹

Waiver of objections. In the absence of a motion to quash or other proper objection, defendant, by pleading guilty, waives defects in a charge which otherwise sufficiently sets forth the offense;⁴⁰ and, by going to trial without pleading surprise or ask-

ing for a postponement, accused has been held to be in no position to complain of a failure of the charge to refer to a prior conviction for the same offense, in a prosecution in which he was convicted as a second offender.⁴¹

b. Issues, Proof, and Variance

All of the essential allegations of the charge must be proved as alleged.

In accordance with general rules discussed in Indictments and Informations §§ 244, 254, in order to sustain a conviction for driving while under the influence of intoxicants, all the essential allegations of the charge must be proved⁴² as alleged.⁴³ Where the charge is driving while under the influence of intoxicants, it is unnecessary to prove that accused was drunk or intoxicated, and proof that

officers on information and belief—State v. Filon, 46 A 2d 61, 134 N J Law 113—Grosky v McGovern, 41 A 2d 39, 133 N J Law 277.

Before whom verified

(1) Under some statutes the complaint may be made to and verified before the magistrate issuing the warrant.—Tomich v Norton, 48 A 2d 752, 134 N J Law 411.

(2) It may also be verified before the clerk—State v. Filon, 46 A 2d 61, 134 N J Law 113—State v. Paerles, 159 A 701, 10 N J Misc. 355.

36. Complaint held fatally defective where jurat did not indicate that it was sworn to before an officer authorized to administer an oath—Midkiff v State, Tex.Cr., 209 S.W.2d 351.

37. Ill.—People v. Poe, 26 NE 2d 415, 304 Ill.App. 601.

N.Y.—People v. Decker, 282 N.Y.S. 176, 156 Misc. 156.

Tenn.—Daniels v. State, 296 S.W. 20, 155 Tenn. 549.

Allegation of possession of intoxicating liquor may be disregarded as surplusage—People v. Poe, 26 NE 2d 415, 304 Ill.App. 601.

Degree of intoxication

Indictment charging defendant with driving while intoxicated and "while in a degree under the influence of intoxicating liquor" was sufficient to charge defendant with having driven while intoxicated, although allegation charging him with having driven while in a degree under the influence of intoxicating liquor might be rejected as surplusage for alleged vagueness—Walker v. State, 116 S.W.2d 1076, 134 Tex.Cr. 500—Morgan v. State, 116 S.W.2d 1079, 134 Tex.Cr. 490.

Erroneous name for offense may be disregarded as surplusage.—State v. Schnell, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 1082.

Statement as to arrest

(1) An allegation that the offense was committed in the presence of the arresting officer is unnecessary, and, if made, constitutes surplusage—People v. Decker, 282 N.Y.S. 176, 156 Misc. 156—People v. Dennis, 230 N.Y.S. 510, 132 Misc. 410.

(2) Accordingly, a statement in the information as to the arrest does not render the information insufficient or defective although untrue—People v. Dennis, supra.

38. N.C.—State v. Hunt, 150 S.E. 353, 197 N.C. 707.
Ohio.—State v. Foster, 10 NE 2d 786, 56 Ohio App. 267.

Amendments held proper

(1) Insertion of words "or other road over which public had right to travel."—State v. Hunt, 150 S.E. 353, 197 N.C. 707.

(2) Interlineation of word "motor" before the word "truck"—State v. Foster, 10 NE 2d 786, 56 Ohio App. 267.

Effect of superseding statute

Where the offense charged was committed after a superseding statute became effective, the original information and an amendment thereto were not objectionable as charging separate offenses under the superseded statute and under the superseding statute.—State v. Hurd, 105 P.2d 59, 5 Wash.2d 308.

39. Ohio.—State v. Foster, 10 NE 2d 786, 56 Ohio App. 267.

40. Ill.—People v. Poe, 26 NE 2d 415, 304 Ill.App. 601.
N.Y.—People v. Decker, 282 N.Y.S. 176, 156 Misc. 156.

Election

Where record as a whole clearly indicated election to charge defendant with specific offense of driving a motor vehicle while intoxicated, alle-

gation in the same count that the defendant had a half pint of liquor in his motor vehicle with seal on bottle broken contrary to statute might be rejected as surplusage where no motion to quash was made and defendant pleaded guilty.—People v. Poe, 26 NE 2d 415, 304 Ill.App. 601.

41. N.J.—State v. Rowe, 181 A. 706, 116 N.J. Law 48, affirmed 5 A.2d 697, 122 N.J. Law 466.

42. Cal.—People v. Dawes, 98 P.2d 787, 37 Cal.App.2d 44—People v. Levens, 82 P.2d 698, 28 Cal.App.2d 455.

Ga.—Langford v. State, 26 S.E.2d 385, 69 Ga.App. 619.

Tex.—Pool v. State, 278 S.W. 212, 102 Tex.Cr. 451.

43. Ga.—Hall v. State, 198 S.E. 713, 58 Ga.App. 398.

Tex.—Mercer v. State, 157 S.W.2d 919, 143 Tex.Cr. 196.

Particular street or highway

(1) Evidence that accused was seen driving on certain highway on date alleged in indictment was not error, notwithstanding the indictment did not allege name or number of the highway—Mercer v. State, supra.

(2) Under indictment alleging operation of automobile while intoxicated on two streets, evidence need not show offense occurred on both streets.—Noble v. State, 18 S.W.2d 619, 112 Tex.Cr. 676.

Street as public highway

Proof that automobile was driven on public street in named city in such county was held not a variance from an allegation that automobile was driven on a public highway in the county.—White v. State, 95 S.W.2d 429, 131 Tex.Cr. 69—Blackman v. State, Tex.Cr., 20 S.W.2d 783.

he was under the influence of intoxicants is sufficient;⁴⁴ under such an allegation, however, it may be proved that accused was drunk.⁴⁵ If the charge contains unnecessary descriptive averments as to the place where the offense was committed the state must prove them as alleged.⁴⁶ So, where the offense is alleged to have been committed on a public highway, the state must prove such fact although such allegation was unnecessary under the statute.⁴⁷ Similarly, where the information contains an unnecessary description of the vehicle it must be proved as described.⁴⁸

§ 633. — Evidence

- a. In general
- b. Admissibility
- c. Weight and sufficiency

a. In General

The burden of proving every element of the offense of driving a motor vehicle while intoxicated is on the prosecution.

A statute providing that the having of intoxi-

cating liquor on or about his person or in his vehicle by the driver of a motor vehicle is prima facie evidence of a violation of the statute has been held to create an arbitrary and unreasonable presumption.⁴⁹

In accordance with the rules relating to the burden of proof in criminal prosecutions generally, the burden of proving every element of the offense of driving a motor vehicle while intoxicated is on the prosecution.⁵⁰ However, it is not necessary to prove any specific degree of intoxication as this is a question of fact to be determined from all the circumstances of the case.⁵¹ So, in a prosecution for driving while under the influence of intoxicating liquor, the state need not prove that accused was drunk,⁵² or that the intoxication had reached a stage where it would interfere with the operation of the vehicle,⁵³ nor is the state required to prove that accused had taken any particular intoxicating beverage.⁵⁴

Accused is not required to take the stand or produce other witnesses but may stand on the rec-

44. Ga.—Hall v. State, 198 S.E. 713, 58 Ga.App. 398—Lanier v. State, 183 S.E. 678 52 Ga.App. 459—Austin v. State, 170 S.E. 86, 47 Ga.App. 191—Moye v. State, 169 S.E. 59, 46 Ga.App. 727—Wallace v. State, 162 S.E. 162, 44 Ga.App. 571—Chapman v. State, 151 S.E. 410 40 Ga.App. 725—Hart v. State, 105 S.E. 383, 26 Ga.App. 64.

45. Tex.—Mercer v. State, 157 S.W. 2d 919, 143 Tex.Cr. 196.

46. Tex.—Brunson v. State, Cr., 211 S.W.2d 755—Thomas v. State, Cr., 210 S.W.2d 826—Blackburn v. State, Cr., 204 S.W.2d 619.

Name or number of highway

(1) If the state in an indictment charging the driving of a motor vehicle on a public highway by a motorist while intoxicated alleges the name or number of the highway or street the state must prove the name or number as alleged, although the indictment would not have been defective had it failed to allege the name or number of the highway—Thomas v. State, Tex.Cr., 210 S.W.2d 826—Stasney v. State, Tex.Cr., 208 S.W.2d 894—Hadley v. State, Tex.Cr., 205 S.W.2d 374—Mercer v. State, 157 S.W.2d 919, 143 Tex.Cr. 196—Bedwell v. State, 165 S.W.2d 930, 142 Tex.Cr. 599—Malone v. State, 117 S.W.2d 779, 135 Tex.Cr. 169—Spencer v. State, 42 S.W.2d 259, 118 Tex.Cr. 336.

(2) Indictment charging defendant with driving car while intoxicated over "Dixie-Overland Highway" was held not sustained by proof that he drove car over "Dixie Highway."—Spencer v. State, supra.

Incorporated city

(1) In prosecution for driving motor vehicle in incorporated city while intoxicated, state must prove that city was incorporated—Hollingsworth v. State, 56 S.W.2d 869, 122 Tex.Cr. 545—Burleson v. State, 47 S.W.2d 845, 120 Tex.Cr. 104—Akin v. State, 23 S.W.2d 379, 114 Tex.Cr. 343.

(2) Variance between indictment alleging driving of automobile while intoxicated in "city," and proof showing offense was committed within incorporated town was held not fatal—Noble v. State, 18 S.W.2d 619, 112 Tex.Cr. 676.

47. Ala.—Sexton v. State, 196 So. 742, 29 Ala.App. 336, certiorari denied 196 So. 746, 239 Ala. 662.

48. Tex.—Brunson v. State, Cr., 211 S.W.2d 755—Briggs v. State, Cr., 211 S.W.2d 180.

49. Okl.—Simpkins v. State, 249 P. 168, 35 Okl.Cr. 143.

Possession of liquor as prima facie evidence of violation of liquor law see Intoxicating Liquors § 339 a (2).

Presumptions in criminal prosecutions see Criminal Law §§ 579-599.

50. Iowa.—State v. Hiatt, 1 N.W.2d 664, 231 Iowa 499—State v. Hamer, 274 N.W. 885, 223 Iowa 1129.

Ohio—State v. Hainbuch, 57 N.E.2d 940, 74 Ohio App. 193.

Tex.—Brunson v. State, Cr., 211 S.W.2d 755—Snider v. State, 165 S.W.2d 904, 145 Tex.Cr. 59—Burleson v. State, 47 S.W.2d 845, 120 Tex.Cr. 104.

42 C.J. p 1334 note 41.

Voluntary intoxication

Prosecution has burden of proving that defendant's intoxication was caused by voluntary use of intoxicating liquor.—Commonwealth v. Dale, 163 N.E. 158, 264 Mass. 535.

Place of offense

Burden was on state to prove that automobile was driven upon highway described in indictment—Stasney v. State, Tex.Cr., 208 S.W.2d 894—Blackburn v. State, Tex.Cr., 204 S.W.2d 619—Walker v. State, 125 S.W.2d 571, 136 Tex.Cr. 368.

Public danger

State is not obligated to prove that actual danger existed at time of arrest of driver—State v. Cormier, 43 A.2d 819, 141 Me. 307.

51. Cal.—People v. Ekstromer, 235 P. 69, 71 Cal.App. 239.

52. Ga.—Austin v. State, 170 S.E. 86, 47 Ga.App. 191—Hart v. State, 105 S.E. 383, 26 Ga.App. 64.

Ind.—Klaser v. State, 166 N.E. 21, 89 Ind.App. 561.

Kan.—State v. Hayden, 271 P. 291, 126 Kan. 799.

Pa.—Commonwealth v. Long, 198 A. 474, 131 Pa.Super. 28.

53. Ala.—McMurry v. State, 184 So. 42, 28 Ala.App. 253, certiorari denied 184 So. 43, 236 Ala. 589—Holley v. State, 144 So. 535, 25 Ala.App. 260, certiorari denied 144 So. 537, 225 Ala. 597.

Va.—Owens v. Commonwealth, 136 S.E. 765, 147 Va. 624.

54. Ala.—James v. State, 146 So. 424, 25 Ala.App. 335.

ord and demand an acquittal if he believes the state has failed to make out a case against him by the evidence.⁵⁵ If he takes the stand, however, and introduces other witnesses, he thereby authorizes the court to determine the sufficiency of the proof from the whole case.⁵⁶

b. Admissibility

Competent evidence which tends to prove or disprove the elements of the offense charged is admissible in prosecutions for driving a motor vehicle while under the influence of intoxicants.

In conformity with the general rules govern-

ing the admissibility of evidence in criminal cases, any competent evidence is admissible on the part of the prosecution which tends to prove any element of the offense charged.⁵⁷ Thus, on the issue of intoxication, it is proper to show the facts and circumstances connected with the offense,⁵⁸ such as the appearance and conduct of accused at the time he was driving the automobile,⁵⁹ the manner and result of his driving,⁶⁰ and the use or possession of intoxicating liquor by accused or by others with him in the car.⁶¹ However, evidence on the issue of intoxication must not be too re-

55. Ind.—Hunt v. State, 23 N.E.2d 681, 216 Ind. 171.

56. Ind.—Hunt v. State, *supra*.

57. Ark.—Canard v. State, 298 S.W. 24, 174 Ark. 918.

Cal.—People v. Leutholtz, 283 P. 292, 102 Cal.App. 493.

Tex.—Allen v. State, 197 S.W.2d 1013, 149 Tex.Cr. 612—West v. State, 132 S.W.2d 872, 137 Tex.Cr. 554.

Vt.—State v. Storrs, 163 A. 560, 105 Vt. 180.

42 C.J. p 1334 notes 44–50.

Aider and abettor

In prosecution for violating statute by aiding and abetting third person to commit the offense, evidence that third person was an agent for partnership of which accused was a member, and was using accused's automobile under direction of manager of the business and not under direction of accused who went along with third person at his invitation merely for the ride, was admissible.—State v. Storms, 10 N.W.2d 53, 233 Iowa 655

Public nature of road

(1) Street, road, or highway may be shown to be "public," that is, used or open for use and traffic by public, by oral testimony of persons reasonably familiar with such use in trial for driving automobile thereon while intoxicated.—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219.

(2) Showing of absence of court order establishing road on which accused was driving while intoxicated rendered admissible evidence showing public usage.—Johnson v. State, 31 S.W.2d 1084, 116 Tex.Cr. 185.

(3) Time or manner of dedication, title to soil, and location of public highway, private rights, and privileges are ordinarily immaterial in trial for driving automobile while intoxicated on highway shown by uncontradicted testimony to be open or used for traffic by public generally.—Nichols v. State, *supra*.

58. Ala.—Reynolds v. State, 134 So. 815, 24 Ala.App. 249, certiorari denied 134 So. 817, 223 Ala. 130.

Mont.—State v. Schnell, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 1082.

N.Y.—People v. Dennis, 230 N.Y.S. 510, 132 Misc. 410

Okl.—Drew v. State, 112 P.2d 429, 71 Okl.Cr. 415.

Tex.—Allen v. State, Civ.App., 197 S.W.2d 1013—Stevens v. State, 119 S.W.2d 1050, 135 Tex.Cr. 335.

Vt.—State v. Storrs, 163 A. 560, 105 Vt. 180.

42 C.J. p 1334 note 45.

59. Cal.—People v. Libhart, 249 P. 211, 79 Cal.App. 291.

Minn.—State v. Murray, 26 N.W.2d 364, 223 Minn. 297—State v. Reilly, 238 N.W. 492, 184 Minn. 266

Mo.—State v. Griffin, 6 S.W.2d 866, 320 Mo. 288.

Mont.—State v. Schnell, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 1082

Tex.—Conrad v. State, Cr. 209 S.W.2d 355—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219—Stewart v. State, 299 S.W. 646, 108 Tex.Cr. 199—Riddle v. State, 298 S.W. 580, 107 Tex.Cr. 571.

42 C.J. p 1334 note 46.

Conduct on another street

Where accused is charged with operating the vehicle on a named street, evidence as to accused's conduct on another street is admissible as a part of the same transaction and continuous series of events leading up to his operation of the automobile on the named street.—Sale v. State, 186 S.E. 198, 53 Ga.App. 489.

Medical evidence

Act providing that accused, charged with operating automobile while intoxicated, may be examined by own physician, and should be so informed, did not by implication make inadmissible state's medical evidence for not informing.—State v. Cantara, 148 A. 415, 50 R.I. 440.

60. Tex.—Allen v. State, 197 S.W.2d 1013, 149 Tex.Cr. 612—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219.

42 C.J. p 1334 note 47.

Accident

Mont.—State v. Schnell, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 579.

Tex.—Thomas v. State, 3 S.W.2d 807, 109 Tex.Cr. 207.

Damage to another

Admission of evidence that accused "damaged" another's car was held error in prosecution for operating motor vehicle while intoxicated.—Phillips v. State, 145 So. 169, 25 Ala.App. 286.

Speed

Evidence as to speed at which defendant was driving when arrested was held admissible.

Ariz.—Hasten v. State, 280 P. 670, 35 Ariz. 427.

Pa.—Commonwealth v. Long, 198 A. 474, 131 Pa.Super. 28.

61. Ga.—Corpus Juris cited in Cavender v. State, 169 S.E. 253, 254, 46 Ga.App. 782.

N.M.—State v. Tinsley, 283 P. 907, 34 N.M. 458

N.D.—State v. Rickel, 286 N.W. 895, 69 ND 329.

42 C.J. p 1334 note 48.

Alcoholic breath

(1) Evidence that accused's breath smelled of whisky is admissible.—State v. Fitzpatrick, Mo.App., 267 S.W. 905.

(2) Fact that accused's breath smelled of alcohol, although the type of liquor could not be identified, was held admissible.—Johnson v. State, 147 S.W.2d 811, 141 Tex.Cr. 175.

Evidence held admissible

(1) Fact that bottle of liquor was found near place of accident.

Cal.—People v. Skoff, 21 P.2d 118, 131 Cal.App. 235.

Iowa.—State v. Jenkins, 212 N.W. 475, 203 Iowa 251.

(2) Alcoholic content of wine as shown by laboratory report.—Halloway v. State, 175 S.W.2d 258, 146 Tex.Cr. 353.

(3) Specimen of accused's blood, properly identified and voluntarily given soon after his arrest.—State v. Werling, 13 N.W.2d 318, 234 Iowa 1109.

(4) Other evidence see 42 C.J. p 1334 note 48 [a].

mote in point of time or too speculative.⁶² Where the prosecution is for injury to property while operating an automobile in an intoxicated condition, a statement as to who the occupants of the injured car were, and whether they were injured, is admissible notwithstanding accused is not charged with injury to person,⁶³ since the injury of such people was so intimately connected with defendant's criminal act as to form part of it.⁶⁴

On the part of accused, any competent evidence is admissible which tends to prove his matters of defense or disprove any element of the offense.⁶⁵ Thus, where intoxication is claimed to have been the cause of certain conduct of accused, it is competent to show like occurrences on other occasions which indicate that the cause for such conduct was other than intoxication, as, for example, insanity or habitual eccentricity.⁶⁶ Evidence of accused so remote in point of time as to confuse rather than illuminate should not be admitted.⁶⁷

62. Tex.—Garrison v. State, 114 S. W.2d 557, 131 Tex.Cr. 159.

Before and after

Intoxication may be proved to have existed both before and after alleged offense

Ky.—Vanhoose v. Commonwealth, 98 S.W.2d 49, 266 Ky. 37.

Okl.—George Little Star v. State, 29 P.2d 995, 55 Okl.Cr. 294.

Intoxication before collision

In prosecution for driving while intoxicated and inflicting bodily injury in collision, evidence that deceased was intoxicated several hours before collision was properly excluded as too remote in time and in view of accused's failure to offer to show causal connection between such intoxication and collision—People v. Trantham, 74 P.2d 851, 24 Cal.App.2d 177.

Subsequent intoxication

(1) Evidence showing that accused was seen intoxicated the following day is inadmissible where it is not established that accused was continuously intoxicated from time of the driving until the following afternoon.—State v. Kelly, 40 S.E.2d 454, 227 N.C. 62.

(2) Evidence that some time after accident accused, charged with operating motor vehicle while intoxicated, appeared to be drunk, was held inadmissible, in absence of proof of nonaccess to liquor after collision—Phillips v. State, 145 So. 169, 25 Ala. App. 286.

(3) Evidence of subsequent intoxication was held admissible, however, where there was proof that accused consumed no liquor after the accident.—State v. Rickel, 286 N.W. 895, 69 N.D. 329.

(4) Evidence of subsequent intoxication has also been held admissible, the remoteness in time going to the weight rather than the admissibility of the evidence—King v. State, 113 S.W.2d 181, 133 Tex.Cr. 496—Jones v. State, 92 S.W.2d 246, 130 Tex.Cr. 102.

Method of driving

In prosecution for driving an automobile while intoxicated and by accused's negligence and reckless conduct causing the death of another, testimony as to accused's method of driving automobile shortly before accident was admissible as evidence of negligence, recklessness and want of care at time of accident.—Patton v. People, 168 P.2d 266, 114 Colo. 534.

63. La.—State v. Blackwood, 110 So. 417, 162 La. 266.

64. La.—State v. Blackwood, supra.

65. Cal.—People v. Pugh, 173 P.2d 320, 76 Cal.App.2d 598.

Okl.—Drew v. State, 112 P.2d 429, 71 Okl.Cr. 415.

42 C.J. p 1335 note 51.

Careful driving

Evidence that defendant's automobile was being driven in cautious, prudent, and orderly manner before it was stopped was held admissible—People v. Fellows, 34 P.2d 177, 139 Cal.App. 337.

Evidence of collateral matters held not admissible.—State v. Bosseau, 13 P.2d 53, 168 Wash. 669.

Cost of repair

Proof that defendant had actually paid prosecuting witness more than it cost the witness to fix up his automobile after a collision with defendant's automobile was properly re-

Evidence as to gravity of offense. Under a statute permitting a wide range in punishment and authorizing the jury to make the punishment fit the crime, it is proper to show all the facts and circumstances connected with the crime charged in order that the jury may consider such matters in assessing the appropriate punishment.⁶⁸ For this purpose it is proper and admissible in evidence to show that, as a result of accused's driving while intoxicated, a passenger in his car was killed.⁶⁹

c. Weight and Sufficiency

As in other criminal prosecutions, the guilt of the accused must be established beyond a reasonable doubt.

In accordance with the rules pertaining to the weight and sufficiency of the evidence to support a conviction in criminal cases generally, the guilt of one accused of the offense of driving a motor vehicle while intoxicated must be established beyond a reasonable doubt,⁷⁰ and evidence giving

fused—State v. Rickel, 286 N.W. 895, 69 N.D. 329.

Negligence of another

Negligence of driver of other automobile involved in collision was held immaterial on question whether accused drove automobile while intoxicated—Holley v. State, 144 So. 535, 25 Ala.App. 260, certiorari denied 144 So. 537, 225 Ala. 597.

Nonintoxicating character of liquor used by accused may be proved to show that he was not intoxicated—Drew v. State, 112 P.2d 429, 71 Okl.Cr. 415.

Cross examination

Refusal to permit accused in trial for driving automobile while intoxicated to ask deputy sheriff, who arrested her, if it was not his custom to testify that accused was drunk, held not error.—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219.

66. Cal.—People v. Owen, 251 P. 686, 80 Cal.App. 248.

42 C.J. p 1335 note 52.

67. Colo.—Patton v. People, 168 P. 2d 266, 114 Colo. 534.

Subsequent soberness

Excluding testimony whether accused was sober several hours after arrest was not an abuse of discretion.—State v. McGarr, R.L., 147 A. 876.

68. Mo.—State v. Hatcher, 259 S.W. 467, 303 Mo. 13.

69. Mo.—State v. Hatcher, supra.

70. Conn.—State v. Kreske, 36 A.2d 389, 130 Conn. 558.

Ga.—Hall v. State, 198 S.E. 713, 58 Ga.App. 398—Lanier v. State, 183 S.E. 658, 52 Ga.App. 459—Austin v. State, 170 S.E. 86, 47 Ga.App. 191—Moye v. State, 169 S.E. 59, 46 Ga.App. 727—Wallace v. State, 162

S.E. 162, 44 Ga.App. 571—Chapman v. State, 151 S.E. 410, 40 Ga.App. 725—Hart v. State, 105 S.E. 383, 26 Ga.App. 383.

Ind.—Hunt v. State, 23 N.E.2d 681, 216 Ind. 171.

Iowa.—State v. Boyle, 297 N.W. 312, 230 Iowa 305.

Mo.—State v. Grove, 204 S.W.2d 757.

N.Y.—People v. Lyon, 70 N.Y.S.2d 381, 272 App.Div. 830—People v. Kelly, 68 N.Y.S.2d 825, 271 App. Div. 1027—People v. Storey, 15 N.Y.S.2d 939, 258 App.Div. 815.

N.C.—State v. Carroll, 37 S.E.2d 688, 226 N.C. 237.

Ohio.—State v. Hainbuch, 57 N.E.2d 940, 74 Ohio App. 193.

Pa.—Commonwealth v. McDermott, Quar Sess., 44 Dauph Co. 156—Commonwealth v. Newcomer, Com.Pl., 53 York Leg.Rec. 41.

W.Va.—State v. Mininni, 133 S.E. 320, 101 W.Va. 611.

Self-contradictory statements cannot sustain a conviction—State v. Hamer, 271 N.W. 885, 223 Iowa 1129.

Aider and abettor

Evidence was held to sustain conviction on theory that accused aided and abetted intoxicated third person to commit the offense by at least impliedly inviting third person to occupy driver's seat of accused's automobile while the two persons were engaged in a joint venture—State v. Storms, 10 N.W.2d 53, 233 Iowa 655.

Corpus delicti

(1) It has been held that the corpus delicti is established by proof beyond a reasonable doubt, that a motor vehicle was operated upon a public highway of the state, and that the operator thereof was at the time under the influence of intoxicating liquor—Hunt v. State, 23 N.E.2d 681, 216 Ind. 171.

(2) Evidence held sufficient to establish corpus delicti.

Ind.—Hunt v. State, 23 N.E.2d 681, 216 Ind. 171.

Pa.—Commonwealth v. Coleman, 56 Pa. Dist. & Co. 170, 63 Montg. Co. 96.

Prior sobriety

Evidence that accused was sober when last seen prior to arrest was held not to show that he was not under the influence of intoxicating liquor upon the public streets he traveled—State v. Duguid, 72 P.2d 435, 50 Ariz. 276.

Evidence held sufficient

(1) Generally.

Cal.—People v. Graybehl, 153 P.2d 771, 67 Cal.App.2d 210—People v. Berner, 82 P.2d 617, 28 Cal.App.2d 392.

Ga.—Lankford v. State, 27 S.E.2d 349, 70 Ga.App. 76.

Tex.—Lamkin v. State, 123 S.W.2d 662, 136 Tex.Cr. 99—Thomason v. State, 72 S.W.2d 598, 126 Tex.Cr. 554.

(2) To establish prima facie case of driving while intoxicated—State v. Hiatt, 1 N.W.2d 664, 231 Iowa 499.

(3) To sustain or warrant conviction of driving automobile while intoxicated.

Ala.—Heal v. State, App., 25 So.2d 183—Oliver v. State, App., 25 So.2d 183—Pierson v. State, 18 So.2d 578, 31 Ala.App. 452, certiorari denied 18 So.2d 580, 245 Ala. 683—Butler v. State, 17 So.2d 429, 31 Ala.App. 354—Chambers v. State, 15 So.2d 743, second case, 31 Ala.App. 269, certiorari denied 15 So.2d 744, 245 Ala. 113.

Ark.—Budd v. State, 131 S.W.2d 933, 198 Ark. 869.

Cal.—People v. Sanders, 83 P.2d 720, 28 Cal.App.2d 746—People v. Skoff, 21 P.2d 118, 131 Cal.App. 235—People v. Thompson, 12 P.2d 81, 123 Cal.App. 726—People v. Martin, 300 P. 108, 114 Cal.App. 337—People v. Dryden, 245 P. 436, 76 Cal.App. 525.

Colo.—Patton v. People, 168 P.2d 266, 114 Colo. 534.

D.C.—Price v. District of Columbia, Mun.App., 54 A.2d 142.

Ga.—Durham v. State, 144 S.E. 109, 166 Ga. 561—Jordan v. State, 16 S.E.2d 444, 65 Ga.App. 740—Boyd v. State, 10 S.E.2d 271, 63 Ga.App. 84—Daniel v. State, 1 S.E.2d 229, 59 Ga.App. 454—James v. State, 164 S.E. 104, 45 Ga.App. 228—Lovell v. State, 156 S.E. 704, 42 Ga.App. 410—Knight v. State, 146 S.E. 323, 39 Ga.App. 138—Brown v. State, 139 S.E. 112, 37 Ga.App. 112—Brown v. State, 135 S.E. 765, 36 Ga.App. 84.

Idaho.—State v. Scrivner, 162 P.2d 897, 66 Idaho 498.

Ill.—People v. Evans, 7 N.E.2d 912, 290 Ill.App. 75.

Ind.—Inman v. State, 62 N.E.2d 627, 223 Ind. 500.

Iowa.—State v. Benson, 300 N.W. 275, 230 Iowa 1168—State v. Carlson, 276 N.W. 770, 224 Iowa 1263—State v. Sharpshair, 245 N.W. 350, 215 Iowa 399—State v. Dillard, 221 N.W. 817, 207 Iowa 831.

Kan.—State v. Sarver, 4 P.2d 440, 134 Kan. 98.

Mass.—Commonwealth v. Sabeau, 176 N.E. 523, 275 Mass. 546.

Minn.—State v. Traver, 269 N.W. 393, 198 Minn. 237.

Mo.—State v. Grove, 204 S.W.2d 757—State v. Weston, 202 S.W.2d 50—State v. Wester, 18 S.W.2d 28—State v. Caruthers, 17 S.W.2d 940—State v. Griffin, 6 S.W.2d 866, 320 Mo. 288—State v. Reifsteck, 295 S.W. 741, 317 Mo. 268.

Neb.—Haffke v. State, 262 N.W. 599, 129 Neb. 713—Smith v. State, 247 N.W. 421, 124 Neb. 587—Rhodes v. State, 245 N.W. 402, 124 Neb. 147.

N.Y.—People v. Grover, 21 N.Y.S.2d 204, 259 App.Div. 1104.

N.D.—State v. Hopperstad, 283 N.W. 785, 69 N.D. 65.

Okla.—Kennedy v. State, 137 P.2d 244, 76 Okl.Cr. 256—Pack v. State, 18 P.2d 284, 54 Okl.Cr. 234—Curry v. State, 17 P.2d 521, 54 Okl.Cr. 225—Harragard v. State, 3 P.2d 749, 52 Okl.Cr. 41—Lawson v. State, 298 P. 896, 50 Okl.Cr. 443—Lee v. State, 293 P. 1114, 49 Okl.Cr. 258—Davis v. State, 290 P. 347, 48 Okl.Cr. 186—Logan v. State, 274 P. 39, 42 Okl.Cr. 1—Clark v. State, 256 P. 941, 37 Okl.Cr. 89.

Tenn.—Christian v. State, 197 S.W.2d 797, 181 Tenn. 163—Jones v. State, 196 S.W.2d 491, 184 Tenn. 128—Smith v. State, 21 S.W.2d 400, 159 Tenn. 674—Crossway v. State, 8 S.W.2d 486, 157 Tenn. 363—Daniels v. State, 296 S.W. 20, 155 Tenn. 549.

Tex.—Brunson v. State, Cr., 211 S.W.2d 755—Conrad v. State, Cr., 209 S.W.2d 355—Moore v. State, Cr., 209 S.W.2d 192—Moore v. State, Cr., 206 S.W.2d 600—Blackburn v. State, Cr., 204 S.W.2d 619—Winkley v. State, Cr., 202 S.W.2d 676—Singleton v. State, Cr., 200 S.W.2d 1015—Haynes v. State, Cr., 200 S.W.2d 824—Sharp v. State, Cr., 199 S.W.2d 159—Parsons v. State, 194 S.W.2d 560, 149 Tex.Cr. 395—Crutchfield v. State, 187 S.W.2d 911, 148 Tex.Cr. 399—Goodman v. State, 187 S.W.2d 224, 148 Tex.Cr. 353—Williams v. State, 181 S.W.2d 280, 147 Tex.Cr. 446—Wolfe v. State, 178 S.W.2d 274, 147 Tex.Cr. 62—Johnson v. State, 170 S.W.2d 770, 514 Tex.Cr. 603—Randolph v. State, 169 S.W.2d 178, 145 Tex.Cr. 526—Doyle v. State, 165 S.W.2d 906, 145 Tex.Cr. 165—Jarmon v. State, 162 S.W.2d 111, 144 Tex.Cr. 267—Short v. State, 157 S.W.2d 897, 143 Tex.Cr. 217—Bedwell v. State, 155 S.W.2d 930, 142 Tex.Cr. 599—Zachery v. State, 154 S.W.2d 489, 142 Tex.Cr. 464—Brooks v. State, 139 S.W.2d 805, 139 Tex.Cr. 193—Smith v. State, 134 S.W.2d 269, 138 Tex.Cr. 159—Kennedy v. State, 127 S.W.2d 895, 137 Tex.Cr. 85—Kessler v. State, 125 S.W.2d 308, 136 Tex.Cr. 340—Roberson v. State, 124 S.W.2d 365, 136 Tex.Cr. 186—Lamkin v. State, 123 S.W.2d 662, 136 Tex.Cr. 99—Irvin v. State, 121 S.W.2d 370, 135 Tex.Cr. 569—Garrison v. State, 114 S.W.2d 557, 134 Tex.Cr. 159—Huse v. State, 109 S.W.2d 184, 133 Tex.Cr. 135—Hughes v. State, 106 S.W.2d 698, 132 Tex.Cr. 639—Turner v. State, 106 S.W.2d 303, 132 Tex.Cr. 587—Collins v. State, 101 S.W.2d 860, 132 Tex.Cr. 327—Gage v. State, 102 S.W.2d 216, 132 Tex.Cr. 97—Scott v. State, 95 S.W.2d 396, 130 Tex.Cr. 635—Thompson v. State, 51 S.W.2d 314, 121 Tex.Cr. 234—Drady v. State, 44 S.W.2d 373, 119 Tex.Cr. 178—Spears v. State, Cr., 20 S.W.2d 1063—Wimberly v. State, 6 S.W.2d 120, 109 Tex.Cr. 581.

—Lockhart v. State, 1 S.W.2d 894, 108 Tex.Cr. 597—Boyd v. State, 292 S.W. 112, 106 Tex.Cr. 492.
 Va.—Blakey v. Commonwealth, 29 S.E.2d 863, 182 Va. 614.
 W.Va.—State v. McMillion, 32 S.E.2d 625, 127 W.Va. 197—State v. Magdich, 143 S.E. 348, 105 W.Va. 585.
 42 C.J. p 1336 note 76 [a] (1).

(4) To sustain conviction for drunken driving—Parsons v. State, 94 P.2d 955, 67 Okl.Cr. 437.

(5) To support conviction of driving while in an intoxicated condition. Fla.—Bartels v. State, 24 So.2d 40, 156 Fla. 535.

Ga.—Robinson v. State, 45 S.E.2d 717, 76 Ga.App. 313, followed in 45 S.E.2d 718.

Iowa—State v. Morkrid, 288 N.W. 412.

Mo.—State v. Bryant, 205 S.W.2d 732, 356 Mo. 1223—State v. Revard, 106 S.W.2d 906, 341 Mo. 170.

(6) To sustain or warrant conviction for operating automobile while under influence of intoxicating liquor. Ala.—Pickett v. State, 9 So.2d 31, 30 Ala.App. 543—O'Reilly v. State, 190 So. 305, 28 Ala.App. 589, certiorari dismissed 191 So. 260, 238 Ala. 461—Davis v. State, 176 So. 379, 27 Ala.App. 551, certiorari denied, Sup., 176 So. 382, 234 Ala. 625.
 Ariz.—Weston v. State, 65 P.2d 652, 49 Ariz. 183.

Cal.—People v. McIntire, 1 P.2d 443, 213 Cal. 50—People v. Smith, 103 P.2d 199, 39 Cal.App.2d 277—People v. Ray, 268 P. 382, 92 Cal.App. 417.

Ga.—Harris v. State, 35 S.E.2d 17, 72 Ga.App. 716—Grier v. State, 34 S.E.2d 642, 72 Ga.App. 633—Gilleland v. State, 32 S.E.2d 916, 72 Ga.App. 61—Langford v. State, 26 S.E.2d 385, 69 Ga.App. 619—Johnson v. State, 25 S.E.2d 584, 69 Ga.App. 377—Newmans v. State, 16 S.E.2d 87, 65 Ga.App. 288—Stephens v. State, 195 S.E. 294, 57 Ga.App. 320—Jackson v. State, 192 S.E. 642, 56 Ga.App. 355—Parker v. State, 185 S.E. 598, 53 Ga.App. 344—Locklear v. State, 182 S.E. 533, 52 Ga.App. 86—Cavender v. State, 169 S.E. 253, 46 Ga.App. 782—Moye v. State, 169 S.E. 59, 46 Ga.App. 727.

Ind.—Hunt v. State, 23 N.E.2d 681, 216 Ind. 171—Fiedler v. State, 18 N.E.2d 384, 215 Ind. 53—Blood v. State, 16 N.E.2d 874, 214 Ind. 578.

Me.—State v. Jalbert, 53 A.2d 336.

Minn.—State v. Murray, 26 N.W.2d 364, 223 Minn. 297—State v. Weeks, 12 N.W.2d 493, 216 Minn. 279—City of Duluth v. La Fleaur, 272 N.W. 389, 199 Minn. 470—State v. Winberg, 264 N.W. 578, 186 Minn. 135—State v. Reilly, 238 N.W. 492, 184 Minn. 266—State v. Graham, 222 N.W. 909, 176 Minn. 164.

Miss.—Ferguson v. State, 23 So.2d 687, 198 Miss. 828.

Mont.—State v. Schnell, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 1082.

N.J.—State v. Myers, 55 A.2d 661, 136 N.J.Law 288—State v. Gavin, 54 A.2d 236, 136 N.J.Law 47—State v. Rowe, 5 A.2d 697, 122 N.J.Law 466—State v. Von Geldern, 162 A. 183, 10 N.J.Misc. 1045.

N.D.—State v. Myers, 19 N.W.2d 17, 73 N.D. 687—State v. Rickel, 286 N.W. 895, 69 N.D. 329.

Ohio.—State v. Nutt, 65 N.E.2d 675, 78 Ohio App. 336.

Okl.—Rheurark v. State, Cr., 193 P.2d 621—Skaggs v. State, Cr., 184 P.2d 121—Rule v. State, Cr., 182 P.2d 525—Griffin v. State, Cr., 180 P.2d 844—Callicott v. State, Cr., 176 P.2d 837—Smith v. State, 171 P.2d 268, 82 Okl.Cr. 412—Scott v. State, 158 P.2d 728, 80 Okl.Cr. 259—Hancock v. State, 156 P.2d 155, 80 Okl.Cr. 1—Mack v. State, 154 P.2d 103, 79 Okl.Cr. 355—Morris v. State, 153 P.2d 829, 79 Okl.Cr. 244—Coulson v. State, 146 P.2d 847, 78 Okl.Cr. 233—Heald v. State, 145 P.2d 206, 78 Okl.Cr. 130—Grooms v. State, 142 P.2d 862, 77 Okl.Cr. 448—Bilbrey v. State, 135 P.2d 999, 76 Okl.Cr. 249—White v. State, 134 P.2d 1039, 76 Okl.Cr. 147—King v. State, 121 P.2d 1017, 73 Okl.Cr. 404—Ford v. State, 121 P.2d 320, 73 Okl.Cr. 358—Pooler v. State, 104 P.2d 733, 70 Okl.Cr. 199, modified on other grounds 105 P.2d 553, 70 Okl.Cr. 199—Bootin v. State, 101 P.2d 271, 69 Okl.Cr. 88—Duncan v. State, 85 P.2d 439, 65 Okl.Cr. 283—Carr v. State, 84 P.2d 42, 65 Okl.Cr. 201—Brown v. State, 290 P. 416, 48 Okl.Cr. 251—Bruce v. State, 287 P. 809, 46 Okl.Cr. 214—Le Parre v. State, 287 P. 733, 46 Okl.Cr. 210—Brown v. State, 286 P. 911, 47 Okl.Cr. 169—Welch v. State, 277 P. 280, 43 Okl.Cr. 47.

Pa.—Commonwealth v. McConahy, 29 A.2d 348, 151 Pa.Super. 26—Commonwealth v. Kerns, 188 A. 81, 124 Pa.Super. 61—Commonwealth v. Oakley, 36 Pa.Dist. & Co. 326.

S.D.—State v. Dale, 284 N.W. 770, 66 S.D. 418.

Tenn.—Crumley v. State, 174 S.W.2d 572, 180 Tenn. 303.

Tex.—Lawler v. State, 164 S.W.2d 850, 144 Tex.Cr. 558.

Utah—State v. Stewart, 171 P.2d 383, 110 Utah 203.

Wash.—State v. Dalton, 290 P. 989, 158 Wash. 144.

Wis.—City of Madison v. Fitzgerald, 19 N.W.2d 168, 247 Wis. 195.

42 C.J. p 1336 note 76 [a] (1).

(7) To sustain conviction of unlawfully driving automobile while under influence of liquor thereby injuring another—People v. Fugh, 173 P.2d 320, 76 Cal.App.2d 598—People v. Dawes, 98 P.2d 787, 37 Cal.App.2d 44—People v. Trantham, 74 P.2d 851, 24 Cal.App.2d 177—People v. Smith, 58 P.2d 684, 14 Cal.App.2d 548.

(8) To warrant finding that defendant was intoxicated.

Cal.—People v. Leutholtz, 283 P. 292, 102 Cal.App. 493.

Tex.—Steele v. State, 93 S.W.2d 150, 130 Tex.Cr. 198—Jones v. State, 97 S.W.2d 246, 130 Tex.Cr. 102—Teel v. State, 91 S.W.2d 747, 130 Tex.Cr. 32.

42 C.J. p 1336 note 76 [a] (3).

(9) To show that defendant was intoxicated and driving automobile at time and place alleged.

Cal.—People v. Fellows, 34 P.2d 177, 139 Cal.App. 337.

Tenn.—Martin v. State, 8 S.W.2d 479, 157 Tenn. 383.

(10) To establish identity of accused as the driver of the vehicle.—People v. Mellor, 5 N.W.2d 455, 302 Mich. 537—42 C.J. p 1336 note 76 [a] (4).

(11) To sustain finding that accused was driver of automobile in question.

R.I.—State v. Turcotte, 26 A.2d 625, 68 R.I. 119.

Tex.—Hadley v. State, Cr., 205 S.W. 2d 374.

42 C.J. p 1336 note 76 [a] (2).

(12) To show that accused was driving a motor vehicle.—Ford v. State, 121 P.2d 320, 73 Okl.Cr. 358.

(13) To establish the road, street, or highway as public.

Ga.—Langford v. State, 26 S.E.2d 385, 69 Ga.App. 619.

Ill.—People v. Kyle, 173 N.E. 75, 341 Ill. 31.

Mo.—State v. Davis, 143 S.W.2d 244.

Tex.—Anderson v. State, 195 S.W.2d 368, 149 Tex.Cr. 423—Lamkin v. State, 123 S.W.2d 662, 136 Tex.Cr. 99—Smith v. State, 92 S.W.2d 1046, 130 Tex.Cr. 117—Buck v. State, 72 S.W.2d 282, 126 Tex.Cr. 382—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219—Wood v. State, 45 S.W.2d 599, 119 Tex.Cr. 352—Johnson v. State, 31 S.W.2d 1084, 116 Tex.Cr. 185—Blackman v. State, Cr., 20 S.W.2d 783—Richardson v. State, 5 S.W.2d 141, 109 Tex.Cr. 403.

42 C.J. p 1336 note 76 [a] (5).

Evidence held insufficient

(1) In general.

Cal.—People v. Levens, 82 P.2d 698, 28 Cal.App.2d 455.

Tex.—Walker v. State, 125 S.W.2d 571, 136 Tex.Cr. 368.

42 C.J. p 1336 note 76.

(2) To sustain conviction for driving automobile while intoxicated.

Ala.—Underwood v. State, 132 So. 806, 24 Ala.App. 191.

Ga.—Stewart v. State, 175 S.E. 485, 49 Ga.App. 332.

Ind.—Hicks v. State, 150 N.E. 759, 197 Ind. 294.

Iowa.—State v. Hooper, 269 N.W. 431, 222 Iowa 481—State v. McKenzie, 216 N.W. 29, 204 Iowa 833.

N.Y.—People, on Complaint of Mulrean v. Fox, 10 N.Y.S.2d 694, 256

rise to a mere inference, conjecture, or suspicion of guilt is not sufficient to warrant a conviction.⁷¹ A conviction may rest on circumstantial evidence⁷² but the question whether the evidence is sufficient to support the conviction depends on the facts of the particular case.⁷³

Intoxication need not be proved by one who actually accompanied the driver,⁷⁴ nor, in order to establish intoxication, is it necessary to prove the process by which accused became intoxicated.⁷⁵ The mere fact that accused operated his automobile recklessly along a highway is not evidence of intoxication;⁷⁶ nor is intoxication established by

the mere fact that accused drank intoxicating liquor or had an odor of liquor on his breath, in the absence of some proof showing that it produced in him some manifestation of intoxication.⁷⁷

§ 634. — Questions of Law and Fact

In prosecutions for driving a motor vehicle while under the influence of intoxicants, questions of law are for the court, and questions of fact are for the jury.

As in other criminal cases, questions as to the weight and sufficiency of evidence⁷⁸ and the credibility of witnesses⁷⁹ are ordinarily for the jury, and, where the evidence is sufficient to be submitted to them,⁸⁰ it is for them to determine, on

App.Div. 578—*People v. Brewster*, 300 N.Y.S. 75, 252 App.Div. 877—*People v. Merna*, 250 N.Y.S. 351, 233 App.Div. 739—*People v. Betts*, 254 N.Y.S. 786, 142 Misc. 240.

Okl.—*Bristow v. State*, Cr., 189 P.2d 629.

Tex.—*Stasney v. State*, Cr., 208 S.W. 2d 894—*Walker v. State*, 125 S.W. 2d 571, 136 Tex.Cr. 368—*Armstrong v. State*, 94 S.W.2d 456, 130 Tex.Cr. 317—*Toombs v. State*, 21 S.W.2d 1051, 113 Tex.Cr. 602—*Brown v. State*, 300 S.W. 81, 108 Tex.Cr. 360 42 C.J. p 1336 note 76 [b] (1).

(3) To sustain conviction for operating automobile while under influence of liquor.

Ga.—*Welch v. State*, 185 S.E. 361, 53 Ga.App. 222.

N.C.—*State v. Miller*, 18 S.E.2d 143, 220 N.C. 660.

Okl.—*Brown v. State*, 166 P.2d 1021, 81 Okl.Cr. 303—*Brown v. State*, 164 P.2d 249, 81 Okl.Cr. 303—*Phenis v. State*, 135 P.2d 62, 76 Okl.Cr. 156—*Wheeler v. State*, 94 P.2d 9, 67 Okl.Cr. 291.

(4) To establish intoxication.

Iowa.—*State v. Hamer*, 274 N.W. 885, 223 Iowa 1129.

N.Y.—*People v. King*, 28 N.Y.S.2d 460.

(5) To establish that defendant was driving.—*State v. McDonough*, 29 A.2d 582, 129 Conn. 483.

(6) To show that accused was driver or operator of car.

Cal.—*People v. Kelley*, 70 P.2d 276, 27 Cal.App.2d 771.

Pa.—*Commonwealth v. Fox*, 17 Pa. Dist. & Co. 491, 43 Lanc.L.Rev. 246. 42 C.J. p 1336 note 76 [b] (2).

71. Ind.—*Hicks v. State*, 150 N.E. 759, 197 Ind. 294.

42 C.J. p 1336 note 77.

Confusion incident to accident

In determining whether evidence establishes intoxication, allowance must be made for ordinary excitement and confusion incident to an accident.—*People v. Storey*, 15 N.Y. S.2d 939, 258 App.Div. 815—*People v. King*, 28 N.Y.S.2d 460.

Remote evidence

Testimony of witnesses who arrived at scene of accident about half hour after accident that accused was intoxicated had negligible probative force, where motorist, with whose automobile accused collided, testified that accused was not intoxicated, and where accused had access to liquor after accident.—*State v. Hamer*, 274 N.W. 885, 223 Iowa 1129.

72. Conn.—*State v. Kreske*, 36 A.2d 389, 130 Conn. 558.

Ga.—*Jackson v. State*, 192 S.E. 642, 56 Ga.App. 355—*Franklin v. State*, 179 S.E. 649, 51 Ga.App. 98.

Iowa.—*State v. Hiatt*, 1 N.W.2d 664, 234 Iowa 499—*State v. Boyle*, 297 N.W. 312, 230 Iowa 305.

Pa.—*Commonwealth v. Long*, 198 A. 474, 131 Pa.Super. 28.

42 C.J. p 1336 note 78.

Public character of street or highway may be proved by circumstantial evidence.—*Lankford v. State*, 27 S.E.2d 349, 70 Ga.App. 76—*Langford v. State*, 26 S.E.2d 385, 69 Ga.App. 619.

73. Iowa.—*State v. Hiatt*, 1 N.W.2d 664, 234 Iowa 499.

74. Ky.—*Vanhoose v. Commonwealth*, 98 S.W.2d 49, 266 Ky. 37.

75. Colo.—*Bauer v. People*, 86 P.2d 1088, 103 Colo. 449.

76. N.Y.—*People v. Weaver*, 177 N.Y.S. 71, 188 App.Div. 395.

77. Ala.—*Rainey v. State*, 12 So.2d 106, 31 Ala.App. 66.

N.Y.—*People v. King*, 28 N.Y.S.2d 460—*People v. Fox*, 10 N.Y.S.2d 694, 256 App.Div. 578.

Ohio.—*State v. Hainbuch*, 57 N.E.2d 940, 74 Ohio App. 193.

42 C.J. p 1336 note 80.

78. Ala.—*Oliver v. State*, 25 So.2d 183, 32 Ala.App. 293.

Iowa.—*State v. Carlson*, 276 N.W. 770, 234 Iowa 1262.

N.D.—*State v. Myers*, 19 N.W.2d 17, 73 N.D. 687.

Pa.—*Commonwealth v. Long*, 198 A. 474, 131 Pa.Super. 28.

Tenn.—*Martin v. State*, 8 S.W.2d 479, 157 Tenn. 383.

Tex.—*Zachery v. State*, 154 S.W.2d 489, 142 Tex.Cr. 464.

Wash.—*State v. Bosseau*, 13 P.2d 53, 168 Wash. 669.

42 C.J. p 1336 note 84.

Corroborative evidence

La.—*State v. Blackwood*, 110 So. 417, 162 La. 266.

Testimony of accused

Iowa.—*State v. Hiatt*, 1 N.W.2d 664, 231 Iowa 499.

79. Iowa.—*State v. Carlson*, 276 N.W. 770, 234 Iowa 1262.

Pa.—*Commonwealth v. McConahy*, 29 A.2d 348, 151 Pa.Super. 26.

Tex.—*Jarmon v. State*, 162 S.W.2d 111, 144 Tex.Cr. 267.

Statements of accused

In prosecution for operating motor vehicle while under the influence of intoxicating liquor, the commonwealth was not bound by accused's statement which was offered in evidence, and jury could believe part of the statement and reject part, if it had ground for so doing.—*Commonwealth v. Long*, 198 A. 474, 131 Pa.Super. 28.

Assault by arresting officer

Fact that defendant was assaulted by one of the arresting officers was a circumstance to be considered by the jury but did not render the testimony of such officer wholly incredible.—*Christian v. State*, 197 S.W.2d 797, 184 Tenn. 163.

80. Evidence held sufficient to go to jury

(1) Generally.

Ala.—*Pierson v. State*, 18 So.2d 578, 31 Ala.App. 452, certiorari denied 18 So.2d 580, 245 Ala. 683—*McIntosh v. State*, 173 So. 617, 27 Ala. App. 411, modified on other grounds 173 So. 619, 234 Ala. 16—*James v. State*, 146 So. 424, 25 Ala.App. 335.

Iowa.—*State v. Hiatt*, 1 N.W.2d 664, 231 Iowa 499—*State v. Boyle*, 297 N.W. 312, 230 Iowa 305.

Mo.—*State v. Kissinger*, 123 S.W.2d 81, 343 Mo. 781.

N.C.—*State v. Holbrook*, 46 S.E.2d 843, 228 N.C. 620—*State v. Newton*, 177 S.E. 184, 207 N.C. 323.

conflicting evidence, the guilt of accused⁸¹ and other fact questions,⁸² such as whether accused was intoxicated,⁸³ or under the influence of intoxicating liquor⁸⁴ at the time and place charged,⁸⁵ and whether he drove or operated a motor vehicle⁸⁶ upon a public way⁸⁷ while in an intoxicated condition.⁸⁸ What constitutes intoxication, however, has been held to be a question of law to be defined by the court.⁸⁹

§ 635. — Instructions

In a prosecution for driving while under the influence of intoxicants or drugs, the court should give clear and accurate instructions applicable to the case.

Under the rules governing instructions in criminal cases generally, the court may and should give clear and accurate instructions applicable to the case.⁹⁰ Instructions which are argumenta-

Okl.—Watts v. State, 137 P.2d 268, 76 Okl.Cr. 362—Russell v. State, 135 P.2d 1003, 76 Okl.Cr. 198.

Tex.—Lockhart v. State, 1 S.W.2d 894, 108 Tex.Cr. 597.

Wash.—State v. Bosseau, 13 P.2d 53, 168 Wash. 669.

42 C.J. p 1336 note 85 [a] (1).

(2) As to guilt of accused

Ala.—Oliver v. State, 25 So.2d 183, 32 Ala.App. 293—McMurry v. State, 184 So. 42, 28 Ala.App. 253, certiorari denied 184 So. 43, 236 Ala. 589.

Iowa.—State v. Lowe, 16 N.W.2d 296, 235 Iowa 274.

(3) As to commission of offense and the connection of accused therewith.

Ala.—Butler v. State, 17 So.2d 429, 31 Ala.App. 354.

Okl.—Wirth v. State, 151 P.2d 819, 79 Okl.Cr. 59.

(4) As to intoxication of accused. —People v. Mellor, 5 N.W.2d 455, 302 Mich. 537—42 C.J. p 1336 note 85 [a] (2).

(5) As to whether accused was driver of vehicle.

Iowa.—State v. Lorey, 197 N.W. 446, 197 Iowa 552.

Miss.—Hendley v. State, 4 So.2d 543, 192 Miss. 58.

Evidence held insufficient to go to jury

(1) Generally.

Miss.—Terry v. State, 160 So. 574, 172 Miss. 303.

N.C.—State v. Flincham, 44 S.E.2d 724, 228 N.C. 149.

(2) As to whether accused drove car while intoxicated.—State v. Williams, 251 P. 126, 141 Wash. 165.

Directed verdict

(1) Directed verdict for accused should be ordered where evidence is insufficient to justify submission of case to the jury.

Iowa.—State v. Liechti, 229 N.W. 743, 209 Iowa 1119.

Okl.—Wheeler v. State, 94 P.2d 9, 67 Okl.Cr. 291.

(2) Instructed verdict was held properly refused under the evidence. —Thomas v. State, 3 S.W.2d 807, 109 Tex.Cr. 207.

St. Ga.—Yarbrough v. State, 194 S. E. 832, 57 Ga.App. 168.

Iowa.—State v. Pearce, 1 N.W.2d 621,

231 Iowa 443—State v. McDowell, 290 N.W. 65, 228 Iowa 180.

Mo.—State v. Davis, 143 S.W.2d 244 —State v. Cain, 37 S.W.2d 416—

State v. Harrison, 24 S.W.2d 985.

Neb.—Haffke v. State, 30 N.W.2d 462, 149 Neb. 83.

N.C.—State v. Sentelle, 193 S.E. 405, 212 N.C. 386—State v. Stancell, 188 S.E. 637, 210 N.C. 843.

Pa.—Commonwealth v. Long, 198 A. 471, 131 Pa. Super. 28.

Tenn.—Christian v. State, 197 S.W.2d 797, 184 Tenn. 163.

Tex.—Lazarine v. State, 158 S.W.2d 537, 143 Tex.Cr. 280—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219—Riddle v. State, 298 S.W. 580, 107 Tex.Cr. 571.

Affirmative charge

Defendant was not entitled to affirmative charge in his favor, where evidence was in direct conflict in its material aspects—O'Reilly v. State, 190 So. 305, 28 Ala.App. 589, certiorari dismissed 191 So. 260, 238 Ala. 161.

82. Cal.—People v. Leach, 31 P.2d 449, 137 Cal.App. 753.

Cause of injury

Cal.—People v. Grubbehl, 153 P.2d 771, 67 Cal.App.2d 210.

83. Ala.—Heal v. State, App. 25 So. 2d 183, 32 Ala.App. 282—Ballard v. State, 148 So. 752, 25 Ala.App. 457 —Phillips v. State, 145 So. 169, 25 Ala.App. 286

Ill.—People v. Schneider, 200 N.E. 321, 362 Ill. 478.

Iowa.—State v. Werling, 13 N.W.2d 318, 234 Iowa 1109—State v. Carlson, 276 N.W. 770, 224 Iowa 1262—State v. McGregor, 266 N.W. 23—State v. Jenkins, 212 N.W. 475, 203 Iowa 251.

Ky.—Vanhooose v. Commonwealth, 98 S.W.2d 49, 266 Ky. 37.

Mass.—Commonwealth v. Wood, 158 N.E. 834, 261 Mass. 458.

Minn.—State v. Melin, 228 N.W. 171, 179 Minn. 1.

Tex.—Snyder v. State, 198 S.W.2d 108, 149 Tex.Cr. 636—Jarmon v. State, 162 S.W.2d 111, 144 Tex.Cr. 267—Zachery v. State, 154 S.W.2d 489, 142 Tex.Cr. 464—Pierce v. State, 125 S.W.2d 584, 136 Tex.Cr. 355—Garrison v. State, 114 S.W. 2d 557, 134 Tex.Cr. 159—Alexander v. State, 110 S.W.2d 583, 133 Tex. Cr. 276—Fleming v. State, 92 S.W.

2d 252, 130 Tex.Cr. 63—Stewart v. State, 299 S.W. 646, 108 Tex.Cr. 199.

Va.—Anthony v. Commonwealth, 18 S.E.2d 897, 179 Va. 303—Owens v. Commonwealth, 136 S.E. 765, 147 Va. 624.

Vt.—State v. Coomer, 163 A. 585, 105 Vt. 175, 94 A.L.R. 1038.

42 C.J. p 1336 note 86.

84. Ariz.—Weston v. State, 65 P.2d 652, 49 Ariz. 183

Ind.—Klaser v. State, 166 N.E. 21, 89 Ind. App. 561.

Okl.—Billrey v. State, 135 P.2d 999, 76 Okl.Cr. 249—Luellen v. State, 81 P.2d 323, 64 Okl.Cr. 382.

R.I.—State v. Turcotte, 26 A.2d 625, 68 R.I. 119.

State of intoxication

Okl.—Drew v. State, 112 P.2d 429, 71 Okl.Cr. 415

85. Ind.—Blood v. State, 16 N.E.2d 874, 214 Ind. 578—Basson v. State, 187 N.E. 344, 205 Ind. 532.

86. Ala.—Heal v. State, 25 So.2d 183, 32 Ala.App. 282.

Conn.—State v. Swift, 6 A.2d 359, 125 Conn. 399.

Question whether accused or another drove the automobile is for jury.

Ga.—Andrews v. State, 191 S.E. 170, 55 Ga.App. 677.

Okl.—King v. State, 121 P.2d 1017, 73 Okl.Cr. 401.

87. Mass.—Commonwealth v. Wood, 158 N.E. 834, 261 Mass. 458.

88. Mo.—State v. Kissinger, 123 S.W.2d 81, 343 Mo. 781—State v. Raines, 62 S.W.2d 727, 333 Mo. 538. 42 C.J. p 1336 note 88.

89. Ill.—People v. Schneider, 200 N.E. 321, 362 Ill. 478.

90. Mo.—State v. Jones, 268 S.W. 83, 306 Mo. 437.

42 C.J. p 1336 note 90.

Instructions held proper or not erroneous

(1) As to what constitutes "intoxicated" or "intoxication"

Iowa.—State v. Wheelock, 254 N.W. 313, 218 Iowa 178—State v. Kendall, 203 N.W. 806, 200 Iowa 483.

Tex.—Gage v. State, 102 S.W.2d 216, 132 Tex.Cr. 97—Lockhart v. State, 1 S.W.2d 894, 108 Tex.Cr. 597.

Va.—Harrell v. City of Norfolk, 21 S.E.2d 733, 180 Va. 27, 142 A.L.R. 550.

tive,⁹¹ misleading,⁹² or expressive of an opinion on the facts of the case,⁹³ or which assume the existence of facts which are in issue,⁹⁴ should not be given. The instructions should conform to the evidence and charge or accusation⁹⁵ and they should properly submit the issues in the case⁹⁶ and properly guide or confine the jury within the issues raised.⁹⁷ The court should not instruct on the matter of the suspension of defendant's license to drive where the statute provides for au-

tomatic suspension thereof on conviction.⁹⁸ Words of well-defined and well-understood meaning, used in instructions given, need not be separately defined.⁹⁹

Instructions as to the evidence to be considered¹ and the weighing and giving effect thereto² should be in accord with the general rules governing such questions.

Requested instructions are properly refused where they do not state the law correctly,³ tend to

(2) As to what constitutes "under the influence of intoxicating liquor" Ga.—Durham v. State, 144 S.E. 109, 166 Ga. 561—Kea v. State, 182 S. E. 802, 52 Ga.App. 211.

N.C.—State v. Bowen, 39 S.E.2d 740, 326 N.C. 601—State v. Biggerstaff, 39 S.E.2d 619, 226 N.C. 603.

Okl.—Drew v. State, 112 P.2d 429, 71 Okl.Cr. 415.

Pa.—Commonwealth v. Buoy, 193 A. 144, 128 Pa.Super. 264.

S.D.—State v. Dale, 284 N.W. 770, 66 S.D. 418.

(3) As to effect of negligent or unlawful driving—State v. Wheelock, 254 N.W. 313, 218 Iowa 178.

(4) As to proof required. Iowa.—State v. Conklin, 216 N.W. 704, 204 Iowa 1131.

Tex.—Cox v. State, 150 S.W.2d 85, 141 Tex.Cr. 561.

(5) As to nature of highway or street—Nichols v. State, 49 S.W.2d 783, 120 Tex.Cr. 219.

(6) As to liability of owner of truck riding with drunken driver.—State v. Gibbs, 44 S.E.2d 201, 227 N.C. 677.

(7) As to punishment—Steele v. State, 93 S.W.2d 150, 130 Tex.Cr. 198.

(8) Other instructions. Cal.—People v. Martin, 300 P. 108, 114 Cal.App. 337—People v. Ellena, 228 P. 389, 67 Cal.App. 683.

Conn.—State v. Swift, 6 A.2d 359, 125 Conn. 399.

42 C.J. p 1336 note 90 [a].

Instructions held erroneous

(1) As to what constitutes "under influence of intoxicating liquor"—State v. Carroll, 37 S.E.2d 688, 226 N.C. 237.

(2) As to what constitutes operation of motor vehicle.—State v. Hatcher, 185 S.E. 435, 210 N.C. 55.

(3) As to punishment or penalty. Ind.—Reese v. State, 165 N.E. 780, 89 Ind.App. 378.

Tex.—Doyle v. State, 113 S.W.2d 915, 133 Tex.Cr. 612—Wilkinson v. State, 113 S.W.2d 535, 133 Tex.Cr. 603—Morris v. State, 112 S.W.2d 193, 133 Tex.Cr. 440—Short v. State, 111 S.W.2d 713, 133 Tex.Cr. 380—King v. State, 110 S.W.2d 1155, 133 Tex.Cr. 317—Alexander v.

State, 110 S.W.2d 583, 133 Tex.Cr. 276.

(4) Other instructions see 42 C.J. p 1336 note 90 [b].

91. Ga.—Brown v. State, 135 S.E. 765, 36 Ga.App. 84.

92. Mass.—Commonwealth v. Sabean, 176 N.E. 523, 275 Mass. 546.

Instructions held not misleading Iowa.—State v. Hiatt, 1 N.W.2d 664, 231 Iowa 499.

93. Ga.—Brown v. State, 135 S.E. 765, 36 Ga.App. 84.

94. Mo.—State v. Jones, 268 S.W. 83, 306 Mo. 437.

95. Ga.—Brown v. State, 135 S.E. 765, 36 Ga.App. 84.

Mont.—State v. Schnell, 88 P.2d 19, 107 Mont. 579, 121 A.L.R. 1082.

Tex.—Doyle v. State, 113 S.W.2d 915, 133 Tex.Cr. 612—King v. State, 110 S.W.2d 1155, 133 Tex.Cr. 317—Alexander v. State, 110 S.W.2d 583, 133 Tex.Cr. 276.

Va.—Harrell v. City of Norfolk, 21 S.E.2d 733, 180 Va. 27, 142 A.L.R. 550.

Charge on circumstantial evidence is unnecessary where there is direct testimony in the case proving the offense—Garrison v. State, 114 S.W. 2d 557, 134 Tex.Cr. 159.

Surplusage

Where charge predicated conviction on finding that accused drove motor vehicle while intoxicated or under influence of intoxicating liquor "in any degree," but indictment did not contain quoted words, they could be treated as surplusage.—Hall v. State, 59 S.W.2d 160, 123 Tex.Cr. 382.

96. Tex.—Johnson v. State, 170 S.W. 2d 770, 145 Tex.Cr. 603.

Issues held sufficiently submitted

Tex.—Johnson v. State, supra.

97. Tex.—Yocham v. State, 139 S.W. 2d 807, 139 Tex.Cr. 219. 42 C.J. p 1337 note 95.

98. Tex.—Taylor v. State, Cr., 209 S.W.2d 191—Collins v. State, 115 S.W.2d 963, 134 Tex.Cr. 429—Schultz v. State, 115 S.W.2d 417, 134 Tex.Cr. 251—Wilkinson v. State, 113 S.W.2d 535, 133 Tex.Cr. 603—Morris v. State, 112 S.W.2d 193, 133 Tex.

Cr. 440—Short v. State, 111 S.W. 2d 713, 133 Tex.Cr. 380.

99. Mo.—State v. Weston, 202 S.W. 2d 50.

"Intoxicated" and "intoxicated condition"

Mo.—State v. Weston, supra—State v. Itevard, 106 S.W.2d 906, 341 Mo. 170—State v. Reifsteck, 295 S.W. 741, 317 Mo. 268.

In Oklahoma

(1) It has been held that the term "under the influence of intoxicating liquor," as used in the statute, is of common usage and requires no definition or explanation to be understood by persons of ordinary intelligence, and it is not error for the court to fail to define or explain the term—Welch v. State, 277 P. 280, 43 Okl.Cr. 47.

(2) It has also been held that the court was not bound to define term "intoxicating liquor" for jury on defendant's request, since such term is self-definitive—Drew v. State, 112 P.2d 429, 71 Okl.Cr. 415.

(3) However, it has been held that it is much better practice for the court to give an instruction defining the term, especially if requested—Phenis v. State, 135 P.2d 62, 76 Okl. Cr. 156—Lucien v. State, 81 P.2d 323, 64 Okl.Cr. 382.

1. Wash. State v. Neadeau, 242 P. 36, 137 Wash. 297.

2. Mo.—State v. Fitzpatrick, 267 S.W. 905.

42 C.J. p 1337 note 97.

3. Ala.—McMurry v. State, 184 So. 42, 28 Ala.App. 253, certiorari denied 184 So. 43, 236 Ala. 589.

Cal.—People v. Smith, 103 P.2d 199, 39 Cal.App.2d 277—People v. Fator, 58 P.2d 402, 14 Cal.App.2d 403.

Iowa.—State v. McGregor, 266 N.W. 22—State v. Wheelock, 254 N.W. 313, 218 Iowa 178.

Mass.—Commonwealth v. Sabean, 176 N.E. 523, 275 Mass. 546.

Tex.—Kessler v. State, 125 S.W.2d 308, 136 Tex.Cr. 340.

42 C.J. p 1337 note 99.

Alcoholic content of beer

Court properly refused to give motorist's requested instruction that under the law of the state three and

mislead or confuse,⁴ or are on an issue not in dispute,⁵ or on a matter which is without record evidence on which they may be based,⁶ or give undue prominence or emphasis to particular matters,⁷ or merely state an abstract proposition,⁸ or where they are substantially covered by other instructions given by the court.⁹ However, requests which correctly state the law and are warranted by the pleadings and the evidence in the case, and which are not covered by other instructions given, should be given, and refusal thereof constitutes error.¹⁰

§ 636. — Verdict, Judgment, Sentence, and Punishment

- a. Verdict, judgment, and sentence
- b. Punishment

a. Verdict, Judgment, and Sentence

The general rules in criminal cases as to verdicts, judgments, and sentences apply in prosecutions for driving a motor vehicle while under the influence of intoxicants or drugs.

General rules apply to the verdict¹¹ and to the form and substance of a record of conviction¹² on a charge of driving an automobile while intox-

icated. The judgment and sentence following a conviction must be under, and pursuant to, the particular statute under which accused was prosecuted,¹³ and must be based or founded on a sufficient verdict,¹⁴ and be responsive thereto,¹⁵ and impose a certain and definite sentence in accordance with the law.¹⁶ An alternative or ambiguous sentence is improper.¹⁷

Subject to general rules, it has been held in a prosecution for driving an automobile while intoxicated that the refusal of the court to permit accused to introduce testimony and to present a plea for leniency, after conviction and before sentence was pronounced, in mitigation of punishment is not erroneous.¹⁸

Degree of offense. Reduction of the degree of the offense of driving a motor vehicle upon the highway while addicted to, or under the influence of, narcotic drugs from a felony to a misdemeanor has been held to be a question for the judgment and discretion of the trial court.¹⁹

Setting aside judgment. A defendant who pleaded guilty to a charge of driving an automobile

two tenths percent beer was not intoxicating, and that, unless jury found that motorist was operating his automobile while under the influence of intoxicating liquor containing in excess of three and two tenths percent of alcohol, he should be acquitted—*Drew v. State*, 112 P. 2d 429, 71 Okl. Cr. 416—*Daniels v. State*, 98 P.2d 68, 68 Okl. Cr. 324—*Ashcraft v. State*, 98 P.2d 60, 68 Okl. Cr. 308.

4. Ala.—*Holley v. State*, 144 So. 535, 25 Ala. App. 260, certiorari denied 144 So. 537, 225 Ala. 597.

Mo.—*State v. Revard*, 106 S.W.2d 906, 341 Mo. 170.

5. Wash.—*Tenino v. Hyde*, 244 P. 550, 138 Wash. 251.

Recklessness

A charge on recklessness is properly refused since recklessness is no part of the offense of driving while under the influence of intoxicating liquor.—*Spiekard v. City of Lynchburg*, 6 S.E.2d 610, 174 Va. 502.

6. Ill.—*People v. Evans*, 7 N.E.2d 912, 290 Ill. App. 75.

Tex.—*Stewart v. State*, 299 S.W. 646, 108 Tex. Cr. 199.

Va.—*Moore v. Commonwealth*, 168 S. E. 325, 160 Va. 909.

7. Cal.—*People v. Mullins*, 226 P. 622, 66 Cal. App. 475.

Ga.—*Brown v. State*, 135 S.E. 765, 36 Ga. App. 84.

8. La.—*State v. Blackwood*, 110 So. 417, 162 La. 266.

9. Mo.—*State v. Revard*, 106 S.W. 2d 906, 341 Mo. 170.

Okl.—*Wirth v. State*, 151 P.2d 819, 79 Okl. Cr. 59.

Tex.—*Kessler v. State*, 125 S.W.2d 308, 136 Tex. Cr. 340.
42 C.J. p 1337 note 4.

10. Ala.—*Landers v. State*, 162 So. 550, 26 Ala. App. 506.

Cal.—*People v. Boulware*, 106 P.2d 436, 41 Cal. App. 2d 268

Tex.—*Kavans v. State, Cr.*, 209 S.W. 2d 928.

Defendant's theory of case should be submitted to the jury when supported by evidence.—*Snider v. State*, 165 S.W.2d 904, 145 Tex. Cr. 59.

11. Consistency

Where accused is charged both with driving while intoxicated and failing to give information and aid after being involved in an accident, he may be found guilty of the former charge, although acquitted of the latter.—*People v. Smith*, 103 P.2d 199, 39 Cal. App. 2d 277.

Verdict held sufficient

Verdict finding defendant "guilty as charged" and assessing "his punishment by \$50.00 and 60 days in County Jail."—*State v. Couch*, 124 S.W.2d 1091, 344 Mo. 78.

Verdict held not too indefinite

Tex.—*Pierce v. State*, 125 S.W.2d 584, 136 Tex. Cr. 355.

12. Vt.—*Stevens v. State*, 136 A. 387, 42 C.J. p 1337 note 7.

Identity of offense

Record of conviction merely stat-

ing violation of section and subdivision of act was held sufficient to identify offense—*Payne v. Gardner*, 147 A. 857, 7 N.J. Misc. 1091.

Record of conviction held sufficient
N.J.—*State v. Von Geldern*, 162 A. 183, 10 N.J. Misc. 1045.

13. Ala.—*Sexton v. State*, 196 So. 742, 29 Ala. App. 336, certiorari granted on other grounds 196 So. 744, 239 Ala. 287.

Cal.—*People v. Martin*, 300 P. 108, 114 Cal. App. 337.

14. Cal.—*People v. Thompson*, 12 P. 2d 81, 123 Cal. App. 726.

Mo.—*State v. Couch*, 124 S.W.2d 1091, 344 Mo. 78.

15. Cal.—*People v. Martin*, 300 P. 108, 114 Cal. App. 337.

Judgment held justified by verdict
N.C.—*State v. Jones*, 190 S.E. 733, 211 N.C. 735.

16. Cal.—*People v. Martin*, 300 P. 108, 114 Cal. App. 337.

"Term prescribed by law"

Judgment sentencing accused to imprisonment "for the term prescribed by law" was void where no specific sentence was prescribed by the statute.—*People v. Martin*, *supra*.

17. Del.—*Mullin v. State* on Complaint of Williams, 194 A. 578, 8 W. W. Harr. 533.

18. Iowa.—*State v. Kendall*, 203 N. W. 806, 200 Iowa 483.

19. Cal.—*People v. Berner*, 82 P.2d 617, 28 Cal. App. 2d 392.

while intoxicated is not entitled to have the judgment set aside on the ground of fraud or mistake, in that he believed he was pleading guilty merely to a complaint for breach of peace, by virtue of a statute permitting the vacation, under such circumstances, of a judgment entered on default, as a judgment entered on a plea of guilty is not a judgment taken on default.²⁰

b. Punishment

- (1) In general
- (2) Discretion of court
- (3) Determination by jury
- (4) Matters to be considered in fixing punishment
- (5) Imprisonment for nonpayment of costs or fine

(1) In General

The penalty or punishment to be imposed for the violation of a statute prohibiting driving while intoxicated is that prescribed by statute.

The penalty or punishment to be imposed for the

violation of a statute prohibiting driving while intoxicated is either prescribed by the statute which creates and defines the offense,²¹ or, where it does not do so, by the provisions of the general penal law prescribing the punishment for offenses for which no penalty is otherwise specially provided.²² In accordance with the general rules pertaining to the construction of statutes, a specific statutory provision which relates to drunken drivers alone, and which provides punishment therefor will prevail over a general statutory provision relating to violations of the law of the road, which imposes penalties only by reference to statutes that cover many separate violations of the law of the road.²³ The penalty or punishment imposed must not violate a constitutional provision prohibiting cruel and unusual punishments,²⁴ and it must not be excessive.²⁵ Where the place of imprisonment is prescribed by the statute, the court is without jurisdiction to direct imprisonment elsewhere.²⁶

Prohibiting driving. Under some statutes a person convicted of operating a motor vehicle while intoxicated may be prohibited from driving²⁷ upon

20. Vt.—Stevens v. State, 136 A. 387, 42 C.J. p 1337 note 10.

21. Ala.—McIntosh v. State, 173 So. 617, 27 Ala App. 411, modified on other grounds 173 So. 619, 234 Ala. 16.

N.C.—State v. Parker, 17 SE2d 475, 220 N.C. 416.

Tex.—Sharp v. State, 94 S.W.2d 177, 130 Tex Cr 366, 42 C.J. p 1337 note 16.

22. N.Y.—People v. Howe, 218 N.Y. S. 361, 218 App Div 273, 42 C.J. p 1337 note 17.

23. Wis.—Degutes v. State, 207 N.W. 948, 189 Wis 435, 42 C.J. p 1337 note 19.

24. N.C.—State v. Jones, 106 S.E. 827, 181 N.C. 543, 42 C.J. p 1337 note 20. Cruel and unusual punishments generally see Criminal Law § 1978.

Reason for increased punishment

The reason for increasing severity of punishment for driving while intoxicated is explained fully by the large death toll from automobile accidents. An automobile negligently driven is a dangerous instrumentality upon a public highway.—State v. Cantara, 148 A. 415, 50 R.I. 440.

25. Okl.—Campbell v. State, Okl.Cr., 173 P.2d 584—King v. State, 121 P.2d 1017, 73 Okl Cr. 404, 42 C.J. p 1337 note 21.

Punishment held not excessive

(1) Four years' imprisonment.—State v. Zuck, Mo., 142 S.W.2d 8.

(2) Two years' imprisonment.—

State v. Revard, 106 S.W.2d 906, 341 Mo 170.

(3) One-year imprisonment.—Gault v. State, 274 P. 687, 42 Okl Cr 89.

(4) Eight months and ten days in penitentiary.—Brown v. State, 290 P. 416, 48 Okl.Cr. 251.

(5) Six months in county jail.—Mack v. State, 154 P.2d 103, 79 Okl. Cr. 255.

(6) Imprisonment in penitentiary for period not exceeding one year.—State v. Dillard, 221 N.W. 817, 207 Iowa 831—State v. Giles, 206 N.W. 133, 200 Iowa 1232, 42 A.L.R. 1496.

(7) Thirty days' imprisonment in workhouse.—State v. Weeks, 12 N.W. 2d 493, 216 Minn 279.

(8) Maximum sentence, without fine.—People v. Ritsky, 231 N.Y.S. 848, 224 App Div. 425.

(9) Nine months imprisonment in jail and one hundred dollar fine.—State v. Grove, Mo., 204 S.W.2d 757.

(10) Six months in jail and a fine of one hundred dollars.—State v. Bryant, 205 S.W.2d 732, 356 Mo. 1223.

(11) Three months in county jail and payment of fine of five hundred dollars and costs.—State v. Small, 11 N.W.2d 377, 233 Iowa 1280.

(12) Fine of one thousand dollars.—State v. Rayburn, 238 N.W. 908, 213 Iowa 396.

(13) Fine of two hundred fifty dollars and costs.—White v. State, 134 P.2d 1039, 76 Okl Cr. 147.

(14) Fine of two hundred fifty

dollars.—Hancock v. State, 156 P.2d 155, 80 Okl Cr 1.

(15) Other punishments see 42 C.J. p 1337 note 21 [a].

Punishment held excessive

(1) One year in penitentiary. Iowa—State v. Kendall, 203 N.W. 806, 200 Iowa 483. Okl.—Albrecht v. State, 115 P.2d 274, 72 Okl Cr 270.

(2) Nine months in penitentiary.—Pooler v. State, 105 P.2d 553, 70 Okl. Cr 199.

(3) Six months in penitentiary.—Harjo v. State, 106 P.2d 527, 70 Okl. Cr 369—Daniels v. State, 93 P.2d 68, 68 Okl Cr 324—Ashcraft v. State, 98 P.2d 60, 68 Okl Cr. 308.

(4) One year in penitentiary and five hundred dollars fine.—Clark v. State, 256 P. 941, 37 Okl Cr. 89.

(5) Six months in penitentiary and five hundred dollars fine.—Rayouth v. State, 267 P. 687, 40 Okl.Cr. 160.

(6) Six months in jail and two hundred dollars fine.—Luellen v. State, 81 P.2d 323, 64 Okl Cr. 382.

(7) Thirty-five dollars fine in addition to thirty days in workhouse and injunction against driving.—Daniels v. State, 296 S.W. 20, 155 Tenn. 549.

26. Utah.—Ex parte Folck, 132 P.2d 130, 102 Utah. 470.

27. Neb.—Smith v. State, 247 N.W. 421, 124 Neb 587, 42 C.J. p 1338 note 24.

Revocation or suspension of license to drive see supra § 160.

the public highways of the state²⁸ for a specified period.

(2) Discretion of Court

Under some statutes the extent of the punishment is left to the discretion of the court within certain limits.

Some statutes leave the extent of punishment to the discretion of the court within certain limits,²⁹ but a trial judge cannot, in his discretion, impose a punishment different from that provided by the statute which prescribes it.³⁰ It has been held that, on a plea of guilty to a charge of operating a motor vehicle while intoxicated, the court may in its discretion impose a fine, suspend prison sentence, and place accused on probation, and may subsequently vacate the probation and sentence him to imprisonment.³¹

Recommendation by jury. Under some statutes, the recommendation of the jury as to the punishment to be imposed is not binding on the court,³² and failure to follow it does not constitute an abuse of discretion.³³ Under other statutes the discretion of the court is limited to the imposition of a

sentence which does not exceed the recommendation of the jury.³⁴

(3) Determination by Jury

Under some statutes the jury assesses the punishment, within prescribed limits.

Under a statute permitting a wide range in punishment for driving while intoxicated and authorizing the jury to make the punishment fit the crime, the gravity of the offense depends to a large extent on the facts and circumstances attending and resulting from its commission, and such matters should be considered by the jury in determining the appropriate punishment.³⁵ In assessing the punishment, the jury must stay within the limits prescribed by the statute,³⁶ and be free from bias, passion, or prejudice.³⁷

(4) Matters to Be Considered in Fixing Punishment

The attending circumstances may be considered by the court in fixing the punishment on conviction for driving a motor vehicle while under the influence of intoxicants.

Validity of statute

Statute prohibiting operation of motor vehicle while intoxicated and depriving person convicted thereunder of right to drive for specified period held valid exercise of police power, since court in which conviction is had has jurisdiction to enforce statute.—*Smith v. State*, *supra*.

Suspension of prison sentence

Under some statutes the trial court may restrain a motorist from driving an automobile within the state only if the sentence of imprisonment is suspended.—*State v. Colohan*, 286 N.W. 888, 69 N.D. 316.

Foreign license

The statute requiring magistrate to inform defendant, arraigned on charge of violating vehicle and traffic law, that his "license" to drive motor vehicle may or must be suspended or revoked on his conviction, does not require magistrate to inform defendant that driver's license issued to him by another state will be revoked, if he is convicted in the state on such charge as for operating motor vehicle while intoxicated.—*People v. Bass*, 72 N.Y.S.2d 479, 188 Misc. 875.

In Texas

(1) Under an earlier statute the judgment and sentence could prohibit defendant from driving for a specified period.—*Sharp v. State*, 94 S.W.2d 177, 130 Tex.Cr. 366—*Williams v. State*, 76 S.W.2d 511, 127 Tex.Cr. 299.

(2) This statute was repealed by a later statute providing for the auto-

matic suspension of defendant's license on conviction; provision against driving may be included in the judgment, but is no longer necessary.—*McIntire v. State*, 117 S.W.2d 1093, 135 Tex.Cr. 285—*Chaney v. State*, 112 S.W.2d 464, 133 Tex.Cr. 517—*Harris v. State*, 109 S.W.2d 201, 133 Tex.Cr. 126—*Harris v. State*, 109 S.W.2d 203, 133 Tex.Cr. 129.

(3) The prohibition against driving, however, cannot be for a greater period than that specified in the statute.—*Collins v. State*, 115 S.W.2d 963, 134 Tex.Cr. 429—*Schultz v. State*, 115 S.W.2d 417, 134 Tex.Cr. 251—*Hayes v. State*, 115 S.W.2d 960, 134 Tex.Cr. 444—*Chaney v. State*, *supra*.

28. S.D.—*State v. Swanson*, 17 N.W.2d 303, 70 S.D. 313.

Tenn.—*Daniels v. State*, 296 S.W. 20, 155 Tenn. 549.

Statute held constitutional

S.D.—*State v. Swanson*, 17 N.W.2d 303, 70 S.D. 313.

Mandatory punishment

Tenn.—*Crosswy v. State*, 8 S.W.2d 486, 157 Tenn. 363.

Failure to limit prohibition to public highways of the state was held error.—*State v. Swanson*, 17 N.W.2d 303, 70 S.D. 313.

29. Idaho.—*State v. Scrivner*, 162 P.2d 897, 66 Idaho 498.

Iowa.—*State v. Small*, 11 N.W.2d 377, 233 Iowa 1280.
42 C.J. p 1338 note 22.

Sentence held justified

Ill.—*People v. Poe*, 26 N.E.2d 415, 304 Ill.App. 601.

Discretion held not abused

Iowa.—*State v. Pearce*, 1 N.W.2d 621, 231 Iowa 443.

30. Iowa.—*State v. Gillman*, 210 N.W. 435, 202 Iowa 428.
42 C.J. p 1338 note 23.

31. N.Y.—*People v. Page*, 211 N.Y.S. 401, 125 Misc. 538.

32. Idaho.—*State v. Scrivner*, 162 P.2d 897, 66 Idaho 498.

33. Idaho.—*State v. Scrivner*, *supra*.

34. Cal.—*People v. Martin*, 300 P. 108, 114 Cal.App. 337—*People v. Ray*, 268 P. 382, 92 Cal.App. 417.

35. Mo.—*State v. Hatcher*, 259 S.W. 467, 303 Mo. 13.
42 C.J. p 1338 note 27.

Punishment held warranted by the evidence

Mo.—*State v. Griffin*, 6 S.W.2d 866, 320 Mo. 288.

36. Mo.—*State v. Hart*, 142 S.W.2d 18.

Punishment held authorized by the statute.—*State v. Hart*, *supra*.

37. Mo.—*State v. Revard*, 106 S.W.2d 906, 341 Mo. 170.

Bias, passion, or prejudice held not shown

Mo.—*State v. Bryant*, 205 S.W.2d 732, 356 Mo. 1223—*State v. Grove*, 204 S.W.2d 757—*State v. Zuck*, 142 S.W.2d 8—*State v. Revard*, 106 S.W.2d 906, 341 Mo. 170.

Okl.—*White v. State*, 134 P.2d 1039, 76 Okl.Cr. 147.

The offense of driving while intoxicated, even in its most mitigated form, has been held to involve so much of danger to human life as to call for severe punishment,³⁸ and, although in determining the punishment to be imposed the court should consider the attending circumstances,³⁹ the very nature of the offense is such that aggravation inheres in it,⁴⁰ and such punishment as tends to prevent a repetition of the crime should be imposed.⁴¹ The effect on the members of accused's family of a penitentiary sentence for one year for driving an automobile while intoxicated cannot be considered in determining whether such a sentence should be imposed.⁴² It has also been held, however, that a sentence of imprisonment in jail as well as the payment of a fine is improper in the case of a first offender of good repute, where the imprisonment of accused will inflict unusual hardship on his family.⁴³

(5) Imprisonment for Nonpayment of Costs or Fine

In the absence of statutory authorization therefor, the accused may not be imprisoned for nonpayment of a fine imposed on conviction for driving a motor vehicle while under the influence of intoxicants.

Unless and except as provided for by statute,⁴⁴ imprisonment for nonpayment of a fine or costs on conviction of operating a motor vehicle while intoxicated is not authorized.⁴⁵ Where the term of imprisonment to be imposed for the nonpayment of a fine is prescribed and limited by statute, a judgment providing imprisonment until payment of the fine imposed is unauthorized.⁴⁶

§ 637. — Appeal and Error

Matters relating to a review by a higher court of a conviction for driving a motor vehicle while intoxicated are governed generally by the rules and statutes applicable to a review in criminal prosecutions.

Matters relating to a review by a higher court of a conviction for driving a motor vehicle while intoxicated are governed generally by the rules and statutes applicable to a review in criminal prosecutions.⁴⁷ Accordingly, these rules have been applied to such matters as the jurisdiction of the reviewing court,⁴⁸ as to the proper presentation and reservation in the lower court of the grounds of review,⁴⁹ as to the assignment of errors in briefs,⁵⁰ as to the scope and extent of the review,⁵¹

38. Iowa.—State v. Giles, 206 N.W. 133, 200 Iowa 1232, 42 A.L.R. 1496 42 C.J. p 1338 note 28

39. Iowa.—State v. Giles, *supra*.
Matters in aggravation and in mitigation

Pa.—Commonwealth v. Artzberger, Quar. Sess., 52 York Leg. Rec. 65.

40. Iowa.—State v. Giles, 206 N.W. 133, 200 Iowa 1232, 42 A.L.R. 1496.

41. Iowa.—State v. Giles, *supra*.
42 C.J. p 1338 note 31.

42. Iowa.—State v. Fahey, 207 N.W. 608, 201 Iowa 575.

43. Okl.—Campbell v. State, Cr., 173 P.2d 584.

44. Ala.—Rutler v. State, 17 So.2d 429, 31 Ala.App. 354.

Hard labor or ordinary imprisonment
Ala.—McIntosh v. State, 173 So. 617, 27 Ala.App. 411, modified on other grounds 173 So. 619, 234 Ala. 16.

Change after oral sentence

Where, after conviction, the court orally pronounces judgment and sentence of imprisonment and a fine, this pronouncement fixes the penalty imposed, and the court may not in the written judgment subsequently entered provide for additional imprisonment on nonpayment of the fine.—State ex rel. Perry v. Garrecht, 297 N.W. 132, 70 N.D. 599.

45. Iowa.—State v. Gillman, 210 N.W. 435, 202 Iowa 428.

Justice of peace

Under statutes governing penalty

for driving under influence of intoxicating liquor and terms of imprisonment for nonpayment of fines, justice of the peace was held to have no power to impose sentence of imprisonment for nonpayment of fine for such offense.—Mullin v. State, on Complaint of Williams, 191 A. 578, 8 W.W.Harr., Del., 533.

46. Iowa.—State v. Gillman, 210 N.W. 435, 202 Iowa 428.
42 C.J. p 1338 note 35.

47. Pa.—Commonwealth v. Hasko, 46 Pa. Dist. & Co. 359, 59 Montg. Co. 1, 56 York Leg. Rec. 191.

Record

On appeal from a trial de novo, the record must show that accused was convicted of the offense which had been charged in the complaint.—Knight v. Kinkaid, 141 A. 569, 104 N.J. Law 457—Walsh v. Egan, 154 A. 413, 9 N.J. Misc. 421.

Return on appeal was sufficient where summary of testimony found defendant guilty of "operating motor vehicle while under influence of liquor," as complaint charged.—State v. Cooper, 162 A. 191, 10 N.J. Misc. 1066.

48. Me.—State v. Mathon, 123 A. 824, 123 Me. 566.
42 C.J. p 1338 note 37.

Appeal from declaration of forfeiture of bond

N.M.—Mares v. Kool, 177 P.2d 532, 51 N.M. 36.

Jurisdiction to commit

Where accused who was convicted in police court of driving motor vehicle while under influence of intoxicating liquor appealed to superior court and was there found guilty by jury, superior court had jurisdiction to commit accused to city jail as against contention that superior court had jurisdiction only to commit him to county jail.—City of Yakima v. Barron, 44 P.2d 823, 182 Wash. 62.

49. N.J.—Latimer v. Wilson, 134 A. 750, 103 N.J. Law 159.
42 C.J. p 1338 note 38

50. Cal.—People v. Ellena, 228 P. 389, 67 Cal. App. 683

Specification of errors in affidavit of appeal

N.Y.—People v. Dennis, 230 N.Y.S. 510, 132 Misc. 410.

51. N.J.—Latimer v. Wilson, 134 A. 750, 103 N.J. Law 159.
42 C.J. p 1339 note 40.

Assumption that conviction is first offense

Tex.—Schultz v. State, 115 S.W.2d 417, 134 Tex. Cr. 251—Hayes v. State, 115 S.W.2d 960, 134 Tex. Cr. 444.

Original return

On appeal from a conviction in a city court, under some statutes the appeal must be heard on the original return.—People v. Dennis, 230 N.Y.S. 510, 132 Misc. 410.

and the presumptions or inferences indulged in by the reviewing court.⁵²

Under general rules, a judgment in a prosecution for driving while intoxicated will not be reversed for error which was not harmful or prejudicial to any substantial rights of accused,⁵³ or where it did not operate in a miscarriage of justice.⁵⁴

Determination and disposition of cause. Where a statute leaves the punishment for the offense of driving while intoxicated within the sound discretion of the trial court, the sentence imposed will not be reviewed by the supreme court on appeal where the exercise of such discretion has not been grossly and palpably abused.⁵⁵ However, if the punishment to which accused is sentenced is greater than that which the facts of the case seem to warrant, the appellate court may, by virtue of statutes in some jurisdictions, reverse, modify, or reduce the judgment,⁵⁶ but such procedure is unauthorized where the penalty imposed is an indeterminate sentence of imprisonment.⁵⁷ The appellate court will not hesitate to reverse if material error appears,⁵⁸ and a new trial will be awarded where the evidence is of such a character that it does not beyond all reasonable doubt prove guilt as charged.⁵⁹ An appeal will not be dismissed as moot, because ac-

cused has paid the fine and costs, where conviction makes revocation of his driver's license mandatory and where such conviction imposes a stigma on his name.⁶⁰ Where a majority of the reviewing court does not vote for a reversal, it has been held that the conviction will be affirmed.⁶¹

§ 638. Driving without License or Number Plates or Identification Marks; Unlawful Plates

- a. Driving without license or number plates or identification marks
- b. Unlawful use of license or number plates

a. Driving without License or Number Plates or Identification Marks

Under some statutes it is an offense to drive or operate a motor vehicle without displaying the prescribed license or number plates or other marks of identification.

The various statutes requiring registration of motor vehicles usually make it an offense to drive or operate vehicles without having displayed thereon the prescribed license or number plates or other marks of identification.⁶² Ordinarily the violation of such a statute is a misdemeanor.⁶³

Trial de novo

(1) In prosecution for operating automobile while intoxicated, defendant was entitled to trial de novo on plea of not guilty in superior court on appeal from recorder's court where record did not show that, as contended, defendant pleaded guilty in recorder's court.—*State v. McKnight*, 185 S.E. 437, 210 N.C. 57.

(2) Cases tried de novo.—*Knight v. Kinkhead*, 141 A. 569, 104 N.J.Law 457—42 C.J. p 1339 note 40 [b].

Weighting evidence

On summary review, the reviewing court does not weigh the evidence.—*State v. Gavin*, 54 A.2d 236, 136 N.J.Law 47.

52. N.C.—*State v. Jones*, 106 S.E. 827, 181 N.C. 543.

42 C.J. p 1339 note 41.

53. N.J.—*State v. Myers*, 55 A.2d 661, 136 N.J.Law 288—*State v. Gavin*, 54 A.2d 236, 136 N.J.Law 47.

Va.—*Owens v. Commonwealth*, 136 S.E. 765, 147 Va. 624.

42 C.J. p 1339 note 43.

54. Cal.—*People v. Dryden*, 245 P. 436, 76 Cal.App. 525.

55. N.C.—*State v. Jones*, 106 S.E. 827, 181 N.C. 543.

56. Okl.—*Odom v. State*, 95 P.2d 916, 68 Okl.Cr. 117.

42 C.J. p 1339 note 47.

57. Iowa—*State v. Overbay*, 206 N.W. 634, 201 Iowa 758.
42 C.J. p 1339 note 48.

58. N.Y.—*People v. Jensen*, 255 N.Y.S. 337, 142 Misc. 340.

59. W.Va.—*State v. Mininni*, 133 S.E. 320, 101 W.Va. 611.

60. Miss.—*Hall v. State*, 32 So.2d 195.

61. Utah—*Salt Lake City v. Kussee*, 85 P.2d 802, 97 Utah 97.

62. Fla.—*State v. Cahoon*, 143 So. 253, 106 Fla. 299.

Tex.—*Claer v. State*, 294 S.W. 559, 106 Tex.Cr. 626.

42 C.J. p 1339 note 51.

License and registration generally see *supra* §§ 58-78.

Defenses

(1) In prosecution against police officer for operating city's automobile without license tag, fact that commissioner refused to issue tag for statutory fee was no defense.—*State v. Cahoon*, 143 So. 253, 106 Fla. 299.

(2) When the owner of a motor vehicle has complied with every requirement of the statute necessary to entitle him to receive the number plates from the proper official and he fails to receive them only because such official is unable to fur-

nish them, such facts constitute a defense to a charge of operating the vehicle without having the number plates displayed.—*State v. Gish*, 150 N.W. 37, 168 Iowa 70, 171 Ark. 135.

Plates with advertising matter

Automobile owner who obtained a registration certificate but refused to accept license plates bearing words advertising a world's fair and continued to display plates for the former year on refusal of division of motor vehicles to issue plates without advertising matter, did not violate vehicle code provision requiring display of current year's license plates when and as required by the code, since the code did not authorize plates with such advertising matter.—*People v. Kirby*, 99 P.2d 603, 38 Cal.App.2d Supp. 768.

63. Okl.—*Ex parte Frele*, 274 P. 684, 42 Okl.Cr. 57.

Municipal misdemeanor

Notwithstanding a municipality has adopted an ordinance making all state misdemeanors also municipal misdemeanors, a municipal corporation cannot punish as a municipal misdemeanor the driving of a motor vehicle upon its streets without having it properly tagged in accordance with the state law.—*Hattiesburg v. James*, 99 So. 133, 134 Miss. 671.

A statute making it unlawful to operate a motor vehicle on a public street without having the license number plates displayed applies to the driver of the vehicle as well as to the owner.⁶⁴ One who operates a motor vehicle in violation of a statute requiring a display of the license plate on the vehicle may be convicted although the owner was riding with him at the time.⁶⁵ Where the statute includes municipally owned vehicles, the driver of such a vehicle may be convicted of a violation.⁶⁶

Intent. Whether under such statutes a specific criminal intent or guilty knowledge is an essential element of the offense is to be determined from the language of the statute in connection with its purpose and design.⁶⁷

An indictment or information must allege every fact necessary to constitute the offense charged and to bring accused within the statutory provisions.⁶⁸ Thus, under a statute forbidding the operation of a motor vehicle on a public highway

without having the required license number plates attached, an information which fails to charge operation on a public highway is fatally defective.⁶⁹ Indictments or informations charging the operation of a motor vehicle without having the required license or number plates need not negative the exceptions made by the statute in favor of nonresidents.⁷⁰ There is no variance between an allegation of driving upon a public highway and proof that the place of the offense was upon a parkway which is nevertheless a public highway, although under the control of park commissioners.⁷¹

Trial. General rules apply as to the admissibility⁷² and the weight and sufficiency⁷³ of evidence, questions of fact,⁷⁴ and instructions.⁷⁵

b. Unlawful Use of License or Number Plates

Under some statutes it is an offense to make an unlawful use of license or number plates.

Under some statutes it is an offense to make an unlawful use of license or number plates,⁷⁶ such

64. Ind.—Baldwin v. State, 141 N.E. 343, 194 Ind. 303.

65. Pa.—Commonwealth v. Buzard, 27 Pa. Dist. 21.
42 C.J. p. 1339 note 54.

66. Fla.—State v. Cahoon, 143 So. 253, 106 Fla. 299.
42 C.J. p. 1340 note 56.

67. Ga.—Harden v. State, 112 S.E. 159, 28 Ga. App. 560.
42 C.J. p. 1340 note 57.

68. Mo.—State v. Hass, App. 82 S.W.2d 621.
Tex.—Ray v. State, 279 S.W. 457, 103 Tex. Cr. 8.

69. Tex.—Ray v. State, supra.

70. Okl.—State v. Shafer, 179 P. 782, 15 Okl. Cr. 610.

71. Mass.—Commonwealth v. Butler, 90 N.E. 360, 204 Mass. 11.

72. Tex.—Claer v. State, 294 S.W. 559, 106 Tex. Cr. 626.

Evidence held inadmissible

(1) In general.—Everett v. State, 148 So. 171, 25 Ala. App. 432.

(2) Evidence as to defendant's intention in driving vehicle without license plates.—Claer v. State, 294 S.W. 559, 106 Tex. Cr. 626.

73. Evidence held insufficient to sustain conviction

N.Y.—People v. Goldbach, 9 N.Y.S. 2d 427, 256 App. Div. 848.

Tex.—Shires v. State, 191 S.W.2d 475, 149 Tex. Cr. 88—Herrin v. State, 115 S.W.2d 942, 134 Tex. Cr. 296.

Failure to produce registration

Under statute providing that failure to produce certificate of registration shall be presumptive evidence of displaying number plates not

proper for the vehicle, where a motorist owned a certificate of registration at the time of his arrest, and the automobile displayed the corresponding number, failure to produce a certificate of registration on demand did not authorize a conviction for operating an automobile on the public highways without having a distinctive number corresponding to a certificate of registration displayed upon the automobile, since the statute prescribes a rule of evidence only.—People v. Simon, 33 N.Y.S. 2d 14, 178 Misc. 49.

74. Evidence held sufficient for jury
Tex.—Claer v. State, 291 S.W. 559, 106 Tex. Cr. 626.

75. Instruction held properly refused

Okl.—Evans v. State, 26 P.2d 767, 55 Okl. Cr. 157.

76. Pa.—Commonwealth v. Romesburg, 91 Pa. Super. Ct. 559.

Obstructing license plates

(1) It has been held that a motorist operating his automobile with license plates from which the words "New York World's Fair 1939," required by statute to appear thereon, had been cut off was guilty of obstructing license plates.—People v. McClean, 3 N.Y.S. 2d 314, 167 Misc. 40.

(2) It has also been held, however, that a motorist who did not obstruct any part of number or year or state portion of license plate, but only covered up words "New York World's Fair 1939," was not guilty of obstructing license plates, since statute requiring quoted words on license plates was invalid.—People v.

Perkins, 1 N.Y.S. 2d 940, 166 Misc. 520.

Jurisdiction

A prosecution for operating a motor vehicle displaying the license plate of another motor vehicle cannot be commenced in common pleas court, but only before a magistrate or justice of the peace.—Young v. State, 185 N.E. 208, 44 Ohio App. 259.

Criminal responsibility

Defendant's criminal responsibility was not lessened by co-operation of another in operating automobile with wrong number plates.—State v. Duggee, 144 A. 689, 101 Vt. 491.

Criminal intent

Accused, employed to drive another's car, and having no knowledge that license tag was a replaced tag, was not guilty of using replaced license tag, since no criminal intent was present.—Moore v. State, 152 So. 609, 26 Ala. App. 60.

Indictment

(1) Indictment for unlawful use of motor vehicle registration plates need not identify with particularity registration plates or motor vehicle, and need not aver that plates were issued by state highway department.—Commonwealth v. Romesburg, 91 Pa. Super. 559.

(2) Fact that indictment in prosecution for displaying wrong license number on automobile did not negative possibility that proper license was displayed was immaterial.—Clark v. State, 22 S.W.2d 361, 160 Tenn. 225.

Question for jury

In prosecution for having wrong license number on automobile, whether automobile carried license of

as dealer's license plates.⁷⁷

§ 639. Driving without Operator's License

- a. In general
- b. After revocation or suspension of license

a. In General

Under some statutes it is an offense to operate a motor vehicle without having first obtained an operator's license.

Statutes have been enacted in various jurisdic-

another car without accused's knowledge was for jury.—*Clark v. State*, supra.

Evidence held insufficient to support conviction

Tex.—*Blankenship v. State*, 97 S.W. 2d 475, 131 Tex.Cr. 146.

77. N.Y.—*People v. Christensen & Weiss*, 294 N.Y.S. 591, 250 App.Div. 470—*People v. Boldway*, 210 N.Y.S. 219, 124 Misc. 816

Pa.—*Commonwealth v. Luxner*, Quar. Sess., 8 Fav. L.J. 133.

Reasonable construction

N.Y.—*People v. Christensen & Weiss*, 294 N.Y.S. 591, 250 App.Div. 470.

78. Mass.—*Watson v. Forbes*, 30 N.E.2d 228, 307 Mass. 383—*Rog v. Eltis*, 169 N.E. 413, 269 Mass. 466.

Pa.—*Commonwealth v. Williams*, 1 A.2d 812, 133 Pa.Super. 104—*Commonwealth v. Bowman*, 86 Pittsb. Leg.J. 567

42 C.J. p. 1340 note 65.

Distinct offenses

Some statutes provide for two distinct offenses, one of operating a motor vehicle without a license, which is merely cognizable by summary proceeding, and the other of operating a motor vehicle after a license is revoked or suspended, which is a misdemeanor.—*Commonwealth v. Krupa*, 40 Pa.Dist. & Co. 572, 57 Montg.Co. 107—*Commonwealth v. Gernert*, 33 Pa.Dist. & Co. 620, 52 York Co. 89—*Commonwealth v. Boyd*, 2 Pa.Dist. & Co. 220.

Defenses

It is no defense that an operator's license had been applied for and issued and was in fact received by the operator the day following the violation.—*Commonwealth v. Annesetti*, 31 Pa.Dist. & Co. 407, 18 Wash. Co. 93.

Burden of proof

In prosecution for operating motor vehicle without license, provision of statute respecting exemption of non-resident owners is defensive matter which defendant must prove.—*Cotton v. State*, 133 So. 65, 24 Ala. App. 219.

Punishment

It has been held that a justice of the peace was not authorized to impose both a fine and imprisonment for driving automobile without license—*State v. Orton*, 259 P. 1077, 115 Wash. 289.

79. Parent convicted as principal

Parent riding in automobile driven by son under sixteen years of age was held properly convicted of misdemeanor as principal—*Reeves v. State*, 143 S.E. 462, 38 Ga.App. 86.

Person renting car from owner

In prosecution for operating motor vehicle without license, person renting car from owner would be liable.—*Cotton v. State*, 133 So. 65, 24 Ala. App. 219

Nonresident

(1) A nonresident has been held not subject to prosecution for a violation of such a statute—*King v. District of Columbia*, 277 F. 562, 51 App.D.C. 160

(2) A person who has been refused a license in the state has been held not exempt from prosecution, although he later becomes a resident of another state and obtains a license in such state—*State v. Rosner*, 144 A. 772, 50 R.I. 33.

Trucker license

Defendant, possessing license to operate truck only, may be convicted of operating touring car without license—*Commonwealth v. Magarosi*, 158 N.E. 771, 261 Mass. 228.

80. Holder of junior operator's license

(1) It has been held that holder of junior operator's license driving mother's automobile with parents' consent for purpose of procuring employment for himself during summer months was operating automobile in usual and ordinary pursuit of the business of parent within statute authorizing such operation of motor vehicle by holder of junior operator's license and that he was not guilty of misdemeanor of operating motor vehicle without a license.—*People v. Gray*, 77 N.Y.S.2d 805, 191 Misc. 541.

tions making it an offense to operate a motor vehicle without having first obtained an operator's license,⁷⁸ and, as discussed supra § 149, the validity of such statutes has been generally sustained. Particular persons have been held to be subject⁷⁹ or not to be subject⁸⁰ to prosecution under such a statute. In accordance with the general rules of criminal pleading, a complaint, indictment, or information in a prosecution for driving without an operator's license, which substantially follows the language of the statute, is usually sufficient.⁸¹ Words used in the statute which are not descriptive of the offense need not be incorporated in the

(2) It has also been held that violation of rule promulgated by commissioner of motor vehicles, restricting use of automobiles by junior licensees to the hours of daylight, was not a misdemeanor, and that violator of such rule was not guilty of offense of driving without a license—*People v. Gillette*, 16 N.Y.S.2d 361, 172 Misc. 817.

Person without chauffeur's license

(1) Person employed by electric company as meter reader and licensed as operator committed no offense in driving employer's automobile without chauffeur's license—*People v. Anthony*, 231 N.Y.S. 591, 133 Misc. 257.

(2) A salesman operating an automobile provided by his employer in the solicitation and delivery of orders was held not a chauffeur within the meaning of a statute defining a chauffeur as any person whose business or occupation is that of operating a motor vehicle for hire, and could not be convicted of operating without a chauffeur's license—*Matthews v. State*, 214 S.W. 339, 85 Tex.Cr. 469.

81. Mo.—*State v. Cobb*, 87 S.W. 551, 113 Mo.App. 156.

Indictment held defective

Information alleging that defendant operated a motor vehicle upon public highway without a driver's license charged no offense under Drivers' License Act, since a driver's license is not known to the law because the act only authorizes issuance of operators', commercial operators' and chauffeurs' license and use of term "driver" interchangeably with term "operator" would not be authorized in view of definition in the act of term "driver" as meaning every person who drives or is in actual physical possession of a vehicle.—*Hassell v. State*, 194 S.W.2d 400, 149 Tex.Cr. 333.

Complaint held sufficient

Mass.—*Commonwealth v. Magarosi*, 158 N.E. 771, 261 Mass. 228.

indictment,⁸² and an exception in a subsequent clause or section of the statute need not be negatived.⁸³

b. After Revocation or Suspension of License

Under some statutes it is an offense for a person to operate a motor vehicle after his operator's license has been suspended or revoked and before such license has been reinstated.

Under some statutes, it is an offense for a person to operate a motor vehicle after his operator's license has been suspended or revoked and before such license has been reinstated.⁸⁴ The violation of such a statute is usually a misdemeanor,⁸⁵ and nonresidents⁸⁶ as well as residents⁸⁷ have been held subject to prosecution for a violation thereof.

The general rules governing criminal prosecutions apply in a prosecution for operating a motor vehicle after a license has been revoked or sus-

pended with respect to the indictment, information, or complaint,⁸⁸ issues, proof, and variance,⁸⁹ the admissibility⁹⁰ and the weight and sufficiency⁹¹ of the evidence, questions of law and fact,⁹² instructions,⁹³ judgment,⁹⁴ punishment,⁹⁵ and review.⁹⁶

§ 640. Driving without Required Brakes

Under some statutes it is an offense to operate or drive a motor vehicle which is not equipped with adequate brakes.

Under some statutes, it is an offense to operate or drive a motor vehicle which is not equipped with adequate brakes.⁹⁷

§ 641. Exceeding Lawful Speed

a. In general

b. Particular statutory provisions

82. Mo.—State v. Cobb, 87 S.W. 551, 113 Mo. App. 156.
42 C.J. p. 1340 note 72.

83. Md.—Ruggles v. State, 87 A. 1080, 120 Md. 553.

84. Del.—State v. Larimore, 144 A. 867, 4 W.W. Harr. 153.

Pa.—Commonwealth v. Healey, 27 A. 2d 557, 149 Pa. Super. 497—Commonwealth v. Sherman, 47 Pa. Dist. & Co. 507, 23 Wash. Co. 107—Commonwealth v. Krupa, 40 Pa. Dist. & Co. 572, 57 Montg. Co. 107—Commonwealth v. Buleski, 39 Pa. Dist. & Co. 496—Commonwealth v. Boyd, 2 Pa. Dist. & Co. 220.

Tenn.—Ratliff v. State, 184 S.W. 2d 572, 182 Tenn. 177.

Vt.—State v. Hallock, 44 A.2d 326, 114 Vt. 292.

The frozen surface of a lake was a "place open to public or general circulation of vehicles" within statutory provision defining term "public highway" in statutes relating to motor vehicles as including all parts of any bridge, culvert, roadway, street, square, fairground, or other place open to public or general circulation of vehicles, so as to render ejusdem generis rule inapplicable in determining whether county court's findings justified conviction of one driving automobile on such surface for operation of motor vehicle on public highway after revocation of his operator's license—State v. Hallock, *supra*.

85. Pa.—Commonwealth v. Krupa, 40 Pa. Dist. & Co. 572, 57 Montg. Co. 107—Commonwealth v. Gernert, 52 York Leg. Rec. 89, 33 Pa. Dist. & Co. 620.

86. U.S.—District of Columbia v. Fred, D.C., 50 S.Ct. 163, 281 U.S. 49, 74 L.Ed. 694.

Pa.—Commonwealth v. Maconi, 59 Pa. Dist. & Co. 484, 35 Del. Co. 111.
Tenn.—Ratliff v. State, 184 S.W. 2d 572, 182 Tenn. 177.

87. Tenn.—Ratliff v. State, *supra*.

88. Cal.—People v. O'Rourke, 13 P. 2d 989, 124 Cal. App. 752.

Indictment held insufficient

Pa.—Commonwealth v. Cagg, 28 Pa. Dist. & Co. 579, 18 Erie Co. 265.

Information held sufficient

Cal.—People v. O'Rourke, 13 P. 2d 989, 124 Cal. App. 752.

Complaint held sufficient

N.J.—State v. Aerles, 159 A. 701, 10 N.J. Misc. 355.

89. D.C.—Chesevoir v. District of Columbia, 29 F.2d 798, 58 App. D. C. 268.

90. Cal.—People v. Sanders, 83 P. 2d 720, 28 Cal. App. 2d 746.

Pa.—Commonwealth v. Healey, 27 A. 2d 557, 149 Pa. Super. 497—Commonwealth v. Buleski, 39 Pa. Dist. & Co. 496.

Evidence held competent

In prosecution for operating a motor vehicle after revocation of operator's license, evidence that defendant was tried on indictment for operating an automobile while intoxicated was competent on question whether license issued to defendant had been legally revoked—State v. Stewart, 31 S.E.2d 534, 224 N.C. 528.

91. **Evidence held sufficient to sustain conviction**

N.C.—State v. Stewart, *supra*.

Tenn.—Ratliff v. State, 184 S.W. 2d 572, 182 Tenn. 177.

Evidence held insufficient to sustain conviction

N.C.—State v. McDaniels, 14 S.E.2d 793, 219 N.C. 763.

92. Cal.—People v. Noggle, 45 P. 2d 430, 7 Cal. App. 2d 14.

Evidence held sufficient for jury

N.C.—State v. Stewart, 31 S.E.2d 534, 224 N.C. 528.

93. Pa.—Commonwealth v. Buleski, 39 Pa. Dist. & Co. 496.

94. Pa.—Commonwealth v. Buleski, *supra*.

Judgment held erroneous

Tex.—Persall v. State, 169 S.W.2d 488, 145 Tex. Cr. 476.

95. **Fine and imprisonment**

Under statute penalizing operation of motor vehicle after driver's license has been suspended, it has been held that there may be a fine imposed without imprisonment, but that there cannot be an imprisonment without a fine—Persall v. State, *supra*.

96. S.C.—State v. Orvig, 151 S.E. 616, 154 S.C. 403.

97. N.Y.—People v. DeWitt, 25 N.Y. S.2d 236, 175 Misc. 481.

Purpose

Purpose of statute prohibiting operation of automobiles with inadequate brakes was to insure safety both to persons and property upon the highways—People v. DeWitt, *supra*.

Burden of proof

In prosecution for driving automobile with inadequate brakes, burden was on the people to establish defendant's guilt beyond a reasonable doubt—People v. DeWitt, *supra*.

Evidence held insufficient to sustain conviction

N.Y.—People v. DeWitt, *supra*.

a. In General

The violation of various statutes or ordinances which regulate the speed at which motor vehicles may be operated on the public highways or streets constitutes an offense.

In many jurisdictions there are statutes or ordinances which regulate the speed of motor vehicles on the public highways and streets and make it an offense to violate their provisions.⁹⁸ It is, of course, essential that a statute, in order to authorize a punishment for excessive speeding, must create such an offense.⁹⁹ Statutes and ordinances creating such an offense have been held to be valid and enforceable¹ where they conform to the requirements of certainty and reasonableness.²

A speed regulation is to be construed in accordance with the intent of the legislators as ascertained from the object to be obtained and the evil to be remedied,³ and since the purpose of such laws is to prevent damage to the life or limb of any person, and to insure the safety of any property which may be on the highway,⁴ a construction will be adopted which will tend to attain such a result.⁵ On the other hand, it has also been held that, since such statutes or ordinances are penal in nature,⁶ they must be strictly construed.⁷

Definitions. Generally the words "motor vehicle," as used in a statute regulating the speed of

motor vehicles, are sufficiently broad and comprehensive to include automobiles,⁸ and the words "ride or drive" are broad enough to apply in the case of motorcycles or automobiles when ridden or driven.⁹ However, the term "motor vehicle," as defined in some statutes, has been held not synonymous with the word "automobile."¹⁰ The words "public road or highway" in such a statute are synonymous with, or at least include, a public street,¹¹ and the expression "territory contiguous thereto" refers to the land lying immediately upon or adjacent to such highway.¹² The word "descent" as used in a speed regulation has been interpreted to mean, within the legislative intent, such an incline on the highway as is commonly denominated a "hill."¹³ In addition, various terms used in connection with the regulation of the speed of motor vehicles have been the subject of express definition.¹⁴ Where various parts of a statute regulating the speed of motor vehicles become operative at different times, a provision which defines the meanings of various terms thereafter used in the subsequent parts of the statute, and which went into effect at an earlier period, becomes applicable to the other provisions of the act whenever the latter go into effect.¹⁵

Grade of offense. Ordinarily a violation of the laws regulating the speed of motor vehicles is a

98. D.C.—Lohman v. District of Columbia, Mun App, 51 A 2d 382.

Pa.—Commonwealth v. Aurick, 10 A 2d 22, 138 Pa.Super. 180.

Wis.—Seely v. City of Milwaukee, 248 N.W. 912, 212 Wis. 124.

42 C.J. p 1342 note 14.

Excessive speed as reckless driving see supra § 610.

Civil action

It has been held that a proceeding against one violating city speed ordinance is a civil action.—Seely v. City of Milwaukee, supra.

99. N.Y.—People v. Ellis, 85 N.Y.S. 120, 88 App.Div. 471.

42 C.J. p 1342 note 15.
Punishment generally see infra § 650.

1. Cal.—People v. Banat, 100 P.2d 374, 39 Cal.App.2d Supp. 765.

Miss.—White v. City of Philadelphia, 19 So.2d 493, 197 Miss. 166, suggestion of error overruled 19 So.2d 744, 197 Miss. 166.

Validity generally see supra § 29.

Ordinance held invalid

Speed ordinance was invalid where it made violation a misdemeanor and provided for possible jail sentence of more than thirty days.—People v. Kitendaugh, 77 N.Y.S.2d 321, 190 Misc. 410.

Partial invalidity

Where the ordinance defines three separate offenses, the invalidity of two of the offenses does not affect the validity of the third.—People v. Hirshon, 43 N.Y.S.2d 764.

2. Cal.—People v. Banat, 100 P.2d 374, 39 Cal.App.2d Supp. 765.

D.C.—Lohman v. District of Columbia, Mun.App., 51 A 2d 382.

Tex.—Ex parte Kuehne, 12 S.W.2d 790, 111 Tex.Cr. 363.

Primary test of validity of a regulation requiring a vehicle approaching an intersection to slow down and be kept under such control as to avoid colliding with pedestrians or vehicles is whether it sets up reasonably ascertainable standards of guilt so that a man of ordinary intelligence may understand it and avoid violating it.—Lohman v. District of Columbia, D.C.Mun.App., 51 A.2d 382.

Statute held void for uncertainty

Okl.—Missel v. State, 244 P. 462, 33 Okl.Cr. 376.

Regulation held not enforceable

N.Y.—People, on Complaint of McGuire, v. Perry, 23 N.Y.S.2d 769.

3. Ga.—Elsbery v. State, 76 S.E. 779, 12 Ga App. 86.

4. Ga.—Elsbery v. State, supra.

5. Ga.—Elsbery v. State, supra.

6. Pa.—Commonwealth v. Anspach, 4 A.2d 203, 134 Pa.Super. 369—Commonwealth v. Wolfgang, 182 A. 109, 120 Pa.Super. 252.

7. Pa.—Commonwealth v. Anspach 4 A 2d 203, 134 Pa.Super. 369—Commonwealth v. Wolfgang, 182 A 109, 120 Pa.Super. 252—Commonwealth v. Weber, 33 Pa.Dist. & Co 488, 30 Mun.L.R. 93.

8. Ohio.—Schier v. State, 117 N.E. 229, 96 Ohio St. 245.

9. R.I.—State v. Smith, 69 A. 1061, 29 R.I. 245.

42 C.J. p 1343 note 35.

10. Ohio.—Brown v. State, 10 Ohio N.P., N.S., 238.

11. Ohio.—Schier v. State, 117 N.E. 229, 96 Ohio St. 245.

12. Tex.—Ex parte Slaughter, 243 S.W. 478, 92 Tex.Cr. 212.

13. Ga.—Elsbery v. State, 76 S.E. 779, 12 Ga App. 86.

14. Statutory definitions

(1) Residence District.—Baker v. Court of Special Sessions in and for Essex County, 15 A.2d 102, 125 N.J. Law 127.

(2) Other definitions see 42 C.J. p 1343 note 43 [a].

15. Mass.—Commonwealth v. Cassidy, 95 N.E. 214, 209 Mass. 24.

misdemeanor.¹⁶ Thus, where the offense of driving an automobile at an excessive rate of speed is not punishable by imprisonment in the state prison, it is a misdemeanor and not a felony,¹⁷ but, where a statute also authorizes the graver punishment, the offense may constitute either a misdemeanor or a felony.¹⁸ Under some statutes a first violation of the speed laws is penalized by permitting a suit against the violator to recover a fine imposed by the statute,¹⁹ and it is only a second offense, committed after a former conviction, that is punishable in a criminal prosecution as a misdemeanor.²⁰

Separate offenses. Sometimes statutes and ordinances prescribe different rates of speed, in which event a single act of speeding may constitute an offense under both a municipal ordinance and the state law.²¹ Where a statute prescribes different rates of speed for designated districts or localities, each provision creates a separate and distinct offense,²² and the rule is the same where a speed regulation is contained in a section of the statute dealing with matters of regulation other than speed.²³

b. Particular Statutory Provisions

- (1) Statutes prescribing definite speed limit
- (2) Statutes not prescribing definite speed limit

(1) Statutes Prescribing Definite Speed Limit

Some statutes or ordinances make it an offense to operate a motor vehicle in excess of a prescribed rate of speed in particular places and under certain circumstances.

Some statutes or ordinances make it an offense to operate a motor vehicle in excess of a prescribed rate of speed in various places and under certain circumstances,²⁴ such as on a public highway,²⁵ in a town,²⁶ in a closely built-up portion of a village or city,²⁷ in a residence district,²⁸ or in a school zone,²⁹ or on approaching and traversing a sharp curve in the road,³⁰ or in turning a corner of meeting highways,³¹ or in crossing such intersections,³² or in driving down a descent or incline in the road.³³

Passing other vehicles. Some statutes provide that a person operating a motor vehicle shall, on approaching another vehicle, animal, or person, reduce the speed of the vehicle to a specified rate of speed and shall not exceed such speed until entirely past such vehicle, animal, or person.³⁴

Computation. Some statutes prescribe the manner in which speed is to be timed under various conditions for the purpose of ascertaining whether or not there has been a violation of a speed limit.³⁵ Under such statutes, when the rate of speed is timed on a highway within a business or residence district where official speed signs are erected, the time is required to be taken by at least two peace officers, one of whom shall be stationed at each end

16. Miss.—White v. City of Philadelphia, 19 So 2d 493, 197 Miss 166, suggestion of error overruled 19 So 2d 744, 197 Miss. 166.
42 C.J. p 1343 note 44.

For jurisdictional purposes

Violation of provision in vehicle and traffic law authorizing state traffic commission to establish speed zones is traffic infraction and not misdemeanor, but is deemed a misdemeanor for jurisdictional purposes.—People v. Gilberg, 21 N.Y.S.2d 920.

17. Mass.—Commonwealth v. Sherman, 78 N.E. 98, 191 Mass. 439.

18. Neb.—Wagner v. State, 206 N.W. 732, 114 Neb. 171.

19. Pa.—Commonwealth v. Pfeiffer, 35 Pa.Co. 476.

20. Pa.—Commonwealth v. Pfeiffer, supra.

21. N.Y.—People v. Prison Keeper, 83 N.E. 44, 190 N.Y. 315—People v. Fitzgerald, 168 N.Y.S. 930, 101 Misc. 695.

22. Tex.—Byrd v. State, 129 S.W. 620, 59 Tex.Cr. 513.

23. N.Y.—People v. Colon, 148 N.Y.S. 321, 85 Misc. 229.
42 C.J. p 1342 note 26.

24. N.Y.—People, on Complaint of Lucius v. Herman, 20 N.Y.S.2d 149, 174 Misc. 235—People v. Rowe, 247 N.Y.S. 663, 138 Misc. 611.

25. Ga.—Hall v. State, 37 S.E.2d 545, 73 Ga App. 616—Perry v. State, 8 S.E.2d 425, 62 Ga App. 115.
42 C.J. p 1343 note 51.

26. Mass.—Commonwealth v. Sherman, 78 N.E. 98, 191 Mass. 439.
42 C.J. p 1343 note 54.

27. N.Y.—People v. Hayes, 124 N.Y.S. 417, 66 Misc. 606.

28. N.J.—Baker v. Court of Special Sessions in and for Essex County, 15 A.2d 102, 125 N.J.Law 127.

"Residence district" construed

An avenue which was one-third of a mile long and somewhat sparsely built upon, with a total of ten private residences and no business buildings of any kind, and which was known as a residential section, was a "residence district" within

the meaning of the statute.—Baker v. Court of Special Sessions in and for Essex County, supra.

29. N.Y.—People v. Willcox, 37 N.Y.S.2d 127.

30. Ga.—Deveraux v. State, 106 S.E. 739, 26 Ga App. 429.

31. N.Y.—People v. Colon, 148 N.Y.S. 321, 85 Misc. 229.

32. Ala.—Alabama City v. Allen, 108 So 267, 21 Ala.App. 332.

33. Ga.—Elsbery v. State, 76 S.E. 779, 12 Ga App. 86.

34. Kan.—State v. Pfeiffer, 153 P. 552, 96 Kan. 791.

Vehicle proceeding in same direction

In construing such a statute, in which the rate of speed in passing was fixed at eight miles per hour, the speed limit was held not to apply to the passing of a horse-drawn vehicle proceeding in the same direction.—State v. Pfeiffer, supra—42 C.J. p 1343 note 60.

35. Pa.—Commonwealth v. Wolfgang, 182 A. 109, 120 Pa.Super. 252.

of a measured stretch;³⁶ and under all other conditions the rate of speed is required to be timed by a peace officer using a motor vehicle equipped with a speedometer tested for accuracy within a prescribed period prior to the alleged violation.³⁷

Distance traveled. Where a statute limits the lawful rate of speed to a certain distance in a specified time, as, for example, one mile in a given number of minutes, or a given number of miles per hour, that which is prohibited is the excessive rate of speed and not its continuance for any specified distance,³⁸ and it is, therefore, not necessary to constitute the offense that accused should have operated his car at the excessive speed for the space of a full mile.³⁹

Erection of speed signs. Where a statute which establishes a maximum speed limit of general application permits a lower rate of speed for highways in dangerous or closely built-up sections, but requires the local authorities to erect signs on the highways where the lower speed rate is to prevail, the erection of such signs, in conformity with the requirement of the statute, is a condition precedent to the effectiveness of the lower speed limit with-

in such areas.⁴⁰ Accordingly, if such signs are not erected, the maximum speed rate established by the statute prevails,⁴¹ and the operation of a vehicle on the highway at such a point in excess of the reduced or lower rate of speed but within the maximum rate does not constitute an offense in violation of the statute.⁴² The proper placing of the prescribed signs constitutes actual notice to a motorist of the reduced or lower speed limit⁴³ whether or not seen,⁴⁴ but such signs must be constructed in the manner and form required by the statute.⁴⁵

(2) Statutes Not Prescribing Definite Speed Limit

It may be an offense to operate a motor vehicle on a highway in violation of statutory provisions which do not prescribe a definite speed limit.

It may be an offense to violate statutory provisions which do not prescribe a definite speed limit,⁴⁶ such as to operate a motor vehicle on a highway at a speed greater⁴⁷ or less⁴⁸ than is reasonable and proper, having regard for the traffic, surface, and width of the highway, and any other restrictions or conditions then and there existing,

36. Pa.—Commonwealth v. Wolfgang, supra.

Purpose

The purpose of such a provision is to abolish "speed traps" in smaller villages and boroughs.—Commonwealth v. Wolfgang, supra.

Rural sections

Such provision does not authorize use of officers at each end of measured stretch in apprehension of speed limit violators in rural sections.—Commonwealth v. Wolfgang, supra.

Substantial compliance

In order to sustain a conviction it must be shown that the stretch was properly measured, and, while it is not necessary that an officer be stationed precisely at each end of the measured stretch, at least substantial compliance with this requirement is indispensable, and the stationing of an officer some one hundred feet from a terminus is not substantial compliance.—Commonwealth v. Patterson, 31 Pa. Dist. & Co. 470.

37. Pa.—Commonwealth v. Parish, 10 A.2d 896, 138 Pa.Super. 593—Commonwealth v. Wolfgang, 182 A. 109, 120 Pa.Super. 252—Commonwealth v. Gunther, 86 Pittsb.Leg. J. 340.

38. Pa.—Commonwealth v. Pfeiffer, 35 Pa.Co. 476.

39. Pa.—Commonwealth v. Pfeiffer, supra.

42 C.J. p 1343 note 63.

40. N.Y.—People v Schrader, 16 N. Y.S.2d 421, 172 Misc. 246
42 C.J. p 1342 note 28.

41. Pa.—Commonwealth v. Moller, 50 Pa.Super. 366—Commonwealth v. Vollmer, 25 Pa. Dist. 1070.

42. N.Y.—People v. Prison Keeper, 83 N.E. 44, 190 N.Y. 315.
42 C.J. p 1342 note 30.

43. N.Y.—People v. Schrader, 16 N. Y.S.2d 424, 172 Misc. 246—People v. Hayes, 124 N.Y.S. 417, 66 Misc. 606.

44. N.Y.—People v. Hayes, supra.

45. N.Y.—People v. Hayes, supra.
42 C.J. p 1343 note 33.

46. Pa.—Commonwealth v. Aurick, 10 A.2d 22, 138 Pa.Super. 180—Commonwealth v. Reber, 46 Pa. Dist. & Co. 411, 58 Montg.Co. 444—Commonwealth v. Messner, Quar. Sess., 33 Del.Co. 414.

Intersection

Under some ordinances it is an offense to violate a regulation requiring the operator of a motor vehicle approaching an intersection to slow down and keep his vehicle under such control as to avoid colliding with pedestrians or vehicles.—Lohman v. District of Columbia, D. C.Mun.App., 51 A.2d 382.

Speed faster than common traveling pace

Under some statutes it was an offense to ride or drive a motor vehicle faster than a common traveling pace upon any public street or

highway—State v. Smith, 69 A. 1061.
29 R.I. 245—42 C.J. p 1344 note 83.

47. Cal.—People v. Don Carlos, 117 P.2d 748, 47 Cal.App.2d Supp. 863—People v. Banat, 100 P.2d 374, 39 Cal.App.2d Supp. 765.

Ohio—State v. Blair, 157 N.E. 801, 24 Ohio App. 413—Justin v. City of Cincinnati, 28 Ohio N.P., N.S., 309.

Okl.—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323—Scott v. State, 108 P.2d 189, 71 Okl.Cr. 54.

Pa.—Commonwealth v. Reber, 46 Pa. Dist. & Co. 411, 58 Montg.Co. 444.
42 C.J. p 1344 notes 69, 72.

Statute held inapplicable

A statute which makes it an offense to operate a motor vehicle on the public highways at a rate of speed greater than is reasonable and proper, having regard to traffic and the use of the way, or so as to endanger the property, life, or limb of any person, is intended as a regulation of the speed of automobiles on highways, and has been held not to apply to the mistake of an inexperienced driver, who, while learning to operate an automobile, unintentionally backed his car upon the sidewalk.—People v. Ribstein, 234 Ill.App. 440.

48. Ohio.—Justin v. City of Cincinnati, 28 Ohio N.P., N.S., 309.

Okl.—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323—Scott v. State, 108 P.2d 189, 71 Okl.Cr. 54.

Pa.—Commonwealth v. Reber, 46 Pa. Dist. & Co. 411, 58 Montg.Co. 444.

or to operate a motor vehicle at such a speed as to endanger the life, limb, or property of any person,⁴⁹ or to operate a vehicle at a speed greater than will permit bringing it to a stop within the assured clear distance ahead.⁵⁰

Where a statute provides that a motor vehicle shall not be operated at a speed greater than is reasonable and proper with regard to circumstances named, or in any event upon the public highway in designated localities at a greater than a specified rate of speed, the "reasonable and proper" clause does not enlarge the maximum rate established by the statute but is a limitation on the right to operate at such a rate,⁵¹ and the driving of an automobile at a speed in excess of the maximum rate prescribed for the particular locality constitutes an offense under the statute irrespective of any question as to whether such speed was reasonable and proper.⁵²

Prima facie evidence provisions. Where a statute contains a proviso that the driving at a speed in excess of a given rate upon the highways generally, or in designated areas, shall constitute prima facie or presumptive evidence of a rate of speed that is greater than is reasonable or proper under the law,⁵³ it does not establish an absolute or fixed speed limit in any locality at which automobiles may be operated,⁵⁴ but the offense consists in the driving of an automobile at a rate of speed greater than is reasonable and proper with regard to the circumstances named in the statute irrespective of any particular rate of speed.⁵⁵ Thus the fact that the rate specified in the prima facie clause has been exceeded does not in itself establish an offense, for, if the presumption arising from such excessive speed is overcome by evidence that the automobile was operated at a reasonable and prop-

er rate under the circumstances, there has been no violation of the statute.⁵⁶ On the other hand, if an automobile is operated at a speed greater than is reasonable or proper, it may constitute an offense even though the actual speed of the vehicle was less than the rate set out in the prima facie clause.⁵⁷

§ 642. — Intent

Under some statutes intent is not an element of the offense of driving at an excessive speed.

A statute which makes it an offense to operate a motor vehicle at a greater than a specified rate of speed does not make the intent of the driver an element of the offense,⁵⁸ and the only intention necessary to render a violator liable is the doing of the prohibited act.⁵⁹ It has been held, however, that, where the statute creating the offense provides punishment only for a willful violation, no offense has been committed unless the act of speeding was willfully done.⁶⁰

§ 643. — Persons Liable

Ordinarily the only person liable for a violation of a speed statute is the one who was actually operating the motor vehicle at the time.

Ordinarily the only person liable for a violation of a speed statute is the one who was actually operating the vehicle at the time.⁶¹ It has been held, however, that one who, being present in the car, such as the owner, participates in, or is responsible for, the running of the machine at the illegal rate of speed may also be guilty.⁶² Where the offense is a misdemeanor, all who participate in its commission are principals and may be charged and convicted as such.⁶³ Under a statute which prohibits the owner of a motor vehicle, who is riding therein, to cause or permit it to proceed at a

49. Cal.—People v. Don Carlos, 117 P.2d 748, 47 Cal.App.2d Supp. 863 —People v. Banat, 100 P.2d 374, 39 Cal.App.2d Supp. 765.

Pa.—Commonwealth v. Reber, 46 Pa. Dist. & Co. 411, 58 Montg.Co. 444.

50. Okl.—Chandler v. State, 146 P. 2d 598, 79 Okl.Cr. 323—Scott v. State, 108 P.2d 189, 71 Okl.Cr. 54.

Pa.—Commonwealth v. Reber, 46 Pa. Dist. & Co. 411, 58 Montg.Co. 444.

51. Miss.—Snipes v. State, 109 So. 722, 144 Miss. 266.

42 C.J. p 1344 note 80.

52. R.I.—State v. Buchanan, 79 A. 1114, 32 R.I. 490.

42 C.J. p 1344 note 81.

53. N.J.—Baker v. Court of Special Sessions in and for Essex County, 15 A.2d 102, 125 N.J.Law 127.

Construction

The phrase "prima facie unlawful," as used in the section of statute providing that it shall be "prima facie unlawful" for a person to exceed any of the enumerated speed limitations for drivers of vehicles, does not carry any implication that the act of exceeding the speed limit is purged of unlawfulness because, notwithstanding such excessive speed, care is used in driving.—Baker v. Court of Special Sessions in and for Essex County, supra.

54. Mass.—Commonwealth v. Cassidy, 95 N.E. 214, 209 Mass. 24. 42 C.J. p 1344 note 74.

55. Ill.—People v. Lloyd, 178 Ill.App. 66.

Mass.—Commonwealth v. Cassidy, 95 N.E. 214, 209 Mass. 24.

56. Ill.—People v. Lloyd, 178 Ill. App. 66.

Mass.—Commonwealth v. Cassidy, 95 N.E. 214, 209 Mass. 24.

57. Mass.—Commonwealth v. Cassidy, supra.

58. Ill.—People v. Thexton, 188 Ill. App. 2.

Tex.—Goodwin v. State, 138 S.W. 399, 63 Tex.Cr. 140.

59. Tex.—Goodwin v. State, supra. 42 C.J. p 1344 note 85.

60. Ill.—People v. Ribstein, 234 Ill. App. 440.

61. Pa.—Commonwealth v. David, 15 Pa.Dist. 793.

42 C.J. p 1345 note 90.

62. Mass.—Commonwealth v. Sherman, 78 N.E. 98, 191 Mass. 439.

63. Mass.—Commonwealth v. Sherman, supra.

greater speed than that prescribed, an owner riding in his automobile is liable for a violation by his chauffeur of a regulation as to speed at which a street corner may be turned.⁶⁴

Exemptions. Police officers in the discharge of their duty⁶⁵ or members of the military or naval service of the United States acting in case of military necessity in time of war⁶⁶ are not chargeable with a violation of speed regulations, although no specific exemption may be made in their favor. The operator of a government mail truck has been held not exempt from such a regulation.⁶⁷ A physician is not exempt from such regulation unless the regulation so provides,⁶⁸ although he may sometimes be excused, within the discretion of court, for a violation committed while hastening to a bona fide emergency case.⁶⁹

§ 644. — Defenses

Any valid defense may be interposed in a prosecution for a violation of a speed statute.

Any valid defense may be interposed in a prosecution for a violation of a speed statute.⁷⁰ Control of the vehicle by a third person riding in it does not relieve the driver from liability⁷¹ unless he was acting under duress.⁷² The exercise of care by accused is not a defense to driving at a speed in excess of the maximum fixed by statute,⁷³ although it may be where the charge is of operating a vehicle at a speed greater than was reasonable and proper under the circumstances.⁷⁴ Violations by the other drivers without molestation are no de-

fense,⁷⁵ nor is the fact that speed was occasioned by an attempt to elude service of a warrant⁷⁶ or to escape an unlawful arrest.⁷⁷ If a statute creating the offense is repealed without a saving clause, there can be no prosecution or punishment for a violation of it before the repeal,⁷⁸ even though a prosecution has been begun,⁷⁹ and, of course, where the repealing statute went into effect before the commission of the offense no prosecution or conviction can be maintained.⁸⁰

§ 645. — Notice of Intended Prosecution

Matters with respect to arrests for violations of the laws relating to the operation of motor vehicles are discussed in Arrest § 1 et seq. Proceedings preliminary to a criminal prosecution generally are considered in Criminal Law §§ 300-366.

For a discussion of English cases with respect to notice of intended prosecution see 42 C.J. p 1345 notes 21, 22.

Examine Pocket Parts for later cases.

§ 646. — Indictment, Information, or Complaint

General rules as to the form and sufficiency of indictments, informations, and complaints usually apply in prosecutions for violations of the speed laws.

The rules as to the form and sufficiency of complaints, informations, and indictments generally apply in prosecutions for violations of the speed laws.⁸¹ All the essential elements of the crime as defined by the statute creating it must be alleged.⁸²

64. N.Y.—People v. Colon, 148 N.Y. S. 321, 85 Misc. 229.

65. Wash.—State v. Gorham, 188 P. 457, 110 Wash. 330, 9 A.L.R. 365.

State game protector

A state game protector who, in driving automobile to investigate a complaint that some one was engaged in illegal trapping, exceeded speed restrictions and who departed from his direct route to pick up a companion for apparently personal reasons was held subject to the restrictions of a speed ordinance of the municipality as against contention that he was driving a police vehicle within the meaning of statute excepting such vehicles.—City of Rochester v. Lindner, 4 N.Y.S.2d 4, 167 Misc. 790.

66. R.I.—State v. Burton, 103 A. 962, 41 R.I. 303, L.R.A.1918F. 559.

67. Cal.—People v. Don Carlos, 117 P.2d 748, 47 Cal.App.2d Supp. 983.

Va.—Hall v. Commonwealth, 105 S.E. 551, 129 Va. 738.

68. N.Y.—People v. Seidler, 176 N.Y. S. 677, 107 Misc. 67.

69. N.Y.—People v. Seidler, *supra*.

70. Miss.—White v. City of Philadelphia, 19 So.2d 493, 197 Miss. 166, suggestion of error overruled 19 So.2d 744, 197 Miss. 166.

Mail truck

The fact that the operator of a mail truck was late in the discharge of his duty and was trying to make up time, did not constitute a defense.—People v. Don Carlos, 117 P.2d 748, 47 Cal.App.2d Supp. 863.

71. Tex.—Goodwin v. State, 138 S. W. 399, 63 Tex.Cr. 140.

72. Tex.—Goodwin v. State, *supra*.

73. R.I.—State v. Buchanan, 79 A. 1114, 32 R.I. 490.

74. R.I.—State v. Buchanan, *supra*.

75. Ill.—People v. Beak, 126 N.E. 201, 291 Ill. 449.

76. Me.—State v. Freeman, 119 A. 668, 122 Me. 294, 29 A.L.R. 881.

77. Ga.—Murphy v. City of Atlanta, 14 S.E.2d 232, 64 Ga.App. 752.

78. Tex.—Ex parte Wright, 199 S.W. 486, 82 Tex.Cr. 247.

79. Tex.—Ex parte Wright, *supra*.

80. Tex.—Ex parte Wright, *supra*.

81. N.Y.—People v. Bruno, 43 N.Y.S. 2d 942.

Wis.—Seely v. City of Milwaukee, 248 N.W. 912, 212 Wis. 124, 42 C.J. p 1345 note 28.

Formal complaint

(1) In proceeding for violating speed ordinance, while it would have been better practice on objection made in municipal court to have filed formal complaint, failure to do so was not fatal defect.—Seely v. City of Milwaukee, *supra*.

(2) In absence of objection by accused when he appeared in district court charged with violating speed ordinance, statement of offense entered by the clerk constituted sufficient complaint.—Seely v. City of Milwaukee, *supra*.

82. Ala.—Brown v. State, 24 So.2d 450, 32 Ala.App. 246.

Cal.—People v. Banat, 100 P.2d 374, 39 Cal.App.2d Supp. 765.

with certainty⁸⁸ so as to inform accused of the charge which he has to meet.⁸⁴

An information must identify the particular speed law whose provision accused is charged with violating,⁸⁵ and, where the offense is created by an ordinance enacted under a statute prescribing certain conditions precedent to the operation of such ordinance, the information must set forth the due adoption of the ordinance⁸⁶ and the performance of all the requirements of the statute.⁸⁷

Erection of speed limit signs. Where the effectiveness of a local speed regulation depends on the placing of speed limit signs on the highway, the information must allege the erection of a sign with the inscription required by the statute at the place where the excessive speed was to be reduced.⁸⁸ However, where the statute required the placing of such signs only in certain territories outside of city limits, the erection of the signs need not be alleged when the charge is of speeding within the city limits.⁸⁹

Intent. If required by the statute, an information in an unlawful speed prosecution must charge a willful violation of the speed law.⁹⁰

Place. Generally, where the commission of the

offense of speeding as defined by the statute depends on the character of the place where the act was done, the place of commission must be alleged.⁹¹ There need be no allegation, however, as to the particular point or place at which the alleged offense was committed where the act charged is a violation of the law if committed anywhere within the jurisdiction.⁹² So, where an ordinance prohibits the operation of an automobile above a prescribed rate of speed in the built-up portions of the city, it is sufficient to allege that the act was committed within "the built up portion of the city" and within the corporate limits thereof,⁹³ it being unnecessary to allege upon what particular street in the corporate limits the unlawful speeding was done.⁹⁴ In a prosecution for exceeding the speed limit on a highway where the contiguous territory is closely built up in violation of a statute defining such territory, it is unnecessary for the complaint to specify in what manner the highway therein described was closely built up.⁹⁵ Similarly, although the phrase "closely built up" as used in a speed regulation is separately defined by the statute with reference to the residential and business portions, it is unnecessary for a complaint charging a violation on a particular highway in a city to furnish information in addition in order to enable defend-

Ga.—Perry v. State, 8 S.E.2d 425, 62 Ga.App. 115.

N.Y.—People v. De Gironimo, 15 N.Y.S.2d 1017, 172 Misc. 1100

N.C.—State v. Crayton, 199 S.E. 918, 214 N.C. 579.

42 C.J. p 1316 note 29.

Lack of jurisdiction to determine speed limit

An information would not lie against accused for operating automobile on public highway on street within city in excess of speed limit fixed by commissioner of motor vehicles since the speed limit in urban residence districts was fixed by statute, and the commissioner was without jurisdiction to determine speed limit in such districts.—State v. Langley, 26 A.2d 368, 92 N.H. 136.

Affidavit held sufficient

Miss.—White v. City of Philadelphia, 19 So.2d 493, 197 Miss. 166, suggestion of error overruled 19 So.2d 744, 197 Miss. 166.

Complaint held sufficient

Ala.—Chergotakos v. City of Gadsden, 166 So. 434, 27 Ala.App. 100.

Information held sufficient

N.Y.—People v. Bruno, 43 N.Y.S.2d 942.

42 C.J. p 1346 note 29 [a].

Indictment or information held insufficient

N.Y.—People v. Marketos, 54 N.Y.S.2d 857.

Ohio—State v. Blair, 157 N.E. 801, 24 Ohio App. 413.

42 C.J. p 1346 note 29 [b].

83. N.Y.—People v. Bruno, 43 N.Y.S.2d 942.

42 C.J. p 1343 note 39, p 1346 note 30.

Surplusage may be rejected and will not invalidate the indictment or information—People v. Wilcox, 37 N.Y.S.2d 127—42 C.J. p 1346 note 30 [c]

84. Pa.—Commonwealth v. Weber, 33 Pa.Dist. & Co. 488, 30 Mun.L.R. 93.

42 C.J. p 1346 note 31.

Information held sufficient

N.Y.—People v. Reed, 57 N.Y.S.2d 902, 185 Misc. 908—People v. Hirshon, 43 N.Y.S.2d 764.

42 C.J. p 1346 note 31 [a].

85. Pa.—Commonwealth v. Radomski, 55 Pa.Dist. & Co. 77, 62 Montg. Co. 9, 38 Mun.L.R. 156—Commonwealth v. Miller, Quar Sess., 57 Dauph Co. 325—Commonwealth v. McKinley, 38 Mun.L.R. 82, 94 Pittsb.Leg.J. 419.

42 C.J. p 1346 note 40.

86. N.Y.—People v. Bell, 148 N.Y.S. 753, 31 N.Y.Cr. 370.

87. N.Y.—People v. Bell, supra.

88. N.Y.—People v. Bell, supra. 42 C.J. p 1346 note 45.

Information held sufficient

An information charging violation of speed law established by municipality as authorized by vehicle and traffic law which did not allege that city had erected signs warning motorists of speed limitations as required by the state law was held sufficient on theory that allegation of adoption of ordinance included impliedly an allegation of placing of signs—People v. Schrader, 16 N.Y.S.2d 424, 172 Misc. 246.

89. R.I.—State v. Buchanan, 79 A. 1114, 32 R.I. 490.

90. Ill.—People v. Ribstein, 234 Ill. App. 410.

91. W.Va.—State v. Lantz, 111 S.E. 766, 90 W.Va. 738, 26 A.L.R. 894 42 C.J. p 1347 note 51.

92. W.Va.—State v. Lantz, supra. 42 C.J. p 1347 note 52.

93. R.I.—State v. Buchanan, 79 A. 1114, 32 R.I. 490.

Tex.—White v. State, 198 S.W. 964, 82 Tex.Cr. 274.

94. Tex.—White v. State, supra.

95. R.I.—State v. Buchanan, 79 A. 1114, 32 R.I. 490.

42 C.J. p 1347 note 55.

ant to ascertain whether he is charged with exceeding the statutory speed limit in a business or in a residential section of the city.⁹⁶

Rate of speed. An averment as to the speed alleged to have been unlawful has been held essential.⁹⁷

Second offense. Where a prosecution as a misdemeanor is authorized only on a second violation of the speed laws, the information must contain an allegation to the effect that this was accused's second offense.⁹⁸

Language of statute. Generally a complaint, information, or indictment charging the offense of unlawful speeding in the language of the statute or ordinance creating the offense,⁹⁹ or in substantially similar language,¹ is sufficient. Where such statute or ordinance, however, fails to set out the facts constituting the offense sufficiently to apprise accused of the precise nature of the charge against him,² or so that he may be able to avail himself of his acquittal or conviction as a protection against further prosecution for the same offense,³ a more particular statement of the necessary facts will be required in the charge.⁴

Where a statute applicable to all public highways prohibits the driving of motor vehicles at a speed greater than is reasonable and proper, having regard to the traffic, use of the way, etc., an information in the language of the statute is sufficient, although it does not charge the character of the public way⁵ or specify with further particularity the circumstances and conditions existing on the

highway which rendered the speed unreasonable or improper.⁶

Bill of particulars. Subject to the general rules pertaining to the allowance of bills of particulars in criminal prosecutions, where a party accused of a speed violation cannot prepare his defense because of lack of information or particularity in the averments of the charge, he may demand a bill of particulars,⁷ and on a proper showing the prosecuting attorney will be required to furnish him therewith.⁸

Issues, proof, and variance. As in the case of criminal prosecutions generally, the evidence in a prosecution for a violation of a speed law must conform to the allegations of the information.⁹

§ 647. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

Subject to statutory variations, general rules apply with respect to presumptions and burden of proof in a prosecution for a violation of a speed statute.

In a prosecution for a violation of a speed statute, the burden is on the prosecution to establish all the essential elements of the offense¹⁰ and the guilt of accused.¹¹ It must establish that the particular statute on which the prosecution is based was violated¹² by accused,¹³ that the place of the commission of the alleged offense of speeding was within the venue as laid,¹⁴ and that it was com-

96. R.I.—State v. Buchanan, *supra*.
97. Neb.—Wagner v. State, 206 N.W. 732, 114 Neb. 171.
42 C.J. p 1347 note 59.

Speed need not be specified

An information, under a statutory provision which does not prescribe a definite speed limit, need not specify the speed at which accused was traveling.—Commonwealth v. Weber, 33 Pa. Dist. & Co. 488, 30 Mun. L.R. 93.

98. Pa.—Commonwealth v. Pfeiffer, 35 Pa. Co. 476.

99. Ind.—Smith v. State, 115 N.E. 943, 186 Ind. 252.
42 C.J. p 1346 note 35.

Negating exceptions

An exception contained in the enacting clause of the statute must be negated.—Byrd v. State, 129 S.W. 620, 59 Tex. Cr. 513—42 C.J. p 1347 note 61.

1. Wash.—State v. Randall, 182 P. 575, 107 Wash. 695.

2. W.Va.—State v. Lantz, 111 S.E. 766, 90 W.Va. 738, 26 A.L.R. 894.
42 C.J. p 1346 note 37.

3. Ohio—State v. Rhoades, 20 Ohio N.P., N.S. 372.
Wash.—State v. Randall, 182 P. 575, 107 Wash. 695.

4. W.Va.—State v. Lantz, 111 S.E. 766, 90 W.Va. 738, 26 A.L.R. 894.
42 C.J. p 1346 note 39.

5. Ill.—People v. Levin, 181 Ill. App. 429.

6. Ohio—State v. Rhoades, 20 Ohio N.P., N.S. 372.

7. W.Va.—State v. Lantz, 111 S.E. 766, 90 W.Va. 738, 26 A.L.R. 894.

8. W.Va.—State v. Lantz, *supra*.
42 C.J. p 1346 note 34.

9. N.Y.—People v. De Gironimo, 15 N.Y.S.2d 1017, 172 Misc. 1100.

Evidence held inadmissible

N.Y.—People v. De Gironimo, *supra*.

10. N.Y.—People v. Shoen, 256 N.Y. S. 390, 142 Misc. 788.
N.D.—State v. Johnson, 16 N.W.2d 873, 73 N.D. 526.

Okl.—Scott v. State, 108 P.2d 189, 71 Okl. Cr. 54.

Pa.—Commonwealth v. Anspach, 4 A. 2d 203, 134 Pa. Super. 369—Commonwealth v. Messner, Quar. Sess., 33 Del. Co. 414.

Accuracy of officer's speedometer

In some jurisdictions the prosecution has the burden of showing that the officer's speedometer has been tested for accuracy as prescribed by statute.—Commonwealth v. Leitzel, 40 Pa. Dist. & Co. 410—Commonwealth v. Penman, 36 Pa. Dist. & Co. 634—Commonwealth v. Harvey, Pa. Com. Pl., 49 Dauph. Co. 43.

11. Ill.—People v. Lloyd, 178 Ill. App. 66.

Mass.—Commonwealth v. Cassidy, 95 N.E. 214, 209 Mass. 24.
42 C.J. p 1348 note 80.

12. Ind.—Smith v. State, 115 N.E. 943, 186 Ind. 252.
42 C.J. p 1348 note 81.

13. Pa.—Commonwealth v. Bacon, 35 Pa. Co. 429.

14. Wash.—Spokane v. Knight, 165 P. 105, 96 Wash. 403.

mitted within the statutory period of limitations before the commencement of the prosecution.¹⁵ Where the placing of speed-limit signs is required by the statute, the erection of the proper signs must be established.¹⁶ The knowledge of the driver as to the provisions of a statute limiting the speed of motor vehicles is presumed.¹⁷

In a prosecution for violation of a municipal ordinance, the burden of showing that a legal ordinance has been duly adopted and that statutory requirements relating to its enactment have been duly complied with rests on the prosecution,¹⁸ unless such facts are admitted,¹⁹ and a conviction without such proof cannot be sustained.²⁰

Exemption. The burden of proving that he is exempt from liability to prosecution has been held to be on accused.²¹

Unnecessary allegations. Although it was unnecessary to the charging of an offense to allege upon what particular street in the jurisdiction the act of unlawful speeding was committed, where an indictment charges the crime as done upon a named street, the prosecution must prove that the act charged was done upon the street alleged.²² However, an information alleging that the act of speeding occurred upon a public highway within the jurisdiction of a park commission need not be proved, where there is another allegation in the information that the violation occurred upon a public highway in the city and that fact was proved.²³

Under prima facie evidence provisions. In a prosecution under a statute which makes it an offense to drive an automobile at a speed greater than is reasonable and proper under the circumstances and also provides that driving in excess of certain rates of speed in designated localities shall be prima facie or presumptive evidence that the motor vehicle is being operated at the prohibited rate of speed, proof that accused operated an automobile at a rate of speed in excess of that specified in the statute does not establish the commission of an offense by him,²⁴ but merely establishes a prima facie case.²⁵ Such a provision is merely a rule of evidence,²⁶ raising a rebuttable presumption,²⁷ which may be overcome by the evidence.²⁸ The operation of this statutory presumption does not change the burden on the prosecution to prove the guilt of accused,²⁹ but simply requires that in the absence of explanatory or contradictory evidence the finding shall be in accordance with the proof establishing the prima facie case.³⁰ Where a prima facie case under the statute is made out, and accused offers no evidence to meet it, the prima facie case becomes conclusive and justifies a finding of guilty.³¹

b. Admissibility

In the absence of special statutory provisions, the rules governing the admissibility of evidence in criminal cases generally apply to a prosecution for a violation of the speed laws.

In the absence of special statutory provisions,³²

15. Ind.—*Buchanan v. State*, 113 N. E. 726, 185 Ind. 222.
42 C.J. p 1348 note 84.

16. N.Y.—*People v. Schrader*, 16 N. Y.S.2d 424, 172 Misc. 246—*People v. Hirshon*, 43 N.Y.S.2d 764.
Pa.—*Commonwealth v. Anspach*, 4 A. 2d 203, 134 Pa. Super. 369.
42 C.J. p 1348 note 86.

Prima facie case

In prosecution for violating a city speed limitation ordinance, after prosecution has established that city has complied with statute making erection of signs notifying motorists of city speed limitation a condition precedent to enactment of city ordinance, the prosecution have proved a prima facie case, and any further attack on ordinance must rest on accused.—*People v. Schrader*, 16 N.Y.S.2d 424, 172 Misc. 246.

17. Ill.—*People v. Camberis*, 130 N. E. 712, 297 Ill. 455—*People v. Falkovitch*, 117 N.E. 398, 280 Ill. 321, Ann.Cas.1918B 1077.

18. N.Y.—*People v. Travis*, 178 N.E. 762, 257 N.Y. 474—*People v. Schrader*, 16 N.Y.S.2d 424, 172 Misc. 246

—*People v. Shoen*, 256 N.Y.S. 390, 142 Misc. 788.
42 C.J. p 1348 note 89.

19. Mass.—*Commonwealth v. Sherman*, 78 N.E. 98, 191 Mass. 439.

20. N.Y.—*People v. Traina*, 155 N.Y.S. 1015, 92 Misc. 82.

21. Mo.—*City of Brentwood v. Nalley, App.*, 208 S.W.2d 838.

22. Ga.—*Nalls v. State*, 107 S.E. 354, 27 Ga.App. 38.

42 C.J. p 1348 note 92.

23. Ill.—*People v. Hood*, 191 Ill.App. 33.

24. Cal.—*Ex parte Moseley*, 45 P.2d 241, 6 Cal.App.2d 654.

N.Y.—*People v. Gironimo*, 15 N.Y.S. 2d 1017, 172 Misc. 1100.

42 C.J. p 1348 note 95.

25. Cal.—*Ex parte Moseley*, 45 P.2d 241, 6 Cal.App.2d 654.

N.Y.—*People v. Gironimo*, 15 N.Y.S. 2d 1017, 172 Misc. 1100.

N.C.—*State v. Crayton*, 199 S.E. 918, 214 N.C. 579.

42 C.J. p 1348 note 96.

26. N.Y.—*People v. Brown*, 33 N.Y.S. 2d 58.

27. N.Y.—*People v. Brown*, *supra*.

28. Cal.—*Ex parte Moseley*, 45 P.2d 241, 6 Cal.App.2d 654.

N.Y.—*People v. Gironimo*, 15 N.Y.S. 2d 1017, 172 Misc. 1100—*People v. Brown*, 33 N.Y.S. 2d 58.

42 C.J. p 1348 note 97.

Burden of proof on accused

In prosecution for violation of ordinance prohibiting unreasonable speeds and making speed in excess of thirty-five miles per hour prima facie unlawful, burden of proof was cast on accused, on proof of a speed greater than thirty-five miles per hour—*City of Cincinnati v. Cramer*, 27 N.E.2d 406, 63 Ohio App. 526.

29. Mass.—*Commonwealth v. Cassidy*, 95 N.E. 214, 209 Mass. 24.

42 C.J. p 1348 note 98.

30. Ill.—*Morrison v. Flowers*, 139 N. E. 10, 308 Ill. 189.

31. Miss.—*White v. City of Philadelphia*, 19 So.2d 493, 197 Miss. 166, suggestion of error overruled 19 So.2d 744, 197 Miss. 166.

42 C.J. p 1348 note 1.

32. Cal.—*People v. Stewart*, 288 P. 57, 107 Cal.App., Supp. 757.

Evidence based on use of speed traps
Under some statutes which have

the rules governing the admissibility of evidence in criminal cases apply to prosecutions for violation of the speed laws.³³ Measurements obtained by use of a speedometer have been held admissible to show the rate of speed at which an automobile was being driven.³⁴ Evidence that a certain make of speedometer is in use in many police departments in official testing is not admissible to prove the accuracy of this kind of speedometer in general or of the particular one in question.³⁵ A statutory provision that an official certificate as to the accuracy of a speedometer on an officer's motor vehicle shall be competent and prima facie evidence of the fact has been held to be invalid.³⁶

c. Weight and Sufficiency

In the absence of special statutes, the rules governing

the weight and sufficiency of the evidence in criminal cases apply in a prosecution for a violation of a speed statute.

In the absence of special statutes,³⁷ the rules governing the weight and sufficiency of the evidence in criminal cases apply in determining whether the evidence in a prosecution for a violation of a speed statute is sufficient to sustain a conviction.³⁸ These general rules also control as to the sufficiency of the evidence to establish the essential facts necessary to constitute the offense charged and to authorize a prosecution therefor,³⁹ such as jurisdiction or venue,⁴⁰ the existence of the speed ordinance on which the prosecution is based,⁴¹ the identity⁴² and participation⁴³ of accused, the

been held valid, evidence of speed violations obtained by operation of speed traps is declared incompetent and inadmissible in the trial of the person arrested for such offense.—*Fleming v. Orange County Super Ct.*, 238 P. 88, 196 Cal. 344.

Testimony held competent

Testimony of officer arresting speeder while on highway for purpose disconnected with vehicle act was held competent, even though he used automobile without distinctive color.—*People v. Stewart*, 288 P. 57, 107 Cal.App. Supp. 757.

33. Ga.—*Dunahoo v. State*, 167 S.E. 614, 46 Ga.App. 310.
42 C.J. p 1348 note 4.

Ordinances

In proceeding for violating speed ordinance, admission of ordinances was not error, since municipal court must take judicial notice of ordinances.—*Seely v. City of Milwaukee*, 248 N.W. 912, 212 Wis. 124.

34. Wash.—*Spokane v. Knight*, 165 P. 105, 96 Wash. 403.
42 C.J. p 1349 note 8.

35. R.I.—*State v. Buchanan*, 79 A. 1114, 32 R.I. 490.
42 C.J. p 1349 note 10.

36. Pa.—*Commonwealth v. Baddorf*, 42 Pa.Dist. & Co. 276, 51 Dauph Co. 75—*Commonwealth v. Obenreder*, 40 Pa.Dist. & Co. 155.

37. Prima facie evidence

The statute providing that speed in excess of that determined by commissioner of motor vehicles shall be prima facie evidence that such speed is not reasonable and safe, means that it shall be evidence sufficient to support a verdict if one should be found.—*State v. Langley*, 26 A.2d 368, 92 N.H. 136.

Unsupported evidence of one officer

Under some statutes designed to eliminate speed traps, a conviction cannot be had except on the testimony

of two peace officers stationed at each end of a measured stretch.—*Commonwealth v. Kurtz*, 33 Pa.Dist. & Co. 661.

38. Pa.—*Commonwealth v. Zook*, Quar.Sess., 29 Mun.I.R. 100.

Prima facie case

Commonwealth made prima facie case of violating statutory speed limit through arresting officer who testified that inspection of speedometer on his automobile had been made within thirty days prior to alleged violation, that he was present and observed test as it was made, that he followed accused on highway for more than one-quarter of mile and, from reading of his speedometer, determined that accused was driving his automobile at speed in excess of legal limit.—*Commonwealth v. Parish*, 10 A.2d 896, 138 Pa.Super. 593.

Evidence held sufficient

Cal.—*People v. Don Carlos*, 117 P.2d 748, 47 Cal.App.2d Supp. 863

Ga.—*Chin v. State*, 35 S.E.2d 18, 72 Ga.App. 733—*Fugh v. State*, 13 S.E.2d 41, 64 Ga.App. 267.

Kan.—*State v. Blake*, 298 P. 748, 133 Kan. 152.

Miss.—*White v. City of Philadelphia*, 19 So.2d 493, 197 Miss. 166, suggestion of error overruled 19 So.2d 744, 197 Miss. 166.

N.Y.—*People, on Complaint of Lucius, v. Herman*, 20 N.Y.S.2d 149, 174 Misc. 235—*People v. Hirshon*, 43 N.Y.S.2d 764—*People v. Willcox*, 37 N.Y.S.2d 127.

Ohio.—*City of Cincinnati v. Cramer*, 27 N.E.2d 406, 63 Ohio App. 526.

Okl.—*Torgeson v. State*, 281 P. 812, 45 Okl.Cr. 50.

Pa.—*Commonwealth v. Parish*, 10 A.2d 896, 138 Pa.Super. 593—*Commonwealth v. Reber*, 46 Pa.Dist. & Co. 411, 58 Montg.Co. 444.

Tex.—*Scott v. State*, 114 S.W.2d 564, 134 Tex.Cr. 191.

42 C.J. p 1349 note 19 [a].

Evidence held insufficient

Ill.—*People v. Trekalotis*, 8 N.E.2d 388, 290 Ill.App. 605

N.Y.—*People v. Brown*, 33 N.Y.S.2d 58.

Okl.—*Scott v. State*, 108 P.2d 189, 71 Okl.Cr. 54—*Cole v. State*, 104 P.2d 981, 70 Okl.Cr. 109.

Pa.—*Commonwealth v. Baddorf*, 42 Pa.Dist. & Co. 276, 51 Dauph.Co. 75—*Commonwealth v. Mehelic*, Quar.Sess., 21 Wash.Co. 109.
42 C.J. p 1349 note 19 [b].

39. D.C.—*Lohman v. District of Columbia*, Mun.App., 51 A.2d 382.

N.Y.—*People, on Complaint of Lucius, v. Herman*, 20 N.Y.S.2d 149, 174 Misc. 235.

Pa.—*Commonwealth v. Harvey*, Com.Pl., 49 Dauph.Co. 43.

Va.—*Hall v. Commonwealth*, 105 S.E. 551, 129 Va. 738.

Accuracy of officer's speedometer

Pa.—*Commonwealth v. Letzel*, 40 Pa.Dist. & Co. 410—*Commonwealth v. Penman*, 36 Pa.Dist. & Co. 631—*Commonwealth v. Hilands*, 36 Pa.Dist. & Co. 472.

40. Mo.—*City of St. Louis v. Lee*, App., 132 S.W.2d 1055.

Wis.—*Seely v. City of Milwaukee*, 248 N.W. 912, 212 Wis. 124.

42 C.J. p 1349 note 21.

41. N.Y.—*People v. Averill*, 208 N.Y.S. 774, 124 Misc. 383.

42 C.J. p 1349 note 22.

42. Tex.—*Allen v. State*, 169 S.W. 1151, 74 Tex.Cr. 623.

42 C.J. p 1349 note 23.

43. Mass.—*Commonwealth v. Sherman*, 78 N.E. 98, 191 Mass. 439.

Evidence held sufficient

Ga.—*Smith v. State*, 38 S.E.2d 639, 74 Ga.App. 17—*Mitchell v. State*, 38 S.E.2d 95, 73 Ga.App. 831—*Walden v. State*, 36 S.E.2d 886, 73 Ga.App. 472.

Mass.—*Commonwealth v. Sherman*, 78 N.E. 98, 191 Mass. 439.

place where the offense was committed,⁴⁴ and the erection of speed signs.⁴⁵

§ 648. — Questions of Law and Fact

In a prosecution for unlawful speeding it is the province of the jury, where the evidence is conflicting and is sufficient to warrant a submission to them, to determine questions of fact.

In a prosecution for unlawful speeding it is the province of the jury, where the evidence is conflicting and is sufficient to warrant a submission to them,⁴⁶ or for the court, trying a case without a jury, to determine as a question of fact such matters as the rate of speed at which the vehicle in question was being driven;⁴⁷ whether the speed was greater than was reasonable and proper, having regard to the traffic and other circumstances;⁴⁸ the amount of traffic upon the highway at the time of the alleged violation;⁴⁹ and the accuracy of the speedometer used by a witness.⁵⁰ Where a prima facie case is established by virtue of a statutory provision⁵¹ and evidence is introduced in rebuttal, it becomes a question for the jury, or the court trying the case without a jury, to decide on the whole evidence whether the presumption raised by the prima facie case has been overcome.⁵²

§ 649. — Instructions

The court should instruct the jury fully and correctly with respect to the law of the case.

In accordance with the rules applicable in criminal cases generally the court, in a prosecution for unlawful speeding, should submit the case to the jury with full and accurate instructions applicable to the issues, and should not give instructions which are misleading or erroneous.⁵³

§ 650. — Judgment, Sentence, Punishment, and Review

- a. Judgment, sentence, and punishment
- b. Review

a. Judgment, Sentence, and Punishment

General rules usually apply with respect to judgment, sentence, and punishment in a prosecution for violating the speed laws.

General rules usually apply with respect to a judgment of conviction or sentence in a prosecution for a violation of the speed laws.⁵⁴ Under a penal statute which prohibits more than one punishment for single acts which may constitute distinct offenses under different provisions of law, it is improper for a court to render two separate sentences of conviction in a prosecution for a single act of speeding within a municipality which constituted a violation of both the municipal and state speed laws.⁵⁵ In such a case the trial court can properly proceed under either the state law or the municipal ordinance, but not under both.⁵⁶ It is not necessary to fix and determine the number of days of imprisonment as the alternative in a sentence for unlawful speeding where the statute itself provides for this.⁵⁷ Similarly, in the judgment for a conviction obtained in a summary proceeding for the collection of a penalty for unlawful speeding, it is not necessary to state to whom the fine is payable where the statute itself specifies the party entitled.⁵⁸ Where an accused is being tried for a second offense and is liable, therefore, to a more severe punishment, it has been held that everything necessary to authorize the higher penalty should be distinctly found by the magistrate so that it may clearly appear that the sentence is

44. N.Y.—*People v. Hirshon*, 43 N. Y.S.2d 764.

42 C.J. p 1349 note 25.

45. N.Y.—*People v. Schrader*, 16 N. Y.S.2d 424, 172 Misc. 246.

Pa.—*Commonwealth v. Anspach*, 4 A. 2d 203, 134 Pa.Super. 369.

42 C.J. p 1349 note 26.

46. Pa.—*Commonwealth v. Kurtz*, 33 Pa.Dist. & Co. 661.

42 C.J. p 1350 note 38.

47. Minn.—*State v. Skahen*, 190 N. W. 794, 153 Minn. 492.

42 C.J. p 1350 note 39.

48. Wis.—*Mulkern v. State*, 187 N. W. 190, 176 Wis. 490.

42 C.J. p 1350 note 40.

49. Minn.—*State v. Skahen*, 190 N. W. 794, 153 Minn. 492.

50. Wash.—*Spokane v. Knight*, 165 P. 105, 96 Wash. 403.

51. Effect of statute

The statute providing that speed

in excess of that determined by commissioner of motor vehicles shall be prima facie evidence that such speed is not reasonable and safe, means that it shall be evidence sufficient to invoke the judgment of the trier of fact.—*State v. Langley*, 26 A.2d 368, 92 N.H. 136.

52. Mass.—*Commonwealth v. Cassidy*, 95 N.E. 214, 209 Mass. 24.

42 C.J. p 1350 note 44.

53. Ga.—*Dunahoo v. State*, 167 S.E. 614, 46 Ga.App. 310.

42 C.J. p 1350 note 46.

Instructions held erroneous

Ga.—*Dunahoo v. State*, supra.

N.D.—*State v. Johnson*, 16 N.W.2d 873, 73 N.D. 526.

42 C.J. p 1350 note 46 [b].

Instructions held not erroneous

Miss.—*White v. City of Philadelphia*, 19 So.2d 493, 197 Miss. 166, suggestion overruled 19 So.2d 744, 197 Miss. 166.

54. Mo.—*Schwaller v. May*, 115 S.W. 2d 207, 231 Mo.App. 185.

Judgment held not void

Ala.—*Chergotakos v. City of Gadsden*, 166 So. 434, 27 Ala.App. 100.

Conviction on plea of guilty

A conviction for speeding on defendant's plea of guilty was legal, notwithstanding sentence imposed on defendant was unauthorized and illegal.—*City of Rochester v. Newton*, 8 N.Y.S.2d 441, 169 Misc. 726.

55. N.Y.—*People v. Fitzgerald*, 188 N.Y.S. 930, 101 Misc. 695.

56. N.Y.—*People v. Fitzgerald*, supra.

42 C.J. p 1350 note 49.

57. Pa.—*Commonwealth v. Nelson*, 19 Pa.Dist. 1044.—*Commonwealth v. Dyer*, 38 Pa.Co. 258.

58. Pa.—*Commonwealth v. Nelson*, 19 Pa.Dist. 1044.

warranted.⁵⁹

Punishment. The penalty or punishment to be imposed for a violation of the speed laws is that prescribed by statute or ordinance,⁶⁰ and may be a fine,⁶¹ or imprisonment,⁶² or both.⁶³ A penalty which is excessive or unauthorized cannot be enforced.⁶⁴ Thus, where a statute prescribes a maximum penalty for a first offense and authorizes more severe punishments for second or subsequent offenses, the more severe punishment may not be inflicted on a first offender.⁶⁵ So, where a second offense, in order to be punishable as such, must have been committed within a period of one year, a fine as for a second offense cannot be sustained where it does not appear that the offense was committed within such period.⁶⁶ Similarly, where the jurisdiction of a court as to the punishment it may inflict is limited, it cannot impose a greater penalty,

even though the speed statute authorizes a punishment in excess of the court's jurisdiction.⁶⁷

Where accused has several times previously been convicted of operating his automobile at an illegal rate of speed, it is within the discretion of the court under some statutes to punish him by imprisonment,⁶⁸ and a jail sentence so imposed which is warranted by the circumstances of the case will be affirmed.⁶⁹

b. Review

In the absence of a statute to the contrary, the general rules of review in criminal cases apply as to a review of a conviction for the violation of the speed laws.

Matters relating to a review by a higher court of a conviction for the violation of the speed laws are governed, in the absence of special statutes, by the rules and statutes applicable to a review in criminal prosecutions generally.⁷⁰ This is true

59. Pa.—Commonwealth v. Dyer, 38 Pa.Co. 258.

60. Mo.—City of St. Louis v. Lee, App., 132 S.W.2d 1055.
Wis.—Seely v. City of Milwaukee, 248 N.W. 912, 213 Wis. 124.

Statute must be strictly construed.
Pa.—Commonwealth v. Anspach, 4 A.2d 203, 134 Pa.Super. 369—Commonwealth v. Wolfgang, 182 A. 109, 120 Pa.Super. 252.

Suspension of license

In prosecution for speeding, where jury found motorist guilty, imposed a fine, and suspended driver's license, and ordinance invested judge, alone, with power to order suspension of license on conviction, and court, in entering judgment, included an order for suspension, suspension was effective, and jury's verdict as to suspension was at most a recommendation.—Schwaller v. May, 115 S.W.2d 207, 234 Mo.App. 185.

61. Mo.—City of St. Louis v. Lee, App., 132 S.W.2d 1055.

Release fee

Tex.—Ex parte Griffiths, 145 S.W.2d 192, 140 Tex.Cr. 364.

Suspension of fine

(1) The suspension of a fine for speeding could not legally be conditioned on the filing by accused of a public liability insurance policy.—City of Rochester v. Drummond, 11 N.Y.S.2d 725, 171 Misc. 13.

(2) Where accused, convicted for speeding, was a dealer in used automobiles and carried a blanket liability policy on all his automobiles, requiring him to procure another public liability policy was so unreasonable that such action could not properly be required as condition of suspension of his fine.—City of Rochester v. Drummond, supra.

Option as to payment of fine

In prosecution for speeding, municipal court had no power in imposing fine to give accused privilege of either paying fine or relieving himself of paying part of it by filing public liability policy with court, or of the whole of it by leaving operator's license with court for period of sixty days during which time accused should not drive automobile.—City of Rochester v. Newton, 8 N.Y.S.2d 441, 169 Misc. 726.

62. Mo.—City of St. Louis v. Lee, App., 132 S.W.2d 1055.

Imprisonment for five days for violation of basic speed law was not an abuse of discretion.—People v. Don Carlos, 117 P.2d 748, 47 Cal.App.2d Supp. 863.

63. Mo.—City of St. Louis v. Lee, App., 132 S.W.2d 1055.

64. N.Y.—People v. Kiltendaugh, 77 N.Y.S.2d 321, 190 Misc. 410.—City of Rochester v. Newton, 8 N.Y.S.2d 441, 169 Misc. 726.

Penalty held excessive

N.Y.—City of Rochester v. Newton, 8 N.Y.S.2d 441, 169 Misc. 726.

Okl.—Torgeson v. State, 281 P. 812, 45 Okl.Cr. 50.

65. Miss.—Snipes v. State, 109 So. 722.

42 C.J. p. 1350 note 55.

66. Pa.—Commonwealth v. Dyer, 38 Pa.Co. 258.

67. N.Y.—People v. De Graff, 107 N.Y.S. 1038, 56 Misc. 429.

68. N.Y.—People v. Seidler, 176 N.Y.S. 677, 107 Misc. 67.

69. N.Y.—People v. Seidler, supra.

70. Appeal

(1) On appeal from a judgment of conviction for violation of a city speed ordinance, the cause becomes quasi-criminal, and is triable de novo

with city as plaintiff, accused becomes bound for the penalty assessed in the circuit court, and judgment may be entered against him for penalty and costs, instead of the fine or a sentence therefor.—Chergotakos v. City of Gadsden, 166 So. 434, 27 Ala.App. 100.

(2) In the absence of a statute giving the right of an appeal to a municipality in prosecutions for violation of its speed ordinances, no appeal will lie from a judgment of the lower court discharging accused in such a prosecution.—Alabama City v. Allen, 108 So. 267, 21 Ala.App. 332.

(3) A motion to amend affidavit, charging operation of automobile on city streets at speed in violation of ordinance, on appeal from conviction before mayor, was properly overruled where it was not shown that amended affidavit would charge offense under ordinance.—City of Pascagoula v. Rogers, 184 So. 433, 183 Miss. 323.

(4) In prosecution for speed, where judgment of conviction imposed fine and ordered suspension of driver's license under power given to judge by city ordinance, and, on appeal, motorist posted supersedeas bond, execution of judgment as to suspension was thereby stayed pending appeal, as well as to imposition of fine, so that arrest and detention of motorist for offense of driving automobile while license was suspended, prior to appeal, was an unlawful deprivation of liberty.—Schwaller v. May, 115 S.W.2d 207, 234 Mo.App. 185.

Certiorari

A writ of certiorari will be awarded where the information does not contain a reference to the section and subsection of the speed statute alleged to be violated.—Commonwealth v. Radomski, 55 D. & C. 77, 62 Montg. Co. 9, 38 Mun.L.R. 156.

as to such matters as the scope of review on certiorari,⁷¹ the presumptions or inference indulged by the reviewing court,⁷² the presentation in the lower court of the grounds of review by appropriate motions, demurrers, objections, and exceptions,⁷³ and as to the waiver of the right to raise the question as to the manner in which the review was presented.⁷⁴

Determination and disposition of cause. The judgment will be affirmed where no error appears⁷⁵ and there was sufficient evidence to support the verdict.⁷⁶ In the absence of anything to indicate that the trial court was hostile⁷⁷ or that the jurors were prejudiced or received improper impressions,⁷⁸ a verdict or finding will not be reversed except for the best of reasons. A conviction will not be sustained, however, by a reviewing court where the information on which the prosecution is based does not state a crime⁷⁹ or where the record fails to set forth all the facts necessary to sustain the conviction.⁸⁰ The judgment may be modified in a proper case.⁸¹

§ 651. Failing to Exhibit License on Request

The failure of the operator of a motor vehicle to exhibit his operator's license or registration when requested by a peace officer or other authorized person is an offense under some statutes.

71. Cal.—Fleming v. Orange County Super. Ct., 238 P. 88, 196 Cal 344.

42 C.J. p 1351 note 66.

72. Cal.—Fleming v. Orange County Super. Ct., supra.

42 C.J. p 1351 note 67.

73. Ill.—People v. Beak, 126 N.E. 201, 291 Ill. 449.

42 C.J. p 1351 note 68.

74. Ill.—People v. Thexton, 188 Ill. App. 2.

75. Ga.—Devereaux v. State, 106 S.E. 739, 26 Ga.App. 429.

42 C.J. p 1351 note 70.

76. Ga.—Devereaux v. State, supra.

42 C.J. p 1351 note 71.

77. Pa.—Commonwealth v. Nelson, 19 Pa.Dist. 1044.

78. R.I.—State v. Buchanan, 79 A. 1114, 32 R.I. 490.

79. N.Y.—People v. Bell, 148 N.Y.S. 753, 31 N.Y.Cr. 370.

Wash.—State v. Hall, 116 P. 593, 64 Wash. 99.

80. N.Y.—People v. Higgins, 31 N.Y.S.2d 508.

42 C.J. p 1351 note 75.

81. Okl.—Torgeson v. State, 281 P. 813, 45 Okl.Cr. 50.

Excessive fine reduced

N.Y.—City of Rochester v. Drummond, 11 N.Y.S.2d 725, 171 Misc. 13.

82. Mass.—Commonwealth v. Sullivan, 40 N.E.2d 261, 311 Mass. 177. Pa.—Commonwealth v. Wagner, Quar. Sess., 58 Montg.Co. 108.

Displaying badge

Badge reading "Inspector, Registry of Motor Vehicles" and worn by person making demand on motorist to produce license to operate motor vehicle was not such a "badge" as disclosed to the motorist that the person making the demand had the powers of a police officer and the displaying of such a badge by an investigator was not in conformity with statute making it an offense on part of motorist to refuse to comply with demand of police officer, who displays his badge to produce license to operate motor vehicle.—Commonwealth v. Sullivan, 40 N.E.2d 261, 311 Mass. 177.

Complaint

A complaint charging operation of automobile and failure to display operator's license on demand by peace officer was insufficient to charge an offense under statute requiring a license to be carried and exhibited on demand, in absence of allegation that accused was, on date of alleged offense, a licensee.—Barber v. State, Tex.Cr., 191 S.W.2d 879.

The failure of the operator of a motor vehicle to exhibit his operator's license or registration when requested by a peace officer or other authorized person is an offense under some statutes,⁸² and such statutes have been held applicable to all persons coming within their terms and not exempt therefrom either by the express terms of the statute or by necessary implication.⁸³ Under other statutes such a failure has been held not a criminal offense,⁸⁴ but only prima facie evidence that the operator has not obtained a license.⁸⁵

§ 652. Failing to Give Information Identifying Driver

In the absence of a statute, failure of the driver or operator of a motor vehicle to reveal his identity is not an offense.

In the absence of a statute, failure of the driver or operator of a motor vehicle to reveal his identity is not an offense.⁸⁶

§ 653. Failing to Give Warning Signals

The failure of the operator of a motor vehicle to give proper warning signals at various times and places is an offense under some statutes.

The failure of the operator of a motor vehicle to give proper warning signals at various times and

Evidence held insufficient to sustain conviction

Mass.—Commonwealth v. Sullivan, 40 N.E.2d 261, 311 Mass. 177.

83. D.C.—Crosen v. District of Columbia, 2 F.2d 924, 55 App.D.C. 122. 42 C.J. p 1352 note 80.

84. Ohio.—State v. Farren, 45 N.E. 2d 413, 140 Ohio St. 473, 143 A.L.R. 1016.—State v. Farren, App., 57 N.E.2d 334.

85. Ohio.—State v. Farren, 45 N.E. 2d 413, 140 Ohio St. 473, 143 A.L.R. 1016.—State v. Farren, App., 57 N.E.2d 334.

Rule of evidence

Statutes providing that the failure by an operator of a motor vehicle to exhibit his license or registration to any magistrate, motor vehicle inspector, police officer, constable, or other competent authority shall be presumptive evidence that such person is not duly licensed prescribe a rule of evidence only, and one who has a license cannot be convicted simply because he fails on demand of a police officer to exhibit it.—People v. Meyer, 186 N.Y.S. 434, 194 App.Div. 822.—People v. Simon, 33 N.Y.S.2d 14, 178 Misc. 49.

86. N.Y.—People v. Grange, 190 N.Y.S. 573, 116 Misc. 523. 42 C.J. p 1352 note 85.

places is an offense under some statutes.⁸⁷ It has been held that there can be no conviction under such a statute where the signal was not given because the operator did not see the vehicle in front of him by reason of his lights suddenly going out and where he was going slowly and was seeking a suitable place to stop to endeavor to fix the lights.⁸⁸

§ 654. Failing to Keep to Right

The failure of an operator of a motor vehicle to keep to the right at particular times or places is an offense under some statutes.

87. N.Y.—*People v. Stoner*, 7 N.Y.S. 2d 510, 169 Misc. 469.

Ohio—*City of Dayton v. Sliver*, App., 36 N.E.2d 1002.

Pa.—*Commonwealth v. Diehl*, 35 Pa. Dist. & Co. 503

42 C.J. p 1352 note 88.

Left turn

A driver of school bus, who because of construction of bus was unable to signal his intention to make a left turn by extending left arm horizontally, did not comply with ordinance requiring operator of vehicle to signal intention to make left turn by extending left arm horizontally, but providing that a mechanical or electrical device which conveys an "intelligent" signal to a vehicle approaching from the rear may be used in lieu thereof, by operating of alternating flasher lights by applying brakes before making a left turn, inasmuch as it was impossible to determine from the signal whether bus driver intended to stop, turn right, or turn left.—*City of Dayton v. Sliver*, Ohio App., 36 N.E.2d 1002.

Information

(1) Under a statute requiring one operating a motor vehicle to give a signal before passing a vehicle proceeding in the same direction, an information is not defective as charging an attempt to pass a vehicle, which is not in itself an offense, which charges that accused attempted to pass another vehicle without sounding a signal.—*Russell v. State*, 228 S.W. 566, 88 Tex.Cr. 512.

(2) Information held sufficient.—*Commonwealth v. Zellers*, 34 Pa.Dist. & Co. 43.

Questions not involved

In a prosecution for violation of a statute requiring the sounding of signals in rounding a curve, the question whether the negligence of defendant was the proximate cause of the collision is not involved, nor is the question whether the person whose car was struck was guilty of contributory negligence.—*People v. Arrieta*, 28 Puerto Rico 313.

Instructions

Ga.—*Dunahoo v. State*, 167 S.E. 614, 46 Ga App 310

88. Tex.—*Russell v. State*, 228 S.W. 566, 88 Tex.Cr. 512.

89. Cal.—*People v. Dallas*, 109 P. 2d 409, 42 Cal App 2d 196

Ga.—*Cain v. State*, 35 S.E.2d 18, 72 Ga App 733

Mo.—*State v. Ball*, App., 171 S.W.2d 787.

Pa.—*Commonwealth v. Johnston*, 29 Pa Dist & Co 662

SC—*State v. Brown*, 32 S.E.2d 825, 205 SC 514

Not criminal per se

Driving a motor vehicle on the left side of the road is not per se a criminal act.—*Gutierrez v. State*, 68 S.W.2d 198, 125 Tex.Cr. 283.

Statute held not repealed by implication

Cal.—*People v. Hugon*, 114 P.2d 84, 45 Cal App 2d Supp 817.

Defenses

In a prosecution for violation of an ordinance requiring drivers of motor vehicles turning to the right at a street intersection to remain as close as possible to the right-hand curb, it was no justification to accused that the space close to the curb was occupied by persons alighting from or boarding a streetcar and that if he had not passed to the left of the streetcar he would have had to stop his automobile or slow down and wait for the way to be clear.—*Oshkosh v. Campbell*, 139 N.W. 316, 151 Wis 567.

Questions not involved

In a prosecution based on violation of a statute requiring motor vehicles to be kept to the right, the question whether the negligence of defendant was the proximate cause of the collision is not involved nor is the question whether the person whose car he struck was guilty of contributory negligence.—*People v. Arrieta*, 28 Puerto Rico 313.

90. Tex.—*Ex parte Williams*, 79 S.W.2d 325, 128 Tex.Cr. 148.

The failure of an operator of a motor vehicle to keep to the right at particular times or places is an offense under some statutes.⁸⁹ Such statutes have been held valid and enforceable where they conform to the requirements of certainty and reasonableness.⁹⁰ General rules of construction apply,⁹¹ and it has been held that in interpreting a particular statute the circumstances under which it would become effective and the purpose for which it was enacted should be properly taken into account.⁹²

General rules apply as to the indictment, information, or complaint,⁹³ and, likewise, general rules

91. "Clear" and "unobstructed"

Words "clear" and "unobstructed" in statute requiring vehicle driver to travel on right side of highway, unless clear and unobstructed on left side for fifty yards, mean same thing.—*Ex parte Williams*, supra.

Effect of other statutes

(1) In prosecution for violating statute requiring an automobile to be driven on the right half of a roadway, the statute providing that whenever any roadway has been divided into three or more clearly marked lanes for traffic, a vehicle shall normally be driven in the lane nearest the right-hand curb or edge of the roadway, could not be relied on as limiting the effect of the former statute, where evidence showed that the highway involved was a four-lane highway with a marked double line in the center.—*People v. Hugon*, 114 P.2d 84, 45 Cal.App.2d Supp. 817.

(2) The statute providing that, except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase his speed until completely passed by the overtaking vehicle, does not limit the effect of the statute requiring an automobile to be driven on the right half of and as close as practicable to the right-hand curb or edge of the roadway.—*People v. Hugon*, supra.

92. Tex.—*Ex parte Williams*, 79 S.W.2d 325, 128 Tex.Cr. 148.

93. Tex.—*Gutierrez v. State*, 68 S.W.2d 198, 125 Tex.Cr. 283. 42 C.J. p 1352 note 94.

Exceptions must be negated

Pa.—*Commonwealth v. Johnston*, 29 Pa.Dist. & Co. 662.

Information held sufficient

Mo.—*State v. Ball*, App., 171 S.W.2d 787.

Information held insufficient

Tex.—*Gutierrez v. State*, 68 S.W.2d 198, 125 Tex.Cr. 283.

apply as to the burden of proof,⁹⁴ and as to the weight and sufficiency of the evidence.⁹⁵

§ 655. Failing to Protect Edge of Pavement

Under some statutes it is an offense to operate a metal-tired vehicle of more than a certain weight over the edge of a paved highway without protecting such edge.

Under some statutes it is made an offense to operate a metal-tired vehicle of more than a certain weight over the edge of a paved highway without protecting such edge so as to prevent the vehicle from breaking off the corners.⁹⁶ In a prosecution under such a statute, evidence to the effect that the highways were used constantly for the hauling of horse-drawn vehicles with loads exceeding the limit named in the statute is properly excluded,⁹⁷ as is also evidence that certain highways were also generally used for the purpose of moving houses and heavy machinery.⁹⁸

§ 656. Failing to Stop on Signal of Driver of Animals; Frightening Animals

Some statutes make it an offense for the driver or operator of a motor vehicle to fail to stop on a signal given by a person riding or driving animals along a highway.

Some statutes make it an offense for the driver or operator of a motor vehicle to fail to stop on a signal given by one riding or driving animals along a highway.⁹⁹ It has been held that such a statute will not be construed to require the danger signal to be given by the driver or manager of the animal in person but will permit it to be given by any occupant of the vehicle,¹ although the contrary has also been held.² A charge of such an offense should follow the statute in stating the essentials thereof.³ The admission of evidence of the speed of the motor vehicle has been held proper in a prosecution under such a statute.⁴

Under other statutes it is made an offense to fail to exercise all reasonable precautions to prevent the frightening of an approaching horse and to insure the safety of any person riding or driving it.⁵ The charge under such a statute should state the name of the person alleged to have been injured,⁶ and the evidence should show that defendant was in control of the motor vehicle or was operating it.⁷ A statute requiring the giving of reasonable warning on approaching a pedestrian or a horse or horses or other draft animals being ridden or driven on the highway will not be so construed as to protect pedestrians only.⁸ An indictment alleging a violation of a statute requiring the giving of warning and the use of precaution to prevent frightening horses or other draft animals need not allege specifically the manner in which animals became frightened or the manner in which their driver was injured, since the offense consists in the failure to signal.⁹

§ 657. Homicide

- a. In general
- b. Particular offenses
- c. Liability of persons not operating vehicle
- d. Violation of law
- e. Intoxication

a. In General

One who causes the death of a human being by means of the operation of a motor vehicle may be guilty of murder, manslaughter, or other criminal homicide.

One who causes the death of a human being by means or because of his operation of a motor vehicle may be guilty of murder, manslaughter, or other criminal homicide,¹⁰ the precise grade of the homicide being dependent on the facts of the

94. Burden as to statutory exceptions

Defendant charged with driving his automobile in traffic lane nearest to center line of four-lane street, although lane of traffic to right of automobile was free and unobstructed, had burden of showing that he came within one of the exceptions of the statute requiring automobiles to be driven on the right half of a roadway.—*People v. Hugon*, 114 P.2d 84, 45 Cal.App.2d Supp. 817.

95. Evidence held sufficient to sustain conviction

Ga.—*Cain v. State*, 35 S.E.2d 18, 72 Ga.App. 733—*Boyd v. State*, 10 S.E.2d 271, 63 Ga.App. 84
Pa.—*Commonwealth v. Reed*, 31 A.2d 595, 152 Pa.Super. 249.

96. Ill.—*People v. Sisk*, 130 N.E. 696, 297 Ill. 314.

97. Ill.—*People v. Sisk*, supra.

98. Ill.—*People v. Sisk*, supra.

99. Wis.—*McCummins v. State*, 112 N.W. 25, 132 Wis. 236.

1. Ind.—*State v. Goodwin*, 82 N.E. 459, 169 Ind. 265.
42 C.J. p 1353 note 13.

2. Mo.—*State v. Wilson*, 174 S.W. 163, 188 Mo.App. 342.

3. Wis.—*McCummins v. State*, 112 N.W. 25, 132 Wis. 236.
42 C.J. p 1353 note 15.

4. Wis.—*McCummins v. State*, supra.

5. Tex.—*Pinion v. State*, 219 S.W. 831, 87 Tex.Cr. 86.

6. Tex.—*Pinion v. State*, supra.

7. Tex.—*Pinion v. State*, supra.
42 C.J. p 1353 note 20.

8. Ga.—*Holland v. State*, 76 S.E. 104, 11 Ga.App. 769.
42 C.J. p 1353 note 21.

9. Ga.—*Holland v. State*, supra.

10. Ill.—*People v. Herkless*, 196 N.E. 829, 361 Ill. 32.

Ky.—*Morris v. Commonwealth*, 73 S.W.2d 1, 255 Ky. 278.

Mich.—*People v. McMurchy*, 228 N.W. 723, 249 Mich. 147.

Or.—*Chandler v. State*, 146 P.2d 598, 79 Okl.Cr. 323.

Tex.—*Corpus Juris* cited in *Brandon v. Schroeder*, Civ.App., 149 S.W.2d 140, 142.

42 C.J. p 1354 note 28.

particular case as they are applied to the statutes defining the different grades of homicide.¹¹ In determining the question whether the causing of a death by means of a motor vehicle constitutes a criminal homicide, the driver of the vehicle should be charged with the natural and reasonable consequences of his conduct,¹² but a motor vehicle is not to be classed in the same category with deadly weapons.¹³ General statutes governing criminal homicides apply to homicides caused by the operation of motor vehicles, even though such statutes were enacted prior to the time when motor vehicles were invented.¹⁴ Also, a special statute dealing with homicides caused by the operation of motor vehicles has been held not to preclude the application of a general homicide statute to a situation that is not covered by the special statute.¹⁵

The corpus delicti in a prosecution for a homicide caused by the operation of a motor vehicle consists of the killing of deceased as a proximate result of a collision with, or the instrumentality of, a motor vehicle driven or operated, in one of the modes specified.¹⁶

New trial. Where basic and fundamental error is involved, the fact that only a general exception, and not specific exceptions, was taken thereto does not justify the overruling of a motion for a new trial.¹⁷

b. Particular Offenses

- (1) Murder
- (2) Manslaughter
- (3) Other homicides
- (4) Assault with intent to murder or kill

Motor vehicle as "habitation" in the law of self-defense see Homicide § 109 b.

11. Va.—Goodman v. Commonwealth, 151 S.E. 168, 153 Va. 943.

Specification of different crimes

The circumstances constituting crimes of manslaughter, murder, or assault in the first or second degree while operating automobile must be clearly specified and unquestioned and not result of speculation—People v. Stoval, 15 N.Y.S.2d 498, 172 Misc. 469.

Gross negligence, concurring with and directing act of driving automobile which results in killing of human being, fixes grade of crime and furnishes test by which degree of guilt is determined.—Christie v. State, 248 N.W. 920, 212 Wis. 136.

12. Ky.—Dixon v. Commonwealth, 194 S.W.2d 655, 302 Ky. 353—Lewis v. Commonwealth, 191 S.W.2d 416, 301 Ky. 268—Cornett v. Commonwealth, 138 S.W.2d 492, 282 Ky. 322—Newcomb v. Commonwealth,

124 S.W.2d 486, 276 Ky. 362—Largent v. Commonwealth, 97 S.W.2d 538, 265 Ky. 598—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356.

Presumption see infra § 666

13. Ky.—Largent v. Commonwealth, 97 S.W.2d 538, 265 Ky. 598—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356.

14. Kan.—State v. Bailey, 193 P. 354, 107 Kan. 637.
29 C.J. p 1154 note 94 [b].

Homicide committed in execution of felony

Tex.—Jones v. State, 75 S.W.2d 683, 127 Tex.Cr. 227.

15. Tex.—Jones v. State, supra.

16. Wyo.—Thompson v. State, 283 P. 151, 41 Wyo. 72.

Negligent homicide

D.C.—Ercoli v. U. S., 131 F.2d 354, 76 U.S.App.D.C. 360—Ridgell v. U. S., Mun.App., 54 A.2d 679.

17. Pa.—Commonwealth v. Kurtz, 33 Pa.Dist. & Co. 661.

(1) Murder

The intentional killing of a human being through the agency or operation of a motor vehicle, or a killing thereby under circumstances equivalent to an intentional killing or evincing depravity of mind, may constitute murder.

In general an intentional killing of a human being by means of the operation or driving of a motor vehicle constitutes murder.¹⁸ Accordingly, in the absence of any circumstances of justification or excuse, a driver of a motor vehicle may be adjudged guilty of murder where he knowingly operates his vehicle toward and against another person with intent to run him down,¹⁹ or with reckless disregard for his life,²⁰ or where he intentionally runs into an obstruction causing a passenger to be thrown from the car,²¹ and thereby causes his death. Also, a homicide resulting from the operation of a motor vehicle in violation of law may be adjudged murder where the unlawful manner of operation is such as naturally tends to destroy human life;²² and, under some statutes, in order to make a case of murder against a motorist driving in an unlawful and negligent manner, it must appear that such conduct was directly perilous to human life or that human life would probably be endangered thereby.²³ Under statutes making a homicide murder when committed by acts greatly dangerous to others and evincing depravity of mind, a driver is guilty of the crime when he operates his motor vehicle at high speed or otherwise negligently or unlawfully, without regard to the presence or lives of other persons, and kills a human being,²⁴ although he had no preconceived purpose to kill anyone.²⁵

18. Minn.—State v. Bolsinger, 21 N. W.2d 480, 221 Minn. 154.

19. Cal.—People v. Brown, 200 P. 727, 53 Cal.App. 664

Degrees of murder see Homicide §§ 29–36.

Justifiable or excusable homicide generally see Homicide §§ 97–138.

20. Ala.—Hammell v. State, 111 So. 191, 21 Ala.App. 633.

Ga.—Herrington v. State, 120 S.E. 554, 31 Ga.App. 167.

21. W.Va.—State v. Welsengoff, 101 S.E. 450, 85 W.Va. 271.

42 C.J. p 1354 note 33.

22. Ga.—Powell v. State, 18 S.E.2d 678, 193 Ga. 398.

23. Tenn.—Shorter v. State, 247 S. W. 985, 147 Tenn. 355.

42 C.J. p 1354 note 38.

24. Wis.—Montgomery v. State, 190 N.W. 105, 178 Wis. 461.

42 C.J. p 1354 note 36.

25. Ala.—State v. Massey, 100 So. 625, 20 Ala.App. 58.

(2) Manslaughter

One who through the agency, or in the operation, of a motor vehicle unintentionally causes the death of a human being by act or conduct which, although sufficient to impose criminal liability therefor, is not such as to make the offense murder or some other specific grade of criminal homicide, is guilty of manslaughter, or of some grade or degree thereof.

Ordinarily, one who through the agency, or in the operation, of a motor vehicle causes the death of a human being under circumstances such as to impose criminal liability therefor is guilty of manslaughter, or some grade or degree thereof, where the act or conduct causing the death is not such as to make the offense murder or some other specific grade of criminal homicide.²⁶ Subject to the terms of the statute under which prosecution is brought, the offense is manslaughter, involuntary manslaughter, or manslaughter of a grade equivalent

to the common-law offense of manslaughter where the death is caused, without malice and without any intention to kill, under circumstances such that the act or conduct constitutes negligence of a grade or degree sufficient to impose criminal liability,²⁷ or while engaged in the commission of an unlawful act²⁸ not amounting to a felony,²⁹ or without due care and caution and in violation of statutes or ordinances,³⁰ or in the commission of a lawful act in an unlawful or negligent manner, or without due caution and circumspection.³¹ It has been held that, if one operates a motor vehicle upon the highway in a manner that he knows or has reasonable grounds to believe is reasonably calculated to injure others using the highway, and under such circumstances recklessly, wantonly, and with gross carelessness strikes and kills another, he is guilty of voluntary manslaughter.³²

26. Neb.—Benton v. State, 247 N. W. 21, 124 Neb. 485

Okl.—Hall v. State, 159 P.2d 283, 80 Okl. Cr. 310

SD.—State v. Bates, 271 N.W. 765, 65 S.D. 105.

27. Miss.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1

Okl.—Hall v. State, 159 P.2d 283, 80 Okl. Cr. 310—Chandler v. State, 146 P.2d 598, 79 Okl. Cr. 323

Pa.—Commonwealth v. Romig, 22 Pa. Dist. & Co. 341, 27 Berks Co. 41

SD.—State v. Bates, 271 N.W. 765, 65 S.D. 105.

42 C.J. p. 1354 note 40.

Grade or degree of manslaughter generally see Homicide §§ 40-67. Negligence causing death as manslaughter see Homicide § 62.

What constitutes culpable negligence see *infra* § 659.

28. Ala.—Hammell v. State, 111 So. 191, 21 Ala. App. 633.

Ind.—Roby v. State, 17 N.E.2d 800, 215 Ind. 55.

Neb.—Benton v. State, 247 N.W. 21, 124 Neb. 485.

Okl.—Hall v. State, 159 P.2d 283, 80 Okl. Cr. 310—Chandler v. State, 146 P.2d 598, 79 Okl. Cr. 323

Pa.—Commonwealth v. Ushka, 198 A. 465, 130 Pa. Super. 600—Commonwealth v. Romig, 22 Pa. Dist. & Co. 341, 27 Berks Co. 41—Commonwealth v. Bender, Com. Pl., 58 Dauph. Co. 21—Commonwealth v. Ankrim, Quar. Sess., 50 Lanc. Rev. 243.

42 C.J. p. 1355 note 41.

Unlawful act causing death as manslaughter see Homicide §§ 57-61.

Violation of statute or ordinance as negligence generally see the C.J.S. title Negligence § 19, also 45 C.J. p. 714 note 91-p. 732 note 36.

Essential element

Under some statutes, the death of a human being in consequence of

an unlawful act is an essential element of the crime of involuntary manslaughter, and constitutes the very essence of the crime.—Commonwealth v. Aurick, 19 A.2d 920, 342 Pa. 282—Commonwealth v. Delucese, 38 A.2d 494, 155 Pa. Super. 120—Commonwealth v. Stosny, 31 A.2d 582, 152 Pa. Super. 236

Conviction of unlawful act is not required.—Commonwealth v. Kurtz, 33 Pa. Dist. & Co. 661

Time when act became unlawful

Any act contrary to law, whether or not unlawful at the time the manslaughter statute was enacted, is within the rule.—Commonwealth v. Aurick, 10 A.2d 22, 138 Pa. Super. 180.

Violation of ordinance

It has been held that the unlawful act must be an act prohibited by statute or general principle of law, as distinguished from an act prohibited by a municipal ordinance.

Kan.—State v. Bowser, 261 P. 846, 124 Kan. 556.

Ohio.—Steele v. State, 168 N.E. 846, 121 Ohio St. 332, overruling State v. O'Mara, 136 N.E. 885, 105 Ohio St. 94.

Motor Vehicle Act

Accused may be tried and punished under "manslaughter" act, even though some of homicidal acts may constitute violation of Motor Vehicle Act.—Crawford v. State, 216 N.W. 294, 116 Neb. 125.

Repeal of excepting act

(1) On repeal of amendment, which excepted homicide caused by driving of motor vehicle from statutory definition of involuntary manslaughter, the definition again applied without the exception.—People v. Mitchell, 166 P.2d 10, 27 Cal.2d 678—People v. Ely, 163 P.2d 453, 71 Cal. App.2d 729.

(2) After repeal of such amend-

ment a prosecution lies for manslaughter where the homicide is caused by the driving of a vehicle.—People v. Ely, *supra*

29. Cal.—People v. Hurley, 56 P.2d 978, 13 Cal. App.2d 208

Ky.—Middleton v. Commonwealth, 202 S.W.2d 610, 304 Ky. 784—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356

Pa.—Commonwealth v. Ushka, 198 A. 465, 130 Pa. Super. 600

Utah.—State v. Lingman, 91 P.2d 457, 97 Utah 180.

Misdemeanor

Ariz.—Steffani v. State, 42 P.2d 615, 45 Ariz. 210

Cal.—People v. Freeman, 60 P.2d 333, 16 Cal. App.2d 101.

30. S.C.—State v. Brown, 32 S.E.2d 825, 205 S.C. 514—State v. Staggs, 195 S.E. 130, 186 S.C. 151—State v. Dixon, 186 S.E. 531, 181 S.C. 1.

31. Ark.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

Cal.—People v. Hurley, 56 P.2d 978, 13 Cal. App.2d 208.

Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga. App. 325.

Ky.—Middleton v. Commonwealth, 202 S.W.2d 610, 304 Ky. 784—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356.

Tenn.—Copeland v. State, 285 S.W. 565, 154 Tenn. 7, 49 A.L.R. 605.

Lawful act required

Under a statute which imposes criminal liability for a killing in the commission of a lawful act, which might produce death, in an unlawful manner or without due caution and circumspection, it has been held that the act required is one which has knowable and apparent potentialities for producing death.—State v. Lingman, 91 P.2d 457, 97 Utah 180.

32. Ky.—Dixon v. Commonwealth,

(3) Other Homicides

Under some statutes, one who causes the death of a human being by the negligent or other specified operation of a motor vehicle is guilty of the crime of negligent homicide, reckless homicide, involuntary homicide, or other statutory designation therefor.

Under some statutes, frequently enacted in order to provide a specific offense, other than manslaughter, for certain homicides caused by the operation of motor vehicles or to make criminal specified homicides caused thereby which prior thereto did not constitute a criminal offense, one who causes the death of a human being by the negligent or other specified operation of a motor vehicle is

guilty of the crime of negligent homicide,³³ or of reckless homicide,³⁴ or involuntary homicide,³⁵ or of criminal negligence in the operation of a motor vehicle resulting in death,³⁶ or some other statutory designation for such an offense.³⁷ Such statutes and statutes relating to manslaughter have been held not to be in conflict with each other.³⁸ Although such offenses, sometimes by force of express statutory provision to that effect, have been held lesser offenses than the crime of manslaughter,³⁹ and included within a charge of manslaughter committed in the operation of a motor vehicle,⁴⁰ they are different from the offense of

194 S.W.2d 655, 302 Ky. 353—Lewis v. Commonwealth, 191 S.W.2d 416, 301 Ky. 268—Cornett v. Commonwealth, 138 S.W.2d 492, 282 Ky. 322—Carnes v. Commonwealth, 129 S.W.2d 543, 278 Ky. 771—Largent v. Commonwealth, 97 S.W.2d 538, 265 Ky. 598—Dublin v. Commonwealth, 86 S.W.2d 136, 260 Ky. 412—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356.

Voluntary manslaughter generally see Homicide §§ 40-54.

Basis of rule

The principle is based on the theory that a man intends the natural consequences of his act and that he is aware, or ought to be aware, of what will result from the reckless or grossly careless operation of an automobile, which becomes a dangerous instrumentality under such circumstances, although he actually has no intention to kill—Largent v. Commonwealth, 97 S.W.2d 538, 265 Ky. 598—Morris v. Commonwealth, 73 S.W.2d 1, 255 Ky. 276—King v. Commonwealth, 70 S.W.2d 687, 253 Ky. 775.

Driving with defective steering gear Ky.—Largent v. Commonwealth, 97 S.W.2d 538, 265 Ky. 598.

Negligence must amount to reckless and wanton carelessness.—Newcomb v. Commonwealth, 124 S.W.2d 486, 276 Ky. 302.

33. Ark.—Phillips v. State, 161 S.W. 2d 747, 204 Ark. 205.

D.C.—Ercoll v. U. S., 131 F.2d 354, 76 U.S.App.D.C. 360.

Validity

Statutes providing for the crime of negligent homicide have been held not so indefinite and uncertain as to be invalid.

D.C.—U. S. v. Henderson, 121 F.2d 75, 73 App.D.C. 369.

Mich.—People v. McMurchy, 228 N. W. 723, 249 Mich. 147.

Tex.—Young v. State, 47 S.W.2d 320, 120 Tex.Cr. 39.

Definiteness required

It is not necessary that statute be so definite that offending motorist

may know with certainty just how negligent he may be in causing another's death before he becomes criminally liable, since motorist has no legal right to be negligent in any degree.—State ex rel Zent v. Yanny, 12 N.W.2d 45, 244 Wis. 342.

Apparent danger

In a prosecution for negligent homicide, it is unnecessary to view the situation from accused's standpoint in determining whether there was "apparent danger"—Vasquez v. State, 52 S.W.2d 1056, 121 Tex.Cr. 478.

Effect on manslaughter

Statutory provision, including crime of negligent homicide by operating vehicle in crime of manslaughter so committed, was held not to change common-law crime of manslaughter or to repeal or amend any statute defining manslaughter—People v. McMurchy, 228 N.W. 723, 249 Mich. 147.

Dual liability not created

A provision in a statute relating to negligent homicide, which specifically provided that provisions of penal code defining involuntary manslaughter should not apply to homicide caused by driving of any vehicle, was held to prevent dual liability for same conduct.—People v. Mitchell, 166 P.2d 10, 27 Cal.2d 678.

34. Ind.—State v. Beckman, 37 N. E.2d 531, 219 Ind. 176.

Validity

The statute was held sufficiently definite to describe a public offense.—State v. Beckman, supra.

35. La.—State v. Porter, 146 So. 465, 176 La. 673.

Elements of offense

The sole elements of the offense are that the death of another was caused by the grossly negligent or grossly reckless use of a vehicle.—State v. Porter, supra.

36. Minn.—State v. Homme, 32 N.W. 2d 151, 226 Minn. 83.

N.Y.—People v. Bearden, 49 N.E.2d 785, 290 N.Y. 478—People v. Williams, 61 N.Y.S.2d 252, 187 Misc.

299—People v. Brucato, 32 N.Y.S. 2d 689.

Validity

Standard of guilt based on operating or driving vehicle in a reckless or grossly negligent manner satisfies the requirements of due process—State v. Bolsinger, 21 N.W. 2d 480, 221 Minn. 154.

No longer manslaughter

Causing death by culpable negligence in operating a motor vehicle is no longer manslaughter—People v. Stovali, 15 N.Y.S.2d 498, 172 Misc. 469.

Murder

The statute penalizing criminal negligence in the operation of a vehicle resulting in death has been construed not to include cases of murder.—State v. Bolsinger, 21 N.W. 2d 480, 221 Minn. 154.

Conduct constituting the offense

Under some statutes the crime occurs where one operates or drives a motor vehicle in a reckless or culpably negligent manner, whereby a human being is killed.—People v. Gardner, 8 N.Y.S.2d 917, 235 App.Div. 683.

37. Killing by driving vehicle carelessly and heedlessly

N.J.—State v. Hedinger, 19 A.2d 322, 126 N.J.Law 288, affirmed 23 A.2d 409, 127 N.J.Law 564.

38. Ark.—Phillips v. State, 161 S. W.2d 747, 204 Ark. 205.

Repeal

The later act does not repeal the former act.—Phillips v. State, supra.

Prosecution not exclusive under one or other statute

The mere fact that the state might have prosecuted a motorist for negligent homicide does not preclude it from prosecuting him under the statute relating to involuntary manslaughter by automobile.—Phillips v. State, supra.

39. La.—State v. Porter, 146 So. 465, 176 La. 673.

Mich.—People v. Campbell, 212 N.W. 97, 237 Mich. 424.

40. La.—State v. Porter, 146 So. 465, 176 La. 673.

manslaughter or a grade thereof,⁴¹ and the lesser homicide offense does not include the greater crime of manslaughter.⁴²

The question whether accused is guilty of the offense is dependent on the facts and circumstances of the particular case.⁴³ Such crime can be committed only as specified in the statutes defining it, and according to some authority only by means of a motor vehicle.⁴⁴ Under some statutes, negligent homicide is of two kinds or degrees, one which happens in the performance of a lawful act and one which occurs in the performance of an unlawful act.⁴⁵ It has been held to arise where a person is killed as a result of the operation of a motor vehicle at an immoderate or unreasonable rate of speed.⁴⁶ In some jurisdictions a motorist who, by the willful and negligent use of his motor vehicle, injures and causes the death of another does not necessarily thereby come under statutes denouncing negligent homicide, but he may be guilty of some other form of criminal homicide.⁴⁷

(4) Assault with Intent to Murder or Kill

The offense of assault with intent to kill or murder

may arise from an assault on a human being with, or in the operation of, a motor vehicle.

The offense of assault with intent to murder or kill may arise from an assault on a human being with, or in the operation of, a motor vehicle.⁴⁸ The offense of assault with intent to murder does not arise in a case where, if death had ensued, accused could not have been convicted of murder.⁴⁹ Where the driver of a motor vehicle resisting a lawful arrest attempts to run down an officer with the car, his act constitutes an assault with intent to commit murder.⁵⁰ Mere culpable negligence does not show a depraved mind regardless of human life essential to a conviction of an assault that, if death had ensued, would have constituted murder in the second degree.⁵¹

c. Liability of Persons Not Operating Vehicle

One may be guilty of a criminal homicide who aids or abets another in the operation of a motor vehicle in such a manner as to cause the death of a human being.

One may be guilty of a criminal homicide for a death caused by the operation of a motor vehicle where he aids or abets another therein,⁵² as where the driver of a motor vehicle, in pursuance of an

Mich.—People v. McMurchy, 228 N. W. 723, 249 Mich. 147.

Not manslaughter in some other degree

Negligent homicide has been held not "manslaughter in some other degree" within meaning of statute providing that every killing which would be manslaughter at common law and is not declared in that article to be "manslaughter in some other degree" should be deemed "manslaughter in the fourth degree."—State v. Gloyd, 81 P.2d 966, 148 Kan. 706.

41. Cal.—People v. Amick, 125 P. 2d 25, 20 Cal.2d 217—People v. Crow, 120 P.2d 686, 48 Cal.App.2d 666—People v. Warner, 80 P.2d 737, 27 Cal.App.2d 190.

La.—State v. Porter, 146 So. 465, 176 La. 673.

42. La.—State v. Porter, supra.

43. Cal.—People v. Gomez, 138 P.2d 788, 59 Cal.App.2d 417.

How crime determined

Crime of negligent homicide by operating vehicle is determined by facts in each case through application of positive rule.—People v. McMurchy, 228 N.W. 723, 249 Mich. 147.

44. Cal.—People v. Amick, 125 P. 2d 25, 20 Cal.2d 217.

Wis.—State ex rel. Zent v. Yanny, 12 N.W.2d 45, 244 Wis. 342.

Other statute not incorporated

A statute making it unlawful to operate a motor vehicle in a reckless manner and defining it as op-

eration in such a manner as to indicate a willful or wanton disregard for the safety of persons or property is not incorporated into a statute defining negligent homicide as the operation of a motor vehicle in a reckless manner or with disregard for the safety of others so as to make willful or wanton disregard for the safety of persons or property one of the elements of negligent homicide.—State v. Dickert, 79 P.2d 328, 194 Wash. 629.

45. Tex.—Kirksey v. State, 123 S. W.2d 905, 136 Tex. Cr. 97.

A lawful act within the meaning of the statute is one not forbidden by the penal law and which would give no just occasion for a civil action.—Leavell v. State, 137 S.W.2d 40, 138 Tex. Cr. 471.

Unlawful acts, within the meaning of the statute, are those acts which are forbidden by the penal laws and classed as misdemeanors and such acts as would give just occasion for a civil action.—Leavell v. State, supra—Morgan v. State, 120 S.W.2d 1063, 135 Tex. Cr. 402.

Of the first degree

One is guilty of negligent homicide of the first degree when death results from negligence in the performance of a lawful act.—Leavell v. State, 137 S.W.2d 40, 138 Tex. Cr. 471.

Of the second degree

Negligent homicide of the second degree can be committed only when the person guilty is in the act of

committing or attempting to commit an unlawful act.—Leavell v. State, supra.

46. Mich.—People v. McMurchy, 228 N.W. 723, 249 Mich. 147.

Provision held proper

Provision as to immoderate speed, in statute defining negligent homicide by operating vehicle, has been held proper, the speed limit laws not being affected thereby.—People v. McMurchy, supra.

Speed limit not necessarily controlling

Fact that motorist was not exceeding maximum speed provided by law does not necessarily mean that he was proceeding at a lawful rate of speed.—People v. Warner, 80 P.2d 737, 27 Cal.App.2d 190.

47. Tex.—Cockrell v. State, 117 S.W. 2d 1105, 135 Tex. Cr. 218.

48. Ga.—Wright v. State, 148 S.E. 731, 168 Ga. 690—Payne v. State, 40 S.E.2d 759, 74 Ga. App. 646.

Okl.—Lamb v. State, 105 P.2d 799, 70 Okl. Cr. 236.

Tex.—Duhon v. State, 125 S.W.2d 550, 136 Tex. Cr. 404.

49. Ga.—Mundy v. State, 1 S.E.2d 605, 59 Ga. App. 509.

50. Tenn.—Love v. Bass, 238 S.W. 94, 145 Tenn. 522.

42 C.J. p 1317 note 64.

51. Wis.—Njcielek v. State, 189 N. W. 147, 178 Wis. 94.

42 C.J. p 1317 note 65.

52. D.C.—Story v. U. S., 16 F.2d 342, 57 App.D.C. 3, 53 A.L.R. 246,

agreement, races with the driver of another car whose excessive and unlawful speed results in an accident causing a death,⁵³ or where the owner of a motor vehicle is present and acting in concert with the driver,⁵⁴ or urges and encourages the driver to drive at an excessive speed which causes an accident and the death of another,⁵⁵ or where the owner knowingly puts the motor vehicle in the immediate control of a careless and reckless driver, sits by his side, and without protest permits him so recklessly and negligently to operate it as to cause the death of another,⁵⁶ or intrusts the operation of a crowded automobile to an inexperienced driver and then goes to sleep.⁵⁷ However, a motor vehicle is not a dangerous instrument *per se* so as to make an owner, who places it in the hands of another to operate, criminally responsible for a homicide resulting from its operation.⁵⁸ If the owner did not aid, abet, or encourage the driver in its improper operation, he is not liable as principal for a homicide resulting therefrom,⁵⁹ and his mere presence and general control of the vehicle are not alone sufficient to impose such liability on him.⁶⁰

Under a statute which imposes criminal liability on a person who operates or drives a motor vehicle in a specified manner, whereby a human being is killed, criminal liability is limited to the operator of the vehicle which causes the death of a human being.⁶¹ Under other statutes, it has been held that a motorist whose driving caused an accident

between other vehicles, with a resultant death, may be criminally liable for the death, even though his own car did not come in contact with the others.⁶²

Guests in a motor vehicle who were not on a joint mission with the driver, had no control over him, were not negligent, and did not do or say anything to cause the accident, cannot be convicted as principals for murder or other criminal homicide for the death of a person caused thereby.⁶³

d. Violation of Law

- (1) In general
- (2) Speed of vehicle

(1) In General

Not every violation of law or unlawful act in the operation of a motor vehicle will render the operator criminally liable for a death caused thereby. The violation must be intentional, or negligent and careless, or in reckless disregard or heedless indifference to the rights and safety of others, or an act which is dangerous and likely to result in death or great bodily harm and in violation of a statute designed to prevent injury and protect human life, and a mere unintentional or inadvertent violation or law not accompanied by recklessness is insufficient.

Under the rule that one who causes the death of another through the agency or operation of a motor vehicle while engaged in the commission of an unlawful act may be guilty of some form of criminal homicide, such as manslaughter, as discussed *supra* subdivision b (2) of this section, or lesser or substituted grade of criminal homicide, as discussed *supra* subdivision b (3) of this section, it

certiorari denied 47 S.Ct. 576, 274 U.S. 739, 71 L.Ed. 1318.

Neb.—Puckett v. State, 15 N.W.2d 63, 144 Neb. 876.

Tex.—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9.

42 C.J. p 1354 note 28.

Two or more

With respect to prosecution of two accused for manslaughter through operation of automobile, doctrine of joint adventurer applicable to civil liability does not obtain, but conduct of two or more people in handling of automobile may be such as to make them equally guilty of manslaughter.—Peterson v. State, 175 So. 519, 128 Fla. 717.

53. S.C.—State v. Fair, 40 S.E.2d 634, 209 S.C. 439.

54. Neb.—Puckett v. State, 15 N.W.2d 63, 144 Neb. 876.

55. Tex.—Schorr v. State, 132 S.W.2d 898, 137 Tex.Cr. 625.

29 C.J. p 1156 note 18 [a].

56. Tex.—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9.

Va.—James v. Commonwealth, 16 S.E.2d 296, 178 Va. 28.

Drunken driver

D.C.—Story v. U. S., 16 F.2d 342, 57 App.D.C. 3, 53 A.L.R. 246, certiorari denied 47 S.Ct. 576, 274 U.S. 739, 71 L.Ed. 1318.

Tex.—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9.

Drunken proprietor

N.C.—State v. Trott, 130 S.E. 627, 190 N.C. 674, 42 A.L.R. 1114.

57. Okl.—Armstrong v. State, 289 P. 1115, 48 Okl.Cr. 146.

58. Tex.—Schorr v. State, 132 S.W.2d 898, 137 Tex.Cr. 625.

Motor vehicle as dangerous instrumentality generally see *supra* § 12.

Effect of statute

Owner of automobile operated by driver whom owner had engaged as an experienced driver, was not rendered responsible for homicide by statute providing that any person who advises or agrees to the commission of an offense and who is present when it is committed is a principal whether or not he aided in the illegal act.—Schorr v. State, *supra*.

59. Tex.—Schorr v. State, *supra*.

Encouragement to operate at excessive speed was held not shown by owner's statement that driver was a good driver and that automobile was running smoothly.—Schorr v. State, *supra*.

60. Tex.—Schorr v. State, *supra*.

Owner held not guilty

N.Y.—People v. Scanlon, 117 N.Y.S. 57, 132 App.Div. 528.

61. N.Y.—People v. Lemieux, 27 N.Y.S.2d 235, 176 Misc. 305.

Operator of different car

Operator of motor vehicle engaged in race with other car is not criminally liable for death of passenger in other car when it overturned while first car was ahead.—People v. Lemieux, *supra*.

62. Pa.—Commonwealth v. Pagano, 33 Berks Co. 233.

63. Involuntary manslaughter

Ga.—McCorkle v. State, 7 S.E.2d 332, 61 Ga.App. 743.

Murder

Tex.—Warren v. State, 98 S.W.2d 197, 131 Tex.Cr. 303.

has been held that not every violation of law or unlawful act in the operation of a motor vehicle will render the operator criminally liable for a death caused thereby.⁶⁴ Such liability has been held not imposed for a death caused by an unintentional or inadvertent violation of law governing the operation of motor vehicles, not accompanied by recklessness and not under circumstances such that the act was likely to result in death or bodily harm,⁶⁵ or by a technical violation of law in the operation of the vehicle which was due to unforeseen circumstances and conditions beyond the control of accused and against his will and without negligence on his part.⁶⁶

In some jurisdictions a distinction is made between acts *malum in se* and acts *malum prohibitum*.⁶⁷ In such jurisdictions criminal liability is imposed for a death caused by the operation of a motor vehicle while the operator is engaged in an unlawful act *malum in se*,⁶⁸ but, if the act is *malum prohibitum*, criminal liability will be imposed for some, but not all, violations thereof resulting in

death.⁶⁹ If the act is *malum prohibitum*, it has been held that the unlawful act must be done in such a manner as to constitute more than a mere thoughtless omission or slight deviation from the norm of prudent conduct and must be reckless or in marked disregard for the safety of others,⁷⁰ or the killing must be the natural or probable result of the unlawful act,⁷¹ in order for criminal liability to be imposed, although it is not essential to the existence of the offense that the unlawful act be one which has knowable and apparent potentialities for producing death.⁷² In other jurisdictions, however, criminal liability is imposed for a death caused by the operation of a motor vehicle while the operator is engaged in the commission of an unlawful act without regard to whether the unlawful act is *malum prohibitum* or *malum in se*.⁷³ Criminal liability, however, is imposed for the violation of a statute or law regulating the operation of motor vehicles resulting in death if the violation was intentional,⁷⁴ or negligent and careless,⁷⁵ or such as to disclose a reckless disregard of conse-

64. Ill.—*People v. Lynn*, 52 NE2d 166, 385 Ill. 165.

Utah—*State v. Lingman*, 91 P.2d 457, 97 Utah 180.

Not necessarily involuntary manslaughter

Pa.—*Commonwealth v. Aurick*, 10 A.2d 22, 138 Pa. Super. 180.

Not alone sufficient

Mass.—*Commonwealth v. Aronc*, 163 NE 758, 265 Mass. 128.

Character of violation required

Violation of penal automobile statute designed for protection of human life and limb is criminal negligence if intentionally, willfully, or wantonly committed, or inadvertently or unintentionally committed with recklessness amounting, at least, to gross negligence, or under circumstances from which probable death or injury to others might have been reasonably anticipated—*Cain v. State*, 190 SE 371, 55 Ga. App. 376.

Rule of the road

A mere violation of a rule of the road is not an unlawful or criminal act within the law of manslaughter, but in addition to such a violation there must be a wanton and reckless indifference to the safety of others.—*State v. Kellison*, 11 N.W.2d 371, 233 Iowa 1274.

Improper lights

A death caused by a motorist driving with only one headlight in violation of statute is not, alone, sufficient to constitute involuntary manslaughter, but to do so it must appear that the driver was operating his vehicle at the time in a careless, negligent, or unlawful manner.

—*Martin v. State*, 174 S.W.2d 242, 206 Ark. 151.

65. Ga.—*Cain v. State*, 190 S.E. 371, 55 Ga. App. 376.

N.C.—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69.

Test

The test of criminal liability for violating highway statute by driving upon wrong side of road is whether driver does so consciously or under circumstances which would charge a reasonably prudent person with appreciation of the fact and the anticipation of consequences injurious or fatal to others.—*Weaver v. State*, 206 S.W.2d 293, 185 Tenn. 276—*Trentham v. State*, 206 S.W.2d 291, 185 Tenn. 271—*Potter v. State*, 124 S.W.2d 232, 174 Tenn. 118.

66. N.C.—*State v. McDonald*, 191 S.E. 733, 211 N.C. 672.

Mechanical failure

Ill.—*People v. Lynn*, 52 NE2d 166, 385 Ill. 165.

Failure of lights

Fla.—*Austin v. State*, 132 So. 491, 101 Fla. 990.

Ill.—*People v. Lynn*, 52 NE2d 166, 385 Ill. 165.

Tire and engine failure

Fla.—*Austin v. State*, 132 So. 491, 101 Fla. 990.

Provocation or emergency

The fact that the violation of a positive law or the commission of an act expressly prohibited is *prima facie* unlawful does not preclude accused from showing a provocation or emergency which produce such act,

if such was the case—*Bell v. Commonwealth*, 195 SE 675, 170 Va. 597.

67. Tenn.—*Keller v. State*, 299 S.W. 803, 155 Tenn. 633, 59 A.L.R. 685.

68. Tenn.—*Keller v. State*, *supra*.

69. Utah.—*State v. Lingman*, 91 P.2d 457, 97 Utah 180.

70. Utah.—*State v. Lingman*, *supra*.

71. Tenn.—*Keller v. State*, 299 S.W. 803, 155 Tenn. 633, 59 A.L.R. 685.

72. Utah.—*State v. Lingman*, 91 P.2d 457, 97 Utah 180.

73. Involuntary manslaughter

Where the offense charged is involuntary manslaughter, it is immaterial whether the unlawfulness of the act is inherent in its very nature and purpose or arises only from the manner of performing an act which in its inception and aims is not unlawful—*Commonwealth v. Aurick*, 19 A.2d 920, 342 Pa. 282—*Commonwealth v. Delicese*, 38 A.2d 494, 155 Pa. Super. 120.

74. N.C.—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69.

75. Ill.—*People v. Camberis*, 130 N.E. 712, 297 Ill. 455.

29 C.J. p. 1153 note 90 [a].

Negligent or reckless act

(1) Negligence sufficient to make an act unlawful within the rule is more than mere thoughtlessness or slight carelessness; it is reckless conduct or conduct evincing a marked disregard for the safety of others.—*State v. Lingman*, 91 P.2d 457, 97 Utah 180.

(2) It has been stated that reckless operation of a motor vehicle is

quences or a heedless indifference to the rights and safety of others and reasonable foresight that injury would probably result,⁷⁶ or if the act is in itself dangerous and likely to result in death or great bodily harm,⁷⁷ and is in violation of a statute intended and designed to prevent injury and protect human life and safety.⁷⁸

Under the foregoing rules it has been held in various instances that merely driving on the wrong side of the street,⁷⁹ driving on the left side of

the road at excessive speed,⁸⁰ passing an overtaken vehicle to the right,⁸¹ or driving without a license⁸² is not, of itself, sufficient to establish criminal liability for a homicide resulting therefrom. On the other hand, under the foregoing rules it has been held that a motorist may be guilty of a criminal homicide for a death occasioned by the operation of a motor vehicle in violation of regulations imposed by law,⁸³ such as the violation of laws pertaining to the operation of motor vehicles upon a public highway or street,⁸⁴ including violations

an unlawful act which will sustain a charge of involuntary manslaughter for a death caused thereby—*Commonwealth v. Holman*, 50 A.2d 720, 160 1a Super. 211—*Commonwealth v. Stosny*, 31 A.2d 582, 152 Pa Super 236—*Commonwealth v. Aurick*, 10 A.2d 22, 138 Pa Sup r. 180—*Commonwealth v. Hipple*, 1a Quar. Sess., 57 Dauph.Co. 156—*Commonwealth v. Amatucci*, Pa. Quar.Sess., 29 Del Co. 160.

(3) However, the recklessness of conduct must amount to unlawfulness of conduct and not merely approximate unlawfulness in order to sustain the charge.—*Commonwealth v. Aurick*, 19 A.2d 920, 342 Pa. 282.

76. N.C.—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69.

77. N.C.—*State v. Lowery*, 27 S.E.2d 638, 223 N.C. 598—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69—*State v. Palmer*, 147 S.E. 817, 197 N.C. 135.

S.C.—*State v. Brown*, 32 S.E.2d 825, 205 S.C. 514.

78. Kan.—*State v. Custer*, 282 P. 1071, 129 Kan 381, 67 A.L.R. 909. La.—*State v. Wilbanks*, 123 So. 600, 168 La. 861.

N.C.—*State v. Stansell*, 164 S.E. 580, 203 N.C. 69—*State v. Palmer*, 147 S.E. 817, 197 N.C. 135—*State v. McIver*, 94 S.E. 682, 175 N.C. 761. S.C.—*State v. Brown*, 32 S.E.2d 825, 205 S.C. 514.

42 C.J. p 1355 note 41 [a].

Failure to stop

Motorist's failure to obey law requiring him to stop at stop sign before entering highway is negligence.—*State v. Satterfield*, 153 S.E. 155, 198 N.C. 682.

79. Miss.—*Smith v. State*, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

Criminal negligence depends on circumstances

Utah.—*State v. Riddle*, 188 P.2d 449.

Inference not conclusive

The inference of negligence arising from violation of statute by driving upon the wrong side of the road is not necessarily conclusive and may be rebutted by contradictory evidence, and by evidence explaining the conditions under which the al-

leged offense was committed.—*State v. Brown*, 32 S.E.2d 825, 205 S.C. 514.

Not per se violation

Driving motor vehicle upon left side of highway is not per se violation of law, but is so only when highway is not clear and unobstructed for fifty yards ahead.—*Dunham v. State*, 186 S.W.2d 820, 148 Tex Cr 329.

Passing vehicle

A motorist who turns to the left to pass a vehicle ahead must be reasonably alert that he shall not thereby seriously endanger a vehicle approaching in the opposite direction, since the latter has the right of way over him.—*Henderson v. State*, 25 So. 2d 133, 199 Miss 629.

Malum prohibitum

Driving of automobile at excessive speed upon left side of road is not malum in se, but merely malum prohibitum.—*Hurt v. State*, 201 S.W.2d 988, 184 Tenn. 608.

81. Miss.—*Goudy v. State*, 35 So.2d 308.

82. In Pennsylvania

(1) The killing of a person while operating a motor vehicle without an operator's license has been held insufficient, without other negligent or unlawful act, to convict the driver of involuntary manslaughter, on the ground that the driving without an operator's license was not the proximate cause of the death.—*Commonwealth v. Williams*, 1 A.2d 812, 133 Pa.Super. 104—*Commonwealth v. Lowans*, 21 Pa.Dist. & Co. 66, 39 Dauph. Co. 66, 82 Pittsb.Leg.J. 238, 48 York Leg.Rec. 49.

(2) It has been stated that the failure of one to procure a motor vehicle operator's license, without more, is not an offense.—*Commonwealth v. Williams*, supra.

(3) Other authority, however, has held that the death results from the unlawful operation of the vehicle, that the unlawful act is the driving of the automobile, not the failure to obtain a license, and, hence, the driver may be convicted of involuntary manslaughter.—*Commonwealth v. Romig*, 22 Pa.Dist. & Co. 341, 27 Berks Co. 41.

83. Ky.—*Newcomb v. Commonwealth*, 124 S.W.2d 486, 276 Ky. 362.

29 C.J. p 1152 note 76.

Unlawful acts within rule

(1) The lawful act of driving in an unlawful manner is an unlawful act.—*State v. Lingman*, 91 P.2d 457, 97 Utah 180.

(2) A motorist's careless and reckless commission of an act violative of law and reasonably calculated to injure another, and his continuance of such act after circumstances bring further notice of danger and risk, are unlawful acts.—*Pell v. Commonwealth*, 195 S.E. 675, 170 Va. 597.

84. Cal.—*People v. Wilson*, 226 P. 5, 193 Cal 512—*People v. Lett*, 177 P.2d 47, 77 Cal.App.2d 917.

Ky.—*Middleton v. Commonwealth*, 202 S.W.2d 610, 304 Ky. 781—*Dixon v. Commonwealth*, 194 S.W.2d 655, 302 Ky. 353—*Lewis v. Commonwealth*, 191 S.W.2d 416, 301 Ky 268—*Lowe v. Commonwealth*, 181 S.W.2d 409, 298 Ky. 7—*Cornett v. Commonwealth*, 138 S.W.2d 492, 282 Ky. 322.

Neb.—*Puckett v. State*, 15 N.W.2d 63, 144 Neb. 876—*Crawford v. State*, 216 N.W. 294, 116 Neb 125.

N.C.—*State v. Whaley*, 132 S.E. 6, 191 N.C. 387.

Operation upon public highway held required

Ohio.—*State v. Root*, 7 N.E.2d 664, 54 Ohio App. 412, affirmed 6 N.E. 2d 979, 132 Ohio St. 229.

Hospital driveway

A driveway leading into and located wholly on state hospital grounds, and never dedicated or legally accepted as a public thoroughfare, was not a road or highway within second-degree manslaughter statute.—*State v. Root*, 6 N.E.2d 979, 132 Ohio St. 229.

Statutes within rule

(1) Statute imposing duty to operate safely.—*State v. Wells*, 64 N.E. 2d 593, 146 Ohio St. 131.

(2) Statute regarding safety of pedestrians.—*State v. Howey*, 65 N.E.2d 671, 78 Ohio App. 419.

Guest

Statute imposing requirement for

arising from reckless driving,⁸⁵ or driving upon the left or wrong side of the highway in a careless and negligent manner,⁸⁶ or going to the left side of the road in a careless and negligent manner in passing another vehicle,⁸⁷ or driving upon the wrong side of the highway at a high rate of speed while turning a curve,⁸⁸ or driving through or into an intersection against a red traffic signal⁸⁹ or driving at night without lights,⁹⁰ or in violation of a regulation or law governing the lighting equipment of motor vehicles,⁹¹ or parking an unlighted vehicle upon the highway at night,⁹² or driving while under the influence of narcotics.⁹³

safe operation of vehicle was construed to impose duty with respect to guest riding in car, so that motorist's violation of statute resulting in death of guest would be manslaughter in the second degree.—*State v. Wells*, 64 N.E.2d 593, 146 Ohio St 131.

Violation held to constitute circumstance to be considered

N.J.—*State v. Linauducel*, 3 A.2d 796, 122 N.J. Law 137, affirmed 8 A.2d 576, 123 N.J. Law 228.

Excuse for violation

Statutory signals required of persons operating automobile upon highway are not necessary, where pedestrian has seen automobile approaching.—*Hawpe v. Commonwealth*, 27 S.W.2d 394, 234 Ky. 27.

Passing school bus

(1) A homicide caused by passing a school bus which had been stopped has been held to be involuntary manslaughter.—*Commonwealth v. Mullins*, 176 S.W.2d 403, 296 Ky. 190.

(2) Provision of statute requiring vehicles approaching a school bus stopped upon highway to receive or discharge passengers to be brought to a complete stop applies only to situations not covered by another section of the same act which states duties of operator of a vehicle approaching a school bus that has stopped upon highway outside a business or residence district.—*Commonwealth v. Mullins*, *supra*.

85. Where law prohibits reckless driving

N.C.—*State v. Dills*, 167 S.E. 459, 204 N.C. 33.

86. Miss.—*Sims v. State*, 115 So. 217, 149 Miss. 171.

At high rate of speed

Fla.—*Franklin v. State*, 163 So. 55, 129 Fla. 686.

87. Involuntary manslaughter

Ga.—*Collins v. State*, 18 S.E.2d 24, 66 Ga.App. 325.

When another vehicle is approaching
Ga.—*Collins v. State*, *supra*.

88. Tenn.—*Trentham v. State*, 206 S.W.2d 291, 185 Tenn. 271.

89. Cal.—*People v. Barnett*, 175 P.2d 237, 77 Cal.App.2d 299.

90. La.—*State v. Wilbanks*, 123 So. 600, 168 La. 861.

91. Pa.—*Commonwealth v. Aurick*, 10 A.2d 22, 138 Pa.Super. 180.

Manslaughter in fourth degree

Wis.—*Clemens v. State*, 185 N.W. 209, 176 Wis. 289.

92. Statute held inapplicable

Statute prohibiting parking vehicle upon highway was held inapplicable where driver was unable to get his vehicle off the highway due to engine trouble.—*State v. Hintz*, 102 P.2d 639, 61 Idaho 411.

Test of liability

Criminal liability for parking unlighted truck upon highway at night depends on accused's wanton negligence in not exercising reasonable care to avoid death or injury.—*Thompson v. State*, 146 So. 201, 108 Fla. 370.

Motorist held not guilty of manslaughter

Idaho.—*State v. Hintz*, 102 P.2d 639, 61 Idaho 411.

93. Ala.—*Broxton v. State*, 171 So. 390, 27 Ala.App. 298.

94. Cal.—*Corpus Juris* cited in *People v. Mitchell*, 166 P.2d 10, 13, 27 Cal.2d 678.

Ga.—*Huntsinger v. State*, 36 S.E.2d 92, 200 Ga. 127.

Kan.—*State v. Custer*, 282 P. 1071, 129 Kan. 381, 67 A.L.R. 909.
42 C.J. p 1355 note 45—29 C.J. p 1161 note 88 [b].

95. Ala.—*Jones v. State*, 109 So. 189, 21 Ala.App. 234.

Cal.—*People v. Mitchell*, 166 P.2d 10, 27 Cal.2d 678.

Ga.—*Black v. State*, 130 S.E. 591, 34 Ga.App. 449.

Pa.—*Commonwealth v. Aurick*, 10 A.2d 22, 138 Pa.Super. 180.

Distance maintained

It is a violation of law to drive in excess of the statutory speed limit

(2) Speed of Vehicle

A motorist may be guilty of a criminal homicide for a death occasioned by the operation of his vehicle at an excessive or unlawful speed.

Under the rules imposing criminal liability for a death caused while engaged in the commission of an unlawful act, it has been held that a motorist may be guilty of a criminal homicide, where a person is killed as a result of his operation of a motor vehicle at an excessive speed,⁹⁴ as where the death was caused by driving a motor vehicle in violation of a speed law⁹⁵ designed to prevent injury to the person,⁹⁶ or at a speed which, under the

for a distance of less than one quarter of a mile, even though, in order to sustain a conviction for violation of the speed limit, it is necessary that accused's speed be timed for not less than that distance.—*Commonwealth v. Kurtz*, 33 Pa.Dist. & Co. 661.

Anticipation of injury

One disobeying statute regulating speed of automobile has been held to have anticipated possibility of any injury caused thereby.—*McGoldrick v. State*, 21 S.W.2d 390, 159 Tenn. 667.

Culpable negligence

Excessive speed may constitute culpable negligence within the statute defining manslaughter in the second degree.—*State v. Goldstone*, 175 N.W. 892, 144 Minn. 405.

Violation held to constitute negligence as matter of law

Cal.—*People v. Lett*, 177 P.2d 47, 77 Cal.App.2d 917.

Violation considered with other circumstances

Ind.—*Minardo v. State*, 183 N.E. 548, 204 Ind. 422.

Habitual violation by other motorists is not a defense—*Wilson v. State*, 161 So. 744, 173 Miss. 372.

Wanton or reckless conduct

It is not necessary that motorist's driving should have been wanton or reckless.—*People v. Flores*, 187 P.2d 910, 83 Cal.App.2d 11.

Where excess above speed limit is willful and intentional, homicide caused thereby is manslaughter.—*Wilson v. State*, 161 So. 744, 173 Miss. 372.

Peace officer

Prohibition agent, killing pedestrian while pursuing criminal, was excepted from speed limitations, if he acted in good faith, and with care of ordinarily prudent person.—*Lilly v. State of West Virginia*, C.C.A.W. Va., 29 F.2d 61.

96. Cal.—*People v. Mitchell*, 166 P.2d 10, 27 Cal.2d 678—*People v. Flores*, 187 P.2d 910, 83 Cal.App.2d 11.

circumstances, made it an unlawful act.⁹⁷ However, the speed at which a motor vehicle was going has been held not of itself sufficient to impose criminal liability for a homicide resulting from the operation of the vehicle.⁹⁸ In some jurisdictions, it has been held that, in order that a homicide resulting from a violation of a speed law may constitute manslaughter, accused must have displayed a wanton and reckless disregard and indifference for the safety of other persons who might reasonably be expected to be injured thereby,⁹⁹ and, in others, that driving in excess of the speed limit merely through a failure to exercise due care, and not intentionally or recklessly, will not impose criminal liability for a death caused thereby, unless in the light of the attendant circumstances it was likely to result in death or bodily harm.¹ Where driving in excess of the speed limit just prior to

the accident was the cause thereof, the mere fact that at the moment of impact the speed of the vehicle had been slowed to a rate below the speed limit will not be sufficient of itself to entitle accused to an acquittal.² Under an ordinance providing that a speed in excess of a specified rate shall be unlawful, justifying circumstances have been held to be immaterial.³

e. Intoxication

A death occasioned by the operation of a motor vehicle while the driver is under the influence of intoxicating liquor may constitute a criminal homicide.

A death occasioned by the operation of a motor vehicle while the driver is under the influence of intoxicating liquor has been held to be a criminal homicide,⁴ generally some form or grade of manslaughter,⁵ although the facts may be such as to

97. Ala.—Downey v. State, 4 So.2d 422, 30 Ala.App. 285, certiorari granted 4 So.2d 428, 241 Ala. 514. Pa.—Commonwealth v. Carroll, 200 A. 139, 131 Pa.Super. 357.

Speed limit not conclusive

(1) Fact that accused at time of collision was operating automobile within legal speed limit would not be conclusive on question whether speed was excessive.—People v. Von Eckartsberg, 23 P.2d 819, 133 Cal.App. 1.

(2) Automobile must be operated at reasonable speed not endangering life irrespective of legal speed limit.—People v. McKee, 251 P. 675, 80 Cal.App. 200.

(3) Driving at a rate less than the maximum speed limit may, under certain circumstances, constitute violation of speed law.—People v. Marcom, 5 P.2d 974, 118 Cal.App. 683.

Regardless of negligence

The killing may amount to manslaughter in the second degree, regardless of whether the driving of the automobile was grossly careless, or grossly negligent.—Downey v. State, 4 So.2d 422, 30 Ala.App. 285, certiorari granted 4 So.2d 428, 241 Ala. 514.

It is unlawful to drive a motor vehicle at such speed as to endanger the life, limb, or property of another.—Downey v. State, supra.

98. Ill.—People v. Schneider, 195 N.E. 430, 360 Ill. 43.

Pa.—Commonwealth v. Hipple, Quar. Sess., 57 Dauph.Co. 156.

Knowledge that car was in path

In manslaughter prosecution for death caused by collision with overturned vehicle at intersection, the motorist's speed of fifteen to eighteen miles per hour would not of itself constitute criminal negligence unless motorist had reason to know

that overturned automobile was in his path.—People v. Schneider, 195 N.E. 430, 360 Ill. 43.

99. Iowa.—State v. Kellison, 11 N.W.2d 371, 233 Iowa 1274—State v. Graff, 290 N.W. 97, 228 Iowa 159.

Manslaughter per se

Mere driving of automobile striking pedestrian at speed violating ordinance would not per se make driver guilty of manslaughter, even though death of pedestrian resulted.—State v. Thomlinson, 228 N.W. 80, 209 Iowa 555.

1. N.C.—State v. Stansell, 161 S.E. 580, 203 N.C. 69.

2. Tex.—Vannoy v. State, 155 S.W. 2d 368, 142 Tex.Cr. 513.

3. Utah.—State v. Lingman, 91 P.2d 457, 97 Utah 180.

4. Colo.—Patton v. People, 168 P. 2d 266, 114 Colo. 534—Stevens v. People, 51 P.2d 1022, 97 Colo. 559. Tex.—Flowers v. State, Cr., 202 S.W. 2d 462, modified on other grounds 203 S.W.2d 539—McWhirter v. State, 180 S.W.2d 364, 147 Tex.Cr. 268.

Criminal negligence resulting in death

Minn.—State v. Bolsinger, 21 N.W. 2d 480, 221 Minn. 154.

Construction of statute

Statute imposing criminal liability must be interpreted in the light of the natural meaning of its language.—Rinehart v. People, 95 P.2d 10, 105 Colo. 123.

5. Ala.—Graham v. State, 176 So. 382, 27 Ala.App. 505, certiorari denied 176 So. 384, 234 Ala. 653—Broxton v. State, 171 So. 390, 27 Ala.App. 298.

Ariz.—State v. Ponce, 124 P.2d 543, 59 Ariz. 158—Steffani v. State, 42 P.2d 615, 45 Ariz. 210.

Cal.—People v. Freeman, 60 P.2d 333, 16 Cal.App. 2d 101.

Fla.—Roddenberry v. State, 11 So.2d 582, 152 Fla. 197, appeal dismissed 63 S.Ct. 266, 317 U.S. 600, 87 L.Ed. 490, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. 568—Cannon v. State, 107 So. 360, 91 Fla. 214.

Ga.—Trippe v. State, 36 S.E.2d 121, 73 Ga.App. 322—Black v. State, 130 S.E. 591, 34 Ga.App. 449.

Ky.—Dixon v. Commonwealth, 194 S.W.2d 655, 302 Ky. 353—Newcomb v. Commonwealth, 124 S.W.2d 486, 276 Ky. 362—Dublin v. Commonwealth, 86 S.W.2d 136, 260 Ky. 412. Miss.—Williams v. State, 137 So. 106, 161 Miss. 406.

N.C.—State v. Dills, 167 S.E. 459, 201 N.C. 33—State v. Stansell, 164 S.E. 580, 203 N.C. 69—State v. Leonard, 141 S.E. 736, 195 N.C. 242. Ohio—Masoncup v. State, 189 N.E. 512, 47 Ohio App. 32.

Or.—State v. Boug, 59 P.2d 396, 154 Or. 354.

Pa.—Commonwealth v. Kulgaucuk, Quar.Sess., 27 Erie Co. 78.

S.C.—State v. Long, 195 S.E. 624, 186 S.C. 439.

Utah.—State v. Busby, 131 P.2d 510, 102 Utah 416, 144 A.L.R. 1168.

Wis.—Christie v. State, 248 N.W. 820, 212 Wis. 136.

42 C.J. p. 1355 note 46.

Purpose of statute is to bring just punishment on those who are responsible for death of others because of mismanagement of automobiles due to intoxication.—Barrington v. State, 199 So. 320, 145 Fla. 61.

Construction

The statute must be read with respect to its manifest intent and spirit, and cannot be limited to the literal meaning of a single word, and must be construed as a whole and interpreted according to the sense in

make the offense murder,⁶ and it has been held to be murder in jurisdictions where the act of driving a motor vehicle while intoxicated is a felony.⁷ The killing of a person may constitute criminal homicide where the driver, in addition to being intoxicated, is otherwise violating the law,⁸ and operation of a motor vehicle while intoxicated may be negligence sufficient to constitute the offense of manslaughter,⁹ or be sufficient to show a wanton and reckless disregard of human life.¹⁰ However,

under some statutes, the driving of a motor vehicle while under the influence of intoxicating liquor, although a misdemeanor and, hence, negligence *per se*,¹¹ is not *per se* culpable or criminal negligence which will cause the offense to be manslaughter;¹² nor does it, of itself, make out a *prima facie* case of manslaughter;¹³ and the fact that driving while intoxicated in itself is a statutory violation and a criminal offense is not determinative thereof.¹⁴ The mere fact that the driver of a motor vehicle

which the words are employed, regard being had to the plain intention of the legislature.—*Barrington v. State*, *supra*.

Repeal of statute

Act dealing with traffic regulations, even though it denounced offense of driving a motor vehicle while intoxicated was held not expressly or by implication to repeal statute denouncing and prescribing punishment for manslaughter committed by one operating a motor vehicle while intoxicated.—*Calhoun v. Baden*, 15 So 2d 444, 153 Fla. 663

Manslaughter in second degree

Ala.—*Rombokas v. State*, 170 So 780, 27 Ala.App. 227, certiorari denied Sup., 170 So 782, 233 Ala. 214—*Oliver v. State*, 134 So. 892, 24 Ala. App. 292, certiorari denied 134 So 894, 223 Ala 167

Offense is not manslaughter in first degree

N.Y.—*People v. Grieco*, 193 NE 634, 266 N.Y. 48, motion denied 193 NE 292, 265 NY 505

Dangerous instrumentality

When an automobile is operated by an intoxicated driver, it becomes a dangerous instrumentality.—*State v. Richardson*, 249 NW. 211, 216 Iowa 809.

Character of act

(1) Driving while intoxicated is unlawful act.—*Benton v. State*, 247 NW. 21, 124 Neb. 485

(2) Driving while under the influence of intoxicating liquor is not merely "malum prohibitum," but is "malum in se"
Iowa.—*State v. Kellison*, 11 N.W.2d 371, 233 Iowa 1274.

S.C.—*State v. Long*, 195 S.E. 624, 186 S.C. 439.

Tenn.—*Keller v. State*, 299 S.W. 803, 155 Tenn. 633, 59 A.L.R. 685.
29 C.J. p 1153 note 84 [d].

Place of operation

Manslaughter may be committed under statute whether automobile is operated upon highways, streets, thoroughfares, or at some other place.—*Patterson v. State*, 175 So. 730, 128 Fla. 539.

What constitutes operation of vehicle

(1) Operation of vehicle is not limited to state of motion produced by

mechanism of automobile, but includes at least ordinary stops upon the highway which are to be regarded as fairly incidental to its operation.—*Barrington v. State*, 199 So. 320, 145 Fla. 61.

(2) Operation of vehicle includes parking upon highway at night without lights.—*Barrington v. State*, *supra*.

Culpable negligence in the operation of the motor vehicle is not an element of the crime as it is defined in some of the statutes.—*Graives v. State*, 172 So. 716, 127 Fla. 182—*Cannon v. State*, 107 So 360, 91 Fla 214.

Wanton and reckless disregard of the safety of others is not required in order to constitute the offense under some statutes.—*State v. Kellison*, 11 N.W.2d 371, 233 Iowa 1274.

6. S.C.—*State v. Long*, 195 S.E. 624, 186 S.C. 439.

Intoxication as affecting intent see *infra* § 658.

7. Tex.—*Simmons v. State*, 169 S.W. 2d 171, 145 Tex.Cr. 448—*Fox v. State*, 165 S.W.2d 733, 145 Tex.Cr. 71.

Crime is not negligent homicide

Tex.—*Evans v. State*, 147 S.W.2d 794, 141 Tex.Cr. 241—*Totten v. State*, 113 S.W.2d 194, 134 Tex.Cr. 62—*Collins v. State*, 94 S.W.2d 443, 130 Tex.Cr. 386—*Jones v. State*, 75 S.W.2d 683, 127 Tex.Cr. 227.

Dangerous character of road

The motorist is not entitled to any more consideration because the accident occurred upon a double curve in a highway.—*Houston v. State*, 158 S.W.2d 1004, 143 Tex.Cr. 460.

8. N.C.—*State v. Palmer*, 147 S.E. 817, 197 N.C. 135.

At high rate of speed

Ky.—*Raymer v. Commonwealth*, 197 S.W.2d 903, 303 Ky. 418.

Driving without license

Pa.—*Commonwealth v. Tole*, 25 Pa. Dist. 957, 44 Pa.Co. 257.

9. Minn.—*State v. Bolsinger*, 21 N.W.2d 480, 221 Minn. 154.

N.M.—*State v. Sisneros*, 82 P.2d 274, 42 N.M. 500.

Utah.—*State v. Capps*, 176 P.2d 873.

Gross and culpable negligence

S.C.—*State v. Long*, 195 S.E. 624, 186 S.C. 439.

Intoxication provides element of negligence

Where the primary offense denounced by the statute is the operation of a motor vehicle by an intoxicated person, with the punishment to be meted out dependent on the injury resulting, the most severe being imposed where death results, the element of negligence is established by the intoxication of accused due to the voluntary use of intoxicants.—*Roddenberry v. State*, 11 So 2d 582, 152 Fla. 197, appeal dismissed *Roddenberry v. State of Florida*, 63 S.Ct. 266, 317 U.S. 600, 87 L.Ed. 490, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. 568.

Facts considered on question of negligence

Accused's consumption of liquor and failure to have brakes in proper condition could be considered as bearing on question of negligence, even though they were not in themselves the proximate cause or causes of collision.—*State v. McDaniels*, Wash., 190 P.2d 705.

Killing by gross negligence constitutes manslaughter.—*State v. Blaine*, 140 A 566, 104 N.J.Law 325.

Care of drunken man insufficient

Driver of motor vehicle whose drunkenness caused another's death is guilty of involuntary manslaughter, even though he was as careful as a drunken man could be expected to be.—*Albert v. Commonwealth*, 27 S.E.2d 177, 181 Va. 894.

10. Ala.—*Graham v. State*, 176 So. 382, 27 Ala App 505, certiorari denied 176 So 384, 234 Ala. 653.

11. Miss.—*Cutshall v. State*, 4 So.2d 289, 191 Miss. 764.

12. Mo.—*State v. Budge*, 137 A. 244, 126 Mo. 223, 53 A.L.R. 241.

Miss.—*Cutshall v. State*, 4 So.2d 289, 191 Miss. 764.

13. Miss.—*Cutshall v. State*, *supra*.

14. Miss.—*Cutshall v. State*, *supra*.

The effect of the intoxication is the important and relevant fact, and not that such conduct constitutes in itself a criminal offense.—*Cutshall v. State*, *supra*.

has been drinking intoxicating liquor has been held insufficient to impose criminal liability on him for a death resulting from the operation of the vehicle.¹⁵ In order to impose such liability his drinking must have been to such an extent that at the time of the accident he was under the influence of intoxicating liquor or was intoxicated.¹⁶

§ 658. — Intent to Kill or Knowledge of Danger

In determining the guilt of a driver of a motor vehicle, accused of a criminal homicide, consideration should be given to the presumption that he knew the natural and necessary consequences of his driving, as well as to his right to assume that others would use due care for their own safety. Intent or malice is required in order that the homicide may constitute murder, and generally an intent to kill or wanton conduct, from which malice may be inferred, is required for voluntary manslaughter or manslaughter in the first degree, but ordinarily intent or malice is not required for involuntary manslaughter or negligent homicide.

One who drives a motor vehicle in an unlawful or negligent manner is presumed to know the natural and necessary consequences which may result therefrom,¹⁷ including the knowledge that several persons may be killed and injured in an accident resulting therefrom.¹⁸ The physical conditions ex-

isting at the time of the accident, which accused knew or ought to have known, should be considered in determining whether he was driving recklessly or otherwise improperly.¹⁹ Any assumption in which a driver has the right to indulge, such as that others will use due care for their own safety, is to be considered on the question of his guilt.²⁰ The question whether or not accused actually knew that he was violating the law at the time of the homicide is immaterial.²¹

Murder. Since intent or malice is a necessary element of murder, as considered in Homicide §§ 13-15, in order that the killing of a person by the operation of a motor vehicle may constitute murder there ordinarily must have been what is in law an intent to kill by such an operation,²² and consciousness of peril or probable peril to life therefrom.²³ Actual intent to kill deceased on the part of the operator of the motor vehicle has been held not to be required in order to constitute murder,²⁴ and, under some statutes, one may be guilty of murder without malice where he so operates a motor vehicle as to cause the death of another.²⁵ The necessary intent or malice may be implied or inferred.²⁶ However, a motor vehicle is not per se

15. Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646—State v. Ruffin, 126 S.W.2d 218, 344 Mo. 301.

16. Amount of liquor consumed held immaterial

Ohio.—Masoncup v. State, 189 N.E. 512, 47 Ohio App. 32.

When intoxication a factor

In order for the driver's intoxication to be a factor in manslaughter case involving culpable negligence, it must create abnormal mental and physical condition tending to deprive driver of clearness of intellect and control of himself which he would otherwise possess.—Cutshall v. State, 4 So.2d 289, 191 Miss. 764.

Effect on accused considered

Any mental and physical condition of accused due to the influence of intoxicating liquor may be considered on the issue of culpable negligence.—Cutshall v. State, supra.

Extent of intoxication required

(1) Generally.

Ariz.—Steffani v. State, 42 P.2d 615, 45 Ariz. 210.

Ohio.—Masoncup v. State, 189 N.E. 512, 47 Ohio App. 32.

(2) Person may be under influence of liquor without being intoxicated, within statute as to manslaughter.—Cannon v. State, 107 So. 360, 91 Fla. 214.

(3) Motorist who is so under influence of intoxicating liquor that his capacity to operate automobile is

impaired is intoxicated.—Stevens v. People, 51 P.2d 1022, 97 Colo. 559.

(4) One who, although sufficiently under influence of liquor to impair his capacity as a driver, yet sufficiently sober to know that he is undertaking a sober man's job, drives automobile upon highway is guilty of willful and wanton disregard of rights of other users of highway.—Patton v. People, 168 P.2d 266, 114 Colo. 534.

17. Ga.—Webb v. State, 23 S.E.2d 578, 68 Ga App. 466.

18. Ga.—Webb v. State, supra.

Where several deaths and injuries resulted, accused is criminally accountable for each one.—Webb v. State, supra.

19. Del.—State v. Dean, 122 A. 448, 2 W.W.Harr. 290, affirmed Dean v. State, 125 A. 478, 2 W.W.Harr. 496.

Condition of vehicle

Accused has been held chargeable with knowledge of condition of brakes on his automobile.—People v. Isbell, 2 N.E.2d 84, 363 Ill. 264.

20. Mich.—People v. Campbell, 212 N.W. 97, 237 Mich. 424.

Permissible assumptions

(1) Motorist may assume that pedestrian walking at practically right angles to path of automobile would stop before stepping in front of it.—State v. Schneiders, 137 S.W.2d 439, 345 Mo. 899.

(2) A motorist may properly assume that the operators of other motor vehicles will use reasonable care and have their vehicles under control.—Commonwealth v. Ushka, 198 A. 465, 130 Pa.Super. 600.

21. Ala.—Ballum v. State, 88 So. 200, 17 Ala App. 679.

22. Ark.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

23. Pa.—Commonwealth v. Mayberry, 138 A. 686, 290 Pa. 195.

24. Tex.—Cockrell v. State, 117 S.W. 2d 1105, 135 Tex.Cr. 218.

25. Tex.—Fox v. State, 165 S.W.2d 733, 145 Tex.Cr. 71.

26. Tex.—Cockrell v. State, 117 S.W. 2d 1105, 135 Tex.Cr. 218.

Malice will be implied, so as to make the crime murder, where all the facts and circumstances show an abandoned and malignant heart; but not otherwise.—Huntsinger v. State, 36 S.E.2d 92, 200 Ga. 127.

Effect of statute

In statute defining "involuntary manslaughter," proviso that involuntary killing in commission of unlawful act naturally tending to destroy human being's life shall be deemed murder, will not be applied in prosecution for murder wherein state relies on implied malice, unless circumstances show accused's abandoned and malignant heart.—Huntsinger v. State, supra.

a dangerous instrumentality or deadly weapon so that in a prosecution for murder malice will be imputed merely from its reckless or unlawful use.²⁷

Manslaughter. Under some statutes, in order that the operation of a motor vehicle causing a death may constitute voluntary manslaughter or manslaughter in the first degree there must be either a positive intent to kill or an intentional act from which, ordinarily, in the usual course of events death or great bodily harm may be a consequence,²⁸ and, if the latter is relied on, a positive or specific intent to kill is not necessary to the existence of the offense.²⁹ Whether or not there was an intent to kill, the offense is committed where a death results from a motorist driving recklessly in such a manner as to endanger human life,³⁰ or so as to evidence a wanton and reckless disregard of human life at the time and place and

under the circumstances,³¹ or where accused intentionally drove against deceased.³²

It has been stated that malice or an intent to take life is not necessary in order that a death from the operation of a motor vehicle may constitute manslaughter,³³ or involuntary manslaughter,³⁴ or manslaughter in the second degree;³⁵ and some statutes, in defining what acts constitute the crime of manslaughter, contemplate an unintentional killing.³⁶ However, intent to do an unlawful or grossly negligent act, resulting in the unintentional death of another, has been held to be an element of the offense;³⁷ and, hence, the crime is committed, unless otherwise provided by statute, when a person is unintentionally killed by the driver's operation of his motor vehicle negligently or in violation of law,³⁸ and although at the time the driver did not

27. Ga.—Huntsinger v. State, *supra*.

28. Ala.—Lewis v. State, 167 So 608, 27 Ala.App 155—Reynolds v. State, 134 So. 815, 24 Ala.App. 249, certiorari denied 134 So. 817, 223 Ala. 130.

29. Ala.—Rainey v. State, 17 So 2d 687, 245 Ala. 458—Graham v. State, 176 So. 382, 27 Ala.App 505, certiorari denied 176 So. 384, 234 Ala. 653.

30. Ala.—Jones v. State, 34 So.2d 483, 33 Ala.App. 451—Reynolds v. State, 134 So. 815, 24 Ala.App 249, certiorari denied 134 So. 817, 223 Ala. 130.

31. Ala.—Graham v. State, 176 So. 382, 27 Ala.App 505, certiorari denied 176 So. 384, 234 Ala. 653—Pratt v. State, 171 So. 393, 27 Ala.App. 301—Hammell v. State, 111 So. 191, 21 Ala.App. 633.

Imports intent

The recklessness of accused itself imports the essential criminal intent—Newcomb v. Commonwealth, 124 S. W.2d 486, 276 Ky. 362.

Knowledge required

Actual or probable damages to some person must have existed as matter of knowledge and present consciousness, or that which in law is the equivalent thereof, in order to constitute reckless and wanton negligence.—Willis v. State, 197 So. 62, 29 Ala.App. 365, certiorari denied 197 So. 67, 240 Ala. 52—Curlette v. State, 142 So. 775, 25 Ala.App. 179.

Speed

Forty miles per hour is not per se reckless speed.—Curlette v. State, *supra*.

Character of wanton or reckless conduct required

(1) Accused must have been guilty of such recklessness or wanton conduct as to imply the malice afore-

thought necessary to constitute murder at common law.—State ex rel. Shields v. Portman, 6 N.W.2d 713, 242 Wis. 5.

(2) Culpable wantonness, sufficient to authorize a conviction, exists when accused has knowledge that some person is likely to be in a position of danger and, with conscious disregard of such known danger, recklessly proceeds on a dangerous course which causes disaster, although he may not know whether any person is actually in danger—Rainey v. State, 17 So.2d 687, 245 Ala. 458

Wanton misconduct held not shown from mere fact that:

(1) Accused was driving automobile on wrong side of road—Curlette v. State, 142 So. 775, 25 Ala.App. 179.

(2) Accused took three drinks of home brew four and one-half hours before driving.—Curlette v. State, *supra*.

32. Ala.—Pratt v. State, 171 So. 393, 27 Ala.App. 301—Hammell v. State, 111 So. 191, 21 Ala.App. 633.

33. Ill.—People v. Lynn, 52 N.E.2d 166, 385 Ill. 165—People v. Littwin, 39 N.E.2d 5, 378 Ill. 567—People v. Hansen, 38 N.E.2d 738, 378 Ill. 491—People v. Maloney, 18 N.E.2d 885, 370 Ill. 351—People v. Allen, 14 N.E.2d 397, 368 Ill. 368, certiorari denied Allen v. People of State of Illinois, 60 S.Ct. 132, 308 U.S. 511, 84 L.Ed. 436—People v. Peterson, 4 N.E.2d 37, 364 Ill. 80—People v. Herkless, 196 N.E. 829, 361 Ill. 32—People v. Schneider, 195 N.E. 430, 360 Ill. 43—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

Iowa.—State v. Thomlinson, 228 N.W. 80, 209 Iowa 555.

Wash.—State v. Hopkins, 265 P. 481, 147 Wash. 198, 59 A.L.R. 688, certiorari denied Hopkins v. State of

Washington, 49 S.Ct. 21, 278 U.S. 617, 73 L.Ed. 540.

Actual intent to harm some one is not required.—State v. Studebaker, 66 S.W.2d 877, 334 Mo. 471.

Willful killing is not required

Miss.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

Substitute for intent

Negligence and reckless indifference to lives and safety of others supply intent.—State v. Thomlinson, 228 N.W. 80, 209 Iowa 555.

34. Ark.—Martin v. State, 174 S.W. 2d 242, 206 Ark. 15.

Cal.—People v. Barnett, 175 P.2d 237, 77 Cal.App.2d 299.

Ky.—Roberts v. Commonwealth, 95 S.W.2d 23, 264 Ky. 545.

La.—State v. Porter, 146 So. 465, 176 La. 673.

Mich.—People v. Townsend, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

Pa.—Commonwealth v. Holman, 50 A.2d 720, 160 Pa.Super. 211.

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

42 C.J. p 1356 note 53—29 C.J. p 1156 note 18.

"Involuntary manslaughter" defined see Homicide § 55.

35. Ala.—Jones v. State, 109 So. 189, 21 Ala.App. 234.

Okl.—Wilson v. State, 105 P.2d 789, 70 Okl.Cr. 262.

36. Ind.—Roby v. State, 17 N.E.2d 800, 215 Ind. 55.

37. Wash.—State v. Hopkins, 265 P. 481, 147 Wash. 198, 59 A.L.R. 688, certiorari denied Hopkins v. State of Washington, 49 S.Ct. 21, 278 U.S. 617, 73 L.Ed. 540.

38. Ala.—Estes v. State, 93 So. 217, 18 Ala.App. 606.

Manslaughter in second degree

Ala.—Hammell v. State, 111 So. 191, 21 Ala.App. 633.

actually know that his act would result in a homicide.³⁹

Other homicides. Under various statutes an intent to kill is not an element of the offense of negligent homicide,⁴⁰ and it has been held not to depend on the presence of the element of willfulness or intention to violate the law.⁴¹ Under other statutes, in order that reckless driving may constitute the crime of criminal negligence in the operation of a vehicle resulting in death, accused must have known, or should have known, that his manner of driving the vehicle created an unreasonable risk of harm, but he need not have intended to cause harm.⁴² Intent has been held not a necessary element of the statutory crime of involuntary homicide.⁴³

Assault with intent to murder. A specific intent to kill is an essential element of the offense of assault with intent to kill or murder by striking another with a motor vehicle operated by accused.⁴⁴ A wanton or reckless state of mind may be the equivalent of a specific intent to kill.⁴⁵ Also, it has been held that the intent to do the prohibited act is sufficient where the injury resulted from the unlawful act,⁴⁶ or that the operation of the vehicle in a manner forbidden by law may take the place of and supply the unlawful intent.⁴⁷ However, criminal negligence will not, in every case, supply the intent to kill, and the mere fact that accused was violating the speed or traffic laws of the state

or was under the influence of intoxicating liquor is not ipso facto sufficient therefor.⁴⁸

Intoxication or influence of drugs. It has been held that a driver of a motor vehicle is not guilty of murder who, at the time of the homicide, had been deprived of his reason and the capacity of knowing the wrongfulness of his acts by drugs given to him or prescribed for him by a physician to alleviate pain,⁴⁹ or who is so under the influence of intoxicating liquor as to be incapable of forming the necessary intent for murder.⁵⁰ However, voluntary drunkenness is no excuse for crime.⁵¹ It has been held that driving a motor vehicle at excessive speed while intoxicated is sufficient to sustain a conviction of murder in the second degree for a death caused thereby, even though the killing was not intentional,⁵² or that intent or malice sufficient to constitute murder may be implied where an intoxicated person drives in a reckless and wanton manner so as to endanger the lives of others.⁵³ The fact that at the time of the homicide the driver was so intoxicated as not to know that his driving was apt to cause injury to another is no defense to a charge of involuntary manslaughter.⁵⁴ The drunken condition of an owner or proprietor of a motor vehicle who permitted his vehicle to be driven in a reckless manner by a drunken companion has been held not to constitute a defense to a prosecution for the murder of one killed by the reckless operation of the vehicle.⁵⁵

Even though it might be considered a felonious killing if accused wrongfully ran his motor vehicle over deceased, although without malice or intention to kill, a verdict of manslaughter in the second degree will not be disturbed.—*Gore v. State*, 114 So. 791, 22 Ala.App. 136, certiorari denied *Ex parte State ex rel. Attorney General*, 114 So. 794, 217 Ala. 68, 39. Ala.—*Estes v. State*, 93 So. 217, 18 Ala.App. 606

Knowledge required

It need not have been reasonably apparent to accused that death of another would result from his act, but it is sufficient if he knew or reasonably should have known, that his act tended to endanger life.—*State v. Studebaker*, 66 S.W.2d 877, 334 Mo. 471.

Intent to do the prohibited act is sufficient to support a conviction for a killing resulting from the unlawful act of accused in the operation of a motor vehicle.—*Webb v. State*, 23 S.E.2d 578, 68 Ga.App. 466.

40. Tex.—*Stover v. State*, 104 S.W. 2d 48, 132 Tex.Cr. 356.

41. Cal.—*People v. Pryor*, 61 P.2d 773, 17 Cal.App.2d 147.

42. Minn.—*State v. Bolsinger*, 21 N.W.2d 489, 221 Minn. 154.

43. La.—*State v. Porter*, 146 So. 465, 176 La. 673.

44. Ga.—*Wright v. State*, 148 S.E. 731, 168 Ga. 690—*Payne v. State*, 40 S.E.2d 759, 74 Ga.App. 646—*Mundy v. State*, 1 S.E.2d 605, 59 Ga.App. 509—*Necesse v. State*, 150 S.E. 451, 40 Ga.App. 503—*Smith v. State*, 147 S.E. 781, 39 Ga.App. 552.

45. Ga.—*Payne v. State*, 40 S.E.2d 759, 74 Ga.App. 646—*Denard v. State*, 81 S.E. 378, 14 Ga.App. 485.

46. Ga.—*Webb v. State*, 23 S.E.2d 578, 68 Ga.App. 466.

47. Okl.—*Lamb v. State*, 105 P.2d 799, 70 Okl.Cr. 236.

48. Ga.—*Mundy v. State*, 1 S.E.2d 605, 59 Ga.App. 509.

49. Okl.—*Williams v. State*, 74 P.2d 632, 63 Okl.Cr. 234.

50. Ala.—*State v. Massey*, 100 So. 625, 20 Ala.App. 56.

Ga.—*Herrington v. State*, 120 S.E. 554, 31 Ga.App. 167.

51. Ky.—*Morris v. Commonwealth*, 73 S.W.2d 1, 255 Ky. 276.

Tex.—*Brewer v. State*, 143 S.W.2d 599, 140 Tex.Cr. 9.

42 C.J. p 1356 note 52.

Effect of intoxication as to liability for crime generally see Criminal Law §§ 65-71.

No defense to manslaughter in first degree

Ala.—*Graham v. State*, 176 So. 382, 27 Ala.App. 505, certiorari denied 176 So. 384, 234 Ala. 653.

52. Ala.—*Reed v. State*, 142 So. 442, 225 Ala. 219.

53. Tex.—*Cockrell v. State*, 117 S.W. 2d 1105, 135 Tex.Cr. 218.

54. Mich.—*People v. Townsend*, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

Homicide while driving under influence of liquor as manslaughter see supra § 657 e.

Gravamen of offense

The intoxication of accused is the gravamen of his offense, and the greater the degree thereof the more aggravated his offense.—*People v. Townsend*, supra.

55. Tex.—*Brewer v. State*, 143 S.W. 2d 599, 140 Tex.Cr. 9.

Knowledge of owner. In order that an owner may be responsible as principal for a homicide resulting from the driver's improper operation of the vehicle, he must have known, or it must have been apparent to him, that the driver's operation thereof was negligent or otherwise improper.⁵⁶

§ 659. — Degree of Negligence

- a. In general
- b. Involuntary manslaughter
- c. Negligent homicide or similar statutory offense

a. In General

Although, under some statutes, ordinary negligence in the operation of a motor vehicle is sufficient to make the death of a human being caused thereby some form or grade of criminal homicide, generally some greater character or degree of negligence is required therefor.

Not every instance where a human being is killed

by a motor vehicle driven by another under circumstances showing negligence constitutes a crime,⁵⁷ and a homicide may result from carelessness of such low degree or trivial character in the lawful operation of a motor vehicle as not to involve criminality.⁵⁸ Although, under some statutes, negligence, or ordinary negligence, in the operation of a motor vehicle is sufficient to support a charge of some form or grade of criminal homicide for a death caused thereby, and it is unnecessary to show gross negligence,⁵⁹ generally the negligence required is more than ordinary common-law negligence,⁶⁰ and is something more, or greater in degree, than the negligence necessary to impose civil liability.⁶¹ In the absence of statute providing otherwise, criminal liability does not arise for a death in the use or operation of a motor vehicle caused from slight negligence,⁶² or from mere carelessness or negligence,⁶³ where the negligent act causing the death was lawful,⁶⁴ or from

Drunken proprietor

Proprietor of motor vehicle may be convicted of murder in second degree where, while intoxicated although not irresponsible, he directed another intoxicated person to take charge of his car, whose negligent and unlawful operation caused wreck and killing of another—State v. Trott, 130 S.E. 627, 190 N.C. 674, 42 A.L.R. 1114.

56. Tex.—Schorr v. State, 132 S.W.2d 898, 137 Tex.Cr. 625.

Excessive speed

Owner who was not experienced driver was held not criminally negligent for excessive speed of experienced driver because he failed constantly to keep his eyes on the speedometer.—Schorr v. State, supra.

57. Ill.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451—People v. Lynn, 52 N.E.2d 166, 385 Ill. 165—People v. Burgard, 36 N.E.2d 558, 377 Ill. 322—People v. Schneider, 195 N.E. 430, 360 Ill. 43—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

Ky.—Carnes v. Commonwealth, 129 S.W. 543, 278 Ky. 771.

Okl.—Clapp v. State, 120 P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144—Freeman v. State, 101 P.2d 653, 69 Okl.Cr. 164.

58. Ala.—Crisp v. State, 109 So. 282, 21 Ala.App. 449, reversed on other grounds 109 So. 287, 215 Ala. 2. Negligence giving rise to criminal responsibility generally see the C.J.S. title Negligence § 306, also 45 C.J. p 1371 note 16—p 1373 note 39.

59. Manslaughter

Cal.—People v. Wilson, 177 P.2d 567, 78 Cal.App.2d 108.

Wash.—State v. Ramser, 136 P.2d 1013, 17 Wash.2d 581.

Wanton or reckless act not necessary

Where a person is doing anything dangerous or has charge of anything dangerous in its use, such as an automobile, and acts without proper precautions that a person of ordinary prudence would have used, and death of another results therefrom, his act or neglect is a criminal act, even though his negligence does not amount to wanton or reckless disregard of human safety or life—People v. Wilson, 177 P.2d 567, 78 Cal.App.2d 108.

60. Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646.

Pa.—Commonwealth v. Kulgaucuk, Quar.Sess., 27 Erie Co. 78.

Simple negligence is insufficient to sustain a charge of manslaughter in the first degree—Willis v. State, 197 So. 62, 29 Ala.App. 365, certiorari denied 197 So. 67, 240 Ala. 52.

An error of judgment in turning to left to avoid motor vehicle approaching upon the wrong side of the highway has been held not to be criminal negligence sufficient to sustain a conviction for manslaughter.—Hiller v. State, 50 S.W.2d 225, 164 Tenn. 388.

61. Ala.—Crisp v. State, 109 So. 282, 21 Ala.App. 449, reversed on other grounds 109 So. 287, 215 Ala. 2.

Ark.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga.App. 325.

Kan.—State v. Custer, 282 P. 1071, 129 Kan. 381, 67 A.L.R. 909.

Ky.—Carnes v. Commonwealth, 129 S.W. 543, 278 Ky. 771.

N.Y.—People v. Bearden, 49 N.E.2d 785, 290 N.Y. 478—People v. Gardner, 8 N.Y.S.2d 917, 255 App.Div.

683—People v. Williams, 61 N.Y. S.2d 252, 187 Misc. 299.

N.C.—State v. Satterfield, 153 S.E. 155, 198 N.C. 682—State v. Rountree, 106 S.E. 669, 181 N.C. 535.

Okl.—Hall v. State, 159 P.2d 283, 80 Okl.Cr. 310—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323—Freeman v. State, 101 P.2d 653, 69 Okl.Cr. 164.

Tenn.—Trentham v. State, 206 S.W.2d 291, 185 Tenn. 271—Potter v. State, 124 S.W.2d 232, 174 Tenn. 118—Hiller v. State, 50 S.W.2d 225, 164 Tenn. 388.

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

Degrees of negligence adopted by statutes as a basis for particular homicides resulting from the operation of motor vehicles will be recognized and given effect—State v. Boisinger, 21 N.W.2d 480, 221 Minn. 154.

62. Mich.—People v. Campbell, 212 N.W. 97, 237 Mich. 424.

N.Y.—People v. Ambrico, 12 N.Y.S.2d 510.

63. Del.—State v. Elliott, 8 A.2d 873, 1 Terry 250.

Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga.App. 325.

Idaho—State v. Hintz, 102 P.2d 639, 61 Idaho 411.

Ill.—People v. Allen, 151 N.E. 676, 321 Ill. 11.

Miss.—Scott v. State, 185 So. 195, 183 Miss. 788.

42 C.J. p 1357 note 64.

Motor vehicle as dangerous instrumentality generally see supra § 12.

Negligence in handling of deadly weapons see Homicide § 62 b.

64. Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga.App. 325.

mere negligence not amounting to a reckless, willful, and wanton disregard of consequences.⁶⁵

The character or degree of negligence required for criminal liability has been variously stated and is dependent on the grade of offense involved and the provisions of the controlling statutes. Accordingly, it has been variously stated that the negligence in the operation of a motor vehicle necessary and sufficient to impose criminal liability for a death resulting therefrom is negligence so great that the law imputes a criminal intent,⁶⁶ or such a wide departure from due care as to amount to gross and reckless operation of the motor vehicle,⁶⁷ or criminal or culpable negligence,⁶⁸ gross negligence,⁶⁹ or gross or culpable negligence,⁷⁰ or carelessness or recklessness,⁷¹ or operation of the vehicle in a reckless, wanton, and careless manner.⁷²

However, regardless of the particular character or degree of negligence stated to be necessary to impose criminal liability, the character of conduct required is generally such as manifests on the part of accused an indifference to, or disregard for, the consequences of his act or the life or safety of others or such as is likely to cause great bodily harm or death to another.⁷³

Under these rules the standard of conduct, by which criminal liability for a homicide resulting from the operation of a motor vehicle is measured, is not the highest degree of care.⁷⁴ It has been held to be the omission to do something which a reasonable and prudent person would do,⁷⁵ or the doing of something which such a person would not do under the circumstances surrounding the particular case,⁷⁶ or the want of usual and ordinary

65. N.M.—State v. Harris, 70 P.2d 757, 41 N.M. 426.

66. Mich.—People v. Campbell, 212 N.W. 97, 237 Mich. 424.
42 C.J. p 1356 note 63.

When homicide results from reckless driving of automobile, criminal intent is imputed to offender.—Goodman v. Commonwealth, 151 S.E. 168, 153 Va. 943.

67. Ky.—Swango v. Commonwealth, 124 S.W.2d 768, 276 Ky. 467.

68. Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga App. 325.

Okl.—Clapp v. State, 120 P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144.—Freeman v. State, 101 P.2d 653, 69 Okl.Cr. 164.

69. Manslaughter

N.J.—State v. Blaine, 140 A. 566, 104 N.J.Law 325.

70. Idaho.—State v. Hintz, 102 P.2d 639, 61 Idaho 411.

Manslaughter

Me.—State v. Ela, 8 A.2d 589, 136 Me. 303.

71. Ky.—Wilson v. Commonwealth, 147 S.W.2d 62, 285 Ky. 136.

72. W.Va.—State v. Weisengoff, 101 S.E. 450, 85 W.Va. 271.
42 C.J. p 1356 note 48.

Reckless driving

Ala.—Hammell v. State, 111 So. 191, 21 Ala.App. 633—Jones v. State, 109 So. 189, 21 Ala.App. 234.

73. Ala.—Crisp v. State, 109 So. 282, 21 Ala.App. 449, reversed on other grounds 109 So. 287, 215 Ala. 2.

Del.—State v. Elliott, 8 A.2d 873, 1 Terry 250.

Idaho.—State v. Hintz, 102 P.2d 639, 61 Idaho 411.

Ky.—Carnes v. Commonwealth, 129 S.W.2d 543, 278 Ky. 771.

Me.—State v. Ela, 8 A.2d 589, 136 Me. 303.

N.Y.—People v. Ambrico, 12 N.Y.S.2d 510.

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

42 C.J. p 1357 notes 65, 66.

Callous disregard of human life

Va.—Goodman v. Commonwealth, 151 S.E. 168, 153 Va. 943.

Utter disregard for the safety of others under circumstances likely to cause injury.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451—People v. Lynn, 52 N.E.2d 166, 385 Ill. 165—People v. Hansen, 38 N.E.2d 738, 378 Ill. 491—People v. Burgard, 36 N.E.2d 558, 377 Ill. 322—People v. Przybvl, 6 N.E.2d 848, 365 Ill. 515—People v. Schneider, 195 N.E. 430, 360 Ill. 43—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

Manslaughter

(1) In general.

Ill.—People v. Lynn, 52 N.E.2d 166, 385 Ill. 165—People v. Littwin, 39 N.E.2d 5, 378 Ill. 567—People v. Hansen, 38 N.E.2d 738, 378 Ill. 491—People v. Maloney, 18 N.E.2d 885, 370 Ill. 351—People v. Allen, 14 N.E.2d 397, 368 Ill. 368, certiorari denied Allen v. People of State of Illinois, 60 S.Ct. 132, 308 U.S. 511, 84 L.Ed. 436—People v. Peterson, 4 N.E.2d 37, 364 Ill. 80—People v. Herklless, 196 N.E. 829, 361 Ill. 32—People v. Sikes, 159 N.E. 293, 328 Ill. 64—People v. Allen, 151 N.E. 676, 321 Ill. 11.

Iowa.—State v. Graff, 290 N.W. 97, 228 Iowa 159—State v. Thomlinson, 228 N.W. 80, 209 Iowa 555.

Neb.—Cowan v. State, 2 N.W.2d 111, 140 Neb. 837.

N.J.—State v. Blaine, 140 A. 566, 104 N.J.Law 325—State v. Harlow, 140 A. 438, 6 N.J.Misc. 149.

N.M.—State v. Harris, 70 P.2d 757, 41 N.M. 426.

N.C.—State v. Leonard, 141 S.E. 736, 195 N.C. 242.

(2) Reckless or utter disregard for human life is necessary to constitute manslaughter.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646—State v.

Schneiders, 137 S.W.2d 439, 345 Mo. 899—State v. Ruffin, 126 S.W.2d 218, 344 Mo. 301.

In order to constitute wanton or reckless negligence, there must be a design, purpose, or intent to do wrong, or reckless indifference to, or disregard for, the natural or probable consequence of the act—Willis v. State, 197 So. 62, 29 Ala.App. 365, certiorari denied 197 So. 67, 240 Ala. 52.

“Reckless” imports a disregard by accused of the consequences of his act and an indifference to the rights of others.—People v. Bearden, 49 N.E.2d 785, 290 N.Y. 478—People v. Williams, 61 N.Y.S.2d 252, 187 Misc 299.

Subsequent conduct

It is proper to consider the conduct of accused subsequent to the accident, including his denial to officers that he had had an accident, as a circumstance with respect to whether his entire conduct had been characterized by a spirit of wanton disregard for safety of others.—Cutshall v. State, Miss., 35 So.2d 318.

74. Mo.—State v. Schneiders, 137 S.W.2d 439, 345 Mo. 899—State v. Ruffin, 126 S.W.2d 218, 344 Mo. 301.
42 C.J. p 1356 note 63 [b].

75. Mo.—State v. Ruffin, supra.

Okl.—Ray v. State, Cr., 189 P.2d 620—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323—Clapp v. State, 120 P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144—Wilson v. State, 105 P.2d 789, 70 Okl. Cr. 262—Freeman v. State, 101 P.2d 653, 69 Okl.Cr. 164—Romines v. State, 281 P. 310, 45 Okl.Cr. 40—Nail v. State, 242 P. 270, 33 Okl.Cr. 100.

76. Mo.—State v. Ruffin, 126 S.W.2d 218, 344 Mo. 301.

Okl.—Ray v. State, Cr., 189 P.2d 620—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323—Clapp v. State, 120

care and caution in the performance of an act usually and ordinarily done by a person under similar circumstances and conditions,⁷⁷ or a disregard for the consequences which may ensue from the act and indifference to the rights of others.⁷⁸

Murder. It has been held in jurisdictions where a specific intent to kill is a necessary element of murder that no degree of negligence, however gross, is sufficient of itself to constitute the crime of murder.⁷⁹

P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144—Wilson v. State, 105 P.2d 789, 70 Okl.Cr. 262—Romines v. State, 281 P. 310, 45 Okl.Cr. 40—Nail v. State, 242 P. 270, 33 Okl.Cr. 100.

77. Okl.—Freeman v. State, 101 P.2d 653, 69 Okl.Cr. 164—Romines v. State, 281 P. 310, 45 Okl.Cr. 40.

Failure to operate prudently

Failure to operate automobile prudently and at reasonable speed constitutes "culpable negligence."—Romines v. State, supra.

78. Ga.—Cain v. State, 190 S.E. 371, 55 Ga.App. 376.

N.Y.—People v. Bearden, 49 N.E.2d 785, 290 N.Y. 478—People v. Gardner, 8 N.Y.S.2d 917, 255 App.Div. 683—People v. Williams, 61 N.Y.S.2d 252, 187 Misc. 299.

Test

The test of culpable negligence is, do the acts charged as criminal show a degree of carelessness amounting to a culpable disregard of the rights and safety of others.—Clapp v. State, 120 P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144—Freeman v. State, 101 P.2d 653, 69 Okl.Cr. 164.

79. Ark.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

80. Duty at intersection

Pa.—Commonwealth v. Ushka, 198 A. 465, 130 Pa.Super. 600.
Wash.—State v. Mooney, 16 P.2d 455, 170 Wash. 260.

81. Okl.—Romines v. State, 281 P. 310, 45 Okl.Cr. 40.

Degree of care required is that which a reasonably careful and prudent man would use under like circumstances.—Downey v. State, 4 So.2d 422, 30 Ala.App. 285, certiorari granted 4 So.2d 428, 241 Ala. 514.

Unfamiliar road

A motorist, who is unfamiliar with the road upon which he is driving in the nighttime, cannot with impunity take chances on mere appearances and drive ahead without regard for the possibility of causing death or injury to other persons upon the highway.—State v. Phelps, 110 P.2d 755, 153 Kan. 337.

82. Del.—State v. Elliott, 8 A.2d 873, 1 Terry 250.

Circumstances considered

The character of the highway before and at place of collision, the position of parked automobile with which motorist collided, and the conditions of visibility and speed at which motorist was driving are to be considered.—State v. Elliott, supra.

What constitutes proper control

"Control" means management or government, and the phrase "under proper control" as applied to the operation of an automobile upon a public highway means operation at such speed and with such attention to its mechanism and power as will enable the driver to stop it with a reasonable degree of quickness or within a reasonable distance, or to guide it safely by objects upon the highway, dependent on existing circumstances and likelihood of danger to others upon the highway.—State v. Elliott, supra.

83. Del.—State v. Elliott, supra.

Ill.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451—People v. Lynn, 52 N.E.2d 166, 385 Ill. 165—People v. Malonev, 18 N.E.2d 885, 370 Ill. 351—People v. Allen, 14 N.E.2d 397, 368 Ill. 368, certiorari denied Allen v. People of State of Illinois, 60 S.Ct. 132, 308 U.S. 511, 84 L.Ed. 436—People v. Herklless, 196 N.E. 829, 361 Ill. 32.

Care demanded by circumstances

One operating an automobile upon a public highway must use that degree of care and caution which the particular circumstances demand in order that others lawfully upon the highway may not be injured or killed.—State v. Elliott, 8 A.2d 873, 1 Terry, Del., 250.

Care to avoid collision

Driver of vehicle passing another must exercise proper care to avoid collision with oncoming vehicle, whether vehicle passed is moving or at rest.—Goodman v. Commonwealth, 151 S.E. 168, 153 Va. 943.

Duty to avoid pedestrian

N.J.—State v. Linarducci, 3 A.2d 796, 122 N.J.Law 137, affirmed 8 A.2d 576, 123 N.J.Law 228.

Care in passing another vehicle

Ill.—People v. Przybyl, 6 N.E.2d 848, 365 Ill. 515.

Duties required for due care. With respect to the crime of homicide, it is the duty of a motorist to drive in conformity with the rules of the road,⁸⁰ to operate his vehicle in a careful and prudent manner and at a reasonable rate of speed,⁸¹ to keep his motor vehicle under control,⁸² to exercise reasonable care in the control and management of his vehicle to prevent injury to others,⁸³ and to keep a proper lookout;⁸⁴ and the right of others to use the highways and streets must be con-

84. Del.—State v. Elliott, 8 A.2d 873, 1 Terry 250.

Ky.—Swango v. Commonwealth, 124 S.W.2d 768, 276 Ky. 467.

Okl.—Nail v. State, 242 P. 270, 33 Okl.Cr. 100.

42 C.J. p 1356 note 47.

Circumstances considered

The character of the roadway, the brightness of the night, the speed at which he was driving, and the position of the parked vehicle the motorist hit are to be considered.—State v. Elliott, 8 A.2d 873, 1 Terry, Del., 250.

Duty to maintain lookout

(1) There is a duty on the part of automobile driver to keep a lookout for pedestrians upon crosswalks, even though such driver may have a green light at the intersection.—State v. Bushy, 131 P.2d 510, 102 Utah 416, 144 A.L.R. 1468.

(2) Inability of motorist to see because of lights of automobile approaching from opposite direction enlarge his obligation to be cautious and to anticipate presence of a pedestrian in crosswalk.—People v. Lett, 177 P.2d 47, 77 Cal.App.2d 917.

(3) Lack of knowledge of motorist blinded by lights of approaching vehicle, of presence of pedestrian in public crosswalk, does not justify failure to keep proper lookout for pedestrian, or to give warning.—People v. Lett, supra.

Failure to see

(1) Motorist who did not see his victim until the instant of impact, or not at all, was held guilty of gross negligence or of an entire indifference to those using the street or highway simultaneously with him.—People v. Flores, 187 P.2d 910, 83 Cal. App.2d 11.

(2) Failure to see that which is plainly visible is a disregard for duty.—State v. Elliott, 8 A.2d 873, 1 Terry, Del., 250.

Unlawful act held not shown

The failure of motorist who had right of way to look to his left after reaching a point close to the intersection was held not of itself an unlawful act sufficient to sustain a manslaughter charge.—Commonwealth v. Ushka, 198 A. 465, 130 Pa.Super. 606.

sidered.⁸⁵

b. Involuntary Manslaughter

The negligence necessary and sufficient to convict a motorist of involuntary manslaughter, or manslaughter of some grade equivalent thereto, is generally negligence greater than ordinary negligence or the negligence sufficient to support a civil action for damages, and is negligence which is gross, culpable, or criminal, or equivalent thereto, and such as evinces a disregard for the life or safety of others.

Where negligence is relied on to convict a motorist of involuntary manslaughter, or manslaughter

of a grade equivalent thereto, for a death resulting from the operation of his motor vehicle, it has generally been held that the negligence required is more than ordinary negligence or the lack of ordinary care,⁸⁶ or more than the negligence sufficient to support a civil action for damages,⁸⁷ although, under some circumstances, a failure to exercise ordinary care has been held to constitute gross negligence sufficient to render the crime manslaughter.⁸⁸ Gross⁸⁹ or culpable,⁹⁰ or criminal,⁹¹

85. Pedestrian

Ill.—People v. Przybyl, 6 N.E.2d 848, 365 Ill. 515.

Beach

Fact that certain beaches have been made public highways does not restrict right of pedestrians in use of beaches for lawful purposes.—Sallas v. State, 124 So. 27, 98 Fla. 464.

86. Ark.—Phillips v. State, 161 S.W. 2d 747, 204 Ark. 205.

Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga.App. 325.

Pa.—Commonwealth v. Delicese, 38 A.2d 494, 155 Pa.Super. 120—Commonwealth v. Ushka, 198 A. 465, 130 Pa.Super. 600—Commonwealth v. Bender, Com.Pl., 58 Dauph.Co. 21.

S.D.—State v. Bates, 271 N.W. 765, 65 S.D. 105.

Utah.—State v. Adamson, 125 P.2d 429, 101 Utah 534.

Manslaughter in fourth degree

Wis.—State v. Whatley, 245 N.W. 93, 210 Wis. 157, 99 A.L.R. 749.

More than simple negligence is required

Cal.—People v. Hurley, 56 P.2d 978, 13 Cal.App.2d 208.

87. Ga.—Cain v. State, 190 S.E. 371, 55 Ga.App. 376.

Pa.—Commonwealth v. Delicese, 38 A. 2d 494, 155 Pa.Super. 120—Commonwealth v. Stosny, 31 A.2d 582, 152 Pa.Super. 236.

Tenn.—Hiller v. State, 50 S.W.2d 225, 164 Tenn. 388.

88. In crowded streets or business district

Ky.—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356.
42 C.J. p 1357 note 66 [a].

Driving into car which driver knew was in front of him upon the highway is gross negligence where ordinary care would have avoided collision.—Benton v. State, 247 N.W. 21, 124 Neb. 485.

89. Cal.—People v. Flores, 187 P.2d 910, 83 Cal.App.2d 11—People v. Hurley, 56 P.2d 978, 13 Cal.App.2d 208.

Effect of other statute

"Gross negligence," as defined in the so-called guest passenger act, where it is used as synonymous with

"wanton and willful misconduct," has no application in a case of involuntary manslaughter arising when an unlawful act is committed.—People v. Wardell, 289 N.W. 328, 291 Mich. 276

Gross negligence held shown

Wis.—State v. Whatley, 245 N.W. 93, 210 Wis. 157, 99 A.L.R. 749.

What constitutes

Gross negligence cannot rest on inadvertence; there must be something in the conduct of the motorist which shows wantonness, recklessness, or willfulness.—Bussard v. State, 288 N.W. 187, 233 Wis. 11—State v. Whatley, 245 N.W. 93, 210 Wis. 157, 99 A.L.R. 749.

90. Miss.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.
42 C.J. p 1354 note 40.

Comparison with requirement of guest statute

Culpable negligence has been held similar to that conduct denounced by automobile guest statute as "gross negligence" and "willful and wanton misconduct."—State v. Bates, 271 N.W. 765, 65 S.D. 105.

Greater than gross

Under a statute which makes a killing through culpable negligence manslaughter, the term "culpable negligence" has been construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

Homicide not improbable

In order to constitute a killing through culpable negligence it must be shown that a homicide was not improbable under all the facts existing at the time.—Smith v. State, supra.

Fast driving

Culpable negligence was not shown where a driver who was driving somewhat faster than usual lost control of automobile while attempting a left turn, and, in order to avoid collision with another automobile,

ran over a man and struck post near sidewalk.—Scott v. State, 185 So. 195, 183 Miss. 788.

91. Cal.—People v. Hurley, 56 P.2d 978, 13 Cal.App.2d 208.

Gist of the offense is criminal negligence.

Ill.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451—People v. Lynn, 52 N.E.2d 166, 385 Ill. 165—People v. Hansen, 38 N.E.2d 738, 378 Ill. 491—People v. Burgard, 36 N.E.2d 558, 377 Ill. 322—People v. Przybyl, 6 N.E.2d 848, 365 Ill. 515—People v. Herkless, 196 N.E. 829, 361 Ill. 32—People v. Schneider, 195 N.E. 430, 360 Ill. 43—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

Miss.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

Under statute

The phrase "without due caution and circumspection" means, or is the equivalent of, criminal negligence.

Ark.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

Cal.—People v. Hurley, 56 P.2d 978, 13 Cal.App.2d 208.

What constitutes

(1) "Criminal negligence" has been defined as the reckless disregard for consequences or a needless indifference to the rights and safety of others with a reasonable foresight that injury would probably result.

Ark.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga.App. 325.

(2) Negligence, in order to be criminal, must be reckless or wanton and of such character as to show an utter disregard for the safety of others under circumstances likely to cause injury.

Ill.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451—People v. Lynn, 52 N.E.2d 166, 385 Ill. 165—People v. Herkless, 196 N.E. 829, 361 Ill. 32—People v. Schneider, 195 N.E. 430, 360 Ill. 43.

Miss.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

Lack of sleep

Criminal negligence was shown where motorist fell asleep while driving because of loss of sleep.—Johnson v. State, 4 So.2d 671, 148 Fla. 510.

or gross or culpable,⁹² or wanton and reckless⁹³ negligence is required and sufficient; as is reckless and negligent driving;⁹⁴ or negligence or conduct such as to evince a disregard for life or the safety of others;⁹⁵ or willful and reckless acts of accused, implying an indifference to consequences which may ensue equivalent to a criminal intent;⁹⁶ or operation in a grossly negligent or reckless manner, but not willfully or wantonly;⁹⁷ or driving with a degree of carelessness amounting to a culpable disregard for the rights and safety of others;⁹⁸ or some action from which mens rea may be inferred.⁹⁹ Under some statutes the negligence must amount to unlawfulness of conduct in order to sustain a charge of involuntary manslaughter,¹ that is, conduct which evinces a disregard for human life or an indifference to consequences² and which contains an element of recklessness or rashness,³ al-

though it need not be such as exhibits a reckless, wanton, and wicked disregard of the safety of others.⁴ Under a statute defining involuntary manslaughter as the involuntary killing of another in the commission of a lawful act which might produce death, without due caution and circumspection, the act must be one which might produce death, but the negligence need not be wanton or reckless.⁵

c. Negligent Homicide or Similar Statutory Offense

Under some statutes the offense of negligent homicide or a similar offense may arise from a death caused by ordinary negligence in the operation of a motor vehicle, but under other statutes negligence of a higher degree or character is required for the offense.

Under some statutes one may be guilty of negligent homicide who causes a homicide by ordinary negligence in the operation of a motor vehicle,⁶

Failure to see pedestrian was held not to be criminal negligence under the circumstances.—*People v. Hurley*, 56 P.2d 978, 13 Cal App 2d 208.

92. Ga.—*Collins v. State*, 18 S E 2d 24, 66 Ga App. 325.

93. Iowa.—*State v. Kellison*, 11 N. W.2d 371, 233 Iowa 1274.

94. Ala.—**Corpus Juris** quoted in *Barnett v State*, 171 So 293, 294, 27 Ala App. 277, certiorari denied 171 So. 296, 233 Ala. 182.

La.—**Corpus Juris** cited in *State v. Wilbanks*, 123 So. 600, 601, 168 La. 861.

Pa.—*Commonwealth v Romig*, 22 Pa. Dist & Co. 341, 27 Berks Co. 41, 29 C.J. p 1156 note 18.

95. Ky.—*Middleton v. Commonwealth*, 202 S.W.2d 610, 304 Ky. 784—*Dixon v. Commonwealth*, 194 S.W.2d 655, 302 Ky. 353—*Lewis v. Commonwealth*, 191 S.W.2d 416, 301 Ky. 268—*Lowe v. Commonwealth*, 181 S.W.2d 409, 298 Ky. 7—*Commonwealth v. Mullins*, 176 S.W.2d 403, 296 Ky. 190—*Cornett v Commonwealth*, 138 S.W.2d 492, 282 Ky. 322.

Tenn.—*Copeland v. State*, 285 S.W. 565, 154 Tenn. 7, 49 A.L.R. 605.

Utah.—*State v. Adamson*, 125 P.2d 429, 101 Utah 534.

Person in lawful use of highway

Passenger in automobile with consent of driver was in "lawful use of highway," within statute defining offense.—*Masoncup v. State*, 189 N.E. 512, 47 Ohio App. 32.

96. Ind.—*Minardo v. State*, 183 N.E. 548, 204 Ind. 422.

97. La.—*State v. Vinzant*, 7 So.2d 917, 200 La. 301.

"**Recklessly**," as used in statute, implies carelessness, heedlessness, indifference, inattention to duty, thoughtlessness, or want of care.—*State v. Vinzant*, *supra*.

"Willfully" and "wantonly"

The words "willfully" and "wantonly" are practically synonymous terms, but they are not synonymous with the words "negligently" and "recklessly."—*State v. Vinzant*, *supra*.

98. Second degree manslaughter

Okl.—*Ray v. State*, Cr., 189 P.2d 620—*Wilson v. State*, 105 P.2d 789, 70 Okl.Cr. 262—*Nail v. State*, 242 P. 270, 33 Okl.Cr. 100.

99. S.D.—*State v. Bates*, 271 N.W. 765, 65 S.D. 105.

1. Pa.—*Commonwealth v. Aurick*, 19 A.2d 920, 342 Pa. 282—*Commonwealth v. Dellcese*, 38 A.2d 494, 155 Pa.Super. 120—*Commonwealth v. Stosny*, 31 A.2d 582, 152 Pa.Super. 236—*Commonwealth v. Hatch*, 27 A.2d 742, 149 Pa.Super. 289—*Commonwealth v. Romig*, 22 Pa.Dist & Co. 341, 27 Berks Co. 41.

2. Pa.—*Commonwealth v. Holman*, 50 A.2d 720, 160 Pa.Super. 211—*Commonwealth v. Dellcese*, 38 A.2d 494, 155 Pa.Super. 120.

3. Pa.—*Commonwealth v. Dellcese*, *supra*—*Commonwealth v. Ushka*, 198 A. 465, 130 Pa.Super. 600.

4. Pa.—*Commonwealth v. Aurick*, 19 A.2d 920, 342 Pa. 282—*Commonwealth v. Romig*, 22 Pa.Dist. & Co. 341, 27 Berks Co. 41.

5. Cal.—*People v. Sellar*, 207 P. 396, 57 Cal.App. 195.

6. Mich.—*People v. McMurphy*, 228 N.W. 723, 249 Mich. 147.

Wash.—*State v. McDaniels*, 190 P.2d 705—*State v. Stevick*, 161 P.2d 181, 23 Wash.2d 420.

42 C.J. p 1857 note 68.

Falling asleep

Accused who knew he had lost sleep and who had been drinking was held negligent in attempting to drive the vehicle and falling asleep.—*Peo-*

ple v. Robinson, 235 N.W. 236, 253 Mich. 507.

In California

(1) Ordinary negligence was held sufficient for the commission of the offense of negligent homicide when the statute creating the offense defined it as a "death caused by driving in a negligent manner" or in the commission of an unlawful act not amounting to a felony.—*People v. Pociask*, 96 P.2d 788, 14 Cal 2d 679—*People v. Warner*, 80 P.2d 737, 27 Cal. App 2d 190.

(2) Under the amendment of 1941 which redefined the offense as a death caused by driving "with reckless disregard for, or willful indifference to, the safety of others", something more than ordinary negligence, but less than the conventional intentional tort, was required in order to sustain a conviction.—*People v. Young*, 129 P.2d 353, 20 Cal 2d 832—*Ex parte Whitlatch*, 140 P.2d 457, 60 Cal.App.2d 189—*People v. Murray*, 136 P.2d 389, 58 Cal.App.2d 239.

(3) The amendment, which redefined the offense of negligent homicide, should be interpreted in accordance with definitions given by courts to similar terms, if such definitions may reasonably be said to fit the particular words used.—*Ex parte Whitlatch*, *supra*.

(4) "Reckless disregard of the safety of others," within statute defining negligent homicide, is doing an act while recklessly ignoring the safety of others, and is equivalent to the intentional doing of an act with a wanton and reckless disregard of its possible result.—*People v. Young*, *supra*—*People v. Freeman*, 142 P.2d 435, 61 Cal.App.2d 110—*People v. Gomez*, 138 P.2d 788, 59 Cal.App.2d 417—*People v. Murray*, *supra*—*People v. Montes*, 131 P.2d 581, 56 Cal. App.2d 80.

that is, by more than slight and less than gross negligence;⁷ and in order to establish the offense it is not necessary to show negligence of such character as to evince a criminal intent⁸ or gross negligence.⁹ Under other statutes the offense of criminal negligence resulting in death arises where a death is caused by the operation of a motor vehicle in a reckless or grossly negligent manner,¹⁰ or in a reckless or culpably negligent manner,¹¹ or the offense of negligent homicide arises where the death is caused by operating the vehicle in a careless, reckless, or negligent manner constituting or amounting to a high degree of negligence.¹² Under such statutes, the negligence required is not mere ordinary negligence such as will impose civil liability, but negligence of an aggravated

character,¹³ or gross or criminal negligence such as amounts to a willful intent to do injury or a wanton and reckless disregard for the rights and safety of others.¹⁴

§ 660. — Cause of Death

In order to convict an accused of a charge of a criminal homicide through the agency of a motor vehicle, the death of the decedent must have been proximately caused through the agency of such vehicle and by the acts of the accused which are charged as criminal.

In order for an accused to be guilty of a criminal homicide for the death of a human being resulting from his use or operation of a motor vehicle, the acts of accused which are charged as criminal must have proximately caused the death of the deceased,¹⁵ and it must not have been the result

(5) "Willful indifference to the safety of others," as used in statute, is an intentional lack of regard concerning safety of others, or an intentional doing of something with knowledge that serious injury is a probable result.—*People v. Young*, supra—*People v. Gomez*, supra—*People v. Murray*, supra—*People v. Montes*, supra.

(6) The driving with a reckless disregard or willful indifference to the safety of others required to constitute the offense has been held to be the same as "willful misconduct," which implies at least the intention of doing an act either with knowledge that serious injury is a probable result or the intention of doing an act with a wanton and reckless disregard of its probable result.—*People v. Freeman*, 142 P.2d 435, 61 Cal.App.2d 110.

7. Mich.—*People v. McMurphy*, 228 N.W. 723, 249 Mich. 147—*People v. Campbell*, 212 N.W. 97, 237 Mich. 424.

8. Mich.—*People v. Campbell*, supra.

9. Wash.—*State v. McDaniels*, 190 P.2d 705—*Steve v. Stevick*, 161 P.2d 181, 23 Wash.2d 420.

10. Minn.—*State v. Homme*, 32 N.W.2d 151, 226 Minn. 83.

"Grossly negligent" means "very great negligence" or want of even scant care, but not such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.—*State v. Homme*, supra—*State v. Bolsinger*, 21 N.W.2d 480, 221 Minn. 154.

Recklessness

(1) "Reckless" means a willful or wanton disregard for the safety of persons or property involving intentional conduct but not intentional harm as a result thereof.—*State v. Homme*, 32 N.W.2d 151, 226 Minn. 83.

(2) If death of pedestrian was due to motorist's intentional disregard for pedestrian's safety, death was

due to "recklessness"—*State v. Bolsinger*, 21 N.W.2d 480, 221 Minn. 154.

11. N.Y.—*People v. Bearden*, 49 N.E.2d 785, 290 N.Y. 478—*People v. Jackson*, 8 N.Y.S.2d 939, 255 App. Div. 688—*People v. Williams*, 61 N.Y.S.2d 252, 187 Misc. 299—*People v. Brucato*, 32 N.Y.S.2d 689.

Reckless or culpable negligence occurs where a death results from the negligent operation of a motor vehicle and in addition there is a reckless disregard for the consequences and indifference to the rights of others.—*People v. Gardner*, 8 N.Y.S.2d 917, 255 App. Div. 683.

12. Wis.—*State ex rel. Zent v. Yanny*, 12 N.W.2d 45, 214 Wis. 342.

13. N.Y.—*People v. Chalupka*, 32 N.Y.S.2d 688.

Panic

Criminal negligence within the statute is not shown by the fact that a driver when confronted with an emergency becomes panicky and loses control over his vehicle and thus causes the death of another.—*People v. Brucato*, 32 N.Y.S.2d 689.

Character of negligence required

(1) Under some statutes the negligence required is negligence representing indifference to a legal duty, or conduct not only creating unreasonable risk of bodily harm to another, but also involving high degree of probability that substantial harm will result to another, but it is something less than willful and wanton conduct, which is the virtual equivalent of intentional wrong.—*State ex rel. Zent v. Yanny*, 12 N.W.2d 45, 214 Wis. 342.

(2) Under other statutes the negligence required is negligence indicating such a reckless and wanton attitude as evinces a disregard for the safety of life and limb and is almost tantamount to a willfulness to do harm.—*People v. Brucato*, 32 N.Y.S.2d 689—*People v. Chalupka*, 32 N.Y.S.2d 688.

14. Killing by driving vehicle carelessly and heedlessly

N.J.—*State v. Linarducci*, 3 A.2d 796, 122 N.J.Law 137, affirmed 8 A.2d 576, 123 N.J.Law 228.

Term "gross negligence" imports negligence of a materially greater degree than mere want of ordinary care or inattention or carelessness of such character as to signify an indifference to rights of others.—*State v. Carty*, 180 A. 287, 120 Conn. 231.

15. Ala.—*Broxton v. State*, 171 So. 390, 27 Ala App 298.

Cal.—*People v. Goodale*, 91 P.2d 163, 33 Cal App 2d 80.

Fla.—*Thompson v. State*, 146 So. 201, 108 Fla. 370.

Ga.—*Cain v. State*, 190 S.E. 371, 55 Ga App 376.

Iowa.—*State v. Richardson*, 240 N.W. 695, 216 Iowa 809, reheard 219 N.W. 211, 216 Iowa 809.

N.M.—*State v. Sisneros*, 82 P.2d 271, 42 N.M. 560.

N.C.—*State v. Lowery*, 27 S.E.2d 638, 223 N.C. 598.

Okla.—*Hall v. State*, 159 P.2d 283, 80 Okl.Cr. 310—*Chandler v. State*, 146 P.2d 598, 79 Okl.Cr. 323—*Clapp v. State*, 120 P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144.

Pa.—*Commonwealth v. Aurick*, 10 A.2d 22, 138 Pa. Super. 180—*Commonwealth v. Romig*, 22 Pa. Dist. & Co. 341, 27 Berks Co. 41—*Commonwealth v. Lowans*, 21 Pa. Dist. & Co. 66, 82 Pittsb. Leg. J. 238, 39 Dauph Co. 66, 48 York Leg. Rec. 49.

Wash.—*State v. Carlisten*, 136 P.2d 183, 17 Wash.2d 573.

42 C.J. p 1355 note 42—29 C.J. p 1150 note 57 [a].

Decedent's own negligence causing death see infra § 663.

Causal relationship required

Under some statutes, in order to impose criminal liability, there must be a direct causal relationship between the death, the car which

of an independent and intervening cause in which accused did not participate.¹⁶ An operator of a motor vehicle who injures another by negligence or unlawful conduct is responsible when death results from blood poisoning caused by dirt forced into the wounds at the time of the accident,¹⁷ unless the medical treatment of the injured person was so grossly erroneous or unskillful as to have been an intervening cause of death;¹⁸ and a driver whose operation of his motor vehicle causes injury to one who has an alcoholic brain, so that delirium tremens follows and death results, is criminally liable.¹⁹ Also accused is not entitled to be acquitted as a matter of law where the death results from shock, fright, fear, or terror and not from physical injuries inflicted by the accident.²⁰

Intoxication. In some jurisdictions it has been held that, in order for criminal liability to arise for a homicide occurring while accused was driving in an intoxicated condition or under the influence of intoxicating liquor, there must be a causal connection between the intoxication and the death of deceased,²¹ and that criminal liability will not be imposed on the ground of driving while intoxicated if accused was operating his vehicle correctly and as a man should who was not under the influence of intoxicating liquor, so that his intoxicated condition did not bring about or contribute

to the death of the deceased.²² On the other hand, it has been held in other jurisdictions that the mere act of driving while under the influence of intoxicating liquor makes the operation of the vehicle so unlawful that a death from its operation imposes criminal liability without regard to whether or not the driver's intoxication was the cause of the death or contributed thereto.²³ In still other jurisdictions it has been held that driving a motor vehicle while intoxicated is *malum in se* and in itself imposes criminal liability for a death resulting therefrom, but that driving while merely under the influence of liquor is only *malum prohibitum* and a homicide resulting therefrom may be excusable on the ground of misadventure if the violation of the statute in no way contributed to the homicide.²⁴

§ 661. — Failure to Render Assistance to Injured Person

Failure to comply with a statutory duty to render assistance to a person injured in a motor vehicle accident is no ingredient of the homicide where assistance would not have prevented his death.

The violation of a statute requiring a driver of a motor vehicle who has injured another to give him assistance is no ingredient or element of manslaughter, where the victim was so injured that

caused the death, and the reckless and culpably negligent operation of the car which caused the death—*People v. Lemieux*, 27 N.Y.S.2d 235, 176 Misc. 305.

Act of owner

In order for the proprietor of a motor vehicle driven by another to be liable for a homicide caused by the vehicle on the ground that he permitted it to be driven at an excessive rate of speed, such excessive rate of speed must have been the proximate cause of the accident—*State v. Lewis*, 174 S.E. 483, 115 W.Va. 1.

Permit to move building

Failure of accused to have a permit to transport building along county road was held not to contribute to death of motorist who collided with the building because it was not protected by flares—*State v. Ramser*, 136 P.2d 1013, 17 Wash.2d 581.

Acts as to which proximate cause held required for criminal liability

(1) Driving with defective brakes—*Coudy v. State*, Miss., 35 So.2d 308.

(2) Driving without license.—*Commonwealth v. Williams*, 1 A.2d 812, 133 Pa.Super. 104.

(3) Excessive speed.—*People v.*

Lemieux, 27 N.Y.S.2d 235, 176 Misc. 305.

(4) Failure to stop at stop sign before entering highway—*State v. Satterfield*, 153 S.E. 155, 198 N.C. 682.

(5) Violation of speed law.

Me.—*State v. Budge*, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.

Tenn.—*Miller v. State*, 50 S.W.2d 225, 164 Tenn. 388.

16. Va.—*Goodman v. Commonwealth*, 151 S.E. 168, 153 Va. 943.

17. Mich.—*People v. Townsend*, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

Death resulting from disease caused by injury generally see Homicide § 11 b.

18. Mich.—*People v. Townsend*, supra.

Death resulting from erroneous or unskillful treatment generally see Homicide § 11 c.

19. Conn.—*State v. Block*, 89 A. 167, 87 Conn. 673, 49 L.R.A.N.S., 913. Prior causes contributing to death generally see Homicide § 11 d.

20. La.—*State v. Lee*, 156 So. 801, 180 La. 494.

21. Cal.—*People v. Goodale*, 91 P.2d 163, 33 Cal.App.2d 80.

Miss.—*Cutshall v. State*, 4 So.2d 289, 191 Miss. 764.

Tex.—*McWhirter v. State*, 180 S.W.2d 364, 147 Tex.Cr. 268—*Burton v. State*, 55 S.W.2d 813, 122 Tex.Cr. 363.

Utah.—*State v. Capps*, 176 P.2d 873.

22. Murder

Tex.—*Fox v. State*, 165 S.W.2d 733, 145 Tex.Cr. 71—*Moynahan v. State*, 146 S.W.2d 376, 140 Tex.Cr. 640—*Burton v. State*, 55 S.W.2d 813, 122 Tex.Cr. 363.

23. Tenn.—*Keller v. State*, 299 S.W. 803, 155 Tenn. 633, 59 A.L.R. 685.

Policy of law

It is immaterial whether or not the intoxication of the driver was the cause of the death. The policy of the law forbids an investigation of probable consequences when the driver of an automobile under the influence of an intoxicant kills another person on a public highway. There are many things a sober man, in the exercise of due care, would do to avoid such a result which would be entirely beyond an intoxicated driver. Fatalities are too numerous and conditions too serious to permit speculative inquiries in such a case.—*Keller v. State*, supra.

24. Me.—*State v. Budge*, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.

even if he had been assisted, death could not have been prevented.²⁵

§ 662. — Unavoidable Accident

There is no criminal liability for a death resulting from the operation of a motor vehicle where it is due to unavoidable accident or misadventure.

There is no criminal liability for a death resulting from the operation of a motor vehicle where it is due to unavoidable accident or misadventure,²⁶ or for an accidental, unintentional killing by a motorist, even though at the time of the killing he is engaged in an unlawful act which does not contribute to it.²⁷ However, a motorist who jeopardizes the lives and safety of others cannot, under the plea of accident, escape criminal liability for a homicide involuntarily resulting from his reckless or careless act or conduct.²⁸ A death by accident and mistake caused by a motor vehicle operated in such a manner and under such circumstances that in its operation the motorist is not prosecuting a lawful object in a lawful manner is not excusable under a statute excusing a death caused by one in the prosecution of a lawful ob-

ject by lawful means where it happens by accident or misfortune.²⁹ One who drives his motor vehicle negligently or unlawfully and thereby causes the death of another is criminally responsible, even though the particular accident or the death of the particular person was unavoidable in the sense that the driver, at the time the danger became imminent or he discovered it, used every possible precaution to prevent death or injury to him.³⁰ The mere fact that the driver had his car under control is immaterial where he should have avoided the accident and failed to do so.³¹

§ 663. — Negligence of Decedent or Third Person

The negligence of the deceased or of a third person is not a defense to a prosecution for a homicide resulting from the operation of a motor vehicle, although it may be considered on the issue of whether the accused was criminally negligent or whether his conduct was the proximate cause of the homicide.

Contributory negligence of the deceased is not a defense to a prosecution for a homicide resulting from the operation of a motor vehicle³² and does not excuse an act of negligence or malfeasance on

25. Minn.—State v. Peterson, 190 N. W. 345, 153 Minn. 310.

Liability for neglect of duty after accident see *infra* §§ 674-683.

26. Mont.—State v. Bast, 151 P.2d 1009, 116 Mont. 329

Va.—Goodman v. Commonwealth, 151 S.E. 168, 153 Va. 943.

42 C.J. p 1357 note 74.

Death from accident or misfortune in general see Homicide § 112.

Accidental collision

Motorist is not criminally liable for death caused by accidental collision if he was not negligent, or, if negligent, his conduct was not such as to evidence a reckless disregard for life and safety of others.—State v. Elliott, 8 A.2d 873, 1 Terry, Del., 250.

Death held result of misadventure

Where automobile passing parked truck was struck by another car and knocked into truck, and protruding rod killed passenger, his death was the result of misadventure due to an independent and intervening cause.—Goodman v. Commonwealth, 151 S.E. 168, 153 Va. 943.

Misadventure

Allowance must always be made for misadventure and accident.—Potter v. State, 124 S.W.2d 232, 174 Tenn. 118—Hiller v. State, 50 S.W.2d 225, 164 Tenn. 388—Copeland v. State, 285 S.W. 565, 154 Tenn. 7, 49 A.L.R. 605.

27. Me.—State v. Budge, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.

Okl.—Hall v. State, 159 P.2d 283, 80 Okl.Cr. 310.

28. Ind.—Minardo v. State, 183 N.E. 548, 204 Ind. 422.

29. Cal.—People v. Wilson, 177 P.2d 567, 78 Cal.App.2d 108

Driving under influence of intoxicating liquor

Tex.—Flowers v. State, Cr., 202 S.W.2d 462.

30. Okl.—Nail v. State, 242 P. 270, 33 Okl.Cr. 100.

42 C.J. p 1357 note 75.

31. Utah—State v. Lake, 196 P. 1015, 57 Utah 619.

32. Ark.—Benson v. State, 208 S.W.2d 767, 212 Ark. 905.

Cal.—People v. Lett, 177 P.2d 47, 77 Cal.App.2d 917—People v. Barnett, 175 P.2d 237, 77 Cal.App.2d 299—People v. Hurley, 56 P.2d 978, 13 Cal.App.2d 208—People v. Marconi, 5 P.2d 974, 118 Cal.App. 683—People v. McKee, 251 P. 675, 80 Cal.App. 200.

Ga.—Cain v. State, 190 S.E. 371, 55 Ga.App. 376.

Hawaii—Territory v. Kaupu, 35 Hawaii 396.

Ill.—People v. Rewland, 167 N.E. 10, 335 Ill. 432.

Iowa.—State v. Williams, 28 N.W.2d 514, 238 Iowa 838—State v. Kellison, 11 N.W.2d 371, 233 Iowa 1274—State v. Graff, 290 N.W. 97, 228 Iowa 159—State v. Thomlinson, 228 N.W. 80, 209 Iowa 555.

Kan.—State v. Pendleton, 61 P.2d 107, 144 Kan. 410—State v. Custer,

282 P. 1071, 129 Kan. 381, 67 A.L.R. 909

Ky.—Lowe v. Commonwealth, 181 S.W.2d 409, 298 Ky. 7—Held v. Commonwealth, 208 S.W. 772, 183 Ky 209.

La.—State v. Wilbanks, 123 So. 600, 168 La. 861.

Mich.—People v. Clark, 295 N.W. 370, 295 Mich. 704—People v. Campbell, 212 N.W. 97, 237 Mich. 424.

Minn.—State v. Bolsinger, 21 N.W.2d 480, 221 Minn. 154.

Neb.—Benton v. State, 247 N.W. 21, 124 Neb. 485.

N.J.—State v. Kellow, 53 A.2d 796, 136 N.J.Law 1, affirmed 57 A.2d 389, 136 N.J.Law 633.

N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

N.C.—State v. Palmer, 147 S.E. 817, 197 N.C. 135.

Ohio.—Driggs v. State, 178 N.E. 15, 40 Ohio App. 130, petition dismissed 177 N.E. 633, 123 Ohio St. 686.

Pa.—Commonwealth v. Hatch, 27 A.2d 742, 149 Pa.Super. 289.

Tenn.—Hurt v. State, 201 S.W.2d 988, 184 Tenn. 608—Hiller v. State, 50 S.W.2d 225, 164 Tenn. 388—McGoldrick v. State, 21 S.W.2d 390, 159 Tenn. 667—Keller v. State, 299 S.W. 803, 155 Tenn. 633, 59 A.L.R. 685.

Tex.—Fox v. State, 165 S.W.2d 783, 145 Tex.Cr. 71—Click v. State, 164 S.W.2d 664, 144 Tex.Cr. 468—Ruedas v. State, 158 S.W.2d 500, 143 Tex.Cr. 291—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9—Anderson v. State, 117 S.W.2d 486, 185

the part of the driver which proximately causes the death.³³ However, a homicide due solely to the negligence or fault of decedent imposes no criminal liability on the driver of a motor vehicle which strikes and kills him.³⁴ Hence the conduct of deceased is a circumstance to be considered in determining the guilt of accused.³⁵ It may be considered in order to determine whether accused was in fact negligent in the operation of the motor vehicle,³⁶ and on the degree of culpability or guilt of accused,³⁷ and whether his acts were the proximate cause of the death,³⁸ or whether it resulted from an unavoidable accident.³⁹ Also it is not a defense that causes other than the negligence or unlawful act of accused in the operation of his vehicle were contributing or concurring causes to the death of deceased.⁴⁰

§ 664. — Indictment, Information, or Complaint

Indictments, informations, or affidavits charging homicides occasioned through the operation of motor vehicles or assault with intent to murder or kill must state with certainty and in ordinary and concise language, sufficient to inform the accused of the nature of the accusation against him, the essential elements of the offense charged.

The rules with respect to indictments, informations, or affidavits for homicides generally, considered in Homicide §§ 139-174, ordinarily apply to indictments, informations, or affidavits for homicides occasioned through the operation of motor vehicles or for assaults with intent to murder or kill by operation of a motor vehicle.⁴¹ In general such pleadings must state with certainty and precision, or in ordinary and concise language,⁴² sufficient to inform accused with reasonable certainty

Tex Cr. 104—Stover v. State, 104 S.W.2d 48, 132 Tex.Cr. 356—Vasquez v. State, 52 S.W.2d 1056, 121 Tex. Cr. 478.

Utah—State v. Busby, 131 P.2d 510, 102 Utah 416, 144 A.L.R. 1468

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597

Wash—State v. McDaniels, 190 P.2d 705—State v. Ramser, 136 P.2d 1013, 17 Wash.2d 581—State v. Carlsen, 136 P.2d 183, 17 Wash.2d 573.

42 C.J. p 1357 note 78.

Equal opportunity of deceased to avoid injury is no defense to accused.—Broxton v. State, 171 So. 390, 27 Ala. App. 298.

33. La.—State v. Wilbanks, 123 So. 600, 168 La. 861.

Ohio—**Corpus Juris cited in State v. Wells**, 64 N.E.2d 593, 597, 146 Ohio St. 131.

42 C.J. p 1357 note 78.

Effect of right to assume lawful conduct

Motorist's right to assume that others are not violating the law gives him no right heedlessly and recklessly to endanger the safety of others, whether or not they were violating the law—State v. Williams, 28 N.W.2d 514, 238 Iowa 838

34. N.J.—State v. Oliver, 153 A. 399, 107 N.J.Law 319.

Pa.—Commonwealth v. Hatch, 27 A.2d 742, 149 Pa.Super. 289.

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

Wash.—State v. Ramser, 136 P.2d 1013, 17 Wash.2d 581.

42 C.J. p 1357 note 77.

35. Pa.—Commonwealth v. Hatch, 27 A.2d 742, 149 Pa.Super. 289.

Accused may plead the negligence of deceased.—People v. Francis, 19 Puerto Rico 659.

36. Minn.—State v. Bolsinger, 21 N.W.2d 480, 221 Minn. 154.

N.J.—State v. Oliver, 153 A. 399, 107 N.J.Law 319

Tex.—Fox v. State, 165 S.W.2d 733, 145 Tex.Cr. 71—Vasquez v. State, 52 S.W.2d 1056, 121 Tex.Cr. 478

Wash—State v. Ramser, 136 P.2d 1013, 17 Wash.2d 581

42 C.J. p 1358 note 80.

37. Cal.—People v. Hurley, 56 P.2d 978, 13 Cal App.2d 208

Mich.—People v. Clark, 295 N.W. 370, 295 Mich. 704

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

Mitigation

Negligence of deceased may be taken into consideration to mitigate guilt of accused—People v. Francis, 19 Puerto Rico 659.

38. Hawaii.—Territory v. Kaupu, 35 Hawaii 396.

Kan.—State v. Pendleton, 61 P.2d 107, 144 Kan. 410.

Mich.—People v. Clark, 295 N.W. 370, 295 Mich. 704

Minn.—State v. Bolsinger, 21 N.W.2d 480, 221 Minn. 154.

N.J.—State v. Kellow, 53 A.2d 796, 136 N.J.Law 1, affirmed 57 A.2d 389, 136 N.J.Law 633

N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

Tenn.—Hurt v. State, 201 S.W.2d 988, 184 Tenn. 608—Copeland v. State, 285 S.W. 565, 154 Tenn. 7, 49 A.L.R. 605.

Tex.—Fox v. State, 165 S.W.2d 733, 145 Tex.Cr. 71—Vasquez v. State, 52 S.W.2d 1056, 121 Tex.Cr. 478.

39. Tenn.—Hurt v. State, 201 S.W.2d 988, 184 Tenn. 608—Copeland v. State, 285 S.W. 565, 154 Tenn. 7, 49 A.L.R. 605.

40. N.Y.—People v. Scanlon, 117 N.Y.S. 57, 132 App.Div. 528.

42 C.J. p 1358 notes 84, 85.

Negligence of third person

Fla.—Graives v. State, 172 So. 716, 127 Fla. 182.

Utah—State v. Martin, 217 P. 966, 62 Utah 69.

Condition of railroad crossing, which was due to separate and distinct acts of negligence of persons whose duty it was to maintain the crossing in good condition, would not excuse accused if he himself was guilty of criminal negligence.—State v. Kaufman, 30 So.2d 337, 211 La. 517.

Negligence not imputed to deceased

Negligence of driver who parked on highway automobile in which deceased was riding, and which was struck by defendant's automobile, could not be imputed to deceased who had no control over such other automobile—Anderson v. State, 117 S.W.2d 465, 135 Tex. Cr. 104.

41. Charge as principal

Information charging that accused, being present in her car, permitted intoxicated person to drive it, causing death, was held to charge accused with manslaughter as principal—State v. Hopkins, 265 P. 481, 147 Wash. 198, 59 A.L.R. 688, certiorari denied Hopkins v. State of Washington, 49 S.Ct. 21, 278 U.S. 617, 73 L. Ed. 540.

Deceased a human being

It is not necessary to allege that deceased was a human being.—Whitman v. State, 122 So. 567, 97 Fla. 988.

42. Ala.—McQueen v. State, 13 So.2d 59, 31 Ala.App. 101, certiorari denied 13 So.2d 61, 244 Ala. 251.

Wash.—State v. Gunns, 240 P. 674, 136 Wash. 495.

Surplusage

(1) The indictment is not invalidated by surplusage.

Ga.—Jordan v. State, 22 S.E.2d 194, 68 Ga.App. 139.

N.Y.—People v. Butler, 233 N.Y.S. 656, 133 Misc. 658.

42 C.J. p 1358 note 91 [c] (2).

of the nature of the particular accusation against him which he must prepare to meet,⁴³ the facts | essential to constitute the offense charged,⁴⁴ and it has been held that the mere statement of a con-

(2) Pleading is not bad because it contains a phrase which merely emphasizes the continuity of the misconduct previously alleged and the resulting homicide.—Turrell v. State, 51 N.E.2d 359, 221 Ind. 662.

Charge held too indefinite

Ga.—Shupe v. State, 136 S.E. 331, 36 Ga.App. 286.

Indictments or informations held not indefinite

D.C.—Story v. U. S., 16 F.2d 342, 57 App.D.C. 3, 53 A.L.R. 246, certiorari denied 47 S.Ct. 576, 274 U.S. 739, 71 L.Ed. 1318.

Ga.—Kelly v. State, 10 S.E.2d 417, 63 Ga.App. 231.

Ill.—People v. Rewland, 167 N.E. 10, 335 Ill. 432.

Charge held not redundant

Tex.—Wallace v. State, 170 S.W.2d 762, 145 Tex.Cr. 625.

43 Ala.—McQueen v. State, 13 So. 2d 59, 31 Ala.App. 101, certiorari denied 13 So.2d 61, 244 Ala. 251.

Specific acts of misconduct accused will be required to meet on the trial must be alleged.—Taubert v. State, 176 S.W.2d 955, 146 Tex.Cr. 582.

Indictment, information, or affidavit held sufficient

D.C.—U. S. v. Henderson, 121 F.2d 75, 73 App.D.C. 369.

Ga.—Kelly v. State, 10 S.E.2d 417, 63 Ga.App. 231.—Passley v. State, 8 S.E.2d 131, 62 Ga.App. 88.

Ind.—Kraft v. State, 171 N.E. 1, 202 Ind. 44.

Okl.—Lamb v. State, 105 P.2d 799, 70 Okl.Cr. 236.

Or.—State v. Lockwood, 268 F. 1016, 126 Or. 118.

Wash.—State v. Hull, 48 P.2d 225, 182 Wash. 681.—State v. Gunns, 240 P. 674, 136 Wash. 495.

Want of control

Averment that accused was driving his vehicle without having it under proper control has been held insufficient to advise accused of what acts or omissions to show want of proper control he would be required to meet on the trial.—Taubert v. State, 176 S.W.2d 955, 146 Tex.Cr. 582.

44 Tex.—Worley v. State, 231 S.W. 391, 89 Tex.Cr. 393.
42 C.J. p 1358 note 91.

Malice

(1) In order to allege implied malice, indictment must allege that accused acted so recklessly that law would imply actual intent to kill.—Wright v. State, 141 S.E. 903, 166 Ga. 1.

(2) Indictment alleging that accused's unlawful operation of automobile naturally tended to destroy

life was insufficient to imply malice.—Wright v. State, supra.

Operation on public highway or street

Where the offense may be committed by operating a motor vehicle, whether on the highways, streets, or thoroughfares, or at some other place, it is unnecessary to allege that the vehicle was being operated on a highway, street, or thoroughfare.—Roddenberry v. State, 11 So.2d 582, 152 Fla. 197, appeal dismissed Roddenberry v. State of Florida, 63 S.Ct. 266, 317 U.S. 600, 87 L.Ed. 490, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. 568.—Patterson v. State, 175 So. 730, 128 Fla. 539.

Weapon likely to produce death

Indictment for assault with intent to murder by operation of automobile while under influence of liquor need not allege assault was made with weapon likely to produce death.—Wright v. State, 148 S.E. 731, 168 Ga. 690, conformed to 149 S.E. 153, 40 Ga.App. 118.

Allegations held sufficient to charge particular elements

(1) Intentional or willful homicide.—Wright v. State, 141 S.E. 903, 166 Ga. 1.

(2) Intoxication of accused.—Moynahan v. State, 146 S.W.2d 376, 140 Tex.Cr. 540.—Maedgen v. State, 104 S.W.2d 518, 132 Tex.Cr. 397.—O'Conner v. State, 88 S.W.2d 1048, 129 Tex.Cr. 509.

(3) Manner of death.

Ala.—French v. State, 20 So.2d 237, 31 Ala.App. 589.

Fla.—Diehl v. State, 158 So. 504, 117 Fla. 816.

(4) Means by which deceased was killed.—Hyde v. State, 160 So. 237, 230 Ala. 243.

(5) Unlawful driving while intoxicated.—Blackburn v. State, 180 N.E. 180, 203 Ind. 332.

Allegations held sufficient to charge particular offenses

(1) Assault with intent to murder or kill.

Ga.—Smith v. State, 147 S.E. 781, 39 Ga.App. 552.

Miss.—Edwards v. State, 180 So. 746, 181 Miss. 601.

Okl.—Lamb v. State, 105 P.2d 799, 70 Okl.Cr. 236.

(2) Criminal negligence in operation of vehicle resulting in death.—People v. Davis, 10 N.Y.S.2d 1011.

(3) Manslaughter.

Fla.—Howell v. State, 187 So. 163, 136 Fla. 582.—Patterson v. State, 175 So. 730, 128 Fla. 539.—Tootle v. State, 130 So. 912, 100 Fla. 1248—

Whitman v. State, 122 So. 567, 97 Fla. 988.

Idaho.—State v. Brooks, 238 P. 894, 49 Idaho 404.—State v. Gee, 284 P. 845, 48 Idaho 688.

Ill.—People v. Haiges, 41 N.E.2d 749, 379 Ill. 532.—People v. Herkless, 196 N.E. 829, 361 Ill. 32.—People v. Wallage, 186 N.E. 540, 353 Ill. 95.—People v. Flanagan, 170 N.E. 265, 338 Ill. 353.

Miss.—Bradford v. State, 127 So. 277, 158 Miss. 210.

Mo.—State v. Murphy, 23 S.W.2d 136, 324 Mo. 183.—State v. Millin, 300 S.W. 694, 318 Mo. 553.—State v. Scheufler, 285 S.W. 419.—State v. Renfro, 279 S.W. 702.

Mont.—State v. Gondeiro, 268 P. 507, 82 Mont. 530.

Neb.—Crawford v. State, 216 N.W. 294, 116 Neb. 125.

Wash.—State v. Hull, 48 P.2d 225, 182 Wash. 681.

Wyo.—State v. Cantrell, 186 P.2d 539.

30 C.J. p 99 note 49 [c] (2)–(5)—42 C.J. p 1358 note 91 [a] (4).

(4) Manslaughter in first degree.—McQueen v. State, 13 So.2d 59, 31 Ala.App. 101, certiorari denied 13 So.2d 61, 244 Ala. 251.

(5) Manslaughter in second degree Minn.—State v. Geary, 239 N.W. 158, 184 Minn. 387.

Okl.—Mayse v. State, 259 P. 277, 38 Okl.Cr. 144.

(6) Involuntary manslaughter.

Ariz.—Gutierrez v. State, 34 P.2d 395, 44 Ariz. 114.

Ga.—Wright v. State, 141 S.E. 903, 166 Ga. 1.—Kelly v. State, 10 S.E.2d 417, 63 Ga.App. 231.—Passley v. State, 8 S.E.2d 131, 62 Ga.App. 88.

—Foy v. State, 150 S.E. 917, 40 Ga. App. 617.

Idaho.—State v. Goldizen, 76 P.2d 278, 58 Idaho 532.—State v. Frank, 1 P.2d 181, 51 Idaho 21.

Ill.—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

Ind.—Roby v. State, 17 N.E.2d 800, 215 Ind. 55.—Kraft v. State, 171 N.E. 1, 202 Ind. 44.

Or.—State v. Lockwood, 268 P. 1016, 126 Or. 118.

Utah.—State v. Assenberg, 244 P. 1027, 66 Utah 573.

42 C.J. p 1358 note 91 [a] (1), (3).

(7) Involuntary manslaughter in commission of unlawful act.—Cambron v. State, 138 S.E. 280, 36 Ga. App. 784.

(8) Manslaughter for death caused by operation of motor vehicle by person while intoxicated.—Tootle v. State, 130 So. 912, 100 Fla. 1248.

(9) Murder.

Okl.—Dunham v. State, 148 P.2d 834,

clusion is not sufficient.⁴⁵ The prosecution has been required to allege everything it must prove,⁴⁶ and it has been held that the act or conduct of accused which caused the death of the deceased must be described and set out in the pleadings.⁴⁷ However, the pleadings need not allege all the facts and circumstances constituting the offense,⁴⁸ and matters which are not elements of the offense charged need not be alleged.⁴⁹

In some jurisdictions it is sufficient to charge the

offense in the statutory language,⁵⁰ provided the statute is fully descriptive of the offense and sets forth the elements thereof;⁵¹ and it has been considered to be the better practice to follow the statutory language.⁵² It is not always sufficient, however, nor is it indispensable, to follow the language of the statute,⁵³ and pleadings have been held sufficient which charge the offense substantially in the language of the statute⁵⁴ or in language equivalent thereto.⁵⁵ In jurisdictions where a statutory form

78 Okl.Cr. 54—Mancy v. State, 13 P.2d 597, 53 Okl.Cr. 438—Ware v. State, 288 P. 374, 47 Okl.Cr. 434. Tex.—Brittain v. State, 139 S.W.2d 586, 139 Tex.Cr. 263—Totten v. State, 113 S.W.2d 194, 134 Tex.Cr. 62—Snyder v. State, 102 S.W.2d 424, 132 Tex.Cr. 73—Jones v. State, 75 S.W.2d 683, 127 Tex.Cr. 227—Darnell v. State, 74 S.W.2d 1013, 127 Tex.Cr. 109—Norman v. State, 52 S.W.2d 1051, 121 Tex.Cr. 433. (10) Murder in third degree.—State v. Shepard, 214 N.W. 280, 171 Minn. 414.

(11) Murder in commission of unlawful act.—Smith v. State, 31 S.E.2d 737, 71 Ga.App. 647—Cole v. State, 22 S.E.2d 529, 68 Ga.App. 179.

(12) Murder without malice.—Jenkins v. State, 175 S.W.2d 88, 146 Tex.Cr. 364.

(13) Murder while engaged in commission of felony.—Clark v. State, 73 P.2d 481, 63 Okl.Cr. 138.

(14) Negligent homicide. Cal.—People v. Dallas, 109 P.2d 409, 42 Cal.App.2d 596 Mich.—People v. McMurchy, 228 N.W. 723, 249 Mich. 147. Or.—State v. Coffman, 136 P.2d 687, 171 Or. 166

(15) Negligent homicide in first degree.—Taubert v. State, 176 S.W.2d 955, 146 Tex.Cr. 582—Kirksey v. State, 123 S.W.2d 905, 136 Tex.Cr. 97.

(16) Negligent homicide in second degree.—West v. State, 139 S.W.2d 90, 139 Tex.Cr. 177—Leavell v. State, 137 S.W.2d 40, 138 Tex.Cr. 471.

(17) Involuntary homicide.—State v. Porter, 146 So. 465, 176 La. 673.

(18) Reckless homicide.—Turrell v. State, 51 N.E.2d 359, 221 Ind. 662.

Allegations held insufficient to charge particular offenses

(1) Assault with intent to murder.—Minge v. State, 164 S.E. 68, 45 Ga.App. 197.

(2) Intoxication.—Cannon v. State, 107 So. 360, 91 Fla. 214—42 C.J. p 1358 note 91 [c] (1).

(3) Manslaughter. Ind.—Kimmel v. State, 154 N.E. 16, 198 Ind. 444.

Okl.—Vaughn v. State, 276 P. 701, 42 Okl.Cr. 376.

42 C.J. p 1358 note 91 [b] (2).

(4) Voluntary manslaughter.—People v. Maki, 223 N.W. 70, 245 Mich. 455.

(5) Manslaughter for death caused by operation of motor vehicle by person while intoxicated.—Cannon v. State, 107 So. 360, 91 Fla. 214.

(6) Manslaughter in second degree.—People v. Butler, 233 N.Y.S. 656, 133 Misc. 658.

(7) Murder. Ga.—Wright v. State, 141 S.E. 903, 166 Ga. 1.

Tex.—Hittson v. State, 97 S.W.2d 951, 131 Tex.Cr. 228.

(8) Negligent homicide.—Snyder v. State, 102 S.W.2d 424, 132 Tex.Cr. 73.

(9) Negligent homicide in the second degree.—Morgan v. State, 120 S.W.2d 1063, 135 Tex.Cr. 402—Punchard v. State, 54 S.W.2d 110, 122 Tex.Cr. 134.

(10) Reckless homicide.—State v. Beckman, 37 N.E.2d 531, 219 Ind. 176.

45. Tex.—Taubert v. State, 176 S.W.2d 955, 146 Tex.Cr. 582.

Driving on highway

Allegation that accused was driving on a public highway was not insufficient as a "conclusion" of the pleader.—Evans v. State, 147 S.W.2d 794, 141 Tex.Cr. 241.

46. Tex.—Maedgen v. State, 104 S.W.2d 518, 132 Tex.Cr. 397.

47. Ind.—Shelton v. State, 199 N.E. 148, 209 Ind. 534.

48. Idaho.—State v. Frank, 1 P.2d 181, 51 Idaho 21.

Involuntary manslaughter

Idaho.—State v. Frank, supra.

Details of commission of crime of involuntary manslaughter need not be alleged.—State v. Brooks, 288 P. 894, 49 Idaho 404.

49. La.—State v. Porter, 146 So. 465, 176 La. 673.

Culpable negligence of accused need not be alleged in pleading charging manslaughter committed by operating motor vehicle while intoxicated.

icated.—Tottle v. State, 130 So. 912, 100 Fla. 1248.

Willfulness

In a prosecution for manslaughter by motor vehicle it is not necessary to allege that the killing was willfully done.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

50. Or.—State v. Lockwood, 268 P. 1016, 126 Or. 118.

Involuntary manslaughter

Or.—State v. Miller, 243 P. 72, 119 Or. 409, affirmed Miller v. State of Oregon, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825. 31 C.J. p 717 note 27 [a] (3).

Involuntary homicide

La.—State v. Porter, 146 So. 465, 176 La. 673.

Negligent homicide

Mich.—People v. Eger, 299 N.W. 803, 299 Mich. 49. Minn.—State v. Bolsinger, 21 N.W.2d 480, 221 Minn. 154.

Statutory exceptions

It is unnecessary to allege statutory exceptions which are not elements of the offense and which it is not necessary to prove.—State v. Porter, 146 So. 465, 176 La. 673.

51. Minn.—State v. Bolsinger, 21 N.W.2d 480, 221 Minn. 154.

Purpose of statute requiring additional statement is to insure that accused will be able properly to prepare and make his defense and thereafter will be able to plead the judgment as a bar to a subsequent prosecution for the same offense and also to inform the court of the facts alleged so that it may properly decide the case and pronounce judgment.—U. S. v. Henderson, 121 F.2d 75, 73 App.D.C. 369.

52. Tex.—Maedgen v. State, 104 S.W.2d 518, 132 Tex.Cr. 397.

53. Tex.—Maedgen v. State, supra.

54. Cal.—People v. Dallas, 109 P.2d 409, 42 Cal.App.2d 596.

Negligent homicide

Wash.—State v. Dickert, 79 P.2d 328, 194 Wash. 629.

55. Tex.—Maedgen v. State, 104 S.W.2d 518, 132 Tex.Cr. 397.

Wash.—State v. Ramos, 294 P. 223, 159 Wash. 599.

is provided for charging the offense, it is sufficient to charge the offense in such form.⁵⁶

In some jurisdictions general allegations that decedent was killed by accused in operating his motor vehicle unlawfully, feloniously, wantonly, recklessly, or with culpable negligence, without giving the details thereof, have been held sufficient,⁵⁷ although on a proper showing accused may be entitled to a bill of particulars.⁵⁸ In other jurisdictions, however, it has been held that such an indictment or information is insufficient where it contains no allegation of specific facts showing negligence or recklessness,⁵⁹ as distinguished from conclusions of fact or law;⁶⁰ but if it proceeds to set out the acts constituting the reckless or unlawful driving it is sufficient.⁶¹ The fact that the homicide charged is alleged to have been committed by culpable negligence does not require that the provisions of statutes regulating the operation of motor vehicles must be alleged.⁶² An allegation of a

willful and unlawful violation of a statute governing the operation of motor vehicles has been held to constitute an allegation of negligent operation of the motor vehicle.⁶³

Different modes or means. Where the offense charged may be committed in one or more of several different ways it may be charged in the alternative,⁶⁴ and, where the homicide is charged to have been committed in different ways, if any one of the charges is good the pleading is sufficient to charge the crime.⁶⁵

Unlawful act. Where a pleading charges a homicide by accused in the commission of an unlawful act it must allege the unlawful act.⁶⁶ In such case it has been held sufficient to charge the unlawful act with sufficient particularity to identify it.⁶⁷ It has been held necessary, however, to allege such facts as will show that the act was unlawful, and that merely to allege the act and characterize it as unlawful is insufficient;⁶⁸ and also a pleading

Words of same meaning

Words used in a statute to define the offense need not be strictly pursued in the indictment; it is sufficient to use other words conveying the same meaning.—*McQueen v. State*, 13 So.2d 59, 31 Ala.App. 101, certiorari denied 13 So.2d 61, 244 Ala. 251.

56. Ala.—*Holt v. State*, 157 So. 449, 26 Ala.App. 223, certiorari denied 157 So. 452, 229 Ala. 368.

57. Ill.—*People v. Jeffers*, 25 N.E.2d 35, 372 Ill. 590, certiorari denied *Jeffers v. People of State of Illinois*, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

42 C.J. p 1359 note 92—30 C.J. p 97 note 29 [a] (1), (2), p 103 note 13 [a] (8).

Statutory standard

Allegation of recklessness by driving with defective brakes is not required to use the language of statute prescribing a general standard of brake capacity for motor vehicles.—*Turrell v. State*, 51 N.E.2d 359, 221 Ind. 662.

58. N.Y.—*People v. Murphy*, 10 N.Y. S.2d 955, 170 Misc. 656.

Puerto Rico—*People v. Moreno*, 28 Puerto Rico 96.

59. N.M.—*State v. Gray*, 30 P.2d 278, 38 N.M. 203.

Tex.—*Self v. State*, 104 S.W.2d 16, 132 Tex.Cr. 234.

42 C.J. p 1359 note 94.

Charge is subject to demurrer

Iowa.—*State v. Sexsmith*, 206 N.W. 100, 200 Iowa 1244.

60. Ind.—*Kimmel v. State*, 154 N.E. 16, 198 Ind. 444.

Iowa.—*State v. Sexsmith*, 206 N.W. 100, 200 Iowa 1244.

61. Utah.—*State v. Assenberg*, 244 P. 1027, 66 Utah 573.

Way or manner of driving

The pleadings need not particularize the way or manner in which accused drove or plead explicitly acts relied on as negligence.—*Taubert v. State*, 176 S.W.2d 955, 146 Tex.Cr. 582.

Allegations held sufficient to charge recklessness.—*Turrell v. State*, 51 N.E.2d 359, 221 Ind. 662.

62. Fla.—*Denmark v. State*, 102 So. 246, 88 Fla. 244.

63. Cal.—*People v. Dallas*, 109 P.2d 409, 42 Cal.App.2d 596.

64. Idaho.—*State v. Monteith*, 20 P. 2d 1023, 53 Idaho 30.

65. Wash.—*State v. Hull*, 48 P.2d 225, 182 Wash. 681.

66. **Negligent homicide in second degree**

Tex.—*Leavell v. State*, 137 S.W.2d 40, 138 Tex.Cr. 471.

67. Or.—*State v. Lockwood*, 268 P. 1016, 126 Or. 118.

42 C.J. p 1359 note 99.

Pleadings held sufficient

(1) To charge unlawful driving on the wrong side of the highway.—*People v. Dallas*, 109 P.2d 409, 42 Cal.App.2d 596.

(2) To charge killing of a human being in the commission of the unlawful acts of exceeding the speed limit and driving on the wrong side of the road.—*Kelly v. State*, 10 S.E. 2d 417, 63 Ga.App. 231.

(3) To charge violation of speed regulations prescribed by statute.—

State v. Hull, 48 P.2d 225, 182 Wash. 681—*State v. Gunns*, 240 P. 674, 136 Wash. 495.

(4) To charge unlawful act which in its consequences tends to destroy human life.—*Jordan v. State*, 22 S.E. 2d 194, 68 Ga.App. 139.

Pleadings held not defective

Indictment which alleges that accused unlawfully, willfully, and feloniously made an assault with a motor vehicle has been held not defective for failure to allege commission of an unlawful act.—*People v. Rewland*, 167 N.E. 10, 335 Ill. 432.

68. Tex.—*Worley v. State*, 231 S.W. 391, 89 Tex.Cr. 393.

Driving on left side of highway

(1) It has been held insufficient merely to allege that accused unlawfully drove and operated his vehicle on the left side of the highway, since driving on the left side of the highway is not unlawful per se.—*Morgan v. State*, 120 S.W.2d 1063, 135 Tex.Cr. 402.

(2) The pleadings must contain allegations sufficient to show that it was practicable to have driven on the right side, "practicable" meaning usable or passable.—*Morgan v. State*, supra.

(3) Allegation that accused operated his vehicle on the left side of the highway when the highway was not clear for a distance of fifty yards ahead is a sufficient averment of an unlawful act where a statute prohibits driving on the left side under such circumstances.—*Casares v. State*, 164 S.W.2d 700, 144 Tex.Cr. 465.—*Click v. State*, 164 S.W.2d 664, 144 Tex.Cr. 468.

charging an unlawful act is insufficient when it fails to include the element of apparent danger, where a statute makes apparent danger of causing the death of deceased or of some person an essential of the offense.⁶⁹

Proximate cause. Ordinarily the indictment, information, or affidavit should allege that the death was proximately caused by the acts described.⁷⁰

Description of vehicle. The pleadings need not describe the particular character or kind of motor vehicle with which the killing was accomplished.⁷¹

Time. An indictment which in one count gives the date of the crime as the date of the accident and in another count as the date of the death of the injured person is not objectionable.⁷²

Joint conduct of accused and another. Where the conduct of accused and another or others in the handling of a motor vehicle is such as to make them equally guilty of the offense charged, they may be charged jointly with the offense without pleading any facts tending to show the alleged joint operation of the vehicle or the alleged act or acts of negligence relied on as to each of the persons accused.⁷³

Designation of crime or degree. An information or indictment reciting all the elements of manslaughter in a particular statutory degree will support a conviction thereof, although the degree of the crime is not specified.⁷⁴

Charge of manslaughter alone. Where the facts

and circumstances justify it, manslaughter alone may be charged, as considered in Homicide § 163, and an information or indictment therefor must allege that accused was in the commission of some unlawful act, or was negligent in doing some act lawful in itself, or negligently omitted to perform a legal duty, and that death resulted therefrom.⁷⁵

Distinct and included offenses. It has been held that an indictment for manslaughter is sufficient to support a conviction of assault,⁷⁶ that a charge of manslaughter in the first degree is sufficient to support a conviction of manslaughter in the second degree,⁷⁷ and that, where a statute provides that a charge for murder includes all the lesser degrees of culpable homicide, such a charge carries with it a charge of negligent homicide.⁷⁸ Where, however, a lesser homicide has elements other than, and different from, those alleged in the charging of a particular homicide, the lesser is not included in the charge of the greater.⁷⁹ An indictment charging commission of a homicide in the performance of an unlawful act, which constitutes manslaughter in the second degree under the statute, is not sufficient to support a conviction for manslaughter in the first degree, which consists in a homicide committed in the performance of a lawful act negligently done, where the two crimes are distinct and differently punishable.⁸⁰ Also the offense of manslaughter is not included in a charge of the lesser offense of involuntary homicide.⁸¹

Distinct penal offenses not included within the homicide charged are not charged as offenses by

69. Tex.—Worley v. State, 231 S.W. 391, 89 Tex. Cr. 393.

70. Ind.—State v. Beckman, 37 N.E. 2d 531, 219 Ind. 176.

"Proximate"

Where the affidavit in a prosecution for negligent homicide alleges that the acts of reckless misconduct specified caused the death of decedent it need not characterize accused's reckless misconduct as "proximate", notwithstanding such misconduct must be the proximate cause of the homicide.—Turrell v. State, 51 N.E.2d 359, 221 Ind. 662.

Pleadings held sufficient

(1) To charge proximate cause.—Kraft v. State, 171 N.E. 1, 202 Ind. 44.

(2) To charge that deceased died as a result of a wound inflicted on him by accused.—People v. Jeffers, 25 N.E.2d 35, 372 Ill. 590, certiorari denied Jeffers v. People of State of Illinois, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

(3) To charge that unlawful driving while intoxicated was proximate

cause of person's death.—Blackburn v. State, 180 N.E. 180, 203 Ind. 332.

71. Ill.—People v. Rewland, 167 N.E. 10, 335 Ill. 432.
42 C.J. p 1359 note 2.

72. Mich.—People v. Townsend, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

42 C.J. p 1359 note 3.

73. Fla.—Cochran v. State, 193 So. 535, 141 Fla. 467.

Impossible act

An information charging that two accused jointly committed manslaughter through operation of automobile was not quashable for charging impossible act, where complaining accused was in physical control of automobile, since other accused might be jointly responsible for automobile's operation.—Peterson v. State, 175 So. 519, 128 Fla. 717.

74. S.D.—State v. Denevan, 206 N.W. 927, 49 S.D. 192.

75. Ind.—Kimmel v. State, 154 N.E. 16, 198 Ind. 444.

Mich.—People v. Townsend, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

76. Del.—State v. Dean, 122 A. 448, 2 W.W.Harr. 290, affirmed 125 A. 478, 2 W.W.Harr. 469—State v. Disalvo, 121 A. 661, 2 W.W.Harr. 232.

77. Okl.—Ray v. State, Cr., 189 P.2d 620.

78. Tex.—Wallace v. State, 170 S.W. 2d 762, 145 Tex. Cr. 625.

Negligent homicide in second degree was included in indictment charging murder without malice.—Wallace v. State, supra.

79. Negligent homicide has been held not included in a charge of murder for a death caused while driving a motor vehicle while intoxicated, where driving while intoxicated constitutes a felony.—Totter v. State, 113 S.W.2d 194, 134 Tex. Cr. 62—Snyder v. State, 102 S.W.2d 424, 132 Tex. Cr. 73.

80. Tex.—Hampton v. State, 244 S.W. 525, 92 Tex. Cr. 441.

81. La.—State v. Porter, 146 So. 465, 176 La. 673.

the fact that the acts or conduct of accused alleged to have caused the death of the deceased are in themselves distinct penal offenses. Hence, an indictment for murder reciting that accused made an assault on decedent with his motor vehicle, and ran against and struck him, and caused his death, is not objectionable as charging several distinct offenses,⁸² nor is an indictment alleging a homicide as the result of accused's driving while intoxicated and at excessive speed, although each of such acts constitutes a misdemeanor.⁸³

Grade of offense for which accused may be indicted. Where a motorist's conduct in the operation of a motor vehicle resulting in the death of another includes all the elements of both a lesser and a greater offense, he may be indicted for either the greater or the lesser offense.⁸⁴

§ 665. — Issues, Proof, and Variance

In a prosecution for a homicide resulting from the operation of a motor vehicle, the state must prove the essential elements of the offense charge and the evidence must be confined to the issues raised by the pleadings. A material variance between the allegations of the pleadings

and the proof may be fatal to a conviction, but an immaterial variance will be disregarded.

In accordance with the rules governing the issues, proof, and variance in prosecutions for homicide generally, considered in Homicide §§ 175-184, which apply in prosecutions for a homicide caused by the operation of a motor vehicle,⁸⁵ the essential elements of the offense charged must be proved.⁸⁶ Proof is required of the corpus delicti,⁸⁷ that the accident or collision was the cause of the death of deceased,⁸⁸ and, where accused is prosecuted as a principal, of his identity as the driver of the motor vehicle which caused the death of deceased.⁸⁹ Where it constitutes an essential element of the offense charged, it is necessary in order to sustain a conviction that there be proof of negligence of the requisite character.⁹⁰

The evidence must be confined to the issues raised by the pleadings;⁹¹ but it is not necessary for the pleadings to allege the particular kind or character of evidence on which the state intends to rely to prove a particular issue in order for such evidence to be admissible thereon.⁹² The proof

82. S.C.—State v. Porte, 115 S.E. 238, 122 S.C. 298.

83. S.D.—State v. Denevan, 206 N.W. 927, 49 S.D. 192.

84. Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga.App.2d 325.

85. Defenses

In prosecution for negligent homicide by automobile, it was not incumbent on accused to plead insanity in order for him to prove that epilepsy caused him to be unconscious at the time of the accident.—People v. Freeman, 142 P.2d 435, 61 Cal.App.2d 110.

86. Proof required

(1) Under information charging negligent homicide, it was only necessary to prove, other than jurisdictional facts as to time and place, that accused was driving a motor vehicle negligently and that such driving resulted in death of person therein named.—People v. Warner, 80 P.2d 737, 27 Cal.App.2d 190.

(2) To sustain verdict of guilty of manslaughter the proof must disclose that accused knew of the danger of collision and recklessly, negligently, or wantonly ran down and collided with deceased without using such means as were reasonable and at his command to prevent the accident.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451.

(3) In a prosecution for manslaughter it is not necessary to prove that the killing was willfully done.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

87. Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646.

88. Mo.—State v. Simler, supra

89. Mere suspicion will not suffice.—Barnett v. State, 184 So. 702, 28 Ala.App. 293, certiorari denied 184 So. 709, 236 Ala. 666.

90. Miss.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

Criminal negligence

Ill.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451.—People v. Burgard, 36 N.E.2d 558, 377 Ill. 322.

Culpable negligence

Fla.—Pitts v. State, 182 So. 234, 132 Fla. 812.

Number of acts of negligence

Whether accused was guilty of several cumulative acts of negligence bearing a causal relation to injury inflicted is material on the question of his gross and culpable negligence.—Boll v. Commonwealth, 195 S.E. 675, 170 Va. 597.

In order to establish culpable or criminal negligence, it is not necessary to prove that accused intentionally, knowingly, and recklessly drove his vehicle against deceased.—People v. Przybyl, 6 N.E.2d 848, 365 Ill. 516.

91. Evidence applicable to different counts

Any evidence which tends to prove the charge as laid in a particular count of the indictment may be considered thereon, regardless of whether or not other counts contain similar charges.—People v. Jeffers, 25 N.E.2d 35, 372 Ill. 590, certiorari denied Jeffers v. People of State of Illinois,

60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

Count not submitted

Evidence of accused's intoxication under a count not submitted to the jury was held admissible where the state in the development of the case proceeded on all the counts alleged.—Wallace v. State, 170 S.W.2d 762, 145 Tex.Cr. 625.

92. La.—State v. Vinzant, 7 So.2d 917, 200 La. 301.

Flight from scene of accident

On manslaughter charge, evidence of flight from the scene of the accident is admissible, even though it is not specifically alleged.—People v. Pierce, 15 N.E.2d 845, 369 Ill. 172.

Proof under particular issues

(1) Evidence of accused's intoxication was admissible without an averment thereof, in prosecution of motorist under negligent homicide statute.—People v. Randall, 293 N.W. 725, 294 Mich. 478.

(2) Evidence of driving automobile on wrong side of road was admissible where the pleadings alleged driving in an unlawful, careless, and negligent manner.—Crawford v. State, 216 N.W. 294, 116 Neb. 128.

(3) Evidence that there was a stop sign at intersection was admissible on issue of speed and reckless driving, even though there was no allegation in the pleadings that accused ran through it.—Millum v. State, 195 S.W.2d 134, 149 Tex.Cr. 409.

(4) Evidence as to whether accused had any liquor with him at

must conform to the pleadings as to material matters.⁹³ It must correspond with the allegations as to the manner, means, and character of acts and conduct of accused by which the homicide was committed;⁹⁴ and proof of acts of accused other than, or different from, those alleged to have caused the death of deceased will not sustain the charge,⁹⁵ even though they may be similar to the acts charged.⁹⁶ Substantial correspondence between the charge and proof is sufficient,⁹⁷ and the fact that particular acts are alleged as the cause of the death does not preclude the state from relying on other acts within the scope of the pleadings.⁹⁸ Where several acts are alleged as the cause of the death of deceased, proof of any one act or combination of acts alleged is sufficient.⁹⁹

A driver of a motor vehicle charged with manslaughter committed while in the performance of an unlawful act may be convicted on proof of negligence in the killing, regardless of the fact that the statute or ordinance relied on is invalid, in the absence of any statutory distinction between manslaughter as committed in the performance of an unlawful act and in the performance of a lawful act in an unlawful manner;¹ but where by statute two degrees of manslaughter are created, and separate punishments provided, dependent on the manner of commission, one charged with the commission of a homicide in the performance of an unlawful act

cannot be convicted of a homicide committed in the performance of a lawful act negligently done.² However, the mere fact that a particular act is a misdemeanor and punishable as such does not prevent its being the basis of a prosecution for manslaughter.³

Place of death. The failure of the indictment, information, or affidavit to state the place of death has been held not to preclude the introduction of evidence thereof.⁴

§ 666. — Evidence

- a. In general
- b. Admissibility
- c. Weight and sufficiency

a. In General

On the trial of one charged with criminal homicide through the agency of a motor vehicle, the burden of proof is on the prosecution to establish beyond a reasonable doubt all the essential elements of the crime charged and the guilt of the accused.

In conformity with the general rules of evidence governing the burden of proof in prosecutions for homicide generally, considered in Homicide § 185, on the trial of one charged with criminal homicide through the agency of a motor vehicle the burden of proof is on the prosecution to establish beyond a reasonable doubt all the essential elements of the crime charged⁵ and, likewise, to establish beyond

time of the accident and that his motor vehicle had only one headlight burning was admissible on the issue of gross carelessness and recklessness—*State v. Vinzant*, 7 So.2d 917, 200 La. 301.

93. Mich.—*People v. Harrigan*, 187 N.W. 306, 218 Mich. 235. 42 C.J. p 1359 note 12.

Fatal variance held not shown
Cal.—*People v. Pryor*, 61 P.2d 773, 17 Cal.App.2d 147.

Variance held immaterial

(1) Variance between indictment which described the vehicle in which deceased was riding as an automobile and the proof which established that it was an automobile turned into a truck.—*People v. Rewland*, 167 N.E. 10, 335 Ill. 432.

(2) Other variances held immaterial see 42 C.J. p 1359 note 12 [b].

94. Del.—*Dean v. State*, 125 A. 478, 2 W.W.Harr. 469.

Information held sufficient to allow proof as to how automobile was operated and to permit the establishment of facts under which motorist might be shown guilty of one or more of the acts or omissions which are the elements of the offense of manslaughter.

ter.—*People v. Wilson*, 177 P.2d 567, 78 Cal.App.2d 108.

95. Ind.—*Shelton v. State*, 199 N.E. 148, 209 Ind. 534.

Acts included within scope of those charged

Indictment charging manslaughter covered driving of automobile with willful and reckless disregard for life and limb of others as well as driving at unlawful rate of speed.—*Minardo v. State*, 183 NE 548, 204 Ind. 422.

96. Ind.—*Shelton v. State*, 199 N.E. 148, 209 Ind. 534.

97. Del.—*Dean v. State*, 125 A. 478, 2 W.W.Harr. 469.

Test of variance

Whether a variation exists between proof and allegations as to manner and means of death depends entirely on whether instrument used to cause death and manner thereof are substantially of the same nature and character as alleged in indictment.—*Dean v. State*, supra.

98. Particular act as negligence

The fact that particular acts are alleged as constituting the culpable negligence essential to the offense does not preclude the state from relying on other acts of negligence, where the indictment also charged

that accused by his careless culpable negligence in handling, operating, and driving of automobile, caused the accident.—*Bannerman v. State*, 170 So. 127, 125 Fla. 459.

99. Utah.—*State v. Anderson*, 116 P. 2d 398, 100 Utah 468.

1. Wash.—*State v. Sandvig*, 251 P. 887, 141 Wash. 542.

2. Tex.—*Hampton v. State*, 244 S.W. 525, 92 Tex.Cr. 441.

3. Neb.—*Crawford v. State*, 216 N. W. 294, 116 Neb. 125.

S.D.—*State v. Denevan*, 206 N.W. 927, 49 S.D. 192.

4. Colo.—*Haddock v. People*, 188 P. 2d 891, 117 Colo. 416.

5. Driver of motor vehicle

The prosecution must show that accused was the driver of the motor vehicle as alleged.—*State v. Schneiders*, 137 S.W.2d 439, 349 Mo. 899.

Effect of admission

Statement of accused that he was so drunk at time of accident that he did not know what had happened was no admission that his automobile had struck pedestrian and did not relieve the state of burden of proving that accused's automobile killed pedestrian.—*State v. Miller*, 19 N.W.2d 271, 247 Wis. 339.

a reasonable doubt the guilt of accused.⁶ Thus the prosecution has the burden to show beyond a reasonable doubt that accused committed an act of the character necessary to constitute the offense charged,⁷ as that accused was culpably negligent, where negligence is the gravamen of the offense,⁸ or was driving while under the influence of intoxicating liquor,⁹ and that the wrongful acts charged,¹⁰ such as the negligence¹¹ or unlawful act¹² of accused, proximately caused the death of deceased. Where a statute makes a death resulting from the operation of a motor vehicle by an intoxicated person of itself constitute a criminal homicide, there is no burden on the state to establish that an intoxicated motorist was negligent.¹³ It is not incumbent on the state to show that one killed by a motor vehicle was free from contributory negligence¹⁴ or that the death was not the result of an unavoidable accident.¹⁵

Accused is required to meet evidence tending to show that death proximately resulted from his acts.¹⁶

Presumptions and inferences. Accused cannot be convicted of the offense charged through the application of the doctrine of *res ipsa loquitur*.¹⁷ It will be presumed, in the absence of evidence to the contrary, that accused exercised due care in operating his motor vehicle¹⁸ and that the vehicle was properly equipped.¹⁹ On the other hand, a driver is presumed to have intended the natural consequences of his act²⁰ and to have anticipated the possibility of any natural result of his negligence.²¹ One accused of manslaughter by driving at an excessive speed must be presumed to know the provisions of the law limiting the speed of motor vehicles.²² Negligence may be inferred from the mere fact of the operation of a motor vehicle in violation of law,²³ but the mere happening of the collision or accident raises no presumption of negligence.²⁴ Malice may be implied or presumed from the reckless, wanton, and gross carelessness with which a motor vehicle is operated,²⁵ but it cannot be inferred from the mere fact of the op-

Matters required to be proved against owner

(1) That owner knew that driver was intoxicated.—*State v. Creech*, 188 S.E. 316, 210 N.C. 700.

(2) That owner knew that driver was exceeding speed limit and by words or acts encouraged such conduct, or that he failed to remonstrate with the driver.—*Schorr v. State*, 132 S.W.2d 898, 137 Tex.Cr. 625.

6. Fla.—*Savage v. State*, 11 So.2d 778, 152 Fla. 367.

Ill.—*People v. Burgard*, 36 N.E.2d 558, 377 Ill. 322.

Mo.—*State v. Simler*, 167 S.W.2d 376, 350 Mo. 646.

Mont.—*State v. Bast*, 151 P.2d 1009, 116 Mont. 329.

Wash.—*State v. McDaniels*, 190 P.2d 705.

7. Unlawful act

Pa.—*Commonwealth v. Matteo*, 197 A. 787, 130 Pa.Super. 524.

8. Cal.—*Ex parte Reid*, 284 P. 518, 103 Cal.App. 380.

Fla.—*Hawkins v. State*, 163 So. 133, 120 Fla. 905.

Mo.—*State v. Schneiders*, 137 S.W.2d 439, 349 Mo. 899.

42 C.J. p 1360 note 21.

Criminal negligence

Mont.—*State v. Bast*, 151 P.2d 1009, 116 Mont. 329.

N.M.—*State v. Sisneros*, 82 P.2d 274, 42 N.M. 500.

9. N.M.—*State v. Sisneros*, supra.

Tex.—*Hittson v. State*, 114 S.W.2d 881, 134 Tex.Cr. 131.

10. Pa.—*Commonwealth v. Matteo*, 197 A. 787, 130 Pa.Super. 524.

The causal connection required is more than the mere fact that there is a coincidence of time and place between the wrongful acts and the fact of death.—*Maxon v. State*, 187 N.W. 753, 177 Wis. 379, 21 A.L.R. 1484.

11. Mo.—*State v. Schneiders*, 137 S.W.2d 439, 349 Mo. 899.

Wash.—*State v. McDaniels*, 190 P.2d 705.

Wis.—*Maxon v. State*, 187 N.W. 753, 177 Wis. 379, 21 A.L.R. 1484.

12. Pa.—*Commonwealth v. Matteo*, 197 A. 787, 130 Pa.Super. 524.

Va.—*Terry v. Commonwealth*, 198 S.E. 911, 171 Va. 505.

Wis.—*Maxon v. State*, 187 N.W. 753, 177 Wis. 379, 21 A.L.R. 1484.

13. Fla.—*Roddenberry v. State*, 11 So.2d 582, 152 Fla. 197, appeal dismissed *Roddenberry v. State of Florida*, 63 S.Ct. 266, 317 U.S. 600, 87 L.Ed. 490, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. 568.

14. Cal.—*People v. Black*, 295 P. 87, 111 Cal.App. 90, vacation denied 300 P. 43, 114 Cal.App. 468.

Pa.—*Commonwealth v. Matteo*, 197 A. 787, 130 Pa.Super. 524.

42 C.J. p 1360 note 22.

15. Minn.—*State v. Kline*, 209 N.W. 881, 168 Minn. 263.

16. Cal.—*People v. Wilson*, 177 P.2d 567, 78 Cal.App.2d 108.

17. Mo.—*State v. Simler*, 167 S.W.2d 376, 350 Mo. 646—*State v. Ruffin*, 126 S.W.2d 218, 344 Mo. 301.

18. Mont.—*State v. Bast*, 151 P.2d 1009, 116 Mont. 329.

19. Properly equipped with lights

Mich.—*People v. Beauchamp*, 245 N.W. 784, 260 Mich. 491.

20. Ky.—*Dublin v. Commonwealth*, 86 S.W.2d 136, 260 Ky. 412.

Tex.—*Duhon v. State*, 125 S.W.2d 550, 136 Tex.Cr. 404.

21. Tenn.—*Lauterbach v. State*, 179 S.W. 130, 132 Tenn. 603.

22. Ill.—*People v. Camberis*, 130 N.E. 712, 297 Ill. 455.

23. Minn.—*State v. Kline*, 209 N.W. 881, 168 Minn. 263.

42 C.J. p 1360 note 24.

Intoxication

(1) Driving while intoxicated has been held to raise a presumption of negligence.—*State v. Kline*, 209 N.W. 881, 168 Minn. 263.

(2) A statute making the driving of an automobile while intoxicated a criminal offense raises a presumption that such a driver is negligent.—*State v. Long*, 195 S.E. 624, 186 S.C. 439.

Speed

A finding that accused was operating his vehicle in excess of the rate of speed provided by statute as prima facie evidence of a violation of law raises a rebuttable presumption that accused was violating the law.—*State v. Hemmingway*, 156 A. 365, 4 W.W.Harr., Del., 598.

24. Fla.—*Hawkins v. State*, 163 So. 133, 120 Fla. 905.

Pa.—*Commonwealth v. Gill*, 182 A. 103, 120 Pa.Super. 22.

25. D.C.—*Nestlerode v. U. S.*, 122 F.2d 56, 74 App.D.C. 276.

eration of the vehicle in violation of law.²⁶

A presumption of malice necessary to support a conviction of assault with intent to murder may arise from a reckless disregard of human life,²⁷ and if the manner of use of the motor vehicle is such as is likely or calculated to produce death the presumption obtains that death was intended.²⁸ An intoxicated driver is presumed to be able to think and to form purposes and intentions, until the contrary is shown.²⁹

b. Admissibility

- (1) In general
- (2) Intoxication
- (3) Speed
- (4) Reputation and habits of accused

(1) In General

In a prosecution for the death of a person killed by or

because of the operation of a motor vehicle, evidence is admissible which tends to establish any of the essential elements of the crime or to connect the accused therewith, or which justly tends to exculpate the accused or to reduce the grade of the offense.

In conformity with the rules governing the admissibility of evidence in prosecutions for a homicide generally, considered in Homicide §§ 200-311, evidence which tends to establish any of the essential elements of the crime or to connect accused therewith, or which justly tends to exculpate accused or to reduce the grade of the offense, ordinarily is admissible in a prosecution for the death of a person killed by or because of the operation of a motor vehicle.³⁰ In general the entire circumstances surrounding the homicide are proper for the jury's consideration in determining the liability of accused, and evidence thereof is admissible.³¹ Evidence is admissible of the negligent op-

Ky.—Dublin v Commonwealth, 86 S.W.2d 136, 260 Ky 412.

26. Tenn.—Shorter v State, 247 S.W. 985, 147 Tenn. 355.
42 C.J. p 1360 note 25

27. Ga.—Payne v State, 40 S.E.2d 759, 74 Ga App. 646—Denard v State, 81 S.E. 378, 14 Ga App 485
Tex.—Duhon v. State, 125 S.W.2d 550, 136 Tex Cr. 404

28. Tex.—Duhon v. State, supra.

29. Ga.—Herrington v State, 120 S.E. 554, 31 Ga App 167

30. Okl.—Ray v. State, Cr., 189 P.2d 620.
42 C.J. p 1360 note 29.

Remoteness

Testimony as to acts of officer at scene six days after killing by automobile was held not objectionable as remote—State v. Blaine, 137 A. 829, 5 N.J.Misc. 633, affirmed State v. Blaine, 140 A. 566, 104 N.J. Law 325

Admissions and statements of accused

(1) Conduct of accused, after accident, in inquiring for gun and stating that he would like to finish everything, could be considered by jury.—State v. Graff, 290 N.W. 97, 228 Iowa 159.

(2) Evidence that accused asked to telephone officers about automobile which drove him off road was held not admissible—State v. Peterson, 194 S.E. 498, 212 N.C. 758.

(3) Admissibility of other statements of accused see 42 C.J. p 1360 note 29 [a].

Motive

(1) Testimony by sheriff assaulted by accused that he had accused under arrest at previous date when accused threatened to knock sheriff's automobile from road was admissible to show motive.—Sudan v. State, 155 S.E. 102, 41 Ga.App. 828.

(2) Admissibility of other evidence as to motive see 42 C.J. p 1360 note 29 [f].

Identification

(1) Admitting radiator emblem found near place of accident fitting into radiator of car of accused was held not error—People v. Leutholtz, 283 P. 292, 102 Cal.App 493.

(2) Permitting partial identification of other occupant of automobile at time of killing was held proper.—State v. McGrath, 140 A. 452, 6 N.J. Misc. 217, affirmed 142 A. 918, 105 N.J. Law 251

(3) Admissibility of other evidence relative to the identity of the driver see 42 C.J. p 1360 note 29 [d].

Permit to move building on highway

Where failure to obtain permit to move building on county road was not a proximate cause of the death of motorist who collided with building on highway at night not protected by flares, evidence was not admissible of the failure of accused to have such a permit, and its introduction was not justified by the fact that the state, without objection, introduced evidence showing that accused had procured a permit to transport it over a state highway.—State v. Ramser, 136 P.2d 1013, 17 Wash.2d 581.

Evidence held admissible

(1) Generally.

Conn.—State v. Goldberger, 173 A. 216, 118 Conn. 444.

Ky.—Summers v. Commonwealth, 33 S.W.2d 594, 236 Ky. 499.

N.C.—State v. Ormond, 191 S.E. 22, 211 N.C. 437.

Okl.—Ray v. State, Cr., 189 P.2d 620.
Pa.—Commonwealth v. Fetterolf, Quar.Sess., 17 Northumb.Leg.J. 42.

(2) Of conduct of accused during period just prior to accident indicating carelessness.—Wagner v. Com-

monwealth, 18 S.E.2d 838, 179 Va. 387.

Evidence held inadmissible

(1) Generally.—Vasquez v. State, 52 S.W.2d 1056, 121 Tex.Cr. 478.

(2) Testimony that accused was accustomed to having fits—Nichols v. Commonwealth, 163 S.W.2d 480, 291 Ky. 165.

(3) Evidence as to usual method of dragging road and extent of road usually covered in dragging.—Reynolds v. State, 134 So. 815, 24 Ala.App. 249, certiorari denied 134 So. 817, 223 Ala. 130

(4) Indictment finding no bill against third person.—Cain v. State, 190 S.E. 371, 55 Ga.App. 378.

31. Wis.—Maxon v. State, 187 N.W. 753, 177 Wis. 379, 21 A.L.R. 1484.

30 C.J. p 216 note 5 [g]—42 C.J. p 1361 note 30.

Circumstances to be considered

In determining whether there was criminal negligence, jury could consider type of the road, that accused had rounded a curve only a short distance from scene of collision, the speed at which accused's truck was traveling, the character of surface of road, and that accused's truck, with ample room to pass on its right-hand side of road, crossed to left side of road and struck automobile in which deceased was riding.—Thomas v. State, 38 S.E.2d 188, 73 Ga.App. 803.

Injury to other persons

(1) Evidence of injury to persons other than deceased has been held admissible.

Ill.—People v. Jeffers, 25 N.E.2d 85, 372 Ill. 590, certiorari denied Jeffers v. People of State of Illinois, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

eration of the vehicle by accused,³² of the negligence of deceased,³³ of the condition of the motor vehicle,³⁴ of the condition of its brakes,³⁵ of accused's flight from the scene of the accident,³⁶ or that accused left the body of deceased lying in the road after striking him.³⁷ Evidence as to the manner in which accused was driving a short distance, or shortly, before the accident has been held admissible,³⁸ where the circumstances tend to identify the vehicle as that of accused, even though it is not actually identified as such;³⁹ but evidence as to the manner accused was driving

before⁴⁰ or after⁴¹ the accident is not admissible where it is too remote to have any probative value.

Consciousness of guilt. Testimony of a statement made by accused before his arrest that the police were searching for him is admissible, as showing his consciousness of guilt.⁴² However, testimony that after the homicide accused boasted about turning off the lights of his car is a conclusion of the witness as to such statements.⁴³

Ordinances. Under various circumstances the introduction in evidence of ordinances relating to speed and traffic have been held proper,⁴⁴ but an

Ky.—Nichols v. Commonwealth, 163 S.W.2d 480, 291 Ky. 165.
Tex.—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9.

(2) However, in a prosecution for murder, the manner and extent of injury suffered by others in the accident have been held not admissible and irrelevant and inflammatory.—McKee v. State, 102 S.W.2d 1058, 132 Tex.Cr. 67.

Possession of driver's license

(1) Evidence that accused did not have a driver's license has been held admissible.—People v. Warner, 80 P.2d 737, 27 Cal.App.2d 190.

(2) Other authority, however, has held that evidence accused did not have a driver's license is not admissible, since the failure to have a driver's license was not the proximate cause of the death of deceased.—Roberts v. Commonwealth, 95 S.W.2d 23, 264 Ky. 545.

Held admissible

(1) Evidence to show the distance within which the vehicle could have been stopped.—Roberts v. Commonwealth, supra.

(2) Location of scattered brains of deceased.—Reynolds v. State, 134 So. 815, 24 Ala.App. 240, certiorari denied 134 So. 817, 223 Ala. 130.

(3) Number of children in car, owner of which was struck by automobile while crossing street.—State v. Thomlinson, 228 N.W. 80, 209 Iowa 555.

(4) Sounding of horn.—State v. Miller, 243 P. 72, 119 Or. 409, affirmed Miller v. State of Oregon, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825.

(5) Evidence that accused drove his automobile into a crowd.—People v. Joffers, 25 N.E.2d 35, 372 Ill. 590, certiorari denied Jeffers v. People of State of Illinois, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

(6) Evidence that three people were standing in safety zone where deceased was hit, on question of accused's ability to observe them.—State v. Bolle, Mo., 201 S.W.2d 158.

32. Ala.—Williams v. State, 84 So. 424, 17 Ala.App. 285.

30 C.J. p 216 note 5—42 C.J. p 1361 note 30 [e].

Cumulative effect of acts

Cumulative effect of series of connected or independent negligent acts can be considered as showing attitude of accused.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

33. N.J.—State v. Oliver, 153 A. 399, 107 N.J.Law 319.

Ohio—Driggs v. State, 178 N.E. 15, 40 Ohio App. 130, petition dismissed 177 N.E. 633, 123 Ohio St. 686.

Tenn.—Hurt v. State, 201 S.W.2d 988, 188 Tenn. 608.

30 C.J. p 216 note 9 [a]—42 C.J. p 1361 note 30 [f].

34. Ala.—Bailum v. State, 88 So. 200, 17 Ala.App. 679.

42 C.J. p 1361 note 30 [c].

Equipment of vehicle

Failure to comply with statute requiring a rear-view mirror may be shown by state on cross-examination of accused.—Jones v. State, 34 So.2d 483, 33 Ala.App. 451.

Evidence held admissible

(1) Condition of bumper after striking deceased.—People v. Ely, 265 P. 818, 203 Cal. 628.

(2) That windshield was obscured. Cal.—People v. Warner, 80 P.2d 737, 27 Cal.App.2d 190.

Mass.—Commonwealth v. Arone, 163 N.E. 758, 265 Mass. 128.

35. Cal.—People v. Perkins, 171 P.2d 919, 75 Cal.App.2d 875.

Prerequisite to admissibility

As a prerequisite to admission of evidence of condition of brakes after automobile had been wrecked, the state should have shown continuance of the condition immediately before the wreck.—Turrell v. State, 51 N.E.2d 359, 221 Ind. 682.

Evidence held admissible

(1) Of distance required to stop accused's automobile.—People v. Isbell, 2 N.E.2d 84, 363 Ill. 264.

(2) That before sale of vehicle to accused its wheel locked when the

brakes were applied, where accused claimed the accident was caused by a like mishap.—Commonwealth v. Tackett, 187 S.W.2d 297, 299 Ky. 731.

Evidence held inadmissible

Where accused did not see the persons he struck until he was right on top of them evidence that, some time after accident, brakes on his truck were examined by a mechanic and found to be very defective, was properly rejected.—State v. Dickert, 79 P.2d 328, 194 Wash. 629.

36. Va.—Bowie v. Commonwealth, 35 S.E.2d 345, 184 Va. 381.

Wis.—Opanchar v. State, 222 N.W. 245, 197 Wis. 454.

Speed at which accused was driving after the accident has been held admissible to show flight.—People v. Herkless, 196 N.E. 829, 361 Ill. 32.

37. Conn.—State v. Ford, 146 A. 828, 109 Conn. 490.

38. Ky.—Nichols v. Commonwealth, 163 S.W.2d 480, 291 Ky. 165—Largent v. Commonwealth, 97 S.W.2d 538, 265 Ky. 598.

Miss.—Sims v. State, 115 So. 217, 149 Miss. 171.

Mo.—State v. Sumpter, 184 S.W.2d 1005.

Such evidence is admissible to show negligence, recklessness, or want of care at the time of the collision.—Patton v. People, 168 P.2d 266, 114 Colo. 534.

39. Utah.—State v. Freeman, 71 P.2d 196, 93 Utah 125.

40. Ky.—Cornett v. Commonwealth, 138 S.W.2d 492, 282 Ky. 322—Elkins v. Commonwealth, 51 S.W.2d 916, 244 Ky. 583.

41. Ky.—Cornett v. Commonwealth, 138 S.W.2d 492, 282 Ky. 322.

42. Ala.—Williams v. State, 84 So. 424, 17 Ala.App. 285.

43. Ala.—Williams v. State, supra.

44. Utah.—State v. Freeman, 71 P.2d 196, 93 Utah 125.

To establish improper manner of doing lawful act

Ark.—Nichols v. State, 68 S.W.2d 655, 187 Ark. 998.

invalid ordinance is not admissible in evidence.⁴⁵ In a prosecution for manslaughter by driving in a business or closely built-up section of a city at a greater rate of speed than is permitted by the statute in such places, it is not competent to prove the violation by an ordinance of the municipality defining what are the business and closely built-up portions thereof;⁴⁶ but a municipal regulation duly passed in the exercise of the local police power is admissible in evidence to establish the general and usual rules of a road within the municipality upon which a homicide occurred, in a prosecution for manslaughter predicated on the violation of a statute prohibiting the operation of vehicles at an unreasonable speed, having regard for the circumstances and the usual rules of the road,⁴⁷ notwithstanding the rules established by such ordinance are not the rules generally and uniformly operating throughout the state.⁴⁸

Testimony on cross-examination. It has been held proper on cross-examination to question a witness as to whether accused had told him that when he ran over deceased he thought it was another person, and, if the witness denies it, it is competent to inquire whether he had not told another person that accused had made such a state-

ment to him and to rebut his denial with such person's testimony.⁴⁹

(2) Intoxication

Where one of the essential elements of the homicide charged is culpable negligence or some other degree thereof, or driving while intoxicated, evidence is admissible that the accused was driving while intoxicated or under the influence of intoxicating liquor.

Where the gist of a charge of a criminal homicide is accused's culpable negligence in the operation of a motor vehicle, or driving while intoxicated, evidence is admissible that he was at the time of the homicide under the influence of intoxicating liquor⁵⁰ or that his breath smelled of alcohol or liquor.⁵¹ Also the state may introduce evidence as to the sobriety of all the occupants of the vehicle⁵² and testimony that the companions of accused had liquor and were under its influence is admissible as part of the res gestæ and as tending to show his opportunity to obtain it.⁵³ Evidence is admissible that bottles of liquor, or partially filled bottles of liquor, were found in the vehicle after the accident,⁵⁴ or near the scene of the homicide,⁵⁵ or were thrown from the vehicle,⁵⁶ or that accused attempted to dispose of liquor found therein.⁵⁷ A witness may testify that accused was "under

Title and number

Where the court cannot take judicial notice of a city ordinance unless pleaded at least by title and number, an ordinance is inadmissible in evidence when not so referred to in the indictment.—*State v. Sandvig*, 251 P. 887, 141 Wash. 542.

45. Utah.—*State v. Lingman*, 91 P. 2d 457, 97 Utah 180.

Statutory prerequisites

A city ordinance establishing a speed limit is not admissible in evidence in the absence of a showing that the municipality has complied with a statute relative to the establishment of business and suburban districts and the posting of signs, without which such an ordinance is ineffectual.—*State v. Clark*, 196 N.W. 82, 196 Iowa 1134.

46. Ohio.—*State v. Born*, 98 N.E. 108, 85 Ohio St. 430.
42 C.J. p 1361 note 32.

47. Ohio.—*State v. O'Mara*, 136 N.E. 885, 105 Ohio St. 94, overruling so far as in conflict *State v. Born*, 98 N.E. 108, 85 Ohio St. 430.

48. Ohio.—*State v. O'Mara*, 136 N.E. 885, 105 Ohio St. 94.

49. Ala.—*Lindsey v. State*, 28 So.2d 799, 32 Ala.App. 545, certiorari denied 28 So.2d 804, 248 Ala. 628.

50. Ala.—*Holt v. State*, 157 So. 449, 26 Ala.App. 223, certiorari denied 157 So. 452, 229 Ala. 368.

Fla.—*Graves v. State*, 172 So. 716, 127 Fla. 182.—*Cannon v. State*, 107 So. 360, 91 Fla. 214.

Iowa.—*State v. Graff*, 290 N.W. 97, 228 Iowa 159.

Mich.—*People v. Beauchamp*, 245 N.W. 784, 260 Mich. 491.

Mo.—*State v. Carter*, 116 S.W.2d 21, 342 Mo. 439.—*State v. Coulter*, 204 S.W. 5.

Okl.—*Hall v. State*, 159 P.2d 283, 80 Okl. Cr. 310.

Tex.—*Daniel v. State*, 288 S.W. 1081, 105 Tex. Cr. 468.
42 C.J. p 1362 note 46.

Slight intoxication

Evidence of slight intoxication is admissible.—*People v. Emmons*, 299 P. 541, 114 Cal.App. 26.

Evidence held admissible to show intoxication

(1) Evidence tending to show that motorist had been drinking.—*Jones v. Commonwealth*, 116 S.W.2d 984, 273 Ky. 444.

(2) Negligent operation of vehicle.—*State v. Blaine*, 137 A. 829, 5 N.J. Misc. 633, affirmed *State v. Blaine*, 140 A. 566, 104 N.J. Law 325.

(3) Evidence that accused did not concern himself with persons injured in accident.—*Pooler v. State*, 170 S.E. 309, 47 Ga.App. 303.

(4) Vile remarks of accused at scene of collision.—*People v. Haskins*, 85 P.2d 498, 29 Cal.App.2d 715.

51. Ky.—*Elkins v. Commonwealth*, 51 S.W.2d 916, 244 Ky. 533.

Mich.—*People v. Gibson*, 235 N.W. 225, 253 Mich. 476.

Tex.—*Parrocini v. State*, 234 S.W. 671, 90 Tex. Cr. 320.

52. N.J.—*State v. Snook*, 107 A. 62, 93 N.J. Law 29, affirmed 109 A. 289, 94 N.J. Law 271.

Arraignment of auto guest

Question whether auto guest was arraigned on charge of intoxication growing out of same accident was held improper.—*State v. Voelpel*, 289 N.W. 677, 213 Iowa 702.

53. N.C.—*State v. Jessup*, 111 S.E. 523, 183 N.C. 771.

54. Tex.—*Parrocini v. State*, 234 S.W. 671, 90 Tex. Cr. 320.

55. Ala.—*Reynolds v. State*, 134 So. 815, 24 Ala.App. 249, certiorari denied 134 So. 817, 223 Ala. 130.
Mont.—*State v. Gondeiro*, 268 P. 507, 82 Mont. 530.

56. Tex.—*Parrocini v. State*, 234 S.W. 671, 90 Tex. Cr. 320.

Reason for disposing of liquor

Effort to induce accused on cross-examination to tell why he wanted to dispose of a case of beer which was found in the back of his automobile at the time of the accident was held not error.—*Wallace v. State*, 170 S.W.2d 762, 145 Tex. Cr. 625.

the influence of liquor," as a statement of fact based on his conduct and appearance at the time.⁵⁸

Intoxication before or after the accident. Evidence is admissible of accused's use of intoxicating liquor, or intoxicated condition shortly before⁵⁹ or after⁶⁰ the commission of the offense. Also evidence is admissible that shortly before the accident accused was in company where liquor was being consumed,⁶¹ or that on the day of the accident accused had tried to borrow money to enable a companion to buy whisky, such evidence bearing on the fact that he and his party intended to provide themselves therewith for the occasion.⁶² Evidence as to the manner in which accused drove the motor vehicle before⁶³ or after⁶⁴ the accident and some distance from the place thereof has been held admissible, as relevant and material, when near enough in time to bear on the extent to which his intoxication caused the homicide, and the remoteness goes rather to its weight than to its admissibility.⁶⁵ Evidence is not admissible, however, that accused was under the influence of intoxicating liquor or had liquor on his breath at a remote pe-

riod prior to⁶⁶ or after⁶⁷ the accident.

Capacity for intent. While intoxication is not an excuse for crime, as discussed supra § 658, evidence thereof is admissible in favor of accused in a prosecution for murder in the first degree on the question whether or not he was capable of forming the necessary intent.⁶⁸

(3) Speed

Where the negligence of the operator of the motor vehicle or the violation of a speed law is an essential element of the homicide charged, evidence of the speed of the vehicle is admissible.

Where the negligence of the operator of the motor vehicle or the violation of a speed law is an essential element of the homicide charged, testimony is admissible as to the speed of the vehicle.⁶⁹ On the question of speed, evidence is admissible of the relevant circumstances which tend to show its speed,⁷⁰ including evidence of the track or marks made on the ground by a motor vehicle which skidded, swerved, or slid at the accident, and the distance of such skidding, swerving, or sliding.⁷¹

58. N.C.—State v. Jessup, 111 S.E. 523, 183 N.C. 771, 774.
Or.—State v. Boag, 59 P.2d 396, 154 Or. 354.

59. Ala.—Crump v. State, 191 So. 475, 29 Ala.App. 22, certiorari denied 191 So. 478, 238 Ala. 439.

Cal.—People v. Warner, 80 P.2d 737, 27 Cal.App.2d 190.

La.—State v. Flattmann, 135 So. 3, 172 La. 620.

N.C.—State v. Dills, 167 S.E. 459, 204 N.C. 33—State v. Palmer, 147 S.E. 817, 197 N.C. 135.

Tex.—McDaniel v. State, 288 S.W. 1081, 105 Tex.Cr. 468.

Va.—Wagner v. Commonwealth, 18 S.E.2d 888, 179 Va. 387.

Fear of accused's companions

Evidence that witness, who had been in the car with accused, left the car because of fast and reckless driving was held admissible as a circumstance to show that accused was drunk.—State v. Palmer, 147 S.E. 817, 197 N.C. 135.

Malice

In prosecution of automobile owner for murder arising out of automobile collision occurring while automobile was being driven by an intoxicated companion with owner's consent, evidence showing conduct and drunken condition of owner during the day preceding the collision resulting in the death for which he was charged was admissible as showing malice.—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9.

Circumstances to show accused not intoxicated held admissible

Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646.

60. Fla.—Graves v. State, 172 So. 716, 127 Fla. 182.

Ill.—People v. Wallage, 186 N.E. 540, 353 Ill. 95.

Okl.—Nail v. State, 242 P. 270, 33 Okl.Cr. 100.

Utah.—State v. Busby, 131 P.2d 510, 102 Utah 416, 144 A.L.R. 1468.

Five hours after

Ga.—Goldin v. State, 142 S.E. 757, 38 Ga.App. 110.

61. Minn.—State v. Graham, 222 N.W. 909, 176 Minn. 164.

62. S.C.—State v. Jessup, 111 S.E. 523, 183 S.C. 771.

63. Ala.—Graham v. State, 140 So. 621, 25 Ala.App. 44.

Iowa.—State v. Neville, 293 N.W. 560, 228 Iowa 1225.

Evidence held not admissible

Evidence as to manner in which accused was driving five or six miles distant from the place of the accident has been held not admissible where the testimony was not limited to proof of intoxication before or after collision and testimony as to identity was hearsay.—State v. Boag, 59 P.2d 396, 154 Or. 354.

64. Minn.—State v. Kline, 209 N.W. 881, 168 Minn. 263.

42 C.J. p 1362 note 54.

65. Cal.—People v. Collins, 233 P. 97, 195 Cal. 325.

Okl.—Nail v. State, 242 P. 270, 33 Okl.Cr. 100.

66. Idaho.—State v. Frank, 1 P.2d 181, 51 Idaho 21.

67. Ala.—Lindsey v. State, 22 So.2d 621, 32 Ala.App. 158.

On afternoon following night of accident

Fla.—Duke v. State, 142 So. 886, 106 Fla. 205.

68. Ala.—State v. Massey, 100 So. 625, 20 Ala.App. 56.

69. Minn.—State v. Melin, 228 N.W. 171, 179 Minn. 1.

Pa.—Commonwealth v. Dudick, 87 Pa.Super. 33.

70. Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646.

Evidence of circumstances held admissible

(1) That other persons were injured in the accident—State v. Leonard, 141 S.E. 736, 195 N.C. 242.

(2) Extent of injuries or condition of deceased's body.

Pa.—Commonwealth v. Dull, Quar. Sess., 50 Lanc.Rev. 151.

Tex.—Ladd v. State, 27 S.W.2d 1098, 115 Tex.Cr. 355.

(3) Height or distance body of deceased was thrown by impact of vehicle.

Minn.—State v. Melin, 228 N.W. 171, 179 Minn. 1.

Mo.—State v. Bolle, 201 S.W.2d 158.

71. Or.—State v. Miller, 243 P. 72, 119 Or. 409, affirmed Miller v. State of Oregon, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825.

Va.—Lawrence v. Commonwealth, 26 S.E.2d 54, 181 Va. 582.

Where a statute makes driving in excess of a specified speed merely prima facie evidence of unlawfulness, accused may introduce evidence of surrounding circumstances to overcome a prima facie case established on the basis of excessive speed.⁷²

Speed at place distant from the accident. Evidence of the speed of a motor vehicle at a point remote from the place of a homicide is inadmissible,⁷³ as is evidence of the average speed of the motor vehicle over a particular distance or time,⁷⁴ because of the rapidity with which the rate may be changed;⁷⁵ but, where it is not too remote, evidence as to the speed at which accused was driving his vehicle before reaching the point of the accident is competent,⁷⁶ as is also the fact that accused had been racing just prior thereto.⁷⁷ Testimony as to the speed of a motor vehicle observed by a witness is admissible when it is sufficiently identified as the vehicle driven by accused,⁷⁸ and in some instances such testimony has been held admissible where the circumstances tend to identify the vehicle as that of accused, even though it is not actually identified as such,⁷⁹ but other authority has held such testimony not admissible where the vehicle is not sufficiently identified as the one driven by accused.⁸⁰ Evidence that the witness was frightened at the speed of the vehicle of accused when accused passed him has been held not admissible.⁸¹

(4) Reputation and Habits of Accused

Evidence of the general reputation and habits of a

person accused of a homicide in the operation of a motor vehicle is admissible.

Where one is charged with negligent homicide, evidence of his general reputation as a law-abiding citizen is admissible,⁸² and he is not confined to proving merely his reputation as a careful and prudent man.⁸³ Evidence has also been held admissible that accused was a reckless driver.⁸⁴ Evidence of accused's record with his employer, however, has been held not admissible;⁸⁵ and evidence of his general habits of driving may properly be excluded, where the circumstances of the homicide are clearly described by the witnesses.⁸⁶

c. Weight and Sufficiency

- (1) In general
- (2) Circumstantial evidence
- (3) Speed
- (4) Particular offenses and elements thereof

(1) In General

In order to sustain a conviction for a criminal homicide arising from the operation of a motor vehicle, the evidence must be sufficient to establish all elements of the offense and to show the guilt of the accused beyond a reasonable doubt.

The general rules as to the weight and sufficiency of evidence in criminal cases apply in prosecutions for homicide through the agency of a motor vehicle.⁸⁷ In order to sustain a conviction of such a homicide the evidence must be sufficient to

Wis.—*Ronning v. State*, 200 N.W. 394, 184 Wis. 651.

72. Utah—*State v. Lingman*, 91 P. 2d 457, 97 Utah 180.

73. Ky.—*Largent v. Commonwealth*, 97 S.W.2d 538, 265 Ky. 598.
Mich.—*People v. Barnes*, 148 N.W. 400, 182 Mich. 179.
42 C.J. p 1361 note 41.

74. Mich.—*People v. Barnes*, *supra*.
30 C.J. p 218 note 6 [b].

75. Mich.—*People v. Barnes*, *supra*.
Minn.—*State v. Kline*, 209 N.W. 881, 168 Minn. 263.

76. N.C.—*State v. Peterson*, 194 S.E. 498, 212 N.C. 758.

Ohio.—*Prince v. State*, 12 Ohio App. 347.

Tex.—*Ladd v. State*, 27 S.W.2d 1098, 115 Tex.Cr. 355.

Evidence held admissible

(1) Evidence as to speed at which accused was traveling when he passed witness approximately eight miles from point of collision.—*State v. Carlsen*, 136 P.2d 183, 17 Wash.2d 578.

(2) Evidence that car was going

at certain speed mile from where accident occurred and that judging from sound speed was not lessened.—*Bradford v. State*, 146 So 635, 166 Miss. 296.

(3) Testimony of drivers of automobiles which accused attempted to pass and of persons working in fields and residing near scene of accident, regarding speed.—*State v. Monteith*, 20 P.2d 1023, 53 Idaho 30.

77. *Flee of guilty* to charge of reckless driving by other party to the race was held not to prevent the prosecutor from showing that accused and the other had been actually engaged in racing before the accident.—*People v. Connor*, 294 N.W. 74, 295 Mich. 1.

78. N.C.—*State v. Leonard*, 141 S. E. 736, 195 N.C. 242.

79. Cal.—*People v. Marconi*, 5 P.2d 974, 118 Cal.App. 683.
Ga.—*Cammons v. State*, 2 S.E.2d 205, 59 Ga.App. 759.

Okl.—*Chandler v. State*, 146 P.2d 598, 79 Okl.Cr. 323.

Utah.—*State v. Freeman*, 71 P.2d 196, 93 Utah 125.

80. Mich.—*People v. Barnes*, 148 N.W. 400, 182 Mich. 179.

42 C.J. p 1361 note 45

81. Tex.—*Ladd v. State*, 27 S.W.2d 1098, 115 Tex.Cr. 355.

82. Wyo.—*Thompson v. State*, 283 P. 151, 41 Wyo. 72.
42 C.J. p 1362 note 60

83. Tex.—*Harr v. State*, 263 S.W. 1055, 98 Tex.Cr. 1.

84. N.J.—*State v. Villano*, 142 A. 643, 6 N.J.Misc. 713, affirmed 146 A. 917, 106 N.J.Law 601.

85. Cal.—*People v. Marconi*, 5 P.2d 974, 118 Cal.App. 683.

86. N.H.—*State v. Currier*, 106 A. 491, 79 N.H. 171.

87. Wis.—*Montgomery v. State*, 190 N.W. 105, 178 Wis. 461.
42 C.J. p 1362 note 65.

Condition of brakes

Evidence of condition of brakes on motor vehicle after it had been wrecked, in absence of evidence proving there had been no change therein, tended to prove only brake condition when witness' examination was made, and was lacking in proba-

establish beyond a reasonable doubt the guilt of accused,⁸⁸ and also those specific elements of the offense which are applicable to the grade or degree of homicide of which accused is convicted.⁸⁹ The evidence must be sufficient to establish the cause of death⁹⁰ and that the acts accused is charged to have committed proximately caused the death,⁹¹

and where it merely establishes the existence of such acts it is not sufficient.⁹² Also, where it is an essential element of the offense, the evidence must establish beyond a reasonable doubt that accused was guilty of negligence of the requisite character or degree,⁹³ or that accused was guilty

tive value as to inadequacy of brakes preceding the wreck.—Turrell v. State, 51 N.E.2d 359, 221 Ind. 662.

88. Del.—State v. Dean, 122 A. 448, 2 W.W.Harr. 290, affirmed 125 A. 478, 2 W.W.Harr. 469.

Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646.

Mont.—State v. Bast, 151 P.2d 1009, 116 Mont. 229.

N.Y.—People v. Huibbs, 68 N.Y.S.2d 788, 271 App.Div. 1021.

Pa.—Commonwealth v. Scott, Quar. Sess., 21 Wash Co. 167.

Sufficient for punitive damages

The evidence should be as strong as that required for imposition of punitive damages in civil suit, wherein plaintiff must show accused's gross and flagrant negligence, evincing reckless disregard of human life or safety of persons exposed to its dangerous effects.—Savage v. State, 11 So.2d 778, 152 Fla. 367.

Tragic character of accident

The deeply deplorable and tragic character of accident and heart-rending results thereof cannot be made basis or premise for determining acts or guilt, but they must be ascertained and determined solely from evidence as to occurrence complained of.—Barnett v. State, 184 So. 702, 28 Ala.App. 293, certiorari denied 184 So. 709, 236 Ala. 666.

Possibility of suicide

Possibility that deceased purposely threw herself in front of automobile was held insufficient to create reasonable doubt of driver's guilt.—People v. Black, 295 P. 87, 111 Cal.App. 90, vacation of judgment denied 300 P. 43, 114 Cal.App. 468.

89. Tex.—Schorr v. State, 132 S.W.2d 898, 137 Tex.Cr. 625.

Principal or accessory

Which of two men, charged with causing death by operating automobile in reckless manner while under influence of intoxicating liquor, was principal, and which accessory, cannot be left to surmise and conjecture.—Quintana v. People, 102 P.2d 486, 106 Colo. 174.

Conditions prerequisite to application of statute

(1) The state had burden to show beyond reasonable doubt that attachment to motor vehicle was a trailer and not semitrailer before jury could consider statute applying limitation on speed of trucks with trailers attached.—State v. Brooks, 186 S.E. 227, 210 N.C. 278.

(2) The state has the burden to prove beyond reasonable doubt that as a matter of fact curve or turn involved was a sharp curve or turn within statute prescribing speed limit on approaching such a curve or turn.—State v. Corley, 182 S.E. 794, 116 W.Va. 630.

90. Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646.

91. Fla.—Howell v. State, 187 So. 163, 136 Fla. 582.

N.C.—State v. Lowery, 27 S.E.2d 638, 223 N.C. 598.

Pa.—Commonwealth v. Matteo, 197 A. 787, 130 Pa.Super. 524.

Tenn.—Hiller v. State, 50 S.W.2d 225, 164 Tenn. 388.

Evidence held sufficient to show death proximately caused by:

(1) The accident.

Idaho—State v. Neil, 74 P.2d 586, 58 Idaho 359.

Ill.—People v. Tobin, 15 N.E.2d 687, 369 Ill. 73.

Minn.—State v. Goldstone, 175 N.W. 892, 144 Minn. 405.

Mo.—State v. Medlin, 197 S.W.2d 626, 355 Mo. 564.

Tex.—Andrews v. State, Cr., 199 S.W.2d 510—Milum v. State, 195 S.W.2d 134, 149 Tex.Cr. 409—O'Connor v. State, 88 S.W.2d 1048, 129 Tex.Cr. 509.

(2) Culpable negligence of accused.—Henderson v. State, 25 So.2d 133, 199 Miss. 629.

(3) Driving at excessive or unlawful rate of speed.

Ind.—Cross v. State, 52 N.E.2d 727, 222 Ind. 241.

Wash.—State v. Carlsen, 136 P.2d 183, 17 Wash.2d 573.

(4) Driving while intoxicated.

Utah.—State v. Capp, 176 P.2d 878.

Va.—Albert v. Commonwealth, 27 S.E.2d 177, 181 Va. 894.

(5) Negligent operation of motor vehicle by accused.—People v. Black, 295 P. 87, 111 Cal.App. 90, vacation of judgment denied 300 P. 43, 114 Cal.App. 468.

(6) Operation of motor vehicle with a wanton and reckless disregard of human life and safety.—Patton v. People, 168 P.2d 266, 114 Colo. 534.

(7) Reckless operation of vehicle by accused while under influence of intoxicants.—Benson v. State, 208 S.W.2d 767, 212 Ark. 905.

Evidence held insufficient to show death proximately caused by:

(1) The accident.—Terry v. Commonwealth, 198 S.E. 911, 171 Va. 505.

(2) Accused driving while intoxicated.—State v. Frank, 1 P.2d 181, 51 Idaho 21.

(3) Act of accused while in the commission of a misdemeanor.—Lightfoot v. State, 34 So.2d 614, 33 Ala.App. 409, certiorari denied 34 So.2d 619, 250 Ala. 392.

(4) Defective condition of vehicle.—People v. Rauch, 299 N.Y.S. 155, 252 App.Div. 795.

(5) Lawful act of accused performed in a grossly negligent or improper manner.—Lightfoot v. State, supra.

(6) Unlawful driving of accused.—Howell v. State, 163 N.E. 492, 200 Ind. 345.

(7) Violation of speed law by accused.—Copeland v. State, 285 S.W. 565, 154 Tenn. 7, 49 A.L.R. 605.

92. N.C.—State v. Lowery, 27 S.E.2d 638, 223 N.C. 598.

Tenn.—Hiller v. State, 50 S.W.2d 225, 164 Tenn. 388.

42 C.J. p 1363 note 80.

Assault with intent to kill

Ga.—Mundy v. State, 1 S.E.2d 605, 59 Ga.App. 509.

93. N.J.—State v. Linarducci, 3 A.2d 796, 122 N.J.Law 137, affirmed 8 A.2d 576, 123 N.J.Law 228.

N.Y.—People v. Jackson, 8 N.Y.S.2d 939, 255 App.Div. 688.

Va.—Lawrence v. Commonwealth, 26 S.E.2d 54, 181 Va. 582.

Criminal negligence

Ill.—People v. Przybyl, 6 N.E.2d 848, 365 Ill. 515.

Gross negligence such as to evince a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of accused's act as to render conduct tantamount to wilfulness has been required in prosecution for manslaughter.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

More happening of accident does not prove that motorist was negligent.—Commonwealth v. Stosny, 31 A.2d 582, 152 Pa.Super. 236—Commonwealth v. Gill, 182 A. 103, 120 Pa. Super. 22.

Attendant circumstances may supply evidence of negligence.—Commonwealth v. Gill, supra.

Revocation of license

Fact that driver's license of accused had been judicially revoked,

of wantonness,⁹⁴ or that he was driving while intoxicated or under the influence of intoxicating liquor,⁹⁵ or with intent to kill.⁹⁶ Proof that decedent was guilty of negligence contributing to his own injury is sufficient to carry to the jury the question whether the homicide was unintentional, although the result of accused's culpable negligence.⁹⁷ Where a motorist's conduct in the operation of a motor vehicle resulting in the death of another includes all the elements of both a higher and a lower offense, a verdict finding him guilty of the lower offense will not be disturbed on the ground that it is contrary to the evidence.⁹⁸

Character and reputation. Testimony as to the good character of accused is to be taken in connection with all the other evidence,⁹⁹ and to be given such weight under all the facts and circumstances as the jury think it entitled to;¹ but his reputation for being a careful and skillful driver does not show freedom from gross negligence in failing to stop after danger to decedent became apparent.²

Conflict with physical facts. Where the physical

facts show evidence to be untrue, it need not be believed.³

Conviction or acquittal of other offense based on the same accident. In a prosecution for manslaughter committed by driving a motor vehicle while intoxicated, there can be no merit in a claim of lack of evidence that accused was driving the vehicle at the time of the accident, where he has urged in bar of the prosecution his own prior conviction for driving while intoxicated, based on the same transaction;⁴ on the other hand, acquittal on a charge of failure to report an accident is not conclusive, on a prosecution for manslaughter based on the same accident, that there was no such accident or that accused was not chargeable with reckless driving.⁵

(2) Circumstantial Evidence

The guilt of the accused may be established by circumstantial evidence.

The guilt of the accused may be established by circumstantial evidence,⁶ at least where resort to

and that he was operating automobile notwithstanding such revocation, was evidence of negligence—*Benton v. State*, 247 N.W. 21, 124 Neb. 485.

Effect of statute

Fact that statute providing that person operating vehicle in reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence differs somewhat from manslaughter statute does not change degree of proof required to convict a person of reckless or culpable negligence—*People v. Williams*, 61 N.Y.S.2d 252, 187 Misc. 239.

94. Manslaughter in first degree

Ala.—*Pratt v. State*, 171 So. 393, 27 Ala.App. 301—*Curlette v. State*, 142 So. 775, 25 Ala.App. 179.

95. Tex.—*Hittson v. State*, 114 S.W. 2d 881, 134 Tex.Cr. 131.

Conclusiveness of odor of whisky on motorist's breath

The fact that a witness testified that breath of motorist carried odor of whiskey, did not absolutely and unqualifiedly show that he was drunk.—*Moore v. State*, 150 S.W.2d 91, 141 Tex.Cr. 570.

Driving recklessly or in violation of law does not tend to prove that the driver was under the influence of intoxicating liquor.—*State v. Johnson*, 287 P. 909, 76 Utah 84.

Proof of intoxication is not indispensable to conviction of manslaughter, where the charge is based on culpable negligence in operating an automobile at an unlawful speed while intoxicated, by colliding with de-

ceased, and there is ample proof that accused was driving at an unlawful and dangerous rate under conditions that warranted finding of culpable negligence—*Hobbs v. State*, 91 So 555, 83 Fla. 480

96. Assault with intent to murder

In prosecution for assault with intent to murder, intent must be established by evidence sufficient to exclude every reasonable hypothesis save that the injury was caused by the reckless and wanton disregard of human life—*Mundy v. State*, 1 S.E. 2d 605, 59 Ga.App. 509.

Recklessness amounting to intent

Facts necessary to prove such recklessness as would amount in law to intentional killing in driving of an automobile must be proved beyond reasonable doubt—*Barnett v. State*, 171 So. 293, 27 Ala.App. 277, certiorari denied 171 So. 296, 233 Ala. 182.

97. Ky.—*Held v. Commonwealth*, 208 S.W. 772, 183 Ky. 209.

98. Ga.—*Collins v. State*, 18 S.E.2d 24, 66 Ga.App.2d 325.

99. Del.—*State v. Dean*, 122 A. 448, 2 W.W.Harr. 290, affirmed 125 A. 478, 2 W.W.Harr. 469—*State v. McIvor*, 111 A. 616, 31 Del. 123.

1. Del.—*State v. Dean*, 122 A. 448, 2 W.W.Harr. 290, affirmed 125 A. 478, 2 W.W.Harr. 469—*State v. McIvor*, 111 A. 616, 31 Del. 123.

Considered same as any other evidence bearing on the general issue.—*Commonwealth v. McConahy*, 29 A.2d 348, 151 Pa.Super. 26.

2. Conn.—*State v. Goetz*, 76 A. 1000, 83 Conn. 437, 30 L.R.A.,N.S., 458.

3. Va.—*Brooks v. Commonwealth*, 134 S.E. 726, 145 Va. 853.
42 C.J. p 1363 note 77.

Testimony held not discredited

Uncontroverted testimony that defendant's automobile, after the collision, turned over a couple of times and landed on its right side approximately ninety feet from the point of collision, and that the automobile collided with overturned and remained practically at the point of the collision was held not to discredit testimony of the driver of the latter automobile as to his efforts to avoid the collision.—*Commonwealth v. Matteo*, 197 A. 787, 130 Pa.Super. 524.

4. Mich.—*People v. Townsend*, 183 N.W. 177, 214 Mich. 267, 16 A.L.R. 902.

5. Utah—*State v. Cheeseman*, 223 P. 762, 63 Utah 138.

6. Ala.—*Lightfoot v. State*, 34 So.2d 614, 33 Ala.App. 409, certiorari denied 34 So.2d 619, 250 Ala. 392—*Brimhurst v. State*, 20 So.2d 885, 31 Ala.App. 608.

Fla.—*Savage v. State*, 11 So.2d 778, 152 Fla. 367.

Ill.—*People v. Burgard*, 36 N.E.2d 568, 377 Ill. 322.

Ky.—*Bolen v. Commonwealth*, 198 S.W.2d 309, 303 Ky. 611.

Mo.—*State v. Simler*, 167 S.W.2d 376, 350 Mo. 646.

Ohio.—*Masoncup v. State*, 189 N.E. 512, 47 Ohio App. 32.

Va.—*Wagner v. Commonwealth*, 18 S.E.2d 888, 179 Va. 387.

such evidence is necessary.⁷ Such evidence, however, must be weighed with care,⁸ and the facts from which the inference of accused's guilt is drawn must be established with certainty;⁹ and it is insufficient where it does not exclude every reasonable hypothesis save that of guilt.¹⁰ The action of a driver in failing to stop or render assistance when he is aware of having struck another person is a circumstance indicative of guilt on his part,¹¹ and a showing that he was intoxicated at the time of the homicide is a persuasive factor.¹²

(3) Speed

Where the speed of a motor vehicle is a factor in determining the guilt of the accused, competent evidence of its speed or excessive speed, or of what speed is unlawful or improper, may be considered.

Where the speed of a motor vehicle is a factor in determining the guilt of one accused of a criminal homicide through the agency of a motor vehicle, competent evidence of its speed or excessive speed,¹³ or of what speed is unlawful or improper,¹⁴ may be considered. Testimony as to the speed of

the motor vehicle is of little probative value, however, where it is based on a momentary glimpse of the vehicle approaching head on,¹⁵ or merely on the condition of the highway and of the vehicles after the collision,¹⁶ or is merely that the motor vehicle was going "fast" or "slowly," and is made without comparison with other vehicles whose speed is known, or in the absence of a showing of facts and circumstances from which some estimate can be made as to what the witness means by such expressions;¹⁷ and evidence as to the speed of the vehicle at some distance from the place of the homicide is of little or no force.¹⁸ Evidence of the distance a vehicle slid or skidded raises merely an inference as to its speed.¹⁹ The fact that a motor vehicle was being operated at an excessive or unlawful speed will not exclude the possibility that the failure of accused to regain control of his vehicle after it began to skid was due to a mechanical defect in the vehicle.²⁰ Speed alone, it has been held, will not sustain a conviction of the offense of criminal negligence in the operation of a motor vehicle resulting in death.²¹ In numer-

Circumstantial evidence and admissions

N.J.—State v. McGrath, 140 A. 452, 6 N.J.Misc. 217, affirmed 142 A. 918, 105 N.J.Law 251.

Circumstances considered

(1) Evidence that motorist made no inquiry as to extent of injury he inflicted, made no report of accident, and offered no aid, as the statute required him to do, supported inference that he drove without due caution and circumspection.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

(2) The distance the body of deceased was dragged and facts regarding accused's flight and concealment may be considered.—State v. Studebaker, 66 S.W.2d 877, 334 Mo. 471.

Matters which may be proved by circumstantial evidence

(1) The corpus delicti.—People v. Schneider, 195 N.E. 430, 360 Ill. 43.

(2) The identity of the vehicle and driver.—State v. Elliott, 110 A. 135, 94 N.J.Law 76—State v. McGrath, 140 A. 452, 6 N.J.Misc. 217, affirmed 142 A. 918, 105 N.J.Law 251.

7. Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 646.

Best proof available

The law demands the best proof available.—State v. Simlor, supra.

8. Ala.—Lightfoot v. State, 34 So.2d 614, 33 Ala.App. 409, certiorari denied 34 So.2d 619, 250 Ala. 392.

Evidence held insufficient

Ill.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451.

9. N.Y.—People v. Jackson, 8 N.Y. S.2d 939, 255 App.Div. 688.

10. Ga.—Bland v. State, 158 S.E. 773, 43 Ga.App. 342.

Ill.—People v. Burgard, 36 N.E.2d 558, 377 Ill. 322.

Mo.—State v. Simler, 167 S.W.2d 376, 350 Mo. 616.

N.Y.—People v. Jackson, 8 N.Y.S.2d 939, 255 App.Div. 688.

Wis.—State v. Miller, 19 N.W.2d 271, 247 Wis. 339.

Evidence held insufficient

(1) To sustain conviction of voluntary manslaughter.—Wilson v. Commonwealth, 147 S.W.2d 62, 285 Ky. 136.

(2) Evidence as consistent with accused's innocence as with his guilt.—Vanhorn v. Commonwealth, 40 S.W.2d 372, 239 Ky. 833.

11. Iowa.—State v. Blewen, 151 N.W. 102, 169 Iowa 256.

Indifference to fate

Accused's lack of sympathy and interest for deceased, who was seen to depart from accused's moving automobile to surface of highway and his total indifference to her fate after his automobile was stopped weakened any suggestion that he was free of blame for the injuries inflicted on her.—Bowie v. Commonwealth, 35 S.E.2d 345, 184 Va. 381.

Flight from scene

Accused's flight from scene of collision without any effort to ascertain extent of injuries caused by his act, or to aid injured person, could be taken into consideration as evidence of guilt.—People v. Herkless, 196 N.E. 829, 361 Ill. 32—People v. Smaszcz, 176 N.E. 768, 344 Ill. 494.

12. Iowa.—State v. Salmer, 164 N.W. 620, 181 Iowa 280.

Extent of intoxication

Evidence that the death was due to the driver's intoxication to an extent constituting culpable negligence, and not merely that it was caused while he was under the influence of intoxicating liquor, is required in some jurisdictions.—Cutshall v. State, 4 So.2d 289, 191 Miss. 764.

13. Pa.—Commonwealth v. Aurick, 10 A.2d 22, 138 Pa.Super. 180.

Statutory method not required

The method of measuring speed as provided in the speed limitation statute is not indispensable.—Commonwealth v. Aurick, supra—Commonwealth v. Kurtz, 33 Pa.Dist. & Co. 661.

14. City speed ordinance was held evidence that accused was doing a lawful act in an improper manner, although not conclusive of that fact.—Nichols v. State, 63 S.W.2d 655, 187 Ark. 999.

15. Pa.—Commonwealth v. Hatch, 27 A.2d 742, 149 Pa.Super. 289.

16. Okl.—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323.

17. Wis.—Ronning v. State, 200 N.W. 394, 184 Wis. 651.

18. Wis.—Ronning v. State, supra.

19. Wis.—Ronning v. State, supra.

20. Ga.—Huntsinger v. State, 36 S.E.2d 92, 200 Ga. 127.

21. N.Y.—People v. Gardner, 8 N.Y.S.2d 917, 255 App.Div. 683.

ous cases the evidence, or particular evidence, has been held sufficient²² or insufficient²³ to show that accused was driving at an excessive, dangerous, or unlawful speed.

(4) Particular Offenses and Elements Thereof

Pursuant to the general rules relative to the weight and sufficiency of the evidence in criminal cases, the courts have frequently held particular evidence sufficient or insufficient to establish a particular element of a criminal homicide by operation of a motor vehicle or to sustain a conviction therefor.

In accordance with the general rules governing

the weight and sufficiency of the evidence in criminal cases, the courts in various cases have held the evidence sufficient to support particular findings or to establish specific elements of the offense,²⁴ such as to establish the corpus delicti,²⁵ the death of the person for whose homicide accused is on trial,²⁶ that accused was the driver of the vehicle that caused the death,²⁷ or that the motor vehicle of accused was the one that caused the death of the deceased,²⁸ or to show intent to kill,²⁹ or negligence of varying degrees or character,³⁰ or that accused was intoxicated or under the influence of intoxicating liquor at the time of the accident,³¹

22. Cal.—People v. Flores, 187 P.2d 910, 83 Cal.App.2d 11—People v. Black, 295 P. 87, 111 Cal.App. 90, vacation of judgment denied 300 P. 43, 114 Cal.App. 468

Ga.—Payne v. State, 40 S.E.2d 759, 74 Ga.App. 646.

Neb.—Benton v. State, 247 N.W. 21, 124 Neb. 485.

Tenn.—McGoldrick v. State, 21 S.W. 2d 390, 159 Tenn. 667.

Tex.—Cole v. State, 125 S.W.2d 575, 136 Tex. Cr. 401.

Wash.—State v. Carlsen, 136 P.2d 183, 17 Wash.2d 573

42 C.J. p 1362 note 65 [d] (3).

23. Pa.—Commonwealth v. Ushka, 198 A. 465, 130 Pa. Super. 600
Wyo.—Thompson v. State, 283 P. 151, 41 Wyo. 72.

Place to which needle on speedometer pointed after the collision was held insufficient to show the speed of the vehicle at the time of the collision—State v. Benton, 182 S.E. 690, 209 N.C. 27.

24. Evidence held to warrant finding

(1) That if accused, when he sought to pass vehicle ahead, had looked he could easily have seen approaching automobile when he made left turn into its path—Henderson v. State, 25 So.2d 133, 199 Miss. 629.

(2) That taillight of motor vehicle of deceased was burning before the collision—State v. Carlsen, 136 P.2d 183, 17 Wash.2d 573.

Evidence held sufficient

To show that accident occurred on public highway as alleged—Moore v. State, 150 S.W.2d 91, 141 Tex. Cr. 570—O'Conner v. State, 88 S.W.2d 1048, 129 Tex. Cr. 509.

25. Cal.—People v. Lett, 177 P.2d 47, 77 Cal.App.2d 917.

D.C.—Ridgell v. U. S., Mun.App., 54 A.2d 679.

Fla.—Hulst v. State, 166 So. 828, 123 Fla. 315.

Ill.—People v. Tobin, 15 N.E.2d 687, 369 Ill. 73—People v. Schneider, 195 N.E. 430, 360 Ill. 43.

42 C.J. p 1362 note 65 [a].

Independent evidence not required.
Corpus delicti need not necessarily

be shown by testimony independent of that of identity or guilt of offender—Thompson v. State, 283 P. 151, 41 Wyo. 72.

26. Cal.—People v. Wilson, 177 P.2d 567, 78 Cal.App.2d 108.

Ill.—People v. Schneider, 195 N.E. 430, 360 Ill. 43.

27. Cal.—People v. Forthun, 105 P. 2d 378, 40 Cal.App.2d 656—People v. Leach, 31 P.2d 149, 137 Cal. App. 753—People v. Black, 295 P. 87, 111 Cal. App. 90, vacation of judgment denied 300 P. 43, 114 Cal. App. 468—People v. Leutholtz, 283 P. 292, 102 Cal.App. 493.

Fla.—Hyman v. State, 12 So.2d 437, 152 Fla. 446.

Ga.—Howard v. State, 179 S.E. 553, 51 Ga. App. 24.

Ky.—Newcomb v. Commonwealth, 124 S.W.2d 486, 276 Ky. 362.

Tex.—Brittain v. State, 139 S.W.2d 586, 139 Tex. Cr. 263—West v. State, 139 S.W.2d 90, 139 Tex. Cr. 177—Van Zandt v. State, 117 S.W.2d 1097, 135 Tex. Cr. 276.

Va.—Wagner v. Commonwealth, 18 S.E.2d 888, 179 Va. 387.

28. Ky.—Newcomb v. Commonwealth, 124 S.W.2d 486, 276 Ky. 362.

29. Tex.—Duhon v. State, 125 S.W. 2d 550, 136 Tex. Cr. 404.

30. Utah.—State v. Olsen, 160 P.2d 427, 108 Utah 377, 160 A.L.R. 508.

Criminal carelessness of vehicle owner

D.C.—Story v. U. S., 16 F.2d 342, 57 App. D.C. 3, 53 A.L.R. 246, certiorari denied 47 S.Ct. 576, 274 U.S. 739, 71 L.Ed. 1318.

Criminal negligence

Idaho.—State v. Gee, 284 P. 845, 48 Idaho 688.

Ill.—People v. Przybyl, 6 N.E.2d 848, 365 Ill. 515.

Utah.—State v. Riddle, 188 P.2d 449.

Culpable negligence

Fla.—Hulst v. State, 166 So. 828, 123 Fla. 315.

Miss.—Jones v. State, 35 So.2d 706—Wells v. State, 139 So. 859, 162 Miss. 617.

N.Y.—People v. Farley, 298 N.Y.S.

876, 252 App. Div. 811, affirmed 14 N.E.2d 190, 277 N.Y. 617.

N.C.—State v. Hough, 42 S.E.2d 659, 227 N.C. 596.

42 C.J. p 1362 note 65 [c].

Gross negligence

Cal.—People v. Leitgeb, 176 P.2d 384, 77 Cal.App.2d 761.

Conn.—State v. Carty, 180 A. 287, 120 Conn. 231.

Gross negligence indicating wanton disregard of human life

Neb.—Cowan v. State, 2 N.W.2d 111, 140 Neb. 837.

Gross and culpable negligence

D.C.—Nestlerode v. U. S., 122 F.2d 56, 74 App. D.C. 276.

Gross or criminal negligence

Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga. App.2d 325.

Gross, wanton, and culpable misconduct

Va.—Bell v. Commonwealth, 195 S. E. 675, 170 Va. 597.

Driving in reckless and grossly negligent manner

Minn.—State v. Bolsinger, 21 N.W. 2d 480, 221 Minn. 154.

Driving recklessly and wantonly

Ky.—Largent v. Commonwealth, 97 S.W.2d 538, 265 Ky. 598.

Driving without due caution and circumspection

Ark.—Phillips v. State, 161 S.W.2d 747, 204 Ark. 205.

Prima facie case of criminal negligence

Ga.—Thomas v. State, 38 S.E.2d 188, 73 Ga. App. 803.

Place

Proof of the exact location of the impact is not required in order to establish gross negligence.—People v. Flores, 187 P.2d 910, 83 Cal.App.2d 11.

31. Fla.—Graives v. State, 172 So. 716, 127 Fla. 182.

Ga.—Powell v. State, 18 S.E.2d 678, 193 Ga. 398—Payne v. State, 40 S. E.2d 759, 74 Ga. App. 646.

Idaho.—State v. Neil, 74 P.2d 588, 58 Idaho 359.

Tenn.—McGoldrick v. State, 21 S.W. 2d 390, 159 Tenn. 667—Keller v.

or was operating his motor vehicle in violation of statutes regulating the operation of motor vehicles,³² or that accused's vehicle was on the wrong or left side of the highway or street,³³ or that the contributory negligence of the deceased, if any,

was not the cause of the accident.³⁴

The evidence has also been held sufficient to sustain a conviction for murder,³⁵ manslaughter generally,³⁶ or, likewise, to sustain a conviction of

State, 299 S.W. 803, 155 Tenn. 633, 59 A.L.R. 685.

Tex.—Flowers v. State, Cr., 202 S.W. 2d 462—McWhirter v. State, 180 S.W.2d 364, 147 Tex.Cr. 268—Moynahan v. State, 146 S.W.2d 376, 140 Tex.Cr. 540—Totten v. State, 113 S.W.2d 194, 134 Tex.Cr. 62—McKee v. State, 102 S.W.2d 1058, 32 Tex. Cr. 67—O'Conner v. State, 88 S.W.2d 1048, 129 Tex.Cr. 509.

Utah.—State v. Capp, 176 P.2d 873. Va.—Albert v. Commonwealth, 27 S.E.2d 177, 181 Va. 894.

42 C.J. p 1362 note 65 [d] (2).

32. Ga.—Powell v. State, 18 S.E.2d 678, 193 Ga. 398.

33. Cal.—People v. Dallas, 109 P.2d 409, 42 Cal.App.2d 596.

Utah.—State v. Riddle, 188 P.2d 449. 42 C.J. p 1362 note 65 [d] (1).

34. Minn.—State v. Bolsinger, 21 N.W.2d 480, 221 Minn. 154.

35. Ga.—Powell v. State, 18 S.E.2d 678, 193 Ga. 398—Vaughn v. State, 18 S.E.2d 469, 193 Ga. 282—Meadows v. State, 199 S.E. 133, 186 Ga. 592—Jones v. State, 194 S.E. 216, 186 Ga. 68—Butler v. State, 173 S.E. 856, 178 Ga. 700.

Okl.—Williams v. State, 74 P.2d 632, 63 Okl.Cr. 234—Ware v. State, 288 P. 374, 47 Okl.Cr. 434.

Tex.—Brittain v. State, 139 S.W.2d 586, 139 Tex.Cr. 262—Totten v. State, 113 S.W.2d 194, 134 Tex.Cr. 62—Hatley v. State, 109 S.W.2d 1062, 138 Tex.Cr. 232—Spivay v. State, 105 S.W.2d 256, 132 Tex.Cr. 474—Norman v. State, 52 S.W.2d 1051, 121 Tex.Cr. 433.

Va.—Lawrence v. Commonwealth, 26 S.E.2d 54, 181 Va. 582.

Murder of arresting officer

Ga.—Booker v. State, 190 S.E. 356, 183 Ga. 822.

Murder with malice

Tex.—Cockrell v. State, 117 S.W.2d 1105, 135 Tex.Cr. 218.

Murder without malice

Tex.—Jenkins v. State, 175 S.W.2d 83, 146 Tex.Cr. 364—Fox v. State, 165 S.W.2d 733, 145 Tex.Cr. 71—Maddgen v. State, 104 S.W.2d 518, 132 Tex.Cr. 307—Hardegree v. State, 104 S.W.2d 24, 132 Tex.Cr. 212.

Murder in second degree

Ala.—Reed v. State, 142 So. 442, 225 Ala. 219—Williams v. State, 7 So. 2d 511, 30 Ala.App. 437.

D.C.—Nestlerode v. U. S., 122 F.2d 56, 74 App.D.C. 276.

N.C.—State v. Peterson, 194 S.E. 498, 212 N.C. 758.

36. Ariz.—Steffani v. State, 42 P.2d 615, 45 Ariz. 210.

Cal.—People v. Von Eckartsberg, 23 P.2d 819, 133 Cal.App. 1—People v. Martin, 300 P. 108, 114 Cal.App. 337—People v. Emmons, 299 P. 541, 114 Cal.App. 26—People v. Johnston, 269 P. 560, 93 Cal.App. 484.

Fla.—Laster v. State, 33 So.2d 728—Lipsy v. State, 16 So.2d 439, 154 Fla. 32—Hyman v. State, 12 So.2d 437, 152 Fla. 446—Mongeon v. State, 3 So.2d 371, 147 Fla. 661—Williams v. State, 2 So.2d 301, 147 Fla. 91—Cochran v. State, 193 So. 535, 141 Fla. 467—Roland v. State, 192 So. 602, 140 Fla. 692—Peterson v. State, 175 So. 519, 128 Fla. 717—Franklin v. State, 163 So. 55, 120 Fla. 586—Sallas v. State, 124 So. 27, 98 Fla. 464.

Ga.—Cammons v. State, 2 S.E.2d 205, 59 Ga.App. 759.

Idaho.—State v. Neil, 74 P.2d 586, 58 Idaho 359.

Ill.—People v. Littwin, 39 NE 2d 5, 378 Ill. 567—People v. Hansen, 38 NE 2d 738, 378 Ill. 491—People v. Jeffers, 25 NE 2d 35, 372 Ill. 590, certiorari denied Jeffers v. People of State of Illinois, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407—People v. Bader, 23 NE 2d 691, 372 Ill. 345, certiorari denied Bader v. People of State of Illinois, 61 S.Ct. 19, 311 U.S. 610, 85 L.Ed. 387—People v. Tobin, 15 NE 2d 687, 369 Ill. 73—People v. Przybyl, 6 NE 2d 848, 365 Ill. 515—People v. Peterson, 4 NE 2d 37, 364 Ill. 80—People v. Isbuhl, 2 NE 2d 84, 363 Ill. 264—People v. Wallace, 186 NE. 540, 353 Ill. 95—People v. Smaszcz, 176 NE 768, 344 Ill. 494—People v. Hladfield, 169 NE. 195, 337 Ill. 462—People v. Rewland, 167 NE. 10, 335 Ill. 432—People v. Glasebrook, 151 NE. 489, 320 Ill. 567—People v. Toohey, 149 NE 795, 319 Ill. 113.

Iowa.—State v. Richardson, 240 N.W. 695, affirmed 249 N.W. 211, 216 Iowa 809.

Me.—State v. Rist, 151 A. 104, 129 Me. 222.

Mass.—Commonwealth v. Maguire, 48 N.E.2d 665, 313 Mass. 669—Commonwealth v. Arone, 163 NE. 758, 265 Mass. 128.

Mich.—People v. Connor, 294 N.W. 74, 295 Mich. 1.

Miss.—Jones v. State, 35 So.2d 706—Cutshall v. State, 35 So.2d 318—Henderson v. State, 25 So.2d 133—Lee v. State, 7 So.2d 875, 192 Miss. 785—Brooks v. State, 4 So.2d 886, 192 Miss. 121—Wilson v. State, 161 So. 744, 173 Miss. 372.

Mo.—State v. Bolle, 201 S.W.2d 158—State v. Carter, 116 S.W.2d 21, 342

Mo. 439—State v. Tucker, 96 S.W. 2d 21, 339 Mo. 101—State v. Murphy, 23 S.W.2d 136, 324 Mo. 183.

Neb.—Cowan v. State, 2 N.W.2d 111, 140 Neb. 837—Dobrusky v. State, 299 N.W. 539, 140 Neb. 360, certiorari denied 62 S.Ct. 915, 315 U.S. 821, 86 L.Ed. 1218.

N.J.—State v. Gregory, 145 A. 4, 7 N.J.Misc. 238—State v. McGrath, 140 A. 452, 6 N.J.Misc. 217, affirmed 142 A. 918, 105 N.J.Law 251.

N.M.—State v. Harris, 70 P.2d 757, 41 N.M. 426.

N.C.—State v. Leonard, 141 S.E. 736, 195 N.C. 242.

S.D.—State v. Nuzum, 234 N.W. 665, 58 S.D. 6.

Tenn.—Smith v. State, 21 S.W.2d 400, 159 Tenn. 674.

Va.—Henson v. Commonwealth, 183 S.E. 435, 165 Va. 821. 30 C.J. p 316 note 68 [e].

Statutory manslaughter

Fla.—Hulst v. State, 166 So. 828, 123 Fla. 315.

While accused somewhat under influence of intoxicating liquor

Iowa.—State v. Graff, 290 N.W. 97, 228 Iowa 159.

While accused intoxicated or under influence of intoxicating liquor

Ariz.—State v. Ponce, 124 P.2d 543, 59 Ariz. 158.

Cal.—People v. Haskins, 85 P.2d 498, 29 Cal.App.2d 715—People v. Leach, 31 P.2d 449, 137 Cal.App. 753—People v. Miller, 297 P. 40, 112 Cal. App. 535—People v. Gagan, 287 P. 543, 105 Cal.App. 389.

Fla.—Chapman v. State, 26 So.2d 509—Moss v. State, 19 So.2d 408, 155 Fla. 20—Touchton v. State, 18 So. 2d 752, 154 Fla. 547—Barrington v. State, 199 So. 320, 145 Fla. 61—Ates v. State, 194 So. 286, 141 Fla. 502—Howell v. State, 187 So. 163, 136 Fla. 582—Graives v. State, 172 So. 716, 127 Fla. 182—Whitman v. State, 122 So. 567, 97 Fla. 988.

Ill.—People v. Pierce, 15 N.E.2d 845, 369 Ill. 172.

Iowa.—State v. Neville, 293 N.W. 560, 228 Iowa 1225.

Mo.—State v. Medlin, 197 S.W.2d 626, 355 Mo. 564.

Neb.—Benton v. State, 247 N.W. 21, 124 Neb. 485—Crawford v. State, 216 N.W. 294, 116 Neb. 125.

Okl.—Haithcock v. State, 74 P.2d 641, 63 Okl.Cr. 276.

Wyo.—State v. Cantrell, 186 P.2d 539.

Failure to sustain charge of different offense

Fact that evidence of intoxication was insufficient to sustain a count

voluntary manslaughter³⁷ or involuntary manslaughter³⁸ or of manslaughter in the first,³⁹ or | second⁴⁰ degree or, likewise, to sustain a conviction

charging driving while intoxicated was held not to affect manslaughter verdict amply supported regardless of such evidence.—*People v. Emmons*, 299 P. 541, 114 Cal.App. 26.

37. Ky.—*Salisbury v. Commonwealth*, 211 S.W.2d 163, 307 Ky. 381—*Raymer v. Commonwealth*, 197 S.W.2d 903, 303 Ky. 418—*Dixon v. Commonwealth*, 194 S.W.2d 655, 302 Ky. 353—*Swango v. Commonwealth*, 124 S.W.2d 768, 276 Ky. 467—*Newcomb v. Commonwealth*, 124 S.W.2d 486, 276 Ky. 362—*Jones v. Commonwealth*, 116 S.W.2d 984, 273 Ky. 444—*Sloan v. Commonwealth*, 104 S.W.2d 988, 268 Ky. 241—*Largent v. Commonwealth*, 97 S.W.2d 538, 265 Ky. 598—*King v. Commonwealth*, 70 S.W.2d 667, 253 Ky. 775—*Colvin v. Commonwealth*, 57 S.W.2d 487, 247 Ky. 480.

38. Ark.—*Phillips v. State*, 161 S.W. 2d 747, 204 Ark. 205.

D.C.—*Nestlerode v. U. S.*, 122 F.2d 66, 74 App.D.C. 276.

Ga.—*Webb v. State*, 23 S.E.2d 578, 68 Ga.App. 466—*Weaver v. State*, 21 S.E.2d 542, 67 Ga.App. 692—*Passley v. State*, 8 S.E.2d 131, 62 Ga.App. 88—*Stephens v. State*, 195 S.E. 477, 57 Ga.App. 390—*Swearingen v. State*, 187 S.E. 690, 54 Ga. App.2d 265—*Wallace v. State*, 159 S.E. 905, 43 Ga.App. 785.

Idaho.—*State v. Monteith*, 20 P.2d 1023, 53 Idaho 30—*State v. Brooks*, 288 P. 894, 49 Idaho 404.

Ill.—*People v. Herkless*, 196 N.E. 829, 361 Ill. 32—*People v. Flanagan*, 170 N.E. 265, 338 Ill. 353.

Ind.—*Cross v. State*, 52 N.E.2d 727, 222 Ind. 241—*Roby v. State*, 17 N.E.2d 800, 215 Ind. 55—*Minardo v. State*, 183 N.E. 548, 204 Ind. 422—*Blackburn v. State*, 180 N.E. 180, 203 Ind. 332—*Kraft v. State*, 171 N.E. 1, 202 Ind. 44.

Ky.—*Feldman v. Commonwealth*, 79 S.W.2d 960, 258 Ky. 277.

Mich.—*People v. Layman*, 299 N.W. 840, 299 Mich. 141.

Mont.—*State v. Robinson*, 96 P.2d 265, 109 Mont. 322.

Nev.—*State v. Beyers*, 71 P.2d 1044, 58 Nev. 125.

N.M.—*State v. Turney*, 65 P.2d 869, 41 N.M. 150.

N.C.—*State v. Huggins*, 199 S.E. 926, 214 N.C. 568.

Pa.—*Commonwealth v. Mayberry*, 138 A. 686, 290 Pa. 195—*Commonwealth v. Amecca*, Super., 50 A.2d 725—*Commonwealth v. Holman*, Super., 50 A.2d 720—*Commonwealth v. Carroll*, 200 A. 139, 131 Pa.Super. 357—*Commonwealth v. Matteo*, 197 A. 787, 130 Pa.Super. 524—*Commonwealth v. Magoscy*, 96 Pa.Super. 547—*Commonwealth v. Ochs*, 91 Pa.Super. 528—*Com-*

monwealth v. Hipple, 57 Dauph.Co. 156—*Commonwealth v. Dull*, 50 Lanc.Rev. 151—*Commonwealth v. Handa*, Quar.Sess., 27 Wash.Co. 82. Tenn.—*Reed v. State*, 110 S.W.2d 308, 172 Tenn. 73.

Utah.—*State v. Thatcher*, 157 P.2d 258, 108 Utah 63—*State v. Rasmussen*, 68 P.2d 176, 92 Utah 357.

Va.—*Bowie v. Commonwealth*, 35 S.E.2d 345, 184 Va. 381—*Wagner v. Commonwealth*, 18 S.E.2d 888, 179 Va. 387—*Bell v. Commonwealth*, 195 S.E. 675, 170 Va. 597—*Salter v. Commonwealth*, 181 S.E. 435, 165 Va. 744.

30 C.J. p 317 note 71 [a].

Driver under influence of intoxicating liquor

Ark.—*Benson v. State*, 208 S.W.2d 767, 212 Ark. 905—*Craig v. State*, 120 S.W.2d 23, 196 Ark. 761.

Cal.—*People v. Crow*, 120 P.2d 686, 48 Cal.App.2d 666.

Ga.—*Howard v. State*, 179 S.E. 553, 51 Ga.App. 24.

Idaho.—*State v. Marshall*, 97 P.2d 657, 61 Idaho 81.

Pa.—*Commonwealth v. McConahy*, 29 A.2d 348, 151 Pa.Super. 26.

Tenn.—*Gentry v. State*, 198 S.W.2d 643, 184 Tenn. 299.

Utah.—*State v. Bushy*, 131 P.2d 510, 102 Utah 416, 144 A.L.R. 1468.

Va.—*Massie v. Commonwealth*, 15 S.E.2d 30, 177 Va. 883.

Driving while intoxicated

Ariz.—*Gibbs v. State*, 58 P.2d 1037, 48 Ariz. 25.

Ark.—*Comer v. State*, 204 S.W.2d 875, 212 Ark. 66—*Martin v. State*, 174 S.W.2d 242, 206 Ark. 151—*Nichols v. State*, 63 S.W.2d 655, 187 Ark. 999.

Cal.—*People v. Freeman*, 60 P.2d 333, 16 Cal.App.2d 101.

Ga.—*Land v. State*, 180 S.E. 649, 51 Ga.App. 438—*Heasley v. State*, 147 S.E. 781, 39 Ga.App. 550—*Clark v. State*, 132 S.E. 650, 35 Ga.App. 241.

Utah.—*State v. Capp*, 176 P.2d 873. Va.—*Albert v. Commonwealth*, 27 S.E.2d 177, 181 Va. 894.

Arising out of violation of traffic statutes

Idaho.—*State v. Salhus*, 189 P.2d 372. Pa.—*Commonwealth v. Waters*, 25 A.2d 766, 148 Pa.Super. 473.

Utah.—*State v. Newton*, 144 P.2d 290, 105 Utah 561.

In commission of unlawful act

Ga.—*Azar v. State*, 40 S.E.2d 590, 74 Ga.App. 610—*Thomas v. State*, 38 S.E.2d 188, 73 Ga.App. 803—*Tripp v. State*, 36 S.E.2d 121, 73 Ga.App. 322—*Johnson v. State*, 34 S.E.2d 555, 72 Ga.App. 534—*Bray v. State*, 27 S.E.2d 566, 70 Ga.App. 104—*Cole v. State*, 22 S.E.2d 529, 68 Ga.App. 179—*Jordan v. State*, 22

S.E.2d 194, 68 Ga.App. 139—*Manning v. State*, 19 S.E.2d 805, 67 Ga.App. 273—*Hunter v. State*, 16 S.E.2d 500, 65 Ga.App. 766—*Jackson v. State*, 198 S.E. 552, 58 Ga.App. 379—*Wiggins v. State*, 183 S.E. 626, 52 Ga.App. 414—*Bell v. State*, 183 S.E. 93, 52 Ga.App. 249—*Howard v. State*, 179 S.E. 553, 51 Ga.App. 24—*Moss v. State*, 158 S.E. 461, 43 Ga.App. 109—*Heasley v. State*, 147 S.E. 784, 39 Ga.App. 550.

In commission of unlawful, but not felonious, act

Va.—*Albert v. Commonwealth*, 27 S.E.2d 177, 181 Va. 894.

In commission of lawful act in an unlawful manner

Ga.—*Collins v. State*, 18 S.E.2d 24, 66 Ga.App. 325—*Kelly v. State*, 10 S.E.2d 417, 63 Ga.App. 231—*Croker v. State*, 197 S.E. 92, 57 Ga.App. 895. Vt.—*Albert v. Commonwealth*, 27 S.E.2d 177, 181 Va. 894.

In commission of lawful act without due caution

Ga.—*Nelson v. State*, 16 S.E.2d 502, 65 Ga.App. 769.

Prima facie case

W.Va.—*State v. Smith*, 193 S.E. 573, 119 W.Va. 347.

39. Ala.—*Jones v. State*, App. 34 So.2d 483—*McQueen v. State*, 13 So.2d 59, 31 Ala.App. 101, certiorari denied 13 So.2d 61, 244 Ala. 251—*Bryan v. State*, 12 So.2d 368, 31 Ala.App. 69—*Graham v. State*, 176 So. 382, 27 Ala.App. 505, certiorari denied 176 So. 384, 234 Ala. 653—*Reynolds v. State*, 134 So. 815, 24 Ala.App. 249, certiorari denied 134 So. 817, 223 Ala. 130.

Okl.—*Roberts v. State*, 166 P.2d 111, 82 Okl.Cr. 75—*Simons v. State*, 101 P.2d 852, 69 Okl.Cr. 265—*Tucker v. State*, 92 P.2d 595, 66 Okl.Cr. 335—*Green v. State*, 88 P.2d 907, 65 Okl.Cr. 463—*Haddock v. State*, 81 P.2d 339, 64 Okl.Cr. 353—*Jenkins v. State*, 45 P.2d 161, 57 Okl.Cr. 45—*Snodgrass v. State*, 2 P.2d 982, 52 Okl.Cr. 44.

Wis.—*Opanchar v. State*, 222 N.W. 245, 197 Wis. 454—*Maxon v. State*, 187 N.W. 753, 177 Wis. 379.

40. Ala.—*Wilson v. State*, 28 So.2d 616, 32 Ala.App. 591—*Bringhurst v. State*, 20 So.2d 885, 31 Ala.App. 608—*Crump v. State*, 191 So. 475, 29 Ala.App. 22, certiorari denied 191 So. 478, 238 Ala. 439—*Pratt v. State*, 171 So. 393, 27 Ala.App. 301. Minn.—*State v. Geary*, 239 N.W. 158, 184 Minn. 387—*State v. Jackson*, 231 N.W. 721, 181 Minn. 68—*State v. Mellin*, 228 N.W. 171, 179 Minn. 1—*State v. La Rose*, 221 N.W. 899, 175 Minn. 537—*State v. Kline*, 209 N.W. 881, 168 Minn. 263.

N.Y.—*People v. Farley*, 298 N.Y.S.

tion of manslaughter in fourth⁴¹ degree, or of manslaughter in the driving of a vehicle,⁴² or of negligent homicide,⁴³ or reckless homicide,⁴⁴ or of criminal negligence in the operation of a motor vehicle resulting in death,⁴⁵ or of causing the death of another by the operation of a motor vehicle while under the influence of intoxicating liquor,⁴⁶ or of operating a motor vehicle in such a careless, reckless, and negligent manner as to cause the death of another,⁴⁷ or of killing by driving a vehicle carelessly and needlessly,⁴⁸ or for operating a motor vehicle

so as to cause the death of another,⁴⁹ or for some other statutory homicide,⁵⁰ or of assault with intent to kill or murder,⁵¹ or to sustain the conviction of an owner or proprietor of a motor vehicle for a death resulting from its operation when driven by another.⁵²

On the other hand, in various cases the courts have held the evidence, or particular evidence, insufficient to show particular elements of the offense charged,⁵³ such as malice,⁵⁴ a specific intent

876, 252 App.Div. 811, affirmed 14 N.E.2d 190, 277 N.Y. 617.

Okl.—Ray v. State, Cr., 189 P.2d 620
—Roberts v. State, 166 P.2d 111, 82 Okl.Cr. 75—Clapp v. State, 120 P.2d 381, 78 Okl.Cr. 261, reversed on other grounds 124 P.2d 267, 74 Okl.Cr. 144—Wilson v. State, 105 P.2d 789, 70 Okl.Cr. 262—Philby v. State, 76 P.2d 412, 64 Okl.Cr. 1—Clark v. State, 73 P.2d 481, 63 Okl.Cr. 138—Henderson v. State, 49 P.2d 811, 58 Okl.Cr. 69—Berry v. State, 18 P.2d 285, 54 Okl.Cr. 154—Mannon v. State, 17 P.2d 522, 54 Okl.Cr. 227—McFadden v. State, 10 P.2d 731, 53 Okl.Cr. 287—Sprouse v. State, 3 P.2d 918, 52 Okl.Cr. 184—Smith v. State, 287 P. 1103, 46 Okl.Cr. 160—Ryan v. State, 283 P. 809, 46 Okl.Cr. 5—Gill v. State, 281 P. 163, 44 Okl.Cr. 324—Amsley v. State, 281 P. 160, 44 Okl.Cr. 382—Herndon v. State, 261 P. 378, 38 Okl.Cr. 338—Nail v. State, 242 P. 270, 33 Okl.Cr. 100.

41. Mo.—State v. Watson, 115 S.W. 1011, 216 Mo. 420.
Wis.—Christie v. State, 248 N.W. 920, 212 Wis. 136.

42. Cal.—People v. Marconi, 5 P.2d 974, 118 Cal.App. 683—People v. Halbert, 248 P. 969, 78 Cal.App. 598.

With gross negligence

Cal.—People v. Leitgeb, 176 P.2d 384, 77 Cal.App.2d 764.

Without gross negligence

Cal.—People v. Lett, 177 P.2d 47, 77 Cal.App.2d 917.

43. Cal.—People v. Wilson, 177 P.2d 567, 78 Cal.App.2d 108—People v. Gomez, 138 P.2d 788, 59 Cal.App.2d 417—People v. Murray, 136 P.2d 389, 58 Cal.App.2d 239—People v. Forthun, 105 P.2d 378, 40 Cal.App.2d 656—People v. Hudspeth, 102 P.2d 1088, 39 Cal.App.2d 300—People v. Goodale, 91 P.2d 163, 33 Cal.App.2d 80—People v. Warner, 80 P.2d 737, 27 Cal.App.2d 190—People v. Salazar, 73 P.2d 937, 23 Cal.App.2d 592—People v. Pryor, 61 P.2d 773, 17 Cal.App.2d 147.

D.C.—Robinson v. U. S., 156 F.2d 574, 81 U.S.App.D.C. 176.

Mich.—People v. Eger, 299 N.W. 803, 299 Mich. 49—People v. Beauchamp, 245 N.W. 784, 260 Mich. 491.

Tex.—Taubert v. State, 176 S.W.2d 955, 146 Tex.Cr. 582—Wallace v. State, 170 S.W.2d 762, 145 Tex.Cr. 625—Cole v. State, 125 S.W.2d 575, 136 Tex.Cr. 401—Stover v. State, 104 S.W.2d 48, 132 Tex.Cr. 356.
Wash.—State v. Carlsen, 136 P.2d 183, 17 Wash.2d 573.

As against defense based on epilepsy
Cal.—People v. Freeman, 142 P.2d 435, 61 Cal.App.2d 110

Negligent homicide in first degree

Tex.—Dunham v. State, 186 S.W.2d 820, 148 Tex.Cr. 329—Harley v. State, 165 S.W.2d 464, 145 Tex. Cr. 26.

Negligent homicide in second degree

Tex.—Walters v. State, Cr., 204 S.W. 2d 621—Harrison v. State, 156 S.W. 2d 983, 143 Tex.Cr. 51—Biscamp v. State, 154 S.W.2d 466, 142 Tex.Cr. 401—Moore v. State, 150 S.W.2d 91, 141 Tex.Cr. 570—West v. State, 139 S.W.2d 90, 139 Tex.Cr. 177—Sage v. State, 124 S.W.2d 376, 136 Tex.Cr. 252—Vasquez v. State, 52 S.W.2d 1056, 121 Tex.Cr. 478.

44. S.C.—State v. McCracken, 43 S.E.2d 607, 211 S.C. 52.

45. Minn.—State v. Bolsinger, 21 N.W.2d 480, 221 Minn. 154.

Evidence held sufficient to sustain indictment

N.Y.—People v. Braunstein, 18 N.Y.S. 2d 12, 258 App.Div. 1089

By operation in reckless, negligent, or careless manner

Colo.—Patton v. People, 168 P.2d 266, 114 Colo. 534—Stevens v. People, 51 P.2d 1022, 97 Colo. 559.

47. Ky.—Dunn v. Commonwealth, 154 S.W.2d 707, 287 Ky. 622.

48. N.J.—State v. Hedinger, 19 A.2d 322, 126 N.J.Law 288, affirmed 23 A.2d 409, 127 N.J.Law 564—State v. Linarducci, 3 A.2d 796, 122 N.J.Law 137, affirmed 8 A.2d 576, 123 N.J. Law 228.

49. R.I.—State v. Ruzzo, 7 A.2d 693, 63 R.I. 138.

By reckless driving

R.I.—State v. Landri, 141 A. 607, reargument denied 142 A. 164.

50. Conn.—State v. Carty, 180 A. 287, 120 Conn. 231.

51. Ga.—Payne v. State, 40 S.E.2d

759, 74 Ga.App. 646—Easley v. State, 175 S.E. 23, 49 Ga.App. 275—Sudan v. State, 155 S.E. 102, 41 Ga. App. 828—Goldin v. State, 142 S.E. 757, 38 Ga.App. 110—Chambliss v. State, 139 S.E. 80, 37 Ga.App. 124.
Okl.—Fay v. State, 71 P.2d 768, 62 Okl.Cr. 350.

42 C.J. p 1317 note 85 [a] (3).

52. Neb.—Puckett v. State, 15 N.W. 2d 63, 144 Neb. 876.

N.C.—State v. Trott, 130 S.E. 627, 190 N.C. 674, 42 A.L.R. 1114.

Wash.—State v. Hopkins, 265 P. 481, 147 Wash. 198, 59 A.L.R. 688, certiorari denied Hopkins v State of Washington, 49 S.Ct. 21, 278 U.S. 617, 73 L.Ed 540

As aider and abettor of intoxicated driver

N.C.—State v. Gibbs, 44 S.E.2d 201, 227 N.C. 677.

Inexperienced driver

Mich.—People v. Ingersoll, 222 N.W. 765, 245 Mich 530

Of involuntary manslaughter

Ga.—Moreland v. State, 139 S.E. 77, 164 Ga. 467, answers to certified questions conformed to 139 S.E. 361, 37 Ga.App. 180—Miller v. State, 176 S.E. 688, 49 Ga.App. 683.

53. Evidence held insufficient

(1) To identify accused with the accident.—People v. Burgard, 36 N.E. 2d 558, 377 Ill. 322.

(2) To show that accused was driving the vehicle at the time of the accident.

N.Y.—People v. Jackson, 8 N.Y.S.2d 939, 255 App.Div. 688.

Va.—Fentress v. Commonwealth, 156 S.E. 361, 155 Va. 1059.

(3) To show that the motor vehicle of accused was the one that caused the accident.

Ill.—People v. Burgard, 36 N.E.2d 558, 377 Ill. 322.

Wis.—State v. Miller, 19 N.W.2d 271, 247 Wis. 339.

(4) To show that the person accused ran into or injured was the one named in the indictment.—People v. Cutshaw, 176 N.E. 772, 344 Ill. 503—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

54. Tex.—Freeman v. State, 37 S.W. 2d 162, 114 Tex.Cr. 624.

to kill,⁵⁵ willful misconduct,⁵⁶ negligence of varying degrees or character,⁵⁷ or that accused was driving while intoxicated or under the influence of intoxicating liquor,⁵⁸ or to overcome the presumption of innocence in favor of accused.⁵⁹

In various cases the evidence has also been held

insufficient to sustain a conviction for murder,⁶⁰ manslaughter generally,⁶¹ or of voluntary⁶² or involuntary⁶³ manslaughter, or manslaughter in the first⁶⁴ or second⁶⁵ degree, or of negligent homicide,⁶⁶ or of the offense of criminal negligence in operation of a vehicle resulting in death,⁶⁷ or of

55. Ga.—Smith v. State, 147 S.E. 781, 39 Ga.App. 552.

56. Conn.—State v. Carty, 180 A. 287, 120 Conn. 231.

57. Criminal negligence

Fla.—Stephens v. State, 191 So. 294, 140 Fla. 163.

Mont.—State v. Bast, 151 P.2d 1009, 116 Mont. 329.

N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

Utah.—State v. Guthell, 98 P.2d 943, 98 Utah 205.

Culpable negligence

Fla.—Graives v. State, 172 So. 716, 127 Fla. 182.

N.Y.—People v. Massa, 16 N.Y.S.2d 956.

Culpable or criminal negligence

Okl.—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323.

Gross or culpable negligence

Me.—State v. Ela, 8 A.2d 589, 136 Me. 303.

Willful and wanton negligence

Ill.—People v. Burgard, 36 N.E.2d 558, 377 Ill. 322.

Reckless disregard or willful indifference to the safety of others

Cal.—People v. Montes, 131 P.2d 581, 56 Cal.App.2d 30.

Driving in a rash or reckless manner

Pa.—Commonwealth v. Ushka, 198 A. 465, 130 Pa.Super. 600.

58. Cal.—People v. Hurley, 56 P.2d 978, 13 Cal.App.2d 208.

Idaho.—State v. Taylor, 177 P.2d 468, 67 Idaho 313—State v. Frank, 1 P. 2d 181, 51 Idaho 21.

Iowa.—State v. Graff, 290 N.W. 97, 228 Iowa 159.

N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

Pa.—Commonwealth v. Stosny, 31 A. 2d 582, 152 Pa.Super. 236.

Tenn.—Hurt v. State, 201 S.W.2d 988, 184 Tenn. 608.

Wyo.—State v. McComb, 239 P. 526, 33 Wyo. 346, 41 A.L.R. 717.

59. Ala.—Lightfoot v. State, 34 So. 2d 614, 33 Ala.App. 409, certiorari denied 34 So.2d 619, 250 Ala. 392.

60. Ga.—Huntsinger v. State, 36 S. E.2d 92, 200 Ga. 127—Ivey v. State, 12 S.E.2d 879, 191 Ga. 461.

Ky.—Holmes v. Commonwealth, 291 S.W. 383, 218 Ky. 314.

Okl.—Daft v. State, 42 P.2d 146, 56 Okl.Cr. 449.

Tex.—Hittson v. State, 114 S.W.2d 881, 134 Tex.Cr. 131—Freeman v. State, 27 S.W.2d 162, 114 Tex.Cr. 624—Mayfield v. State, 25 S.W.2d

833, 114 Tex.Cr. 425—Williams v. State, Cr., 18 S.W.2d 1073.

Murder in second degree

Ala.—Jordan v. State, 157 So. 485, 229 Ala. 415.

Pa.—Commonwealth v. McLaughlin, 142 A. 213, 293 Pa. 218.

W.Va.—State v. Tharp, 180 S.E. 97, 116 W.Va. 256.

61. Fla.—Savage v. State, 11 So.2d 778, 152 Fla. 367—Benton v. State, 172 So. 858, 127 Fla. 206—Hawkins v. State, 163 So. 133, 120 Fla. 905—Thompson v. State, 146 So. 201, 108 Fla. 370.

Ga.—Shupe v. State, 136 S.E. 331, 36 Ga.App. 286.

Ill.—People v. Cutshaw, 176 N.E. 772, 344 Ill. 503—People v. Allen, 151 N.E. 676, 321 Ill. 11.

Iowa.—State v. Weltha, 292 N.W. 148, 228 Iowa 519.

Me.—State v. Ela, 8 A.2d 589, 136 Me. 303.

Mich.—People v. Orr, 220 N.W. 777, 243 Mich. 300.

Mont.—State v. Bast, 151 P.2d 1009, 116 Mont. 329—State v. Powell, 138 P.2d 949, 114 Mont. 571.

Va.—Terry v. Commonwealth, 198 S. E. 911, 171 Va. 505.

By person moving house on highway

Wash.—State v. Ramser, 136 P.2d 1013, 17 Wash.2d 581.

By culpably negligent operation of vehicle

Fla.—Russ v. State, 191 So. 296, 140 Fla. 217—Graives v. State, 172 So. 716, 127 Fla. 182.

Mo.—State v. Schneiders, 137 S.W.2d 439, 345 Mo. 899.

N.C.—State v. Benton, 182 S.E. 690, 209 N.C. 27.

Evidence held insufficient to establish prima facie case

Miss.—Smith v. State, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

62. Ala.—Willis v. State, 197 So. 62, 29 Ala.App. 365, certiorari denied 197 So. 67, 240 Ala. 52.

Ky.—Hawpe v. Commonwealth, 27 S. W.2d 394, 234 Ky. 27.

63. Ga.—Foy v. State, 150 S.E. 917, 40 Ga.App. 617.

Ill.—People v. Crego, 70 N.E.2d 578, 395 Ill. 451—People v. Lynn, 52 N. E.2d 166, 385 Ill. 165.

Ky.—Carnes v. Commonwealth, 129 S.W.2d 543, 278 Ky. 771.

N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

N.C.—State v. Lowery, 27 S.E.2d 638, 223 N.C. 598—State v. Miller, 18 S. E.2d 143, 220 N.C. 660.

Okl.—Freeman v. State, 101 P.2d 653, 69 Okl.Cr. 164.

Pa.—Commonwealth v. Stosny, 31 A. 2d 582, 152 Pa.Super. 236—Commonwealth v. Williams, 1 A.2d 812, 133 Pa.Super. 104—Commonwealth v. Ushka, 198 A. 465, 130 Pa.Super. 600—Commonwealth v. Bender, Com.Pl., 58 Dauph.Co. 21—Commonwealth v. Scott, Quar.Sess., 21 Wash.Co. 167.

Tenn.—Weaver v. State, 206 S.W.2d 293, 185 Tenn. 276—Potter v. State, 124 S.W.2d 232, 174 Tenn. 118—Claybrook v. State, 51 S.W.2d 499, 161 Tenn. 440—Hiller v. State, 50 S. W.2d 225, 164 Tenn. 388.

Utah.—State v. Adamson, 125 P.2d 429, 101 Utah 534—State v. Guthell, 98 P.2d 943, 98 Utah 205.

In commission of unlawful act

Ga.—Burke v. State, 183 S.E. 628, 52 Ga.App. 408.

Traversing steep descent

In a prosecution for involuntary manslaughter under a count for killing a person while driving an automobile without having it under control while approaching or traversing a bridge and steep descent, as required by law, testimony as to the place of the accident was held to negative the charge that accused was approaching or traversing a steep descent—People v. Harrigan, 187 N.W. 306, 218 Mich. 235.

64. Ala.—Itainey v. State, 17 So.2d 683, 31 Ala.App. 271, modified on other grounds 17 So.2d 687, 245 Ala. 458.

S.D.—State v. Rossman, 268 N.W. 702, 64 S.D. 532—State v. Nicholas, 253 N.W. 737, 62 S.D. 511.

While transporting liquor

S.D.—State v. Nicholas, supra.

65. Ala.—Lightfoot v. State, 34 So. 2d 614, 33 Ala.App. 409, certiorari denied 34 So.2d 619, 250 Ala. 392—Copeland v. State, 27 So.2d 224, 32 Ala.App. 473—Barnett v. State, 184 So. 702, 28 Ala.App. 293, certiorari denied 184 So. 709, 236 Ala. 666.

Okl.—Chandler v. State, 146 P.2d 598, 79 Okl.Cr. 323—Murry v. State, 292 P. 389, 48 Okl.Cr. 430.

66. Cal.—People v. Montes, 131 P.2d 581, 56 Cal.App.2d 30—People v. Young, 129 P.2d 353, 20 Cal.2d 832.

Negligent homicide in first degree

Tex.—Johnson v. State, Cr., 207 S. W.2d 871.

67. Minn.—State v. Homme, 32 N.W. 2d 151, 226 Minn. 83.

N.Y.—People v. Bearden, 49 N.E.2d

killing by operating a vehicle at excessive speed,⁶⁸ or of assault with intent to murder,⁶⁹ or to sustain the conviction of an owner or proprietor of a motor vehicle for a death resulting from its operation when driven by another.⁷⁰

§ 667. — Questions of Law and Fact

It is the province of the court, in prosecutions for homicides occasioned through the operation of motor vehicles and for assault with intent to kill or murder, to determine questions of law, and that of the jury to determine issues of fact.

In accordance with the rules in prosecutions for homicide generally, considered in Homicide §§ 338-353, in prosecutions for homicides occasioned through the operation of motor vehicles and for assault with intent to kill or murder, ordinarily it is the province of the court to determine questions of law,⁷¹ and that of the jury to determine, under proper instructions, issues of fact,⁷² such

as the weight to be given the evidence⁷³ and the credibility of the witnesses.⁷⁴ Where there is evidence on which the jury may justifiably find the existence or nonexistence of any material facts in issue, and the evidence is conflicting or of such a character that different conclusions may reasonably be drawn therefrom, the issues should be submitted to the jury.⁷⁵ In order to justify the submission of a material issue to the jury, however, there must be sufficient evidence to support it,⁷⁶ and where there is no evidence on an issue of fact or the evidence is legally insufficient to go to the jury as to such fact, or is undisputed and of such a character that only one inference reasonably can be drawn therefrom, the court may dispose of it without the intervention of a jury by refusing to submit it to the jury, as by sustaining a demurrer to the evidence, by dismissal or nonsuit, or by affirmative charge or direction of a verdict.⁷⁷ In general the guilt or innocence of ac-

785, 290 N.Y. 478—*People v. Hubbs*, 68 N.Y.S.2d 788, 271 App.Div. 1021—*People v. Bonaventura*, 66 N.Y.S.2d 898, 271 App.Div. 900—*People v. Badyiewicz*, 61 N.Y.S.2d 804, 270 App.Div. 873—*People v. Gardner*, 8 N.Y.S.2d 917, 255 App.Div. 683—*People v. Chalupka*, 32 N.Y.S.2d 686.

68. Neb.—*Salisbury v. State*, 216 N.W. 320, 116 Neb. 273.

69. Ga.—*Mundy v. State*, 1 S.E.2d 605, 59 Ga.App. 509—*Gresham v. State*, 166 S.E. 443, 46 Ga.App. 54—*Neese v. State*, 150 S.E. 451, 40 Ga.App. 503—*Smith v. State*, 147 S.E. 781, 39 Ga.App. 552—*Andrews v. State*, 138 S.E. 923, 37 Ga.App. 95.

70. N.Y.—*People v. Rauch*, 299 N.Y.S. 155, 252 App.Div. 795.

N.C.—*State v. Creech*, 188 S.E. 316, 210 N.C. 700.

Tex.—*Schorr v. State*, 132 S.W.2d 898, 137 Tex.Cr. 625.

71. What constitutes intoxication is a question of law to be defined by the court.—*People v. Schneider*, 200 N.E. 321, 362 Ill. 478.

72. Wash.—*State v. Cranmer*, 192 P.2d 331.

73. Ala.—*Crump v. State*, 191 So. 475, 29 Ala.App. 22, certiorari denied 191 So. 478, 238 Ala. 430.

Colo.—*Rinehart v. People*, 95 P.2d 10, 105 Colo. 123.

Mont.—*State v. Gondeiro*, 268 P. 507, 82 Mont. 530.

N.J.—*State v. Linarducci*, 3 A.2d 796, 122 N.J.Law 137, affirmed 3 A.2d 576, 123 N.J.Law 228.

N.Y.—*People v. Bearden*, 49 N.E.2d 785, 290 N.Y. 478.

S.C.—*State v. Brown*, 32 S.E.2d 825, 205 S.C. 514.

Va.—*Lawrence v. Commonwealth*, 26 S.E.2d 54, 181 Va. 582.

Wash.—*State v. Cranmer*, 192 P.2d 331—*State v. Carlsen*, 136 P.2d 183, 17 Wash.2d 573.

74. Ark.—*Benson v. State*, 208 S.W.2d 767, 212 Ark. 905.

Colo.—*Rinehart v. People*, 95 P.2d 10, 105 Colo. 123.

Ky.—*Bolen v. Commonwealth*, 198 S.W.2d 309, 303 Ky. 611.

S.C.—*State v. Brown*, 32 S.E.2d 825, 205 S.C. 514.

75. Ala.—*Downey v. State*, 4 So.2d 422, 30 Ala.App. 285, reversed on other grounds 4 So.2d 428, 241 Ala. 514.

Mo.—*State v. Renfro*, 279 S.W. 702.

S.C.—*State v. Brown*, 32 S.E.2d 825, 205 S.C. 514.

Wash.—*State v. Cranmer*, 192 P.2d 331.

Evidence required

The rule that where there is a scintilla of evidence to support the charge the issue is for the jury has no application in a prosecution for a homicide caused by the operation of a motor vehicle.—*Willis v. State*, 197 So. 62, 29 Ala.App. 365, certiorari denied 197 So. 67, 240 Ala. 52, overruling *Lewis v. State*, 162 So. 552, 26 Ala.App. 515.

An affirmative charge of not guilty is properly refused where there is evidence to support a conviction.—*Estes v. State*, 93 So. 217, 18 Ala.App. 606.

Direction of verdict held error

Utah.—*State v. Thatcher*, 157 P.2d 258, 108 Utah 83.

Peremptory instruction held not warranted

Miss.—*Bailey v. State*, 169 So. 765, 176 Miss. 579.

76. Utah.—*State v. Johnson*, 287 P. 909, 76 Utah 84.

77. Ala.—*Downey v. State*, 4 So.2d 422, 30 Ala.App. 285, reversed on other grounds 4 So.2d 428, 241 Ala. 514—*McHugh v. State*, 3 So.2d 569, 30 Ala.App. 231, certiorari denied 3 So.2d 572, 241 Ala. 569.

Okl.—*Scott v. State*, 108 P.2d 189, 71 Okl.Cr. 54.

Denial of motion of judgment for nonsuit held error in prosecution of owner of vehicle driven by another.—*State v. Creech*, 188 S.E. 316, 210 N.C. 700.

Refusal of peremptory instruction held error

Ky.—*Carnes v. Commonwealth*, 129 S.W.2d 543, 278 Ky. 771.

Rule as to consideration of all evidence

Principle that motion to dismiss as of nonsuit at close of all evidence must be considered in light of all evidence was held inapplicable where testimony of witnesses for accused supported the case for the prosecution on controverted issues.—*State v. Leonard*, 141 S.E. 736, 195 N.C. 242.

Speed

Evidence of the distance a vehicle slid or skidded has been held not alone sufficient to carry the issue of the vehicle's speed to the jury.—*Ronning v. State*, 200 N.W. 394, 184 Wis. 651.

Evidence held insufficient for jury on particular issues

(1) Generally.

Ala.—*Lewis v. State*, 167 So. 608, 27 Ala.App. 155.

Ky.—*Holmes v. Commonwealth*, 291 S.W. 383, 218 Ky. 314.

N.C.—*State v. Landin*, 182 S.E. 689, 209 N.C. 20.

(2) In prosecution for manslaughter in first degree.—*Willis v. State*, 197 So. 62, 29 Ala.App. 365, certiorari

cused is for the jury.⁷⁸

In numerous cases various issues have been held | questions of fact for the jury,⁷⁹ such as the proximate cause of the accident or of the death of de-

denied 197 So. 67, 240 Ala. 52—Barnett v. State, 171 So. 293, 127 Ala. App. 277, certiorari denied 171 So. 296, 233 Ala. 182.

(3) In prosecution for voluntary manslaughter.—Lewis v. Commonwealth, 191 S.W.2d 416, 301 Ky. 268—Lowe v. Commonwealth, 181 S.W.2d 409, 298 Ky. 7.

(4) In prosecution for involuntary manslaughter.—State v. Spruill, 198 S.E. 611, 214 N.C. 123.

(5) On issue of accused's intoxication.—State v. Johnson, 287 P. 909, 76 Utah 84.

(6) Whether accused made assault on deceased and put her in fear, causing her to jump from rapidly moving automobile.—Mayfield v. State, 25 S.W.2d 833, 114 Tex.Cr. 425.

(7) Whether accused was accessory to crime charged.—Quintana v. People, 102 P.2d 486, 106 Colo. 174.

78. Ala.—Wilson v. State, 18 So.2d 701, 31 Ala. App. 481—Allen v. State, 7 So.2d 91, 30 Ala. App. 423.

Ariz.—State v. Benham, 118 P.2d 91, 58 Ariz. 129.

Fla.—Williams v. State, 2 So.2d 301, 147 Fla. 91.

N.J.—State v. Linarducci, 3 A.2d 796, 122 N.J. Law 137, affirmed 8 A.2d 576, 123 N.J. Law 228.

N.C.—State v. Wooten, 46 S.E.2d 868, 228 N.C. 628—State v. Landin, 182 S.E. 689, 209 N.C. 20—State v. Harvell, 167 S.E. 459, 204 N.C. 32.

Accessory after the fact

In prosecution of father for aiding son, who while driving automobile had struck and killed man, in fleeing from scene of such felony, in evading arrest, and in attempting to conceal crime, the guilt of the father under the evidence was held for the jury.—State v. Dunn, 180 S.E. 708, 208 N.C. 333.

Questions held for jury

Whether accused was guilty of:

(1) Assault with intent to kill or murder.—State v. Cody, 31 S.E.2d 446, 224 N.C. 470.

(2) Murder.

Tex.—Houston v. State, 158 S.W.2d 1004, 143 Tex. Cr. 460—Spivey v. State, 105 S.W.2d 256, 132 Tex. Cr. 474—Collins v. State, 94 S.W.2d 443, 130 Tex. Cr. 386.

Wis.—State v. Galle, 252 N.W. 277, 214 Wis. 46.

(3) Murder in second degree.—Hyde v. State, 160 So. 237, 230 Ala. 243.

(4) Murder in second degree or manslaughter.—People v. McIntire, 1 P.2d 443, 213 Cal. 50.

(5) Manslaughter.

Ala.—Pratt v. State, 171 So. 293, 27

Ala. App. 301—Karasek v. State, 168 So. 454, 27 Ala. App. 180.

Fla.—Roddenberry v. State, 11 So.2d 582, 152 Fla. 197, appeal dismissed Roddenberry v. State of Florida, 63 S.Ct. 266, 317 U.S. 600, 87 L.Ed. 490, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. 568.

Ga.—Manning v. State, 19 S.E.2d 805, 67 Ga. App. 273.

Ill.—People v. Maloney, 18 N.E.2d 885, 370 Ill. 351.

Iowa.—State v. Williams, 28 N.W.2d 511, 238 Iowa 838—State v. Long, 245 N.W. 726, 215 Iowa 494—State v. Thomlinson, 228 N.W. 80, 209 Iowa 555.

Ky.—Roberts v. Commonwealth, 95 S.W.2d 23, 264 Ky. 545.

Miss.—Henderson v. State, 25 So.2d 133—Reynolds v. State, 24 So.2d 781, 199 Miss. 409—Williams v. State, 137 So. 106, 161 Miss. 406.

Mo.—State v. Campbell, 84 S.W.2d 618—State v. Studebaker, 66 S.W.2d 877, 331 Mo. 471—State v. Millin, 300 S.W. 694, 318 Mo. 553.

N.J.—State v. Oliver, 149 A. 68, 8 N.J. Misc. 98, reversed on other grounds 153 A. 399, 107 N.J. Law 319.

N.C.—State v. Webber, 185 S.E. 659, 210 N.C. 137—State v. Dills, 167 S.E. 459, 204 N.C. 33—State v. Durham, 161 S.E. 398, 201 N.C. 724.

Pa.—Commonwealth v. Gill, 182 A. 103, 120 Pa. Super. 22.

Wash.—State v. Ilmos, 294 P. 223, 159 Wash. 599—State v. Sandvig, 251 P. 887, 141 Wash. 542.

(6) Manslaughter in first degree.—Jones v. State, Ala. App., 31 So.2d 483—Reynolds v. State, 134 So. 815, 24 Ala. App. 249, certiorari denied 134 So. 817, 223 Ala. 130.

(7) Manslaughter in second degree.

—Downey v. State, 4 So.2d 428, 241 Ala. 514—Champion v. State, 34 So.2d 183, 33 Ala. App. 398—Wilson v. State, 28 So.2d 646, 32 Ala. App. 591—Jackson v. State, 26 So.2d 423, 32 Ala. App. 388—Barnett v. State, 171 So. 293, 27 Ala. App. 277, certiorari denied 171 So. 296, 233 Ala. 182—Holt v. State, 157 So. 449, 26 Ala. App. 223, certiorari denied 157 So. 452, 229 Ala. 368.

(8) Voluntary manslaughter.—Bolen v. Commonwealth, 198 S.W.2d 309, 303 Ky. 611.

(9) Involuntary manslaughter.

Ga.—Manning v. State, 19 S.E.2d 805, 67 Ga. App. 273.

Ill.—People v. Allen, 14 N.E.2d 397, 368 Ill. 368, certiorari denied Allen v. People of State of Illinois, 60 S.Ct. 132, 398 U.S. 511, 84 L.Ed. 436.

Ind.—Roby v. State, 17 N.E.2d 800, 215 Ind. 55.

Ky.—Lewis v. Commonwealth, 191 S.W.2d 416, 301 Ky. 268.

Pa.—Commonwealth v. Waters, 25 A.2d 756, 148 Pa. Super. 473—Commonwealth v. Smith, 5 A.2d 383, 135 Pa. Super. 174—Commonwealth v. Armstrong, Quar. Sess., 27 Wash. Co. 265.

S.C.—State v. Brown, 32 S.E.2d 825, 205 S.C. 514.

(10) Voluntary or involuntary manslaughter.—Cornett v. Commonwealth, 138 S.W.2d 492, 282 Ky. 322.

(11) Negligent homicide.—State v. Crammer, Wash., 192 P.2d 331.

79. Epileptic condition

(1) Where accused claimed that epilepsy caused him to be unconscious from the time of his departure on the drive until after the accident, question for jury was not whether accused knew facts which would lead a reasonable man to realize that the contemplated drive would create an unreasonable risk of bodily harm to others but was whether accused failed to do something which a reasonably prudent man would have done under the circumstances.—People v. Freeman, 142 P.2d 435, 61 Cal. App. 2d 110.

(2) Whether accused had the power of an ordinarily prudent man to estimate the significance of his undertaking to drive, whether he clearly recognized his probable early collapse, and whether his transition to unconsciousness was sudden, whether it occurred on the highway prior to the collision, or whether it had taken place during a visit before accused's departure and as the result of an epileptic attack were for the jury.—People v. Freeman, supra.

Questions held for jury

(1) Whether deceased girl, who jumped from automobile because of accused's advances, acted as reasonably prudent person and her fears of being assaulted were reasonable, so as to authorize conviction for murder.—Patterson v. State, 184 S.E. 309, 181 Ga. 698.

(2) Whether accused consciously fled from the scene of the accident.—State v. Hedinger, 19 A.2d 322, 126 N.J. Law 288, affirmed 23 A.2d 409, 127 N.J. Law 564.

(3) Whether accused struck decedent near center of highway at a point where accused had right to assume no one would be walking, or at edge of ditch on left side of highway where accused had no right to be.—State v. Sumpter, Mo., 184 S.W.2d 1005.

(4) Whether accused abandoned race, as a result of which another motorist was involved in a fatal accident, before the accident occurred.—

ceased,⁸⁰ whether such death was due to unlawful acts or statutory violations of accused in the operation of his motor vehicle,⁸¹ or was due to the fact that accused was intoxicated or under the influence of intoxicating liquor,⁸² or was caused by accused's culpable, criminal, or other negligence of the requisite character,⁸³ or whether accused drove his motor vehicle in an unlawful manner which evidenced a wanton and reckless disregard of human life,⁸⁴ or whether such death was caused by the negligence of deceased⁸⁵ or of a third person.⁸⁶ Likewise it

has been held that the jury should determine whether an emergency was created;⁸⁷ whether the death of decedent was unavoidable⁸⁸ or was the result of an accident;⁸⁹ whether the motor vehicle of accused caused the accident;⁹⁰ whether accused was driving the vehicle;⁹¹ whether a third person involved in the accident was negligent;⁹² whether accused was negligent,⁹³ and, if so, the character or degree of negligence;⁹⁴ whether he was culpably negligent,⁹⁵ and, likewise, jury should deter-

State v. Fair, 40 S.E.2d 634, 209 S.C. 439.

(5) Whether tube leading to hydraulic brake of automobile burst as result of application of brake and caused defendant to lose control of automobile or whether damage to tube resulted from the accident.—**People v. Connor**, 294 N.W. 74, 295 Mich. 1.

80. Ga.—**Manning v. State**, 19 S.E. 2d 805, 67 Ga.App. 273.

Ind.—**Kraft v. State**, 171 N.E. 1, 202 Ind. 44.

N.Y.—**People v. Parody**, 289 N.Y.S. 929, 248 App.Div. 269.

S.C.—**State v. Long**, 195 S.E. 624, 186 S.C. 439.

Tex.—**Houston v. State**, 158 S.W.2d 1004, 143 Tex.Cr. 460—**Leavell v. State**, 137 S.W.2d 40, 138 Tex.Cr. 471—**Moore v. State**, 81 S.W.2d 1015, 128 Tex.Cr. 459.

81. Ala.—**Jones v. State**, App., 34 So. 2d 483.

Fla.—**Howell v. State**, 187 So. 163, 136 Fla. 582.

82. Ala.—**Broxton v. State**, 171 So. 390, 27 Ala.App. 298.

Ga.—**Tripp v. State**, 36 S.E.2d 121, 73 Ga.App. 322.

N.J.—**State v. Blaine**, 137 A. 829, 5 N.J.Misc. 633, affirmed **State v. Blaine**, 140 A. 566, 104 N.J.Law 325.

S.C.—**State v. Long**, 195 S.E. 624, 186 S.C. 439.

Tex.—**Collins v. State**, 94 S.W.2d 443, 130 Tex.Cr. 386.

Utah.—**State v. McQuilkin**, 193 P.2d 433.

Evidence held not to establish as a matter of law that there was no direct causal connection between accused's drunken driving and pedestrian's death.—**State v. Kellison**, 11 N.W.2d 371, 233 Iowa 1274.

83. Ill.—**People v. Hansen**, 38 N.E. 2d 738, 378 Ill. 491—**People v. Maloney**, 18 N.E.2d 885, 370 Ill. 351—**People v. Allen**, 14 N.E.2d 397, 368 Ill. 368, certiorari denied **Allen v. People of State of Illinois**, 60 S.Ct. 132, 308 U.S. 511, 84 L.Ed. 436—**People v. Herkless**, 196 N.E. 829, 361 Ill. 32.

N.J.—**State v. Gregory**, 145 A. 4, 7 N.J.Misc. 238.

84. Ala.—**McQueen v. State**, 13 So.2d

59, 31 Ala.App. 101, certiorari denied 13 So.2d 61, 244 Ala. 251.

85. Ga.—**Manning v. State**, 19 S.E.2d 805, 67 Ga.App. 273.

Mich.—**People v. Pretswell**, 167 N.W. 1000, 202 Mich. 1.

Miss.—**Bradford v. State**, 146 So. 635, 166 Miss. 296.

Contributory negligence

Mich.—**People v. Campbell**, 212 N.W. 97, 237 Mich. 424.

Wash.—**State v. McDaniels**, 190 P.2d 705.

86. Utah.—**State v. McQuilkin**, 193 P.2d 433.

87. Ga.—**Manning v. State**, 19 S.E.2d 805, 67 Ga.App. 273.

88. Ga.—**Manning v. State**, supra.

Mich.—**People v. Pretswell**, 167 N.W. 1000, 202 Mich. 1.

Fire in vehicle of accused

Tex.—**McWhirter v. State**, 180 S.W. 2T 364, 147 Tex.Cr. 268.

90. S.C.—**State v. Staggs**, 195 S.E. 130, 186 S.C. 151.

91. Ala.—**Reed v. State**, 142 So. 441, 25 Ala.App. 18, certiorari denied 142 So. 442, 225 Ala. 219.

Cal.—**People v. Leach**, 31 P.2d 449, 137 Cal.App. 753.

Conn.—**State v. Goldberger**, 173 A. 216, 118 Conn. 444.

Fla.—**Blakes v. State**, 182 So. 447, 133 Fla. 12.

Iowa.—**State v. Kellison**, 11 N.W.2d 371, 233 Iowa 1274.

N.C.—**State v. Leonard**, 141 S.E. 736, 195 N.C. 242.

Wash.—**State v. Taylor**, 81 P.2d 853, 196 Wash. 37.

Change of drivers

Where accused claimed decedent changed places with him after they started out and was driving at the time of the accident, it was for the jury to determine whether there was time for a change of places between time of starting out and the accident and whether or not the change was actually made.—**Ridgell v. U. S.**, D.C. Mun.App., 54 A.2d 679.

92. Utah.—**State v. McQuilkin**, 193 P.2d 433.

93. Cal.—**People v. Leitgeb**, 176 P.2d 384, 77 Cal.App.2d 764.

Colo.—**Rinehart v. People**, 95 P.2d 10, 105 Colo. 123.

Ill.—**People v. Jeffers**, 25 N.E.2d 35, 373 Ill. 590, certiorari denied **Jeffers v. People of State of Illinois**, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

Mich.—**People v. Clark**, 295 N.W. 370, 295 Mich. 704.

Or.—**State v. Miller**, 243 P. 72, 119 Or. 409, affirmed **Miller v. State of Oregon**, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825.

Tex.—**Wallace v. State**, 170 S.W.2d 762, 145 Tex.Cr. 625.

Wash.—**State v. McDaniels**, 190 P.2d 705.

Evidence that accused went to sleep while driving at least presents question for jury as to whether he was negligent, in absence of further evidence.—**State v. Olsen**, 160 P.2d 427, 108 Utah 377, 160 A.L.R. 508.

94. Cal.—**People v. Leitgeb**, 176 P.2d 384, 77 Cal.App.2d 764.

Ill.—**People v. Jeffers**, 25 N.E.2d 35, 372 Ill. 590, certiorari denied **Jeffers v. People of State of Illinois**, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

Okl.—**Clapp v. State**, 120 P.2d 381, 730 Okl.Cr. 261, reversed on rehearing on other grounds 124 P.2d 267, 74 Okl.Cr. 144.

Negligence indicating reckless disregard of life

Mo.—**State v. Melton**, 33 S.W.2d 894, 326 Mo. 962.

95. Fla.—**Lipsev v. State**, 16 So.2d 439, 154 Fla. 32.

Ill.—**People v. Allen**, 14 N.E.2d 397, 368 Ill. 368, certiorari denied **Allen v. People of State of Illinois**, 60 S.Ct. 132, 308 U.S. 511, 84 L.Ed. 436—**People v. Herkless**, 196 N.E. 829, 361 Ill. 32.

Miss.—**Easter v. State**, 4 So.2d 227, 191 Miss. 651, 137 A.L.R. 391—**Turner v. State**, 183 So. 522, 183 Miss. 658—**Bradford v. State**, 127 So. 277, 158 Miss. 210—**Sims v. State**, 115 So. 217, 149 Miss. 171.

Mo.—**State v. Simler**, 167 S.W.2d 876, 350 Mo. 646—**State v. Ritter**, 2 S.W.2d 753—**State v. Scheufler**, 285 S.W. 419.

N.Y.—**People v. Williams**, 61 N.Y.S. 2d 252, 187 Misc. 299.

42 C.J. p 1363 note 86.

mine whether accused was criminally negligent,⁹⁶ grossly negligent,⁹⁷ reckless,⁹⁸ willful and reckless,⁹⁹ or drove with a lack of due caution and circumspection,¹ with reckless disregard for, or willful indifference to, the safety of others,² or with utter disregard of the rights of others,³ or recklessly and wantonly;⁴ whether the killing was intentional;⁵ whether accused's conduct constituted a wanton act equivalent to a wanton killing;⁶ whether accused was driving while intoxicated or under the influence of intoxicating liquor;⁷ the manner in which the motor ve-

hicle of accused was operated;⁸ the speed or excessive or unlawful speed of accused's motor vehicle;⁹ whether accused was driving on the wrong side, or over the center line, of the highway,¹⁰ or failed to yield the right of way to a vehicle approaching from his right at an intersection;¹¹ the lookout which accused maintained;¹² whether accused should have seen a particular object;¹³ whether accused was driving without lights;¹⁴ whether accused gave warning of his approach to the scene of the accident;¹⁵ whether the act of

Intent from violation of law

Where intent with which an offense is committed is an essential element of such offense, the operation of an automobile in a manner forbidden by law by a person charged with an offense takes the place of and supplies the unlawful intent, and it then becomes a question of fact whether accused was guilty of culpable negligence in operating an automobile upon highway in violation of law—*Lamb v. State*, 105 P.2d 799, 70 Okl. Cr. 236.

96. Ill.—*People v. Hansen*, 38 N.E. 2d 738, 378 Ill. 491—*People v. Maloney*, 18 N.E.2d 885, 370 Ill. 351—*People v. Allen*, 14 N.E.2d 397, 368 Ill. 368, certiorari denied *Allen v. People of State of Illinois*, 60 S.Ct. 132, 308 U.S. 511, 84 L.Ed. 436—*People v. Herkless*, 196 N.E. 829, 361 Ill. 32—*People v. Smaszcz*, 176 N.E. 768, 314 Ill. 494—*People v. Toohey*, 149 N.E. 795, 319 Ill. 113. 30 C.J. p 326 note 84.

97. Cal.—*People v. Leitgeb*, 176 P.2d 384, 77 Cal.App.2d 764.

On trial without jury

Accused's guilt of gross negligence or recklessness in operation of vehicle is fact question for judge trying homicide case without jury.—*State v. Porter*, 146 So. 465, 176 La. 673.

98. Ariz.—*Steffani v. State*, 42 P.2d 615, 45 Ariz. 210.
Ind.—*Roby v. State*, 17 N.E.2d 800, 215 Ind. 55.
S.C.—*State v. Dickerson*, 184 S.E. 555, 179 S.C. 239.

99. Ind.—*Minardo v. State*, 183 N.E. 548, 204 Ind. 422.

1. Cal.—*People v. Amick*, 125 P.2d 25, 20 Cal.2d 247—*People v. Pockask*, 96 P.2d 788, 14 Cal.2d 679.

2. Cal.—*People v. Murray*, 136 P.2d 389, 58 Cal.App.2d 239.

3. Ill.—*People v. Peterson*, 4 N.E.2d 37, 364 Ill. 80—*People v. Smaszcz*, 176 N.E. 768, 314 Ill. 494.

4. Ky.—*Jones v. Commonwealth*, 116 S.W.2d 984, 273 Ky. 444.

5. Conn.—*State v. Goldberger*, 173 A. 216, 118 Conn. 444.

6. Ala.—*Rainey v. State*, 17 So.2d 687, 245 Ala. 458.

7. Ala.—*Roberts v. State*, 21 So.2d 289, 32 Ala.App. 20, certiorari denied 21 So.2d 291, 246 Ala. 501—*Broxton v. State*, 171 So. 390, 27 Ala.App. 298.

Fla.—*Graives v. State*, 172 So. 716, 127 Fla. 182.

Ga.—*Trippe v. State*, 36 S.E.2d 121, 73 Ga.App. 322.

Ill.—*People v. Jeffers*, 25 N.E.2d 35, 372 Ill. 590, certiorari denied *Jeffers v. People of State of Illinois*, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407—*People v. Schneider*, 200 N.E. 321, 362 Ill. 478.

Me.—*State v. Budge*, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.

Okl.—*Dunham v. State*, 143 P.2d 834, 78 Okl.Cr. 54.

S.C.—*State v. Long*, 195 S.E. 624, 186 S.C. 439.

Tex.—*Ballard v. State*, Cr., 202 S.W. 2d 682—*Doyle v. State*, 165 S.W.2d 906, 145 Tex.Cr. 165—*Moore v. State*, 150 S.W.2d 91, 141 Tex.Cr. 570—*Derry v. State*, 99 S.W.2d 604, 131 Tex.Cr. 381—*Collins v. State*, 94 S.W.2d 443, 130 Tex.Cr. 386—*Moore v. State*, 81 S.W.2d 1015, 128 Tex.Cr. 459.

Wis.—*State v. Hanks*, 31 N.W.2d 596, 252 Wis. 414.

Whether motorist disabled by intoxication

N.J.—*State v. Linarducci*, 3 A.2d 796, 122 N.J.Law 137, affirmed 8 A.2d 576, 123 N.J.Law 228.

Sufficiency of observation of witness

Whether witnesses who had given their opinion as to the driver's sobriety had made an observation sufficient to justify such opinion was question for jury.—*State v. Linarducci*, supra.

Time of drinking

The weight of evidence that accused drank whisky either three and one-half or four hours before accident, or between five and one-half and six hours prior thereto, was for jury.—*Crump v. State*, 191 So. 475, 29 Ala.App. 22, certiorari denied 191 So. 478, 238 Ala. 439.

8. N.J.—*State v. Fairbrothers*, 124 A. 452, 99 N.J.Law 295.

Wash.—*State v. Mooney*, 16 P.2d 455, 170 Wash. 260.

9. Ala.—*Wilson v. State*, 28 So.2d 646, 32 Ala.App. 591.

Ariz.—*Steffani v. State*, 42 P.2d 615, 45 Ariz. 210.

Ill.—*People v. Jeffers*, 25 N.E.2d 35, 372 Ill. 590, certiorari denied *Jeffers v. People of State of Illinois*, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

Ind.—*Minardo v. State*, 183 N.E. 548, 204 Ind. 422.

Tex.—*Wallace v. State*, 170 S.W.2d 762, 145 Tex.Cr. 625.

Wash.—*State v. Mooney*, 16 P.2d 455, 170 Wash. 260.

42 C.J. p 1363 note 87.

Validity of statute

Act declaring question whether one charged with negligent homicide was driving vehicle at immoderate speed one of fact for jury was held not unconstitutional as requiring prosecutor to request and magistrate to issue warrant of arrest, although honestly believing no crime was committed.—*People v. McMurphy*, 228 N.W. 723, 249 Mich. 147.

10. Ala.—*Roberts v. State*, 21 So.2d 289, 32 Ala.App. 20, certiorari denied 21 So.2d 291, 246 Ala. 501.

Miss.—*Shows v. State*, 168 So. 862, 175 Miss. 604.

11. Tex.—*Leavell v. State*, 137 S.W. 2d 40, 138 Tex.Cr. 471.

12. Utah.—*State v. Lake*, 196 P. 1015, 57 Utah 619.

In time to avoid injury

Whether accused saw deceased in time to avoid the injury was held for the jury.—*Gore v. State*, 114 So. 791, 22 Ala.App. 136, certiorari denied *Ex parte State ex rel. Attorney General*, 114 So. 794, 217 Ala. 68.

13. Iowa.—*State v. Graff*, 290 N.W. 97, 228 Iowa 159.

14. Ala.—*Roberts v. State*, 21 So.2d 289, 32 Ala.App. 20, certiorari denied 21 So.2d 291, 246 Ala. 501.

15. Or.—*State v. Miller*, 243 P. 72, 119 Or. 409, affirmed *Miller v. State of Oregon*, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825.

accused was an act of apparent danger of causing death;¹⁶ the truth of accused's explanation of the accident;¹⁷ the condition of the highway;¹⁸ and the material circumstances surrounding the homicide.¹⁹

What accused under the circumstances might reasonably have assumed would be the conduct of decedent, and what inferences he might have been justified in drawing from his actions, are questions for the jury on the evidence, and not matters of law on which it is the duty of the court to instruct.²⁰ Under some statutes the penalty or punishment to be imposed is for the jury.²¹

Degree or grade of homicide. It is the province of the jury, if accused is found guilty, to determine and fix by their verdict the degree or grade of homicide.²²

§ 668. — Instructions

a. In general

b. Applicability to pleadings and evidence

16. Tex.—Ladd v. State, 27 S.W.2d 1098, 115 Tex Cr 355.

17. Ala.—Williams v. State, 7 So.2d 511, 30 Ala App 437.

18. Ill.—People v. Jeffers, 25 N.E.2d 35, 372 Ill. 590, certiorari denied Jeffers v. People of State of Illinois, 60 S.Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.

19. N.J.—State v. Fairbrothers, 124 A. 452, 99 N.J.Law 295.

Issues held for jury

(1) Possession of liquor, whether knowingly or unwittingly, by accused motorist.—State v. Lockwood, 268 P. 1016, 126 Or. 118.

(2) Whether accused had his foot on the accelerator when his motor vehicle hit and killed the deceased.—State v. Lawson, 182 S.E. 692, 209 N. C. 59.

(3) Whether deceased motorist gave signal for turn across road and whether accused could have seen signal by reasonable care.—Bradford v. State, 146 So. 635, 166 Miss. 296.

20. Conn.—State v. Campbell, 74 A. 927, 82 Conn. 671, 135 Am.S.R. 293, 18 Ann.Cas. 236.

21. Ala.—Hyde v. State, 180 So. 237, 230 Ala. 243.

Power of court

In prosecution for manslaughter in the second degree against accused, who waived trial by jury, court could not fix the punishment where a statute provided that punishment on conviction for manslaughter in the second degree shall be at "discretion of the jury."—Powell v. State, 10 So.2d 867, 80 Ala.App. 606.

Charge imposing duty on jury held not erroneous

Ga.—Cammons v. State, 2 S.E.2d 205, 59 Ga App 759.

22. Okl.—Clapp v. State, 120 P.2d 381, 73 Okl Cr 261, reversed on rehearing on other grounds 124 P. 2d 267, 74 Okl Cr. 144—Philby v. State, 76 P.2d 412, 64 Okl Cr. 1.

23. Utah.—State v. Lingman, 91 P. 2d 457, 197 Utah 180.
42 C.J. p 1363 note 92.

Instructions held confusing

Ill.—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

Instructions held not misleading

(1) In prosecution for homicide.
Tex.—Norman v. State, 52 S.W.2d 1051, 121 Tex Cr. 433.
Utah.—State v. Newton, 144 P.2d 290, 105 Utah 561.

(2) In prosecution for assault with intent to murder.—Payne v. State, 40 S.W.2d 759, 74 Ga.App. 646.

24. Mich.—People v. Silver, 4 N.W. 2d 687, 302 Mich. 359—People v. Connor, 294 N.W. 74, 295 Mich. 1.
42 C.J. p 1364 note 93.

Instructions held proper

(1) Generally.—Jones v. Commonwealth, 116 S.W.2d 984, 273 Ky. 444.

(2) On murder.—Jones v. State, 75 S.W.2d 683, 127 Tex Cr. 227.

(3) Defining murder in third degree.—State v. Shepard, 214 N.W. 280, 171 Minn. 414.

(4) On manslaughter.

Cal.—People v. Leutholtz, 283 P. 292, 102 Cal.App. 493.

Ill.—People v. Jeffers, 25 N.E.2d 35,

c. Statutes and ordinances

d. Other offenses or grades or degrees of offense charged

e. Requested instructions

a. In General

Proper instructions as to the nature and elements of the offense charged and of the requirements for conviction thereof must be given in a prosecution for a death caused by the operation of a motor vehicle, or for an assault with intent to kill or murder.

The rules relating to instructions in prosecutions for homicide generally, considered in Homicide §§ 354-399, apply to a prosecution for causing death by the operation of a motor vehicle, or for assault with intent to kill or murder, except in so far as the means and circumstances under and by which the crime is committed require instructions peculiar thereto.²³ The court should define accurately the offense or offenses with which accused is charged, setting forth clearly the essential elements thereof and the law thereon.²⁴ This requires the court to give correct instructions on each issue

372 Ill 590, certiorari denied Jeffers v. People of State of Illinois, 60 S. Ct. 1081, 310 U.S. 638, 84 L.Ed. 1407.
Kan.—State v. Harrison, 249 P. 623, 121 Kan 670.
N.C.—State v. Dills, 167 S.E. 459, 204 N.C. 33.
Or.—State v. Boag, 59 P.2d 396, 154 Or. 354.

(5) On manslaughter while intoxicated.—Roddenberry v. State, 11 So. 2d 582, 152 Fla. 197, appeal dismissed Roddenberry v. State of Florida, 63 S.Ct. 266, 317 U.S. 600, 87 L. Ed 490, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed 568

(6) On involuntary manslaughter.
Iowa.—State v. Graff, 290 N.W. 97, 228 Iowa 159.

Mich.—People v. Wardell, 289 N.W. 328, 291 Mich. 276.

N.C.—State v. McMahan, 45 S.E.2d 340, 228 N.C. 293

Pa.—Commonwealth v. Armstrong, Quar.Sess., 27 Wash Co. 265.

Tenn.—Gentry v. State, 198 S.W.2d 643, 184 Tenn. 299.

Utah.—State v. Rasmussen, 68 P.2d 176, 92 Utah 357.

Va.—Albert v. Commonwealth, 27 S. E.2d 177, 181 Va. 894.

(7) On negligent homicide.—State v. Carlsen, 136 P.2d 183, 17 Wash. 2d 573.

(8) On assault with intent to murder.—Lamb v. State, 105 P.2d 799, 70 Okl Cr. 236.

(9) Instruction authorizing conviction of accused as aider and abettor, even though he did not drive the truck at time of collision.—Fitzhugh v. State, 179 S.W.2d 173, 207 Ark. 117.

the jury is to consider,²⁵ on the burden of proof,²⁶ the standards of proof required,²⁷ reasonable doubt,²⁸ proximate cause,²⁹ and the character of act or conduct necessary to be found in order for accused to be convicted of the offense charged.³⁰

It is also necessary, where such matters are in issue, to give correct instructions relative to the character or degree of negligence required for conviction,³¹ and, likewise, to give correct instruc-

(10) Other instructions held proper see 42 C.J. p 1363 note 92 [a].

Instructions held improper

(1) As to assault with intent to kill.—State v. Wagoner, 256 P. 959, 123 Kan. 586.

(2) As to manslaughter.

Me.—State v. Budge, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.

Miss.—Reynolds v. State, 24 So.2d 781, 199 Miss. 409.

(3) As to involuntary manslaughter.

Ky.—Roberts v. Commonwealth, 95 S.W.2d 23, 264 Ky. 545.

Pa.—Commonwealth v. Aurick, 10 A.2d 22, 138 Pa. Super. 180.

W.Va.—State v. Lawson, 36 S.E.2d 26, 128 W.Va. 136.

42 C.J. p 1363 note 92 [b].

(4) As to manslaughter in first degree.

Okl.—Hall v. State, 159 P.2d 283, 8 Okl. Cr. 310.

(5) As to murder.—Freeman v. State, 27 S.W.2d 162, 114 Tex. Cr. 624

Omissions held erroneous

(1) Omission of instruction on motorist's statutory duty to come to a complete stop when meeting school bus which had stopped on highway.—Commonwealth v. Mullins, 176 S.W.2d 403, 296 Ky. 190.

(2) Omission from instructions of requirement that jury must find that accused intentionally did or omitted something which he should not have done or omitted and that accused consciously realized that his conduct would in all probability produce result actually produced.—State v. Bates, 271 N.W. 765, 65 S.D. 105.

(3) Omission of requirement that fear of felonious assault by deceased who jumped from vehicle because of accused's attempt to commit violent injury on her was reasonable, or that her act in jumping was reasonable under circumstances and naturally tended to destroy life.—Patterson v. State, 184 S.E. 309, 181 Ga. 698.

(4) Other omissions held erroneous see 42 C.J. p 1364 note 93 [a].

25. Instructions held proper

Ga.—Hunter v. State, 16 S.E.2d 500, 65 Ga. App. 766.

N.C.—State v. Leonard, 141 S.E. 736, 195 N.C. 242.

S.C.—State v. Staggs, 195 S.E. 130, 186 S.C. 151—State v. Dixon, 186 S.E. 531, 181 S.C. 1.

Instructions held erroneous

U.S.—Lilly v. State of West Virginia, C.C.A.W. Va., 29 F.2d 61.

26. N.C.—State v. Brooks, 186 S.E. 237, 210 N.C. 273.

27. N.Y.—People v. Hoh, 3 N.Y.S.2d 72, 254 App. Div. 588.

28. Ala.—Estes v. State, 93 So. 217, 18 Ala. App. 606.

42 C.J. p 1364 note 94.

Instructions held proper

Ky.—Jones v. Commonwealth, 116 S.W.2d 984, 273 Ky. 444.

Okl.—Tucker v. State, 92 P.2d 595, 66 Okl. Cr. 335.

Tex.—Jones v. State, 75 S.W.2d 683, 127 Tex. Cr. 227.

42 C.J. p 1364 note 92 [a].

29. Idaho—State v. Montelith, 20 P.2d 1023, 53 Idaho 30.

N.M.—State v. Sisneros, 82 P.2d 274, 42 N.M. 500.

Okl.—Hall v. State, 159 P.2d 283, 8 Okl. Cr. 310.

Tex.—Sheffield v. State, 72 S.W.2d 245, 126 Tex. Cr. 370.

42 C.J. p 1364 note 95.

Death result of shock or fright

La.—State v. Lee, 156 So. 801, 180 La. 494.

Instructions held sufficient

Idaho—State v. Gee, 284 P. 815, 48 Idaho 688.

Iowa.—State v. Graff, 290 N.W. 97, 228 Iowa 159.

N.C.—State v. Dills, 167 S.E. 459, 204 N.C. 33.

Tex.—Jones v. State, 75 S.W.2d 683, 127 Tex. Cr. 227.

42 C.J. p 1364 note 95 [a].

Instructions held erroneous

(1) Generally.

N.C.—State v. Whaley, 132 S.E. 6, 191 N.C. 387.

Pa.—Commonwealth v. Aurick, 10 A.2d 22, 138 Pa. Super. 180.

W.Va.—State v. Lewis, 174 S.E. 483, 115 W.Va. 1.

(2) Instruction on theory that failure of accused to have a permit to transport building along county road justified conviction, where such failure did not contribute to the death of deceased.—State v. Ramser, 136 P.2d 1013, 17 Wash.2d 581.

Instruction held unnecessary where the undisputed evidence showed that decedent came to his death through the concurrent and united action of his own and defendant's cars which were in collision.—People v. Halbert, 248 P. 969, 78 Cal. App. 598.

30. Iowa.—State v. Graff, 290 N.W. 97, 228 Iowa 159.

Tex.—Brown v. State, 279 S.W. 837, 103 Tex. Cr. 35.

Wash.—State v. Dickert, 79 P.2d 328,

194 Wash. 629—State v. Mooney, 16 P.2d 455, 170 Wash. 260.

Murder

(1) Charge allowing consideration of reckless driving, while intoxicated, in determining driver's guilt of murder was held correct.—Reed v. State, 142 So. 441, 25 Ala. App. 18, certiorari denied 142 So. 442, 225 Ala. 219.

(2) An instruction authorizing a conviction for murder without requiring a finding that accused's act naturally tended to destroy life was held erroneous.—Patterson v. State, 184 S.E. 309, 181 Ga. 698.

Voluntary manslaughter

Specification in voluntary manslaughter instruction that operation of automobile was in manner reasonably calculated to endanger lives of persons on highway rather than life of decedent was held not error.—Dublin v. Commonwealth, 86 S.W.2d 136, 260 Ky. 412.

Involuntary manslaughter

(1) What instruction should contain stated

Pa.—Commonwealth v. Gill, 182 A. 103, 120 Pa. Super. 22.

W.Va.—State v. Lawson, 36 S.E.2d 26, 128 W.Va. 136.

(2) Instruction held proper.

Tenn.—Trentham v. State, 206 S.W.2d 291, 185 Tenn. 271—McGoldrick v. State, 21 S.W.2d 390, 159 Tenn. 667.

Va.—Albert v. Commonwealth, 27 S.E.2d 177, 181 Va. 894.

(3) Instruction held erroneous.—Commonwealth v. Aurick, 19 A.2d 920, 342 Pa. 282

(4) Instruction that involuntary manslaughter involves wanton and reckless disregard for safety of others was held not error for not substituting "lives" for "safety."—State v. Richardson, 240 N.W. 695, reheard 249 N.W. 211, 216 Iowa 809.

31. Cal.—People v. Wilson, 177 P.2d 567, 78 Cal. App.2d 108.

30 C.J. p 408 note 30 [h].

Instructions held proper

(1) Generally.

Colo.—Rinehart v. People, 95 P.2d 10, 105 Colo. 123.

D.C.—Nestlerode v. U. S., 122 F.2d 56, 74 App. D.C. 276.

N.C.—State v. Fields, 19 S.E.2d 486, 221 N.C. 182—State v. Harvell, 167 S.E. 459, 204 N.C. 32.

S.C.—State v. Staggs, 195 S.E. 130, 186 S.C. 151.

Tenn.—Trentham v. State, 206 S.W.2d 291, 185 Tenn. 271.

tions as to culpable negligence,³² driving while intoxicated or under the influence of intoxicating liquor,³³ the duties of accused in the operation of his motor vehicle,³⁴ the right of others to use the high-

way,³⁵ the character of lights required,³⁶ the law of the road,³⁷ speed, or excessive or unlawful speed,³⁸ the failure of accused to give aid to de-

Va.—*Bell v. Commonwealth*, 195 S.E. 675, 170 Va. 597.

(2) Instruction stating required standard of conduct.—*People v. Murray*, 136 P.2d 389, 58 Cal.App.2d 239.

(3) Instruction announcing that it was negligent to operate automobile in violation of law.—*Wells v. State*, 139 So. 859, 162 Miss. 617.

(4) Instruction that violation of statute law was negligence per se and was as matter of law some evidence of wantonness and gross negligence.—*State v. Dixon*, 186 S.E. 531, 181 S.C. 1.

(5) Instruction charging that motorist was negligent if he drove against pedestrian standing in poorly lighted safety zone because he did not see her.—*People v. Good*, 282 N.W. 920, 287 Mich. 110.

(6) Instructions relative to criminal negligence.

Ill.—*People v. Hansen*, 38 N.E.2d 738, 378 Ill. 491.

Iowa.—*State v. Hall*, 11 N.W.2d 481, 233 Iowa 1268.

N.C.—*State v. Durham*, 161 S.E. 398, 201 N.C. 724.

Utah.—*State v. Bleazard*, 133 P.2d 1000, 103 Utah 113.

(7) Instructions on evidence proper for jury to consider.—*People v. Pociask*, 96 P.2d 788, 14 Cal.2d 679.

Instructions held erroneous

(1) Generally.

Pa.—*Commonwealth v. Gill*, 182 A. 103, 120 Pa.Super. 22.

W.Va.—*State v. Lawson*, 36 S.E.2d 26, 128 W.Va. 136.

(2) Instruction stating care required in civil actions.—*People v. Sackett*, 37 N.Y.S.2d 748, 265 App.Div. 867.

(3) Instruction on trial for manslaughter where criminal negligence was not explained.—*People v. Sikes*, 159 N.E. 293, 328 Ill. 64.

(4) Instruction as to negligence for failure to stop for red traffic light.—*People v. Silver*, 4 N.W.2d 687, 302 Mich. 359.

(5) Charge that manslaughter may result from negligence, meaning failure to use reasonable care.—*State v. Harlow*, 140 A. 438, 6 N.J.Misc. 149.

(6) Instructions in prosecution for involuntary manslaughter which failed to differentiate between civil and criminal responsibility for negligence.—*Cain v. State*, 190 S.E. 371, 55 Ga.App. 376.

(7) The word "gross" as applied to negligence and carelessness should have been omitted from instruction

on involuntary manslaughter, and words "negligently and carelessly" only should have been used and defined to mean failure to exercise ordinary care instead of slight degree of care.—*Sloan v. Commonwealth*, 104 S.W.2d 988, 268 Ky. 241.

32. N.Y.—*People v. Hoh*, 3 N.Y.S.2d 72, 254 App.Div. 538.

42 C.J. p 1364 note 96

Proper instruction stated

Miss.—*Smith v. State*, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1.

Instruction defining lesser degree of negligence is not required where culpable negligence was fairly defined.—*State v. Studebaker*, 66 S.W.2d 877, 334 Mo. 471.

Instructions held sufficient or not erroneous

Mo.—*State v. Bolle*, 201 S.W.2d 158—*State v. Studebaker*, 66 S.W.2d 877, 334 Mo. 471—*State v. Murphy*, 23 S.W.2d 136, 324 Mo. 183.

42 C.J. p 1364 note 96 [a].

Instructions held improper

(1) Generally.

Iowa.—*State v. Clark*, 196 N.W. 82, 196 Iowa 1134.

Miss.—*Reynolds v. State*, 24 So.2d 781, 199 Miss. 409—*Smith v. State*, 20 So.2d 701, 197 Miss. 802, 161 A.L.R. 1—*McKinney v. State*, 18 So.2d 446, 196 Miss. 826—*Shows v. State*, 168 So. 862, 175 Miss. 604.

Mo.—*State v. Melton*, 33 S.W.2d 894, 326 Mo. 962—*State v. Millin*, 300 S.W. 694, 318 Mo. 553.

N.Y.—*People v. Pace*, 221 N.Y.S. 778, 220 App.Div. 495—*People v. Angelo*, 221 N.Y.S. 47, 219 App.Div. 646, affirmed 159 N.E. 394, 246 N.Y. 451.

N.C.—*State v. Cope*, 167 S.E. 456, 204 N.C. 28.

(2) Instruction requiring that accused be without any negligence for acquittal of murder charge on ground of accident was held erroneous where statute required acquittal if accused was free from culpable negligence.—*Weaver v. State*, 21 S.E.2d 542, 67 Ga.App. 692.

33. Ill.—*People v. Schneider*, 200 N.E. 321, 362 Ill. 478.

Instructions held proper

(1) Generally.

Cal.—*People v. Aguilar*, 35 P.2d 137, 140 Cal.App. 87, hearing denied 35 P.2d 142, 140 Cal.App. 87—*People v. McKee*, 251 P. 675, 80 Cal.App. 200.

Fla.—*Roddenberry v. State*, 11 So.2d 582, 152 Fla. 197, appeal dismissed *Roddenberry v. State of Florida*, 63 S.Ct. 266, 317 U.S. 600, 87 L.Ed. 490, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. 568.

Mich.—*People v. Beauchamp*, 245 N.W. 784, 260 Mich. 491.

Tex.—*Darnell v. State*, 74 S.W.2d 1013, 127 Tex.Cr. 109.

42 C.J. p 1363 note 92 [a] (1).

(2) Instruction defining "intoxicated."—*Rinehart v. People*, 95 P.2d 10, 105 Colo. 123.

(3) Instruction that "Intoxicated" and "under influence of intoxicating liquor" are synonymous terms, notwithstanding definition of such terms was not necessary.—*Moynahan v. State*, 146 S.W.2d 376, 140 Tex.Cr. 540.

(4) Instruction that drunkenness or temporary insanity caused by the particular debauch should not relieve accused, who had voluntarily become drunk, from criminal responsibility or reduce the crime from second degree murder to manslaughter.—*Nestlerode v. U. S.*, 122 F.2d 56, 74 App.D.C. 276.

(5) Charge that accused need only be shown to have been under influence of some intoxicant, whether or not drunk, was held proper.—*Chapman v. State*, 151 S.E. 410, 40 Ga.App. 725.

Instruction held not required on intoxication requiring acquittal of charge of murder in third degree.—*State v. Shepard*, 214 N.W. 280, 171 Minn. 414.

34. Instruction on duty when passing another held erroneous.—*Jadd v. State*, 27 S.W.2d 1098, 115 Tex.Cr. 355.

35. Pedestrian

Instruction that a pedestrian has the same right under the law to use a public highway as any person traveling in an automobile or other means of transportation was held correct.—*Fox v. State*, 165 S.W.2d 733, 145 Tex.Cr. 71.

36. Pa.—*Commonwealth v. Aurick*, 10 A.2d 22, 138 Pa.Super. 180.

Va.—*Bell v. Commonwealth*, 195 S.E. 675, 170 Va. 597.

37. Instructions held proper

Cal.—*People v. Marconi*, 5 P.2d 974, 118 Cal.App. 683.

Ga.—*Kelly v. State*, 10 S.E.2d 417, 63 Ga.App. 231.

Instructions held erroneous

N.C.—*State v. Toler*, 142 S.E. 715, 195 N.C. 481.

38. N.J.—*State v. Kellow*, 53 A.2d 796, 136 N.J.Law 1, affirmed 57 A.2d 389, 136 N.J.Law 633.

42 C.J. p 1363 note 92 [a] (3), [b].

Character of vehicle

Accused was held entitled to instruction that state had burden to

ceased,³⁹ unavoidable accident,⁴⁰ justifiable and excusable homicide,⁴¹ and the negligence or contributory negligence of deceased or others.⁴²

Definition of terms. Where the pleadings and evidence make them material, the court should define the terms "gross negligence," "reckless," "wanton," and other such technical terms.⁴³

Construction as a whole. In view of the rule that the entire law of the case need not be stated in a single instruction and that all the instructions must be considered together, a particular instruction omitting some element of the offense or the

finding is not erroneous where such matter is fully covered by other instructions.⁴⁴

b. Applicability to Pleadings and Evidence

The instructions should be applicable to the issues raised in the pleadings and be supported by the evidence.

The instructions should conform to the indictment, information, or affidavit and to the evidence,⁴⁵ and also should fully and fairly declare the law applicable to any defense offered by accused which is supported by the evidence and raises an issue of fact favorable to him.⁴⁶ Thus an instruction is erroneous and should not be given

show beyond reasonable doubt that vehicle was of character to which speed limit statute applied—*State v. Brooks*, 186 S.E. 237, 210 N.C. 273.

Instruction held not misleading
Mich.—*People v. Campbell*, 212 N.W. 97, 237 Mich. 424.

Instructions held proper

(1) Generally.
Cal.—*People v. Wilson*, 177 P.2d 567, 78 Cal.App.2d 108.
Pa.—*Commonwealth v. Kurtz*, 33 Pa. Dist. & Co. 661.
Tenn.—*McGoldrick v. State*, 21 S.W. 2d 390, 159 Tenn. 667.

(2) Instruction that violation of statute relating to speed was negligence per se and some evidence of gross negligence.—*State v. Dixon*, 186 S.E. 531, 181 S.C. 1.

(3) Instruction authorizing consideration of evidence of skid marks in determining speed of car.—*State v. Kellow*, 53 A.2d 796, 136 N.J.Law 1, affirmed 57 A.2d 389, 136 N.J.Law 633.

Instructions held erroneous

(1) Generally.
Miss.—*Bradford v. State*, 127 So. 277, 158 Miss. 210.
N.C.—*State v. Webber*, 185 S.E. 659, 210 N.C. 137.
Utah.—*State v. Lingman*, 91 P.2d 457, 97 Utah 180.

(2) Instruction, conflicting with statute, that violation of statute with respect to speed was negligence per se.—*People v. Spence*, 231 N.W. 126, 250 Mich. 573.

(3) Instruction on speed of automobile remote from place of killing.—*People v. Campbell*, 212 N.W. 97, 237 Mich. 424.

39. Instructions held proper

Cal.—*People v. Johnston*, 269 P. 560, 93 Cal.App. 484.

40. Ky.—*Jones v. Commonwealth*, 281 S.W. 164, 213 Ky. 356.

42 C.J. p 1363 note 92 [a] (2), p 1364 note 97.

41. Fla.—*Graives v. State*, 172 So. 716, 127 Fla. 182.

42. Kan.—*State v. Bowser*, 261 P. 846, 124 Kan. 556.

42 C.J. p 1364 note 98.

Propriety of refusal to give requested instruction setting up contributory negligence as a defense see *infra* subdivision c of this section.

Instructions held proper

(1) Generally.
Iowa.—*State v. Williams*, 28 N.W.2d 514, 238 Iowa 838.
Kan.—*State v. Phelps*, 110 P.2d 755, 153 Kan. 337.
N.J.—*State v. Kellow*, 53 A.2d 796, 136 N.J.Law 1, affirmed 57 A.2d 389, 136 N.J.Law 633.
N.C.—*State v. Palmer*, 147 S.E. 817, 197 N.C. 135.
Tenn.—*Gentry v. State*, 193 S.W.2d 643, 184 Tenn. 299.

(2) Instruction that contributory negligence is no defense.

Cal.—*People v. Pociask*, 96 P.2d 788, 14 Cal.2d 679—*People v. Von Eckartsberg*, 23 P.2d 819, 133 Cal.App. 1—*People v. Leutholtz*, 283 P. 292, 102 Cal.App. 493.

Instruction held erroneous

N.C.—*State v. Eldridge*, 150 S.E. 125, 197 N.C. 626.

Instruction held misleading

Pa.—*Commonwealth v. Amecca*, 50 A. 2d 725, 160 Pa.Super. 257.

43. Ky.—*Jones v. Commonwealth*, 281 S.W. 164, 213 Ky. 356.

42 C.J. p 1364 note 99.

Instruction held proper

(1) Instruction defining "reckless."—*State v. Boisinger*, 21 N.W.2d 480, 221 Minn. 154.

(2) Instruction defining "involuntary manslaughter" was not erroneous for failing to charge that "culpable indifference" must be indifference to life, as distinguished from indifference to safety, of others.—*State v. Richardson*, 249 N.W. 211, 216 Iowa 809.

(3) Other instructions held proper see 42 C.J. p 1364 note 99 [a].

Failure to define "reckless" as well as "wanton" in instruction on voluntary manslaughter was held not er-

ror.—*Dublin v. Commonwealth*, 86 S.W.2d 136, 260 Ky. 412.

44. Okl.—*Hall v. State*, 159 P.2d 283, 80 Okl.Cr. 310.

42 C.J. p 1364 note 2.

45. Cal.—*People v. Tennis*, 193 P.2d 5, 85 Cal.App.2d 521.

Tenn.—*Hurt v. State*, 201 S.W.2d 988, 184 Tenn. 608.

Charge in harmony with state's theory as alleged in a proper pleading and as supported by the evidence is generally correct.—*State v. Lockwood*, 268 P. 1016, 126 Or. 118.

Permissible instruction stated in manslaughter prosecution.—*State v. Lingman*, 91 P.2d 457, 197 Utah 180.

Allegations sufficient to support instructions

Allegation in bill of particulars charging willful and wanton disregard for the rights and safety of one who was driving an automobile in intersection was held sufficient to support an instruction based on evidence of failure to yield right of way.—*State v. Lingman*, *supra*.

Instructions held proper

(1) Charge relative to control of vehicle while passing pedestrian, in prosecution for killing another by driving automobile in intoxicated condition.—*Icatley v. State*, 147 S.E. 784, 39 Ga.App. 550.

(2) Instruction on murder with malice.—*Brewer v. State*, 143 S.W.2d 599, 140 Tex.Cr. 9.

(3) Instruction with reference to ordinary negligence in case where the pleadings charged gross negligence.—*People v. Wilson*, 177 P.2d 567, 78 Cal.App.2d 108.

Instructions held improper

Cal.—*People v. Okada*, 58 P.2d 967, 14 Cal.App.2d 660.

46. Idaho.—*State v. Moultrie*, 254 P. 520, 43 Idaho 766.

Tex.—*McKee v. State*, 102 S.W.2d 1058, 132 Tex.Cr. 67.

Defense based on epilepsy

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his depart-

which authorizes a conviction on the basis of acts not alleged,⁴⁷ as where it does not limit the jury to the acts of negligence alleged,⁴⁸ or is on the statutory duty of a driver to stop and give his name or render assistance in case of an accident, where accused is not charged with violation of such statute.⁴⁹ Also instructions are erroneous and should not be given which are without support in the evidence,⁵⁰ such as instructions as to a grade or degree of homicide not supported by the evidence,⁵¹ or on issues or a state of facts not supported thereby,⁵² or which imply unproved facts,⁵³ or which authorize the jury to make findings which are not

supported by the evidence,⁵⁴ or which are as to the care or duty of a driver under circumstances which do not appear in the evidence.⁵⁵ Where there is no evidence to support certain acts charged in an indictment, they should be withdrawn from the jury.⁵⁶ On the other hand, instructions are proper which authorize a conviction on any of several acts charged, each of which is sufficient to support the offense charged.⁵⁷

Under the pleadings and evidence of various cases, particular instructions have been held warranted,⁵⁸ including instructions relative to death caused by misadventure or unavoidable accident,⁵⁹

ture on the drive until after the accident, instruction should have authorized acquittal if accused was unconscious at the time of the accident, and such state of being had wholly or to a material extent overtaken him before leaving.—*People v. Freeman*, 142 P.2d 435, 61 Cal.App.2d 110.

Instruction to ignore defense if jury did not believe evidence relative thereto was held proper.—*People v. Freeman*, supra.

Failure to instruct on defense held error

(1) Generally.—*Eason v. State*, Tex.Cr., 198 S.W.2d 896.

(2) On law governing withdrawal from, or abandonment of, unlawful enterprise.—*State v. Fair*, 40 S.E.2d 634, 209 S.C. 439.

Qualification of instruction relative to accused's right in emergency was held to nullify it to such an extent as to constitute error.—*State v. Moultrie*, 254 P. 520, 43 Idaho 766.

Evidence held insufficient to raise defense of accident so that failure to instruct thereon was not error.—*Biscamp v. State*, 154 S.W.2d 466, 142 Tex.Cr. 401.

Instructions held proper

Va.—*Bell v. Commonwealth*, 195 S.L. 675, 170 Va. 597.

Instructions held erroneous

Cal.—*People v. Freeman*, 142 P.2d 435, 61 Cal.App.2d 110.

47. Cal.—*People v. Banks*, 62 P.2d 160, 17 Cal.App.2d 508—*People v. Okada*, 58 P.2d 967, 14 Cal.App.2d 660.

S.D.—*State v. McNabb*, 246 N.W. 291, 61 S.D. 100.

Tex.—*Murray v. State*, 18 S.W.2d 921, 113 Tex.Cr. 98.

48. D.C.—*Sinclair v. U. S.*, 265 F. 991, 49 App.D.C. 351.

49. Wash.—*State v. Vanskiko*, 208 P. 84, 120 Wash. 659.

50. Tex.—*Burton v. State*, 55 S.W.2d 813, 122 Tex.Cr. 363.

51. Ky.—*Middleton v. Commonwealth*, 202 S.W.2d 610, 304 Ky. 784.

Murder

Ky.—*Jones v. Commonwealth*, 281 S.W. 164, 213 Ky. 356.

Pa.—*Commonwealth v. Mayberry*, 138 A. 686, 290 Pa. 195.

52. Idaho—*State v. Brooks*, 288 P. 894, 49 Idaho 404.

Instruction held not required or authorized

(1) On condition or emergency under which driving on left-hand half or center of highway would be excusable or proper.

Cal.—*People v. Tennis*, 193 P.2d 5, 85 Cal.App.2d 521.

Minn.—*State v. Puert*, 269 N.W. 872, 198 Minn. 175.

(2) On conduct of accused in emergency.—*State v. Gee*, 281 P. 845, 48 Idaho 688.

(3) On conspiracy between accused and person riding with accused at time of accident.—*McCorkle v. State*, 7 S.E.2d 332, 61 Ga.App. 743.

(4) On excusable homicide.—*State v. Bolle*, Mo., 201 S.W.2d 158.

Instructions held erroneous

(1) Instruction that speed was evidence of reckless driving.—*People v. Pace*, 21 N.Y.S. 778, 220 App.Div. 495.

(2) Instruction including factor of drunken driving where there was no evidence that accused was drunk.—*Hurt v. State*, 201 S.W.2d 988, 184 Tenn. 608.

(3) Instructions as to speed limits in business and residential districts, where there was no evidence that district in which accident happened was sign-posted as either business or residential district.—*People v. Okada*, 58 P.2d 967, 14 Cal.App.2d 660.

53. Cal.—*People v. Okada*, supra.

54. Pa.—*Commonwealth v. Aurick*, 10 A.2d 22, 138 Pa.Super. 180.

55. Mich.—*People v. Campbell*, 212 N.W. 97, 237 Mich. 424.

56. Utah—*State v. Assenberg*, 244 P. 1027, 66 Utah 573.

Excessive speed

Wyo.—*Thompson v. State*, 283 P. 151, 41 Wyo. 72.

57. Cal.—*People v. Goodale*, 91 P.2d 163, 33 Cal.App.2d 80

Wyo.—*Thompson v. State*, 283 P. 151, 41 Wyo. 72.

Unanimous agreement on particular acts

Instruction was held not erroneous where the court instructed that, in order to convict, the jury must unanimously agree that accused committed one or more of the acts charged.—*State v. Bleazard*, 133 P.2d 1000, 103 Utah 113.

Instructions held sufficient

Utah.—*State v. Rasmussen*, 68 P.2d 176, 92 Utah 357.

58. Utah.—*State v. Lingman*, 91 P. 2d 457, 197 Utah 180.

Cause of death

(1) Instruction that accident was cause of death of woman who died while being operated on was proper where the accident necessitated the operation.—*State v. Medlin*, 197 S.W. 2d 626, 355 Mo. 564.

(2) Instruction on whether unlawful act of accused caused the death of deceased has been held proper.—*State v. Brown*, 32 S.E.2d 825, 205 S. C. 514.

Instructions held proper

(1) Instruction as to where deceased was when struck.—*State v. Linarducci*, 3 A.2d 796, 122 N.J.Law 137, affirmed 8 A.2d 576, 123 A.L.R. 228.

(2) Instruction on manslaughter in fourth degree for death of companion killed when automobile ran into ditch.—*Christie v. State*, 248 N. W. 920, 212 Wis. 136.

59. Ky.—*Lowe v. Commonwealth*, 181 S.W.2d 409, 298 Ky. 7.

Va.—*Bell v. Commonwealth*, 195 S. E. 675, 170 Va. 597.

Tire blow out

S.C.—*State v. Brown*, 32 S.E.2d 825, 205 S.C. 514.

the specification of certain acts as constituting reckless driving,⁶⁰ accused's negligent, reckless, and wanton operation of the vehicle,⁶¹ the care required to be exercised by accused in the operation of his vehicle,⁶² the duty of accused to sound his horn,⁶³ the speed of accused's vehicle,⁶⁴ or the intoxication of accused.⁶⁵

c. Statutes and Ordinances

The court may include in its instructions a statement of any valid statute or ordinance, or the substance thereof, relative to the operation of motor vehicles which is applicable to the facts of the case as developed by the evidence.

At the trial of a person charged with causing the death of another by the operation of a motor vehicle the court may read to the jury, or give the substance of, any valid statute or ordinance relative to the operation of motor vehicles which is applicable to the facts of the case as developed by the evidence,⁶⁶ even though a violation of such statute or ordinance is not specifically alleged in the indictment or information.⁶⁷ However, it has been held that an ordinance or statute should not be embodied in the instructions where the pleadings do not make its violation a basis of the offense

charged⁶⁸ or where there is no evidence in the case which would make the statute applicable therein.⁶⁹ Also, in a prosecution founded on criminal negligence, an ordinance making every accident a violation of the city laws should not be embodied in the instructions.⁷⁰ Instructions which incorporate statutory provisions expressly made inapplicable to acts committed in driving a motor vehicle are erroneous.⁷¹ It is error to read to the jury a statute applicable only under circumstances which do not appear in the case, without plainly indicating that it does not apply.⁷²

d. Other Offenses or Grades or Degrees of Offense Charged

The court should instruct on other offenses or lesser grades or degrees of homicide included within the offense charged and which are supported by the evidence, but not on offenses not included within the offense charged or which are not supported by the evidence, unless by way of illustration.

Ordinarily on a trial for a criminal homicide by the operation of a motor vehicle the court may and should instruct on grades or lower degrees of homicide included within the offense charged and supported by the evidence.⁷³ Thus instruc-

60. Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

61. Ill.—People v. Flanagan, 170 N.E. 265, 338 Ill. 353.

62. Iowa.—State v. Williams, 28 N.W.2d 514, 238 Iowa 838.

Duty to stop when blinded by headlights

N.J.—State v. Kellow, 53 A.2d 796, 136 N.J.Law 1, affirmed 57 A.2d 389, 136 N.J.Law 633.

Relative rights and duties

In prosecution of truck driver for manslaughter of motorist, instructing jury as to relative rights and duties of driver and motorist on highway was proper.—Turner v. State, 183 So. 522, 183 Miss. 658.

63. Cal.—People v. Perkins, 171 P.2d 919, 75 Cal.App.2d 875.

Iowa.—State v. Williams, 28 N.W.2d 514, 238 Iowa 838.

64. Cal.—People v. Von Eckartsberg, 23 P.2d 819, 133 Cal.App. 1.

65. Kan.—State v. Townsend, 73 P.2d 1124, 146 Kan. 982.

66. Ga.—Butler v. State, 173 S.E. 856, 178 Ga. 700.

Tex.—Moynahan v. State, 146 S.W.2d 376, 140 Tex.Cr. 540.
42 C.J. p 1365 note 14.

Speed regulation

Ga.—Butler v. State, 173 S.E. 856, 178 Ga. 700.

Idaho.—State v. Montleith, 20 P.2d 1023, 53 Idaho 30.

Iowa.—State v. Richardson, 240 N.

W. 695, reheard 249 N.W. 211, 216 Iowa 809.

42 C.J. p 1365 note 14 [a].

Part of statute

Failure to include part of statute accused was not charged with violating was held not error.—State v. Williams, 28 N.W.2d 514, 238 Iowa 838.

Explanatory instructions telling the jury how instructions giving the substance of certain statutes should be considered were held unnecessary where all of the instructions given gave the jury aid it required, if any, in considering applicability of instructions given.—People v. Pierce, 15 N.E.2d 845, 369 Ill. 172.

Where statutes or ordinances not applicable

(1) In prosecution for manslaughter for running down pedestrian, violation of parking ordinance by third person was held to have no bearing on the case and not to require instruction regarding such ordinance.—State v. Gee, 284 P. 845, 48 Idaho 688.

(2) Instruction that vehicles have right of way except at crossings was held properly refused where the crossing was unobstructed.—State v. Gee, supra.

(3) Instruction respecting statute which was inapplicable because passed after offense charged was properly refused.—State v. Stelljes, 184 So. 373, 172 La. 401.

Validity of ordinance

Where the validity of an ordinance depends on compliance by the municipality with a statute, an instruction referring to the ordinance is improper in the absence of proof of such compliance.—State v. Clark, 196 N.W. 82, 196 Iowa 1134—42 C.J. p 1365 note 17.

67. Minn.—State v. Kline, 209 N.W. 881, 168 Minn. 263.

42 C.J. p 1365 note 14.

68. Utah.—State v. Lingman, 91 P.2d 457, 97 Utah 180.

69. Utah.—State v. Newton, 144 P.2d 290, 105 Utah 561.

70. Ala.—Jones v. State, 109 So. 189, 21 Ala.App. 234.

42 C.J. p 1365 note 15.

71. Cal.—People v. Tennis, 193 P.2d 5, 85 Cal.App.2d 521.

72. S.C.—State v. Martin, 115 S.E. 252, 122 S.C. 286.

42 C.J. p 1365 note 16.

73. Okl.—Clapp v. State, 120 P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144.

Duty to submit to jury lesser degrees of homicide than those charged generally see Homicide § 389.

Instructions held proper

(1) Instruction submitting issue of manslaughter in the second degree as an included offense in charge of manslaughter in the first degree.—Ray v. State, Okl.Cr., 189 P.2d 620.

(2) On manslaughter in the fourth

tions which ignore, exclude, or tend to exclude a lower or intermediate grade or degree of homicide, which is comprehended by the indictment and evidence, are erroneous.⁷⁴ Also, in a prosecution for murder committed by running into decedent with an automobile, it is not error to mention in the instructions the various kinds of manslaughter, by way of illustration.⁷⁵ However, an instruction on a lesser offense than that charged need not be given where the evidence is such that accused cannot properly be convicted thereof,⁷⁶ as where the evidence shows that accused is either guilty of the character or degree of offense charged or entirely innocent,⁷⁷ or where the evidence establishes the absence of an element essential to the lesser offense.⁷⁸ Also, in a prosecution for manslaughter, it is not proper to instruct on murder, where there is no evidence of malice or intention to kill,⁷⁹ although such an instruction is not prejudicial where it is limited to pointing out the distinctions between murder and manslaughter.⁸⁰ When accused is charged with voluntary manslaughter, it is proper to instruct the jury on involuntary manslaughter, in view of the difficulty of distinguishing between the facts constituting the two offenses when committed by the operation of

a motor vehicle.⁸¹ It is not error to refuse to charge on an offense not included within the homicide charged.⁸² The failure to charge the law of involuntary manslaughter in the commission of a lawful act in an unlawful manner is not error in a prosecution for assault with intent to murder.⁸³

e. Requested Instructions

The court should give requested instructions which correctly state the law and which are warranted by the pleadings and evidence, and which are not covered by other instructions.

The court is required to give properly requested instructions which correctly propound the law and are warranted by the pleading and evidence, and are not covered by other instructions,⁸⁴ including instructions as to defenses set up by accused and supported by evidence,⁸⁵ and, while in general it cannot modify, qualify, or limit them,⁸⁶ it may explain instructions so requested and given.⁸⁷ Also additional matter may and should be included where the requested instruction, while correct, is likely to be misleading,⁸⁸ or where it does not completely and accurately state the rule applicable to

degree in prosecution on a charge of manslaughter in the first degree.—*State v. Gloyd*, 84 P.2d 966, 148 Kan. 706.

(3) In a murder prosecution the court should instruct on the law of manslaughter if there is any evidence that the alleged crime might have been committed under circumstances that would reduce the crime from murder to manslaughter.—*Tucker v. State*, 92 P.2d 595, 66 Okl. Cr. 335.

74. Ga.—*Floyd v. State*, 197 S.E. 837, 186 Ga. 445.

Instructions held erroneous

Instruction that under particular facts accused is guilty of murder in second degree has been held erroneous where such facts also authorize a verdict of manslaughter.—*People v. Wallace*, 37 P.2d 1053, 2 Cal.App.2d 238.

Failure to instruct held error

(1) On manslaughter in prosecution for murder based on charge of driving motor vehicle while intoxicated.—*Daft v. State*, 42 P.2d 146, 56 Okl.Cr. 449.

(2) On involuntary manslaughter in prosecution for murder.—*Wright v. State*, 141 S.E. 903, 166 Ga. 1.

(3) On manslaughter in second degree in prosecution for first degree manslaughter.—*Roberts v. State*, 166 P.2d 111, 82 Okl.Cr. 75.

75. S.C.—*State v. Porte*, 115 S.E. 238, 122 S.C. 298.

76. Okl.—*Tucker v. State*, 92 P.2d 595, 66 Okl.Cr. 335.

Assault and battery

It is not the duty of the court to charge on the question of the included offense of assault and battery, when there is no evidence to justify a verdict of guilty of that offense.—*Bell v. State*, 7 Ohio App. 185.

77. Idaho.—*State v. Montelth*, 20 P. 2d 1023, 53 Idaho 30.

78. Ala.—*Crump v. State*, 191 So. 475, 29 Ala.App. 22, certiorari denied 191 So. 478, 238 Ala. 439.

79. Ky.—*Jones v. Commonwealth*, 281 S.W. 164, 213 Ky. 356.

80. Cal.—*People v. Wilson*, 228 P. 5, 193 Cal. 512.

81. Ky.—*Jones v. Commonwealth*, 281 S.W. 164, 213 Ky. 356.

82. Refusal of instruction held not error

(1) On assault and assault and battery where the pleadings charged involuntary manslaughter.—*Blackburn v. State*, 180 N.E. 180, 203 Ind. 332.

(2) On negligent homicide where pleading charged murder by unlawfully driving vehicle while intoxicated.—*Totten v. State*, 113 S.W.2d 194, 134 Tex.Cr. 62.

83. Ga.—*Payne v. State*, 40 S.E.2d 759, 74 Ga.App. 646.

84. Ala.—*Curlette v. State*, 142 So. 775, 25 Ala.App. 179.

Ill.—*People v. Schneider*, 200 NE 321, 362 Ill. 478.

Tex.—*Ruedas v. State*, 158 S.W.2d 500, 143 Tex.Cr. 291.

42 C.J. p 1364 note 97 [c].
Refusal to charge on offense not included in homicide charged see supra subdivision d of this section.

Failure to give requested instruction held error

Ohio.—*State v. Minko*, App., 46 N.E. 2d 469.

85. Ala.—*Downey v. State*, 4 So.2d 422, 30 Ala.App. 285, reversed on other grounds 4 So.2d 428, 241 Ala. 514.

Mo.—*State v. Sumpter*, 184 S.W.2d 1005.

Tex.—*Sheffield v. State*, 73 S.W.2d 245, 126 Tex.Cr. 370.

Charge based on accused's testimony
Ala.—*Lewis v. State*, 162 So. 552, 26 Ala.App. 515.

86. Ala.—*Ballum v. State*, 88 So. 200, 17 Ala.App. 679.

S.C.—*State v. Martin*, 115 S.E. 252, 122 S.C. 286.

87. Ala.—*Ballum v. State*, 88 So. 200, 17 Ala.App. 679.

88. Or.—*State v. Miller*, 243 P. 72, 119 Or. 409, affirmed *Miller v. State of Oregon*, 47 S.Ct. 344, 278 U.S. 657, 71 L.Ed. 825.

42 C.J. p 1365 note 12.

the issue with reference to which it is offered.⁸⁹

Requested instructions should be and are properly refused where they are not correct,⁹⁰ or are deficient,⁹¹ or where their meaning is not certain and clear,⁹² or they would be misleading,⁹³ or where the matter is sufficiently covered by other instructions.⁹⁴ It is also proper to refuse requested instructions which endeavor to set up defenses which are not available to accused,⁹⁵ which are not supported by the evidence,⁹⁶ which improperly limit the jury as to the evidence they may consider,⁹⁷ or which require proof of matters not necessary

to the offense charged.⁹⁸

§ 669. — Verdict and Findings

The form, sufficiency, and operation of the verdict are governed by the rules relating to verdicts in prosecutions for homicide generally.

The form, sufficiency, and operation of a verdict in the trial of one accused of causing the death of another person by the operation of a motor vehicle are governed by the rules relating to verdicts in prosecutions for homicide generally.⁹⁹ When an information of manslaughter alleges the vio-

89. Unavoidable accident

Tex.—Sheffield v. State, 72 S.W.2d 245, 126 Tex.Cr. 370.

90. Ala.—Curlette v. State, 142 So. 775, 25 Ala.App. 179—Pippin v. State, 97 So. 615, 19 Ala.App. 384.

Cal.—People v. Aguilar, 35 P.2d 137, 140 Cal.App. 87, hearing denied, Sup., 35 P.2d 142, 140 Cal.App. 87.

Ga.—Stephens v. State, 195 S.E. 477, 57 Ga.App. 390.

Ill.—People v. Pierce, 15 N.E.2d 845, 369 Ill. 172—People v. Isbell, 2 N.E.2d 84, 363 Ill. 264.

La.—State v. Lee, 156 So. 801, 180 La. 494.

Mo.—State v. Studebaker, 66 S.W.2d 877, 334 Mo. 471.

Or.—State v. Miller, 243 P. 72, 119 Or. 409, affirmed Miller v. State of Oregon, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825.

Tex.—Fox v. State, 165 S.W.2d 733, 145 Tex.Cr. 71—Click v. State, 164 S.W.2d 664, 144 Tex.Cr. 468—Houston v. State, 158 S.W.2d 1004, 143 Tex.Cr. 460.

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

Wash.—State v. Dickert, 79 P.2d 328, 194 Wash. 629.

W.Va.—State v. Lawson, 36 S.E.2d 26, 128 W.Va. 136.

Instructions held properly refused

(1) Generally.—Stover v. State, 104 S.W.2d 48, 132 Tex.Cr. 356.

(2) Instruction containing erroneous statement of character of negligence required to convict.

Cal.—People v. Pociask, 96 P.2d 788, 14 Cal.2d 679.

Pa.—Commonwealth v. Ochs, 91 Pa. Super. 528.

(3) Instruction to acquit of negligent homicide if accused fell asleep and collision occurred in consequence thereof.—People v. Robinson, 235 N.W. 236, 263 Mich. 507.

(4) Instruction that deceased was operating his automobile unlawfully on the highway if it had not been inspected by state patrol during the year, where there was no causal connection between failure to have vehicle inspected and collision that caused death.—State v. Carlsen, 136 P.2d 183, 17 Wash.2d 573.

91. Fla.—Franklin v. State, 163 So. 55, 120 Fla. 686.

92. Tex.—Moynahan v. State, 146 S.W.2d 376, 140 Tex.Cr. 540.

93. Ala.—Curlette v. State, 142 So. 775, 25 Ala.App. 179

Cal.—People v. Marconi, 5 P.2d 974, 118 Cal.App. 683.

94. Cal.—People v. Aguilar, 35 P.2d 137, 140 Cal.App. 87, hearing denied 35 P.2d 142, 140 Cal.App. 87.

D.C.—Nestlerode v. U. S., 122 F.2d 56, 74 App.D.C. 276

Ga.—Stephens v. State, 195 S.E. 477, 57 Ga.App. 390.

N.M.—State v. Turney, 65 P.2d 869, 41 N.M. 150.

Tex.—Houston v. State, 158 S.W.2d 1004, 143 Tex.Cr. 460—Stover v. State, 104 S.W.2d 48, 132 Tex.Cr. 356.

Va.—Bowie v. Commonwealth, 35 S.E.2d 345, 184 Va. 381.

Intoxication

Refusal to instruct that intoxication alone would not justify conviction was not prejudicial, where court charged that intoxication was circumstance to be considered by jury with others in determining guilt or innocence.—State v. Richardson, 249 N.W. 211, 216 Iowa 809.

95. Ill.—People v. Herkless, 196 N.E. 829, 361 Ill. 32.

Tex.—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9—Anderson v. State, 117 S.W.2d 465, 135 Tex.Cr. 104.

Contributory negligence

Ala.—Pratt v. State, 171 So. 393, 27 Ala.App. 301—Broxton v. State, 171 So. 390, 27 Ala.App. 298.

Idaho.—State v. Taylor, 177 P.2d 468, 67 Idaho 313.

Kan.—State v. Gloyd, 84 P.2d 966, 148 Kan. 706.

Mo.—State v. Medlin, 197 S.W.2d 626, 355 Mo. 564.

Tex.—Walters v. State, Cr., 204 S.W.2d 621—Fox v. State, 165 S.W.2d 733, 145 Tex.Cr. 71—Biscamp v. State, 154 S.W.2d 466, 142 Tex.Cr. 401—Brewer v. State, 143 S.W.2d 599, 140 Tex.Cr. 9—Stover v. State, 104 S.W.2d 48, 132 Tex.Cr. 356.

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

Wash.—State v. Carlsen, 136 P.2d 183, 17 Wash.2d 573.

42 C.J. p 1364 note 98 [a] (2).

Law prohibiting passing stopped school bus

In prosecution for negligent homicide caused when motorist passed school bus which was discharging passengers, accused was held not entitled to charge on unavoidable accident, since accident could have been avoided by compliance with law prohibiting motorist from passing school bus.—Menefee v. State, 87 S.W.2d 473, 129 Tex.Cr. 375.

96. Ala.—Wilson v. State, 28 So.2d 646, 32 Ala.App. 591.

Ariz.—Gibbs v. State, 58 P.2d 1037, 48 Ariz. 25.

Idaho.—State v. Gee, 284 P. 845, 48 Idaho 688.

Kan.—State v. Phelps, 110 P.2d 755, 153 Kan. 337.

La.—State v. Linam, 144 So. 600, 175 La. 865.

Mo.—State v. Studebaker, 66 S.W.2d 877, 334 Mo. 471.

Utah.—State v. Newton, 144 P.2d 290, 105 Utah 561.

Va.—Bowie v. Commonwealth, 35 S.E.2d 345, 184 Va. 381.

Wyo.—Thompson v. State, 283 P. 151, 41 Wyo. 72.

Excusable homicide

Cal.—People v. Aguilar, 35 P.2d 137, 140 Cal.App. 87, hearing denied, Sup., 35 P.2d 142, 140 Cal.App. 87.

Right to assume deceased would avoid vehicle

Tex.—Stover v. State, 104 S.W.2d 48, 132 Tex.Cr. 356.

97. D.C.—Nestlerode v. U. S., 122 F.2d 56, 74 App.D.C. 276.

98. Ala.—Pippin v. State, 97 So. 615, 19 Ala.App. 384.

Ark.—Nichols v. State, 63 S.W.2d 655, 187 Ark. 999.

Cal.—People v. Lloyd, 275 P. 1010, 97 Cal.App. 664.

Or.—State v. Boag, 59 P.2d 396, 154 Or. 354.

99. Pa.—Commonwealth v. Stine, 193 A. 344, 127 Pa.Super. 169—Commonwealth v. Handa, Quar. Sess., 27 Wash.Co. 122.

lation of two statutory provisions, one of which is invalid, a verdict of guilty will be applied to the valid portion of the indictment.¹

§ 670. — Judgment, Sentence, and Punishment

The sentence imposed on one convicted of some grade of criminal homicide for a death resulting from the operation of a motor vehicle must be in conformity with the punishment provided therefor by statute.

The sentence imposed on one convicted of some grade of criminal homicide for a death resulting from the operation of a motor vehicle must be in conformity with the punishment provided therefor by statute, and in some jurisdictions is fixed by statutes specifically applicable to deaths resulting from the operation of motor vehicles and not

under statutes applicable to homicides generally.² In some jurisdictions it is within the province of the jury to fix the period of punishment,³ but the place of punishment is solely within the province of the court.⁴

§ 671. — Appeal and Error

A conviction for a homicide resulting from the operation of a motor vehicle will be reversed on appeal for error prejudicial to the accused, but it will not be reversed for harmless or nonprejudicial error.

A conviction for a homicide resulting from the operation of a motor vehicle will be reversed on appeal for error prejudicial to accused in the trial of the case;⁵ but it will not be reversed for error which has not been prejudicial to accused,⁶ as where evidence improperly admitted was harm-

Responsiveness

A verdict which is responsive to one phase of the evidence has been held sufficient.—*Oliver v. State*, 134 So. 892, 24 Ala.App. 292, certiorari denied 134 So. 894, 223 Ala. 167.

Verdict held insufficient

Verdict finding accused guilty of failing to stop and render aid after automobile accident could not support conviction of murder in second degree.—*People v. McIntire*, 1 P.2d 443, 213 Cal. 50.

Findings held unnecessary

(1) Finding that motorist's automobile struck deceased is unnecessary where motorist admitted it.—*State v. Medlin*, 197 S.W.2d 626, 355 Mo. 564.

(2) Failure to require finding that passenger was not operating automobile was not error where the court required finding that the accused was operating it.—*State v. Lovelace*, Mo., 39 S.W.2d 533.

1. Tex.—*Parrocchini v. State*, 234 S.W. 671, 90 Tex.Cr. 320.

2. Tex.—*Kirksey v. State*, 123 S.W. 2d 905, 136 Tex.Cr. 97.
Wash.—*State v. Sandvig*, 251 P. 887, 141 Wash. 542.

Statute held not conflicting with general statute

Statute providing penalty for homicide committed by operation of automobile was held not conflicting with statute respecting involuntary manslaughter.—*State v. Williams*, 139 So. 481, 173 La. 1061.

Penalty for felony actually committed

Tex.—*Flowers v. State*, Cr., 203 S.W. 2d 539.

Manslaughter in second degree

Ala.—*Powell v. State*, 10 So.2d 867, 30 Ala.App. 606.

Negligent homicide

(1) Statute granting discretion to punish negligent homicide by impris-

onment in either state prison or county jail, was not invalid as granting trial judge power to transform a felony into a misdemeanor.—*People v. Pryor*, 61 P.2d 773, 17 Cal.App.2d 147.

(2) Imposing county jail sentence on motorist convicted of negligent homicide did not change nature of offense.—*People v. Pryor*, supra.

3. Ala.—*McHugh v. State*, 3 So.2d 569, 30 Ala.App. 231, certiorari denied 3 So.2d 572, 241 Ala. 569.

4. Ala.—*McHugh v. State*, supra.

5. Admission of evidence held reversible error
Ga.—*Hicks v. State*, 189 S.E. 373, 55 Ga.App. 149.

Argument held prejudicial

Ala.—*Ballum v. State*, 88 So. 200, 17 Ala.App. 679.

Ill.—*People v. Schneider*, 200 N.E. 321, 362 Ill. 478.

Error in instructions held reversible error

(1) Prejudicially erroneous instructions.

Cal.—*People v. Okada*, 58 P.2d 967, 14 Cal.App.2d 660.—*People v. Wallace*, 37 P.2d 1053, 2 Cal.App.2d 238.
Ky.—*Roberts v. Commonwealth*, 95 S.W.2d 23, 264 Ky. 545.

Miss.—*Reynolds v. State*, 24 So.2d 781, 199 Miss. 409.—*McKinney v. State*, 18 So.2d 446, 196 Miss. 826.—*Bailey v. State*, 169 So. 765, 176 Miss. 579.

S.D.—*State v. McNabb*, 246 N.W. 291, 61 S.D. 100.
42 C.J. p 1365 note 26 [d].

(2) Failure or refusal to give proper instructions generally.—*People v. Schneider*, 200 N.E. 321, 362 Ill. 478.

(3) Failure or refusal to give instructions on lesser grade or degree of offense.
Kan.—*State v. Gloyd*, 84 P.2d 966, 148 Kan. 706.

Okl.—*Roberts v. State*, 166 P.2d 111, 82 Okl.Cr. 75.

Failure to prove essential element

Conviction was reversed where record failed to show that party injured was dead.—*Mendiola v. State*, 98 S.W.2d 193, 131 Tex.Cr. 293.

6. Md.—*Neusbaum v. State*, 143 A. 872, 156 Md. 149.

42 C.J. p 1365 note 25.

Errors in instructions held not ground for reversal

(1) Generally.—*State v. Smith*, 193 S.E. 573, 119 W.Va. 347—42 C.J. p 1365 note 26 [c].

(2) Erroneous instruction on driving automobile while intoxicated, where jury found accused guilty because of reckless driving.—*State v. Monteith*, 20 P.2d 1023, 53 Idaho 30.

(3) Failure to charge that unlawful act must be proximate cause of death to warrant conviction, where undisputed evidence established that such act was cause of death and no request to charge thereon was made.—*Logan v. State*, 275 P. 657, 42 Okl. Cr. 294.

(4) Instruction on care and duty of driver under circumstances which do not appear in evidence, where it is not confusing or misleading.—*People v. Campbell*, 212 N.W. 97, 237 Mich. 424.

(5) Erroneous charge as to what punishment should be imposed.—*Holt v. State*, 157 So. 449, 26 Ala.App. 223, certiorari denied 157 So. 452, 229 Ala. 368.

(6) Inadvertent transposition of words in instruction which was so obvious that it could not have misled the jury.—*Gibbs v. State*, 58 P.2d 1037, 48 Ariz. 25.

(7) Inadvertent reference in instruction to witness as accused.—*Commonwealth v. Kurtz*, 33 Pa.Dist. & Co. 661.

Errors held not ground for reversal

(1) Improper question by attorney.—*State v. Harris*, 183 S.E. 740, 209 N.C. 579.

less to accused,⁷ or error in the giving of instructions was favorable to accused,⁸ or was with reference to an offense of which accused was not convicted,⁹ or where the jury, on the law and the facts, find accused guilty of a lower degree or grade of homicide than that of which he should have been convicted.¹⁰ Of course, a conviction will not be reversed for a decision of the trial court which was not erroneous.¹¹ A finding of the trier of facts when supported by substantial evidence will not be disturbed by an appellate court.¹² The mere fact that the sentence imposed in the trial court is severe does not authorize the appellate court to modify or reverse the judgment.¹³

§ 672. Loitering; Seeking Employment

Some statutes have penalized loitering on the streets or vehicles for hire seeking employment.

Motor vehicles used for hire and for which their owners have public hack licenses are within the meaning of a police regulation against loitering upon the street of vehicles for hire seeking employment.¹⁴ The owner of the vehicle who knowingly permits the violation of the law may be responsible criminally, although the driver in charge of the vehicle may also have been responsible.¹⁵ Under a statute making it an offense for the driver of a motor vehicle to loiter upon public streets

and avenues, conviction is improper where the proof shows that the vehicle was standing at the time of the driver's arrest upon the private property of a railroad company where it had a right to be under a contract between the owner of the taxicab and the railroad company.¹⁶

§ 673. Maliciously Damaging; Malicious Mischief

Injury to, destruction of, or tampering with, a motor vehicle may constitute a criminal offense either under principles relating to malicious mischief generally or under statutes relating to personal property generally or specifically to vehicles or motor vehicles.

In accordance with the principles relating to malicious mischief generally, discussed in Malicious Mischief §§ 1-5, malicious injury to a motor vehicle is an offense.¹⁷ It has been held that a person is guilty of malicious mischief where, while using the car of another, and regardless of the rights of the owner, he operates it in such a reckless manner as to wreck or seriously damage it.¹⁸ A general statute defining the offense of willful and malicious destruction of, or injury to, the personal property of another applies to the destruction of, or injury to, a motor vehicle.¹⁹ Some statutes specifically applicable to vehicles or motor vehicles in various terms penalize injury to, or tampering with, a motor vehicle²⁰ or its contents.²¹ Under a

(2) Improper question by court — *Bowen v. State*, 140 S.W. 28, 100 Ark. 232.

7. Conn.—*State v. Goldberger*, 173 A 216, 118 Conn. 444.

Ill.—*People v. Peterson*, 4 N.E.2d 37, 364 Ill. 80.

Md.—*Neusbaum v. State*, 143 A. 872, 156 Md. 149.

Minn.—*State v. Puert*, 269 N.W. 372, 198 Minn. 175.

Miss.—*Sims v. State*, 115 So. 217, 149 Miss. 171.

N.C.—*State v. Leonard*, 141 S.E. 736, 195 N.C. 242.

Pa.—*Commonwealth v. Kurtz*, 33 Pa. Dist. & Co. 661.

Tex.—*Snyder v. State*, 102 S.W.2d 424, 132 Tex.Cr. 73.

Utah.—*State v. Lake*, 196 P. 1015, 57 Utah 610.

42 C.J. p 1365 note 26 [a].

8. Ga.—*Booker v. State*, 190 S.E. 356, 183 Ga. 822.

S.C.—*State v. Staggs*, 195 S.E. 130, 186 S.C. 151.

Blocked-out instructions

Consideration by jury of blocked-out instructions, effect of which could only have been favorable to accused, was held not reversible error.—*People v. Henry*, 72 P.2d 915, 23 Cal.App.2d 155.

9. Error in instruction on graver offense

Cal.—*People v. Aguilar*, 35 P.2d 137,

140 Cal.App. 87, hearing denied, Sup., 35 P.2d 142, 140 Cal.App. 87. Tex.—*Stover v. State*, 104 S.W.2d 48, 132 Tex.Cr. 356.

Error in instruction on lesser offense Ga.—*Cain v. State*, 190 S.E. 371, 55 Ga.App. 376.

Ky.—*Sloan v. Commonwealth*, 104 S.W.2d 988, 268 Ky. 241.

10. Okl.—*Clapp v. State*, 120 P.2d 381, 73 Okl.Cr. 261, reheard 124 P.2d 267, 74 Okl.Cr. 144.—*Tucker v. State*, 92 P.2d 595, 66 Okl.Cr. 335.—*Philby v. State*, 76 P.2d 412, 64 Okl.Cr. 1.

11. Ariz.—*Gibbs v. State*, 58 P.2d 1037, 48 Ariz. 25.

12. Cal.—*People v. Gomez*, 138 P.2d 788, 59 Cal.App.2d 417.

Decision of jury convicting accused will not be superseded by the appellate court.—*O'Conner v. State*, 88 S.W.2d 1048, 129 Tex.Cr. 509.

13. Ky.—*Largent v. Commonwealth*, 97 S.W.2d 538, 265 Ky. 598.

14. D.C.—*Gassenheimer v. District of Columbia*, 26 App.D.C. 557. 42 C.J. p 1384 note 7.

15. D.C.—*Gassenheimer v. District of Columbia*, supra.

16. D.C.—*Reamy v. District of Columbia*, 278 F. 323, 55 App.D.C. 359

17. S.C.—*State v. Abney*, 95 S.E. 179, 109 S.C. 102.

42 C.J. p 1384 note 13.

18. S.C.—*State v. Davis*, 70 S.E. 811, 88 S.C. 229, 34 L.R.A., N.S., 295.

19. Fla.—*Williams v. State*, 109 So. 805, 92 Fla. 648.

Knowledge of ownership

Under statute, knowledge on the part of the person who inflicts the injury on a motor vehicle of who owns the vehicle is not an essential element of the offense.—*Commonwealth v. Hosman*, 154 N.E. 76, 257 Mass 379.

Accessory before fact

One who had instructed the driver of a motor vehicle engaged in an unlawful transaction to crash through in case of interference was guilty as an accessory before the fact to an offense under the statute, where the driver obeyed the instruction in driving into another motor vehicle and all the elements of an offense under the statute existed.—*Commonwealth v. Hosman*, supra.

20. Cal.—*People v. Score*, 120 P.2d 62, 48 Cal.App.2d 495.

Mo.—*State v. Ryan*, App., 289 S.W. 13.

Wis.—*Sekat v. State*, 260 N.W. 246, 218 Wis. 91.

21. Cal.—*People v. Score*, 120 P.2d 62, 48 Cal.App.2d 495.

statute punishing anyone who shall purposely and maliciously change the gears of a standing motor vehicle to a position other than that in which they were left by the owner, one who, having been employed to repair a motor vehicle, places the car in gear in order to operate it is not guilty of the offense contemplated, although in trying out the car he takes third persons for a ride.²²

The offense of wrongful removal of parts of a motor vehicle is discussed infra § 713, and the offense of obstructing a highway in Highways §§ 230, 231.

Indictment or information. General rules as to the sufficiency of an indictment or information, discussed in Indictments and Informations §§ 35-184, apply.²³

Evidence. General rules of evidence in criminal prosecutions apply as to the admissibility²⁴ and weight and sufficiency²⁵ of the evidence.

Instructions. As in other criminal prosecutions, the court should fully and correctly instruct the

jury as to the law applicable to the issues.²⁶

§ 674. Neglecting Duty after Accident

- a. In general
- b. Validity of statutes or ordinances
- c. Essentials or elements of offense

a. In General

Statutes imposing on the operation of a motor vehicle, in whole or in part, under certain circumstances, the duty to stop, give certain information, render assistance, and make a report, and providing a penalty for failure to comply, are to be given a reasonable construction, or, as sometimes stated, are to be construed strictly in favor of the accused.

The purpose of a statute requiring, in whole or in part, that the operator of a motor vehicle, in case of accident, collision, or injury or damage to person or property, shall stop, give certain information, such as his name and address, render assistance, and make a report to proper authorities, and providing a penalty for failure to comply,²⁷ which is commonly or popularly referred to as a "hit-and-run statute,"²⁸ has been stated in varying terms.²⁹ A statute of this type, being

Examining contents of compartment

Under a statute making the willful injury to, or tampering with, the contents of a vehicle a misdemeanor, a person who was sitting in a motor vehicle and was going through the contents of the glove compartment without the owner's consent was in the act of committing a misdemeanor.—*People v. Score*, supra.

22. Tex.—*Welch v. State*, 194 S.W. 400, 81 Tex.Cr. 192.

23. Indictment or information held sufficient

Fla.—*Williams v. State*, 109 So. 805, 92 Fla. 648.

Ill.—*People v. Stanton*, 8 N.E.2d 67, 289 Ill.App. 616.

24. Evidence held inadmissible

Evidence that accused's father had paid complaining witness a certain amount for repair of motor vehicle, in the absence of evidence connecting accused with payment, in a prosecution for unlawfully, intentionally, and maliciously damaging a motor vehicle.—*People v. Peltz*, 10 N.E.2d 843, 292 Ill.App. 632.

25. Evidence held sufficient to authorize or sustain a conviction in prosecution:

(1) Under statute relative to tampering with motor vehicle without the consent of owner.—*State v. Ryan*, Mo.App., 289 S.W. 13.

(2) Under statute relative to injuring, and interfering with the lawful operation of, a motor vehicle.—*Sekat v. State*, 260 N.W. 246, 218 Wis. 91.

(3) For unlawfully and wrongfully interfering with, cutting, defacing,

and injuring automobile.—*Bryan v. State*, 270 P. 860, 41 Okl.Cr. 98.

(4) For unlawfully cutting automobile tires.—*Collier v. Commonwealth*, 135 S.E. 680, 146 Va. 264.

Evidence held insufficient to authorize or sustain conviction in prosecution:

(1) Under statute relative to tampering with a motor vehicle without the consent of the owner.—*Waggoner v. State*, 120 S.W.2d 1062, 135 Tex. Cr. 446.

(2) Under a general statute relative to unlawfully, wantonly, or maliciously injuring the property of another, for so operating a motor vehicle as to injure another motor vehicle in a collision.—*Terry v. State*, 31 So.2d 105, 33 Ala.App. 75, certiorari denied 31 So.2d 107, 249 Ala. 304.

(3) For unlawfully cutting automobile tires.—*Collier v. Commonwealth*, 135 S.E. 680, 146 Va. 264.

26. Instructions held sufficient or proper

Mass.—*Commonwealth v. Hosman*, 154 N.E. 76, 257 Mass. 379.

27. Colo.—*People v. Graham*, 110 P. 2d 258, 107 Colo. 202.

N.Y.—*People v. La Rock*, 21 N.Y.S. 2d 778, 174 Misc. 795.

Repeal of statute

(1) Where a statute covering generally the matter here under consideration had been superseded by a statute dealing with the same subject, a conviction under the repealed statute for an alleged offense committed after the superseding statute

had become effective was not permissible.

Ala.—*Pate v. State*, 143 So. 208, 25 Ala.App. 208.

Ariz.—*Olson v. State*, 285 P. 286, 36 Ariz. 294.

(2) A statute requiring stopping, giving information, and rendering assistance was not repealed as to the provision for rendering assistance by a later statute which merely covered stopping and giving information.—*People v. Finley*, 149 P. 779, 27 Cal. App. 291.

28. D.C.—*Oden v. District of Columbia*, 79 F.2d 175, 65 App.D.C. 50.

Ind.—*Ule v. State*, 194 N.E. 140, 208 Ind. 255, 101 A.L.R. 903.

N.H.—*State v. Derosa*, 50 A.2d 231, 94 N.H. 228.

S.D.—*State v. Tarbell*, 266 N.W. 677, 64 S.D. 330.

Va.—*Herchenbach v. Commonwealth*, 38 S.E.2d 328, 185 Va. 217—Blankenship v. Commonwealth, 35 S.E. 2d 760, 184 Va. 495.

Offense of "hit and run"

(1) The offense defined by the statute is sometimes referred to as the offense of "hit and run."—*People v. Houston*, 74 P.2d 515, 24 Cal.App.2d 515.

(2) The offense defined by the statute is commonly known as "hit and run driving."—*State v. Lee*, 88 P.2d 996, 53 Ariz. 295.

29. Acquisition of information, obtaining assistance, and prevention of evasion of liability

D.C.—*Oden v. District of Columbia*, 79 F.2d 175, 65 App.D.C. 50.

penal, must be construed reasonably,³⁰ or, as sometimes stated, it must be construed strictly in favor of accused.³¹ Such a statute may not be enlarged by construction or extended by inference to include acts not within its terms,³² and accused cannot be held liable under some statutes for failure to do something which was not necessary or which was not reasonably required.³³

Such a statute has been held to create but one criminal offense, although it may require the performance of several separate acts,³⁴ and there can be but one punishment.³⁵ It has also been held or recognized, however, that a failure to perform any one of several acts designated by the statute may constitute a separate offense.³⁶

Regulations relative to duty after accident are discussed generally supra § 38.

Grade of offense. Some statutes of the general type here under consideration have constituted the offense a felony.³⁷ A statute making it a felony for the driver of an automobile striking any person or vehicle to fail to stop, give his name, and

render assistance is not inconsistent with the provisions of a later statute making it a misdemeanor for the driver in such case to fail to stop and give his name, as to the portion requiring the giving of assistance; and therefore a driver indicted for failure to give assistance to an injured person can be convicted and punished as for a felony.³⁸ Under other statutes, however, the particular offense is a misdemeanor, such as failing to stop,³⁹ failing to stop and give information,⁴⁰ leaving the scene of an accident without reporting,⁴¹ or failing to give assistance.⁴²

Jurisdiction. In general, questions as to jurisdiction in a prosecution for an offense of the general type here under consideration depend on the local statutes and rules of practice.⁴³

b. Validity of Statutes or Ordinances

Statutes of the general type here under consideration have generally been regarded as valid.

Statutes of the general type here under consideration have generally been held constitutional and valid,⁴⁴ as a reasonable exercise of the po-

Ind.—Runyon v. State, 38 N.E.2d 235, 219 Ind. 352.

N.Y.—People v. Chusid, 14 N.Y.S.2d 474, 172 Misc. 492.

S.D.—State v. Clark, 290 N.W. 237, 67 S.D. 133.

Aimed at "hit-and-run" drivers

D.C.—Scott v. District of Columbia, Mun. App., 55 A.2d 854.

Ga.—Georgia Power Co. v. Shipp, 24 S.E.2d 764, 195 Ga. 446, mandate conformed to 25 S.E.2d 524, 69 Ga. App. 356.

Okl.—McDonald v. State, 15 P.2d 149, 54 Okl. Cr. 122.

Prevention of accidents or injury

Ark.—Benson v. State, 208 S.W.2d 767, 212 Ark. 905.

30. Ala.—Lashley v. State, 180 So. 717, 236 Ala. 1—Lashley v. State, 180 So. 720, 28 Ala.App. 86, certiorari denied 180 So. 724, 236 Ala. 28.

Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641—People v. Kaufman, 193 P. 953, 49 Cal. App. 570.

31. Kan.—State v. Bowser, 145 P.2d 135, 158 Kan. 12.

N.J.—Butler v. Jersey Coast News Co., 160 A. 659, 109 N.J. Law 255.

Pa.—Commonwealth v. Adams, 23 A. 2d 59, 146 Pa. Super. 601.

32. Okl.—McDonald v. State, 15 P. 2d 149, 54 Okl. Cr. 122.

S.D.—State v. Clark, 290 N.W. 237, 67 S.D. 133.

33. Pa.—Commonwealth v. Adams, 23 A.2d 59, 146 Pa. Super. 601.

34. Ind.—Runyon v. State, 38 N.E. 2d 235, 219 Ind. 352.

Kan.—State v. Razez, 282 P. 755, 129 Kan. 328, 66 A.L.R. 1225.

Pa.—Commonwealth v. Zeitler, 79 Pa. Super. 81.

35. Ind.—Runyon v. State, 38 N.E. 2d 235, 219 Ind. 352.

36. Cal.—People v. Scofield, 265 P. 914, 203 Cal. 703, followed in People v. Campridon, 268 P. 372, 204 Cal. 701—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 611—People v. Steele, 280 P. 999, 100 Cal.App. 639.

37. Cal.—People v. Houston, 74 P.2d 515, 24 Cal.App.2d 167.

Mich.—People v. Buckley, 4 N.W.2d 448, 302 Mich. 12.

N.H.—State v. Derosia, 50 A.2d 231, 94 N.H. 228.

Tex.—Poenich v. State, Cr., 12 S.W. 2d 208.

Va.—James v. Commonwealth, 16 S. E.2d 296, 178 Va. 28.

Wis.—Boehm v. State, 209 N.W. 730, 190 Wis. 609.

Determine by place of punishment

In accordance with general rules stated in Criminal Law § 6, it has been held or recognized that the offense under a statute of the type here under consideration which does not in terms characterize the offense either as a felony or as a misdemeanor is a felony, where the statute permits imprisonment in the penitentiary.—Bragan v. State, 9 So.2d 123, 248 Ala. 102, answer to certified question conformed to 9 So.2d 126, 30 Ala.App. 548—Lashley v. State, 180 So. 717, 236 Ala. 1—Lashley v. State, 180 So. 720, 28 Ala.App. 86, certiorari denied 180 So. 724, 236 Ala. 28—State v. Hall, 134 So. 898, 24 Ala.App. 336.

38. Cal.—People v. Finley, 149 P. 779, 27 Cal.App. 291.

39. In Pennsylvania

(1) It has been held that even since the amendment of 1937, 75 P.S. § 631, a person who fails to stop after his vehicle has collided with, and damaged, property may properly be charged with a misdemeanor under subs. (a), whether the property was attended or unattended.—Commonwealth v. Baker, 53 Pa. Dist. & Co. 702, 61 Montg. Co. 200—Commonwealth v. Wolfendale, 43 Pa. Dist. & Co. 230.

(2) It has been held, however, that, while prior to such amendment failure to stop constituted a misdemeanor or whether the property damaged was attended or unattended, since such amendment failure to stop is a mere summary offense under subs. (d), if the property damaged was unattended.—Commonwealth v. Krivonak, 46 Pa. Dist. & Co. 109, 24 Erie Co. 185—Commonwealth v. Kane, 38 Pa. Dist. & Co. 480.

40. Ariz.—Olson v. State, 285 P. 282, 36 Ariz. 294.

41. N.Y.—People v. Patrick, 26 N.Y. S.2d 183, 175 Misc. 997.

42. Ariz.—Olson v. State, 285 P. 282, 36 Ariz. 294.

Mich.—People v. Hoaglin, 247 N.W. 141, 262 Mich. 162.

43. Idaho.—State ex rel. Gundlach v. Featherstone, 34 P.2d 52, 54 Idaho 640.

N.Y.—People v. Chmielewski, 275 N. Y.S. 148, 153 Misc. 386.

44. Ala.—Corpus Juris cited in

lice power of the state,⁴⁵ and as not in violation of a constitutional guaranty against self-incrimination.⁴⁶ Such a statute has been upheld as against a claim that it is void for indefiniteness, uncertainty, or vagueness.⁴⁷ It has been held, however, that a statutory provision for rendering such assistance as may be reasonable or necessary after an accident is too vague, indefinite, and uncertain to permit enforcement of such provision, and, therefore, that it cannot properly be the basis of a criminal prosecution.⁴⁸

A municipal ordinance requiring one involved in an accident resulting in injury to any person or property to identify himself and vehicle has been held to be valid as within the limits of police power delegated to the municipal corporation.⁴⁹ A municipal ordinance which requires the rendering of reasonable assistance under penalty has, however, been held to be invalid,⁵⁰ and it has been held that a municipal ordinance requiring the driver or operator of a vehicle involved in an accident which

causes injury to a person or which disables a vehicle to make a full report to the police department violates the constitutional guaranty against self-incrimination.⁵¹ A municipal ordinance requiring the operator of a motor vehicle who has been involved in an accident to report such accident to municipal police if the damage is to the apparent extent of a specified amount or more has been held invalid on the ground that the minimum amount fixed by the ordinance is less than that fixed by a statute requiring a like report to a particular state department,⁵² and also on the ground that the penalty prescribed for a violation of such ordinance is in excess of that which the municipality has been allowed to impose for such violation.⁵³

Driving after conviction. A statutory provision making it an offense to drive a motor vehicle within a prescribed period from conviction for leaving after an accident without stopping is valid as a police regulation.⁵⁴

Lashley v. State, 180 So. 717, 719, 236 Ala. 1—Griffin v. State, 10 So. 2d 374, 30 Ala. App. 599—*Corpus Juris* cited in Lashley v. State, 180 So. 720, 723, 28 Ala. App. 86, certiorari denied 180 So. 724, 236 Ala. 28—State v. Hall, 134 So. 898, 24 Ala. App. 336.

Cal.—People v. Bowlin, 65 P.2d 840, 19 Cal. App. 2d 397.

D.C.—Scott v. District of Columbia, Mun. App., 55 A.2d 854.

Fla.—In re Jones, 178 So. 424, 130 Fla. 667.

Ind.—Ule v. State, 194 N.E. 140, 208 Ind. 255, 101 A.L.R. 903.

Mich.—People v. Thompson, 242 N.W. 857, 259 Mich. 109.

Okl.—McDonald v. State, 15 P.2d 149, 54 Okl. Cr. 122.

Tex.—Scott v. State, 233 S.W. 1097, 90 Tex. Cr. 100, 16 A.L.R. 1420.

W.Va.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

42 C.J. p 640 note 43, p 1384 note 18.

45. Mo.—Ex parte Kneedler, 147 S.W. 983, 243 Mo. 632, 40 L.R.A., N.S., 622, Ann.Cas.1913C 923.

W.Va.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

42 C.J. p 1384 note 18 [a] (2), (3).

46. Ala.—Lashley v. State, 180 So. 717, 236 Ala. 1—Lashley v. State, 180 So. 720, 28 Ala. App. 86, certiorari denied 180 So. 724, 236 Ala. 28.

Fla.—In re Jones, 178 So. 424, 130 Fla. 667.

Ind.—St. Clair v. State, 196 N.E. 683, 209 Ind. 135—Ule v. State, 194 N.E. 140, 208 Ind. 255, 101 A.L.R. 903.

Kan.—State v. Razey, 282 P. 755, 129 Kan. 328, 66 A.L.R. 1225.

Mich.—*Corpus Juris* cited in People

v. Thompson, 242 N.W. 857, 862, 259 Mich. 109.

Okl.—McDonald v. State, 15 P.2d 149, 54 Okl. Cr. 122.

42 C.J. p 640 note 45, p 1384 note 18 [a] (1).

Self-incrimination generally see Criminal Law §§ 649–656; the C.J.S. title Witnesses §§ 431–443, also 70 C.J. p 719 note 43–p 738 note 90.

Reasons for, and discussion of, rule

(1) In a case in which the rule stated in the text was apparently recognized, it was stated that the operation of a motor vehicle on public highways is a right and not a privilege which the state may grant or withhold at pleasure and may grant on condition, and that it is permissible to waive the right or immunity as to giving incriminating evidence.—Commonwealth v. Showers, 32 Pa. Dist. & Co. 264.

(2) It has also been stated that, even if the requirements of the statute are construed as violative, of the constitutional privilege against self-incrimination, it would not be necessary to declare the statute invalid in order to obtain the protection of the guaranty, since, if, in the particular case, the constitutional privilege justified the refusal to give the information required by the statute, the question could be raised in the defense of the prosecution.

Mo.—Ex parte Kneedler, 147 S.W. 983, 243 Mo. 632, 639, 40 L.R.A., N.S., 622, Ann.Cas.1913C 923.

Pa.—Commonwealth v. Showers, *supra*.

(3) Other reasons for rule see 42 C.J. p 640 note 45 [a].

Filing report with secretary of state

Statutory provision is not unconstitutional as depriving motorist of constitutional guaranty against self-incrimination by requiring the filing of a report with secretary of state when a vehicle is involved in accident resulting in death or injury—Surtman v. Secretary of State, 15 N.W.2d 471, 309 Mich. 270.

47. D.C.—Scott v. District of Columbia, Mun. App., 55 A.2d 854.

Ind.—Ule v. State, 194 N.E. 140, 208 Ind. 255, 101 A.L.R. 903.

W.Va.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

42 C.J. p 1384 note 18 [b].

Place of confinement

Such a regulation is not invalid, as being vague and indefinite, by reason of the fact that it provides for punishment by confinement either in the penitentiary or the county jail—Mossier v. State, 234 S.W. 225, 90 Tex. Cr. 136.

48. Ga.—Hurst v. State, 147 S.E. 782, 39 Ga. App. 522.

49. S.D.—City of Sioux Falls v. Peterson, 25 N.W.2d 556.

50. Ohio.—Henry v. Cleveland, 27 O.C.A. 321.

42 C.J. p 640 note 43 [b].

51. Ohio.—Rembrandt v. City of Cleveland, 161 N.E. 364, 28 Ohio App. 4.

52. Pa.—Commonwealth v. Zahniser, 33 Pa. Dist. & Co. 35.

53. Pa.—Commonwealth v. Zahniser, *supra*.

54. Ala.—State v. Campbell, 107 So. 788, 21 Ala. App. 303.

42 C.J. p 640 note 47.

c. Essentials or Elements of Offense

- (1) In general
- (2) Knowledge and intent
- (3) Failure to stop
- (4) Failure to furnish information, to report, or to exhibit license
- (5) Failure to render assistance

(1) In General

The duties imposed on the operator of a motor vehicle who has been involved in an accident or who has caused injury to another depend largely on the provisions of the statute.

The duty imposed on the driver of a motor vehicle, who has been involved in an accident or has caused injury to another, is primarily to be determined from the provisions of the statute;⁵⁵ and, where several distinct acts are required of him, the omission of any one or more of them constitutes a "violation."⁵⁶ The acts or omissions which constitute the offense of "hit and run" do not commence until after the injury or damage has been inflicted.⁵⁷ The imposition of the duties prescribed by some statutes on a driver "causing" an injury relates to the physical cause of the injury involved rather than to the legal responsibility therefor.⁵⁸

In general, it does not matter whether the person accused caused the injury or collision by a culpable act or whether it occurred through pure accident,⁵⁹ and failure of accused to comply with the statute may be the basis for a finding of guilt under some statutes regardless of how the collision in question occurs or who is at fault.⁶⁰ So,

in general, what kind of property was injured⁶¹ or what particular injury was caused⁶² is immaterial. In order to render some statutory provisions operative, it is essential that there should be some damage to property,⁶³ or some substantial damage to property.⁶⁴ Some statutes apply to any motor vehicle, whether it is owned and operated privately or as a common carrier.⁶⁵

The operation of the statutes may be limited to an accident resulting in injury to person or property other than the vehicle under control of accused or its occupants.⁶⁶ Other statutes apply, however, even where the injury is sustained by a person riding in the vehicle driven by accused.⁶⁷

Whether the place where the collision or injury involved occurs is within the operation of the statute depends on the terms of the statute.⁶⁸ Some statutes, either by reason of the fact that the particular statute governs the use of vehicles on public highways⁶⁹ or by reason of express terms,⁷⁰ apply only to collisions or accidents which occur on a street or highway, but other statutes apply whether the offense is committed on a public highway, a private driveway, or other private property.⁷¹

(2) Knowledge and Intent

In general, knowledge on the part of the driver of a motor vehicle that he has struck or injured another person or property or that he has been involved in an accident is essential in order to render him guilty.

As a general rule, a specific intent is not an essential element of the offense,⁷² but knowledge by the driver that he has struck or injured another

55. Ala.—*Lashley v. State*, 180 So. 717, 236 Ala. 1—*Lashley v. State*, 180 So. 720, 28 Ala App. 86, certiorari denied 180 So. 724, 236 Ala. 28—*Layfield v. State*, 173 So. 654, 27 Ala App. 437.

Va.—*Blankenship v. Commonwealth*, 35 S.E.2d 760, 184 Va. 495—*James v. Commonwealth*, 16 S.E.2d 296, 178 Va. 28.

56. Cal.—*People v. Scofield*, 265 P. 914, 203 Cal. 703, followed in *People v. Campridon*, 268 P. 372, 204 Cal. 701—*People v. Kaufman*, 193 P. 953, 49 Cal.App. 570.

42 C.J. p 1385 note 22.

Complete offense

Cal.—*People v. Huber*, 221 P. 695, 64 Cal.App. 352.

57. Va.—*James v. Commonwealth*, 16 S.E.2d 296, 178 Va. 28.

58. Me.—*State v. Verrill*, 112 A. 673, 120 Me. 41.

59. Iowa.—*State v. Schenk*, 262 N. W. 129, 220 Iowa 511.

Mo.—*State v. Hudson*, 285 S.W. 733, 314 Mo. 599.

Unavoidable accident

The requirements of the statute must be complied with, notwithstanding the collision or striking was due to an unavoidable accident—*Oney v. State*, 170 S.W.2d 738, 145 Tex.Cr. 613.

Intentional collision

The duties imposed by the statute must be complied with, notwithstanding the collision or striking was intentional—*Mimms v. State*, 169 S.W.2d 165, 145 Tex.Cr. 456.

60. Tex.—*Oney v. State*, 170 S.W.2d 738, 145 Tex.Cr. 613.

61. Mo.—*State v. Hudson*, 285 S.W. 733, 314 Mo. 599.

62. Ky.—*Wolff v. Commonwealth*, 276 S.W. 1067, 211 Ky. 62.

Mo.—*State v. Hudson*, 285 S.W. 733, 314 Mo. 599.

Extent of damage or injury

The extent of the property damage or the number of people injured or killed is not an element of the offense—*James v. Commonwealth*, 16 S.E.2d 296, 178 Va. 28.

63. N.Y.—*People v. Thomas*, 250 N.Y.S. 413, 232 App.Div. 475.

64. D.C.—*Scott v. District of Columbia*, Mun App., 55 A.2d 854.

65. Ga.—*Shipp v. Georgia Power Co.*, 21 S.E.2d 458, 67 Ga.App. 867, reversed on other grounds *Georgia Power Co. v. Shipp*, 24 S.E.2d 764, 195 Ga. 446, and vacated 25 S.E.2d 524, 69 Ga App. 356.

66. Vt.—*State v. Gosselin*, 6 A.2d 14, 110 Vt. 361.

67. Cal.—*People v. Kinney*, 82 P.2d 203, 28 Cal.App.2d 232.

68. Mass.—*Commonwealth v. Harris*, 154 N.E. 180, 257 Mass. 434.

69. Cal.—*People v. Hoenschle*, 22 P. 2d 777, 132 Cal.App. 387.

70. Ariz.—*State v. Smith*, 189 P.2d 205, 66 Ariz. 376.

Ga.—*Perry v. State*, 8 S.E.2d 425, 62 Ga.App. 115.

71. Tex.—*Salazar v. State*, 169 S.W. 2d 169, 145 Tex.Cr. 478.

72. Cal.—*People v. Henry*, 72 P.2d 915, 23 Cal.App.2d 155.

person or property or that he has been involved in an accident is essential in order to render him guilty of the offense,⁷³ even though it is not expressly so provided by the statute.⁷⁴ According to some cases, in the absence of such express provision, want of such knowledge may constitute a defense,⁷⁵ although the view has been expressed that in such case knowledge is not an ingredient of the offense.⁷⁶ Under some statutes it is not essential that the driver of a vehicle should know that some person,⁷⁷ or some person or property,⁷⁸ has been injured in order to render the statute operative; it is sufficient that the driver knows that he has collided with another vehicle or property⁷⁹ or that his vehicle has struck a person or has collided with a vehicle containing a person.⁸⁰

The knowledge of injury to person or property which is essential to render the statute operative is not an absolute, positive knowledge,⁸¹ and in

general, if the circumstances are such as would ordinarily give rise to the belief by a reasonable person that an injury might result, or has resulted, from an accident or collision, it is the duty of the driver to stop.⁸² So, in general, if he knows that a collision or striking has occurred, the obligation is on him to ascertain whether any injury or damage has resulted therefrom;⁸³ and he cannot rely on his alleged lack of knowledge of an injury due to his having driven at an extremely high rate of speed.⁸⁴ It is not essential that the driver should have positive knowledge of the extent of the damage or injuries inflicted,⁸⁵ and his ignorance of the extent of the injuries inflicted does not govern his guilt or innocence.⁸⁶ In some jurisdictions a driver's want of knowledge that his vehicle has struck a person does not excuse him if such want of knowledge is due to his voluntary intoxication.⁸⁷ It has been held that a driver has

Intent to commit acts made criminal

Assuming that intent is a necessary element, it was held that it was not the intent to commit the crime which was a material element but was an intent to commit the acts made criminal by the statute.—*Seher v. District of Columbia*, 95 F.2d 118, 68 App.D.C. 207.

73. Ariz.—*State v. Lee*, 88 P.2d 996, 53 Ariz. 295.

Cal.—*People v. Pahner*, 51 P.2d 1143, 10 Cal.App.2d 294—*People v. Leutholtz*, 283 P. 292, 102 Cal.App. 493. Mich.—*People v. Lepier*, 24 N.W.2d 190, 315 Mich. 490.

N.Y.—*People v. Shlansky*, 177 N.E. 130, 256 N.Y. 538—*People*, on Complaint of *Mattus v. Dropkin*, 25 N.Y.S.2d 16, 261 App.Div. 223—*People v. Schaeffer*, 1 N.Y.S.2d 714, 253 App.Div. 202—*People*, on Complaint of *O'Connor v. Hirsch*, 269 N.Y.S. 830, 241 App.Div. 712—*People v. Thomas*, 250 N.Y.S. 413, 232 App.Div. 475—*People v. Ericson*, 5 N.Y.S.2d 286, 168 Misc. 51—*People v. Kulick*, 66 N.Y.S.2d 826.

42 C.J. p 1385 note 28.

Knowledge or duty to know

In order to render a driver guilty of the offense of leaving the scene of an accident without reporting, it is essential that he knows, or should know, of the occurrence of the accident and that he is involved in it.—*People v. Hakala*, 61 N.Y.S.2d 718, 270 App.Div. 612.

74. Cal.—*People v. Scofield*, 265 P. 914, 203 Cal. 703, followed in *People v. Campridon*, 288 P. 372, 204 Cal. 701—*People v. Ely*, 265 P. 818, 203 Cal. 628—*People v. Rallo*, 6 P.2d 516, 118 Cal.App. 393.

Neb.—*Behrens v. State*, 1 N.W.2d 289, 140 Neb. 671.

N.C.—*State v. Ray*, 47 S.E.2d 494, 229 N.C. 40.

Pa.—*Commonwealth v. Adams*, 23 A. 2d 59, 146 Pa.Super. 601—*Commonwealth v. Hyman*, 178 A 510, 117 Pa.Super. 585.

Va.—*Herchenbach v. Commonwealth*, 38 S.E.2d 328, 185 Va. 217.

42 C.J. p 1385 note 29.

Reason for rule

The duty imposed on the driver of the vehicle by the statute is not passive and requires positive, affirmative action, that is to say, to stop and to give aid and information, which affirmative acts cannot be performed unless the driver knows that his vehicle has struck a person or object.—*Herchenbach v. Commonwealth*, supra.

Knowledge impliedly necessary

Knowledge of the fact of a collision as essential to the offense is necessarily implied in the requirements of a statute requiring drivers of motor vehicles to stop and render aid to those who may have been injured by a collision, especially in view of a general statutory provision that in every criminal offense there must exist a union of act and intent.—*People v. Bowlin*, 65 P.2d 840, 19 Cal.App.2d 397—*People v. Fodera*, 184 P. 22, 33 Cal.App. 8.

—*People v. Bowlin*, 65 P.2d 840, 19 Cal.App.2d 397—*People v. Fodera*, 184 P. 22, 33 Cal.App. 8.

Informing operator of damage or injury

A person who has been damaged or injured and is entitled to obtain the information contemplated by the statute has the right, if the operator of a motor vehicle is not aware of the infliction of damage by his vehicle, to inform such operator of such infliction of damage.—*Shipp v. Georgia Power Co.*, 21 S.E.2d 458, 87 Ga.App. 867, reversed on other grounds *Georgia Power Co. v. Shipp*,

24 S.E.2d 764, 195 Ga. 446, and vacated 25 S.E.2d 524, 69 Ga.App. 356.

75. Neb.—*Behrens v. State*, 1 N.W. 2d 289, 140 Neb. 671.

Tex.—*Scott v. State*, 233 S.W. 1097, 90 Tex.Cr. 100, 16 A.L.R. 1420.

42 C.J. p 1385 note 29.

76. Ariz.—*Olson v. State*, 285 P. 282, 36 Ariz. 294.

77. Tex.—*Bevil v. State*, 141 S.W. 2d 362, 139 Tex.Cr. 513.

78. Mass.—*Commonwealth v. McMenimon*, 4 N.E.2d 246, 295 Mass. 467.

79. Mass.—*Commonwealth v. McMenimon*, supra.

80. Tex.—*Bevil v. State*, 141 S.W.2d 362, 139 Tex.Cr. 513.

81. Ala.—*Woods v. State*, 73 So. 129, 15 Ala.App. 251.

82. Ala.—*Woods v. State*, supra. N.Y.—*People v. Hakala*, 61 N.Y.S.2d 718, 270 App.Div. 612.

83. Cal.—*People v. Roche*, 121 P.2d 865, 49 Cal.App.2d 459.

N.J.—*Lo Biondo v. Allan*, 40 A.2d 810, 132 N.J.Law 437.

N.Y.—*People v. Hakala*, 61 N.Y.S.2d 718, 270 App.Div. 612—*People v. Ericson*, 5 N.Y.S.2d 286, 168 Misc. 51.

42 C.J. p 1385 note 30.

84. Ill.—*People v. Ripplinger*, 243 Ill.App. 467.

85. Va.—*Herchenbach v. Commonwealth*, 38 S.E.2d 328, 185 Va. 217.

86. Cal.—*People v. Huber*, 221 P. 695, 64 Cal.App. 352.

42 C.J. p 1385 note 32.

87. Tex.—*Martinez v. State*, 128 S.W.2d 398, 137 Tex.Cr. 434, rehearing denied 131 S.W.2d 971, 137 Tex.Cr. 434.

no right to rely on a false statement of another who goes back to ascertain what has occurred,⁸⁸ but it has also been held that, where the offense prescribed by the statute is knowingly leaving the place of an accident without disclosing his name and address, one cannot be said "knowingly" to fail to comply with the statute when he, remaining at the place where his own automobile has been disabled by the accident, sends back a messenger with instructions to make such disclosure, and in good faith believes the messenger has done so, although in fact he has not.⁸⁹

(3) Failure to Stop

Where under the statute the duty to stop, or to stop immediately, has arisen after an accident, a failure to stop constitutes a criminal offense.

Where under the statute the duty to stop,⁹⁰ or to stop immediately,⁹¹ has arisen after an accident, a failure to stop constitutes a criminal offense. Under some statutes the driver of a vehicle which strikes any person or collides with any vehicle containing a person must stop regardless of whether anyone is injured.⁹² So under some statutes the duty to stop exists regardless of how a collision or striking occurs or who is at fault;⁹³ such statutes apply notwithstanding the occurrence is an unavoidable accident⁹⁴ or is intentional.⁹⁵

A definite cessation of movement for a sufficient length of time to permit a person of ordinary powers of observation fully to understand the sur-

rounding circumstances and to obtain a knowledge of the results of the accident is essential.⁹⁶ It is not sufficient to stop for an instant, permitting only a cursory examination of the surrounding conditions,⁹⁷ to stop in order to change gears and direction,⁹⁸ or to stop a short distance from the scene of the accident, where the stop is made because the driver has arrived at his destination and not because of the accident.⁹⁹

Where, under a subdivision of the statute, a failure to stop is constituted an offense, a driver who immediately stops is not guilty of such offense, notwithstanding he fails to comply with requirements of another subdivision of the statute.¹

(4) Failure to Furnish Information, to Report, or to Exhibit License

Failure of the operator of a motor vehicle to furnish information with respect to his name, address, and the like under certain circumstances may justify a finding of criminal liability.

Failure of the driver of a motor vehicle to comply with the requirements of a penal statute that, under certain circumstances, he shall give certain information, as, for example, his name, address, or other matters of identification, to certain persons may justify a finding of criminal liability,² and a like rule applies in the case of failure to comply with a statutory requirement to make a report of an accident.³ Under some statutes the necessity to give the required information arises only when a person has been injured or a vehicle

88. N.Y.—*People v. Curtis*, 122 N. E. 623, 226 N.Y. 519.

89. Mass.—*Commonwealth v. Horsfall*, 100 N.E. 362, 213 Mass. 232, Ann Cas.1914A 682.

90. Okl.—*Johnson v. State*, 81 P.2d 872, 64 Okl.Cr. 418—*McDonald v. State*, 15 P.2d 149, 54 Okl.Cr. 122. Tex.—*Mickle v. State*, 191 S.W.2d 41, 149 Tex.Cr. 53—*Morgan v. State*, 167 S.W.2d 765, 145 Tex.Cr. 276—*Moore v. State*, 145 S.W.2d 887, 140 Tex.Cr. 482—*Bevil v. State*, 141 S.W.2d 362, 139 Tex.Cr. 513.

Stopping sufficient

Under a statute requiring a driver who shall injure any person or shall do substantial damage to property to stop, a driver who, when informed of the accident, stopped at the first available parking spot about one hundred fifty feet from point of collision did not violate statute.—*Oden v. District of Columbia*, 79 F.2d 175, 65 App.D.C. 50.

91. Ga.—*Jackson v. State*, 175 S.E. 421, 49 Ga.App. 245.

Pa.—*Commonwealth v. Baker*, 53 Pa. Dist. & Co. 702, 61 Montg.Co. 200.

Meaning of "immediately"

It has been held that the word "immediately," as used in a statute requiring that a driver "shall immediately stop," does not mean "instantly," and that stopping as promptly as possible under the circumstances is sufficient.—*People v. Odom*, 66 P.2d 206, 209, 19 Cal.App. 2d 641.

Striking and injuring animal

A statute requiring a driver involved in an accident resulting in damage to property immediately to stop applies where a vehicle strikes and injures a dog.—*People v. Fimbres*, 288 P. 19, 109 Cal.App., Supp. 778.

Stopping held insufficient

Driver of motor vehicle who did not stop when he struck pedestrian was guilty of failing to stop at the scene of an accident in which his automobile was involved, notwithstanding he stopped at a place two hundred yards away and arranged for third person to take injured pedestrian to nearby town.—*State v. Brown*, 40 S.E.2d 34, 226 N.C. 681.

Stopping held sufficient

S.D.—*State v. Clark*, 290 N.W. 237, 67 S.D. 133.

92. Tex.—*Moore v. State*, 145 S.W.2d 887, 140 Tex.Cr. 482—*Bevil v. State*, 141 S.W.2d 362, 139 Tex.Cr. 513.

93. Tex.—*Oney v. State*, 170 S.W.2d 738, 145 Tex.Cr. 613.

94. Tex.—*Oney v. State*, supra.

95. Tex.—*Mimms v. State*, 169 S.W. 2d 165, 145 Tex.Cr. 459.

96. Tex.—*Moore v. State*, 145 S.W.2d 887, 140 Tex.Cr. 482.

97. Tex.—*Moore v. State*, supra.

98. Pa.—*Commonwealth v. Baker*, 53 Pa. Dist. & Co. 702, 61 Montg.Co. 200.

99. N.J.—*Lo Blondo v. Allan*, 40 A. 2d 810, 132 N.J.Law 437.

1. S.D.—*State v. Clark*, 290 N.W. 237, 67 S.D. 133.

2. N.Y.—*People v. Chusid*, 14 N.Y. S.2d 474, 172 Misc. 492.

Okl.—*Johnson v. State*, 81 P.2d 872, 64 Okl.Cr. 418.

3. S.D.—*State v. Clark*, 290 N.W. 237, 67 S.D. 133.

has been damaged,⁴ and a statutory provision requiring the giving of information and the exhibition of license to the person struck or to occupants of any vehicle collided with does not apply where a dog is struck or injured.⁵

Some statutes require in general the tendering on the spot and immediately of explicit and definite information as to the operator or person in charge of the vehicle causing damage or injury of a nature which will identify him readily and make it simple and easy to find him thereafter.⁶ A requirement that the driver "make himself known" uses the words in their ordinary sense, and means that he must disclose his identity, and show or make known to some person or persons in the vicinity who he is, his name, and where he may be found.⁷ A statute providing for the exhibition of license and the giving of name, address, and license number requires both the exhibition of the license and the giving of the specified information,⁸ and merely exhibiting the license does not relieve the driver of criminal liability.⁹

Under some statutes or other governmental regulations a request for the particular information is essential in order to impose criminal liability for failure to give it.¹⁰ According to some cases, however, the statutory provision for a request for information applies only to cases where the person on whom the duty rests stops so as to permit an opportunity to make the request.¹¹

Where the statute so provides, the only person to whom it is essential to give the prescribed information is the person struck or the driver or occupant of, or the person attending, the vehicle with which there has been a collision,¹² and it is

not necessary to give such information to other persons who happen to be present.¹³ While under some statutes the required information must be given to the injured person or to a police officer if either is present and capable of receiving the information,¹⁴ under a statute providing in the alternative for giving information to the person sustaining damage or to the police, it is not necessary to furnish the information to the person sustaining damage and also to the police.¹⁵

Under some statutes it is essential to report an occurrence causing injury to a person to certain specified public officials not only where the operator of the vehicle causing the injury is culpable but also where the injury is caused by accident.¹⁶ Some statutes require a report to a specified public officer of an occurrence causing an injury to a person immediately after giving assistance to the injured person and furnishing certain information to such person or to some one in his stead.¹⁷ Where the statute does not fix the time for reporting damage to the nearest police station or judicial officer, the report must be made within a reasonable time.¹⁸

(5) Failure to Render Assistance

Under some statutes failure of the driver of a motor vehicle to render assistance to another under certain circumstances may be the basis of criminal liability.

Under some statutes failure of the driver of a motor vehicle to furnish assistance to others, under certain circumstances, may be the basis of criminal liability.¹⁹ Some statutes impose the duty to render assistance regardless of how the collision or striking occurs or who is at fault;²⁰ they apply notwithstanding the occurrence is an unavoidable accident²¹ or is intentional.²² Under some

4. N.Y.—*People v. Irish*, 222 N.Y.S. 337, 129 Misc. 440.

5. Cal.—*People v. Fimbres*, 288 P. 19, 109 Cal.App. 778.

6. Ga.—*Shipp v. Georgia Power Co.*, 21 S.E.2d 458, 67 Ga.App. 867, reversed on other grounds *Georgia Power Co. v. Shipp*, 24 S.E.2d 764, 195 Ga. 446, and vacated 25 S.E.2d 524, 69 Ga.App. 356.

Mass.—*Commonwealth v. Horsfall*, 100 N.E. 362, 213 Mass. 232, Ann. Cas.1914A 682, 16 A.L.R. 1428.

N.Y.—*People v. Chusid*, 14 N.Y.S.2d 474, 172 Misc. 492.

7. Me.—*State v. Verrill*, 112 A. 673, 120 Me. 41.

8. N.Y.—*People v. Chusid*, 14 N.Y.S.2d 474, 172 Misc. 492.

9. N.Y.—*People v. Chusid*, supra.

10. Ohio.—*City of Cleveland v. Jorski*, 53 N.E.2d 513, 142 Ohio St. 529.

Okl.—*McDonald v. State*, 15 P.2d 149, 54 Okl.Cr. 122.

Pa.—*Commonwealth v. Hyman*, 178 A. 510, 117 Pa.Super. 585.

11. W.Va.—*State v. Masters*, 144 S.E. 718, 106 W.Va. 46.

12. Kan.—*State v. Bowser*, 145 P.2d 135, 158 Kan. 12.

13. Kan.—*State v. Bowser*, supra.

14. Ill.—*People v. Ripplinger*, 243 Ill.App. 467.

15. N.Y.—*People v. Chusid*, 14 N.Y.S.2d 474, 172 Misc. 492.

16. Iowa.—*State v. Schenk*, 262 N.W. 129, 220 Iowa 511.

17. Iowa.—*State v. Schenk*, supra.

18. N.Y.—*People v. La Rock*, 21 N.Y.S.2d 778, 174 Misc. 795.

19. Cal.—*People v. Steele*, 280 P. 999, 100 Cal.App. 639.

"Immediately"

In a statute providing that "the driver of any vehicle which strikes any person . . . shall immediately stop and give his name and address and the names and addresses of all passengers . . . and shall also render to such persons all necessary assistance," the word "immediately" cannot be construed as limiting or modifying the word "render."—*People v. Steele*, supra.

Notwithstanding compliance with duty to stop, a driver may be guilty of an offense if he fails to render the assistance required by the statute.—*Bevil v. State*, 141 S.W.2d 362, 139 Tex.Cr. 513.

20. Tex.—*Oney v. State*, 170 S.W.2d 738, 145 Tex.Cr. 613.

21. Tex.—*Oney v. State*, supra.

22. Tex.—*Mimms v. State*, 169 S.W.2d 165, 145 Tex.Cr. 456.

statutes the duty of a driver to render assistance includes the duty to render assistance to a guest in such driver's vehicle who sustains an injury in an accident in which such vehicle is involved.²³ A statute requiring a driver to render assistance to an injured person does not apply where a vehicle strikes and injures a dog.²⁴

The gist of the offense under some statutes is the willful omission to render reasonable assistance to one who has been injured,²⁵ and a statutory provision for rendering reasonable assistance to an injured person requires the person on whom the duty is imposed to render only such assistance as he sees is necessary.²⁶ What constitutes reasonable or necessary assistance to an injured person required by some statutes depends on the facts of the particular case.²⁷ The assistance is reasonable if it is consistent with that which would be rendered by a prudent man in like circumstances.²⁸ The duty to render reasonable assistance includes the duty to take the injured person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary.²⁹ The person on whom the duty to render assistance is imposed need not take any af-

firmative action in that respect where it is not necessary for him to render assistance because, to his knowledge, others are rendering adequate and sufficient assistance to the injured person.³⁰

§ 675. — Persons Liable

As a general rule only the operator of the motor vehicle who fails to stop or render assistance after an accident is guilty of the offense.

It has been stated broadly that, unless otherwise provided, the statute applies only to the operator of the motor vehicle,³¹ and not to the owner of the vehicle or to the master of the operator, as such,³² and does not create any liability on the part of an owner who is not the operator.³³ So some statutes apply only to persons involved in an accident as a part thereof and a party thereto,³⁴ and, in order to render a person liable under some statutes, it is essential that he should be driving, or have control of, a vehicle involved.³⁵ Some statutes impose liability on an operator who is an actor in a collision of his vehicle with a person and not on one who is merely a passive participant.³⁶

Some statutes, however, do not disclose a leg-

23. Cal.—*People v. Kinney*, 82 P.2d 203, 28 Cal App.2d 232.

24. Cal.—*People v. Fimbres*, 288 P. 19, 109 Cal App. 778.

25. Cal.—*People v. Rallo*, 6 P.2d 516, 119 Cal App. 393.

26. Pa.—*Commonwealth v. Adams*, 23 A.2d 59, 146 Pa Super. 601.

27. Pa.—*Commonwealth v. Adams*, supra—*Commonwealth v. Miles*, Quar.Sess., 27 Del Co. 340—*Commonwealth v. Shappell*, Quar.Sess., 10 Sch.Reg. 94.

W.Va.—*State v. Masters*, 144 S.E. 718, 106 W.Va. 46.

All necessary assistance

(1) Under a statute requiring the rendering of all necessary assistance, whether assistance is required and what assistance should be given are matters which are determinable from the standpoint of an ordinary person similarly situated as is the person by whom the assistance is to be rendered, and such statute requires all such assistance as the facts and circumstance would dictate to a person of ordinary temper, disposition, and feeling under like circumstances.—*Williams v. State*, 102 S.W.2d 212, second case, 132 Tex.Cr. 33.

(2) The statute has also been said to require all the aid which would reasonably appear to one as an ordinary person at the time to be necessary.—*Scott v. State*, 233 S.W. 1097, 90 Tex.Cr. 100, 16 A.L.R. 1420.

28. Pa.—*Commonwealth v. Adams*, 23 A.2d 59, 146 Pa Super. 601—*Commonwealth v. Shappell*, Quar. Sess., 10 Sch Reg 94.

29. Pa.—*Commonwealth v. Hipple*, Quar Sess., 57 Dauph.Co. 156

30. Cal.—*People v. Seofield*, 265 P. 914, 203 Cal 703—*People v. Martin*, 300 P 108, 114 Cal App 337.

Pa.—*Commonwealth v. Adams*, 23 A. 2d 59, 146 Pa.Super 601.

Tex.—*Williams v. State*, 102 S.W 2d 212, second case, 132 Tex.Cr 33

31. Ga.—*Corpus Juris* quoted in *Georgia Power Co. v. Shipp*, 24 S. E.2d 764, 766, 195 Ga. 446, mandate conformed to 25 S.E.2d 524, 69 Ga.App. 356.

Mass.—*Nager v. Reid*, 133 N.E. 98, 240 Mass 211.

32. Ga.—*Georgia Power Co. v. Shipp*, 24 S.E.2d 764, 195 Ga. 446, mandate conformed to 25 S.E.2d 524, 69 Ga.App. 356.

33. Ga.—*Corpus Juris* quoted in *Georgia Power Co. v. Shipp*, 24 S. E.2d 764, 766, 195 Ga. 446, mandate conformed to 25 S.E.2d 524, 69 Ga App. 356.

Mass.—*Nager v. Reid*, 133 N.E. 98, 240 Mass. 211.

34. N.J.—*Butler v. Jersey Coast News Co.*, 160 A. 659, 109 N.J.Law 255.

Passenger jumping from vehicle

Where passenger voluntarily jumped from moving automobile and

was injured in alighting without coming in contact with the automobile in any manner, the automobile was not involved in an accident within the penal provisions of the statute requiring the driver of any vehicle involved in an accident resulting in injury or death to any person to stop the vehicle immediately.—*Behrens v. State*, 1 N.W.2d 289, 140 Neb. 671.

35. Tex.—*Hunter v. State*, 139 S.W. 2d 89, 139 Tex.Cr. 106—*Freeman v. State*, 40 S.W.2d 105, 118 Tex.Cr. 102.

36. Mass.—*Commonwealth v. Bleakney*, 179 N.E. 400, 401, 278 Mass. 198.

"Knowingly colliding"

(1) The words "knowingly colliding" as used in a statute penalizing a departure of the operator of a vehicle without stopping and giving information after knowingly colliding with any person, mean that accused "was in some way the actor, not a mere passive participant in a collision, but to some extent causing the collision or actively colliding."—*Commonwealth v. Bleakney*, 179 N.E. 400, 278 Mass. 198.

(2) Operator's failure to make herself known after pedestrian walked against motionless car would not sustain conviction for going away without making one's self known "after knowingly colliding" with person.—*Commonwealth v. Bleakney*, supra.

islative purpose that only the actual perpetrator of the offense shall be guilty of any crime,³⁷ and the general rule that there may be several parties to a crime which, from its nature, may be committed only by one, stated in Criminal Law § 80, applies.³⁸ Accordingly, it has been held or recognized that the term "driver," as used in a statute in terms applicable to the "driver of any vehicle," includes the owner of the vehicle who is present and in control of the vehicle which is being driven by another,³⁹ and that, notwithstanding the statute in terms applies to the "driver" or "operator" of the vehicle, one who is present and in control of the operation of the vehicle,⁴⁰ including the owner,⁴¹ may be liable for noncompliance with the statute, unless the operator disobeys his instructions;⁴² and a person in control of the vehicle who, after a collision or an occurrence causing an injury, takes over the driving and drives away without complying with the statute may be guilty as a principal.⁴³ Some statutes expressly apply to a person in the vehicle who has or assumes authority over the driver and render such person criminally liable for a violation of the particular statute.⁴⁴ Under a statute in terms applicable to the person operating or driving the vehicle, the fact that the accused driver of the vehicle is not the owner is immaterial.⁴⁵

Some statutes are operative and binding on all drivers involved in an accident, regardless of their respective negligence.⁴⁶ The effect of some statutes

is not limited to the performance of the required acts by drivers of vehicles which strike and injure pedestrians or which are involved in collision with other vehicles,⁴⁷ but include the drivers of vehicles which are involved in accidents of any nature in which another person is injured or killed.⁴⁸

An occupant of, or passenger in, a motor vehicle who is not driving may be guilty of aiding and abetting in the violation of the statute,⁴⁹ even though such violation is a misdemeanor.⁵⁰ Where, in a joint prosecution under a statute in terms applicable to a person operating or driving a motor vehicle against the driver of, and a passenger in, the vehicle, the driver is found not guilty under evidence applicable to both, the passenger is not guilty as a matter of law.⁵¹

§ 676. — Defenses

Where the statute imposes various duties on an operator of a motor vehicle after it has been involved in an accident, the fact that the circumstances are such as to prevent a literal compliance with one requirement does not necessarily excuse a failure to comply with the other requirements of the statute.

Where the statute imposes various duties on an operator of a motor vehicle after it has been involved in an accident, the fact that the circumstances are such as to prevent a literal compliance with one requirement does not necessarily excuse a failure to comply with the other requirements of the statute.⁵² Accordingly, the fact that

37. N.H.—State v. Derosia, 50 A.2d 231, 94 N.H. 228.

38. N.H.—State v. Derosia, supra.

39. Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641—People v. Rallo, 6 P.2d 516, 119 Cal.App. 393.

Joint owner

Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641.

40. Cal.—People v. Steele, 280 P. 999, 100 Cal.App. 639.

41. Ala.—Goodman v. State, 102 So. 486, 20 Ala.App. 392.

Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641—People v. Rallo, 6 P.2d 516, 119 Cal.App. 393.

Ga.—Corpus Juris quoted in Georgia Power Co. v. Shipp, 24 S.E.2d 764, 766, 195 Ga. 446, mandate conformed to 25 S.E.2d 524, 69 Ga.App. 356.

Pa.—Commonwealth v. Coffey, Quar. Sess., 6 Fay.L.J. 114.

42 C.J. p 1385 note 37.

42. Ala.—Goodman v. State, 102 So. 486, 20 Ala.App. 392.

Ga.—Corpus Juris quoted in Georgia Power Co. v. Shipp, 24 S.E.2d 764, 766, 195 Ga. 446, mandate con-

formed to 25 S.E.2d 524, 69 Ga.App. 356

43. Cal.—People v. Steele, 280 P. 999, 100 Cal.App. 639.

Duty of owner riding in vehicle

In a case in which the vehicle was being driven by the chauffeur of the owner when a collision occurred but was driven by the owner from the scene of the accident without furnishing the required information and in which the conviction of the owner was upheld, it was stated that the owner seated beside his chauffeur driving the vehicle had the duty to control the chauffeur and to prevent, as far as able, any conduct of the chauffeur in violation of law.—Petition of Saltman, 194 N.E. 703, 289 Mass. 554.

44. Cal.—People v. Maggio, 266 P. 813, 90 Cal.App. 683.

45. Ill.—People ex rel. Sokoll v. Municipal Court of Chicago, 276 Ill.App. 102, affirmed 194 N.E. 242, 359 Ill. 102.

46. Cal.—People v. Scofield, 265 P. 914, 203 Cal. 703, followed in People v. Campridon, 268 P. 372, 204 Cal. 701.

Accused not at fault as to accident

Accused, even though not at fault in causing accident, was guilty of offense in failing to report it.—People v. Orr, 246 N.Y.S. 673, 138 Misc. 535.

47. Cal.—People v. Kinney, 82 P.2d 203, 28 Cal.App.2d 232.

48. Cal.—People v. Kinney, supra.

49. Mich.—People v. Hoaglin, 247 N. W. 141, 262 Mich. 162.

N.H.—State v. Derosia, 50 A.2d 231, 94 N.H. 228.

Va.—James v. Commonwealth, 16 S. E.2d 296, 178 Va. 28.

Urging driver not to stop

A passenger in a car may be guilty of a violation of the statute when he knows of an accident and urges the driver not to stop, thus aiding and abetting the commission of the crime.—People v. Graves, 240 P. 1019, 74 Cal.App. 415.

50. Mich.—People v. Hoaglin, 247 N. W. 141, 262 Mich. 162.

51. Wash.—State v. McFarland, 291 P. 719, 158 Wash. 652.

52. Cal.—People v. Steele, 280 P. 999, 100 Cal.App. 639.

an injured person is unconscious and so unable to receive the information required by the statute to be given him⁵³ or is dead and therefore not in need of assistance⁵⁴ does not excuse the failure to stop or to comply with other provisions of the statute, and the fact that accused did not think that an injury was grave enough to require rendering assistance does not excuse a failure to stop as required by the statute.⁵⁵

The fact that no person is present to whom the statute requires that certain information shall be given excuses a failure to give such information,⁵⁶ and the fact that the person who is designated by the statute as the one to whom the information is to be given is unconscious and, therefore, unable to receive the information excuses a failure to give it.⁵⁷ So, failure to give the prescribed information by the operator of a vehicle involved in a collision may be excused by the failure of the operator of the other vehicle involved to afford a reasonable opportunity to give such information.⁵⁸ The operator of a motor vehicle is not, however, relieved from the obligation imposed by statute to stop and give to "any proper person" the information required by the fact that the person injured is unconscious and no one else is near by, where the accident takes place under such circumstances that there is every reason to believe some one will shortly appear to whom the required information can be given.⁵⁹ The fact that a driver is under arrest does not necessarily excuse his failure to give to a police officer the information required by the statute,⁶⁰ or his failure to make a report of the accident to a specified state department as required by statute,⁶¹ and the fact that the injured person has been guilty of negligence does not excuse the failure to perform a statutory duty.⁶²

Under a statute requiring one injuring another

to take him to a physician or surgeon for treatment if such treatment is required or if it is requested by the injured person, the driver should be acquitted if under all circumstances it did not reasonably appear to him to be necessary to take the injured person for such treatment, unless he was requested by such person to be so taken, and declined,⁶³ and no guilt attaches to a refusal of such a request made in bad faith by one who is uninjured.⁶⁴ It has been held that the fact that a driver of a vehicle took steps to obtain assistance for an injured guest in such vehicle may excuse such driver's failure to stop and render assistance to the injured occupant of another vehicle with which such driver's vehicle collided.⁶⁵ It has been held, however, that the fact that a person drives on without stopping in order to obtain assistance for the injured person does not excuse a failure to comply with the statutory requirement to stop and to render assistance,⁶⁶ and that the facts that the person who is charged with the duty to render assistance instructs another to render assistance and does not leave the scene of the accident until he receives the assurance of such other that the injured person is dead do not excuse noncompliance.⁶⁷ The belief that an injured person is dead does not necessarily excuse a failure to comply with a statutory requirement to take an injured person to a physician or surgeon for medical or surgical treatment if the necessity to do so exists.⁶⁸

The alleged fear of accused that he might have been assaulted if he had stopped to comply with the statute does not excuse his failure to comply, where there was not any attempt or threat to assault him or the display of any weapon with which an assault might have been committed.⁶⁹ The desire of accused to conceal his private affairs does not excuse his failure to comply with the statute.⁷⁰

53. Cal.—People v. Huber, 221 P. 695, 64 Cal.App. 352.

Tex.—Corpus Juris quoted in Moore v. State, 145 S.W.2d 887, 888, 140 Tex.Cr. 482.

54. Cal.—People v. McKee, 251 P. 675, 80 Cal.App. 200.

Tex.—Corpus Juris quoted in Moore v. State, 145 S.W.2d 887, 888, 140 Tex.Cr. 482—Garcia v. State, 96 S.W.2d 977, 131 Tex.Cr. 84.

55. Tex.—Mickle v. State, 191 S.W. 2d 41, 149 Tex.Cr. 53.

56. Ga.—Mills v. State, 8 S.E.2d 727, 62 Ga.App. 491.

57. Cal.—People v. Scofield, 265 P.

914, 203 Cal. 703—People v. Martin, 300 P. 108, 114 Cal.App. 337.
Kan.—State v. Bowser, 145 P.2d 135, 158 Kan. 12.

58. Pa.—Commonwealth v. Schwalm, 55 Pa.Dist. & Co. 692.

59. N.H.—State v. Sterrin, 98 A. 482, 78 N.H. 220.

60. Ill.—People v. Ripplinger, 243 Ill.App. 467.

61. S.D.—State v. Clark, 290 N.W. 237, 67 S.D. 133.

62. Iowa.—State v. Schenk, 262 N.W. 129, 220 Iowa 511.

63. Tex.—Scott v. State, 233 S.W.

1097, 90 Tex.Cr. 100, 16 A.L.R. 1420.

64. Cal.—People v. Kaufman, 193 P. 953, 49 Cal.App. 570.

65. Tex.—Woods v. State, 121 S.W. 2d 604, 135 Tex.Cr. 540.

66. Tex.—Oney v. State, 170 S.W.2d 738, 145 Tex.Cr. 613.

67. Mich.—People v. Hoaglin, 247 N.W. 141, 262 Mich. 162.

68. Mich.—People v. Hoaglin, supra.

69. Tex.—Garcia v. State, 96 S.W.2d 977, 131 Tex.Cr. 84.

70. Va.—Blankenship v. Commonwealth, 35 S.E.2d 760, 184 Va. 495.

§ 677. — Indictment, Information, or Complaint

As a general rule an indictment or other charge in a prosecution under a statute penalizing a failure to stop, to give information, or to render assistance, in case of accident, collision, injury, or the like, must sufficiently allege the elements of the offense.

In accordance with the rule applicable in criminal prosecutions generally, stated in Indictments and Informations § 130, in general a charge or accusation in a prosecution under a statute of the type here under consideration should allege clearly and specifically the facts and circumstances which constitute the essential elements of the offense.⁷¹ A charge is ordinarily sufficient where it follows the language of the statute,⁷² at least where the statute sets forth with precision and certainty all the elements of the offense.⁷³ The view has been taken, however, that a charge which describes the offense in the language of the statute is not necessarily sufficient and that the description must be specific.⁷⁴

Under particular statutes it is essential to allege that the vehicle driven by accused was a motor vehicle,⁷⁵ that a motor vehicle was involved in the occurrence,⁷⁶ or that the occurrence was accidental.⁷⁷ It is essential, under some statutes, to allege that personal injury or property damage was caused by a vehicle operated by accused⁷⁸

and that such injury or damage was due to the culpability of accused or to accident.⁷⁹ A charge which fails to allege that the accident resulted in injury to any person or property other than the vehicle under control of accused or its occupants is not sufficient, where the statute defining the offense is, by its terms, confined in its operation to an accident causing such an injury.⁸⁰ It has been held that a charge which fails to name or identify the person who was injured is not sufficient.⁸¹ The view has been taken, however, that it is not essential to set forth the name of the person collided with and injured,⁸² but that, where the name of the person injured is not given, accused is entitled as of right to a statement of particulars, for the purpose of obtaining such information.⁸³ It has been held that a charge which fails to name or identify the person whose property has been damaged is not sufficient,⁸⁴ but it has also been held that a charge is sufficient after verdict, notwithstanding it fails to describe with particularity the property injured⁸⁵ or the particular injury caused to the property.⁸⁶

While, according to some cases, a charge is not necessarily fatally defective by reason of its omission to state that the injury was caused or the accident occurred on a public highway,⁸⁷ or to describe the particular point in the highway at which the accident took place,⁸⁸ it has been held that a

71. N.Y.—*People v. Patrick*, 26 N.Y. S.2d 183, 175 Misc. 997.

Misdemeanor

The rule stated in the text applies where the offense charged is a misdemeanor.—*People v. Patrick*, supra.

Sufficient charge of offense as felony

Even if it were essential that the charge should designate the offense as a misdemeanor or as a felony, a charge that the accused driver of a motor vehicle who was involved in an accident failed to stop and render assistance was not demurrable on the ground that accused was not informed whether he was charged with a felony or misdemeanor, since the charge was a felony because it could be punished by imprisonment in the penitentiary.—*Lashley v. State*, 180 So. 717, 236 Ala. 1.—*Lashley v. State*, 180 So. 720, 23 Ala.App. 86, certiorari denied 180 So. 724, 236 Ala. 28.

Charge or accusation held sufficient

Ill.—*People v. Kobylak*, 50 N.E.2d 465, 383 Ill. 432.

N.J.—*State v. Paerles*, 159 A. 701, 10 N.J.Misc. 355.

N.Y.—*People v. La Rock*, 21 N.Y.S.2d 778, 174 Misc. 795.

72. Mass.—*Commonwealth v. Mas-sad*, 136 N.E. 615, 242 Mass. 532.

Mo.—*State v. Tippet*, 296 S.W. 132, 317 Mo. 319.

W.Va.—*State v. Masters*, 144 S.E. 718, 106 W.Va. 46.

42 C.J. p 1386 note 50.

Charging in language of statute and setting forth elements

Information charging accused in language of statute and setting forth all necessary elements of crime in ordinary, concise, and understandable language, stated facts sufficient to constitute a public offense.—*People v. Houston*, 74 P.2d 515, 24 Cal. App.2d 167.

73. Okl.—*Hunter v. State*, 72 P.2d 399, 63 Okl.Cr. 24.

74. Ala.—*Lashley v. State*, 180 So. 724, 236 Ala. 28.

Indictment held sufficient

Ala.—*State v. Hall*, 134 So. 898, 24 Ala.App. 336.

75. Tex.—*Harrison v. State*, Cr., 210 S.W.2d 591.

Charge held insufficient

Where a collision is denounced by the statute only when the colliding vehicle is a motor vehicle, an allegation that a "truck" driven by accused collided with a person was not sufficient.—*Harrison v. State*, supra.

76. Ga.—*Perry v. State*, 8 S.E.2d 425, 62 Ga.App. 115.

77. Ga.—*Lee v. State*, 176 S.E. 820, 50 Ga.App. 12.

78. N.Y.—*People v. Patrick*, 26 N.Y. S.2d 183, 175 Misc. 997.

79. N.Y.—*People v. Patrick*, supra.

80. Vt.—*State v. Gosselin*, 6 A.2d 14, 110 Vt. 361.

81. Ala.—*Lashley v. State*, 180 So. 720, 23 Ala.App. 86, certiorari denied 180 So. 724, 236 Ala. 28.

82. Mass.—*Commonwealth v. Mas-sad*, 136 N.E. 615, 242 Mass. 532.

83. Mass.—*Commonwealth v. Mas-sad*, supra.

Bill of particulars generally see Indictments and Informations § 156.

84. Ala.—*Lashley v. State*, 180 So. 720, 23 Ala.App. 86, certiorari denied 180 So. 724, 236 Ala. 28.

85. Mo.—*State v. Hudson*, 285 S.W. 732, 314 Mo. 599.

86. Mo.—*State v. Hudson*, supra. Aider by verdict generally see Indictments and Informations §§ 312–325.

87. N.Y.—*People v. Curtis*, 112 N.E. 54, 217 N.Y. 304, Ann.Cas.1917E 586.

88. Tex.—*Stalling v. State*, 243 S.W. 990, 92 Tex.Cr. 354.

42 C.J. p 1386 note 52.

charge which fails to show that the accident occurred on a street or highway is not sufficient in a prosecution under a statute which governs the use of vehicles on public highways⁸⁹ or which expressly relates to an accident or collision on a highway or street.⁹⁰ In a prosecution under a statute which is not confined in its operation to public highways, however, failure to allege that accused was driving on a public highway does not render the charge insufficient.⁹¹

Under some circumstances certain allegations may be disregarded as surplusage in reaching the conclusion that the charge is sufficient.⁹²

Knowledge. Where the knowledge in question is not expressly made a part of the statutory definition of the offense, according to some cases a charge need not allege knowledge on the part of accused that he had had or had caused an accident⁹³ or that with knowledge of the accident he failed to stop.⁹⁴ On the other hand, where knowledge is expressly included as an element of the offense, it is essential to allege such knowledge.⁹⁵ It has been held that an allegation that the vehicle driven by accused collided with another vehicle and that accused willfully, unlawfully, feloniously, and knowingly failed to stop is a sufficient allegation of accused's knowledge of the collision,⁹⁶ and that an allegation that accused willfully and unlawfully drove a vehicle and failed immediately to stop such vehicle involved in an accident causing injuries and death to another person and to render the required aid,⁹⁷ or an allegation that accused's vehicle was involved in an accident causing injuries and death to another per-

son and that accused willfully failed immediately to stop such vehicle and willfully neglected to render the required aid,⁹⁸ is a sufficient allegation of accused's knowledge that he had injured or killed another person; but a somewhat stricter rule has apparently been recognized as to the sufficiency of an allegation as to knowledge where knowledge of a particular fact is expressly made an element of the offense by the statute.⁹⁹

It has been held that, in a prosecution for aiding and abetting in the violation of the statute, failure to allege that accused knew that another person was guilty of a violation of the statute does not render the charge insufficient.¹

Failure to stop. In a prosecution under a statute requiring that a driver shall immediately stop under certain circumstances, an allegation that accused unlawfully and feloniously failed to stop is sufficient notwithstanding the omission of the word "immediately" from the allegation,² and an allegation, substantially in the words of the statute, that accused failed immediately to stop is not insufficient on the ground that such allegation permits the inference that accused may have stopped within a reasonable time.³

Failure to give information. In general, where failure to give the information required by the statute is the basis of the charge, the allegations should show that some person to whom under the terms of the statute the information is to be given was present and able to receive the information.⁴ It has been held, however, in a prosecution under a statute providing for giving information to a person who is with the injured person, that failure to

89. Cal.—People v. Hoenschle, 22 P. 2d 777, 132 Cal.App. 387.

90. Ariz.—State v. Smith, 189 P.2d 205, 66 Ariz. 376.

Ga.—Perry v. State, 8 S.E.2d 425, 62 Ga.App. 115.

91. Tex.—Salazar v. State, 169 S.W. 2d 169, 145 Tex.Cr. 478.

92. N.Y.—People v. La Rock, 21 N. Y.S.2d 778, 174 Misc. 795.

Failure to render assistance

(1) In upholding a complaint charging a driver with failure "to stop to render aid" where a vehicle struck and injured a dog, it was stated that the words "to render aid" could be disregarded, where the prosecution was under a statute which required a driver to stop when he struck and injured a dog but which did not require him to render aid in such case.—People v. Fimbres, 288 P. 19, 109 Cal.App. 778.

(2) An allegation that accused failed to stop constituted a sufficient

allegation of the violation of the statute and all further allegations as to failure to render assistance could be treated as surplusage.—Morgan v. State, 167 S.W.2d 765, 145 Tex.Cr. 276.

93. Tex.—Scott v. State, 233 S.W. 1097, 90 Tex.Cr. 100, 16 A.L.R. 1120 W.Va.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

94. Tex.—Scott v. State, 233 S.W. 1097, 90 Tex.Cr. 100, 16 A.L.R. 1420.

95. Ariz.—State v. Lee, 88 P.2d 996, 53 Ariz. 295.

Mich.—People v. Lepler, 24 N.W.2d 190, 315 Mich. 490.

96. Ariz.—State v. Lee, 88 P.2d 996, 53 Ariz. 295.

97. Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641.

98. Cal.—People v. Dallas, 109 P.2d 409, 42 Cal.App.2d 596.

99. Mich.—People v. Lepler, 24 N.W. 2d 190, 315 Mich. 490.

1. NH.—State v. Derosia, 50 A.2d 231, 94 N.H. 228.

2. Ind.—Runyon v. State, 38 N.E.2d 235, 219 Ind. 352.

Charge held sufficient

Cal.—People v. Fimbres, 288 P. 19, 109 Cal.App. Supp. 778.

Tex.—Morgan v. State, 167 S.W.2d 765, 115 Tex.Cr. 276.

W.Va.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

3. Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641.

4. Ga.—Mills v. State, 8 S.E.2d 727, 62 Ga.App. 491.

Kan.—State v. Bowser, 145 P.2d 135, 158 Kan. 12.

Charge held sufficient

Ala.—Griffin v. State, 10 So.2d 374, 30 Ala.App. 599.

Ga.—Lee v. State, 176 S.E. 820, 50 Ga.App. 12.

W.Va.—State v. Murray, 144 S.E. 718, 106 W.Va. 46.

allege the name of the person who was with the injured person is not a fatal defect where the charge negatives any attempt to comply with the statute.⁵ Where the requirement is that the driver stop and give his name, license number, and the like, if requested to give such information, a complaint which alleges failure to stop is not defective for an omission to charge that accused did not give such information, since he was under no duty to do so unless demand therefor had been made,⁶ and, in a prosecution for failing to stop and render assistance, it is not essential to allege that a request for information was made under a provision of the statute for giving information if requested.⁷ Notwithstanding the statute provides for furnishing information on request, the mere failure to allege a request in a charge for failure to stop and to give information does not render the charge insufficient, since a failure to stop renders it impossible to make the request.⁸

Failure to render assistance. Where the statute requires that a driver of a motor vehicle stop after having caused an accident, and render all necessary assistance, including taking the injured person to a physician or surgeon for treatment if necessary or if requested so to do, an indictment which charges failure to stop is not defective because it does not allege that the injured person needed assistance⁹ or needed or requested medical treatment.¹⁰

Issues, proof, and variance. It is essential to prove knowledge on the part of accused of an accident, collision, injury to person or property, or like occurrence where such occurrence is essential to render the statute operative.¹¹ Under some statutes proof of knowledge on the part of accused that he collided with another vehicle or property

is sufficient without proof that he knew that injury had otherwise resulted to a person or property.¹² Evidence of the general good character of accused for being a competent and careful driver is not admissible where the only issue is whether accused was the driver of a vehicle which collided with another vehicle.¹³

It has been held that a charge alleging that the automobile struck a named person and proof that it struck the automobile in which such person was riding presents no variance,¹⁴ but it has also been held that there is a fatal variance where the charge alleges that the vehicle driven by accused struck and collided with a named person and the proof merely shows that the vehicle so driven collided with the vehicles in which such person was driving.¹⁵ There is not a fatal variance where the charge alleges that an accident occurred on a public highway and the proof shows that the body of a person who was struck by a vehicle was found on a named "road," where such road was open to the public for vehicular traffic.¹⁶

§ 678. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

The prosecution has the burden to prove the guilt of accused, in other words, to prove the existence of the elements of the offense.

In accordance with rules applicable in criminal prosecutions generally, the prosecution has the burden to establish the guilt of accused,¹⁷ that is, to prove the elements of the offense.¹⁸ It seems,

5. Ind.—Runyon v. State, 38 N.E.2d 235, 219 Ind. 352.

Reason for rule

A defense showing reasonable compliance with requirement of statute can be made without knowledge of the name of person or persons who were with those incapacitated by accident.—Runyon v. State, *supra*.

6. R.I.—State v. Smith, 72 A. 710, 29 R.I. 513.

7. Tex.—Morris v. State, 94 S.W.2d 1169, 130 Tex.Cr. 533.

8. W.Va.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

9. Cal.—People v. Huber, 221 P. 695, 64 Cal.App. 352.

Charge held sufficient

Ala.—Griffin v. State, 10 So.2d 374, 30 Ala.App. 599.

W.Va.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

10. Tex.—Mosier v. State, 234 S.W. 225, 90 Tex.Cr. 136.

11. Ariz.—State v. Lee, 88 P.2d 996, 53 Ariz. 295.

Pa.—Commonwealth v. Hyman, 178 A. 510, 117 Pa.Super. 585.

12. Mass.—Commonwealth v. McMenimon, 4 N.E.2d 246, 295 Mass. 467.

13. Ala.—May v. State, 165 So. 403, 27 Ala.App. 30.

14. Cal.—People v. Halbert, 248 P. 969, 78 Cal.App. 598.

15. Tex.—Fuller v. State, 48 S.W.2d 303, 120 Tex.Cr. 66.

16. Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641.

17. N.Y.—People v. Hakala, 61 N.Y. S.2d 718, 270 App.Div. 612.

18. N.Y.—People v. Hakala, *supra*.

Fact of injury

The prosecution had the burden to

prove that a person was injured by a motor vehicle.—People v. Hakala, *supra*.

Operation or control by accused

The prosecution had the burden to prove:

(1) That accused was either driving, or was in control of, a vehicle involved.—Hunter v. State, 139 S.W. 2d 89, 139 Tex.Cr. 106—Freeman v. State, 40 S.W.2d 105, 118 Tex.Cr. 102.

(2) That accused was the operator of a vehicle that caused an injury to a person.—People v. Hakala, 61 N.Y.S.2d 718, 270 App.Div. 612.

(3) That accused was operating a vehicle that was involved in an accident resulting in injury to a person.—Commonwealth v. Adams, 23 A.2d 59, 146 Pa.Super. 601.

Knowledge

The prosecution had the burden to prove that accused knew that:

however, that where the statute designates several persons or officers to whom in the alternative an accident is to be reported, an accident having been shown, the onus probandi rests on the driver to show that he reported the accident as required by statute, and not on the state to show that he did not comply with each of the alternative requirements.¹⁹

b. Admissibility

The admissibility of evidence in prosecutions for neglecting a duty after an accident is governed by the usual rules of evidence in criminal cases.

(1) A collision had occurred.—State v. Lee, 88 P.2d 996, 53 Ariz. 295.

(2) He was involved in an accident resulting in an injury to a person.—Commonwealth v. Adams, 23 A.2d 59, 146 Pa.Super. 601.

(3) An injury to a person had been caused which was due to his culpability or to accident.—People v. Hakala, 61 N.Y.S.2d 718, 270 App.Div. 612.

(4) Damage had been caused to property.—People, on Complaint of Mattus, v. Dropkin, 25 N.Y.S.2d 16, 261 App.Div. 223—People v. Ericson, 5 N.Y.S.2d 286, 168 Misc. 51.

Failure to render necessary assistance

The prosecution had the burden to prove that accused failed to render reasonable assistance which he must have seen was necessary.—Commonwealth v. Adams, 23 A.2d 59, 146 Pa. Super. 601.

19. N.Y.—People v. McLaughlin, 165 N.Y.S. 545, 100 Misc. 340, affirmed 173 N.Y.S. 917, 185 App.Div. 945. 42 C.J. p 1386 note 67.

20. Evidence held admissible

(1) In general. Pa.—Commonwealth v. Dudick, 87 Pa. Super. 25.

Tex.—Mimms v. State, 169 S.W.2d 165, 145 Tex.Cr. 456—Miles v. State, 59 S.W.2d 403, 123 Tex.Cr. 501.

42 C.J. p 1387 note 69 [b], [c], [e], [g], [h].

(2) Evidence of officers detailing steps taken in searching for vehicle and its driver, their examination of vehicle, and their conversation with accused before arresting him.—Bouyer v. State, 43 P.2d 153, 57 Okl.Cr. 22.

(3) Evidence of police officer that he was unable to find accused the night of the offense but found him the next night, to show flight.—Powell v. State, 114 S.W.2d 894, 134 Tex. Cr. 244.

(4) Evidence that accused showed signs of intoxication shortly after accident and that he was intoxicated

several hours after accident.—People v. Pahnner, 51 P.2d 1143, 10 Cal.App.2d 294.

(5) Evidence, on behalf of accused, that he was insured, as tending to show lack of motive for committing offense of leaving scene of accident without reporting.—People v. Steele, 37 N.Y.S.2d 199, 179 Misc. 587.

Evidence held inadmissible

N.Y.—People v. Curtis, 112 N.E.54, 217 N.Y. 304, Ann Cas 1917E 586.

42 C.J. p 1387 note 69 [a], [c], [f], [g].

21. N.Y.—People v. Hakala, 61 N.Y.S.2d 718, 270 App.Div. 612—People v. Gold, 55 N.Y.S.2d 258, 269 App. Div. 790—People v. Conlin, 9 N.Y.S.2d 437, 256 App.Div. 817.

Pa.—Commonwealth v. Schwalm, 55 Pa. Dist. & Co. 692.

Evidence held sufficient to authorize or sustain conviction

(1) In general.

Cal.—People v. Ely, 265 P. 818, 203 Cal 628—People v. Forthun, 105 P. 2d 378, 40 Cal.App.2d 656—People v. Houston, 74 P.2d 515, 24 Cal App. 2d 167—People v. Bowlin, 65 P.2d 840, 19 Cal.App.2d 397—People v. Rice, 58 P.2d 956, 14 Cal.App.2d 666—People v. Steele, 280 P. 999, 100 Cal App. 639.

Ga.—Pugh v. State, 13 S.E.2d 41, 64 Ga.App. 267.

Ind.—Runyon v. State, 38 N.E.2d 235, 219 Ind. 352.

Okl.—Johnson v. State, 81 P.2d 872, 64 Okl.Cr. 418.

Tex.—Greer v. State, 300 S.W. 640, 108 Tex.Cr. 356.

Va.—Henson v. Commonwealth, 183 S.E. 438, 165 Va. 829.

Wis.—Link v. State, 259 N.W. 428, 217 Wis. 582, dissenting opinion, 261 N.W. 416, 217 Wis. 582.

42 C.J. p 1387 note 71 [a].

(2) Conviction for aiding, abetting, and assisting another in violating statute.—State v. Derosia, 50 A.2d 231, 94 N.H. 228.

(3) Failure to give information.

N.Y.—People v. Kallof, 1 N.Y.S.2d 546, 253 App.Div. 837.

Okl.—Hunter v. State, 72 P.2d 399, 63 Okl.Cr. 24.

Rules determining the admissibility of evidence in criminal prosecutions generally, stated in Criminal Law §§ 600-899, have been applied in prosecutions for offenses of the character under consideration.²⁰

c. Weight and Sufficiency

The guilt of the accused must be shown beyond a reasonable doubt.

In accordance with rules applicable in criminal prosecutions generally, stated in Criminal Law §§ 910, 918, the guilt of accused must be established beyond a reasonable doubt,²¹ and this is true of

(4) Failure to stop.

Cal.—People v. Thompson, 12 P.2d 81, 123 Cal App 726—People v. Leutholtz, 283 P. 292, 102 Cal.App. 493—People v. Libhart, 249 P. 211, 79 Cal App. 291.

Ga.—Jackson v. State, 175 S.E. 421, 49 Ga App. 345.

N.M.—State v. Kuchan, 139 P.2d 592, 47 NM App. 209.

S.D.—State v. Nicholas, 253 N.W. 737, 62 S.D. 511.

(5) Failure to stop and give information.

Cal.—People v. Frank, 141 P.2d 780, 60 Cal.App.2d 802.

N.J.—Lo Biondo v. Allan, 40 A.2d 810, 132 N.J. Law 437.

Ohio—State v. Brown, App., 39 N.E. 2d 155.

Okl.—Stroud v. State, 167 P.2d 50, 82 Okl.Cr. 124—Bouyer v. State, 43 P. 2d 153, 57 Okl.Cr. 22

(6) Failure to stop and render assistance.

Cal.—People v. Orona, 180 P.2d 694, 79 Cal App.2d 820—People v. Dallas, 109 P.2d 409, 42 Cal.App.2d 596—People v. Hurley, 56 P.2d 978, 13 Cal App 2d 208—People v. Pahnner, 51 P.2d 1143, 10 Cal.App.2d 294—People v. Abila, 29 P.2d 796, 137 Cal.App. 26—People v. Maggio, 286 P. 813, 90 Cal.App. 683.

Pa.—Commonwealth v. Nolf, 58 A.2d 839, 162 Pa.Super. 552—Commonwealth v. Donnelly, 172 A. 190, 113 Pa Super. 173—Commonwealth v. Dudick, 87 Pa.Super. 25—Commonwealth v. Viguers, Quar.Sess., 61 Montg.Co. 320.

Tex.—Harrison v. State, Cr., 210 S.W. 2d 591—Teniente v. State, Cr., 207 S.W.2d 379—Davis v. State, Cr., 199 S.W.2d 155, motion granted 199 S. W.2d 779—Taylor v. State, 196 S. W.2d 925, 149 Tex.Cr. 552—Jones v. State, 171 S.W.2d 889, 146 Tex. Cr. 91—Oney v. State, 170 S.W.2d 738, 145 Tex.Cr. 613—Mimms v. State, 169 S.W.2d 165, 145 Tex.Cr. 456—Hilton v. State, 117 S.W.2d 90, 135 Tex.Cr. 67—Gale v. State, 98 S.W.2d 195, 131 Tex.Cr. 283—Morris v. State, 94 S.W.2d 1169, 130 Tex.Cr. 533—Bell v. State, 92 S.W. 2d 259, 130 Tex.Cr. 90—Miles v.

the various elements of the offense,²² such as striking or injuring a person or property.²³ that accused had knowledge of an accident or of Circumstantial evidence may be sufficient to es-

State, 59 S.W.2d 403, 123 Tex.Cr. 501—Williams v. State, 13 S.W.2d 859, 112 Tex.Cr. 71.

Va.—Blankenship v. Commonwealth, 35 S.E.2d 760, 184 Va. 495.

Wash.—State v. Donckers, 93 P.2d 355, 200 Wash. 45.

(7) Failure to stop, give information, and render assistance.

Cal.—People v. Roche, 121 P.2d 865, 49 Cal.App.2d 459.

Wis.—Klenke v. State, 266 N.W. 472, 221 Wis. 547.

(8) Failure to give information and render assistance.

Ind.—Swope v. State, 39 N.E.2d 947, 220 Ind. 40.

Wis.—Sharp v. State, 4 N.W.2d 136, 241 Wis. 67.

(9) Failure to render assistance.

Cal.—People v. McIntire, 1 P.2d 443, 213 Cal. 50—People v. Kinney, 82 P. 2d 203, 28 Cal.App.2d 232—People v. Rallo, 6 P.2d 516, 119 Cal.App. 393—People v. Reid, 289 P. 653, 106 Cal.App. 616.

Pa.—Commonwealth v. Hipple, Quar. Sess., 57 Dauph.Co. 156.

(10) Failure to file report of accident with state department.—State v. Clark, 290 N.W. 237, 67 S.D. 133.

(11) Failure to stop and report.—People v. Ericson, 5 N.Y.S.2d 286, 168 Misc. 51—People v. Krause, 60 N.Y.S. 2d 175.

(12) Leaving scene of accident without reporting.—People v. Hughes, 59 N.Y.S.2d 76, 269 App.Div. 1016, affirmed 67 N.E.2d 256, 295 N.Y. 847.

Evidence held insufficient to authorize or support conviction

(1) In general.
N.Y.—People v. Schaeffer, 1 N.Y.S.2d 714, 253 App.Div. 202.

S.D.—State v. Tarbell, 266 N.W. 677, 64 S.D. 330.

Va.—Herchenbach v. Commonwealth, 38 S.E.2d 328, 185 Va. 217.

(2) Failure to give information.
N.Y.—People v. Irish, 222 N.Y.S. 337, 129 Misc. 440.

Okl.—McDonald v. State, 15 P.2d 149, 54 Okl.Cr. 122.

Pa.—Commonwealth v. Schwalm, 55 Pa.Dist. & Co. 692.

(3) Failure to stop.—State v. Abell, 75 P.2d 122, 58 Idaho 478.

(4) Failure to stop and give information.

Ill.—People v. Stone, 6 N.E.2d 494, 288 Ill.App. 619.

N.Y.—People v. Thomas, 250 N.Y.S. 413, 232 App.Div. 475.

(5) Failure to stop and render assistance.

Pa.—Commonwealth v. Hyman, 178 A. 510, 117 Pa.Super. 585.

Tex.—Williams v. State, 280 S.W. 220, 103 Tex.Cr. 117.

Wis.—State v. Miller, 19 N.W.2d 271, 247 Wis. 339.

(6) Failure to stop, give information, and render assistance.—People v. Scofield, 265 P. 914, 203 Cal. 703, followed in People v. Campridon, 268 P. 372, 204 Cal. 701.

(7) Failure to give information and render assistance.—People v. Martin, 300 P. 108, 114 Cal.App. 337.

(8) Failure to render assistance.
Pa.—Commonwealth v. Adams, 23 A. 2d 59, 146 Pa.Super. 601.

Tex.—Blitgert v. State, 248 S.W. 1073, 94 Tex.Cr. 53.

(9) Leaving scene of accident.

N.Y.—People v. Shlansky, 177 N.E. 130, 256 N.Y. 538—People v. Conlin, 9 N.Y.S.2d 437, 256 App.Div. 847—People v. Lynch, 8 N.Y.S.2d 282, 253 App.Div. 587.

Tenn.—Jones v. State, 196 S.W.2d 491, 184 Tenn. 128.

(10) Leaving scene of accident without reporting.—People v. Hakala, 61 N.Y.S.2d 718, 270 App.Div. 612—People v. Gold, 55 N.Y.S.2d 258, 269 App.Div. 790—People v. Schneider, 41 N.Y.S.2d 261, 266 App.Div. 751.

22. N.Y.—People v. Hakala, 61 N.Y.S.2d 718, 270 App.Div. 612—People v. Kulick, 66 N.Y.S.2d 826.

Pa.—Commonwealth v. Hyman, 178 A. 510, 117 Pa.Super. 585—Commonwealth v. Schwalm, 55 Pa.Dist. & Co. 692.

Tex.—Freeman v. State, 40 S.W.2d 105, 118 Tex.Cr. 102—Williams v. State, 280 S.W. 220, 103 Tex.Cr. 117.

Wis.—State v. Miller, 19 N.W.2d 271, 247 Wis. 339.

42 C.J. p 1386 note 72.

Evidence held sufficient to show or to authorize finding

(1) That every element of offense existed

Ind.—Runyon v. State, 38 N.E.2d 235, 219 Ind. 352.

Wis.—Klenke v. State, 266 N.W. 472, 221 Wis. 547.

(2) That accused was involved in accident.—Pugh v. State, 13 S.E.2d 41, 64 Ga.App. 267.

(3) That vehicle driven by accused struck a person.—Stroud v. State, 167 P.2d 80, 82 Okl.Cr. 124.

(4) That vehicle driven by accused struck and injured a person.—People v. Frank, 141 P.2d 780, 60 Cal.App.2d 302.

(5) That injured person was in need of assistance.—People v. Reid, 289 P. 653, 106 Cal.App. 616.

(6) That injured person required medical treatment.—People v. Kinney, 82 P.2d 203, 28 Cal.App.2d 232.

(7) That there was substantial damage to vehicle with which accused's vehicle collided.—Scott v. District of Columbia, D.C.Mun.App., 55 A.2d 854.

(8) That accused had authority over driver of vehicle.—People v. Maggio, 266 P. 813, 90 Cal.App. 683.

(9) Of other matters.—Petition of Saltman, 194 N.E. 703, 289 Mass. 554.

Evidence held insufficient

(1) To show injury to any person.—People v. Hakala, 61 N.Y.S.2d 718, 270 App.Div. 612.

(2) To show that accused was driving, or in control of, vehicle that struck a person.—Freeman v. State, 40 S.W.2d 105, 118 Tex.Cr. 102.

(3) To show that collision was due to culpability of accused.—People v. Thomas, 250 N.Y.S. 413, 232 App.Div. 475.

(4) To show that damage was caused to motor vehicle with which motor vehicle driven by accused collided.—People v. Thomas, 250 N.Y.S. 413, 232 App.Div. 475.

(5) To show that accused was driving car involved.—Blitgert v. State, 248 S.W. 1073, 94 Tex.Cr. 53.

(6) To show that particular place involved was a "way" within meaning of statute.—Commonwealth v. Harris, 154 N.E. 180, 257 Mass. 434.

(7) To show that accused had reasonable opportunity to give information.—Commonwealth v. Schwalm, 55 Pa.Dist. & Co. 692.

23. Cal.—People v. Ely, 265 P. 818, 203 Cal. 628.

N.Y.—People v. Hakala, 61 N.Y.S.2d 718, 270 App.Div. 612—People, on Complaint of O'Connor, v. Hirsch, 269 N.Y.S. 830, 241 App.Div. 712—People v. Ericson, 5 N.Y.S.2d 286, 168 Misc. 51—People v. Kulick, 66 N.Y.S.2d 826.

Pa.—Commonwealth v. Adams, 23 A. 2d 59, 146 Pa.Super. 601—Commonwealth v. Hyman, 178 A. 510, 117 Pa.Super. 585.

42 C.J. p 1387 note 73.

Statute not requiring knowledge

In a prosecution under a statute which did not in terms require knowledge of the accident, it was stated that in most cases it would be impossible for the state to prove scienter beyond a reasonable doubt.—State v. Masters, 144 S.E. 718, 106 W.Va. 46.

Evidence held insufficient

(1) To show that accused had knowledge of an accident.—People v. Schaeffer, 1 N.Y.S.2d 714, 253 App.Div. 202.

(2) To show that accused had knowledge of damage.—People v. Shlansky, 177 N.E. 130, 256 N.Y. 538.

establish elements of the offense and the guilt of accused.²⁴ So, while knowledge may be shown by direct proof,²⁵ positive and direct proof is not essential,²⁶ and circumstantial evidence may be sufficient to show knowledge.²⁷ In order to justify a conviction on circumstantial evidence, however, the facts and circumstances shown must be consistent with each other, consistent with the hypothesis that accused is guilty, and inconsistent with the hypothesis that he is innocent.²⁸ A strong suspicion that accused knew that he had injured a person or had damaged the property of another is not sufficient with respect to proof of knowl-

edge.²⁹ Evidence of absence of recent dents or marks on the vehicle driven by accused does not necessarily constitute conclusive proof that accused did not injure a person.³⁰

§ 679. — Questions of Law and Fact

Where the evidence as to an issue is conflicting or is such as to permit the drawing of different conclusions therefrom, in general whether the accused is guilty or whether particular elements of the offense exist is a question of fact for the jury or other trier of the facts.

In accordance with rules applicable in criminal prosecutions generally, where the evidence as to guilt is conflicting or is such as to permit the draw-

(3) To show that accused had knowledge of damage to a vehicle.—*People v. Thomas*, 250 N.Y.S. 413, 232 App Div. 475.

24. Tex.—*Miles v. State*, 59 S.W.2d 403, 123 Tex.Cr. 501—*Williams v. State*, 13 S.W.2d 859, 112 Tex.Cr. 71.

Wash.—*State v. Donckers*, 93 P.2d 355, 200 Wash. 45.

Evidence held sufficient to show or to authorize finding

(1) That accused was guilty.

Pa.—*Commonwealth v. Viguers*, Quar.Sess., 61 Mont Co. 320.

Wash.—*State v. Donckers*, 93 P.2d 355, 200 Wash. 45.

(2) That vehicle driven by accused struck and injured a person.

Cal.—*People v. Forthun*, 105 P.2d 378, 40 Cal.App.2d 656—*People v. Pahner*, 51 P.2d 1143, 10 Cal.App.2d 294—*People v. Thompson*, 12 P.2d 81, 123 Cal.App. 726.

Pa.—*Commonwealth v. Dudlick*, 87 Pa.Super. 25.

Tex.—*Gale v. State*, 98 S.W.2d 195, 131 Tex.Cr. 283—*Williams v. State*, 13 S.W.2d 859, 112 Tex.Cr. 71.

Wash.—*State v. Donckers*, 93 P.2d 355, 200 Wash. 45.

(3) That vehicle driven by accused collided with parked vehicle.—*State v. Brown*, Ohio App., 39 N.E.2d 155.

(4) That vehicle was driven by accused at time of accident, collision, or injury.

Cal.—*People v. Houston*, 74 P.2d 515, 24 Cal.App.2d 167—*People v. Abilla*, 29 P.2d 796, 137 Cal.App. 26.

Tex.—*Hilton v. State*, 117 S.W.2d 90, 135 Tex.Cr. 67.

(5) That person was injured by a motor vehicle.—*State v. Donckers*, 93 P.2d 355, 200 Wash. 45.

Evidence held insufficient

(1) To connect accused with offense.—*State v. Tarbell*, 266 N.W. 677, 64 S.D. 330.

(2) To show that car driven by accused struck a person.—*State v. Miller*, 19 N.W.2d 271, 247 Wis. 339.

(3) To show that vehicle driven by accused was involved in collision.—

People v. Lynch, 3 N.Y.S.2d 282, 253 App Div. 587.

25. Pa.—*Commonwealth v. Adams*, 23 A.2d 59, 146 Pa.Super. 601—*Commonwealth v. Hyman*, 178 A. 510, 117 Pa.Super. 585.

26. Ariz.—*State v. Lee*, 8 P.2d 996, 53 Ariz. 295.

27. Ariz.—*State v. Lee*, supra.

Cal.—*People v. Roche*, 121 P.2d 865, 49 Cal.App.2d 459—*People v. Kinney*, 82 P.2d 203, 28 Cal.App.2d 232—*People v. Pahnner*, 51 P.2d 1143, 10 Cal.App.2d 294.

N.M.—*State v. Kuchan*, 139 P.2d 592, 47 N.M. 209.

Pa.—*Commonwealth v. Adams*, 23 A.2d 59, 146 Pa.Super. 601—*Commonwealth v. Hyman*, 178 A. 510, 117 Pa.Super. 585.

Tex.—*Harrison v. State*, Cr., 210 S.W.2d 591.

42 C.J. p 1387 note 74.

Effect of accused's testimony of want of recollection

Evidence of circumstances connected with the occurrence may be sufficient to permit a finding that accused knew that a vehicle driven by him had struck a person, notwithstanding testimony by accused that he did not remember anything that occurred during the period in question, such testimony by accused not being determinative of the question—*People v. Henry*, 72 P.2d 915, 23 Cal.App.2d 155.

Evidence held sufficient to show or to authorize finding

(1) That accused knew there had been a collision.—*People v. Krause*, 60 N.Y.S.2d 175—42 C.J. p 1387 note 74 (1).

(2) That accused knew vehicle driven by him struck a person.

Cal.—*People v. Frank*, 141 P.2d 780, 40 Cal.App.2d 802—*People v. Hurley*, 56 P.2d 978, 13 Cal.App.2d 208—*People v. Libhart*, 249 P. 211, 79 Cal.App. 291.

Ind.—*Runyon v. State*, 38 N.E.2d 235, 219 Ind. 352.

N.J.—*Lo Mondo v. Allan*, 40 A.2d 810, 132 N.J.Law 427.

N.M.—*State v. Kuchan*, 139 P.2d 592, 47 N.M. 209.

Pa.—*Commonwealth v. Nolf*, 58 A.2d 839, 162 Pa.Super. 552.

Tex.—*Taylor v. State*, 196 S.W.2d 925, 149 Tex.Cr. 552—*Bell v. State*, 92 S.W.2d 259, 130 Tex.Cr. 90.

Wis.—*Klenke v. State*, 266 N.W. 472, 221 Wis. 547.

42 C.J. p 1386 note 73 [a].

(3) That accused knew vehicle driven by him had struck and injured a person

Cal.—*People v. Dallas*, 109 P.2d 409, 42 Cal.App.2d 596—*People v. Henry*, 72 P.2d 915, 23 Cal.App.2d 155—*People v. Pahnner*, 51 P.2d 1143, 10 Cal.App.2d 294.

Ind.—*St. Clair v. State*, 196 N.E. 683, 209 Ind. 135.

N.M.—*State v. Kuchan*, 139 P.2d 592, 47 N.M. 209.

42 C.J. p 1387 note 74 [a] (2).

Evidence held insufficient

(1) To show that accused knew that vehicle driven by him struck a person.

Pa.—*Commonwealth v. Hyman*, 178 A. 510, 117 Pa.Super. 585.

Va.—*Herchenbach v. Commonwealth*, 38 S.E.2d 328, 185 Va. 217.

(2) To show that accused knew that vehicle driven by him had damaged property.—*Commonwealth v. Hyman*, supra.

28. S.D.—*State v. Tarbell*, 266 N.W. 677, 64 S.D. 330.

29. Pa.—*Commonwealth v. Adams*, 23 A.2d 59, 146 Pa.Super. 601.

30. Manner of striking

The absence of recent dents or marks on defendant's automobile was not conclusive proof that he did not inflict injuries described on body of deceased pedestrian in light of testimony of automobile salesman, on cross-examination by commonwealth, that whether striking a man would leave any dents or marks on automobile would depend on manner in which man was struck—*Blankenship v. Commonwealth*, 35 S.E.2d 760, 184 Va. 495.

ing of different conclusions therefrom, whether accused is guilty of an offense with respect to neglecting a statutory duty after an accident is a question of fact for the jury or other trier of the facts,³¹ and a like rule applies with respect to the existence of particular elements of the offense,³² such as whether accused knew that an accident had occurred or that a person or property had been struck, injured, or damaged.³³ Accused is not entitled to a directed verdict in his favor or to a dismissal of the prosecution because of the alleged insufficiency of evidence, where the evidence is sufficient to present a question of fact as to the particular issue or question.³⁴ It has been held, however, that accused is entitled to a dismissal of the prosecution on a judgment of nonsuit, where evidence to prove an essential element of the offense is lacking,³⁵ and a demurrer to the evidence

should be sustained where the evidence is clearly insufficient to show that accused is guilty.³⁶

§ 680. — Instructions

The instructions in a prosecution for neglect of a statutory duty after an accident should fully and correctly state the rules of law applicable to the case.

The instructions should contain a correct statement of law as to matters involved in the particular case,³⁷ and it is proper to refuse to give a requested instruction which does not constitute a correct statement of law.³⁸ An instruction should not be broader than the allegations charging the offense,³⁹ and should not ignore excuses for performing the acts.⁴⁰ Instructions should be confined and limited to the issues⁴¹ and to matters of which there is proof,⁴² should properly apply

31. Evidence held sufficient for submission to jury

(1) On question whether accused was guilty.

Ala.—Layfield v. State, 173 So. 654, 27 Ala.App. 437.

N.C.—State v. Newton, 177 S.E. 184, 207 N.C. 323.

Wash.—State v. Donckers, 93 P.2d 355, 200 Wash. 45.

(2) On question whether accused, taking wheel four blocks from accident, in driving away, was guilty of aiding and abetting previous driver in commission of offense—People v. Steele, 280 P. 999, 100 Cal.App. 639.

(3) On question whether accused was rendered unconscious and, therefore, excused from compliance with statute.—People v. Rico, 58 P.2d 956, 14 Cal.App.2d 666.

(4) On question whether there was reasonable doubt that accused believed that he would be in danger of harm or bodily injury if he had complied with statute.—Greer v. State, 300 S.W. 640, 108 Tex.Cr. 356.

Evidence held insufficient

To authorize submission of question of guilt to jury.—Commonwealth v. Adams, 23 A.2d 59, 146 Pa.Super. 601.

32. D.C.—Scher v. District of Columbia, 95 F.2d 118, 68 App.D.C. 207.

Va.—Blankenship v. Commonwealth, 35 S.E.2d 760, 184 Va. 495.

Failure to render assistance

Cal.—People v. Steele, 280 P. 999, 100 Cal.App. 639.

Evidence held sufficient to authorize submission to jury

(1) On question whether accused was driving motor vehicle at time of accident.—State v. King, 14 S.E.2d 803, 219 N.C. 667.

(2) On question whether accused was person who injured another.—

State v. Newton, 177 S.E. 184, 207 N.C. 323.

(3) On question whether accused reported accident to some police or judicial officer—State v. Tippet, 296 S.W. 132, 317 Mo. 319.

33. Cal.—People v. Leutholtz, 283 P. 292, 102 Cal.App. 493.—People v. Steele, 280 P. 999, 100 Cal.App. 639.—People v. Johnston, 269 P. 560, 93 Cal.App. 484

Neb.—Behrens v. State, 1 N.W.2d 289, 140 Neb. 671.

N.Y.—People v. Ericson, 5 N.Y.S.2d 286, 168 Misc. 51.

Okl.—Stroud v. State, 167 P.2d 80, 82 Okl.Cr. 124

Tex.—Bell v. State, 92 S.W.2d 259, 130 Tex.Cr. 90.

42 C.J. p 1388 note 77.

Sufficiency of evidence

(1) Evidence of circumstances connected with the occurrence which would justify a reasonable man in assuming that accused must have known that there was a collision is sufficient to take the issue as to knowledge to the jury.—State v. Lee, 88 P.2d 996, 53 Ariz. 295.

(2) Evidence presented question of fact as to whether accused knew or was bound to know that his motor vehicle had collided with that of complaining witness.—People v. Podel, 4 N.Y.S.2d 625, 254 App.Div. 768, affirmed 16 N.E.2d 398, 278 N.Y. 676.

34. D.C.—Scher v. District of Columbia, 95 F.2d 118, 68 App.D.C. 207.—Scott v. District of Columbia, D.C.Mun.App., 55 A.2d 854.

Mass.—Petition of Saltman, 194 N.E. 2d 703, 289 Mass. 554.—Commonwealth v. Lewis, 190 N.E. 513, 286 Mass. 256.

35. N.C.—State v. Ray, 47 S.E.2d 494, 229 N.C. 40.

36. Pa.—Commonwealth v. Adams, 23 A.2d 59, 146 Pa.Super. 601.

37. Mass.—Commonwealth v. Bleakney, 179 N.E. 400, 278 Mass. 198.

Instruction held proper

Cal.—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641.—People v. Steele, 280 P. 999, 100 Cal.App. 639.

Iowa.—State v. Schenk, 262 N.W. 129, 220 Iowa 511.

Mass.—Petition of Saltman, 194 N.E. 703, 289 Mass. 554.

Tex.—Davis v. State, Cr., 199 S.W.2d 155, motion granted 199 S.W.2d 779.

38. Tex.—Moore v. State, 145 S.W.2d 887, 140 Tex.Cr. 482.—Bevil v. State, 141 S.W.2d 362, 139 Tex.Cr. 513.

Requested charge held properly refused

Ga.—Jackson v. State, 175 S.E. 421, 49 Ga.App. 345.

Tex.—Mickle v. State, 191 S.W.2d 41, 149 Tex.Cr. 53.

39. Cal.—People v. Reid, 289 P. 653, 106 Cal.App. 616.

Tex.—Moore v. State, 145 S.W.2d 887, 140 Tex.Cr. 482.

40. Cal.—People v. Scofield, 265 P. 914, 203 Cal. 703, followed in People v. Campridon, 268 P. 372, 204 Cal. 701.—People v. Rallo, 6 P.2d 516, 119 Cal.App. 393.

41. Cal.—People v. De Vries, 230 P. 982, 69 Cal.App. 201.

42. Kan.—State v. Bowser, 145 P.2d 135, 158 Kan. 12.

Tex.—Robinson v. State, 102 S.W.2d 220, 132 Tex.Cr. 50.

Charge not called for by evidence

Tex.—Mickle v. State, 191 S.W.2d 41, 149 Tex.Cr. 53.—Salazar v. State, 169 S.W.2d 169, 145 Tex.Cr. 478.

Defenses

(1) Accused is entitled to an instruction setting forth affirmatively matters which constitute a defense to the action where there is evidence to support such matters.—Woods v. State, 121 S.W.2d 604, 135 Tex.Cr. 540

the law to the facts,⁴³ and should limit the jury to the consideration of issues presented by the evidence.⁴⁴ An instruction that the jury must be convinced beyond a reasonable doubt that accused was driving the motor vehicle in question at the time of the accident is properly refused where the evidence of such fact is undisputed.⁴⁵ In a prosecution for failure to render assistance, it is improper to give an instruction submitting to the jury issues as to the speed, or manner and effect of operation, of accused's vehicle.⁴⁶

Where a failure to perform any one of the several acts designated by the statute constitutes a separate offense, and the count charging guilt sets forth separate offenses under the statute, generally it is essential to instruct the jury that they must agree as to at least one of the alternative charges or separate offenses in order to find accused guilty,⁴⁷ but it is not essential under all circumstances to distinguish between the separate offenses under the statute.⁴⁸

Knowledge and intent. In view of the general rule that knowledge of the accident or of striking or injuring a person or property is an essential element of the offense or that want of such knowledge constitutes a defense to the prosecution, stated supra § 674 c (2), ordinarily accused is entitled to an instruction duly submitting to the jury this question as to knowledge,⁴⁹ or, more specifically stated, to an instruction that want of knowledge of the accident would excuse the failure to com-

ply with the statute⁵⁰ or to an instruction which directs an acquittal if the jury entertain a reasonable doubt that he had such knowledge.⁵¹ A requested instruction as to knowledge should constitute a correct statement of law,⁵² and a request for an instruction as to knowledge is properly refused where no issue as to knowledge is raised by the evidence,⁵³ or where the evidence conclusively shows that accused would have known that he struck a person if he had not been under the influence of intoxicating liquor.⁵⁴ The mere failure to use the word "knowingly" does not render an instruction insufficient where the requirement as to knowledge is duly set forth in the instruction in other terms.⁵⁵

It is proper to refuse a requested instruction as to intent which does not constitute a correct statement of law.⁵⁶

§ 681. — Verdict and Findings

In general a verdict of guilty in a prosecution for an offense here under consideration, which is contrary to the evidence and instructions is insufficient.

In general a verdict of guilty in a prosecution for an offense here under consideration is insufficient where it is contrary to the evidence⁵⁷ and to the instructions.⁵⁸ There is not necessarily an inconsistency between a finding that accused is not guilty of an offense of the type here under consideration and a finding that accused violated the statute defining the offense of driving while under the influence of intoxicating liquor.⁵⁹

—Williams v. State, 102 S.W.2d 212, second case, 132 Tex.Cr. 33.

(2) Accused is not entitled to an instruction presenting a certain matter as a defense, however, where, as a witness, he did not present such matter as a reason for failure to comply with the statute and the evidence does not support such defense. —Morris v. State, 94 S.W.2d 1169, 130 Tex.Cr. 533.

43. Tex.—Williams v. State, 102 S.W.2d 212, second case, 132 Tex.Cr. 33.

44. Tex.—Robinson v. State, 102 S.W.2d 220, 132 Tex.Cr. 50.

45. Ala.—Goodman v. State, 102 So. 486, 20 Ala.App. 392.

46. Pa.—Commonwealth v. Hyman, 178 A. 510, 117 Pa.Super. 585.

47. Cal.—People v. Scofield, 265 P. 914, 203 Cal. 703, followed in People v. Campridon, 268 P. 372, 204 Cal. 701.

48. Cal.—People v. Dallas, 109 P.2d

409, 42 Cal.App.2d 596—People v. Odom, 66 P.2d 206, 19 Cal.App.2d 641.

Only one distinct offense charged and considered

Where only the distinct offense of failure to render assistance was charged in the indictment and considered at the trial, an instruction fairly covering the elements of such distinct offense, without reference to the other distinct offenses under the statute, was sufficient.—People v. Kinney, 82 P.2d 203, 28 Cal.App.2d 232.

49. Cal.—People v. Scofield, 265 P. 914, 203 Cal. 703, followed in People v. Campridon, 268 P. 372, 204 Cal. 701—People v. Rallo, 6 P.2d 516, 119 Cal.App. 393.

Tex.—Blakeley v. State, 77 S.W.2d 688, 127 Tex.Cr. 339.

Instruction held sufficient

Tex.—Taylor v. State, 196 S.W.2d 925, 149 Tex.Cr. 552.

50. Tex.—Stalling v. State, 234 S.W. 914, 90 Tex.Cr. 310.

51. Cal.—People v. Ely, 265 P. 818, 203 Cal. 628.

Tex.—Goforth v. State, 241 S.W. 1027, 92 Tex.Cr. 200.

52. Ga.—Jackson v. State, 175 S.E. 421, 49 Ga.App. 345.

Tex.—Bevil v. State, 141 S.W.2d 362, 139 Tex.Cr. 513.

53. Tex.—Jones v. State, 94 S.W.2d 448, 130 Tex.Cr. 419.

54. Tex.—Martinez v. State, 128 S.W.2d 398, 137 Tex.Cr. 434, rehearing denied 131 S.W.2d 971, 137 Tex.Cr. 434.

55. Cal.—People v. Johnston, 269 P. 560, 93 Cal.App. 484.
Tex.—Taylor v. State, 196 S.W.2d 925, 149 Tex.Cr. 552.

56. D.C.—Seher v. District of Columbia, 95 F.2d 118, 68 App.D.C. 207.

57. Idaho.—State v. Abell, 75 P.2d 122, 58 Idaho 478.

58. Idaho.—State v. Abell, supra.

59. Cal.—People v. Smith, 103 P.2d 199, 39 Cal.App.2d 277.

§ 682. — Judgment, Sentence, and Punishment

Local statutes govern as to the period and extent of punishment for an offense with respect to neglecting a statutory duty after an accident, and whether punishment imposed is excessive may depend on the particular facts.

The period and extent of punishment for an offense depend largely on provisions of local statutes,⁶⁰ and whether punishment imposed is excessive may depend on the particular facts.⁶¹ A statute providing for imprisonment for violation of its terms, and silent as to the place of such imprisonment, but declaring a violation to be a felony, which is defined by another statute as any offense punishable by imprisonment in the state's prison, authorizes the sentencing of a violator to the state's prison.⁶²

§ 683. — Appeal and Error

Rules governing appeals in criminal prosecutions generally apply to an appeal in a prosecution for neglecting a statutory duty after an accident.

60. Mich.—*People v. Lepler*, 24 N.W.2d 190, 315 Mich. 490—*People v. Hoaglin*, 247 N.W. 141, 262 Mich. 162.

Misdemeanor

Where the offense is a misdemeanor, the punishment imposed must not exceed that prescribed for misdemeanors.

Mich.—*People v. Hoaglin*, *supra*.

S.D.—*State v. Hanno*, 238 N.W. 23, 58 S.D. 649.

Hard labor and double punishment

(1) Where the punishment was fixed at a designated term of imprisonment and no fine was imposed, it was not permissible to impose an additional period at hard labor on accused to pay the costs of the proceedings.—*Mills v. State*, 191 So. 922, 29 Ala.App. 106.

(2) Under a statute permitting imprisonment in the county or municipal jail for not less than a specified period and not more than a specified period, or for imprisonment in the state prison for not less than a specified period and not more than a specified period, or for a fine of not less than a specified amount and not more than a specified amount, it was not permissible to sentence accused to the state's prison and also to hard labor for the county for a sufficient period to pay a fine assessed by the jury and the costs of the proceeding.—*Bragan v. State*, 9 So.2d 123, 243 Ala. 102, answer to certified question conformed to 9 So. 2d 126, 30 Ala.App. 548—*Bragan v. State*, 9 So.2d 126, 30 Ala.App. 548.

In Pennsylvania

(1) The view has been taken that,

even since the amendment of 1937, 75 P.S. § 634, a person is subject to the punishment imposed by the statute for a misdemeanor where he fails to stop after his vehicle has collided with, and has damaged property, whether the property damaged was attended or unattended.—*Commonwealth v. Baker*, 53 Pa.Dist. & Co. 702, 61 Montg.Co. 200—*Commonwealth v. Wolfendale*, 43 Pa.Dist. & Co. 230.

(2) There is also authority for the view, however, that, where in such case of failure to stop the damaged property was unattended, only the punishment prescribed by the statute for a summary offense can be imposed.—*Commonwealth v. Krivonak*, 46 Pa.Dist. & Co. 109, 24 Erie Co. 185—*Commonwealth v. Kane*, 38 Pa.Dist. & Co. 480.

61. Punishment held excessive

Neb.—*Wright v. State*, 298 N.W. 685, 139 Neb. 684.

N.Y.—*People v. Kantor*, 65 N.Y.S.2d 809, 271 App.Div. 838.

Okl.—*Bouyer v. State*, 43 P.2d 153, 57 Okl.Cr. 22.

Punishment held not excessive

Pa.—*Commonwealth v. Nolf*, 58 A.2d 839, 162 Pa.Super. 552.

62. Wis.—*Boehm v. State*, 209 N.W. 730, 190 Wis. 609.

63. Tex.—*Stalling v. State*, 243 S.W. 990, 92 Tex.Cr. 354.

42 C.J. p 1388 notes 85–87.

64. Mass.—*Commonwealth v. Masad*, 136 N.E. 615, 242 Mass. 532.

42 C.J. p 1388 note 86.

The general rules of review in criminal cases control the review of convictions in prosecutions of the character here under consideration,⁶³ as, for example, with respect to the necessity of raising in the court below questions which it is sought to review,⁶⁴ and as to prejudicial or harmless error and as to the necessity of prejudice to justify a reversal.⁶⁵

§ 684. Obstructing or Blockading Highway

Statutes and ordinances making it an offense to obstruct or block the highways or streets may be violated by the operator of a motor vehicle.

Statutes and ordinances have been enacted in some jurisdictions making it an offense to obstruct or block the highways or streets, and such statutes may be violated by the operator of a motor vehicle.⁶⁶ No hard and fast rule can be laid down as to what in every case will constitute an obstruction of a street or highway by an automobile,⁶⁷ but merely stopping temporarily and for a reasonable time does not violate such statutes.⁶⁸

65. Tex.—*Blakeley v. State*, 77 S.W. 2d 688, 127 Tex.Cr. 339.

42 C.J. p 1388 note 87.

Errors with respect to instructions

Cal.—*People v. Ely*, 265 P. 818, 203 Cal. 628—*People v. Rallo*, 6 P.2d 516, 119 Cal.App. 393.

Tex.—*Woods v. State*, 121 S.W.2d 604, 135 Tex.Cr. 540—*Robinson v. State*, 102 S.W.2d 220, 132 Tex.Cr. 50—*Williams v. State*, 103 S.W.2d 212, second case, 132 Tex.Cr. 33—*Blakeley v. State*, 77 S.W.2d 688, 127 Tex.Cr. 339.

Error held not prejudicial

Cal.—*People v. Odom*, 66 P.2d 206, 19 Cal.App.2d 641.

66. Minn.—*Duluth v. Esterly*, 131 N.W. 791, 115 Minn. 64.

Offense of obstructing highways generally see Highways § 230.

Information held insufficient

Iowa.—*State v. Bethards*, 32 N.W.2d 769.

Evidence held sufficient to support conviction

Ga.—*Richards v. State*, 11 S.E.2d 49, 63 Ga.App. 290.

Minn.—*Duluth v. Esterly*, 131 N.W. 791, 115 Minn. 64.

Evidence held insufficient to sustain conviction

Iowa.—*State v. Bethards*, 32 N.W.2d 769.

67. Minn.—*Duluth v. Esterly*, 131 N.W. 791, 115 Minn. 64.

Question for jury

Ga.—*Richards v. State*, 11 S.E.2d 49, 63 Ga.App. 290.

68. D.C.—*Gassenheimer v. District of Columbia*, 25 App.D.C. 179.

§ 685. Overloading

It is an offense under some statutes or ordinances to operate on the highways or streets a motor vehicle which has a weight in excess of a prescribed maximum.

It is an offense under some statutes or ordinances to operate on the highways or streets a motor vehicle which has a weight in excess of a prescribed maximum,⁶⁹ and such statutes or ordinances have usually been held valid and enforceable.⁷⁰ While such a statute is to be strictly con-

strued⁷¹ since it is penal in nature,⁷² it is not to be given its narrowest meaning, if such is directly contrary to the intention of the legislature⁷³ or out of harmony with its manifest purpose and intent.⁷⁴

An indictment, information, or complaint under such statutes must allege every fact necessary to constitute the offense charged and to bring accused within the statutory provisions.⁷⁵ The rules that

Minn.—Duluth v. Esterly, 131 N.W. 791, 115 Minn. 64.

Parking

(1) Under a statute making willful obstruction of the traffic of streets an offense, the mere leaving of an automobile for a reasonable length of time at a place in the street where vehicles were permitted to be parked does not constitute willful obstruction.—People v. Harden, 179 N.Y.S. 732, 110 Misc. 72.

(2) The parking of automobiles in a city street for purpose of demonstration and sale was not a violation of statute prohibiting obstruction of streets by fences, buildings, structures, or otherwise.—Fry v. State, 9 N.E.2d 701, 55 Ohio App. 264.

(3) Violation of parking regulations as offense see *infra* § 714.

69. Fla.—Dickinson v. Cahoon, 144 So. 345, 107 Fla. 155

Ill.—City of Chicago v. Foley, 167 N.E. 779, 335 Ill. 584

Or.—Kelsey v. Norblad, 298 P. 199, 136 Or. 76.

Pa.—Commonwealth v. Peacock, 179 A. 907, 118 Pa. Super. 168

Tex.—Kitchens v. State, 109 S.W.2d 1071, 133 Tex. Cr. 245—Holtzfeld v. State, 63 S.W.2d 386, 124 Tex. Cr. 422, followed in Stone v. State, 72 S.W.2d 1118, 126 Tex. Cr. 491.

Purpose

The purpose of statute prohibiting the use of public highways by motor vehicles of excessive weight is to prevent injury to the public property in the form of damage to roads, bridges, etc., and to insure the safety of persons traveling over the highways.—Commonwealth v. Burali, 22 A.2d 619, 146 Pa. Super. 525.

Persons liable

(1) Statutory regulations as to weight of motor vehicles generally have been held inapplicable to certificated vehicles of private contract carriers.—Dickinson v. Cahoon, 144 So. 345, 107 Fla. 155.

(2) Truck operators from other states are required to comply with such a statute.—Commonwealth v. Peacock, 179 A. 907, 118 Pa. Super. 168—Commonwealth v. Reed, Pa. Quar. Sess., 51 York Leg. Rec. 73.

(3) In order to convict the owner

of such an offense, where a truck is operated by an employee, it must appear that the owner had knowledge of the excess weight or took part in loading the vehicle or was on or about it when it was being loaded or was in operation.—Commonwealth v. Bloom, 30 Pa. Dist. 648.

Defenses

(1) Defendant's lack of knowledge that motor vehicle was overloaded is not defense and should not be considered in determining whether defendant was guilty of driving overloaded vehicle.—Snyder v. State, 185 N.E. 507, 204 Ind. 666.

(2) Fact that operator of truck charged with violation of statute complied with the laws of another state was held not to preclude conviction.—Commonwealth v. Peacock, 179 A. 907, 118 Pa. Super. 168—Commonwealth v. Reed, Pa. Quar. Sess., 51 York Leg. Rec. 73.

(3) Fact that prosecutor of operator of truck alleged to have violated statute may not have been actuated in making complaint solely by desire to enforce the law and protect the roads would not preclude conviction if evidence clearly established defendant's guilt.—Commonwealth v. Peacock, 179 A. 907, 118 Pa. Super. 168.

(4) Filing of application as interstate motor carrier under Federal Motor Carrier Act did not exempt applicant's truck driver from liability for violation of statute penalizing driving of truck on highway with excessive load.—Morrison v. State, 109 S.W.2d 205, 133 Tex. Cr. 141, followed in Smithhart v. State, 109 S.W.2d 207, 133 Tex. Cr. 145, and Johnson v. State, 109 S.W.2d 207, 133 Tex. Cr. 144.

70. Ill.—City of Chicago v. Foley, 167 N.E. 779, 335 Ill. 584.

Tex.—Rayburn v. Richardson, Civ. App., 131 S.W.2d 1000, appeal dismissed 60 S.Ct. 718, 309 U.S. 632, 84 L.Ed. 990.

Regulations as to excessive size or weight generally see *supra* § 32.

Ordinance held void

Ind.—Eddleman v. City of Brazil, 166 N.E. 1, 201 Ind. 84, followed in Holt v. City of Brazil, 185 N.E. 904, 205 Ind. 710.

Exercise of power by local authorities

Statute granting local authorities power to prohibit by appropriate signs commercial vehicles exceeding certain weights is complied with when the signs are of legal size, if fixed by law, otherwise of reasonably adequate size, are posted conspicuously at points along highways and at intersections with other highways, wherever necessary, without a special reference to the authority creating the prohibition, or the ordinance, resolution, or rule under which it was adopted.—Commonwealth ex rel. Borough of Dormont v. Pahlman, 179 A. 910, 118 Pa. Super. 175.

71. Fla.—Rogers v. Cunningham, 158 So. 430, 117 Fla. 760.

Ga.—Self v. State, 165 S.E. 295, 45 Ga. App. 522.

Ind.—Snyder v. State, 185 N.E. 507, 204 Ind. 666.

Mo.—State v. Schwartzmann Service, 40 S.W.2d 479, 225 Mo. App. 577.

Pa.—Commonwealth v. Burali, 22 A.2d 619, 146 Pa. Super. 525

Vehicle held not within statute

Fla.—Rogers v. Cunningham, 158 So. 430, 117 Fla. 760.

72. Pa.—Commonwealth v. Burali, 22 A.2d 619, 146 Pa. Super. 525.

73. Pa.—Commonwealth v. Burali, *supra*.

Gross weight

Under provision prohibiting weight in excess of specified number of pounds "on" any one wheel for each nominal one inch of width of tire on such wheel, prohibition of excessive weight includes gross weight of load and vehicle including the weight of the axles and wheels, since damage to the roadway which statute is designed to prevent is occasioned by the weight of the load plus the weight of the vehicle itself.—Commonwealth v. Burali, *supra*.

74. Mo.—State v. Schwartzmann Service, 40 S.W.2d 479, 225 Mo. App. 577.

S.D.—State v. Vanderhule, 239 N.W. 485, 59 S.D. 251.

75. Tex.—Stribling v. State, 91 S.W.2d 735, 129 Tex. Cr. 656.

42 C.J. p 1389 note 26.

govern criminal prosecutions generally apply in a prosecution for such an offense with respect to issues, proof, and variance,⁷⁶ evidence,⁷⁷ instructions,⁷⁸ judgment, sentence, and punishment,⁷⁹ and review.⁸⁰

Load extending beyond fenders. Under some statutes it is an offense to carry a load extending more than a prescribed distance beyond the line of the fenders of a vehicle.⁸¹

Affidavit held sufficient

Ind.—Snyder v. State, 185 N.E. 507, 204 Ind. 666.

Complaint held insufficient

S.D.—State v. Vanderhule, 239 N.W. 485, 59 S.D. 251.

Tex.—Stovall v. State, 139 S.W.2d 104, 139 Tex.Cr. 363—Stribling v. State, 91 S.W.2d 735, 129 Tex.Cr. 656.

Amendment

Hawaii.—Territory v. Apa, 28 Hawaii 222.

76. Ind.—Eddleman v. City of Brazil, 166 N.E. 1, 201 Ind. 84, followed in Holt v. City of Brazil, 185 N.E. 904, 205 Ind. 710.

Failure of proof as to one ordinance

Failure to prove alleged violation of one ordinance was held not to prevent conviction on proof of violation of another ordinance charged—Eddleman v. City of Brazil, 166 N.E. 1, 201 Ind. 84, followed in Holt v. City of Brazil, 185 N.E. 904, 205 Ind. 710.

77. Burden of proof

Tex.—Kitchens v. State, 109 S.W.2d 1071, 133 Tex.Cr. 245—Lowe v. State, 103 S.W.2d 159, 132 Tex.Cr. 153.

Admissibility of evidence

Tex.—Lowe v. State, supra.

Sufficiency of evidence

(1) Evidence held sufficient to sustain conviction.

Ga.—Garvin v. State, 166 S.E. 451, 46 Ga.App. 37.

Pa.—Commonwealth v. Burall, 22 A. 2d 619, 146 Pa.Super. 525—Commonwealth v. Davis, 19 Pa.Dist. & Co. 513.

(2) Evidence held insufficient to sustain conviction.

Ga.—Self v. State, 165 S.E. 295, 45 Ga.App. 522.

Pa.—Commonwealth v. Bloom, 30 Pa. Dist. 648.

78. Instructions held erroneous

Ind.—Snyder v. State, 185 N.E. 507, 204 Ind. 666.

Tex.—Kitchens v. State, 109 S.W.2d 1071, 133 Tex.Cr. 245.

79. Determination of punishment

Evidence concerning defendant's lack of knowledge that motor vehicle was overloaded could be considered by jury in fixing punishment in event defendant was found guilty of driv-

ing overloaded vehicle.—Snyder v. State, 185 N.E. 507, 204 Ind. 666.

80. Ind.—Snyder v. State, supra. Tex.—Kitchens v. State, 109 S.W.2d 1071, 133 Tex.Cr. 245.

81. Wis.—Whaley v. State, 227 N.W. 942, 200 Wis. 267.

Evidence held sufficient to sustain conviction

Wis.—Whaley v. State, supra.

82. Cal.—People v. Hugon, 114 P.2d 84, 45 Cal.App.2d Supp. 817.

Pa.—Commonwealth v. Dorr, 27 Pa. Dist. & Co. 372—Commonwealth v. Feigenbaum, 25 Pa.Dist. & Co. 43—Commonwealth v. Krall, 18 Pa. Dist. & Co. 382, 43 Lanc. L. Rev. 219. S.C.—State v. Brown, 32 S.E.2d 825, 205 S.C. 514.

42 C.J. p 1352 notes 95, 96.

Conflict with other statutes

The statute authorizing a motorist to overtake and pass to the right of another automobile under certain conditions is not in irreconcilable conflict with the statute requiring an automobile to be driven on the right half of a roadway.—People v. Hugon, 114 P.2d 84, 45 Cal.App.2d Supp. 817.

Indictment, information, or complaint held sufficient

Ga.—Hawkins v. State, 198 S.E. 551, 58 Ga.App. 386—Collins v. State, 179 S.E. 869, 51 Ga.App. 147—Ray v. State, 169 S.E. 538, 47 Ga.App. 22.

Pa.—Commonwealth v. Huth, 28 Pa. Dist. & Co. 407.

Variance held not fatal

Ga.—Mcaler v. State, 13 S.E.2d 38 64 Ga.App. 282.

Evidence held inadmissible

Ga.—Dunahoo v. State, 167 S.E. 614, 46 Ga.App. 310.

Miss.—Naylor v. State, 130 So. 102, 158 Miss. 99.

Evidence held sufficient to sustain conviction

Idaho.—State v. Pasta, 258 P. 1075, 44 Idaho 671.

Pa.—Commonwealth v. Carmack, 51 Pa.Dist. & Co. 505.

Instructions

(1) Held proper.—Maner v. State, 181 S.E. 856, 181 Ga. 254.

(2) Held erroneous.—Dunahoo v. State, 167 S.E. 614, 46 Ga.App. 310—

§ 686. Passing Other Vehicles

It is an offense under some statutes for an operator of a motor vehicle to violate regulations with respect to overtaking or passing other vehicles.

It is an offense under some statutes for an operator of a motor vehicle to violate regulations with respect to overtaking or passing other vehicles,⁸² such as a streetcar⁸³ or school bus.⁸⁴ Such regulations must be reasonable and not vague or indefinite.⁸⁵

Ward v. State, 147 S.E. 780, 39 Ga. App. 570.

83. Ohio.—City of Cleveland v. Sado, App., 61 N.E.2d 910, appeal dismissed 64 N.E.2d 322, 146 Ohio St. 126.

42 C.J. p 1389 note 27.

Strict construction

Pa.—Commonwealth v. Gear, 17 Pa. Dist. & Co. 433, 48 Montg.Co. 218.

Persons liable

Under a regulation relating to the passing of streetcars, the owner of the motor vehicle while riding therein and having control over the driver may be punished for a violation by the driver.—People v. Colon, 148 N.Y. S. 321, 85 Misc. 229.

Complaint

A complaint for a violation of a regulation must state the essentials of the offense, as, for example, that a car had been stopped to allow passengers to alight and that accused failed to stop with reference to the point where the car had stopped.—State v. Harder, 203 N.W. 418, 163 Minn. 47.

Evidence held sufficient to sustain conviction

Ohio.—City of Cleveland v. Sado, App., 61 N.E.2d 910, appeal dismissed 64 N.E.2d 322, 146 Ohio St. 126.

Evidence held insufficient to sustain conviction

Pa.—Commonwealth v. Gear, 17 Pa. Dist. & Co. 433, 48 Montg.Co. 218.

84. N.C.—State v. Webb, 186 S.E. 241, 210 N.C. 350.

Ohio.—Ippinger v. State, App., 34 N.E.2d 63.

Burden of proof

In prosecution against motorist for passing school hack at lateral distance of less than twenty feet while hack was stopping to allow children to embark and alight therefrom, state must not only prove that motorist passed school hack, but that motorist had knowledge that vehicle he was passing was school hack or show state of facts that would imply such knowledge.—Willinnar v. State, 198 N.E. 779, 209 Ind. 264.

Evidence held sufficient to sustain conviction

Ind.—Willinnar v. State, supra.

85. Ga.—Lester v. State, 179 S.E.

§ 687. Permitting Operation by Unauthorized Person

It is an offense under some statutes to permit an unauthorized person to operate a motor vehicle.

It is an offense under some statutes to permit the operation of a motor vehicle by an unauthorized person.⁸⁶ Under a statute making it an offense to permit a person under sixteen years of age to operate a motor vehicle, a conviction cannot be sustained by proof that a father permitted his eleven-year-old son to hold the steering wheel while the father retained control of the car and was operating it.⁸⁷ Under such a statute it is the permission given to the minor to operate the vehicle which constitutes the offense and not the manner in which the minor operates it.⁸⁸ Although it is an offense to turn back into the road within a specified distance after passing a vehicle, there can be no conviction of such offense under a charge of permitting a minor to operate a motor vehicle, although it is charged that the minor did so turn back into the road.⁸⁹

869, 51 Ga App 146—Collins v. State, 179 S.E. 869, 51 Ga App 147—Ray v. State, 169 S.E. 538, 47 Ga.App. 22.
42 C.J. p 1352 note 93 [a].

Statute held invalid

Tex—Ladd v. State, 27 S.W.2d 1098, 115 Tex Cr 355

86. N.Y.—Plunkett v. Heath, 1 N.Y. S.2d 778.

Pa.—Commonwealth v. Donmoyer, 54 Pa Dist & Co. 492—Commonwealth v. Wolff, 46 Pa.Dist. & Co 186, 58 Montg.Co. 412—Commonwealth v. Pollinger, 45 Pa.Dist. & Co. 689, 58 Montg.Co. 386.

Jurisdiction of offense

Where an unauthorized person operated the car in one county with the permission of defendant, the mere fact that defendant was not bodily present or that the permission was given while defendant was in another county does not deprive the first county of jurisdiction over the offense.—Commonwealth v. Wolff, 46 Pa.Dist. & Co. 186, 58 Montg.Co. 412.

Burden of proof

A defendant cannot be convicted of permitting an unlicensed operator to operate a motor vehicle owned by him in violation of the statute solely on evidence that the driver did not produce an operator's license at the time he was accosted by a state policeman; the burden is on the commonwealth to prove that he was in fact an unlicensed driver.—Common-

wealth v. Barlup, 58 Pa Dist. & Co 53.

87. Neb.—Coryell v. State, 138 N.W. 572, 92 Neb. 482.

88. Neb.—Coryell v. State, supra.

89. Neb.—Coryell v. State, supra.

90. Ill.—Maxon v. U. S Underwriters' Co., 246 Ill.App. 385.

Pa.—Commonwealth v. Unkrich, 16 A 2d 737, 142 Pa Super. 591.

42 C.J. p 1390 note 35.

Sale of motor vehicle with identification marks altered or removed see *infra* § 714 d.

Hidden serial number

The statute making possession of automobile on which manufacturer's serial number or engine number has been omitted, obliterated, or defaced a misdemeanor does not impose an absolute duty on a possessor or operator of an automobile to make a thorough inspection of it to ascertain condition of a hidden serial number.—Commonwealth v. Unkrich, supra.

91. Ark.—Baker v. State, 9 S.W.2d 243, 177 Ark. 1042.

N.Y.—People v. Congress Radio, 232 N.Y.S. 647, 133 Misc. 542, affirmed 234 N.Y.S. 860, 226 App.Div. 784, affirmed 168 N.E. 432, 251 N.Y. 572. 42 C.J. p 1390 note 36.

Part of statute held unconstitutional

In prosecution charging accused with having in his possession automobile with altered engine number,

§ 688. Possession of Motor Vehicle with Identification Marks Altered or Removed

Under some statutes possession of a motor vehicle with the distinguishing numbers or identification marks removed, defaced, or altered is made a penal offense.

Under some statutes possession of a motor vehicle with the distinguishing numbers or identification marks removed, defaced, or altered is made a penal offense.⁹⁰ Statutes of this character have been sustained as a legitimate and proper exercise of the police power.⁹¹ Such a statute should be interpreted in the light of its ordinary meaning and common understanding,⁹² although it should be construed liberally in favor of accused.⁹³

Essentials of offense. Whether under such statutes criminal intent or guilty knowledge is an essential element of the offense is to be determined from the language of the statute, in connection with its purpose and design.⁹⁴ Where such intent or knowledge on the part of an accused is not made an essential element of the offense by the express terms of the statute, it has been held to be not essential.⁹⁵ The offense usually embraces two ele-

It was held that part of statute authorizing court to determine without notice that automobile seized as having altered numbers is property of any particular person is unconstitutional—People v. Gale, 171 N.E. 186, 339 Ill. 162.

92. Pa.—Commonwealth v. Unkrich, 16 A.2d 737, 142 Pa Super. 591.

Radio

Radio held not "mechanical device," within statute prohibiting possession of motor vehicle with identification marks removed—People v. Congress Radio, 232 N.Y.S. 647, 133 Misc. 512, affirmed 234 N.Y.S. 860, 226 App.Div. 784, affirmed 168 N.E. 432, 251 N.Y. 572.

93. Ark.—Baker v. State, 9 S.W.2d 243, 177 Ark. 1042.

Motor "and" serial numbers

Statute held to impose penalty only when both motor "and" serial numbers of automobile in accused's possession are mutilated.—Baker v. State, supra.

94. Iowa.—State v. Dunn, 211 N.W. 850, 202 Iowa 1188.

Pa.—Commonwealth v. Unkrich, 16 A.2d 737, 142 Pa. Super. 591.

95. Ill.—People v. Billardello, 149 N. E. 781, 319 Ill. 124, 42 A.L.R. 1146—Maxon v. U. S. Underwriters' Co., 246 Ill.App. 385.

Iowa.—Espe v. G. McClelland & Son, 226 N.W. 130, 208 Iowa 512. 42 C.J. p 1390 note 39.

ments: (1) The fact of possession of a motor vehicle with the distinguishing numbers or marks of identification removed, effaced, changed, covered, or destroyed.⁹⁶ (2) That such distinguishing numbers or marks of identification were changed or destroyed for the purpose of concealing or destroying the identity of the vehicle.⁹⁷ The fact that the statute permits special numbers to be stamped on the engine by permission of the secretary of state does not relieve the possessor of the motor vehicle of the statutory penalty where the original number was destroyed or altered without securing the required permission.⁹⁸ It is no defense to one who is prosecuted for the offense of having in his possession an automobile with the motor and number so mutilated that he was merely driving it temporarily at the request of one with whom he had been riding, but who ran away on the approach of officers.⁹⁹

Complaint, information, or indictment. An indictment or information under such statutes must set forth and charge all the facts required by the statute to establish the offense and to bring accused within the statutory provisions.¹ An indictment which substantially follows the language of the statute is usually sufficient.² The indictment should describe the motor vehicle with sufficient certainty to identify the subject matter of the offense charged.³ It is not necessary to charge scienter in an information charging accused with having in his possession unlawfully a motor vehicle with a changed engine number.⁴

Evidence. In a prosecution for having possession of a motor vehicle with its numbers or identification marks changed, removed or defaced, it is incumbent on the state to sustain every element

of the offense charged by satisfactory proof beyond a reasonable doubt.⁵ Evidence is admissible in accordance with the usual rules of evidence in criminal cases.⁶ In a prosecution for possessing an automobile the motor and serial numbers of which had been mutilated, an officer may testify that just prior to the arrest of accused he tried to drive the automobile past him, and that the officer pulled his own car in front of accused's car and that the latter struck the officer's car and burst a tire.⁷ Accused may be asked on his cross-examination, in order to affect his credibility, whether he had not represented himself as a person of a different name, and had not stated that he had a car to sell, which afterward proved to have been stolen.⁸ The sufficiency of the evidence required to sustain a conviction is tested by the rules applicable in criminal cases generally.⁹

§ 689. Selling or Transferring without Compliance with Regulations

The sale or transfer of motor vehicles without complying with the statutory regulations relating to such sale or transfer is made an offense under some statutes.

The sale or transfer of motor vehicles without complying with the statutory regulations relating to such sale or transfer is made an offense under some statutes.¹⁰ Under a statute making it an offense to transfer a used automobile without complying with the regulations prescribed, one who purchases the car in good faith, in reliance on representations that it is a new, and not a second-hand, car, is not guilty of the offense.¹¹

§ 690. Shooting at Motor Vehicle

Under a statute making shooting at a motor vehicle

96. Del.—State v. Derrickson, 114 A. 286, 31 Del. 342.

97. Del.—State v. Derrickson, supra. Ill.—People v. Johnson, 123 N.E. 543, 288 Ill. 442, 4 A.L.R. 1535.

98. Ill.—People v. Billardello, 149 N.E. 781, 319 Ill. 124, 42 A.L.R. 1146—Maxon v. U. S. Underwriters' Co., 246 Ill.App. 385.

99. Ark.—Ogburn v. State, 270 S.W. 945, 168 Ark. 396.

1. N.J.—State v. Lee, 126 A. 420, 100 N.J.Law 201.
42 C.J. p 1390 note 44.

An affirmative defense need not be pleaded or proved by the state.—State v. Dunn, 211 N.W. 850, 202 Iowa 1188.

2. Ga.—Glass v. State, 106 S.E. 13, 26 Ga.App. 157.

3. Ga.—Glass v. State, supra.

4. Ill.—People v. Hughes, 226 Ill. App. 135.

5. Del.—State v. Derrickson, 114 A. 286, 31 Del. 342.

6. Iowa.—State v. Dunn, 211 N.W. 850, 202 Iowa 1188.
42 C.J. p 1390 note 50.

7. Ark.—Ogburn v. State, 270 S.W. 945, 168 Ark. 396.

8. Ark.—Ogburn v. State, supra.

9. Kan.—State v. Holland, 40 P.2d 469, 141 Kan. 307.
42 C.J. p 1391 note 53.

Evidence held insufficient to sustain conviction

Pa.—Commonwealth v. Unkrich, 16 A.2d 737, 142 Pa.Super. 591.

10. Mo.—Pearl v. Interstate Securities Co., 206 S.W.2d 975, 357 Mo. 160—Personal Finance Co. of Missouri v. Lewis Inv. Co., App., 138 S.W.2d 655.

Pa.—Commonwealth v. Wright, 44 Pa.Dist. & Co. 489—Commonwealth v. Rogers, 16 Pa.Dist. & Co. 467, 17 West Co. 231.

42 C.J. p 1396 note 40.
Validity of regulations generally see supra § 40.

Failure to remove registration plates may be an offense.—Commonwealth v. Wright, 44 Pa.Dist. & Co. 489.

Information held insufficient

Tex.—Montgomery v. State, 143 S.W. 2d 945, 140 Tex.Cr. 81.

Complaint held insufficient

Tex.—Wallace v. State, 89 S.W.2d 994, 129 Tex.Cr. 534.

Evidence held sufficient to sustain conviction

Tex.—Henry v. State, 60 S.W.2d 771, 124 Tex.Cr. 81.

11. Tex.—Sanders v. Chaddick, Com. App., 267 S.W. 248.

an offense, an indictment which charges the offense in substantially the language of the statute usually is sufficient.

Under a statute making shooting at a motor vehicle an offense, an indictment which charges the offense is substantially the language of the statute usually is sufficient.¹²

§ 691. Taking and Using Motor Vehicle without Consent

- a. In general
- b. Elements of offense

a. In General

Under some statutes it is an offense for a person to take and use or operate the motor vehicle of another without the consent of the owner or custodian.

Under some statutes it is an offense for a person to take and use or operate the motor vehicle of another without consent of the owner¹³ or custodian,¹⁴ or voluntarily to ride in or upon such motor vehicle with knowledge of the fact that it was unlawfully taken.¹⁵

Grade of offense. Under some statutes the offense of unlawfully taking and using a motor vehicle is a misdemeanor,¹⁶ but other statutes denounce the crime as a felony¹⁷ even as to those

who voluntarily ride in the motor vehicle with knowledge that it was unlawfully taken.¹⁸ In some jurisdictions, however, the offense may constitute a felony or a misdemeanor,¹⁹ depending on whether or not accused had color of authority in using the car.²⁰ Under other statutes a first offense is a misdemeanor but second or subsequent offenses are declared felonies.²¹

b. Elements of Offense

- (1) Taking and using without consent
- (2) Riding with knowledge of unlawful taking

(1) Taking and Using without Consent

The essential elements of the offense of taking and using a motor vehicle without the consent of the owner depend on the terms of the particular statute creating the offense.

The essential elements of the offense of taking and using a motor vehicle without the consent of the owner depend on the terms of the particular statute creating the offense.²² Under some of the statutes it is an essential element of the offense not only that the motor vehicle be taken or driven away, but that it be driven or operated upon a street or highway of the state,²³ and in the ab-

12. Fla.—Shumake v. State, 105 So. 314, 90 Fla. 133.

13. U.S.—U S. v. One 1941 Chrysler Brougham Sedan, D.C.Mich., 74 F. Supp. 970.

Cal.—People v. Score, 120 P.2d 62, 48 Cal.App.2d 495—Lanfried v. Bosworth, 114 P.2d 406, 45 Cal.App.2d 408.

Ga.—Carter v. State, 143 S.E. 441, 38 Ga App 182.

Ky.—Mullins v. Commonwealth, 147 S.W.2d 704, 285 Ky. 282.

Mo.—State v. Wahlers, 56 S.W.2d 26.

Ohio—State v. Williams, 59 N.E.2d 58, 74 Ohio App. 370.

Okl.—Clark v. State, 149 P.2d 994, 78 Okl.Cr. 423.

Pa.—Commonwealth, ex rel. Dorillo v. Smith, 19 A.2d 757, 144 Pa.Super. 291.

Tex.—Hogan v. State, 24 S.W.2d 837, 114 Tex.Cr. 137.

Va.—Slater v. Commonwealth, 18 S.E.2d 909, 179 Va. 264.

Wis.—State v. Mularkey, 218 N.W. 809, 195 Wis. 549.

42 C.J. p 1397 note 50.

Distinguished from larceny see Larceny § 1.

Taking accessories as offense under vehicle-taking statutes see infra § 700.

Statute held not uncertain or indefinite

Ill.—People v. Luster, 11 N.E.2d 47, 292 Ill.App. 244.

14. Pa.—Commonwealth, ex rel.

Dorillo v. Smith, 19 A.2d 757, 144 Pa.Super. 291.

42 C.J. p 1399 note 10.

15. Wash.—State v. Tully, 89 P.2d 517, 198 Wash. 605—State v. Hill, 251 P. 280, 141 Wash. 273.

16. Pa.—Commonwealth ex rel. Dorillo v. Smith, 19 A.2d 757, 144 Pa. Super. 291.

Va.—Slater v. Commonwealth, 18 S.E.2d 909, 179 Va. 264.

42 C.J. p 1398 note 67.

17. Mich.—People v. Bauer, 185 N.W. 694, 216 Mich. 659.

42 C.J. p 1398 note 68.

18. Wash.—State v. Hill, 251 P. 280, 141 Wash. 273.

19. In California

(1) It is a felony for any person to take or drive a vehicle without the consent and in the absence of the owner with intent to deprive the owner, either permanently or temporarily, of his title or possession, whether with or without intent to steal such vehicle.—People v. Gherna, 182 P.2d 331, 80 Cal.App.2d 519—People v. Bailey, 165 P.2d 558, 72 Cal.App.2d Supp. 880.

(2) It is a misdemeanor for any person to take an automobile without the permission of the owner for the purpose of temporarily using or operating such automobile.—People v. Gherna, supra—People v. Bailey, supra.

(3) It has been held that if these statutes are in irreconcilable conflict, the felony statute must prevail over the previously adopted misdemeanor statute.—People v. Orona, 164 P.2d 769, 72 Cal.App.2d 478.

(4) It has also been held that the misdemeanor statute has not been impliedly repealed by the felony statute.—People v. Bailey, supra.

20. Tenn.—Bailey v. State, 266 S.W. 122, 150 Tenn. 598—Poston v. Aetna Ins. Co. App., 194 S.W.2d 248.

42 C.J. p 1398 note 72.

In a civil case, it was held that employee's taking of employer's automobile from public garage for personal pleasure trip was not felonious taking without owner's permission—Stovall v. New York Indemnity Co., 8 S.W.2d 473, 157 Tenn. 301, 72 A.L.R. 1368.

21. Colo.—James v. Phoenix Assur. Co., 225 P. 213, 75 Colo. 209.

22. Ind.—People v. State, 172 N.E. 2d 902, 202 Ind. 177.

Manner of operation

Under some statutes the vehicle or automobile taken must be operated by electricity, steam, or explosive power in order to constitute an offense.—People v. State, supra.

23. Ill.—People v. Luster, 11 N.E.2d 47, 292 Ill.App. 244.

Wis.—State v. Mularkey, 218 N.W. 809, 195 Wis. 549.

42 C.J. p 1398 note 76.

sence of the owner.²⁴ Although a statute which prohibits the unlawful taking and operation of a motor vehicle without consent declares the offense to be grand larceny and punishable as such, it does not make the value of the vehicle taken material²⁵ or make it necessary in order to commit the offense that the value of the vehicle be such as to bring it within the requirement of the general statute pertaining to grand larceny.²⁶

Taking. In order to constitute a taking under a statute there must be an asportation,²⁷ but any removal, however slight, of a vehicle may be sufficient.²⁸ Under a statute which makes it an offense for any person to "take possession of and drive or take away" the motor vehicle of another without authority, taking possession constitutes an essential element of the crime²⁹ which must precede the unauthorized driving or taking away.³⁰ Hence, it has been held there is no offense under such a statute where the possession of the vehicle is with the consent of the owner although it is operated without his consent.³¹ Similarly, where a statute prohibits any person from taking and operating or driving a motor vehicle without the owner's consent, it is held not to apply where accused, who operated the car without, or in excess of, his authority, had secured possession of the machine with the owner's consent,³² although such consent was obtained by misrepresentation or for a fraudulent purpose.³³ Of course, where the statutory offense consists merely in the operation of a vehicle without consent, the manner of securing possession is immaterial.³⁴

Use, driving, or operation. Under a statute which prohibits the use of a motor vehicle without

authority, it has been held that the word "use" includes use by a passenger,³⁵ and that it is not necessary to constitute such use within the meaning of the statute that there be active control or operation of the vehicle by one who rides therein.³⁶ However, it is a necessary element of the offense, under a statute prohibiting any person without authority to take possession of and drive or take away a motor vehicle belonging to another, that the taking of possession be followed by a driving or taking away,³⁷ but it has been held that merely pushing a vehicle across the road is not such an unlawful use as to support a conviction for using or attempting to use a motor vehicle without the owner's permission.³⁸

Nonconsent of owner. It is essential to the commission of the offense of unlawful taking and using another's motor vehicle that it be without the authority or consent of the owner.³⁹ In some jurisdictions it has been held that the owner's nonconsent must precede the act of taking, or assuming possession, of the motor vehicle and does not relate to what transpires thereafter,⁴⁰ and hence the taking of possession of the vehicle, as well as the driving or operation, must be unauthorized.⁴¹ Consent within the meaning of the statute implies authority to drive another's car, and requires the sanction on the part of the owner, or person in charge of the car, to another to drive it,⁴² but the fact that the consent of the owner was obtained by misrepresentation or for a fraudulent purpose will not constitute such a taking without consent as is contemplated by the statute.⁴³ The consent of the owner to the use of his car may be implied,⁴⁴ but such permission cannot be inferred

24. Ill.—People v. Luster, 11 N.E.2d 47, 292 Ill.App. 244—People v. Blue, 222 Ill.App. 255.

"Absence" construed

Cal.—People v. Gherna, 182 P.2d 331, 80 Cal.App.2d 519

Ill.—People v. Luster, 11 N.E.2d 47, 292 Ill.App. 244.

25. Ky.—Clark v. Commonwealth, 272 S.W. 430, 209 Ky. 184.

26. Ky.—Clark v. Commonwealth, supra.

27. Cal.—People v. White, 162 P.2d 862, 71 Cal.App.2d 524.

28. Cal.—People v. White, supra, Ky.—Mullins v. Commonwealth, 147 S.W.2d 704, 285 Ky. 282.

29. Mich.—People v. Smith, 182 N.W. 64, 213 Mich. 351.

30. Mich.—People v. Smith, supra.

31. Mich.—People v. Smith, supra. Persons liable see *infra* § 692.

32. Wis.—State v. Mularkey, 218 N.W. 809, 195 Wis. 549. 42 C.J. p 1399 note 89.

33. Iowa.—State v. Boggs, 164 N.W. 759, 181 Iowa 358. 42 C.J. p 1399 note 90.

34. Pa.—Commonwealth v. Osborn, 27 Pa. Dist. 696.

35. Mass.—Commonwealth v. Coleman, 147 N.E. 552, 252 Mass. 241. 42 C.J. p 1399 note 95.

36. Mass.—Commonwealth v. Coleman, supra.

37. Mich.—People v. Smith, 182 N.W. 64, 213 Mich. 351.

38. Tenn.—Bailey v. State, 266 S.W. 122, 150 Tenn. 598.

39. Ky.—Mullins v. Commonwealth, 147 S.W.2d 704, 285 Ky. 282. Wis.—State v. Mularkey, 218 N.W. 809, 195 Wis. 549. 42 C.J. p 1399 note 1.

Request of owner

Where accused took automobile at owner's request to perform a particular mission, statute relating to the taking of an automobile without owner's permission had no application.—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632.

40. Iowa.—State v. Boggs, 164 N.W. 759, 181 Iowa 358. Mich.—People v. Smith, 182 N.W. 64, 213 Mich. 351.

41. Iowa.—State v. Boggs, 164 N.W. 759, 181 Iowa 358. Mich.—People v. Smith, 182 N.W. 64, 213 Mich. 351.

42. Del.—State v. Harris, 114 A. 286, 31 Del. 340. 42 C.J. p 1399 note 5.

43. Iowa.—State v. Boggs, 164 N.W. 759, 181 Iowa 358. 42 C.J. p 1399 note 6.

44. Ill.—People v. Luster, 11 N.E.2d 47, 292 Ill.App. 244. 42 C.J. p 1399 note 7.

from the fact that accused had been, at other times, allowed to operate the car.⁴⁵

The word "owner" in such a statute has been construed,⁴⁶ and the fact that the statute only forbids the taking or using "without the owner's consent" does not confine the meaning of the word "owner" to the real or actual owner but includes one who has possession as a bailee or other lawful custodian,⁴⁷ such as the keeper of the garage where the car in question is stored.⁴⁸

Intent. As distinguished from larceny, it is not essential to the commission of the offense of "unlawful taking and using" as defined by the statutes that there be a felonious intent to deprive the owner permanently of his property,⁴⁹ but the character of taking contemplated is temporary,⁵⁰ the word "take" not being used as meaning "steal" or in the sense of a theft.⁵¹ Under some statutes, however, the unauthorized acts of taking of possession and operation of another's motor vehicle must be done willfully or willfully and wantonly⁵² or intentionally.⁵³ Under other statutes a wrongful intent is not an essential element of the offense and the act is criminal irrespective of the intent⁵⁴ or the purpose of accused in using the automobile.⁵⁵

Under the construction given the statutes in some jurisdictions, it has been held that whoever uses a motor vehicle must actually be authorized to do so if he is to stand guiltless, a mere belief, however honest, in the authority of the person in control, being no defense in the absence of authorization by the owner, or by one who in law possesses the right of control ordinarily vested in the owner,⁵⁶

and hence a mere passive invited guest who rides in the vehicle may be convicted of the offense, although innocent of guilty intent and ignorant of the lack of authority to use the vehicle on the part of the person in control.⁵⁷ In other jurisdictions, however, it has been held that a person laboring under an honest mistake that he had the right to take and use the vehicle,⁵⁸ or a person who, in good faith, believed that he was the owner of it,⁵⁹ or who merely rode in the vehicle with another believing the latter was the owner or had a right to use it,⁶⁰ would not be guilty of an unlawful taking and using within the meaning of the statute.

(2) Riding with Knowledge of Unlawful Taking

Under a statute making it an offense for any person to ride in or upon a motor vehicle with knowledge of the fact that it was unlawfully taken, there must be a combination of the elements in order to constitute the offense.

Under a statute making it an offense for any person voluntarily to ride in or upon a motor vehicle with knowledge of the fact that it was unlawfully taken, there must be a combination of these elements in order to constitute the offense.⁶¹ It is essential: (1) That the motor vehicle shall have been intentionally taken by someone without permission of the owner.⁶² (2) That accused voluntarily rode in or upon the automobile.⁶³ (3) That at the time of riding in or upon the automobile accused did so with knowledge of the fact that it had been unlawfully taken.⁶⁴ The knowledge required by the statute is not actual knowledge such as is acquired by personal observation of the taking,

45. Del.—State v. Harris, 114 A. 286, 31 Del. 340.

42 C.J. p 1399 note 8.

46. In a civil case it has been held that within statute punishing one operating motor vehicle without owner's consent, buyer, under conditional sale agreement, rather than seller, is "owner."—Lennon v. L. A. W. Acceptance Corporation of Rhode Island, 138 A. 215, 217, 48 R.I. 363.

47. Ohio—State v. Shoemaker, 117 N.E. 958, 96 Ohio St. 570.

48. Ohio.—State v. Shoemaker, supra.

42 C.J. p 1400 note 13.

49. Ky.—Mullins v. Commonwealth, 147 S.W.2d 704, 285 Ky. 282.

Va.—Slater v. Commonwealth, 18 S.E. 2d 909, 179 Va. 264.

42 C.J. p 1400 note 15.

Permanently or temporarily

Under some statutes it is an offense to drive another's automobile with the "intent to either permanent-

ly or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal"—People v. Gherna, 182 P.2d 331, 80 Cal.App.2d 519—People v. Orona, 164 P.2d 769, 72 Cal.App.2d 478—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632—People v. Jeffries, 119 P.2d 190, 47 Cal.App.2d 801—People v. Neal, 104 P.2d 555, 40 Cal.App.2d 115—People v. Bailey, 165 P.2d 558, 72 Cal.App.2d Supp. 880—42 C.J. p 1400 note 15 [a].

50. Tex.—Espalin v. State, 237 S.W. 274, 90 Tex.Cr. 625.

51. Tex.—Hunt v. State, 229 S.W. 869, 89 Tex.Cr. 89.

Wash.—State v. Daniels, 205 P. 1054, 119 Wash. 557.

52. Mich.—People v. Smith, 182 N.W. 64, 213 Mich. 351.

53. Mo.—Terry v. Metropolitan Life Ins. Co., App., 206 S.W.2d 724.

Wash.—State v. Hill, 251 P. 280, 141 Wash. 273.

54. Ky.—Singleton v. Commonwealth, 175 S.W. 372, 164 Ky. 243. Mass.—Commonwealth v. Coleman, 147 N.E. 552, 252 Mass. 241.

55. Del.—State v. Harris, 114 A. 286, 31 Del. 340.

N.Y.—Rose v. Balfe, 119 N.E. 842, 223 N.Y. 481, Ann.Cas.1918D 238.

56. Mass.—Commonwealth v. Coleman, 147 N.E. 552, 252 Mass. 241.

57. Mass.—Commonwealth v. Coleman, supra.

58. Tex.—Patterson v. State, 189 S.W. 952, 80 Tex.Cr. 322.

42 C.J. p 1400 note 26.

59. Ky.—Singleton v. Commonwealth, 175 S.W. 372, 164 Ky. 243.

60. Del.—State v. Cusack, 89 A. 216, 27 Del. 469.

42 C.J. p 1400 note 28.

61. Wash.—State v. Hill, 251 P. 280, 141 Wash. 273.

62. Wash.—State v. Hill, supra.

63. Wash.—State v. Hill, supra.

64. Wash.—State v. Hill, supra.

but it is sufficient if the circumstances were such as to make accused believe at any time during the ride in the motor vehicle that it was unlawfully taken.⁶⁵

§ 692. — Persons Liable

In some jurisdictions the offense of taking and using the motor vehicle of another without authority extends to and includes one who may have a general or special relation to the owner, such as a servant or bailee.

In some jurisdictions, either because of judicial construction⁶⁶ or by virtue of an express statutory provision,⁶⁷ the offense of taking and using the motor vehicle of another without authority is not restricted to the taking and operation of a motor vehicle by one who has no relation whatever to the owner,⁶⁸ but extends to and includes one who may have a general relation or a special relation to the owner, such as a servant or bailee.⁶⁹ In other words, an employee,⁷⁰ such as a chauffeur employed to operate a motor vehicle,⁷¹ or a garage manager or a garage employee engaged to care for or repair a motor vehicle,⁷² may be convicted of the offense; but where the particular statutory provision makes the unlawful taking of possession an element of the offense, as discussed supra § 691, one who has lawful possession of the automobile as a bailee or other lawful custodian, such as a garage keeper, cannot be convicted under such statute for the act of driving the car without authority while so having possession.⁷³

*An assignee of a conditional sale contract covering a motor vehicle has been held not guilty of the offense where he takes possession of such motor vehicle after the purchaser's default.*⁷⁴

Principals and accessories. Where the offense is a misdemeanor, one who is present and aids or abets in the unlawful taking and using is an accomplice⁷⁵ and as such is liable, and may be prosecuted and convicted, as a principal in the case.⁷⁶ It is not essential that such a person actually operate the car himself; it is sufficient if he procured another to run or operate it.⁷⁷ Similarly, where the statute makes it a felony willfully and without authority to take possession of and drive away the automobile of another or to assist in and be a party to such taking possession and driving away, such an accomplice may be prosecuted and convicted as for the commission of a felony,⁷⁸ even though he does not physically participate in the unlawful taking.⁷⁹

§ 693. — Indictment

An indictment, information, or complaint for taking and using a motor vehicle without the consent of the owner must set forth, with sufficient certainty, all the facts necessary to constitute the offense.

An indictment, information, or complaint for unlawfully taking and using a motor vehicle without the consent of the owner must set forth, with sufficient certainty,⁸⁰ all the facts necessary to constitute the offense.⁸¹ Thus, where the statute

65. Wash.—State v. Tully, 89 P.2d 517, 198 Wash. 605—State v. Hill, 141 Wash. 273.

66. Del.—State v. Cusack, 89 A. 216, 27 Del. 469.
42 C.J. p 1400 note 35.

67. In Tennessee

(1) The statute forbids chauffeurs and others of that class, who may be in constructive possession of automobiles, from using them for their own purpose, without provision or consent of the owner.—Bailey v. State, 266 S.W. 122, 150 Tenn. 598.

(2) The statute was held inapplicable to salesman intrusted with automobile for use in owner's business.—Stovall v. New York Indemnity Co., 8 S.W.2d 473, 157 Tenn. 301, 72 A.L.R. 1368.

68. Tex.—Hogan v. State, 24 S.W.2d 837, 114 Tex. Cr. 137.
42 C.J. p 1400 note 37.

69. Tex.—Hogan v. State, supra.
42 C.J. p 1401 note 38.

70. Ohio.—State v. Williams, 59 N.E. 2d 58, 74 Ohio App. 370.

71. Ill.—People v. Luster, 11 N.E.2d 47, 292 Ill.App. 244.
42 C.J. p 1401 note 39.

72. Del.—State v. Cusack, 89 A. 216, 27 Del. 469.
42 C.J. p 1401 note 40.

73. Mich.—People v. Smith, 182 N.W. 64, 213 Mich. 351.
42 C.J. p 1399 note 87.

74. Wash.—State v. Johnson, 9 P.2d 1089, 167 Wash. 635.

Agent of assignee

Wash.—State v. Johnson, 9 P.2d 1089, 167 Wash. 635.

75. Del.—State v. Cusack, 89 A. 216, 27 Del. 469.
Ga.—Porter v. State, 91 S.E. 876, 19 Ga.App. 449.

76. Del.—State v. Cusack, 89 A. 216, 27 Del. 469.
Ga.—Porter v. State, 91 S.E. 876, 19 Ga.App. 449.

77. Ga.—Porter v. State, supra.
42 C.J. p 1401 note 47.

78. Mich.—People v. Murnane, 182 N.W. 62, 213 Mich. 205.

79. Mich.—People v. Murnane, supra.
42 C.J. p 1401 note 50.

80. Ill.—People v. Blue, 222 Ill.App. 255.

Grade of offense

In order to charge taking of automobile as misdemeanor, it should be made clear that misdemeanor and not felony had been committed by charging that there was a taking, without owner's consent, either in his presence or with purpose of temporarily using or operating vehicle but not intent to deprive owner of his title to, or possession of, automobile.—People v. Bailey, 165 P.2d 558, 72 Cal.App.2d Supp. 880.

81. Cal.—People v. Bailey, supra.
Ill.—People v. Blue, 222 Ill.App. 255.

Fraudulent intent to deprive the owner of his property permanently, which is essential to the offense of grand larceny at common law, need not be alleged or proved.—Mullins v. Commonwealth, 147 S.W.2d 704, 285 Ky. 282.

Indictment or information held sufficient

Ind.—Headlee v. State, 168 N.E. 692, 201 Ind. 545, rehearing denied 170 N.E. 433, 201 Ind. 545.
42 C.J. p 1401 note 60 [a].

Information held insufficient

Cal.—People v. Ball, 267 P. 701, 204 Cal. 241.

Ill.—People v. Blue, 222 Ill.App. 255.

makes it an element of the offense, it must be charged that the vehicle was operated by electricity, steam, or explosive power,⁸² that the vehicle was driven or operated upon a street or highway of the state,⁸³ and that it was driven or operated in the absence of the owner⁸⁴ and without his consent.⁸⁵ An indictment or information must describe the motor vehicle⁸⁶ and allege the ownership thereof.⁸⁷

Issues, proof, and variance. The rule that a material variance between the allegations of the indictment or information and the proof is fatal applies to prosecutions for taking and using a motor vehicle without the consent of the owner.⁸⁸

§ 694. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

General rules apply as to presumptions and burden of proof in a prosecution for taking and using a motor vehicle without the consent of the owner.

The general rules governing criminal cases as to the burden of proof⁸⁹ and presumptions⁹⁰ apply in a prosecution for taking and using a motor vehicle without the consent of the owner. The prosecution must prove all the essential elements of the offense.⁹¹ Thus it is incumbent on the prosecution to prove an intent to deprive an owner, either permanently or temporarily, of his title to, or possession of, a vehicle where this is an element

of the offense.⁹²

b. Admissibility

The rules regulating the admission of evidence in criminal cases generally govern as to the admissibility of evidence in a prosecution for taking and using a motor vehicle without the consent of the owner.

The rules regulating the admission of evidence in criminal cases generally govern as to the admissibility of evidence to prove or disprove the commission of the offense of taking and using a motor vehicle without the owner's consent.⁹³ Such rules have been applied with reference to admissibility of evidence of the conduct of accused after commission of the offense,⁹⁴ as to the competency of testimony based on a refreshed recollection,⁹⁵ and the eliciting of testimony tending to incriminate⁹⁶ or impeach⁹⁷ a witness. Defendants in aid of their plea of not guilty and in order to rebut the theory of the prosecution may introduce any evidence that might logically relate to the question of guilty knowledge.⁹⁸ The motive for the commission of the crime may be shown as a circumstance tending to show guilt, and the absence of motive or reason for the commission of the alleged offense may be considered as a circumstance favorable to accused.⁹⁹

c. Weight and Sufficiency

The rules governing the weight and sufficiency of evidence in criminal cases apply in a prosecution for taking and using a motor vehicle without the consent of the owner.

The rules governing the weight and sufficiency of the evidence in criminal cases generally apply

82. Ind.—Pepple v. State, 172 N.E. 902, 202 Ind. 177.

83. Wis.—Eastway v. State, 206 N.W. 879, 189 Wis. 56.
42 C.J. p 1401 note 62.

84. Cal.—People v. Ball, 267 P. 701, 204 Cal. 241.

Ill.—People v. Blue, 222 Ill.App. 255.

85. Ill.—People v. Blue, supra.

86. Mo.—State v. Wahlers, 56 S.W. 2d 26.

Information held sufficient

Mo.—State v. Wahlers, supra.

87. Mo.—State v. Wahlers, supra.
42 C.J. p 1401 note 65.

Allegations held sufficient

(1) Generally.—State v. Wahlers, supra.

(2) An allegation of ownership in the name of the garage keeper where the car is stored, or other lawful custodian, has been held sufficient.—State v. Shoemaker, 117 N.E. 958, 96 Ohio St. 570.

88. Cal.—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632.

Fatal variance not shown

DC—Epps v. U. S., 157 F.2d 11, 81 U.S.App.D.C. 241.

Ind.—Headlee v. State, 168 N.E. 692, 201 Ind. 545, rehearing denied 170 N.E. 433, 201 Ind. 545.
42 C.J. p 1401 note 66 [a].

89. Cal.—People v. Kepford, 199 P. 64, 52 Cal.App. 508.

42 C.J. p 1402 note 69.

Presumption of innocence

Cal.—People v. Kepford, 199 P. 64, 52 Cal.App. 508.

Ind.—Rokvic v. State, 143 N.E. 357, 194 Ind. 450.

As to taking

It has been said that the possession of stolen property by defendant under circumstances that would raise a presumption that defendant stole the property, if the charge was larceny, would raise a like presumption, as to the unlawful taking, when the charge was under a statute prohibiting the taking and using of a motor vehicle without consent of the owner.—Rokvic v. State, supra—42 C.J. p 1402 note 74.

91. Mass.—Commonwealth v. Coleman, 147 N.E. 552, 252 Mass. 241.
42 C.J. p 1402 notes 71, 72.

92. Cal.—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632—People v. Zervas, 142 P.2d 946, 61 Cal.App.2d 381—People v. Neal, 104 P.2d 555, 40 Cal.App.2d 115.

93. Mich.—People v. Kiely, 203 N.W. 112, 230 Mich. 403.

94. Mich.—People v. Kiely, supra.

95. Mich.—People v. McNutt, 190 N.W. 750, 220 Mich. 620.

96. Mich.—People v. Kiely, 203 N.W. 112, 230 Mich. 403.

97. Cal.—People v. Kepford, 199 P. 64, 52 Cal.App. 508.
Mich.—People v. McNutt, 190 N.W. 750, 220 Mich. 620.

98. Cal.—People v. Kepford, 199 P. 64, 52 Cal.App. 508.

99. Cal.—People v. Kepford, supra.
42 C.J. p 1402 note 82.

in determining whether the evidence in a prosecution for taking and using a motor vehicle without the consent of the owner is sufficient to sustain a conviction.¹ The general rules also apply with respect to the sufficiency of the evidence to establish the essential elements of the offense,² the connection of accused with the offense,³ ownership of the motor vehicle,⁴ and other matters.⁵ Circumstantial evidence may be sufficient to support a conviction,⁶ and accused's failure to explain his possession of the motor vehicle is a circumstance which may be considered.⁷

Intent. Where intent is an essential element of the offense, it may be established by circumstantial evidence,⁸ but there must be substantial evidence from which it may be reasonably determined.⁹

§ 695. — Questions of Law and Fact

In a prosecution for taking and using a motor ve-

hicle without the consent of the owner it is ordinarily the province of the jury to determine the guilt or innocence of the accused.

In accordance with the rule applicable in criminal prosecutions generally, in a prosecution for taking and using a motor vehicle without the consent of the owner, it is ordinarily the province of the jury to determine questions of fact,¹⁰ such as the guilt or innocence of accused, provided the evidence is sufficient to authorize the submission of the issue to them.¹¹ Where there is sufficient evidence to sustain a verdict of guilty, it is proper for the court to refuse to direct a verdict for accused.¹²

§ 696. — Instructions

In accordance with general rules, in a prosecution for taking and using a motor vehicle without the consent of the owner, the court should give full and accurate instructions to the jury.

1. Ill.—People v. Luster, 11 N.E.2d 47, 292 Ill.App. 244.
- Ohio.—Crouch v. State, 174 N.E. 799, 37 Ohio App. 366.
- 42 C.J. p 1402 note 84.

Separate offenses

Where evidence established that motorist prevented completion of robbery by accused by striking accused and that after motorist departed, accused entered motorist's automobile and drove it away, jury could reasonably infer that separate offenses of attempted robbery and theft and unlawful driving or taking of automobile had been committed—People v. Pearson, 107 P.2d 463, 41 Cal. App.2d 614, certiorari denied Pearson v. People of State of California, 61 S.Ct. 1119, 313 U.S. 587, 85 L.Ed. 1542, rehearing denied 62 S.Ct. 362, 314 U.S. 715, 86 L.Ed. 569.

Evidence held sufficient to sustain conviction

- Cal.—People v. Kehoe, App., 193 P.2d 493—People v. Ragone, 191 P.2d 126, 84 Cal.App.2d 476—People v. Holland, 186 P.2d 58, 82 Cal.App.2d 310—People v. Orona, 180 P.2d 694, 79 Cal.App.2d 820—People v. Robbins, 176 P.2d 935, 78 Cal.App.2d 33—People v. Slayden, 166 P.2d 304, 73 Cal.App.2d 345—People v. Orona, 164 P.2d 769, 72 Cal.App.2d 478—People v. Herman, 164 P.2d 505, 72 Cal.App.2d 241—People v. Pearson, 107 P.2d 463, 41 Cal.App.2d 614, certiorari denied Pearson v. People of State of California, 61 S.Ct. 1119, 313 U.S. 587, 85 L.Ed. 1542, rehearing denied 62 S.Ct. 362, 314 U.S. 715, 86 L.Ed. 569—People v. Dixon, 60 P.2d 140, 16 Cal.App.2d 56—People v. Zabriski, 26 P.2d 511, 135 Cal.App. 169—People v. Magusin, 7 P.2d 764, 120 Cal.App. 115.
- Ga.—Jones v. State, 200 S.E. 813, 59 Ga.App. 342—Glisson v. State, 194

- SE 877, 57 Ga.App. 169—Carter v. State, 143 S.E. 411, 38 Ga.App. 182.
- Ind.—Inman v. State, 62 N.E.2d 627, 223 Ind. 500.

Ky.—Mullins v. Commonwealth, 147 S.W.2d 704, 285 Ky. 282—Cobb v. Commonwealth, 112 S.W.2d 663, 271 Ky. 505

Mo.—State v. Wahlers, 56 S.W.2d 26.

Wis.—Schroeder v. State, 267 N.W. 899, 222 Wis. 251.

42 C.J. p 1402 note 84 [a].

Evidence held insufficient to sustain conviction

Cal.—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632—People v. Zervas, 142 P.2d 946, 61 Cal.App.2d 381.

Tenn.—Bailev v. State, 266 S.W. 122, 150 Tenn. 598.

2. Ohio.—State v. Williams, 59 N.E. 2d 58, 74 Ohio App. 370.

W.Va.—State v. Jarrett, 194 S.E. 1, 119 W.Va. 432.

Asportation may be proved by circumstantial as well as direct evidence—People v. Ragone, 191 P.2d 126, 84 Cal.App.2d 476.

3. Cal.—People v. Morrison, 85 P.2d 478, 30 Cal.App.2d 40—People v. Valdez, 58 P.2d 656, 14 Cal.App.2d 580

Ky.—Mullins v. Commonwealth, 147 S.W.2d 704, 285 Ky. 282.

4. Cal.—People v. Zabriski, 26 P.2d 511, 135 Cal.App. 169.

Ind.—Inman v. State, 62 N.E.2d 627, 223 Ind. 500.

Mo.—State v. Wahlers, 56 S.W.2d 26.

5. Intoxication
Cal.—People v. Valdez, 58 P.2d 656, 14 Cal.App.2d 580.

6. Ky.—Cobb v. Commonwealth, 112 S.W.2d 663, 271 Ky. 505.

7. Cal.—People v. Holland, 186 P.2d 58, 82 Cal.App.2d 310.

D.C.—Epps v. U. S., 157 F.2d 11, 81 U.S.App.D.C. 244.

8. Cal.—People v. Orona, 164 P.2d 769, 72 Cal.App.2d 478

Removal of accessories from another automobile is a circumstance bearing upon defendant's intent—People v. Holland, 186 P.2d 58, 82 Cal.App.2d 310.

9. Cal.—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632.

Evidence held insufficient

Cal.—People v. Gherna, 182 P.2d 331, 80 Cal.App.2d 519—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632—People v. Zervas, 142 P.2d 946, 61 Cal.App.2d 381.

10. Cal.—People v. Stanley, 269 P. 465, 92 Cal.App. 778.

Trial court sitting without a jury was required to consider accused's intoxication in determining the necessary element of intent or purpose involved in offense of driving automobile without owner's consent with intent to deprive owner of possession—People v. Gibson, 146 P.2d 971, 63 Cal.App.2d 632.

Consent

In a prosecution for taking and using a motor vehicle without consent of the owner, the question whether the owner's consent was given directly or constructively is for the jury.—Commonwealth v. Osborn, 27 Pa.Dist. 696.

11. D.C.—Epps v. U. S., 157 F.2d 11, 81 U.S.App.D.C. 244.

Wis.—State v. Retzack, 6 N.W.2d 673, 242 Wis. 15.

42 C.J. p 1402 note 92.

Wading with knowledge of unlawful taking

Wash.—State v. Tully, 89 P.2d 517, 198 Wash. 605.

12. Mass.—Commonwealth v. Coleman, 147 N.E. 552, 252 Mass. 241.

In accordance with general rules, in a prosecution for taking and using a motor vehicle without consent of the owner, the court should give full and accurate instructions applicable to the case,¹³ and it is proper, where accused alleged that he had authority for his acts, for the court to charge also on the question whether he retained the motor vehicle for an unreasonable time, if it was lawfully taken.¹⁴ Instructions which are unnecessary or misleading should not be given,¹⁵ but the charge should be judged as a whole, and not by some incidental statement which, taken by itself, might be misleading.¹⁶ Requested instructions, which do not correctly state the law,¹⁷ or which are inapplicable,¹⁸ or which are fully covered by other instructions given by the court¹⁹ are properly refused.

§ 697. — Verdict and Findings

General rules apply with respect to a verdict in a prosecution for taking and using a motor vehicle without the consent of the owner.

The rules which govern in criminal prosecutions generally apply with respect to a verdict in a prosecution for taking and using a motor vehicle without the consent of the owner.²⁰ Where two defendants are tried jointly for unlawful taking and using a motor vehicle, the jury may return a verdict that the two defendants are not guilty, that one or the other of the defendants is guilty, or that both of defendants are guilty.²¹ A statutory provision authorizing the court to order special findings in connection with the general verdict has been held not applicable to prosecutions for unlawfully taking and using a motor vehicle.²²

13. Cal.—People v. Slaydon, 166 P. 2d 304, 73 Cal.App.2d 345.

42 C.J. p 1402 note 96.

Instructions held sufficient or not erroneous

Cal.—People v. Slaydon, 166 P.2d 304, 73 Cal.App.2d 345.

Ind.—Headlee v. State, 168 N.E. 692, 201 Ind. 545, rehearing denied 170 N.E. 438, 201 Ind. 545.

Mich.—People v. Tutha, 267 N.W. 867, 276 Mich. 387.

Wis.—State v. Retzack, 6 N.W.2d 673, 242 Wis. 15.

42 C.J. p 1402 note 96 [b].

14. R.I.—State v. McDonald, 125 A. 294, 46 R.I. 144.

15. Ky.—Means v. Commonwealth, 247 S.W. 12, 197 Ky. 401.

42 C.J. p 1403 note 98.

Instructions held not misleading

Cal.—People v. Slaydon, 166 P.2d 304, 73 Cal.App.2d 345.

42 C.J. p 1403 note 98 [b].

16. Wash.—State v. Hill, 251 P. 280, 141 Wash. 273.

42 C.J. p 1403 note 99.

17. Requested instructions properly refused

Mass.—Commonwealth v. Coleman, 147 N.E. 552, 252 Mass. 241.

18. Cal.—People v. Ragone, 191 P. 2d 126, 84 Cal.App.2d 476—People v. Herman, 164 P.2d 505, 72 Cal. App.2d 241.

19. Ind.—Rokvic v. State, 143 N.E. 357, 194 Ind. 450.

20. Jury need not find value

In prosecution under statute respecting taking motor vehicle without owner's consent, jury need not find value of motor vehicle.—Crouch v. State, 174 N.E. 799, 37 Ohio App. 366.

21. Del.—State v. Cusack, 89 A. 216, 27 Del. 469.

§ 698. — Judgment, Sentence, and Punishment

The penalty or punishment to be imposed for the unlawful taking and use of another's motor vehicle without consent is usually prescribed by the statute creating the offense.

The penalty or punishment to be imposed for a violation of a statute prohibiting the unlawful taking and use of another's motor vehicle without consent is usually prescribed by the statute creating the offense.²³ Where, however, such a statute prescribes no penalty, but declares the offense a felony, the punishment will be governed by the general provisions of the penal code pertaining to the punishment for felonies.²⁴ A penalty or punishment imposed by the sentence of the court which is excessive or unauthorized cannot be enforced.²⁵

§ 699. — Appeal and Error

Review of a conviction for unlawfully taking and using a motor vehicle is governed by the rules and statutes applicable to a review in criminal prosecutions generally.

Matters relating to a review by a higher court of a conviction for unlawfully taking and using a motor vehicle are governed by the rules and statutes applicable to a review in criminal prosecutions generally. These rules have been applied to such matters as the questions which may be originally raised on appeal or writ of error,²⁶ the presumptions or inferences indulged by the reviewing court,²⁷ and as to the assignments of error to be considered.²⁸

Harmless error. A judgment of conviction will not be reversed for error which was not harmful or prejudicial to any substantial rights of accused.²⁹

22. R.I.—State v. McDonald, 125 A. 294, 46 R.I. 144.

42 C.J. p 1403 note 5.

23. Cal.—Ex parte Miller, 24 P.2d 766, 218 Cal. 698.

Pa.—Commonwealth ex rel. Dorillo v. Smith, 19 A.2d 757, 144 Pa.Super. 265.

24. Cal.—In re Gohlke, 237 P. 779, 73 Cal.App. 536.

25. Ala.—Stephen v. State, 109 So. 525, 21 Ala.App. 490.

42 C.J. p 1403 note 8.

26. Ill.—People v. Kasker, 209 Ill. App. 597.

42 C.J. p 1403 note 10.

27. Ill.—People v. Kasker, supra.

42 C.J. p 1403 note 11.

28. Mo.—State v. Anderson, App., 231 S.W. 1070.

42 C.J. p 1403 note 12.

29. Cal.—People v. Zabriski, 26 P. 2d 511, 135 Cal.App. 169.

42 C.J. p 1403 note 13.

and where there was ample evidence on which the jury might find a verdict of guilty.³⁰

Determination and disposition of cause. A conviction for unlawfully taking and using an automobile without the consent of the owner on an information which does not allege all the facts necessary to constitute the crime with which accused is charged³¹ or which does not set forth such facts with sufficiency certainty³² will be reversed on appeal. However, it has been held that, where the defect in an information, which was not questioned as to sufficiency in the trial court, could have been remedied by an amendment, the reviewing court on a writ of error will remand the cause for an opportunity to amend.³³ So, where the judgment of conviction is erroneous only as to sentence imposed, it will be affirmed and remanded for proper sentence.³⁴

§ 700. Taking Accessories

Under some statutes it is a felony unlawfully and without consent of the owner to take any accessory or appurtenance contained in, on, or forming part of, any motor vehicle amounting in value to more than a specified sum.

Under some statutes it is an offense, amounting to a felony,³⁵ unlawfully and without consent of the owner to take any accessory or appurtenance contained in, on, or forming a part of, any motor vehicle amounting in value to more than a specified sum.³⁶ The nature of the offense is substantially

the same as that of taking and using a motor vehicle without consent of the owner and it is sometimes created by the same statutory provisions.³⁷ The offense is not larceny or the equivalent thereof, but is a distinct crime,³⁸ in the commission of which it is not material whether or not accused had the intention to deprive the owner of his property.³⁹ Hence, it is not a necessary element of the offense that the property be feloniously stolen,⁴⁰ although it is essential that it be taken without the owner's consent.⁴¹

§ 701. Transporting Passengers or Goods; Letting for Hire

- a. Transporting passengers or goods
- b. Letting for hire

a. Transporting Passengers or Goods

- (1) In general
- (2) Persons liable
- (3) Prosecution

(1) In General

Statutes providing for the regulating and licensing of motor vehicles employed in the transportation of passengers or goods for hire frequently make a violation of their requirements an offense.

Statutes or ordinances providing for the regulation and licensing of motor vehicles employed in the transportation of passengers or goods for hire frequently make a violation of their requirements an offense.⁴² Such statutes or ordinances must be

30. R.I.—State v. McDonald, 125 A. 294, 46 R.I. 144.

31. Ill.—People v. Blue, 222 Ill.App. 255.

32. Ill.—People v. Blue, *supra*.

33. Ill.—People v. Kasker, 209 Ill. App. 597.

34. Ala.—Stephens v. State, 109 So. 525, 21 Ala.App. 490.

35. Ind.—Rokvic v. State, 143 N.E. 357, 194 Ind. 450.

36. Ind.—Halstead v. State, 155 N.E. 609, 199 Ind. 397.
42 C.J. p 1404 note 21.

Wrongful removal of parts see *infra* § 713.

Defenses

The fact that some of the necessary parts had been removed and the motor vehicle could not be operated at the time has been held not to constitute a defense.—Halstead v. State, 155 N.E. 609, 199 Ind. 397.

Presumption arising from possession

The possession of stolen property by defendant under circumstances that would raise a presumption that defendant stole the property where the charge was larceny raises a sim-

ilar presumption, as to the unlawful taking, in a prosecution for unlawfully taking automobile accessories without the owner's consent.—Rokvic v. State, 143 N.E. 357, 194 Ind. 450.

Requested instructions held properly refused

Ind.—Halstead v. State, 155 N.E. 609, 199 Ind. 397.

37. Ind.—Leap v. State, 127 N.E. 274, 189 Ind. 538.

38. Ind.—Rokvic v. State, 143 N.E. 357, 194 Ind. 450.

39. Ind.—Rokvic v. State, *supra*.

40. Ind.—Rokvic v. State, *supra*.

41. Ind.—Rokvic v. State, *supra*.
42 C.J. p 1404 note 28.

42. Cal.—Ex parte Marriott, 22 P. 2d 692, 218 Cal. 179—People v. Stolzoff, 162 P.2d 743, 71 Cal.App.2d Supp. 849.

D.C.—Stewart v. District of Columbia, Mun.App., 35 A.2d 247.

Fla.—State ex rel. Coats v. Whitaker, 171 So. 521, 126 Fla. 543.

Mass.—Commonwealth v. White, 157 N.E. 597, 260 Mass. 300.

N.Y.—People v. Verro, 295 N.Y.S. 213, 162 Misc. 313—People ex rel.

Weatherwax, 188 N.Y.S. 559, 115

Misc. 120, affirmed 188 N.Y.S. 579, 197 App.Div. 929—People v. S. & E. Motor Hire Corporation, 29 N.Y.S. 2d 105.

Pa.—Kimble v. Wilson, 42 A.2d 526, 352 Pa. 275—Commonwealth v. Kennedy, 195 A. 770, 129 Pa.Super. 149.

Tex.—Lowery v. English, Civ.App., 299 S.W. 478.

W.Va.—State v. Larkin, 149 S.E. 667, 107 W.Va. 580.

42 C.J. p 1404 note 32.

Grade of offense

(1) A violation is misdemeanor under some statutes.

U.S.—Trinity Universal Ins. Co. v. Cunningham, C.C.A.Mo., 107 F.2d 857, certiorari dismissed 60 S.Ct. 1074, 310 U.S. 654, 84 L.Ed. 1419.
Mich.—People v. Carr, 203 N.W. 948, 231 Mich. 246.

(2) It has been held that although no penalty is provided in the statute, the offense is a misdemeanor and punishable as such under a general statute applicable in cases where the performance of an act is prohibited by a statute which imposes no penalty for its violation.—People ex rel. Weatherwax v. Watt, 188 N.Y.S. 559,

strictly construed,⁴³ and no intendments, beyond such as necessarily go along with the purpose expressed, can be indulged.⁴⁴ They have been usually held valid and enforceable,⁴⁵ and a proper exercise of the police power.⁴⁶ The acts complained of must have occurred after the taking effect of the law.⁴⁷ A statute is not ordinarily violated by a single⁴⁸ or occasional⁴⁹ act of transportation for

hire, but, under some statutes, it has been held that violations are not excused merely because they are casual and irregular in their occurrence.⁵⁰

Vehicles covered. The question whether or not a particular motor vehicle is within the meaning of a statute depends on the terms and construction of the statute involved.⁵¹

115 Misc. 120, affirmed 188 N.Y.S. 579, 197 App.Div. 929—United Tract. Co. v. Smith, 187 N.Y.S. 377, 115 Misc. 73.

Defenses

(1) Defendant could not be convicted for operating taxicab without certificate of convenience and necessity from public service commission, where commission had made no rules, regulations, or orders regulating taxicabs, and had disclaimed jurisdiction to do so, and defendant could not have procured such certificate from the commission had he applied therefor.—Marshall v. State, 200 S. W.2d 491, 211 Ark. 380.

(2) Where nonresident was charged with violation of statute, protection from charge under reciprocal provision of motor vehicle license statute is matter of defense—State v. Caplan, 135 A. 705, 100 Vt. 140, followed in State v. Williams, 135 A. 713, 100 Vt. 160.

Letting of vehicles

(1) Where owner leased truck to interstate carrier for delivery within city of goods deposited in terminal of carrier in the city, and lessee exercised sole control over truck, owner was not guilty of unlawfully operating and maintaining a motor vehicle as a public cart without a license, as prohibited by ordinance.—People v. Heckman Trucking Co., 14 N.E.2d 801, 277 N.Y. 480.

(2) Where a corporation leased trucks to business house to be used to deliver and collect lessee's merchandise only, which was done without cost to lessee's customers, and drivers were supplied by lessor's wholly owned subsidiary under a separate agreement between lessee and the subsidiary, such leased trucks were not "public carts" and lessor was not a "public cartman" within meaning of statutory definitions thereof; nor was a license required for such operation of trucks under statute requiring license for operation of public carts kept for hire or used to carry merchandise for pay.—People v. S. & E. Motor Hire Corporation, 29 N.Y.S.2d 105.

(3) A statute requiring a permit to be obtained by anyone engaging in the business of transporting passengers for hire in any motor-propelled vehicle does not apply to the letting of an automobile by its owner to be

used by such person—State v. Bee Hive Auto Serv. Co., 242 P. 384, 137 Wash. 372.

43. Mich.—People v. Carr, 203 N.W. 948, 231 Mich. 246.

Wash.—State v. Hertz Drive-Yourself Stations, 271 P. 331, 149 Wash. 479.
W.Va.—State v. Larkin, 149 S.E. 667, 107 W.Va. 580.

44. Mich.—People v. Carr, 203 N.W. 948, 231 Mich. 246.

45. La.—City of Shreveport v. Gregory, 172 So. 435, 186 La. 407.

Mass.—Commonwealth v. Reardon, 185 N.E. 40, 282 Mass. 345.

Mont.—State v. Johnson, 243 P. 1073, 75 Mont. 240.

Pa.—Commonwealth v. Kennedy, 195 A. 770, 129 Pa.Super. 149.

Tex.—Dallas Taxicab Co. v. City of Dallas, Civ.App. 68 S.W.2d 359—Lowery v. English, Civ.App., 299 S. W. 478.

Ordinance held reasonable

An ordinance of city prohibiting use of certain streets by busses and trucks transporting passengers and property for hire, but not prohibiting use of such streets by busses whose principal routes were within city limits and by trucks using streets to receive or deliver shipment of goods, was reasonable and not unduly discriminatory or burdensome, where streets contained steep grades and were in residential district and there were other routes available for entrance and exit to the city.—Commonwealth v. Kennedy, 195 A. 770, 129 Pa.Super. 149.

Ordinance held invalid

Penal ordinance forbidding operation of automobile for hire, unless having attached thereto a taximeter of "standard size and design," to be approved by police chief if conforming to specified requirements, was held invalid as delegating to chief lawmaking power and unguided discretion.—Ex parte Wilmoth, 67 S.W. 2d 289, 125 Tex.Cr. 274.

46. Okl.—Herring v. State, 64 P.2d 921, 60 Okl.Cr. 449, certiorari denied 57 S.Ct. 937, 301 U.S. 704, 81 L.Ed. 1358.

Pa.—Commonwealth v. Kennedy, 195 A. 770, 129 Pa.Super. 149.

42 C.J. p 1404 note 33.

47. Ky.—Commonwealth v. Louis-

ville Taxicab, etc., Co., 275 S.W. 795, 210 Ky. 324.

42 C.J. p 1404 note 34.

48. Ga.—Young v. State, 159 S.E. 123, 43 Ga App. 395.

Mass.—Commonwealth v. White, 157 N.E. 597, 260 Mass. 300.

Mont.—State v. Flagg, 242 P. 1023, 75 Mont. 424.

Tex.—Hoffman v. State, Cr.App., 20 S.W.2d 1057.

Continuity of purpose

Act of operator of motor vehicle used as property carrier in "holding himself out for employment" within license statute connotes certain continuity of purpose, one day's hauling for neighbor at his request not necessarily being sufficient.—Commonwealth v. Doss, 167 S.E. 371, 159 Va. 968.

Regular operation

A transportation company which regularly operates its busses along an unauthorized route as an incident to its usual business, as distinguished from a mere isolated departure, caused by necessity, for repairs or gasoline or garage service, is subject to operation of prohibitory statute.—People v. McCue, 4 N.Y.S.2d 617, 254 App Div. 271.

49. Ohio.—State v. Thompson, 26 Ohio N.P.N.S. 335.

W.Va.—State v. Vaughan, 125 S.E. 583, 97 W.Va. 563.

42 C.J. p 1404 note 32 [c].

50. Fla.—State ex rel. Coats v. Whitaker, 171 So. 521, 126 Fla. 543.

Haulage on return trip

Truck owner who was permitted to haul, for compensation, agricultural and horticultural products exclusively from point of production, assembly, or primary manufacture to a certain city, who on return trip from such city hauled, for compensation, fertilizer to consumer consignees was held properly arrested for being engaged in transportation for compensation without a permit.—State ex rel. Coats v. Whitaker, supra.

Sight-seeing bus

(1) In order to come within statute creating offense of operating "sight-seeing bus" for hire without license, hiring must be of such character that general public, on payment of tariff, may board bus and be transported to some point of des-

Place of offense. A regulation requiring a license of persons engaged in the business of transporting passengers for hire within or through the municipality by means of any motor vehicle may be violated where the operator of the vehicle passes through the municipality, but does not solicit trade or take on or let off passengers within it,⁵² and the termini of the route need not be within the municipality.⁵³ Under an ordinance making the operation without a license of an autobus over the city streets unlawful, where the entire route of the bus lies wholly or partly within the limits of the city, it is immaterial whether or not passengers were taken on within the city limits,⁵⁴ and, where a fare is charged for the entire trip, part of which is outside the city limits, it cannot for that reason be contended that no fare is charged within the city limits.⁵⁵

(2) Persons Liable

The question whether or not a particular person is liable for a violation of a statute regulating and licensing motor vehicles employed in the transportation of passengers or goods for hire depends on the terms and the construction of such a statute.

The question whether or not a particular person is liable for a violation of a statute regulating and licensing motor vehicles employed in the transportation of passengers or goods for hire depends on the terms and the construction of such a statute.⁵⁶ Under some statutes, both the owner and his employee, such as a driver of a motor vehicle, have been held liable for a violation of the statute.⁵⁷ Under other statutes, an employee who is not an owner, such as a driver of a motor vehicle, is not liable.⁵⁸ Where the ordinance makes operation of a bus unlawful if either the bus or the driver is unlicensed, both ownership and operation of the bus are not necessary to constitute a violation,⁵⁹ and, one who owns an autobus and hires the drivers operates it within the meaning of such an ordinance.⁶⁰

Aiders or abettors. Under some statutes, any person who aids or abets in the violation of the statute is guilty of the offense,⁶¹ and any person who conducts a travel bureau may be guilty under such a statute.⁶²

tionation.—*People v. Oestreicher*, 22 N. Y.S.2d 899, 175 Misc. 151.

(2) A bus, especially built for children and owned by company deriving ninety-two per cent of its annual revenue from operation of its busses under contract with city board of education to transport children between their homes and schools, was not "sight-seeing bus" unlawfully operated by such company's employee without license while being used during school vacation under special charter primarily for purpose of taking children to and from day camps and incidentally to and from movies, museums, etc., in bad weather.—*People v. Oestreicher*, *supra*.

Taxicab

(1) A "taxicab" within statute prohibiting use of motor vehicles as taxicabs without appropriate license therefor and declaring violation a criminal offense is a motor vehicle offered for hire to the public generally upon the streets of city, and hence motor vehicle available only for hire on private property within city of New York and not plying the streets seeking public employment, was not taxicab within the statute.—*People v. Reser*, 75 N.Y.S.2d 723, 190 Misc. 804.

(2) Ordinance prohibiting operation in city of any motor vehicle for carriage of persons for hire at rate of fare of fourteen cents or less for each passenger without first having procured certificate of public convenience and necessity was held not to apply to taxicabs with a carrying

capacity of not more than seven persons, but only to omnibusses and motor vehicles with a carrying capacity of more than seven persons.—*People v. Verro*, 295 N.Y.S. 313, 162 Misc. 313.

52. Mass.—*Commonwealth v. Theberge*, 121 N.E. 30, 231 Mass. 386.

53. Mass.—*New York, etc., R. Co. v. Deister*, 148 N.E. 590, 253 Mass. 178 —*Commonwealth v. Theberge*, 121 N.E. 30, 231 Mass. 386.

54. N.J.—*Bridgeton v. Zellers*, 124 A. 520, 100 N.J.Law 33.

55. N.J.—*Bridgeton v. Zellers*, *supra*.

56. Ohio.—*Red Eagle Bus Co. v. Public Utilities Commission*, of Ohio, 180 N.E. 261, 124 Ohio St. 625.

A person who takes his neighbors to their common place of employment has been considered not amenable to the statute.—*State v. Thompson*, 26 Ohio N.P.,N.S., 335.

An alien may be convicted for driving a vehicle in violation of an ordinance.—*Morin v. Nunan*, 103 A. 378, 91 N.J.Law 5, 6.

Nonresident

A nonresident may be guilty of violation of such a statute.—*State v. Caplan*, 135 A. 705, 100 Vt. 140, followed in *State v. Williams*, 135 A. 713, 100 Vt. 160.

57. Mont.—*State v. Healow*, 38 P.2d 285, 98 Mont. 177.
42 C.J. p 1404 note 37.

58. Ill.—*City of Chicago v. Dorband*, 18 N.E.2d 107, 297 Ill App. 617 N.Y.—*People v. Speciale*, 7 N.E.2d 840, 273 N.Y. 413.
Pa.—*Commonwealth v. Bradley*, 34 Pa.Dist. & Co. 635, 41 Lack Jur 37.

Chauffeur

A mere chauffeur of a transportation company was not an "officer or agent" of transportation company within meaning of statute authorizing prosecution of an officer or agent for violation of statute prohibiting operation of a bus on an unapproved route.—*People v. McCue*, 4 N.Y.S.2d 617, 254 App.Div. 271.

Knowledge

A mere employee of a transportation company cannot be prosecuted for operating a bus on an unapproved route unless the employee has exercised a choice to violate the requirement with full knowledge thereof.—*People v. McCue*, *supra*.

59. N.J.—*Bridgeton v. Zellers*, 124 A. 520, 100 N.J.Law 33—*Loper v. Bridgeton*, 128 A. 616, 3 N.J.Misc. 439.

60. N.J.—*Bridgeton v. Zellers*, 124 A. 520, 100 N.J.Law 33.

61. Okl.—*Hudgins v. State*, 133 P.2d 231, 75 Okl.Cr. 486.

62. Okl.—*Booth v. State*, 137 P.2d 602, 76 Okl.Cr. 410—*Hall v. State*, 99 P.2d 166, 68 Okl.Cr. 451—*Herring v. State*, 95 P.2d 128, 68 Okl. Cr. 32—*Herring v. State*, 64 P.2d 921, 60 Okl.Cr. 449, certiorari denied 57 S.Ct. 937, 301 U.S. 704, 81 L.Ed. 1358.

(3) Prosecution

In a prosecution for a violation of a statute regulating and licensing motor vehicles employed in the transportation of passengers or goods for hire, general rules usually apply.

A prosecution for a violation of a statute regulating and licensing motor vehicles employed in the transportation of passengers or goods for hire need not be instituted by the commission after determining the fact that accused is operating in violation of the law, but the law may be invoked by any person.⁶³ An indictment, information, or complaint must set forth all the facts required to establish the offense and to bring accused within the statutory provisions.⁶⁴ For example, it must allege

that the trip made was without the license required,⁶⁵ and that defendant has not paid the tax imposed by law.⁶⁶ An allegation that defendant allowed his motor vehicle "to be employed in public service conveying four passengers to" is insufficient to show that defendant acted as a public carrier.⁶⁷ Where the complaint charges, in separate counts, three offenses of driving without a license, a conviction finding defendant guilty as charged in the complaint is bad where there is no proof as to two of the offenses.⁶⁸ In the absence of special statutes, general rules usually apply with respect to the evidence,⁶⁹ questions of law and fact,⁷⁰ judgment, sentence, and punishment,⁷¹ and review.⁷²

Travelers benevolent association

Accused, who incorporated so-called travelers benevolent association and contracted with owners or operators of automobiles, and with persons desiring transportation, for transportation at a fixed rate per mile, and had fixed, permanent place of business where passenger would take conveyance and pay fare, was guilty of operating a motor vehicle upon a public highway without a permit from the corporation commission, where neither accused nor owner or operator of motor vehicle had permit for operation as a motor carrier, notwithstanding execution by operator and accused of so-called lease contracts, and execution by accused and passenger of so-called rental contracts.—Hudgins v. State, 133 P.2d 231, 75 Okl.Cr. 446.

63. Mich.—People v. Carr, 203 N.W. 948, 231 Mich. 246.

Cease and desist order

The commission need not order person to cease and desist violating statute before beginning prosecution for operating transportation company without certificate.—Madden Bros. v. Railroad & Warehouse Commission of Minnesota, D.C.Minn., 43 F.2d 236, appeal dismissed, C.C.A., 49 F.2d 1080.

64. Cal.—People v. Hadley, 226 P. 836, 66 Cal.App. 370, followed in 226 P. 841, 66 Cal.App. 795, and People v. Ernsting, 226 P. 841, 66 Cal.App. 797.

Tex.—Ex parte Garth, 103 S.W.2d 759, 132 Tex.Cr. 194.

Vt.—State v. Caplan, 135 A. 705, 100 Vt. 140, followed in State v. Williams, 135 A. 713, 100 Vt. 160, 42 C.J. p 1405 note 45.

Language of statute

A charge which substantially follows the language of the statute is usually sufficient.

Ala.—Smith v. State, 120 So. 469, 23 Ala.App. 65, reversed on other grounds 120 So. 471, 218 Ala. 669.

Cal.—People v. Hadley, 226 P. 836,

66 Cal.App. 370, followed in 226 P. 841, 66 Cal.App. 795 and People v. Ernsting, 226 P. 841, 66 Cal.App. 797.

Warrant

Warrant charging that defendant, on specified day, operated truck with improper license, but not charging that he held himself out for employment or operated over state highways, charged no crime.—Commonwealth v. Doss, 167 S.E. 371, 159 Va. 968.

Information or complaint held sufficient

Cal.—Ex parte Marriott, 22 P.2d 692, 218 Cal. 179—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770
Kan.—State v. Reed, 65 P.2d 1083, 145 Kan. 459
Vt.—State v. Caplan, 135 A. 705, 100 Vt. 140, followed in State v. Williams, 135 A. 713, 100 Vt. 160.

65. Puerto Rico.—People v. Vergne de la Concha, 26 Puerto Rico 395

66. Puerto Rico.—People v. Vergne de la Concha, supra.

67. Puerto Rico.—People v. Vergne de la Concha, supra.

68. N.J.—Loper v. Bridgeton, 128 A. 616, 3 N.J.Misc. 439.

69. Proof of solicitation

Conviction for operating bus without public hack driver's license or public hack license requires proof of solicitation of public business.—People v. Paradiso, 239 N.Y.S. 355, 135 Misc. 337.

Exceptions

In any proceeding to prosecute auto company for operating without certificate of public convenience, the state must show that company is an auto transportation company and not within exceptions to act.—Madden Bros. v. Railroad & Warehouse Commission of Minnesota, D.C.Minn., 43 F.2d 236, appeal dismissed, C.C.A., 49 F.2d 1080.

Statutory rule

A provision, making proof of one trip between given points with pas-

sengers who are charged individual fares evidence of a practice of making such trips, should be given effect in prosecution against passenger stage corporation for failure to obtain the necessary certificate.—People v. Stolzoff, 162 P.2d 743, 71 Cal.App.2d Supp. 849.

Evidence held sufficient to sustain conviction

(1) Generally.

Mich.—People v. Carr, 203 N.W. 948, 231 Mich. 246.

Mo.—State v. Sanderson, App., 128 S.W.2d 277.

Okl.—Hall v. State, 99 P.2d 163, 68 Okl.Cr. 367.

Pa.—Commonwealth v. Stricker, Quar. Sess., 51 Dauph.Co. 274.

(2) For aiding and abetting.—Booth v. State, 137 P.2d 602, 76 Okl.Cr. 410.

Evidence held insufficient to sustain conviction

Ga.—Willoughby v. City of Atlanta, 177 S.E. 527, 50 Ga.App. 180—

Young v. State, 159 S.E. 123, 43 Ga.App. 395.

Ill.—City of Chicago v. Dorband, 18 N.E.2d 107, 297 Ill.App. 617—City of Chicago v. Kay, 282 Ill.App. 604.

N.Y.—People v. Smith, 15 N.Y.S.2d 459.

70. Question for trial court

In prosecution for violating Public Utilities Act requiring passenger stage corporation transporting passengers between fixed termini to obtain certificate from railroad commission, whether transportation of passengers from Camp Elliott to San Diego was a sufficient designation of fixed termini was question for the trial court.—People v. Stolzoff, 162 P.2d 743, 71 Cal.App.2d Supp. 849.

71. Penalty or punishment

Ordinance providing fixed fine for first and subsequent violations by failing to register names of drivers of autobusses was held void.—Garden State Lines v. Town of Nutley, 167 A. 5, 11 N.J.Misc. 502.

72. Cal.—People v. Stolzoff, 162 P.

b. Letting for Hire

Under some statutes, it may be an offense to violate regulations with respect to the leasing or renting of motor vehicles.

It is not a crime, in the absence of a statute prohibiting it, to let a motor vehicle for hire for a lawful purpose.⁷³ Under some statutes, however, it may be an offense to violate regulations with respect to the leasing or renting of motor vehicles.⁷⁴

§ 702. Transporting Stolen Vehicle in Interstate Commerce; Receiving Such Vehicle.

Under federal statutes, it is an offense either to transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing it to have been stolen; or to receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is part of, or which constitutes, interstate or foreign commerce, knowing it to have been stolen.

Under the provisions of the National Motor Vehicle Theft Act, also known as the Dyer Act,⁷⁵ now 18 U.S.C.A. §§ 2311-2313, it is made an indictable offense either to transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing it to have been stolen,⁷⁶ or to receive, conceal, store, barter, sell, or dis-

pose of any motor vehicle, moving as, or which is part of, or which constitutes, interstate or foreign commerce, knowing it to have been stolen.⁷⁷ The term "motor vehicle" by the terms of the statute includes automobile, automobile truck, and virtually every conceivable variety of self-propelled vehicle on land.⁷⁸

Validity. The provision prohibiting the transportation of stolen vehicles in interstate commerce⁷⁹ and the provision forbidding the receiving, concealing, selling, etc., of such vehicles⁸⁰ have both been held to be a valid exercise of the police power of congress in the regulation of interstate commerce, and, therefore, not unconstitutional;⁸¹ the latter provision, more particularly, on the ground that it applies only where the prohibited acts are a final step in the use of interstate transportation to promote the scheme of unlawfully disposing of the stolen vehicle and of withholding it from its owner,⁸² and merely makes more effective the regulation forbidding transportation of stolen cars.⁸³

Elements of offense. The transportation of a stolen motor vehicle in interstate commerce with guilty knowledge constitutes the crime.⁸⁴ The stat-

2d 743, 71 Cal.App.2d Supp. 849—*People v. Galena*, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Ky.—Commonwealth, for Use and Benefit of City of Jackson, v. Noble, 130 S.W.2d 790, 279 Ky. 383. Tex.—Ex parte Sparks, 2 S.W.2d 449, 108 Tex.Cr. 619.

73. Wash.—State v. Hertz Driv-ur-Self Stations, 271 P. 331, 149 Wash. 479—State v. Bee Hive Auto Serv. Co., 242 P. 384, 137 Wash. 372.

74. Information held insufficient

Fla.—Lehman v. Gear, 147 So. 853, 109 Fla. 552, followed in Lehman v. Fitzgerald, 147 So. 855, 109 Fla. 556.

Evidence held insufficient to sustain conviction

N.Y.—People v. Preciado, 267 N.Y.S. 875, 239 App.Div. 469.

75. U.S.—In re Edwards, C.C.A.Mo., 106 F.2d 537—Cardigan v. White, C.C.A.Kan., 18 F.2d 572, certiorari denied 47 S.Ct. 770, 274 U.S. 755, 71 L.Ed. 1334.

42 C.J. p 1405 note 51.

Distinct offenses

These provisions of the act defined separate and distinct legal offenses.—Madsen v. United States, C.C.A.Kan., 165 F.2d 507—Langston v. U. S., C.C.A.Ark., 153 F.2d 840—Lindsay v. U. S., C.C.A.Okl., 134 F.2d 960, certiorari denied 63 S.Ct. 1316, 319 U.S. 763, 87 L.Ed. 1714—Record v. Hudspeth, C.C.A.Kan., 126 F.2d 585—

Jackson v. Hudspeth, C.C.A.Kan., 111 F.2d 128—Chrysler v. Zerbat, C.C.A.Kan., 81 F.2d 975—42 C.J. p 1405 note 54.

Commerce; interstate commerce

(1) The term "commerce" within the National Motor Vehicle Theft Act means passing to and fro.—Whitaker v. U. S., C.C.A.Cal., 5 F.2d 546, certiorari denied 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

(2) The term "interstate commerce" by the terms of the act means the transportation or causing to be moved from one state, territory, or District of Columbia, to another state, territory, or District of Columbia.

U.S.—Whitaker v. U. S., supra. D.C.—Whitaker v. Hitt, 285 F. 797, 52 App.D.C. 149, 27 A.L.R. 951.

(3) The fact that the definition of "interstate commerce" or "foreign commerce" as contained in the act is not as broad as the term "commerce" used in the constitution does not invalidate the act, since congress can make criminal a particular use to which one or more of the instrumentalities of interstate commerce may be applied, to the exclusion of all others.—Whitaker v. Hitt, supra—42 C.J. p 1406 note 67.

76. U.S.—Madsen v. United States, C.C.A.Kan., 165 F.2d 507—Donaldson v. U. S., C.C.A.Ill., 82 F.2d 680—McNally v. Hill, C.C.A.Pa., 69 F.2d 38, affirmed 55 S.Ct. 24, 293

U.S. 131, 79 L.Ed. 238—Loftus v. U. S., C.C.A.Ill., 46 F.2d 841. 42 C.J. p 1405 note 52.

77. U.S.—Madsen v. United States, C.C.A.Kan., 165 F.2d 507—Donaldson v. U. S., C.C.A.Ill., 82 F.2d 680—McNally v. Hill, C.C.A.Pa., 69 F.2d 38, affirmed 55 S.Ct. 24, 293 U.S. 131, 79 L.Ed. 238—Loftus v. U. S., C.C.A.Ill., 46 F.2d 841.

42 C.J. p 1405 note 53.

Receiving stolen motor vehicles generally see the C.J.S. title Receiving Stolen Goods § 1 et seq., also 42 C.J. p 1391 note 54—p 1396 note 21.

78. U.S.—McBoyle v. U. S., Okl., 51 S.Ct. 840, 283 U.S. 25, 75 L.Ed. 816. 42 C.J. p 1405 note 60.

Applicability to airplane see Aerial Navigation § 34.

79. U.S.—Brooks v. U. S., S.D., 45 S.Ct. 345, 267 U.S. 432, 69 L.Ed. 669, 37 A.L.R. 1407. 42 C.J. p 1405 note 61.

80. U.S.—Brooks v. U. S., supra—Cardigan v. Biddle, C.C.A.Kan., 10 F.2d 444.

81. U.S.—Brooks v. U. S., S.D., 45 S.Ct. 345, 267 U.S. 432, 69 L.Ed. 669, 37 A.L.R. 1407. 42 C.J. p 1405 note 63.

42 C.J. p 1405 note 63.

82. U.S.—Brooks v. U. S., supra. 42 C.J. p 1406 note 64.

83. U.S.—Brooks v. U. S., supra.

84. D.C.—Whitaker v. Hitt, 285 F. 797, 52 App.D.C. 149, 27 A.L.R. 951.

ute does not require an intent to engage in an act of commerce to make it an offense;⁸⁵ and the name of neither the owner of the vehicle nor of the person from whom it was stolen,⁸⁶ nor the value of the vehicle,⁸⁷ is an element of the crime. The larceny element of the offense is satisfied when there is a taking against the will of the owner or a trespass to his possession,⁸⁸ which may occur when the owner is induced by some fraud or trickery to deliver possession of the vehicle to one who feloniously converts it to his own use.⁸⁹

In order to constitute the offense of receiving, concealing, selling, etc., such a vehicle, it is essential that it was stolen⁹⁰ and that it is moving as, or is a part of, or constitutes, interstate or foreign commerce.⁹¹ It is not essential that accused knew that the automobile was moving in interstate commerce;⁹² knowledge that it had been stolen is sufficient.⁹³

§ 703. — What Constitutes "Transportation"

A vehicle may be transported within the statute when it is shipped by common carrier or moved on its own wheels.

A vehicle may be transported within the statute when it is shipped by common carrier or moved on its own wheels,⁹⁴ and the particular method

of transportation is immaterial with respect to the commission of the offense,⁹⁵ since the mere act of removal of an automobile from one state to another⁹⁶ or to a foreign country⁹⁷ is a transportation in interstate or foreign commerce within the meaning of the act. The fact that the automobile is subsequently transported back to the place of starting does not alter the interstate character of the transportation,⁹⁸ and the rule is the same where a stolen automobile is transported from one point in the state to another point in the same state, but moves in its course through another state.⁹⁹ It is not necessary that the automobile should have left the state in which it was stolen before there is a transportation within the act; there may be a violation thereof, even though the motor vehicle involved has not left the state in which interstate movement was begun.¹

It is not essential within the meaning of the act that the transportation be for the purpose of engaging in an act of commerce² or with a view to financial or pecuniary gain or benefit,³ for the mere driving of a stolen automobile from one state to another on its own power is in itself "interstate commerce" within the act,⁴ irrespective of what was intended to be done with the car in the latter state or elsewhere;⁵ and it is immaterial, therefore, whether the transportation was merely for the personal use or convenience of accused⁶ or that

85. U.S.—Hughes v. U. S., C.C.A. Okl., 4 F.2d 387, certiorari denied 45 S.Ct. 511, 268 U.S. 692, 69 L.Ed. 160.

86. U.S.—Foster v. U. S., C.C.A.Cal., 4 F.2d 107.

87. D.C.—Whitaker v. Hitt, 285 F. 797, 52 App.D.C. 149, 27 A.L.R. 951.

88. D.C.—Whitaker v. Hitt, *supra*.

89. U.S.—Stewart v. U. S., C.C.A. Ark., 151 F.2d 386.

The word "stolen" as used in statute is used not in technical sense of what constitutes larceny, but in its well-known meaning of taking personal property of another for one's own use without right or law, and such a taking can exist whenever intent to do so comes into existence and is deliberately carried out regardless of how a person so taking vehicle may have originally come into possession of it.—U. S. v. Adcock, D.C.Ky., 49 F.Supp. 351.

89. U.S.—Stewart v. U. S., C.C.A. Ark., 151 F.2d 386.

90. U.S.—Grimsley v. U. S., C.C.A. Fla., 50 F.2d 509.

91. U.S.—Hill v. Sanford, C.C.A.Ga., 131 F.2d 417, certiorari denied 63 S.Ct. 771, 318 U.S. 774, 87 L.Ed.

1113—McNally v. Hill, C.C.A.Pa., 69 F.2d 38, affirmed 55 S.Ct. 24, 293 U.S. 131, 79 L.Ed. 238—Davidson v. U. S., C.C.A.Mo., 61 F.2d 250—U. S. v. Drexel, C.C.A.N.Y., 56 F.2d 588—Grimsley v. U. S., C.C.A.Fla., 50 F.2d 509.

"If it has come to rest so as no longer to be a part of or constitute interstate commerce, state law regarding stolen property, rather than federal law, would be applicable"—Hill v. Sanford, C.C.A.Ga., 131 F.2d 417, 418, certiorari denied 63 S.Ct. 771, 318 U.S. 774, 87 L.Ed. 1143.

92. U.S.—Donaldson v. U. S., C.C.A. Ill., 82 F.2d 680—Loftus v. U. S., C.C.A.Ill., 46 F.2d 841—Wolf v. U. S., C.C.A.Ind., 36 F.2d 450—Katz v. U. S., C.C.A.Ohio, 281 F. 129.

93. U.S.—Wolf v. U. S., C.C.A.Ind., 36 F.2d 450—Katz v. U. S., 281 F. 129.

94. U.S.—Whitaker v. U. S., C.C.A. Cal., 5 F.2d 546, certiorari denied 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

95. U.S.—Hagan v. U. S., C.C.A.Kan., 9 F.2d 562.

42 C.J. p 1406 note 84.

96. D.C.—Whitaker v. Hitt, 285 F.

797, 52 App.D.C. 149, 27 A.L.R. 951, 42 C.J. p 1406 note 85.

97. U.S.—Nqvist v. U. S., C.C.A. Mich., 2 F.2d 504.

98. U.S.—Hughes v. U. S., C.C.A. Okl., 4 F.2d 387, certiorari denied 45 S.Ct. 511, 268 U.S. 692, 69 L.Ed. 1160.

99. U.S.—U. S. v. Winkler, D.C.Tex., 299 F. 832.

1. U.S.—Cardigan v. Biddle, C.C.A. Kan., 10 F.2d 444—Cardigan v. Biddle, 13 F.2d 1020, 42 C.J. p 1406 note 89.

2. U.S.—Whitaker v. U. S., C.C.A. Cal., 5 F.2d 546, certiorari denied 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416—Hughes v. U. S., C.C.A.Okl., 4 F.2d 387, certiorari denied 45 S.Ct. 511, 268 U.S. 692, 69 L.Ed. 1160.

3. U.S.—Whitaker v. U. S., C.C.A. Cal., 5 F.2d 546, certiorari denied 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

4. U.S.—Whitaker v. U. S., *supra*, 42 C.J. p 1407 note 92.

5. U.S.—Kelly v. U. S., C.C.A.S.C., 277 F. 405.

6. U.S.—Hughes v. U. S., C.C.A.Okl., 4 F.2d 387, certiorari denied 45 S.Ct. 511, 268 U.S. 692, 69 L.Ed. 1160—Kelly v. U. S., 277 F. 405.

it was for the purpose of ultimate sale⁷ and notwithstanding it carried no freight or passengers for hire.⁸

§ 704. — Jurisdiction and Venue

The National Motor Theft Act expressly provided that a violation thereof may be punished in any district in or through which a stolen motor vehicle has been transported or removed.

The National Motor Vehicle Theft Act expressly provided that a violation thereof may be punished in any district in or through which a stolen motor vehicle has been transported or removed.⁹ This provision was held valid,¹⁰ as applied to the offense of transporting a stolen vehicle,¹¹ but invalid, if construed as authorizing a prosecution for a sale thereof to be brought outside the district where the sale occurred.¹²

§ 705. — Indictment

An indictment in a prosecution for a violation of the statute must allege every element entering into the offense.

The rules as to indictments in criminal prosecution usually apply with respect to an indictment in a prosecution for a violation of the statute.¹³

The indictment must expressly and distinctly allege every element entering into the offense as set forth in the statute.¹⁴ Ordinarily, charging the offense in the language of the statute,¹⁵ or substantially in the language of the statute,¹⁶ is sufficient. The indictment must show the interstate character of the offense,¹⁷ even where the prosecution is for a sale of the vehicle.¹⁸ While it has been held that the fact that the vehicle was stolen must¹⁹ or should²⁰ be alleged, there need be no direct averment that the vehicle was stolen.²¹ The indictment must sufficiently charge defendant with knowledge that the vehicle involved had been stolen²² and it should also contain a specific description of such vehicle.²³

It is not necessary to set forth the particulars of the theft²⁴ or any other matters which are not elements of the crime as defined by the statute.²⁵ Thus, it is not necessary to allege the ownership of the motor vehicle²⁶ or the name of the person from whom it was stolen,²⁷ or the value thereof,²⁸

7. U.S.—*Kelly v. U. S.*, *supra*
D.C.—*Whitaker v. Hitt*, 285 F. 797,
52 App.D.C. 149, 27 A.L.R. 951

8. U.S.—*Whitaker v. U. S.*, 5 F.2d
546, certiorari denied 46 S.Ct. 25,
269 U.S. 569, 70 L.Ed. 416

D.C.—*Whitaker v. Hitt*, 285 F. 797,
52 App.D.C. 149, 27 A.L.R. 951

9. U.S.—*Penny v. U. S.*, C.C.A.Va.,
154 F.2d 629—*McNally v. Hill*, C.
C.A.Pa., 69 F.2d 38, affirmed 55 S.
Ct. 24, 293 U.S. 131, 79 L.Ed. 238—
Ventimiglia v. Aderhold, D.C.Ga.,
51 F.2d 308—*Loftus v. U. S.*, C.C.A.
Ill., 46 F.2d 811.

42 C.J. p 1407 note 4.

"Punishment," in district through which motor vehicle has been transported, refers to venue, and not place of punishment.—*Cardigan v. White*, C.C.A.Kan., 18 F.2d 572, certiorari denied 47 S.Ct. 770, 274 U.S. 755, 71 L.Ed. 1334.

Either judicial district

Where a stolen automobile is transported from a point in one state to a point in another state, the transportation in both states is in interstate commerce, and the crime is, therefore, committed in both states and in the respective federal judicial districts, and accused is subject to trial in either district.—*Cardigan v. Biddle*, C.C.A.Kan., 10 F.2d 444.

10. U.S.—*Penny v. U. S.*, C.C.A.Va.,
154 F.2d 629.

11. U.S.—*Ventimiglia v. Aderhold*,
D.C.Ga., 51 F.2d 308.

12. U.S.—*Ventimiglia v. Aderhold*,
supra.

13. U.S.—*Madsen v. U. S.*, C.C.A.
Kan., 165 F.2d 507
42 C.J. p 1407 note 7.

14. U.S.—*Hill v. Sanford*, C.C.A.Ga.,
131 F.2d 417, certiorari denied 63
S.Ct. 771, 318 U.S. 771, 87 L.Ed.
1114—*Jones v. U. S.*, C.C.A.Mo., 19
F.2d 316

42 C.J. p 1407 note 9

Indictment held sufficient

U.S.—*Heglin v. U. S.*, C.C.A.Okl., 27
F.2d 310—*Isbell v. U. S.*, C.C.A.
Okl., 26 F.2d 24

42 C.J. p 1407 note 9 [a].

15. U.S.—*Robertson v. U. S.*, C.C.A.
Tex., 168 F.2d 294.

16. U.S.—*U. S. v. Drexel*, C.C.A.N.Y.,
56 F.2d 588.

42 C.J. p 1407 note 8.

17. U.S.—*McNally v. Hill*, C.C.A.Pa.,
69 F.2d 38, affirmed 55 S.Ct. 24,
293 U.S. 131, 79 L.Ed. 238—*Davidson v. U. S.*, C.C.A.Mo., 61 F.2d 250.

Formal or technical defect

Fact that indictment, strictly construed, alleged that automobile had been transported, not that it was being transported, in interstate commerce, was held formal or technical rather than substantial defect.—*U. S. v. Drexel*, C.C.A.N.Y., 56 F.2d 588.

18. U.S.—*McNally v. Hill*, C.C.A.Pa.,
69 F.2d 38, affirmed 55 S.Ct. 24, 293
U.S. 131, 79 L.Ed. 238.

Allegation in past tense

Fact that indictment for sale of stolen automobile charged, in past tense, that automobile had been transported in interstate commerce as though transportation had been

completed, was held, at most, mere technical defect not fatal to court's jurisdiction.—*McNally v. Hill*, *supra*.

Indictment held insufficient

U.S.—*Grimsley v. U. S.*, C.C.A.Fla.,
50 F.2d 509.

19. U.S.—*Jones v. U. S.*, C.C.A.Mo.,
19 F.2d 316

20. U.S.—*Robertson v. U. S.*, C.C.A.
Tex., 168 F.2d 294.

21. U.S.—*Abraham v. U. S.*, C.C.A.
Okl., 15 F.2d 911.

42 C.J. p 1407 note 12.

22. U.S.—*Brooks v. U. S.*, S.D., 45
S.Ct. 245, 267 U.S. 432, 69 L.Ed.
669, 37 A.L.R. 1107.

42 C.J. p 1407 note 10

23. U.S.—*In re Edwards*, C.C.A.Mo.,
106 F.2d 537.

42 C.J. p 1407 note 11.

Description held sufficient

U.S.—*In re Edwards*, *supra*.

42 C.J. p 1407 note 11 [a].

24. U.S.—*Jones v. U. S.*, C.C.A.Mo.,
19 F.2d 316—*Abraham v. U. S.*, C.
C.A.Okl., 15 F.2d 911.

25. U.S.—*Foster v. U. S.*, C.C.A.Cal.,
4 F.2d 107.

D.C.—*Whitaker v. Hitt*, 285 F. 797,
52 App.D.C. 149, 27 A.L.R. 951.

26. U.S.—*Abraham v. U. S.*, C.C.A.
Okl., 15 F.2d 911.

42 C.J. p 1407 note 15.

27. U.S.—*Abraham v. U. S.*, *supra*
—*Foster v. U. S.*, C.C.A.Cal., 4 F.2d
107.

28. U.S.—*Abraham v. U. S.*, C.C.A.
Cal., 15 F.2d 911—*Whitaker v. U.*

or describe the localities where the theft occurred,²⁹ or the time when it occurred,³⁰ or the manner in which the vehicle was transported.³¹ Since the transportation need not be for the purpose of engaging in commerce, such intent, likewise, need not be charged.³² An indictment which alleges that defendant did "transport and cause to be transported in interstate commerce" a stolen automobile is sufficient to cover the movement of the automobile either under its own power or by carriage as freight, and is not defective for lack of particularization.³³

Issues, proof, and variance. General rules usually apply with respect to the issues, proof, and variance.³⁴

§ 706. — Evidence

In a prosecution for a violation of the statute, the burden of proof is on the prosecution to establish all the essential elements of the offense beyond a reasonable doubt.

In a prosecution for a violation of the statute, the burden of proof is on the prosecution to establish all the essential elements of the offense.³⁵ Thus, the burden is on the prosecution to prove the interstate character of the offense,³⁶ that the motor vehicle involved was stolen,³⁷ and that accused knew it to be stolen at the time it was trans-

ported in interstate or foreign commerce.³⁸ Where the indictment names the alleged owner of the vehicle, it is also essential for the government to prove that that automobile was stolen from such owner as alleged.³⁹

Possession of a stolen motor vehicle, under some circumstances, may raise a presumption or warrant an inference of guilt.⁴⁰ Such a presumption is not one of law,⁴¹ but one of fact.⁴² It has been held that, although possession of a recently stolen motor vehicle may call for an explanation,⁴³ it is not necessary that the explanation should come from defendant,⁴⁴ since it may arise from evidence introduced by the prosecution,⁴⁵ or the testimony of defendant's good character may rebut any possible inference of guilty knowledge which might otherwise arise from the possession.⁴⁶

Admissibility. The rules regulating the admission of evidence in criminal cases usually govern the admissibility of evidence.⁴⁷ Any competent evidence is admissible which tends to establish the knowledge of defendant that the car in question had been stolen.⁴⁸

Weight and sufficiency. In order to warrant a conviction for the violation of the statute, the evidence must be sufficient to establish defendant's guilt and all the essential elements of the offense.⁴⁹

S. 5 F.2d 546, certiorari denied 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416

29. U.S.—Abraham v. U. S., C.C.A. Cal., 15 F.2d 911—Grace v. U. S., C.C.A. La., 4 F.2d 658, certiorari denied 45 S.Ct. 637, 268 U.S. 702, 69 L.Ed. 1165.

30. U.S.—Heglin v. U. S., C.C.A. Okl., 27 F.2d 310—Abraham v. U. S., C.C.A. Okl., 15 F.2d 911.

31. U.S.—Hagan v. U. S., C.C.A. Kan., 9 F.2d 562.

32. U.S.—Hughes v. U. S., C.C.A. Okl., 4 F.2d 387, certiorari denied 45 S.Ct. 511, 268 U.S. 692, 69 L.Ed. 1160.

33. U.S.—Hagan v. U. S., C.C.A. Kan., 9 F.2d 562, 563.

34. Variance held trivial

U.S.—U. S. v. Drexel, C.C.A.N.Y., 56 F.2d 588.

35. U.S.—Cox v. U. S., C.C.A.Mo., 96 F.2d 41.

36. U.S.—Cox v. U. S., supra—Davidson v. U. S., C.C.A.Mo., 61 F.2d 250.

Part of interstate commerce when received

In prosecution for receiving stolen automobile moving in interstate commerce, burden was on government to show that car was part of interstate

commerce when received.—Wolf v. U. S., C.C.A. Ind., 36 F.2d 450.

37. U.S.—Abraham v. U. S., C.C.A. Okl., 15 F.2d 911.

38. U.S.—U. S. v. Vigorito, C.C.A. N.Y., 67 F.2d 329, certiorari denied Vigorito v. U. S., 54 S.Ct. 373, 290 U.S. 705, 78 L.Ed. 606—Abraham v. U. S., C.C.A. Okl., 15 F.2d 911.

39. U.S.—Abraham v. U. S., supra.

40. U.S.—U. S. v. Di Carlo, C.C.A. N.Y., 64 F.2d 15—Drew v. U. S., C.C.A.N.Y., 27 F.2d 715.

Defendant's possession after transit and in state of destination was held to warrant inference that defendant received and stored stolen car at end of interstate journey.—U. S. v. Di Carlo, C.C.A.N.Y., 64 F.2d 15.

Presumption grows weaker as time of possession recedes from time of original taking.—Drew v. U. S., C.C.A.N.Y., 27 F.2d 715.

41. U.S.—McAdams v. U. S., C.C.A. Ark., 74 F.2d 37—U. S. v. Di Carlo, C.C.A.N.Y., 64 F.2d 15.

42. U.S.—U. S. v. Di Carlo, supra—Drew v. U. S., C.C.A.N.Y., 27 F.2d 715.

43. U.S.—McAdams v. U. S., C.C.A. Ark., 74 F.2d 37.

44. U.S.—McAdams v. U. S., supra.

45. U.S.—McAdams v. U. S., supra.

46. U.S.—McAdams v. U. S., supra.

47. U.S.—Jeffers v. U. S., C.C.A. Fla., 151 F.2d 587—U. S. v. Solowitz, C.C.A. Ind., 99 F.2d 714.

Evidence held admissible

U.S.—Baugh v. U. S., C.C.A. Idaho, 27 F.2d 257, certiorari denied 49 S.Ct. 34, 278 U.S. 639, 73 L.Ed. 554.

48. U.S.—U. S. v. Drexel, C.C.A.N.Y., 56 F.2d 588.

42 C.J. p 1408 note 32.

49. U.S.—Cox v. U. S., C.C.A. Mo., 96 F.2d 41—McAdams v. U. S., C.C.A. Ark., 74 F.2d 37.

42 C.J. p 1408 note 36.

Evidence held sufficient

(1) To sustain conviction generally—Madsen v. U. S., C.C.A. Kan., 165 F.2d 507—Donaldson v. U. S., C.C.A. Ill., 82 F.2d 680—McCloud v. U. S., C.C.A. Tenn., 75 F.2d 576—U. S. v. Di Carlo, C.C.A.N.Y., 64 F.2d 15.

(2) To sustain conviction for knowingly transporting stolen motor vehicle in interstate commerce.—Jeffers v. U. S., C.C.A. Fla., 151 F.2d 587—Carpenter v. U. S., C.C.A. Iowa, 113 F.2d 692—U. S. v. Solowitz, C.C.A. Ind., 99 F.2d 714—U. S. v. Brand, C.C.A. N.Y., 79 F.2d 605, certiorari denied Brand v. U. S., 56 S.Ct. 381, 296 U.S. 655, 80 L.Ed. 466—Davidson v. U. S., C.C.A. Mo., 61 F.2d 250—Isbell

beyond a reasonable doubt. The offenses may be established by circumstantial evidence,⁵⁰ and intent to transport a stolen motor vehicle in interstate commerce,⁵¹ or knowledge that it was stolen⁵² may be established by evidence of this nature.

§ 707. — Questions of Law and Fact

Generally, in trials for violation of a federal statute relating to the interstate transportation, sale, or receipt of stolen motor vehicles, it is the province of the jury to determine questions of fact.

In accordance with general rules, in trials for violation of a federal statute relating to the interstate transportation, sale, or receipt of stolen motor vehicles, questions of fact ordinarily are for the jury,⁵³ and it is the province of the jury to determine the guilt or innocence of accused under the evidence.⁵⁴ Where there is sufficient evidence to sustain a verdict of guilty, it is not error to refuse to direct a verdict for defendants.⁵⁵

§ 708. — Instructions

In accordance with general rules, the court should give full and accurate instructions applicable to the case.

v. U. S., C.C.A.Okl., 26 F.2d 24—U. S. v. Adcock, D.C.Ky., 49 F.Supp. 351.

(3) To sustain conviction for knowingly receiving stolen motor vehicle transported in interstate commerce.—Jeffers v. U. S., C.C.A.Fla., 151 F.2d 587—Overby v. U. S., C.C.A.Ind., 23 F.2d 908.

(4) To sustain conviction for aiding and abetting in commission of offense.—Kraus v. U. S., C.C.A.Mo., 87 F.2d 656.

(5) To establish that motor vehicle was stolen.—Bruce v. U. S., C.C.A.Mo., 73 F.2d 972—Isbell v. U. S., C.C.A.Okl., 26 F.2d 24.

(6) To establish knowledge that vehicle was stolen.—U. S. v. Solowitz, C.C.A.Ind., 99 F.2d 714—Bruce v. U. S., supra—Niederluecke v. U. S., C.C.A.Mo., 47 F.2d 888—Loftus v. U. S., C.C.A.Ill., 46 F.2d 841.

Evidence held insufficient

(1) To sustain conviction for knowingly transporting stolen motor vehicle in interstate commerce.—Cox v. U. S., C.C.A.Mo., 96 F.2d 41—Carmichael v. U. S., C.C.A.Ill., 13 F.2d 125.

(2) To sustain conviction for knowingly receiving, concealing, selling, etc., stolen motor vehicle transported in interstate commerce.—McCloud v. U. S., C.C.A.Tenn., 75 F.2d 576—Wolf v. U. S., C.C.A.Ind., 36 F.2d 450.

50. U.S.—U. S. v. Di Carlo, C.C.A.N.Y., 64 F.2d 15.

Possession of automobiles

Fact that defendant came into possession of automobiles shortly after they were stolen was circumstance to

be considered by jury in connection with all other circumstances in determining guilt or innocence—McAdams v. U. S., C.C.A.Ark., 74 F.2d 37.

51. U.S.—Bruce v. U. S., C.C.A.Mo., 73 F.2d 972.

52. U.S.—Bruce v. U. S., supra.

53. U.S.—Loftus v. U. S., C.C.A.Ill., 46 F.2d 841—Drew v. U. S., C.C.A.N.Y., 27 F.2d 715.

42 C.J. p 1408 note 38.

Questions held for jury

(1) Whether accused had knowledge that motor vehicle was stolen—U. S. v. Solowitz, C.C.A.Ind., 99 F.2d 714—U. S. v. Vigorito, C.C.A.N.Y., 67 F.2d 329, certiorari denied Vigorito v. U. S., 54 S.Ct. 373, 290 U.S. 705, 78 L.Ed. 606—Baugh v. U. S., C.C.A.Idaho, 27 F.2d 257, certiorari denied 49 S.Ct. 34, 278 U.S. 639, 73 L.Ed. 554.

(2) When stolen automobile ceased to be in interstate commerce.—Loftus v. U. S., C.C.A.Ill., 46 F.2d 841—Baugh v. U. S., supra.

54. U.S.—U. S. v. Di Carlo, C.C.A.N.Y., 64 F.2d 15—U. S. v. Drexel, C.C.A.N.Y., 56 F.2d 588—Lawrence v. U. S., C.C.A.Ill., 56 F.2d 555, certiorari denied 52 S.Ct. 646, 286 U.S. 565, 76 L.Ed. 1297—Overby v. U. S., C.C.A.Ind., 23 F.2d 908—Ingram v. U. S., C.C.A.Okl., 5 F.2d 940.

55. U.S.—Chapman v. U. S., C.C.A.Tex., 10 F.2d 124, certiorari denied 46 S.Ct. 482, 271 U.S. 667, 70 L.Ed. 1141.

56. U.S.—McAdams v. U. S., C.C.A.Ark., 74 F.2d 37.

In accordance with general rules, the court should give full and accurate instructions applicable to the case,⁵⁶ but is not required to charge propositions, however correctly stated, unless the evidence before the jury justifies them.⁵⁷ The court should instruct the jury as to the essential elements of the offense charged,⁵⁸ but it is unnecessary to separate, distinguish, and emphasize each element of the offense.⁵⁹ Instructions as to the degree, quantity, or weight of evidence required to convict⁶⁰ and the duty of the jury in weighing and considering the evidence⁶¹ should be in accordance with the rules of law governing such questions. The court should not give instructions which are misleading,⁶² but the charge is to be judged as a whole, and not by some incidental statement which, taken by itself, might be misleading.⁶³ Requested instructions are properly refused where they do not state the law correctly,⁶⁴ or where they unduly accentuate and give prominence to particular issues or defenses,⁶⁵ or where they are sufficiently covered by the other charges given.⁶⁶

Instructions held proper or not erroneous

U.S.—Overby v. U. S., C.C.A.Ind., 23 F.2d 908.

42 C.J. p 1408 note 42 [a].

57. U.S.—Grace v. U. S., C.C.A.Ia., 4 F.2d 658, certiorari denied 45 S.Ct. 637, 268 U.S. 702, 69 L.Ed. 1165.

42 C.J. p 1408 note 43

58. Instructions held properly to define offense of receiving a stolen automobile.—Winter v. U. S., C.C.A.S.D., 13 F.2d 53.

59. U.S.—Winter v. U. S., supra.

Instructions held correct

U.S.—Winter v. U. S., supra—Pearlman v. U. S., C.C.A.Cal., 10 F.2d 460.

Instructions held proper or not erroneous

U.S.—Winter v. U. S., C.C.A.S.D., 13 F.2d 53—Pearlman v. U. S., C.C.A.Cal., 10 F.2d 460—York v. U. S., C.C.A.Tenn., 299 F. 778.

62. Instructions held not misleading U.S.—Kelly v. U. S., C.C.A.S.C., 277 F. 405.

63. U.S.—Kelly v. U. S., supra.

64. U.S.—Whitaker v. U. S., C.C.A.Cal., 5 F.2d 546, certiorari denied 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

65. U.S.—Winter v. U. S., C.C.A.S.D., 13 F.2d 53—Grace v. U. S., C.C.A.Ia., 4 F.2d 658, certiorari denied 45 S.Ct. 637, 268 U.S. 702, 69 L.Ed. 1165.

66. U.S.—Winter v. U. S., C.C.A.S.D., 13 F.2d 53.

42 C.J. p 1409 note 52.

Definition of terms. Where the court undertakes to define the terms used in the statute, it should give a correct definition.⁶⁷

§ 709. — Verdict and Findings

In a prosecution for violation of a federal statute relating to the interstate transportation, sale, or receipt of stolen motor vehicles, general rules usually apply to the verdict.

Where the jury return a general verdict of guilty, defendant is thereby convicted of all the acts charged in the count,⁶⁸ and, if one of the acts so charged is such that accused could not be punished for it, as where he has already been convicted for its commission, the charge of such act may be ignored and treated as surplusage, and the verdict treated as one of guilty of the remainder of the acts charged in the count.⁶⁹ Since the provisions define distinct offenses, a verdict of guilty on a count charging interstate transportation is not inconsistent with a verdict of guilty on another count of the indictment charging the selling, storing, or concealment of the same vehicle.⁷⁰ It is within the province of the court to have a verdict corrected to conform to the actual finding of the jury, either in open court or by allowing the jury to retire.⁷¹

§ 710. — Judgment, Sentence, and Punishment

General rules usually apply as to the form and sufficiency of the sentence after conviction.

General rules usually apply as to the form and sufficiency of the sentence after a conviction.⁷² Distinct and separate penalties are provided for each of the two offenses defined,⁷³ and either or both penalties may be inflicted on a person who is found guilty of both offenses.⁷⁴ Since there is no provision which prescribes the district or prison in which one convicted of its violation shall serve his sentence, such person may be sentenced to a federal penitentiary outside the districts in which the stolen vehicle was transported.⁷⁵

§ 711. — Appeal and Error

The review of a judgment of conviction for violation of a federal statute relating to the interstate transportation, sale, or receipt of a stolen motor vehicle is governed by the general rules.

A judgment will not be reversed for error which was not harmful or prejudicial to any substantial rights of accused.⁷⁶ Where the sentence of defendant is no greater than could have been imposed on the first count of an indictment, it is unnecessary to inquire whether the evidence supports the verdict on the other counts.⁷⁷

§ 712. Using Prohibited Way

It may be an offense to violate regulations prohibiting the use of motor vehicles upon certain highways, parkways, or streets.

It may be an offense to violate regulations prohibiting the use of motor vehicles upon certain highways, parkways, or streets.⁷⁸

67. U.S.—Whitaker v. U. S., C.C.A. Cal., 5 F.2d 546, certiorari denied 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

42 C.J. p 1409 note 53.

68. U.S.—U. S. v. Hampden, D.C. Mich., 294 F. 345.

69. U.S.—U. S. v. Hampden, *supra*. 42 C.J. p 1409 note 55.

70. U.S.—York v. U. S., C.C.A.Tenn., 299 F. 778.

71. U.S.—Grace v. U. S., C.C.A.La., 4 F.2d 658, certiorari denied 45 S.Ct. 637, 268 U.S. 702, 69 L.Ed. 1165.

72. **Stating or identifying crime**

An order of sentence, reciting title and number of case and date of order and stating that defendant was sentenced to be committed to attorney general's custody for confinement in penitentiary for five years, was sufficient, even though not stating or identifying crime of transporting stolen automobile for which sentence was entered.—*In re Edwards*, C.C.A.Mo., 106 F.2d 537.

73. U.S.—*Jackson v. Hudspeth*, C.C.A.Kan., 111 F.2d 128—U. S. v. Mathues, C.C.A.Pa., 9 F.2d 913.

74. U.S.—*Madsen v. U. S.*, C.C.A.Kan., 165 F.2d 507—*Langston v. U. S.*, C.C.A.Ark., 153 F.2d 840—*Lindsay v. U. S.*, C.C.A.Okl., 131 F.2d 980, certiorari denied 63 S.Ct. 1316, 319 U.S. 763, 87 L.Ed. 1711—*Jackson v. Hudspeth*, C.C.A.Kan., 111 F.2d 128.

42 C.J. p 1405 note 55.

Sentence held not void or excessive

While two counts of information, charging statutory offenses of transporting stolen automobile in interstate commerce and receiving and concealing such automobile respectively, stated separate offenses, so that court should have imposed separate sentences on each count, single sentence of seven years' imprisonment on both counts after plea of guilty was neither void nor excessive, and single sentence, not exceeding aggregate of permissible separate sentences, is valid.—*Jackson v. Hudspeth*, *supra*.

75. U.S.—*Whitaker v. Biddle*, D.C.Kan., 10 F.2d 372—U. S. v. Mathues, C.C.A.Pa., 9 F.2d 913.

76. U.S.—*Brooks v. U. S.*, S.D., 45

S.Ct. 345, 267 U.S. 432, 69 L.Ed. 669, 37 A.L.R. 1407.

42 C.J. p 1409 note 63.

77. U.S.—*Chapman v. U. S.*, C.C.A.Tex., 10 F.2d 124, certiorari denied 46 S.Ct. 482, 271 U.S. 667, 70 L.Ed. 1141.

78. N.Y.—*People v. LaFrantz*, 69 N.Y.S.2d 614, 188 Misc. 989.

Pa.—Commonwealth v. Kennedy, 195 A. 770, 129 Pa.Super. 149.

42 C.J. p 1409 note 65.

Exclusion of tow trucks from parkway

(1) The regulation of park commissioner that no towing should be done upon a parkway except that in case of breakdown a disabled vehicle might be towed to nearest exit but only by tow truck acting under permit from commissioner is presumptively valid and does not contravene vehicle and traffic law, and is reasonable.—*People v. LaFrantz*, 69 N.Y.S.2d 614, 188 Misc. 989.

(2) The sections of the traffic regulations which prohibited generally use of parkways by commercial vehicles and transaction of unlicensed

§ 713. Wrongful Removal of Parts

Under some statutes, it is an offense, unlawfully and without authority from the owner, to remove from a motor vehicle certain specified parts thereof, or any other part or parts attached to the motor vehicle which are necessary in the use, control, repair, or operation thereof.

Under some statutes, it is a penal offense for one, maliciously or willfully or with intent to steal and without authority from the owner, to remove from a motor vehicle certain specified parts thereof, or any other part or parts attached to the motor vehicle which are necessary in the use, control, repair, or operation thereof.⁷⁹ Such a statute has been held not superseded by, or in conflict with, another statute which forbids the willful breaking of, injury to, or tampering with, the parts of a motor vehicle,⁸⁰ as it is manifest that parts of a car may be broken, injured, and tampered with without being removed.⁸¹ An information, under such a statute, which charges the removal of any of those things specifically named therein need not allege that such property was necessary to the

use, control, repair, or operation of the motor vehicle,⁸² but such an allegation is only necessary where the property taken is some part of the automobile which is not specifically mentioned in the statute.⁸³

§ 714. Other Offenses

- a. Parking
- b. Right of way
- c. Stop signs or signals
- d. Miscellaneous

a. Parking

It is an offense, under some statutes or ordinances, to violate regulations with respect to parking motor vehicles upon the highways and streets.

It is an offense, under some statutes or ordinances, to violate regulations with respect to parking motor vehicles upon the highways and streets.⁸⁴ While such an offense has been held not to be a "crime" in the strict sense of the term,⁸⁵ it may be

business upon parkways are required to be read in conjunction with the section relating to towing and projecting articles, and the subdivision of the traffic regulations providing that, in case of breakdown, a disabled vehicle may be towed to the nearest park exit, included by necessary implication permission for operation of a towing truck to and from the nearest exit, and subdivision providing that no person shall operate in a park a vehicle containing an object projecting or hanging outside or on top thereof, did not negative the implication.—*People v. Mann*, 48 N.E.2d 274, 290 N.Y. 89.

Use held not criminal

Unauthorized use of another's motor vehicle on premises formerly public way is not criminal.—*Commonwealth v. Clancy*, 158 N.E. 758, 261 Mass. 345.

79. *Tex.—Eakens v. State*, 7 S.W.2d 84, 110 Tex.Cr. 5.

Larceny of motor vehicle or accessories see Larceny § 4
Taking accessories without consent of owner see supra § 700.

A lienholder has been held not an owner under the statute.—*Cano v. State*, 15 S.W.2d 626, 112 Tex.Cr. 181.

Affidavit held sufficient

Ohio.—*Hanus v. State*, 163 N.E. 583, 30 Ohio App. 87.

Issues, proof, and variance

Evidence of removal of lug holding spare tire was erroneously admitted as variance with allegation charging attempt to remove fastenings of automobile wheel.—*Eakens v. State*, 7 S.W.2d 84, 110 Tex.Cr. 5.

80. *Tex.—Duffield v. State*, 282 S.W. 807, 103 Tex.Cr. 631.—*Acton v. State*, 282 S.W. 805, 104 Tex.Cr. 75. Tampering with parts of motor vehicle see supra § 673.

81. *Tex.—Acton v. State*, supra.

82. *Tex.—Eakens v. State*, 7 S.W.2d 84, 110 Tex.Cr. 5.
42 C.J. p 1410 note 73.

83. *Tex.—Eakens v. State*, supra.—*Acton v. State*, 282 S.W. 805, 104 Tex.Cr. 75.

84. *Del.—State v. Shaw*, 192 A. 610, 8 W.W.Harr. 352.
Ill.—*City of Chicago v. Crane*, 49 N.E.2d 802, 319 Ill.App. 623.
N.J.—*England v. Township Committee of Millburn*, 5 A.2d 782, 122 N.J.Law 462.

Pa.—*Commonwealth v. Leavitt*, 36 Pa.Dist. & Co. 126, 31 Mun.L.R. 91.—*Commonwealth v. Hill*, Quar. Sess., 18 Wash.Co. 185.

Highways in incorporated cities and towns

A motorist, who parked automobile upon public highway within residential district of incorporated town with unobstructed width of only thirteen feet upon main traveled portion of highway, was guilty of statutory offense of parking automobile without leaving unobstructed width of fifteen feet upon main traveled portion of highway as against contention that statutory prohibition did not apply to highways in incorporated cities and towns.—*State v. Shaw*, 192 A. 610, 8 W.W.Harr., Del., 352.

Particular regulations

(1) Double parking.—*People v.*

Baxter, 32 N.Y.S.2d 320, motion denied 32 N.Y.S.2d 325, affirmed 36 N.Y.S.2d 1020, 178 Misc. 625, appeal dismissed 37 N.Y.S.2d 489, 264 App.Div. 961.

(2) Parking for purpose of selling and delivering goods to consumer.—*England v. Township Committee of Millburn*, 5 A.2d 782, 122 N.J.Law 462.

(3) Parking in loading zone.—*People v. Baxter*, supra.

(4) Parking meters.—*People v. Ackert*, 63 N.Y.S.2d 118, 187 Misc. 67.—*People v. Baxter*, supra.

(5) Restricting parking time.—*State v. Sweeney*, 5 A.2d 41, 90 N.H. 127.

(6) All-night parking.—*Commonwealth v. Hanley*, 34 Pa.Dist. & Co. 492, 31 Mun.L.R. 156.

Defenses

(1) Violation of ordinance prohibiting double parking by others was no justification or defense on part of motorist who had double-parked in violation of ordinance, where there was no evidence that other violators were not tagged.—*People v. Baxter*, 32 N.Y.S.2d 320, motion denied 32 N.Y.S.2d 325, affirmed 36 N.Y.S.2d 1020, 178 Misc. 625, appeal dismissed 37 N.Y.S.2d 489, 264 App.Div. 961.

(2) The alleged fact that double parking by defendant did not interfere with use of highway was not a defense in prosecution for violation of double parking ordinance.—*People v. Baxter*, supra.

85. N.Y.—*People v. Lewis*, 3 N.Y.S.2d 508, 167 Misc. 139.—*Breland v. Gray*, 37 N.Y.S.2d 291.

punishable by a fine or imprisonment, or both.⁸⁶ Such statutes or ordinances have usually been held valid and enforceable⁸⁷ provided they are not unreasonable.⁸⁸ General rules apply as to the construction of such statutes and ordinances.⁸⁹

Intent or guilty knowledge. Whether or not intent or guilty knowledge is an essential element of the offense depends on the terms of the particular statute or ordinance involved and its purpose and design,⁹⁰ and, under some statutes or ordinances, intent or guilty knowledge is not an element of the offense.⁹¹

86. N.Y.—*People v. Lewis*, 3 N.Y.S. 2d 508, 167 Misc. 139.

87. Ill.—*City of Chicago v. McKinley*, 176 N.E. 261, 344 Ill. 297.

Mass.—*Commonwealth v. Ober*, 189 N.E. 601, 286 Mass. 25.

Validity of parking regulations generally see *supra* § 28.

Posting of signs

Under some statutes, a municipal ordinance with respect to parking is not binding and enforceable unless signs are posted in accordance with statute.

Pa.—*Commonwealth v. Hanley*, 34 Pa. Dist. & Co. 492, 31 Mun.L.R. 156

—*Commonwealth v. Moore*, Quar. Sess., 46 Dauph.Co. 217.

Vt.—*State v. Noyes*, 180 A. 893, 107 Vt. 441.

Publication

Publication in pamphlet, among proceedings of city council for the month, of ordinance limiting parking time of automobiles upon city streets was held not to comply with statute, so as to authorize conviction for violations of ordinance.—*City of Des Moines v. Miller*, 259 N.W. 205, 219 Iowa 632.

88. Ill.—*City of Chicago v. McKinley*, 176 N.E. 261, 344 Ill. 297.

Iowa.—*Brodkey v. Sioux City*, 291 N.W. 171, 229 Iowa 1291, modified on other grounds 296 N.W. 352, 229 Iowa 1291.

Ohio.—*Burke v. Cincinnati*, 27 Ohio N.P.N.S., 589.

Ordinance held not reasonable

Ill.—*Haggenjos v. City of Chicago*, 168 N.E. 661, 336 Ill. 573.

89. Ill.—*Haggenjos v. City of Chicago*, *supra*.

Pa.—*Commonwealth v. Moore*, Quar. Sess., 46 Dauph.Co. 217.

Ordinary meaning of words

Ill.—*Haggenjos v. City of Chicago*, 168 N.E. 661, 336 Ill. 573.

90. Cal.—*People v. Forbath*, 42 P.2d 108, 5 Cal.App.2d Supp. 767.

Mass.—*Commonwealth v. Ober*, 189 N.E. 601, 286 Mass. 25.

91. Mass.—*Commonwealth v. Ober*, *supra*.

N.Y.—*People v. Baxter*, 32 N.Y.S.2d

320, motion denied 32 N.Y.S.2d 325, affirmed 36 N.Y.S.2d 1020, 178 Misc. 625, appeal dismissed 37 N.Y.S.2d 489, 264 App.Div. 961.

92. Ill.—*City of Chicago v. Crane*, 49 N.E.2d 802, 319 Ill. App. 623.

93. Ill.—*City of Chicago v. Crane*, *supra*.

94. N.Y.—*City of Rochester v. Tutty*, 6 N.Y.S.2d 975, 169 Misc. 358.

Deputy sheriff

In prosecution for violation of traffic ordinance as to parking of vehicles, fact that defendant was deputy sheriff and used automobile on official business and that no other parking facilities were afforded for the car was held no defense, where defendant was civil deputy, not on police duty, and there was no emergency and he parked car upon street for personal convenience.—*People v. Schwartz*, 192 N.E. 588, 265 N.Y. 310.

95. N.Y.—*City of Rochester v. Tutty*, 6 N.Y.S.2d 975, 169 Misc. 358.

96. Pa.—*Commonwealth v. Hess*, 43 Pa. Dist. & Co. 353, 57 Montg. 391, 33 Mun.L.R. 33.

Jurisdiction

(1) Where, after ticket was attached to automobile for parking near hydrant, a complaint was filed, a warrant issued, and owner of automobile was taken on the warrant and appeared in trial of the case, court had jurisdiction of owner.—*City of Chicago v. Crane*, 49 N.E.2d 802, 319 Ill. App. 623.

(2) Where warrants under which motorist was arrested at night for violation of parking ordinances were valid warrants for execution except in the nighttime or on Sunday, the city court acquired jurisdiction of the person of the motorist when he was brought before the court charged with infractions of the parking ordinance, regardless of the legality of the arrest, and, hence, the manner of the arrest did not affect the validity of motorist's trial and convictions.—*People v. Baxter*, 36 N.Y.S.2d 1020, 178 Misc. 625, appeal dismissed 37 N.Y.S.2d 489, 264 App. Div. 961.

Persons liable. The owner of a motor vehicle is liable for a violation of a parking regulation,⁹² even though he did not park or permit parking of the motor vehicle.⁹³ Public officials,⁹⁴ such as a probation officer,⁹⁵ have been held not exempt from liability for a violation of such a regulation.

Prosecution. In the absence of special statutory provisions, general rules usually apply in a prosecution for a violation of a parking regulation⁹⁶ with respect to the charge or complaint,⁹⁷ presumptions,⁹⁸ and, likewise such general rules

(3) The traffic magistrate's court could proceed against motorist charged with parking in violation of traffic regulations adopted by police commissioner, under provision of city charter authorizing commissioner to make such rules for conduct of traffic as he may deem necessary.—*People v. Simon*, 60 N.Y.S.2d 740, 186 Misc. 1019.

Matters not considered

In prosecution for violating double-parking ordinance, whether double parking interfered with traffic as a fact is not a question for court to consider.—*People v. Baxter*, 32 N.Y.S.2d 320, motion denied 32 N.Y.S.2d 325, affirmed 36 N.Y.S.2d 1020, 178 Misc. 625, appeal dismissed 37 N.Y.S.2d 489, 264 App.Div. 961.

97. Complaint held sufficient

Ind.—*Rainey v. City of Indianapolis*, 68 N.E.2d 515, 224 Ind. 506.

Complaint held insufficient

Vt.—*State v. Noyes*, 180 A. 893, 107 Vt. 441.

Warrant held insufficient

N.C.—*State v. Smith*, 189 S.E. 509, 211 N.C. 206.

98. Particular presumptions

(1) The statutory *prima facie* presumption that registered owner of illegally parked motor vehicle was person who parked it is valid.—*People v. Bigman*, 100 P.2d 370, 38 Cal. App.2d Supp. 773.

(2) In prosecution for violation of traffic regulation in parking overtime, proof that automobile in question was found parked at the time and places charged for the length of time charged in the complaint, and that defendant was the licensed owner of such automobile made out a *prima facie* case for conviction, because, in the absence of proof to the contrary, it would be presumed that the automobile was controlled by defendant, and that he personally violated the regulation.—*People v. Rubin*, 31 N.E.2d 501, 284 N.Y. 392.

(3) Parking signs erected along public streets are presumed to be lawfully maintained.—*City of Ro-*

apply with respect to burden of proof,⁹⁹ weight and sufficiency of the evidence,¹ and review.²

b. Right of Way

It may be an offense, under some statutes or ordinances, for an operator of a motor vehicle to violate regulations as to the right of way.

It may be an offense, under some statutes or ordi-

nances, for an operator of a motor vehicle to violate regulations as to the right of way,³ such as a right of way to which pedestrians are entitled under particular conditions.⁴ In the absence of special statutory provisions, general rules usually apply in a prosecution for a violation of a right of way regulation,⁵ as with respect to the charge or complaint,⁶ and the evidence.⁷

chester v. Tutty, 6 N.Y.S.2d 975, 169 Misc. 358.

99. Burden on defendant

(1) Defendant, charged with parking in violation of traffic regulation adopted by police commissioner pursuant to proclamations issued by chief city magistrate, who claimed that no fine could be imposed under last two of three proclamations because of failure to recite that majority of magistrates consented to proclamations, was required to prove that such proclamations were not in fact consented to by majority of city magistrates.—People v. Simon, 60 N.Y.S.2d 740, 186 Misc. 1049.

(2) In proceeding for violation of automobile parking regulation, it was held that on introduction of evidence of ownership and illegal parking prosecution may rest on presumption of guilt, making it incumbent on defendant to produce evidence that would negative presumption, since presumptions need not always be provided for by statute.—People v. Marchetti, 276 N.Y.S. 708, 154 Misc. 147.

Knowledge or intent

In prosecution for overtime parking under ordinance, people were held not required to prove that registered owner knew of ordinance or consciously intended to permit violation thereof.—People v. Forbath, 42 P.2d 108, 5 Cal.App.2d Supp. 767.

1. Ill.—City of Chicago v. Crane, 49 N.E.2d 802, 319 Ill.App. 623.

Pa.—Commonwealth v. Smith, 60 Pa. Dist. & Co. 520, 39 Berks Co. 289.—Commonwealth v. Foreman Co., 89 Pittsb.Leg.J. 231.

R.I.—State v. Morgan, 48 A.2d 248, 72 R.I. 101.

Evidence held sufficient to sustain conviction

Ohio.—Burke v. Cincinnati, 27 Ohio N.P.,N.S., 589.

Evidence held insufficient to show violation of regulation

N.Y.—People on Complaint of Flaherty v. Registered Owner of Motor Vehicle Bearing License 5Y-1809 N.Y., 297 N.Y.S. 174, 162 Misc. 928.

2. Mo.—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo.App. 167.

R.I.—State v. Morgan, 48 A.2d 248, 72 R.I. 101.

Directing acquittal error

In prosecution for violation of city parking ordinance, wherein parties

filed stipulation showing that defendant's automobile remained parked upon streets longer than allowed by law, and ordinance provided that ownership of automobile should be prima facie evidence of owner's authority or permission to violate ordinance, directing an acquittal was error.—Commonwealth v. Kroger, 122 S.W.2d 1006, 276 Ky. 20.

3. Ohio—City of Columbus v. Rader, App., 78 N.E.2d 424.

Danger of collision

As respects question when one must yield right of way, questions of right of way arise between two users of highway only when there is danger of a collision between them if both proceed on their respective ways without delay.—People v. McLachlan, 93 P.2d 280, 36 Cal.App.2d Supp. 754.

Intersection

Motorist has statutory right of way at intersection only if he is driving in a lawful manner at time of entering intersection, and motorist could not be convicted of violating ordinance for failure to yield right of way to automobile which approached from right but which entered intersection to left of center and thus was not proceeding in a lawful manner.—City of Columbus v. Rader, Ohio App., 78 N.E.2d 424.

Statute held not to state criminal offense

Ind.—Hargis v. State, 44 N.E.2d 307, 220 Ind. 429.

Iowa.—State v. Brighl, 7 N.W.2d 9, 232 Iowa 1087.

4. Cal.—People v. McLachlan, 93 P.2d 280, 36 Cal.App.2d Supp. 754.

"Right of way" construed

The term "right of way," as used in statute requiring vehicles turning right or left to yield right of way to pedestrians lawfully within intersection or adjacent to crosswalk, does not refer to a duty which pedestrian must exercise but something which may be waived.—People v. Noland, 189 P.2d 84, 83 Cal.App.2d Supp. 819.

Crosswalk

The statute providing that a motorist shall yield right of way to pedestrian on crosswalk does not require motorist to stop before entering crosswalk in all cases, but motorist must stop whenever necessary to discharge his duty, and, when pedestrian crossing roadway on cross-

walk is so far from path of an approaching automobile and proceeding in such manner that no interference between them is reasonably to be expected, motorist need not wait as respects his duty under statute to yield the right of way, and need not anticipate that pedestrian will suddenly change his mind and reverse his course of travel, in absence of circumstances reasonably suggesting such a course, as respects his duty under statute to yield right of way.—People v. McLachlan, 93 P.2d 280, 36 Cal.App.2d Supp. 754

5. Cal.—People v. McLachlan, supra.

Nature of proceeding

Proceeding charging motorist with failure to yield right of way to fire apparatus was held not a criminal action so as to preclude member of fire department from serving process under statute restricting right to serve process to a criminal action arising under laws relating to fires and extinguishment thereof and to fire perils.—People, on Complaint of Timmins v. Springer, 10 N.Y.S.2d 136, 170 Misc. 554.

Jurisdiction

Where defendant appeared in person and by counsel in proceeding wherein he was charged with failure to yield right of way to fire apparatus and to drive to position parallel and close to curb, jurisdiction attached and it could not later be questioned.—People, on Complaint of Timmins v. Springer, supra.

Judgment of conviction reversed

Ohio.—City of Columbus v. Rader, App., 78 N.E.2d 424.

Review

Colo.—Cooper v. City and County of Denver, 143 P.2d 1019, 111 Colo. 540.

6. Ind.—Hargis v. State, 44 N.E.2d 307, 220 Ind. 429.

Ohio.—City of Columbus v. Rader, App., 78 N.E.2d 424.

Affidavit held insufficient

Ind.—Hargis v. State, 44 N.E.2d 307, 220 Ind. 429.

Issues, proof, and variance

Colo.—Cooper v. City and County of Denver, 143 P.2d 1022, 111 Colo. 537.—Cooper v. City and County of Denver, 143 P.2d 1019, 111 Colo. 540.

7. Burden of proof

Ohio.—City of Columbus v. Rader, App., 78 N.E.2d 424.

c. Stop Signs or Signals

It is an offense, under some statutes or ordinances, for an operator of a motor vehicle to violate regulations with respect to stop signs or signals.

It is an offense, under some statutes or ordinances, for an operator of a motor vehicle to violate regulations with respect to stop signs or signals.⁸ In the absence of special statutory provisions, general rules usually apply in a prosecution for such an offense,⁹ as with respect to the infor-

mation or complaint,¹⁰ evidence,¹¹ and punishment.¹²

d. Miscellaneous

Regulations with respect to other offenses relating to motor vehicles have been considered by the courts, and particular conduct has been held to constitute or not to constitute a violation thereof.

In addition to the offenses, as considered supra § 596 et seq, there have been cases relating to other offenses involving motor vehicles.¹³ Thus, there

Evidence held sufficient to sustain conviction.

Colo.—Cooper v. City and County of Denver, 143 P.2d 1019, 111 Colo. 540.

N.Y.—People, on Complaint of Timmins v. Springer, 10 N.Y.S.2d 136, 170 Misc. 554.

3. Cal.—People v. Selbares, 107 P.2d 506, 41 Cal App 2d Supp. 962.

N.Y.—People v. Ubertini, 51 N.Y.S.2d 62, 182 Misc. 634—People v. Lindner, 234 N.Y.S. 89, 133 Misc. 728.

Pa.—Commonwealth v. Smith, 57 Pa. Dist. & Co. 396—Commonwealth v. Wagner, Quar.Sess., 58 Montg.Co. 108.

Absence of traffic

Motorist driving through intersection without stopping at stop sign as required by ordinance violated the ordinance, although uncontradicted evidence showed that there was no traffic in intersection or moving toward it or in sight that could be regulated or endangered, where ordinance made it motorist's imperative duty to bring automobile to full stop irrespective of traffic—City of Des Moines v. Pugh, 2 N.W.2d 754, 231 Iowa 1283.

Ambulance

Ordinance requiring all except police and fire department vehicles to stop at street intersections where red light is showing was held applicable to ambulance driven in response to emergency call, it being immaterial that street upon which ambulance was driven was designated as part of state highway system.—Thompson v. City of Memphis, 66 S.W.2d 990, 167 Tenn. 75.

Erection of proper signs

(1) Under some statutes, a regulation is not enforceable where proper stop signs have not been erected.—Commonwealth v. Bieber, 44 Pa.Dist. & Co. 193, 58 Montg.Co. 53, 56 York Leg.Rec. 6—Commonwealth v. Spang, 33 Pa.Dist. & Co. 641, 30 Mun.L.R. 191.

(2) Sign held properly erected for daytime driving.—Commonwealth v. Bieber, supra.

Operation of signal

Where city officials in control of mechanically operated traffic control signal operated by city in public

street determined that it should be operated for only a part of each day, a motorist who drove past signal at a time when officials determined that it should not be in operation could not be convicted for failure to stop, notwithstanding semaphore arm of signal directed him to "Stop," it appearing that signal was controlled by an electric clock and deviations from established schedule could be attributed only to some mechanical defect or irregularity in control mechanism.—People v. Selbares, 107 P.2d 506, 41 Cal App.2d Supp. 962.

9. Commencement of proceedings

Prosecution for driving through stop sign in violation of ordinance was not "commenced" by summons which was handed to defendant for purpose of notifying him that he had violated an ordinance but was commenced by information filed in municipal court, as against contention that action was commenced by summons which was a malicious threat to extort money from defendant, under pretense of acting in an official capacity and that municipal court acquired no jurisdiction—City of Des Moines v. Pugh, 2 N.W.2d 754, 231 Iowa 1283.

Jurisdiction

Since prohibited passing of traffic signal was misdemeanor, it was held not triable in city magistrate's court.—People v. Lindner, 234 N.Y.S. 89, 133 Misc. 728.

10. N.Y.—People v. Lindner, supra. Ohio.—Village of Englewood v. Betlis, 30 Ohio N.P.,N.S., 491.

Information held not fatally defective

Information charging violation of ordinance by driving through stop sign, entitled "city of Des Moines," and having directly underneath the words "State of Iowa" was not fatally defective as joining both city of Des Moines and state as plaintiffs and in alleging the violation of both the ordinance and statute and as violating constitutional provision that style of all process shall be "the State of Iowa" and that all prosecutions shall be conducted in name and by authority of the state—City of Des Moines v. Pugh, 2 N.W.2d 754, 231 Iowa 1283.

Information or complaint held insufficient

Pa.—Commonwealth v. Smith, 57 Pa. Dist. & Co. 396—Commonwealth v. Fox, 52 Pa.Dist. & Co. 618, 49 Lanc. L. Rev. 225—Commonwealth v. Bennett, 32 Pa.Dist. & Co. 542.

11. Iowa—City of Des Moines v. Pugh, 2 N.W.2d 754, 231 Iowa 1283. Pa.—Commonwealth v. Wagner, Quar.Sess., 58 Montg.Co. 108.

Admissibility

In prosecution for failure to stop at stop sign, evidence that defendant was driving fifty miles per hour for a distance of two blocks before he reached stop sign was competent as tending to show commission of crime charged.—People v. Wedge, 48 N.E. 2d 943, 383 Ill. 217.

Evidence held sufficient to sustain conviction

Ill.—People v. Wedge, supra. Iowa—State v. Wilson, 269 N.W. 205, 222 Iowa 572.

N.Y.—People v. Ubertini, 51 N.Y.S. 2d 62, 182 Misc. 634.

Evidence held insufficient to sustain conviction

Okl.—Black v. City of Pawhuska, 287 P. 737, 47 Okl. Cr. 23.

12. Fine held excessive

N.Y.—People v. Ubertini, 51 N.Y.S. 2d 62, 182 Misc. 634.

13. Changing name on operator's permit

D.C.—Dorsey v. Peak, 24 F.2d 892, 58 App.D.C. 64.

Fraud in application for registration or certificate of title

(1) Statute making it a felony to fraudulently use a false or fictitious name in making application for registration of a vehicle or a certificate of title was intended not only to protect sellers of automobile, but also to enable police to trace from license plate the true owner of an automobile, and word "fraudulent" was inserted so that persons who habitually use a fixed pseudonym would not be guilty of a felony, and was intended to require proof that accused gave wrong name with bad motive, so that the mere use of a name other than own does not of it-

have been cases involving the violation of regulations with respect to advertising,¹⁴ noise,¹⁵ width¹⁶ or equipment¹⁷ or inspection¹⁸ of motor vehicles, the occupancy of the driver's seat,¹⁹ starting, stopping, or turning of motor vehicles,²⁰ or setting in

motion or interfering with a parked vehicle without the authority of the driver,²¹ and the emission of smoke, gas, or other substances.²²

It is also an offense, under some statutes or ordi-

self make out prima facie case of bad motive.—*State v. Bland*, 73 P.2d 964, 93 Utah 384.

(2) Use of fictitious name on application for automobile registration was held fraudulent, and punishable under statute prohibiting such practice, even though accused used such name in business and private affairs, where accused did not state in application for initial license that name he gave was of same person as was real name which was on list of revoked licenses, and where accused gave incorrect address and falsely stated his license had never been revoked.—*State v. Librizzi*, 188 A. 511, 14 N.J.Misc. 904.

(3) Evidence held insufficient to sustain conviction.—*State v. Bland*, supra.

Pedestrians crossing road against signal

Cal.—*People v. Hawkins*, 124 P.2d 691, 51 Cal.App.2d Supp. 779.

Tires without serial numbers

(1) Provision of statute prohibiting possession and sale of motor vehicle tires on which manufacturer's number has been destroyed has been held within police power, and not unconstitutional.—*Star Square Auto Supply Co. v. Gerk*, 30 S.W.2d 447, 325 Mo. 968.

(2) In a prosecution for possessing automobile tires on which numbers had been mutilated, instruction that, if accused kept automobile tire in possession with knowledge of mutilation of serial number, he would be guilty, was held not erroneous.—*Hall v. State*, 286 S.W. 1026, 171 Ark. 787.

14. N.Y.—*People v. Railway Exp. Agency*, 67 N.Y.S.2d 732, 188 Misc. 342, affirmed 77 N.E.2d 13, 297 N.Y. 703, reargument denied 77 N.E.2d 794, 297 N.Y. 783.

Authority to adopt

Traffic regulation of city providing that no person shall operate, or cause to be operated, upon any street, an advertising vehicle except where vehicles are engaged in usual business of owner and not mainly for advertising, was within authority of police commissioner to adopt under charter provision giving police commissioner power to regulate movement of vehicular traffic for convenience of public and for proper protection of human life and health.—*People v. Railway Exp. Agency*, supra.

Regulation held not unreasonable
Neb.—*State v. Hind*, 10 N.W.2d 258, 143 Neb. 479.

N.Y.—*People v. Railway Exp. Agency*, 67 N.Y.S.2d 732, 188 Misc. 342, affirmed 77 N.E.2d 13, 297 N.Y. 703, reargument denied 77 N.E.2d 794, 297 N.Y. 783.

Burden of proof

Where city ordinance prohibited operation of advertising vehicles upon city streets, but excluded from prohibition vehicles being operated in usual business or regular work of owner, when not used primarily for advertising purposes, it was incumbent on state to establish by evidence that defendant was not within the exclusionary portion of ordinance.—*State v. Hind*, 10 N.W.2d 258, 143 Neb. 479.

15. Muffler cutout

Refusal to submit issue of lack of criminal intent and guilty knowledge in driving automobile with muffler cutout, and charge to convict if defendant drove car with cutout, was held error under evidence.—*Kellum v. State*, 7 S.W.2d 1078, 110 Tex.Cr. 260.

Amplifying device

Ordinance prohibiting use or operation of amplifying device in front or outside of, or in or through, window of any building, "place," or premises, without license, was held inapplicable to vehicle in motion.—*People v. Weisblatt*, 258 N.Y.S. 687, 144 Misc. 297.

16. N.Y.—*People v. Bedell*, 167 N.E. 519, 251 N.Y. 415.

17. Pa.—*Commonwealth v. Zehner*, 21 Pa.Dist. & Co. 121—*Commonwealth v. Freed*, 20 Pa.Dist. & Co. 298—*Commonwealth v. Horowitz*, 19 Pa.Dist. & Co. 150, 43 Lanc.L. Rev. 347.

Brakes see supra § 640.

Lights see supra § 608.

Mirrors

Pa.—*Commonwealth v. Horowitz*, supra.

18. Failure to display inspection sticker

Pa.—*Commonwealth v. Gilroy*, 40 Pa. Dist. & Co. 566

It is not an offense for an official inspection station licensee to refuse to turn over his certificate of appointment and all inspection stickers to the secretary of revenue, on the latter's arbitrary demand; and a summary conviction for such an offense will be reversed on appeal, especially where it is apparent that the

secretary's revocation of defendant's license was improper.—*Commonwealth v. Price*, 39 Pa.Dist. & Co. 133, 2 Monroe L.R. 87.

19. Ohio.—*Hoffman v. City of Cincinnati*, 14 Ohio Supp. 12.

Construction

Ordinance prohibiting the occupancy of driver's seat of a vehicle in such a manner as to interfere with proper control thereof is a criminal ordinance, and must be strictly, yet reasonably, construed, and the mere presence of four persons in front seat of automobile does not constitute a violation of ordinance prohibiting occupancy of driver's seat in such a manner as to interfere with proper control of vehicle.—*Hoffman v. City of Cincinnati*, supra.

20. Ohio.—*State v. Saam*, Com.Pl., 75 N.E.2d 824.

Information

Tex.—*Johnson v. State*, 73 S.W.2d 853, 126 Tex.Cr. 389.

Evidence held sufficient

Ohio.—*State v. Saam*, Com.Pl., 75 N.E.2d 824

21. N.Y.—*People v. Propp*, 31 N.E.2d 915, 284 N.Y. 491

Okl.—*Lepley v. State*, 103 P.2d 568, 69 Okl.Cr. 379, 146 A.L.R. 1323.

Statute held not violated

(1) Where defendant used her automobile to push complainant's parked automobile sufficient distance to leave pathway leading from street curb to door of defendant's residence unobstructed, and brakes on complainant's automobile were not released by defendant, defendant could not be convicted for violating statute providing that no person shall set any vehicle in motion without authority of driver, since complainant's automobile was not set in "motion" within the statute.—*People v. Propp*, 31 N.E.2d 915, 284 N.Y. 491.

(2) If title to automobile has not passed under conditional sales contract, no force was used by seller's agent in securing possession of the automobile, and seller was owner of the automobile, agent could not be found guilty of statutory offense of interfering with standing vehicle because of taking possession of automobile parked in the street by buyer.—*Lepley v. State*, 103 P.2d 568, 69 Okl.Cr. 379, 146 A.L.R. 1323.

22. Evidence held insufficient to sustain conviction

N.C.—*State v. Yates*, 179 S.E. 756, 208 N.C. 194.

nances, to hang on to, or ride on the outside or rear end of, any motor vehicle;²³ to refuse to comply with the directions or orders of a police offi-

cer;²⁴ or to sell a motor vehicle on which identification marks or numbers have been destroyed, removed, covered, altered, or defaced.²⁵

XII. GARAGE KEEPERS, REPAIRMEN, VEHICLE LIVERYMEN, AND FILLING STATIONS

A. IN GENERAL

§ 715. Definitions

A garage is a building in which motor vehicles are stored and cared for; and it is public or private accordingly as it is or is not maintained for the accommodation of the public. A parking lot is a lot on which the business of parking automobiles for short periods of time in an open-air location is carried on for the accommodation of the public.

A garage is a building in which motor vehicles are stored and cared for.²⁶

A public garage is a building in which for compensation motor vehicles are stored primarily for safe-keeping and not merely as an incident to being repaired.²⁷ A public service station, in the automobile business, is a place at which the public is served with automobile supplies and repairs.²⁸

A private garage is a structure or building kept for the storage of motorcars by the owners, or certain other persons, but not for the general public.²⁹

23. Pa.—DeGregorio v. Malloy, 52 A. 2d 195, 356 Pa. 511—Harris v. Seavitch, 9 A.2d 375, 336 Pa. 294

24. Mass.—Commonwealth v. Flax, 156 N.E. 19, 259 Mass. 117.
Pa.—Commonwealth v. Wagner, Quar Sess., 58 Montg Co 108.
42 C.J. p 1353 note 11.

Information

Iowa—State v. Bethards, 32 N.W. 2d 769.

Evidence

Mass.—Commonwealth v. Flax, 156 N.E. 19, 259 Mass. 117.

Instructions

Mass.—Commonwealth v. Flax, supra.

25. Pa.—Commonwealth v. Unkrich, 16 A.2d 737, 142 Pa Super 591
Possession of such vehicle see supra § 688.

Secret number

The legislature, in enacting statute making sale of automobile on which manufacturer's serial number or engine number has been destroyed, removed, covered, altered, or defaced, with knowledge thereof, a felony, had in mind the numbers that prominently appear on engine and doorjamb of an automobile, which are universally used by those engaged in automobile business and by motor vehicle bureaus, and did not intend to include a number secretly placed on obscure part of an automobile for purpose of aiding in detection of theft—Commonwealth v. Unkrich, supra.

Agent

Export merchant who in good faith, as agent for foreign customer, purchased automobile, the motor number of which was altered for export purposes, did not violate statute prohibiting "sale" of motor vehicle whose original engine number has been altered, since merchant acted as agent in purchasing the automobile, and there was no "sale" by him to

customer within meaning of statute—People, on Complaint of Shanley, v. Stowers, 19 N.Y.S.2d 921, 259 App. Div. 528.

Evidence held insufficient to sustain conviction

Pa.—Commonwealth v. Unkrich, 16 A.2d 737, 142 Pa Super 591.

26. Md.—Legum v. Carlin, 177 A. 287, 168 Md. 191, 99 A.L.R. 536—Montgomery County Motor Co v. State, 127 A. 637, 638, 147 Md. 232
Warehouse as including garage see the C.J.S. title Warehousemen and Safe Depositaries § 1, also 67 C.J. p 443 note 27.

Whether garage is barn, stable, out-house, outbuilding, or other building designated in restrictive covenant in deed see Deeds §§ 164 c (3), 166.

Other definitions

(1) A place for the care and storage of motor vehicles and in which they are kept for hire—Grimes v. State, 200 S.W. 378, 82 Tex Cr. 512—38 C.J. p 73 note 2.

(2) A modern substitute for the ancient livery stable

Md.—Legum v. Carlin, 177 A. 287, 168 Md. 191, 99 A.L.R. 536—Corpus Juris quoted in Montgomery County Motor Co. v. State, 127 A. 637, 638, 147 Md. 232

W.Va.—Corpus Juris quoted in Short v. City of Bluefield, 160 S.E. 562, 563, 111 W.Va. 75.
27 C.J. p 1107 note 19.

(3) A stable for the storage of automobiles or other horseless vehicles.

Md.—Legum v. Carlin, supra—Corpus Juris quoted in Montgomery County Motor Co. v. State, 127 A. 637, 638, 147 Md. 232.

W.Va.—Corpus Juris quoted in Short v. City of Bluefield, 160 S.E. 562, 563, 111 W.Va. 75.
27 C.J. p 1107 note 20.

(4) A station at which motor cars can be sheltered, stored, repaired, cleaned, and made ready for use, also, a place for private storage of a motor car, a stable for motor cars. Tex.—Woods v. Kiersky, Com.App., 14 S.W.2d 825, 828.

W.Va.—Short v. City of Bluefield, 160 S.E. 562, 563, 111 W.Va. 75.
38 C.J. p 73 note 2 [a] (3).

(5) Additional definitions—Short v. City of Bluefield, supra—38 C.J. p 73 note 2 [a] (1), (2)—58 C.J. p 1313 note 4 [a] (1).

Stable is distinguishable in that the word, as ordinarily used, carries the idea not only of a building, but also of the presence of domestic animals.—Riverbank Improvement Co. v. Bancroft, 95 N.E. 216, 209 Mass. 217, 34 L.R.A., N.S., 730, Ann Cas. 1912B 450—58 C.J. p 1313 note 4 [a] (1).

Outbuilding similar to barn distinguished

In view of the purposes to which it is put and its many physical characteristics dissimilar to those of a barn, a garage is not an outbuilding similar to a barn, although it has some physical characteristics similar to those of a barn.—Kasch v. Jorckel, 165 N.E. 366, 30 Ohio App. 404.

Garage is not public highway

N.Y.—Blake v. Salmonson, 67 N.Y.S. 2d 607, 188 Misc. 97.

27. W.Va.—Short v. City of Bluefield, 160 S.E. 562, 111 W.Va. 75.
Livery stable compared and distinguished see Livery-Stable Keepers § 1.

What constitutes public garage within restrictive covenant in deed see Deeds § 165 a.

28. Pa.—Carney v. Penn Oil Co., 140 A. 133, 135, 291 Pa. 371.

29. Tex.—Woods v. Kiersky, Com. App., 14 S.W.2d 825.
50 C.J. p 371 note 82.

A *parking lot* is a lot on which the business of parking automobiles temporarily is conducted for a stipulated rental;³⁰ and the parking-lot business is the business carried on for the accommodation of the public, in providing parking and specialized service facilities for automobiles, for short periods of time, in an open-air location.³¹

A *garage keeper* is one whose business it is to keep automobiles for hire or to keep them stored ready for use or orders.³²

§ 716. Power to Regulate

The business of conducting or operating a public garage or a gasoline filling station is subject to regulation under the police power, as is also the business of renting automobiles without drivers.

Notwithstanding some authority to the contrary,³³ the business of conducting or operating a public garage is considered peculiarly the subject of regulation under the police power³⁴ of the state,³⁵ or the police power granted to a municipality by constitution³⁶ or statute.³⁷ So too, the well-known inconveniences and unusual hazards to the public attending the operation of gasoline filling stations render them peculiarly subject to regulation under the police power.³⁸

Renting motor vehicles without drivers. There is authority both for the view that automobiles hired out without drivers are dedicated to public use so as to be subject to regulation³⁹ and for the view that the business of leasing motor vehicles with-

out drivers to selected customers is not affected with a public interest and the property so employed is not amenable to legislative regulation and control, in the exercise of the police power of the state, in respect of its productivity for the owner's private uses.⁴⁰

A municipality is considered to have power to make reasonable regulations of such business⁴¹ in so far as it is conducted within the limits, and on the streets, of the municipality;⁴² and its power in this respect is not dependent on the operation of the automobiles as common carriers.⁴³ It has been held that the police power of a municipality in this respect is limited only by the extent of the public need for regulation in the promotion of peace, safety, and morals.⁴⁴

Use of streets by wrecker cars. A home-rule city has power to prohibit the use of its streets by the owners of wrecker vehicles and their employees for the purpose of towing wrecked automobiles, clearing wreckage off the streets, and soliciting such business and that of repairing wrecked automobiles.⁴⁵

§ 717. Statutory and Local Regulations in General

Statutes and ordinances authorizing municipal districts to acquire parking spaces to serve the public, prohibiting the parking or operation of private wrecker cars at or near the scene of an automobile accident, or regulating the business of renting automobiles to be driven by the lessees are considered valid.

Other definitions

N.J.—*Trainer v. Calef*, 126 A. 307, 96 N.J.Eq. 671.

30. La.—*State v. Gruber*, 10 So.2d 899, 201 La. 1068.

Public parking place is a kind of garage, and is sometimes referred to as an open-air garage.—*Scully v. Massey*, 17 Pa.Dist. & Co. 363.

31. Colo.—*Bedford v. Johnson*, 78 P. 2d 373, 102 Colo. 203.

32. Md.—*Legum v. Carlin*, 177 A. 287, 168 Md. 191, 99 A.L.R. 536—**Corpus Juris** quoted in *Montgomery County Motor Co. v. State*, 127 A. 637, 638, 147 Md. 232.

27 C.J. p 1107 note 21—38 C.J. p 73 note 6½.

33. N.Y.—*Hoffer v. Schwab*, 213 N.Y. S. 659, 126 Misc. 289.

34. Cal.—*Parker v. Colburn*, 236 P. 921, 196 Cal. 169.

Mass.—*Storer v. Downey*, 102 N.E. 321, 215 Mass. 273.

35. U.S.—*Texas Co. v. City of Tampa*, C.C.A.Fla., 100 F.2d 347.

36. Cal.—*Parker v. Colburn*, 236 P. 921, 196 Cal. 169.

37. N.J.—*Ninth Street Imp. Co. v.*

Ocean City, 100 A. 568, 90 N.J.Law 106.

Municipal regulation of private garage see the C.J.S. title *Municipal Corporations* § 264, also 43 C.J. p 377 notes 43-45.

38. U.S.—*Texas Co. v. City of Tampa*, C.C.A.Fla., 100 F.2d 347.

Ark.—*Van Hovenberg v. Holeman*, 114 S.W.2d 718, 201 Ark. 370.

N.C.—*Shuford v. Town of Waynesville*, 198 S.E. 555, 214 N.C. 135.

Ohio.—*State ex rel. Standard Oil Co. v. Combs*, 194 N.E. 875, 129 Ohio St. 251.

Tex.—*City of San Antonio v. Humble Oil & Refining Co.*, Civ.App., 27 S.W.2d 868, error dismissed.

Municipal regulation see *infra* § 775.

39. Ohio.—*Allen v. City of Cincinnati*, 174 N.E. 795, 37 Ohio App. 339.

40. Pa.—*Hertz v. Drivurself Stations v. Siggins*, 58 A.2d 464, 359 Pa. 25.

41. Ohio.—*Hodge Drive-It-Yourself Co. v. City of Cincinnati*, 175 N.E. 196, 123 Ohio St. 284, 77 A.L.R. 889, affirmed 52 S.Ct. 144, 284 U.S. 335, 76 L.Ed. 323.

Or.—*Covey Drive Yourself & Garage v. City of Portland*, 70 P.2d 566, 157 Or. 117.

Tex.—*Genusa v. City of Houston*, Civ.App., 10 S.W.2d 772.

37 C.J. p 231 note 40 [a]—42 C.J. p 694 notes 13, 14.

42. Tex.—*City of Corpus Christi v. Texas Driverless Co.*, Civ.App., 187 S.W.2d 607, affirmed in part and reversed in part on other grounds 190 S.W.2d 484, 144 Tex. 288.

Maximum fares

Home-rule city has authority to regulate maximum fares to be charged by operators of driverless automobile business.—*City of Corpus Christi v. Texas Driverless Co.*, *supra*.

43. Ohio.—*Hodge Drive-It-Yourself Co. v. City of Cincinnati*, 175 N.E. 196, 123 Ohio St. 284, 77 A.L.R. 889, affirmed 52 S.Ct. 144, 284 U.S. 335, 76 L.Ed. 323.

44. Ohio.—*Hodge Drive-It-Yourself Co. v. City of Cincinnati*, *supra*.

45. Tex.—*City of Dallas v. Harris*, Civ.App., 157 S.W.2d 710, error refused.

Statutes and ordinances held valid include those which classify separately, for purposes of regulation, automobiles kept and used for the purpose of renting them without drivers,⁴⁶ require the owners of such automobiles to submit them for inspection,⁴⁷ make the owner liable for damages caused by the operation of the vehicle to the same extent as the operator would have been liable if he had also been the owner of the vehicle,⁴⁸ or require the owner to file or deposit an insurance policy, surety bond, or cash security, covering the lessee's liability, up to a certain amount, for damages caused by his negligent operation of the vehicle.⁴⁹ However, a statute requiring the filing of a bond or insurance policy has been held invalid where it is applicable only in cities and there are in the state many villages which are as large as, or are larger than, many cities,⁵⁰ and, in the absence of statutory authority therefor, an ordinance which requires the bailor of an automobile for hire to obtain an insurance policy, providing for the payment of any final judgment for damages resulting from the negligent operation of the car by the bailee, the subrogation of the judgment creditor to the bailor's rights against insurer, and the abrogation of the rules and stipulations of the policy as a defense to an action on the policy by any other person, is invalid as an attempt to change the law on the subject of a bailor's liability, without statutory authority therefor.⁵¹

Other measures held valid include legislation authorizing the acquisition by municipal districts of parking spaces to serve the public,⁵² a statute authorizing municipalities to regulate the use of public garages,⁵³ an ordinance relating to the removal

of a motor vehicle abandoned on the street and providing for recovery of the vehicle by the owner on the payment of storage charges,⁵⁴ and ordinances providing for police towing of wrecked automobiles and prohibiting a private person from doing such towing with a wrecker car, or driving a wrecker car to, or parking it at or near, the scene of an automobile accident, or soliciting business connected with the wreck on the streets or sidewalks in the vicinity.⁵⁵ Also, an ordinance limiting the number of automobiles that may be kept in a building occupied for living quarters,⁵⁶ or prohibiting the use of streets for the purpose of carrying on the business of selling or bartering of automobiles, or their storage on the streets,⁵⁷ has been held not invalid. A statute empowering a city to regulate filling stations is invalid where it is in conflict with constitutional provisions,⁵⁸ and an ordinance regulating the location of motor vehicle junk yards has been said to be not valid as an exercise of the police power unless there is an obvious and real connection between the location of such yards and one or more of the purposes for which the police power may be applied.⁵⁹

§ 718. Licenses and Taxes

A person engaged in the business of maintaining and operating a public garage, parking lot, trailer camp, automobile repair shop, or gasoline filling station, or in the business of renting motor vehicles without drivers, must comply with valid requirements in respect of obtaining a license and paying a fee or tax.

Valid requirements, imposed by statute or ordinance, in respect of obtaining a license and paying a fee or tax must be complied with by a person engaged in the business of maintaining and operating a public garage,⁶⁰ a garage wherein motor

46. Ohio—Hodge Drive-It-Yourself Co. v. City of Cincinnati, 175 N.E. 196, 123 Ohio St. 284, 77 A.L.R. 889, affirmed 52 S.Ct. 144, 284 U.S. 335, 76 L.Ed. 323.

Licenses and certificates of public convenience see *infra* § 718.

47. Or.—Covey Drive Yourself & Garage v. City of Portland, 70 P.2d 566, 157 Or. 117.

48. Conn.—Connelly v. Deconinck, 155 A. 231, 113 Conn. 237.

49. Colo.—Driverless Car Co. v. Armstrong, 14 P.2d 1098, 91 Colo. 334.

Or.—Covey Drive Yourself & Garage v. City of Portland, 70 P.2d 566, 157 Or. 117.

42 C.J. p 712 note 73.

In Texas

(1) There is a holding to the contrary—Genusa v. City of Houston, Civ.App., 10 S.W.2d 772.

(2) However, in a subsequent case

supporting the text rule, the court expressly declined to subscribe to the correctness of the prior holding—City of Corpus Christi v. Texas Driverless Co., 190 S.W.2d 484, 114 Tex. 288.

50. Wis.—Watts v. Rent-A-Ford Co., 236 N.W. 521, 237 N.W. 276, 205 Wis. 140.

51. Ill.—Rockford v. Nolan, 146 N.E. 564, 316 Ill. 60.

52. Cal.—City of Whittier v. Dixon, 151 P.2d 5, 24 Cal.2d 664.

53. Ill.—City of Chicago v. Ben Albert, Inc., 13 N.E.2d 987, 368 Ill. 282.

54. Ark.—Means v. American Equitable Assur. Co., 52 S.W.2d 737, 186 Ark. 83.

55. Tex.—Llegl v. City of San Antonio, Civ.App., 207 S.W.2d 441—City of Dallas v. Harris, Civ.App., 157 S.W.2d 710, error refused.

56. Mo.—Bellerive Inv. Co. v. Kansas City, 13 S.W.2d 628, 321 Mo. 969.

Vehicles not containing fuel, etc.

Ordinance prohibiting storage of automobiles in buildings used for living quarters was held not void for failure to exclude vehicles not containing fuel, lubricants, or electrical equipment.—Bellerive Inv. Co. v. Kansas City, *supra*.

57. Ohio—Plummer v. Village of Swanton, 15 N.E.2d 349, 133 Ohio St. 623.

58. Ga.—Reynolds v. Brosnan, 154 S.E. 264, 170 Ga. 773.

Municipal regulations of filling stations see *infra* § 775.

59. Vt.—Vermont Salvage Corporation v. Village of St. Johnsbury, 34 A.2d 188, 113 Vt. 341.

60. Miss.—Lawrence v. Middleton, 60 So. 120, 103 Miss. 173.

38 C.J. p 76 note 59.

vehicles are housed⁶¹ or repaired⁶² for compensation, an open-air parking lot,⁶³ a trailer camp or park,⁶⁴ an automobile repair shop,⁶⁵ a wrecker,⁶⁶ or the business of renting motor vehicles on a drive-it-yourself basis;⁶⁷ and this is also true of

valid statutory requirements of licenses and fees or taxes which are applicable to gasoline filling stations⁶⁸ or automotive service stations,⁶⁹ but it is, of course, otherwise in respect of requirements which are invalid⁷⁰ or inapplicable.⁷¹ A statute of

Requirement of permit from city council

Cal.—Parker v. Colburn, 236 P. 921, 196 Cal. 169.

Ordinance held authorized

Ill.—City of Chicago v. Ben Alpert, Inc., 13 N.E.2d 987, 368 Ill. 282.

61. Va.—Commonwealth v. Whiting Oil Co., 187 S.E. 498, 167 Va. 73.

Statute held not invalid

Va.—Commonwealth v. Whiting Oil Co., supra.

Statute exempting rural garages held not unconstitutional

Ga.—Milliron v. Harrison, 166 S.E. 231, 175 Ga. 764, 84 A.L.R. 1142.

Storage warehouse

A statute requiring a license for the operation of a storage warehouse does not apply to the "live storage" of motor vehicles kept by their owners for frequent use, but does apply to "dead storage" or "winter storage" of such vehicles, and one housing cars both for use and for winter storage must comply with the statute before continuing winter storage.—In re Wegner, 210 N.W. 986, 50 S.D. 583.

62. N.C.—State v. Elkins, 122 S.E. 289, 187 N.C. 533.

38 C.J. p 76 note 59 [a] (3).

63. Pa.—City and County of Philadelphia v. Samuels, 12 A.2d 79, 338 Pa. 321.

64. Ky.—White v. City of Richmond, 169 S.W.2d 315, 293 Ky. 477.

Consent of owners of nearby property

The owners of automobile trailer camp in city, if they had not acquired vested rights prior to enactment of provision of city ordinance requiring consent of sixty-five per cent of property owners within six hundred feet of camp as prerequisite to granting of license for camp, would be subject to that provision.—Cady v. City of Detroit, 286 N.W. 805, 289 Mich. 499, appeal dismissed 60 S.Ct. 470, 309 U.S. 620, 84 L.Ed. 984.

65. La.—Hughes v. S. B. Hicks Motor Co., 1 La.App. 85.

Tenn.—Knoxville Motor Co. v. Kennedy, 55 S.W.2d 265, 165 Tenn. 412.—Stockwell v. Halley, 229 S.W. 382, 144 Tenn. 49.

66. N.J.—Librizzi v. Plunkett, 16 A.2d 280, 126 N.J.Law 17.

Licenses must have requisite fitness and qualifications

N.J.—Librizzi v. Plunkett, supra.

Refusal of renewal of license may be based on a violation of any provisions of the ordinance; but where the ordinance, although requiring that applicant certify whether he has ever been convicted of a felony or misdemeanor or a violation of the ordinance, does not lay down a definite disqualification in event of prior commission of crime, denial of application on ground that applicant has a criminal record is arbitrary.—Librizzi v. Plunkett, supra.

67. Colo.—Herbertson v. Cruse, 170 P.2d 531, 115 Colo. 274.

Ky.—Hertz Drivursel Stations v. City of Louisville, 172 S.W.2d 207, 294 Ky. 568, 147 A.L.R. 306

Md.—Baughman v. Sterrett Operating Service, 173 A. 38, 167 Md. 50.

Ordinances held valid

Ky.—Hertz Drivursel Stations v. City of Louisville, 172 S.W.2d 207, 294 Ky. 568, 147 A.L.R. 306.

Or.—Covey Drive Yourself & Garage v. City of Portland, 70 P.2d 566, 157 Or. 117.

Tex.—San Antonio v. Besteiro, Civ. App., 209 S.W. 472.

Ordinance held not unconstitutional
Ohio—Allen v. City of Cincinnati, 174 N.E. 795, 37 Ohio App. 339.

68. U.S.—Fox v. Standard Oil Co. of New Jersey, W Va., 55 S.Ct. 333, 294 U.S. 87, 79 L.Ed 780, rehearing denied 55 S.Ct. 511, 294 U.S. 732, 79 L.Ed 1261.

Ala.—Williams v. Pugh, 129 So. 792, 24 Ala App 57.—State v. H G Fain Service Station, 124 So 119, 23 Ala. App. 239, certiorari denied 124 So. 121, 220 Ala 55.

Ind.—Midwestern Petroleum Corporation v. State Board of Tax Com'rs, 187 N.E. 882, 206 Ind. 688, rehearing denied 191 N.E. 153, 206 Ind. 688.

Tenn.—Gulf Refining Co v. Graham, 300 S.W. 564, 156 Tenn. 265.

Applicability of chain-store taxes to gasoline filling stations see Licenses § 30 d (4).

Municipal requirements see infra § 776.

Proper exercise of police power

Wis.—State v. Common Council of City of Racine, 230 N.W. 70, 201 Wis. 435.

Revocation of license upheld

Mass.—Hanauer v. State Fire Marshal, 171 N.E. 428, 271 Mass. 506

—St. James Building Corporation v. Foote, 157 N.E. 629, 260 Mass. 548.

Statute authorizing storage without license

A statute providing that crude pe-

troleum or any of its products may be stored in detached and properly ventilated buildings specially adapted to the purpose, and surrounded by an embankment constructed so as effectually to prevent the overflow of the petroleum or any of its products, and, if less than a specified number of feet from other buildings, they must be separated therefrom by a stone wall of specified dimensions, has been held to authorize the erection of a filling station without a license, the underground gasoline storage tanks being regarded as "buildings" within the meaning of the statute, and, under such statute, it has been held not necessary to separate gasoline tanks less than the specified distance apart by a stone wall, the latter requirement referring only to the protection of outside property, and the fact that the owner of the property involved had mistakenly applied for a license would not estop him from proceeding with the construction of a station without a license.—Faulkner v. City of Keene, 155 A. 195, 85 N.H. 147.

69. U.S.—Maxwell v. Shell Eastern Petroleum Products, CCA N.C., 90 F.2d 39, certiorari denied Shell Eastern Petroleum Products v. Maxwell, 58 S.Ct. 34, 302 U.S. 715, 82 L.Ed. 552.

70. Ill.—Rockford v. Nolan, 146 N.E. 564, 316 Ill. 60.

Ordinance not authorized by statute
Ill.—Itrockford v. Nolan, supra.

In New York

(1) It was stated generally, in one case, that the police power cannot be asserted for purpose of licensing public garages.—Hoffer v. Schwab, 213 N.Y.S. 659, 126 Misc. 289.

(2) In a later case, however, it was held that owner of licensed garage may maintain action to enjoin unlawful operation of open-air parking space for more than five cars in a restricted district to detriment of plaintiff's business.—Seidman & Sons v. Tilrose Camp Operating Co., 274 N.Y.S. 606, 153 Misc. 510.

71. Colo.—Armstrong v. Denver Saunders System Co., 268 P. 976, 84 Colo. 138.

Tex.—Yellow Cab Co. v. Pengilly, Civ.App., 11 S.W.2d 560.

38 C.J. p 76 note 59 [a] (4).

Provision expressly made inapplicable in particular city

Conn.—Connecticut Baptist Convention v. McCarthy, 25 A.2d 656, 128 Conn. 701.

this nature must be liberally construed in favor of the citizen.⁷²

Where a requirement is applicable, a person subject thereto must pay the license tax imposed thereby, notwithstanding he also conducts another business in respect of which a separate license tax is imposed.⁷³ Under power conferred on it by charter, a municipality may levy a tax on a dealer in gasoline notwithstanding he is also subject to a license tax on account of another business conducted by him,⁷⁴ as that of garage keeper.⁷⁵ However, a person may be entitled, under one state license, to conduct two or more oil and greasing stations in the same city.⁷⁶

Certificate of public convenience. Although it has been held that a statute requiring a person desiring to engage or continue in the business of leasing motor vehicles without drivers to obtain a certificate of public convenience is unconstitutional,⁷⁷ it has also been held that a home-rule city has authority to prohibit the operation of such vehicles on the streets of the city without first obtaining a certificate of public convenience and necessity.⁷⁸

Statutory exemption of gasoline filling stations from particular tax upheld

Idaho—*J. C. Penney Co v Diefendorf*, 32 P.2d 784, 54 Idaho 374, followed in *Safeway Stores v. Diefendorf*, 32 P.2d 798, 54 Idaho 407.

Statute relating to repair shops was held not intended to apply to the repair shops of automobile dealers.—*Knoxville Motor Co. v Kennedy*, 55 S.W.2d 265, 165 Tenn. 412.

Fees received by city in parking meters were not subject to excise tax under statute levying tax on gross income or proceeds of persons operating business of parking lots or charging storage fees or rents.—*City of Phoenix v. Moore*, 113 P.2d 935, 57 Ariz. 350.

Statutes held inapplicable to renting of automobiles without drivers

(1) Statute imposing motorbus tax.—*Campbell v. Groh*, Tex Civ.App., 8 S.W.2d 712, error refused.

(2) Statute imposing additional fee for the registration of motor vehicles used in the transportation of passengers for hire.—*Armstrong v. Denver Saunders System Co.*, 268 P. 976, 84 Colo. 138.

(3) Statute requiring a permit for the transportation of passengers for hire in motor vehicles.—*State v. Bee Hive Auto Service Co.*, 242 P. 384, 137 Wash. 372.

72. Miss.—*Moore v. Standard Oil Co.*, 117 So. 370, 151 Miss. 100.

Services connected with storage of automobiles

As used in a statute imposing tax measured by value of services rendered by persons engaged in "automobile rent storage garages" and any other business of a similar nature, the quoted words import a service rendered in connection with the storage of automobiles, and any business added to the act by implication because of similarity with such business must relate thereto.—*Bedford v. Johnson*, 78 P.2d 373, 102 Colo. 203.

73. La.—*Hughes v. S. B. Hicks Motor Co.*, 1 La. App. 85.

74. Ga.—*Lewis v. City of Savannah*, 107 S.E. 588, 151 Ga. 489.
Nev.—*Carson City v. Red Arrow Garage, etc., Co.*, 225 P. 487, 47 Nev. 473

Municipal gasoline license taxes generally see Licenses § 30 d (3) (b). Separate license taxes for separate occupations or privileges pursued or exercised by same person as not constituting double taxation see Licenses § 24 b (1).

75. Nev.—*Carson City v. Red Arrow Garage, etc., Co.*, supra.
42 C.J. p 1308 note 62.

76. Miss.—*Moore v. Standard Oil Co.*, 117 So. 370, 151 Miss. 100.

77. Pa.—*Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 359 Pa. 25.

§ 719. Buildings

Regulation of the erection of gasoline filling stations and public garages is within the police power of a state.

Regulation of the erection of gasoline filling stations⁷⁹ and public garages⁸⁰ is within the police power of the state, and a statute prohibiting the erection of such a filling station or garage in a designated area of a particular city is not unconstitutional;⁸¹ but a statute requiring a person desiring to erect a filling station in a residential block to obtain the written consent of the owners of two thirds of the property in such block has been held invalid.⁸² Where the erection of a public garage is regulated by statute, the statute is controlling as to conditions or limitations⁸³ and procedure for obtaining a license or permit.⁸⁴

Municipal building and zoning regulations, and permits thereunder, relating to garages are discussed in the C.J.S. title Municipal Corporations §§ 224–228, also 38 C.J. p 73 notes 10–12, 14, 15, p 74 notes 19–27, p 75 notes 28, 29, 34, 36–44, 47, p 76 notes 48, 51.

Revocation of permit. Where the statute providing for the issuance of permits for the erection or

78. Tex.—*City of Corpus Christi v. Texas Driverless Co.*, Civ.App., 187 S.W.2d 607, affirmed in part and reversed in part on other grounds 190 S.W.2d 484, 144 Tex. 288.

79. U.S.—*Texas Co. v. City of Tampa*, C.C.A. Fla., 100 F.2d 347.
Fla.—*Harz v. Paxton*, 120 So. 3, 97 Fla. 154.

80. U.S.—*Texas Co. v. City of Tampa*, C.C.A. Fla., 100 F.2d 347.
Fla.—*Harz v. Paxton*, 120 So. 3, 97 Fla. 154.

81. U.S.—*Texas Co. v. City of Tampa*, C.C.A. Fla., 100 F.2d 347.
Restriction or limited prohibition of erection of garages as denying due process of law see Constitutional Law § 703 b.

82. Ky.—*McCown v. Gose*, 51 S.W.2d 251, 244 Ky. 402.
Conditional or contingent legislation as delegation of legislative power see Constitutional Law § 141.

83. Mass.—*Marcus v. Commissioner of Public Safety*, 150 N.E. 903, 255 Mass 5.

84. Mass.—*Marcus v. Commissioner of Public Safety*, supra.

Notice
Mass.—*Wright v. Lyons*, 112 N.E. 876, 224 Mass. 167.
38 C.J. p 75 notes 45, 46.

Appeal
Mass.—*Marcus v. Commissioner of Public Safety*, 150 N.E. 903, 255 Mass. 5.

maintenance of garages does not expressly confer a power of revocation, a permit cannot be revoked where it has been lawfully granted and acted on and the licensee has violated no law or regulation,⁸⁵ particularly in the absence of notice or hearing.⁸⁶

County zoning. In the absence of complaint by nearby property owners or proof that the addition in question would be offensive to the surrounding community, it is proper for the court to permit the completion of a small addition to an automobile repair shop in a locality zoned for agricultural purposes by a county zoning ordinance.⁸⁷

§ 720. Garage, Parking Lot, or Repair Shop as Nuisance

A garage is not a nuisance per se, even though it is a public garage and is located in a residential district; but it may be a nuisance in fact by reason of attendant circumstances and surroundings.

Since the storing of automobiles⁸⁸ and engaging

in the business of storing automobiles⁸⁹ or conducting a public garage⁹⁰ are legal, a garage is not, as a general rule, considered a nuisance per se,⁹¹ or a nuisance at common law⁹² under all conditions and circumstances,⁹³ whether it be a private⁹⁴ or a public⁹⁵ garage. A garage for the accommodation of the automobiles of the occupants of a boarding house is not necessarily a nuisance.⁹⁶ The business of conducting a tire repair shop is a lawful one;⁹⁷ and such a shop may not be a nuisance per se in a particular locality.⁹⁸

As nuisances per accidens. Garages,⁹⁹ whether private¹ or public,² may be or become nuisances by reason of attendant circumstances and surroundings. Whether a particular garage is a nuisance depends on its location,³ the manner in which it is kept⁴ or conducted,⁵ and other surrounding circumstances;⁶ and, unless the fact of nuisance is admitted, it involves a question of fact⁷ to be determined according to the evidence.⁸

85. Mass.—General Baking Co. v. Boston St. Comrs., 136 N.E. 245, 242 Mass. 194.

86. Mass.—General Baking Co. v. Boston St. Comrs, supra.

87. Ill.—Winnebago County v. Harrington, 68 N.E.2d 619, 329 Ill.App. 344.

88. Ind.—Brown v. Powell, 176 N.E. 241, 92 Ind.App. 467.

N.H.—True v. McAlpine, 125 A. 680, 81 N.H. 314.

89. Ind.—Brown v. Powell, 176 N.E. 241, 92 Ind.App. 467.

46 C.J. p 707 note 71.

90. Pa.—Sprout v. Levinson, 148 A. 511, 298 Pa. 400.

Garage containing repair shop

Iowa.—Pauly v. Montgomery, 228 N.W. 648, 209 Iowa 699.

91. Ind.—Griffin v. Hubbell, 11 N.E. 2d 136, 212 Ind. 684.—Brown v. Powell, 176 N.E. 241, 92 Ind.App. 467.

46 C.J. p 707 note 72.

Repairing and vulcanizing tires

Ga.—Wilson v. Evans Hotel Co., 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

92. N.Y.—Stein v. Lyon, 87 N.Y.S. 125, 91 App.Div. 593.

93. Mass.—Polish Political Club v. Cloper, 157 N.E. 705, 260 Mass. 559.

94. Pa.—Francis v. Dean, 80 Pa.Super. 108.—Bergmann v. Davis, 29 Pa.Dist. 102.

95. Pa.—Burke v. Hollinger, 146 A. 115, 296 Pa. 510.—Ladner v. Siegel, 142 A. 272, 293 Pa. 306.—Fleagle v. Stokes, 9 Pa.Dist. & Co. 696, 19 Mun.L.R. 128, 40 York Leg.Rec. 193.

46 C.J. p 708 note 75.

96. N.J.—Miller v. Jersey Coast Resorts Corp., 130 A. 824, 98 N.J.Eq. 289.

97. Ala.—Bloch v. McCown, 123 So. 213, 219 Ala. 656.

98. Ala.—Bloch v. McCown, supra.

99. Ill.—Munie v. Millner, 245 Ill.App. 257.

46 C.J. p 708 note 77.

1. Pa.—George v. Goodovich, 135 A. 719, 288 Pa. 48, 50 A.L.R. 105.—La Rossa v. Forte, 92 Pa.Super. 450.

2. Ark.—Huddleston v. Burnett, 287 S.W. 1013, 172 Ark. 216.

Pa.—Jones v. Rezzelano, Com.Pl., 92 Pittsb Leg J. 369.

46 C.J. p 708 note 79.

3. Iowa.—Pauly v. Montgomery, 228 N.W. 648, 209 Iowa 699.

Wis.—Ballstadt v. Pagel, 232 N.W. 862, 202 Wis. 484.

46 C.J. p 708 note 80.

Garage built in public street is both a public and a private nuisance.—Fugate v. Carter, 141 S.E. 483, 151 Va. 108.

4. N.J.—Bourgeois v. Miller, 104 A. 383, 89 N.J.Eq. 285.

5. Iowa.—Pauly v. Montgomery, 228 N.W. 648, 209 Iowa 699.

N.J.—Bourgeois v. Miller, 104 A. 383, 89 N.J.Eq. 285.

6. Iowa.—Pauly v. Montgomery, 228 N.W. 648, 209 Iowa 699.

N.J.—Bourgeois v. Miller, 104 A. 383, 89 N.J.Eq. 285.

Wis.—Ballstadt v. Pagel, 232 N.W. 862, 202 Wis. 484.

7. Mass.—Polish Political Club v. Cloper, 157 N.E. 705, 260 Mass. 559.

Each case stands or falls largely on its own facts

Wis.—Ballstadt v. Pagel, 232 N.W. 862, 202 Wis. 484.

8. Mass.—Polish Political Club v. Cloper, 157 N.E. 705, 260 Mass. 559.

Burden of proof

Lot owners, who sought to enjoin the use of adjoining owners' garage as a public garage on the ground that such use would be a nuisance, had burden of alleging and proving that the garage would be a nuisance and could be devoted to no use except one productive of a nuisance.—Griffin v. Hubbell, 11 N.E.2d 136, 212 Ind. 684.

Defendant should have opportunity of showing whether business could be so conducted that it would not be nuisance.—Pauly v. Montgomery, 228 N.W. 648, 209 Iowa 699.

Immaterial matter

Fact that plaintiff and wife were quarrelsome was immaterial in determining whether garage adjoining their home was nuisance.—Pauly v. Montgomery, supra.

Evidence held insufficient

(1) To show that plaintiff was estopped.

Iowa.—Pauly v. Montgomery, supra.

Mo.—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 781.

(2) To establish that garage was to be used as a public garage and filling station.—Griffin v. Hubbell, 11 N.E.2d 136, 212 Ind. 684.

(3) To support findings.—Brown v. Powell, 176 N.E. 241, 92 Ind.App. 467.

Evidence of damages

(1) Adjoining owners are not entitled to an injunction against maintenance of garage, in absence of evi-

Character of district. A public garage located in a residential district may be or become a nuisance,⁹ as, for instance, when it interferes with the free use and enjoyment of surrounding property;¹⁰ and this is true even though the city has issued a permit to construct the garage.¹¹ Also a private garage in a residential neighborhood may be so operated as to constitute a nuisance;¹² and a tire repair shop may become a nuisance when it is conducted and maintained in a locality which is residential in character.¹³ However, the storing of automobiles is legal, and to engage in that business is legal, even though the business is located in a residential district or section;¹⁴ and, according to the weight of authority, a garage is not, and does not become, a nuisance by the mere fact that it is located in a residential district;¹⁵ even though it be a public garage.¹⁶ The establishment of a public garage in a residential district is not a nuisance per se,¹⁷ and the question whether the operation of a public garage in a residential district constitutes a nuisance is one of fact to be determined on the evidence,¹⁸ especially the evidence or lack of evidence on the question whether the storing of automobiles can be carried on at the particular place in such a way as will not unreasonably disturb those

living near it.¹⁹ In at least one state a public garage in an exclusively residential district is regarded as a nuisance per se,²⁰ whether or not it is maintained in violation of a building restriction²¹ or whether or not it is an annoyance to the general community;²² and a like rule obtains as to a public parking space in such a district.²³ In such state, permission to operate a public garage in a residence district to demonstrate that no injury will be inflicted will not be granted.²⁴

A public garage located in a district devoted to business purposes has been held not to be a nuisance.²⁵ It is not a nuisance per se;²⁶ and the question whether it is a nuisance in fact depends on the proof.²⁷ However, a public garage may constitute a nuisance, even though it is located in a district which is not exclusively residential in character.²⁸ The operation of a public garage in a district which is partly commercial and partly residential may²⁹ or may not³⁰ be enjoined as a nuisance accordingly as the court determines that the attempted use does or does not constitute such interference with the rights of adjoining owners as to justify restraint.³¹ A commercial garage in a semi-business district is not a nuisance in and of itself where the garage business is carried on in the reg-

dence of peculiar damage from nuisance.—*Polish Political Club v. Clopper*, 157 N.E. 705, 260 Mass. 559.

(2) The owner of a lot adjoining a garage was entitled only to nominal damages in suit to enjoin operation and compel removal of garage where no showing was made that construction of garage lessened rental value of lot.—*Wippler v. Hohn*, 110 S.W.2d 409, 341 Mo. 781.

(3) Evidence held insufficient to sustain award of three hundred dollars damages for construction of garage in violation of law.—*La Rossa v. Forte*, 92 Pa.Super. 450.

9. Iowa.—*Pauly v. Montgomery*, 228 N.W. 648, 209 Iowa 699.

Pa.—*Fleagle v. Stokes*, 9 Pa.Dist. & Co. 696, 19 Mun.L.R. 128, 40 York Leg.Rec. 193.

Wis.—*Ballstadt v. Pagel*, 232 N.W. 862, 202 Wis. 484.
46 C.J. p 708 notes 84, 88.

10. Ga.—*Rushing v. Thigpen*, 37 S. E.2d 180, 200 Ga. 313.
46 C.J. p 708 note 85.

11. Iowa.—*Pauly v. Montgomery*, 228 N.W. 648, 209 Iowa 699.

12. Pa.—*George v. Goodovich*, 135 A. 719, 288 Pa. 48, 52, 50 A.L.R. 105.
46 C.J. p 708 note 90.

13. Ala.—*Bloch v. McCown*, 123 So. 213, 219 Ala. 656.

14. N.H.—*True v. McAlpine*, 125 A. 680, 81 N.H. 314.

15. Ala.—*Nevins v. McGavock*, 106 So. 597, 214 Ala. 93.
46 C.J. p 708 note 93.

16. N.Y.—*Sherman v. Livingston*, 128 N.Y.S. 581.
46 C.J. p 708 note 94.

17. Ga.—*Rushing v. Thigpen*, 37 S. E.2d 180, 200 Ga. 313.—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

N.Y.—*Sherman v. Livingston*, 128 N. Y.S. 581.

18. Kan.—*State v. Wade*, 278 P. 1067, 128 Kan. 646.

19. N.H.—*True v. McAlpine*, 125 A. 680, 81 N.H. 314.
46 C.J. p 708 note 98.

Reasonableness of use of the premises is the test.—*True v. McAlpine*, supra.

20. Pa.—*Yeager v. Traylor*, 160 A. 108, 306 Pa. 530.—*Nesbit v. Riesenman*, 148 A. 695, 298 Pa. 475, certiorari denied *Riesenman v. Nesbit*, 50 S.Ct. 408, 281 U.S. 754, 74 L.Ed. 1164.—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400.—*Ladner v. Siegel*, 146 A. 710, 296 Pa. 579.—*Burke v. Hollinger*, 146 A. 115, 296 Pa. 510.—*Ladner v. Siegel*, 142 A. 272, 293 Pa. 306.

Rule is not unconstitutional

Pa.—*Nesbit v. Riesenman*, 148 A. 695, 298 Pa. 475, certiorari denied *Riesenman v. Nesbit*, 50 S.Ct. 408, 281 U.S. 754, 74 L.Ed. 1164.

21. Pa.—*Phillips v. Donaldson*, 112 A. 236, 269 Pa. 244.
46 C.J. p 708 note 86.

22. Pa.—*Phillips v. Donaldson*, supra.

23. Pa.—*Scully v. Massey*, 17 Pa. Dist. & Co. 363.

24. Pa.—*Ladner v. Siegel*, 142 A. 272, 293 Pa. 306.

25. Pa.—*Phillips v. Donaldson*, 112 A. 236, 269 Pa. 244
Wis.—*Wasilewski v. Biedrzycki*, 192 N.W. 989, 180 Wis. 633.

Injunction refused

N.Y.—*Wike v. Herms*, 61 N.Y.S.2d 244, 187 Misc. 111.

26. Pa.—*Ladner v. Siegel*, 146 A. 710, 296 Pa. 579.—*Burke v. Hollinger*, 146 A. 115, 296 Pa. 510.

27. Pa.—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400.

28. Iowa.—*Pauly v. Montgomery*, 228 N.W. 648, 209 Iowa 699.
Pa.—*Rhodes v. Carr*, 30 Pa.Dist. 37.

It is sufficient if the immediate part of the city where the building is located is essentially a residential district.—*Pauly v. Montgomery*, 228 N.W. 648, 209 Iowa 699.

29. Pa.—*Richard v. Weiser*, 198 A. 29, 329 Pa. 203.

30. Pa.—*Burke v. Hollinger*, 146 A. 115, 296 Pa. 510.

31. Pa.—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400.

ular and ordinary way;³² and an owner of residential property in such district is not entitled to the same protection from maintenance of the garage as in a strictly residential district.³³

In a district which is changing to an apartment house locality, a garage connected with an apartment house is not a nuisance³⁴ per se,³⁵ but the operation thereof may become a nuisance;³⁶ under proper limitations and restrictions, it may be erected and maintained for the accommodation of the tenants of that particular apartment house³⁷ or of that apartment house and another in the same vicinity and under the same ownership,³⁸ but it should not be permitted to become a nuisance.³⁹

Garage constructed after granting of injunction. Where defendant constructed a public garage after the granting of a preliminary injunction against the use of any building on the lot as a public garage, he is not in a position to complain because of the expenditures which he made.⁴⁰

Business conducted by lessee. Where the premises are used by a lessee or sublessee as a garage and automobile repair shop, it is proper to make the lessor a party to a suit for an injunction,⁴¹ but not to include him in an order restraining, as a nuisance, the straightening of automobile bodies and fenders.⁴²

Ordering removal of garage. Although a garage is found to be a nuisance, and a statutory proceeding for its removal might be brought on behalf of a municipality, the court may not order its removal in a suit by an adjoining property owner.⁴³

§ 721. Penalties for Violation of Regulations

Liability for a penalty for violation of a statute or ordinance requiring a license or the payment of taxes for the maintenance or operation of a public garage or an automobile repair shop depends on the application of the statute or ordinance to the facts of the case.

Under a statute, penalties must be paid where automobile repair shop taxes are not paid when due;⁴⁴ but a person is not liable for a penalty, provided by ordinance for maintaining a public garage without having obtained a license to do so, where his acts, as shown by undisputed evidence, are not within the prohibition of the ordinance.⁴⁵

§ 722. Offenses by Garage Keepers

A person operating a garage is not criminally liable under a statute which is not applicable to him.

Under a statute providing that any "garage" which fails to keep a proper register of each and every material repair or change in any automobile as required in the act shall be guilty of a misdemeanor, a criminal complaint does not lie for the failure to keep such register against the persons operating⁴⁶ the garage; and a person is not guilty of storing gasoline without a license where he is licensed to conduct a general automobile storage business and automobiles with some unused gasoline in their tanks are stored in his building until called for by their owners.⁴⁷ Competent and relevant evidence is admissible in a prosecution for conducting a garage business in a prohibited area.⁴⁸

§ 723. Offenses by Persons Dealing with Garage Keepers

A statute making it an offense to rent an automobile on a mileage basis fraudulently and without any intention of paying for its use is not intended to turn a criminal court into a collecting agency for the benefit of bailors for hire of automobiles.

A particular criminal statute has been construed as intended to define, and provide punishment for, a species of fraud consisting of the renting of an automobile on a mileage basis when the renter has, in fact, no intention of paying for its use,⁴⁹ and as not intended to turn a criminal court into a collecting agency for the special and exclusive benefit of bailors for hire of automobiles.⁵⁰

32. Mich.—Moore v. Johnson, 222 N. W. 120, 245 Mich. 173.

33. Mich.—Moore v. Johnson, *supra*.

34. Pa.—Pierce v. Kelner, 156 A. 61, 304 Pa. 509.

35. Pa.—Ladner v. Siegel, 146 A. 710, 296 Pa. 579.

36. Pa.—Ladner v. Siegel, *supra*.

37. Pa.—Pilling v. Moore, 160 A. 109, 306 Pa. 406—Yeager v. Traylor, 160 A. 108, 306 Pa. 530.

38. Pa.—Ladner v. Siegel, 146 A. 710, 296 Pa. 579.

39. Pa.—Pilling v. Moore, 160 A. 109, 306 Pa. 406.

40. Pa.—Ladner v. Siegel, 142 A. 272, 293 Pa. 306.

41. Pa.—Whiteley v. Mortgage Service Co., 12 A.2d 9, 337 Pa. 475.

42. Pa.—Whiteley v. Mortgage Service Co., *supra*.

Reason for holding is that the nuisance arises solely from the manner in which the tenant uses the premises and not from anything inherent in the type of building or in its ordinary use under the terms of the lease, the straightening of automobile bodies and fenders not being essential to, or a usual incident of, the conduct of a garage and general repair shop.—Whiteley v. Mortgage Service Co., *supra*.

43. Pa.—La Rossa v. Forte, 92 Pa. Super. 450.

44. La.—Hughes v. S. B. Hicks Motor Co., 1 La.App. 85.

45. Me.—Millett v. Hayes & Co., 164 A. 741, 132 Me. 12.

46. Tex.—Fowler v. State, 196 S.W. 951, 81 Tex Cr. 574.

47. D.C.—District of Columbia v. Weston, 23 App.D.C. 363.
38 C.J. p 76 note 60.

48. N.J.—Cannady v. Town of Montclair, 147 A. 737, 7 N.J.Misc. 1045.

49. Pa.—Metzger v. Hertz Drivurself Stations, 171 A. 118, 112 Pa. Super. 365.

50. Pa.—Metzger v. Hertz Drivurself Stations, *supra*.

B. STORAGE OF VEHICLES

§ 724. In General

Ordinarily a garage keeper is a bailee for hire as to a motor vehicle which is left with, and received by, him for storage; but he is only a gratuitous bailee where he merely permits the vehicle to be placed in his garage as an accommodation. He is a warehouseman as to a vehicle in dead storage, that is, a vehicle stored for a considerable period of time, such as a season, and not kept in condition for frequent use.

The rights, duties, and liabilities of garage keepers are analogous in many respects to those of livery-stable keepers⁵¹ and parking lot proprietors.⁵² Ordinarily, where a motor vehicle is left with, and received by, a garage keeper for storage, a bailment⁵³ mutually benefiting the parties⁵⁴ is created, and the garage keeper becomes a bailee for hire;⁵⁵ but where a garage keeper permits the owner of a motor vehicle to place it in his garage as an accommodation, there being no circumstances to show that it is a bailment for hire, the bailment is merely gratuitous;⁵⁶ and, where a garage keeper has not received a motor vehicle, no bailment is created and no liability attaches to him.⁵⁷

It has been held that, where a contract for the storage of a motor vehicle in a garage obligates the owner to pay a certain rate per month and also to pay for any extras, and the taking of the automobile to and from plaintiff's residence is charged and paid for as an extra, the extra service is an

incident to, and part of, the entire service, and not covered by a new contract each time it is performed.⁵⁸ Where a garage keeper has rented storage space to the owner of a motor vehicle at an agreed rental and assents to a subsequent instruction of the owner that the vehicle is not to be delivered to any person even on a written order, the special undertaking is founded on a valuable consideration.⁵⁹

Garage keeper as warehouseman; "dead" or "live" storage. As applied to the storage of automobiles in garages, "dead storage" is storage of cars not in use deposited or put away, sometimes for the season,⁶⁰ and "live storage" is the storage of cars in active daily use.⁶¹ A garage keeper who houses motor vehicles with the understanding that the owners may take them out for use at frequent intervals is not a warehouseman as to such vehicles;⁶² but he is a warehouseman as to motor vehicles which he houses on dead storage, that is, motor vehicles which he stores for the winter and which are not kept in condition for constant use.⁶³

Rental of space. Where a garage keeper contracts to furnish space for the standing of motor vehicles, furnishes keys to the owners thereof so that they can be removed at will by the owners, does not have any care of or control over, the ve-

51. Kan.—*Roberts v. Kinley*, 132 P. 1180, 89 Kan. 885, 45 L.R.A.N.S., 938.

Mass.—*Hanna v. Shaw*, 138 N.E. 247, 244 Mass. 57.

Duties and liabilities of livery stable keepers as to property left in their custody see *Livery Stable Keepers* §§ 12-15.

52. W.Va.—*Barnette v. Casey*, 19 S. E.2d 621, 124 W.Va. 143.

Parking car in parking lot as creating bailment see *Bailments* §§ 1, 2, 8.

53. Ill.—*Black v. Downtown Parking Stations*, 75 N.E.2d 395, 332 Ill. App. 418—*Byalos v. Matheson*, 243 Ill.App. 60, affirmed 159 N.E. 242, 328 Ill. 269.

N.Y.—*New Amsterdam Casualty Co. v. Greenberg*, 274 N.Y.S. 854, 153 Misc. 347.

N.C.—*Hutchins v. Taylor-Buick Co.*, 153 S.E. 397, 198 N.C. 777.

Pa.—*Smith v. Cohen*, 176 A. 869, 116 Pa.Super. 395.

Tenn.—*Diamond Service Station v. Broadway Motor Co.*, 12 S.W.2d 705, 158 Tenn. 258.

Under common-law terminology, the transaction is a bailment.—*Douglas v. Haro*, La.App., 32 So.2d 387.

Under Louisiana jurisprudence, the transaction is characterized as a "hiring" or "compensated deposit."—*Douglas v. Haro*, supra.

Garageman occupies position of any ordinary bailee

N.Y.—*C. I. T. Corporation v. Isham Park Garage*, 235 N.Y.S. 163, 134 Misc. 501.

54. Ala.—*Bricken v. Sikes*, 68 So. 801, 14 Ala.App. 187, certiorari denied 69 So. 425, 194 Ala. 148.

55. Me.—*Walters v. U. S. Garage*, 160 A. 758, 131 Me. 222.

Mass.—*D. A. Schulte, Inc. v. North Terminal Garage Co.*, 197 N.E. 16, 291 Mass. 251.

Mo.—*McKnight v. Batrick*, App., 49 S.W.2d 277.

N.Y.—*Hobbie v. Ryan*, 223 N.Y.S. 654, 130 Misc. 221.

Ohio.—*North River Ins. Co. of New York v. Ohmer*, 26 N.E.2d 767, 63 Ohio App. 346.

Tenn.—*Andrew Jackson Hotel v. Platt*, 89 S.W.2d 179, 19 Tenn.App. 350.

Utah.—*Romney v. Covey Garage*, 111 P.2d 545, 100 Utah 167.

38 C.J. p 85 note 29.

Baggage in automobile

Where owner paid for storing automobile in garage, being assured

that valuable baggage therein would be safe, transaction constituted bailment of baggage and the garage keeper was a depository for hire, even though no special compensation was paid for the extra service consisting of the care of the baggage.—*Homan v. Burkhart*, 291 P. 624, 108 Cal App. 363.

56. Ill.—*Glende v. Spraner*, 198 Ill. App. 584.

N.Y.—*St. Paul Fire & Marine Ins. Co. v. E. H. Trice Motor Co.*, 196 N.Y. S. 684, 203 App.Div. 218.

57. Ga.—*Atlanta Cadillac Co. v. Manley*, 116 S.E. 35, 29 Ga.App. 522. Pa.—*Patriotic Ins. Co. v. Goodman Models, Inc., Co.*, 89 Pittsb.Leg.J. 389.

58. Mich.—*Banks v. Strong*, 164 N. W. 398, 197 Mich. 544.

59. Pa.—*Hare v. Mulligan*, 77 Pa. Super. 577.

60. N.Y.—*Hogan v. O'Brien*, 206 N. Y.S. 831, 123 Misc. 865, affirmed 208 N.Y.S. 477, 212 App.Div. 193. 38 C.J. p 85 note 35.

61. N.Y.—*Hogan v. O'Brien*, supra. 38 C.J. p 85 note 36.

62. S.D.—*In re Wagner*, 210 N.W. 986, 50 S.D. 583.

63. S.D.—*In re Wagner*, supra.

hicles, and does not assume to watch them, the contract with an owner is not a bailment.⁶⁴ So too, where there is a lease where a designated place in a parking lot is assigned to an automobile owner for his exclusive use without any assumption of dominion or custody of the automobile by the operator of the parking lot.⁶⁵

Duration and termination of bailment. If the bailment of a motor vehicle with a garage keeper is for a definite period, the garage keeper is bound to keep the vehicle for such period.⁶⁶ If it is for an indefinite period, he can terminate it only by notice to the bailor.⁶⁷

Mortgage or pledge of vehicle. A garage keeper holding a motor vehicle as bailee cannot apply it in payment of, or pledge it as security for, its own debt.⁶⁸ Where statutes relating to the registration of chattel mortgages and motor vehicles do not require registration by the owner of a motor vehicle when it is placed by him in storage with a garage keeper, a person taking a mortgage from the garage keeper cannot avail himself of the statutes⁶⁹ even though the garage keeper has authority to sell the vehicle.⁷⁰

§ 725. Compensation

Ordinarily the owner of a motor vehicle stored in the garage of another person is liable for storage charges. A chattel mortgagee of, or an alleged purchaser who has no title to or interest in, the vehicle is not personally liable for storage charges.

A garage proprietor with whom an automobile had originally been left for repairs and afterward for storage is entitled to a reasonable charge for storage of the car up to the time that the owner

demand possession of it;⁷¹ and it is immaterial, in so far as the right to recover charges for storage after completion of repairs is concerned, whether a liability insurance company, in arranging for the repairs, acted for the owner of another vehicle with which the vehicle in question collided.⁷² The owner of the vehicle may not be liable for storage charges where the vehicle was placed in storage by a police officer⁷³ and the officer acted without legal authority.⁷⁴ On the other hand, the owner may be liable where the officer acted under a valid ordinance;⁷⁵ but where, in such case, the garage keeper used the car for personal purposes while it was in his possession the value of such use should be offset against the storage charges.⁷⁶

A chattel mortgagee of a motor vehicle is not personally liable for storage charges;⁷⁷ and an alleged purchaser is not liable where he has no title or interest, title having previously passed to another person.⁷⁸

§ 726. Injuries to, or Loss of, Vehicle

- a. In general
- b. Theft, misdelivery, or refusal to deliver
- c. Disclaimer or limitation of liability

a. In General

Although he is not an insurer of the safety of the vehicle, a garage keeper is bound to use ordinary and reasonable care to protect a motor vehicle stored in his garage under a contract of bailment for hire.

A garage keeper is not an insurer of the safety of a motor vehicle left in his care for storage,⁷⁹ but he is bound to use ordinary and reasonable care for the protection of the vehicle;⁸⁰ his failure

64. Iowa.—Reimers v. Petersen, 22 N.W.2d 817, 237 Iowa 550.
N.Y.—Hogan v. O'Brien, 206 N.Y.S. 831, 123 Misc. 865, affirmed 208 N.Y.S. 477, 212 App.Div. 193.
65. Ala.—Lewis v. Ebersole, 12 So. 2d 543, 244 Ala. 200.
66. N.Y.—Koroleff v. Schildkraut, 179 N.Y.S. 117.
67. Mich.—Banks v. Strong, 164 N.W. 398, 197 Mich. 544.
38 C.J. p 85 note 42.
68. Colo.—Western Finance, etc., Co. v. Fisher, 210 P. 66, 72 Colo. 121.
69. Colo.—Western Finance, etc., Co. v. Fisher, supra.
70. Colo.—Western Finance, etc., Co. v. Fisher, supra.
71. Ill.—Nelson v. McKeown, 203 Ill. App. 231.
72. Mo.—Shoemaker v. Marcum, App., 9 S.W.2d 863.
73. Utah.—Rickenberg v. Capitol

Garage, 249 P. 121, 68 Utah 30, 50 A.L.R. 1303.

74. Ala.—Brown v. Ace Motor Co., 8 So.2d 585, 30 Ala.App. 479, certiorari denied 8 So.2d 588, 243 Ala. 92.
75. Ark.—Means v. American Equitable Assur. Co., 52 S.W.2d 737, 186 Ark. 83.
76. Ark.—Means v. American Equitable Assur. Co., supra.
77. N.Y.—Fidelity & Casualty Co. of New York v. Peckett, 220 N.Y.S. 612, 220 App.Div. 118—Goodrich Silvertown Stores of B. F. Goodrich Co. v. Valentine, 10 N.Y.S.2d 447.
78. Tex.—Wilson v. Auer, Civ.App., 5 S.W.2d 160.
79. D.C.—Medes v. Hornbach, 6 F.2d 711, 56 App.D.C. 13.
La.—Palmetto Fire Ins. Co. v. Clarke Garage Co., 6 La.App. 420.
Mass.—D. A. Schulte, Inc. v. North Terminal Garage Co., 197 N.E. 16, 291 Mass. 251.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360—Malone for Use and Benefit of Globe Rutgers Fire Ins. Co. of New York v. Harth, 12 Tenn.App. 687.
Wis.—Firemen's Fund Ins. Co. v. Schreiber, 135 N.W. 507, 150 Wis. 42, 45 L.R.A.N.S., 314, Ann.Cas. 1913E 823.
38 C.J. p 86 note 49.
Under implied provisions of contract of bailment, however, a garage keeper may be bound to keep the vehicle safely.—Walters v. U. S. Garage, 160 A. 758, 131 Me. 222.
80. D.C.—Medes v. Hornbach, 6 F.2d 711, 56 App.D.C. 13.
N.Y.—Hobble v. Ryan, 223 N.Y.S. 654, 130 Misc. 221.
Ohio.—Dietrich v. Peters, 162 N.E. 753, 28 Ohio App. 427.
Pa.—Smith v. Cohen, 176 A. 869, 116 Pa.Super. 395—Underberg v. Stewart, 86 Pa.Super. 106.
Tenn.—Andrew Jackson Hotel v.

to exercise such care is negligence,⁸¹ and he is liable for loss or damage occasioned by his negligence.⁸² The ordinary care required is that degree of care which a person of ordinary prudence would take of the property, under the same or similar circumstances,⁸³ if it were his own.⁸⁴

It has been held or stated generally that the garage keeper is liable for loss of, or damage to, the vehicle only when it was caused by his negligence⁸⁵ or fault.⁸⁶ However, storage by a garage keeper of a motor vehicle in a place other than that specified in the contract for storage is a breach of the contract of bailment,⁸⁷ and for damage to the vehicle while thus stored the garage keeper is liable irrespective of the question of negligence.⁸⁸ Also, where a motor vehicle in the care of a garage keeper is damaged while being used in violation of the contract of bailment, the garage keeper is liable therefor.⁸⁹

Lack of bailment for hire. Where a motor vehicle is left with a garage keeper under circumstances making the bailment a gratuitous one, the garage keeper is liable only for losses resulting from his gross negligence.⁹⁰ Also, where there is no bail-

ment, as where a garage keeper merely contracts to furnish space for the standing of a motor vehicle, and does not have any control over the vehicle, he is responsible only for wanton negligence.⁹¹

Effect of owner's knowledge generally. The liability of a garage keeper for injury to a motor vehicle is not affected by the owner's knowledge of the condition of the place.⁹²

Freezing. A garage keeper, to whom a motor vehicle is delivered for storage under a simple contract of bailment, is liable for damages resulting from the freezing of water in the cooling system of the vehicle while it is in storage,⁹³ especially where he expressly has agreed to maintain sufficient heat in the garage to prevent freezing,⁹⁴ or where there is an implied agreement to do so arising from the fact that the garage is steam heated.⁹⁵

Negligence of employee generally. A garage keeper who is a bailee for hire of a stored motor vehicle is liable for damage to the vehicle resulting from the negligence of his agent, servant, or employee in the performance of any duty with respect to its care or custody within the general scope

Platt, 89 S.W.2d 179, 19 Tenn App 360—Malone for Use and Benefit of Globe Rutgers Fire Ins. Co. of New York, v. Harth, 12 Tenn.App. 687, 38 C.J. p 86 note 50.

Safe mechanical appliances

(1) Garageman must equip himself with safe mechanical appliances used in operating storage garage, and maintain them in safe condition, and fact that elevator, when entirely down, sank several inches below floor, was sufficient to put storage garageman on notice that elevator was improperly adjusted.—Union Indemnity Co. v. Blaise Downtown Storage, 138 So. 226, 18 La.App. 295.

81. Mo.—McKnight v. Batrick, App., 49 S.W.2d 277.

82. U.S.—U. S. v. Whited & Whited, D.C.Wash., 1 F.Supp. 589.

La.—Union Indemnity Co. v. Blaise Downtown Storage, 138 So. 226, 18 La.App. 295.

Mo.—McKnight v. Batrick, App., 49 S.W.2d 277.

38 C.J. p 86 note 51 [a].

Principle of garage keeper's liability

is that of a warehouseman.—New Jersey Mfrs.' Ass'n Fire Ins. Co. v. Galowitz, 150 A. 408, 106 N.J.Law 493.

Loss by fire

A garage keeper is liable for the loss by fire of property left in his care where the loss occurs by reason of his negligence.—Farris v. Jaquith, 197 P. 750, 70 Colo. 63—38 C.J. p 88 note 82.

83. Mass.—D. A. Schulte, Inc. v. North Terminal Garage Co., 197 N. E. 16, 291 Mass. 251.

Mont.—Myles v. Helena Motors, 121 P.2d 548, 113 Mont. 92.

84. La.—Palmetto Fire Ins. Co. v. Clarke Garage Co., 6 La.App. 420.

Utah.—Romney v. Covey Garage, 111 P.2d 545, 100 Utah 167.

38 C.J. p 86 note 54.

Ordinary care depends on circumstances

N.Y.—Hobble v. Ryan, 223 N.Y.S. 654, 130 Misc. 221.

85. N.Y.—New Amsterdam Casualty Co. v. Greenberg, 274 N.Y.S. 854, 153 Misc. 347.

38 C.J. p 86 note 51.

Proximate cause

(1) A garage keeper is not liable on the ground of negligence for damage to a motor vehicle while in his care unless the damage was proximately caused by his negligence.

Colo.—Mountain Motor Fuel Co. v. Rivers, 170 P. 1164, 65 Colo. 561.

Or.—Pilson v. Tip-Top Auto Co., 136 P. 642, 67 Or. 528.

(2) He is not liable where his act, if negligent, was only the remote cause of the damage and the act of a third person was the direct and proximate cause.—Palmetto Fire Ins. Co. v. Clarke Garage Co., 6 La.App. 420.

86. N.Y.—New Amsterdam Casualty Co. v. Greenberg, 274 N.Y.S. 854, 153 Misc. 347.

87. N.Y.—Koroleff v. Schildkraut, 179 N.Y.S. 117.

Or.—Pilson v. Tip-Top Auto Co., 136 P. 642, 67 Or. 528.

88. Or.—Pilson v. Tip-Top Auto Co., supra.

89. Mich.—La Plant v. Du Pont, 193 N.W. 820, 223 Mich. 343, 31 A.L.R. 694.

N.J.—Corbett v. Smeraldo, 102 A. 889, 91 N.J.Law 29.

Delivery to unauthorized third person see infra subdivision b of this section.

90. N.Y.—St. Paul Fire & Marine Ins. Co. v. E. H. Trice Motor Co., 196 N.Y.S. 684, 203 App Div. 218.

38 C.J. p 86 note 55.

91. N.Y.—Hogan v. O'Brien, 206 N. Y.S. 831, 123 Misc. 865, affirmed 208 N.Y.S. 477, 212 App.Div. 193.

Rental of space as not constituting bailment see supra § 724.

92. Mass.—Stevens v. Stewart-Warner Speedometer Corp., 111 N.E. 771, 223 Mass. 44.

Or.—Simms v. Sullivan, 198 P. 240, 100 Or. 487, 15 A.L.R. 678.

93. N.J.—Bussy v. Hatch, 111 A. 546, 95 N.J.Law 56.

Or.—Simms v. Sullivan, 198 P. 240, 100 Or. 487, 15 A.L.R. 678.

94. N.J.—Bussy v. Hatch, 111 A. 546, 95 N.J.Law 56.

95. N.Y.—Smith v. Economical Garage, Inc., 176 N.Y.S. 479, 107 Misc. 430.

38 C.J. p 88 note 85.

of the servant's employment;⁹⁶ and, notwithstanding some decisions to the contrary,⁹⁷ the weight of authority supports the rule imposing liability where the servant has come into the possession of the property while acting within the scope of his employment, although the injury occurs while he is exceeding the scope of his employment,⁹⁸ as where he is using the vehicle for a purpose of his own.⁹⁹ If, at the time the damage is inflicted, the employee of the garage keeper is acting as agent of the owner of the vehicle, and not as agent of the garage keeper, the keeper is not liable.¹

Liability of operator of parking lot. When no bailment is created by the parking of a motor vehicle, the operator of the parking place is in general not liable to the owner of such vehicle for its loss or destruction.² At any rate, the operator of a parking lot is liable to a person parking a car therein only if he failed in the performance of a duty owing by him to such person and such failure caused injury to such person or damage to his ve-

hicle.³

b. Theft, Misdelivery, or Refusal to Deliver

Delivery of a motor vehicle, received by a garage keeper for storage, to a person not authorized to receive it is a breach of the contract of bailment and a conversion, irrespective of negligence or lack of negligence; but liability of the garage keeper for loss of the vehicle by theft is dependent on negligence of himself or his employee.

A garage proprietor, as a bailee for hire of a motor vehicle received by him for storage, is bound to redeliver it, on demand, to the bailor⁴ or other person entitled to the possession thereof;⁵ and he is answerable in damages for refusal to do so.⁶ Also, he is bound to see that the person to whom he delivers the vehicle is the proper person to receive it;⁷ and he is liable to the owner for a misdelivery or wrongful delivery to a stranger.⁸ While a delivery of the vehicle to a person not authorized to receive it is a breach of the bailment contract,⁹ it goes beyond that and constitutes a conversion,¹⁰ irrespective of negligence or

96. Me.—Walters v. U. S. Garage, 160 A. 758, 131 Me. 222.
38 C.J. p 86 note 62

Failure to use emergency brake

Ill.—Black v. Downtown Parking Stations, 75 N.E.2d 395, 332 Ill.App. 418.

Directing operation of vehicle in garage

Automobile owner's employee driving automobile from elevator in storage garage under direction of garageman's employee was not in such entire control as to relieve garageman's employee from responsibility.—Union Indemnity Co. v. Blaise Downtown Storage, 138 So. 226, 18 La.App. 295.

97. N.Y.—Castorina v. Rosen, 49 N.E.2d 521, 290 N.Y. 445.

Wis.—Firemen's Fund Ins. Co. v. Schreiber, 135 N.W. 507, 150 Wis. 42, 45 L.R.A., N.S., 314, Ann.Cas. 1913E 823.

38 C.J. p 86 note 63 [b].

98. Me.—Corpus Juris cited in Walters v. U. S. Garage, 160 A. 758, 760, 131 Me. 222.

Nev.—Manhattan Fire & Marine Ins. Co. v. Grand Central Garage, 9 P. 2d 682, 54 Nev. 147.

Pa.—Vannatta v. Tolliver, 82 Pa.Super. 546.

38 C.J. p 87 note 64.

Acts chargeable to owner

(1) Act of nightman in charge of garage in leaving unknown and irresponsible employee alone with cars is chargeable to owner of garage.—Employers' Fire Ins. Co. v. Consolidated Garage & Sales Co., 155 N.E. 533, 85 Ind.App. 674.

(2) Negligence of caretaker, left in charge of garage in absence of owner, in allowing vehicle to be tak-

en out by employee must be imputed to owner.—Underberg v. Stewart, 86 Pa.Super. 106.

99. Ill.—Evans v. Williams, 232 Ill. App 439

La.—Gulf & S. I. R. Co. v. Sutter Motor Co., 126 So. 458, 12 La.App. 495

Me.—Walters v. U. S. Garage, 160 A. 758, 131 Me. 222.

Nev.—Manhattan Fire & Marine Ins. Co. v. Grand Central Garage, 9 P.2d 682, 54 Nev. 147.

Ohio.—Burke v. Posner, App., 60 N.E. 2d 191.

38 C.J. p 87 note 64 [a].

Question involved is the liability of a bailee for hire for breach of contract, and not the liability of a master for the tortious acts of his servants.

La.—Gulf & S. I. R. Co. v. Sutter Motor Co., 126 So. 458, 12 La.App. 495.

N.J.—Corbett v. Smeraldo, 102 A. 889, 91 N.J. Law 29

1. La.—Williams v. H. L. Weil Co., 1 La.App. 188.

2. Mo.—Suits v. Electric Park Amusement Co., 249 S.W. 656, 213 Mo.App. 275.

Okl.—Lord v. Oklahoma State Fair Ass'n, 219 P. 713, 95 Okl. 294.

Liability in case of bailment see Bailments § 27 a (1).

3. Mass.—Fielding v. S. Z. Poll Realty Co., 174 N.E. 178, 274 Mass. 20.

Duty is limited by invitation to park; and, in a particular case, such invitation may not go beyond permission to come on the land and leave a car in the space.—Fielding v. S. Z. Poll Realty Co., supra.

4. Me.—Walters v. U. S. Garage, 160 A. 758, 131 Me. 222.

Tex.—Central Meat Market v. Longwell's Transfer, Com.App., 62 S.W. 2d 87.

5. N.Y.—C. I. T. Corporation v. Isham Park Garage, 235 N.Y.S. 163, 134 Misc. 501.

6. N.Y.—C. I. T. Corporation v. Isham Park Garage, supra.

7. Del.—Morgan Millwork Co. v. Dover Garage Co., 108 A. 62, 30 Del. 383.

38 C.J. p 87 note 70.

8. Mass.—D. A. Schulte, Inc., v. North Terminal Garage Co., 197 N.E. 16, 291 Mass. 251

Utah.—Willis v. Jensen, 22 P.2d 220, 82 Utah 148.

9. Cal.—Fisher v. Pickwick Hotel, 108 P.2d 1001, 42 Cal.App.2d Supp. 823.

La.—Polly Shoppe v. Blaise, 134 So. 440, 16 La.App. 553.

Mich.—Crowley v. Detroit Garages, 243 N.W. 2, 259 Mich. 170.

10. Cal.—Fisher v. Pickwick Hotel, 108 P.2d 1001, 42 Cal.App.2d Supp. 823.

Mass.—D. A. Schulte, Inc., v. North Terminal Garage Co., 197 N.E. 16, 291 Mass. 251.

Tex.—Central Meat Market v. Longwell's Transfer, Com.App., 62 S.W. 2d 87.

38 C.J. p 87 note 73.

Failure to return automobile, on presentation of storage certificate, in consequence of negligence in delivery to wrong person constituted conversion.—Crowley v. Detroit Garages, 243 N.W. 2, 259 Mich. 170.

lack of negligence.¹¹ It is generally held that the only surrender of the vehicle which the garage keeper can rightfully make is on the order of the owner,¹² express or reasonably implied,¹³ particularly where he has expressly agreed not to deliver the vehicle without an order;¹⁴ but it has also been held that the garage keeper is not justified in asking for an order from the bailor where the true owner offers to pay the lien for storage and to protect the bailor by a proper indemnity.¹⁵

Theft of vehicle. A garage keeper is liable for the loss by theft of a motor vehicle stored in his garage where he failed to use ordinary care to prevent the theft¹⁶ or to exercise reasonable diligence to recover it after it was stolen.¹⁷ On the other hand, where a stored car is stolen from the garage without negligence or connivance on the part of the garage keeper, he has been held not liable to the owner for the loss,¹⁸ even though the thief is his employee,¹⁹ the garage keeper is not an insurer against damage through theft.²⁰ The owner of the vehicle is negligent, so as to be precluded from recovering from the garage keeper for theft, where he leaves the vehicle outside the garage with the keys in the ignition and the door unlocked, contrary to the usual practice in the garage of placing keys on a shelf inside the ga-

rage;²¹ but, if a motor vehicle left near the entrance of a garage is received by the garage keeper, no duty rests on its owner to lock the car or otherwise attend to its safety.²² The loss or disappearance of such essential and substantial parts of a motor vehicle as the battery and crank while in the possession of the garage keeper may amount to a conversion by him of the vehicle.²³

Articles left in vehicles. Whether a garage keeper has any duty to care for articles in vehicles received by him for storage depends on notice to him of the presence of such articles;²⁴ he is liable, where he had notice, for loss of such articles by negligent delivery to a third person not authorized to receive the vehicle and articles,²⁵ but not where he had no notice.²⁶ It has been said that, if there is notice, the garage keeper's duty rises no higher than that of a gratuitous bailee;²⁷ but, even where the bailment is regarded as gratuitous, there may nevertheless be liability for failure to take adequate measures to guard against the misdelivery which caused the loss;²⁸ and, where a bailment of baggage in the vehicle is regarded as one for hire, slight care is not sufficient.²⁹ Although he knows that the automobile is to be placed outside the garage, the owner does not assume the risk of loss of baggage in the car where the night-

11. Tex.—Central Meat Market v. Longwell's Transfer, Com App., 62 S.W.2d 87.

38 C.J. p 87 note 73.

12. W.Va.—McLain v. West Virginia Auto Co., 79 S.E. 731, 72 W.Va. 738, 48 L.R.A., N.S., 561, Ann.Cas. 1915D 956.

38 C.J. p 87 note 70.

13. Del.—Morgan Millwork Co. v. Dover Garage Co., 108 A. 62, 30 Del. 383.

W.Va.—McLain v. West Virginia Auto Co., 79 S.E. 731, 72 W.Va. 738, 48 L.R.A., N.S., 561, Ann.Cas. 1915D 956.

14. N.Y.—Wilson v. Wyckoff, 117 N.Y.S. 783, 133 App.Div. 92, affirmed 93 N.E. 1135, 200 N.Y. 561.

38 C.J. p 87 note 72.

15. N.Y.—C. I. T. Corporation v. Isham Park Garage, 235 N.Y.S. 163, 134 Misc. 501.

16. Mo.—Corpus Juris cited in McKnight v. Batrick, App., 49 S.W.2d 277, 280.

N.Y.—Arnold v. Kensington Plaza Garages, 42 N.Y.S.2d 118, 179 Misc. 697—Henderson v. Park Central Motors Service, 244 N.Y.S. 409, 138 Misc. 183—Corrao v. Dewey Garage Corporation, 24 N.Y.S.2d 592.

Pa.—Smith v. Cohen, 176 A. 869, 116 Pa.Super. 395.

38 C.J. p 87 note 77.

Matters constituting negligence

(1) Leaving garage door open and unguarded and permitting strangers to enter garage.—Henderson v. Park Central Motors Service, 244 N.Y.S. 409, 138 Misc. 183.

(2) Leaving unlocked automobile on street.—Meine v. Mossler Auto Exchange, 120 So. 533, 10 La App. 65.

17. Wash.—Tacoma Auto Livery Co. v. Union Motor Car Co., 151 P. 243, 87 Wash. 102.

38 C.J. p 87 note 78 [a].

In case of mysterious disappearance of the automobile, ordinary care requires the giving of prompt information of the disappearance to the owner, if not active pursuit by the garage keeper.—U. S. v. Whited & Whited, D.C.Wash., 1 F.Supp. 589.

18. D.C.—Medes v. Hornbach, 6 F. 2d 711, 56 App.D.C. 13.

19. D.C.—Medes v. Hornbach, supra. N.Y.—New Amsterdam Casualty Co. v. Greenberg, 274 N.Y.S. 854, 153 Misc. 347.

20. N.Y.—New Amsterdam Casualty Co. v. Greenberg, 274 N.Y.S. 854, 153 Misc. 347.

21. N.Y.—National Retailers Mut. Ins. Co. v. Protogeron, 62 N.Y.S.2d 80, 186 Misc. 890.

22. Ga.—Atlanta Cadillac Co. v. Manley, 116 S.E. 35, 29 Ga.App. 522.

23. Ga.—Nalley v. Thomason, 113 S. E. 65 28 Ga.App. 787.

24. Pa.—Corpus Juris quoted in Moss v. Jannetti Body Co., 101 Pa. Super 1, 5.

Utah.—Corpus Juris quoted in Willis v. Jensen, 22 P.2d 220, 222, 82 Utah 148.

W.Va.—Corpus Juris quoted in Barnett v. Casey, 19 S.E.2d 621, 623, 124 W.Va. 143.

25. N.Y.—Corrao v. Dewey Garage Corporation, 24 N.Y.S.2d 592.

Property left in garage keeper's office with his consent

N.Y.—Rubin v. Forwarders' Auto Trucking Corp., 181 N.Y.S. 451, 171 Misc. 376.

26. Ill.—Ohge v. La Salle-Randolph Garage Corp., 66 N.E.2d 725, 328 Ill. App. 665.

Mass.—D. A. Schulte, Inc., v. North Terminal Garage Co., 197 N.E. 16, 291 Mass. 251.

Utah.—Willis v. Jensen, 22 P.2d 220, 82 Utah 148.

27. Mass.—D. A. Schulte, Inc., v. North Terminal Garage Co., 197 N. E. 16, 291 Mass. 251.

28. N.Y.—Rubin v. Forwarders' Auto Trucking Corp., 181 N.Y.S. 451, 171 Misc. 376.

29. Cal.—Homan v. Burkhart, 291 P. 624, 108 Cal.App. 363.

man promises to watch the car and its contents.³⁰

c. Disclaimer or Limitation of Liability

In the absence of express or implied agreement by the bailor to the provisions therein, a notice posted in the garage, or printed on bills or monthly statements, which disclaims or attempts to limit liability on the part of the garage keeper is not effective to preclude or limit his liability for a loss caused by his negligence.

The rule has been laid down that a garage keeper with whom a motor vehicle is stored, being a bailee for hire, cannot by contract so limit his responsibility as not to be liable for his negligence.³¹ However, a contract for storage at the owner's risk has been upheld where the owner assumed the risk because of the lower rate and the garage keeper used the same diligence that he used in respect of his own cars.³² It has been held that a garage keeper, by posting a sign or notice in his place of business, cannot limit his liability for theft,³³ fire,³⁴ or negligence generally.³⁵ Unless the bailor's attention is called to such a sign, and he expressly or impliedly agrees to the provisions therein, he is not bound thereby.³⁶

A notice relating to liability for loss, printed on bills or monthly statements, must be read with the understanding that negligence does not cause the loss,³⁷ and it is not effective to relieve the garage keeper from liability, under its unqualified oral bailment agreement, for loss or damage occasioned by his negligence.³⁸

A stipulation in a claim check that the garage keeper will not be liable for theft is of no benefit to him where his employee took out the vehicle for his own purposes and no theft, as the term is usually understood, was committed.³⁹

§ 727. Actions

a. In general

- b. Evidence
- c. Trial
- d. Damages or amount of recovery

a. In General

The plaintiff's initial pleading in an action against a garage keeper for loss of or damage to, a stored motor vehicle is sufficient if it alleges a bailment and a breach of duty by the defendant. Where the action is based on negligence, a tender of the storage charge or a demand for the return of the property is not necessary.

A tender of the storage charge on a motor vehicle is not necessary to a recovery by the owner for the destruction of the vehicle because of a garage keeper's negligence,⁴⁰ nor is a demand for the return of the property necessary.⁴¹

Pleading. A declaration, petition, complaint, or statement of claim in an action against a garage keeper for loss of, or damage to, a motor vehicle left in his care for storage is sufficient if it shows the bailment and a breach of duty by the garage keeper,⁴² even though it is not based on the doctrine of *res ipsa loquitur*.⁴³ Where the action is brought to recover for loss of the vehicle by fire, negligence must be alleged.⁴⁴ Where defendant, in his answer, denies that the automobile was stored with him at the time of its alleged loss, a further plea, in the alternative, that, if the court finds that the car was stored with him when stolen, the theft was due to no fault or negligence on the part of himself or any of his employees is bad, as his denial of possession of the car precludes the idea of any care being bestowed on its safekeeping.⁴⁵

In an action by a garage proprietor against a third person for damages to a stored automobile from a collision which occurred while the automobile was being used by a garage employee without consent and on a mission of his own, plaintiff must allege facts showing that he has an interest in prosecuting the action.⁴⁶

30. Cal.—Homan v. Burkhart, *supra*.
31. Or.—Simms v. Sullivan, 198 P. 240, 100 Or. 487, 15 A.L.R. 678—Pilson v. Tip-Top Auto Co., 136 P. 642, 67 Or. 528.

32. La.—Automobile Underwriters of America v. Langhlin, 6 La.App. 67.

33. Colo.—Cascade Auto Co. v. Peter, 212 P. 823, 72 Colo. 570.

34. Colo.—Parris v. Jaquith, 197 P. 750, 70 Colo. 63.

35. La.—Williams v. H. L. Well Co., 1 La.App. 188.

N.Y.—Arnold v. Kensington Plaza Garages, 42 N.Y.S.2d 118, 179 Misc. 697.

38 C.J. p 85 note 40.

36. Ohio.—Dietrich v. Peters, 162 N. E. 753, 28 Ohio App. 427.

37. N.Y.—Corrao v. Dewey Garage Corporation, 24 N.Y.S.2d 592.

38. N.Y.—Arnold v. Kensington Plaza Garages, 42 N.Y.S.2d 118, 179 Misc. 697.

39. La.—Gulf & S. I. R. Co. v. Sutter Motor Co., 126 So. 458, 12 La. App. 495.

It is doubtful whether provision is binding where it is not called to the attention of the owner of the vehicle.—Gulf & S. I. R. Co. v. Sutter Motor Co., *supra*.

40. Cal.—Hobson v. Silvea, 194 P. 525, 50 Cal.App. 35.

41. Cal.—Hobson v. Silvea, *supra*.

42. Ohio.—Dietrich v. Peters, 162 N. E. 753, 28 Ohio App. 427.

38 C.J. p 89 note 5.

Pleadings held sufficient

Ill.—Pomprowitz v. La Salle-Randolph Garage Corp., 77 N.E.2d 852, 333 Ill.App. 329.

38 C.J. p 89 note 5 [c].

43. R.I.—McCarthy v. McCarthy Freight System, 18 A.2d 336, 66 R. I. 175.

44. Ohio.—Blackburn v. Norris, 189 N.E. 262, 46 Ohio App. 469.

45. La.—Potomac Ins. Co. v. Blaise, App., 181 So. 629.

46. La.—Douglas v. Haro, App., 32 So.2d 387.

b. Evidence

In an action against a garage keeper to recover for loss of, or damage to, a motor vehicle left with him for storage, a presumption of negligence arises and a prima facie case of negligence is established when the plaintiff proves that he delivered his motor vehicle in good condition to the garage keeper and that the latter returned it in a damaged condition or failed or refused to return it on demand.

In an action against a garage keeper to recover for loss of, or damage to, a motor vehicle left with him for storage, plaintiff has the burden of establishing his contentions⁴⁷ by a preponderance of the evidence.⁴⁸ While it has been held that proof by plaintiff that he left his motor vehicle in good condition in defendant's garage and that it was in a damaged state the next morning does not make out a prima facie case⁴⁹ or cause the burden of proof to shift to defendant,⁵⁰ according to the

weight of authority a presumption of negligence arises and a prima facie case of negligence is established where plaintiff proves delivery of his motor vehicle in good condition to the garage keeper and that the latter failed to produce it in a similar condition,⁵¹ or that the garage keeper failed or refused to return it on demand,⁵² or that the vehicle was stolen while in his care.⁵³

In such cases defendant has the burden of going forward with evidence of due care and lack of negligence on his part, to counteract the presumption and rebut the prima facie case;⁵⁴ and where defendant does not introduce evidence of sufficient weight to counteract and overcome the presumption, plaintiff is entitled to recover.⁵⁵ Mere proof of theft of the unreturned vehicle is not sufficient to meet the presumption⁵⁶ and overcome plaintiff's

47. Mo.—Stines v. Dillman, App., 4 S.W.2d 477.

Plaintiff must prove negligence where his vehicle was lost by fire—Blackburn v. Norris, 189 N.E. 262, 46 Ohio App. 469.

48. Mo.—Stines v. Dillman, App., 4 S.W.2d 477.

Evidence held sufficient

(1) In general.

Cal.—Neff v. Campbell, 289 P. 217, 106 Cal App. 286.

Ill.—Neal v. Lincoln Oil Refining Co., 269 Ill App. 207.

La.—Potomac Ins. Co. v. Blaise, App., 181 So. 629—Union Indemnity Co. v. Blaise Downtown Storage, 138 So. 226, 18 La.App. 295.

Mass.—Fielding v. S. Z. Poli Realty Co., 174 N.E. 178, 274 Mass. 20.

Nev.—Manhattan Fire & Marine Ins. Co. v. Grand Central Garage, 9 P. 2d 682, 54 Nev. 147.

N.Y.—Di Gennaro v. Feinberg, 40 N.Y.S.2d 513.

Pa.—Gordon v. Gershman, 95 Pa.Super. 43.

38 C.J. p 90 note 26 [a], [d].

(2) To show theft of vehicle.

La.—Potomac Ins. Co. v. Blaise, App., 181 So. 629.

Tex.—Gulf Coast Chemical Co. v. Hopkins, Civ.App., 145 S.W.2d 928.

(3) To show negligence of defendant.

Mich.—Crowley v. Detroit Garages, 243 N.W. 2, 259 Mich. 170.

Pa.—Underberg v. Stewart, 86 Pa.Super. 106.

38 C.J. p 90 note 26 [d] (5)–(7).

Evidence held insufficient

(1) In general.

Ind.—Employers' Fire Ins. Co. v. Consolidated Garage & Sales Co., 155 N.E. 533, 85 Ind.App. 674.

La.—Gulf & S. I. R. v. Sutter Motor Car Co., App., 146 So. 59.

N.Y.—Bluhm v. Coloma, 62 N.Y.S.2d 643.

38 C.J. p 90 note 26 [e].

(2) To show defendant's negligence.—Rhodes v. Warsawsky, 242 Ill.App. 101—38 C.J. p 90 note 26 [b].

Testimony of other garage owners as to general custom to allow garage doors to remain open, except in severe weather, does not prevent the trial judge from finding defendant guilty of negligence.—Smith v. Cohen, 176 A. 869, 116 Pa.Super. 395.

49. Mass.—Hanna v. Shaw, 138 N.E. 247, 244 Mass. 57.

50. Mass.—Hanna v. Shaw, supra.

51. Ill.—Black v. Downtown Parking Stations, 75 N.E.2d 395, 332 Ill. App. 418.

38 C.J. p 89 note 10.

Proof of damage by fire to stored automobile raises prima facie presumption of garage keeper's negligence.—Hobble v. Ryan, 223 N.Y.S. 654, 130 Misc. 221—38 C.J. p 89 note 10 [a] (2).

52. Ill.—Byalos v. Matheson, 159 N.E. 242, 328 Ill. 269.

Ind.—Employers' Fire Ins. Co. v. Consolidated Garage & Sales Co., 155 N.E. 533, 85 Ind.App. 674.

Ohio.—North River Ins. Co. of New York v. Ohmer, 26 N.E.2d 767, 63 Ohio App. 346—Dietrich v. Peters, 162 N.E. 753, 28 Ohio App. 427.

53. Colo.—Cascade Auto Co. v. Peter, 212 P. 823, 72 Colo. 570.

Mich.—Tatro v. Baker-Fisk-Hugill Co., 184 N.W. 449, 215 Mich. 623.

Doctrine of res ipsa loquitur is, however, inapplicable to action by bailor, where bailee's failure to return automobile was due to employee's theft.—Rhodes v. Warsawsky, 242 Ill.App. 101.

54. N.Y.—Hobbie v. Ryan, 223 N.Y.S. 654, 130 Misc. 221.

Ohio.—Dietrich v. Peters, 162 N.E. 753, 28 Ohio App. 427.

38 C.J. p 89 notes 15, 17.

Unrestricted burden of proof

(1) In some cases it is stated generally that defendant garage keeper has the burden of proving that the damage to the vehicle, or the failure to return the vehicle on demand, was not due to negligence or lack of ordinary care on the part of himself or his employee.

U.S.—U. S. v. Whited & Whited, D. C.Wash., 1 F.Supp. 589.

La.—Gulf & S. I. R. Co. v. Sutter Motor Co., 126 So. 458, 12 La.App. 495.

(2) On proof of theft, defendant's burden was not merely the burden of going forward with proof or a shifting burden, but the burden of proving to the jury that the loss did not arise from his negligence.—Harding v. Shapiro, 206 N.W. 168, 165 Minn. 248—38 C.J. p 89 note 18.

(3) Also, it has been held that garage proprietor had burden, in action by owner for damages resulting to automobile when it was delivered by proprietor's employee to unauthorized person, contrary to special contract for storage, to prove that person who took automobile had express or implied authority to receive it.—Montana Leather Co. v. Colwell, 30 P.2d 473, 96 Mont. 274.

55. Ill.—Standard, Inc., v. Kirby, 48 N.E.2d 716, 319 Ill.App. 206.

Ohio.—North River Ins. Co. of New York v. Ohmer, 26 N.E.2d 767, 63 Ohio App. 346.

Evidence held insufficient

Ill.—Black v. Downtown Parking Stations, 75 N.E.2d 395, 332 Ill.App. 418.

38 C.J. p 90 note 26 [c].

56. Ohio.—North River Ins. Co. of New York v. Ohmer, 26 N.E.2d 767, 63 Ohio App. 346.

prima facie case,⁵⁷ but defendant must go further and show that he was guilty of no negligence that would render him liable.⁵⁸

In an action to recover for storage, it will not be presumed that the ordinary nightman in charge of a public garage had implied or apparent authority to bind his employer by a contract for protracted storage at a certain rate per month.⁵⁹ The finding made or result reached in such an action should not be against the weight of the evidence.⁶⁰

Evidence held inadmissible in an action against a garage keeper for loss of, or damage to, a motor vehicle stored in his garage includes: Evidence as to notices posted about the garage, which disclaimed liability in case of loss and which are not shown to have come to the owner's attention;⁶¹ evidence that the owner carried insurance on the lost vehicle and had collected money for its loss from the insurance company;⁶² evidence of a custom in other garages;⁶³ evidence of instructions given by defendant to his watchman;⁶⁴ evidence that another automobile was stolen from the garage

two months before;⁶⁵ evidence of the failure of defendant to make a record of the return of the vehicle to the garage prior to the alleged negligence in question;⁶⁶ and evidence that the garage keeper made improvements on his premises after the loss.⁶⁷

c. Trial

Questions of fact, such as whether the garage keeper was negligent or exercised ordinary and reasonable care, are to be determined by the jury or other trier of facts; and where the action is tried before a jury instructions correctly stating the law applicable to the pleadings and the evidence may and should be given.

The parties are entitled to a trial where a question of fact is presented in an action.⁶⁸ Unless the evidence bearing thereon is insufficient for submission to a jury,⁶⁹ or is undisputed,⁷⁰ a question of fact should be determined by the jury, or the trial judge trying the case without a jury.⁷¹ Whether the garage keeper was negligent or exercised ordinary and reasonable care in safeguarding the vehicle is ordinarily a question of fact for the jury or other trier of facts⁷² and should not be determined as a question of law;⁷³ but the

57. Ill.—Byalos v. Matheson, 243 Ill. App. 60, affirmed 159 N.E. 242, 328 Ill. 269.

Plaintiff's mere concession that automobile was stolen from defendant's garage did not destroy its prima facie case.—Federal Ins. Co. v. Lindsley, 228 N.Y.S. 614, 132 Misc. 54.

58. Ill.—Byalos v. Matheson, 243 Ill. App. 60, affirmed 159 N.E. 242, 328 Ill. 269.

59. Minn.—Northern Battery Service Co. v. Tschida, 196 N.W. 482, 157 Minn. 401.

60. N.Y.—Equitable Garage, Inc. v. Hall, 171 N.Y.S. 223, 38 C.J. p 77 note 67 [b].

Evidence held to sustain finding as to inception of storage contract Minn.—Pratt v. Midland Mortg Corporation, 246 N.W. 11, 187 Minn. 512.

61. Colo.—Parris v. Jaquith, 197 P. 750, 70 Colo. 63.

Minn.—Hoel v. Flour City Fuel, etc. Co., 175 N.W. 300, 144 Minn. 280.

62. Mass.—Feins v. Ralby, 139 N.E. 530, 245 Mass. 228, 28 A.L.R. 511.

63. Colo.—Parris v. Jaquith, 197 P. 750, 70 Colo. 63, 38 C.J. p 90 note 21 [b].

64. Colo.—Parris v. Jaquith, supra, 38 C.J. p 90 note 21 [a].

65. Utah.—Romney v. Covey Garage, 111 P.2d 545, 100 Utah 167.

66. Mass.—Hayes v. Maykel Auto. Co., 125 N.E. 165, 234 Mass. 198, 38 C.J. p 90 note 21 [c].

67. N.C.—Farrell v. Universal Garage Co., 102 S.E. 617, 179 N.C. 389.

68. N.Y.—Rubinstein v. Pouch, 24 N.Y.S.2d 172.

69. D.C.—Howard v. Swagart, 161 F.2d 651, 82 U.S.App.D.C. 147.

Mo.—Stines v. Dillman, App., 4 S.W.2d 477.

Evidence held sufficient for submission to jury

Mass.—Georgalis v. Geas, 163 N.E. 170, 265 Mass. 8.

Mo.—Motors Ins. Corp. v. Union Market Garage, App., 207 S.W.2d 836.

N.J.—Judge v. Starr, 136 A. 413, 5 N.J. Misc. 283.

38 C.J. p 90 note 29 [c].

70. Mich.—Banks v. Strong, 164 N.W. 398, 197 Mich. 544.

Mont.—Montana Leather Co. v. Colwell, 30 P.2d 473, 96 Mont. 274.

71. Mass.—Hill v. Creditors' Nat. Clearing House, 194 N.E. 128, 289 Mass. 437.

Mo.—McKnight v. Batrick, App., 49 S.W.2d 277.

N.C.—Hutchins v. Taylor-Bulck Co., 153 S.E. 397, 198 N.C. 777.

Pa.—Smith v. Cohen, 176 A. 869, 116 Pa. Super. 395—Lopus v. Gensler, 99 Pa. Super. 44.

Wash.—Sommer v. Yakima Motor Coach Co., 26 P.2d 92, 174 Wash. 638.

On conflicting evidence as to whether a garage keeper has assumed a specific obligation not to deliver a motor vehicle to any person but the owner, even on a written order, the question becomes one for the

jury—Hare v. Mulligan, 77 Pa. Super. 577.

Direction of verdict held properly refused

Ill.—Neal v. Lincoln Oil Refining Co., 269 Ill. App. 207.

Mo.—Motors Ins. Corp. v. Union Market Garage, App., 207 S.W.2d 836.

Question of law

Whether corporation leasing motor coach and its lessor were identical in law was held question of law for court—Sommer v. Yakima Motor Coach Co., 26 P.2d 92, 174 Wash. 638.

72. Minn.—Harding v. Shapiro, 206 N.W. 168, 165 Minn. 248.

Mo.—McKnight v. Batrick, App., 49 S.W.2d 277.

N.Y.—Hobbie v. Ryan, 223 N.Y.S. 654, 130 Misc. 221.

Pa.—Smith v. Cohen, 176 A. 869, 116 Pa. Super. 395.

Tex.—Cox, Inc., v. American Fire & Marine Ins. Co., Civ.App., 28 S.W.2d 899.

Sole question in particular case

Where the automobile was shown without dispute to have been stolen shortly after being stored in defendant's garage, only issue before court, trying the case without a jury, was whether defendant, as bailee, exercised ordinary care under circumstances of automobile's disappearance.—Gulf Coast Chemical Co. v. Hopkins, Tex.Civ.App., 145 S.W.2d 928.

73. Minn.—Harding v. Shapiro, 206 N.W. 168, 165 Minn. 248.

38 C.J. p 90 note 29 [a].

facts may be so conclusive as to make it a question for the court.⁷⁴

Instructions. Where an action against a garage keeper for the loss of, or damage to, property while in his custody is tried before a jury, the degree of care required of him should be properly defined by the instructions;⁷⁵ and the court may give correct instructions on the burden of proof;⁷⁶ but the refusal of a proper instruction is not error where the requested instruction has been substantially given in another instruction.⁷⁷ Correct instructions which are applicable to the pleadings and the evidence may be given whether the action is one to recover for the destruction of, or damage to, a stored motor vehicle⁷⁸ or is one to recover for personal injuries sustained by the owner of a stored vehicle when struck by another vehicle driven in the garage by a garage employee.⁷⁹

d. Damages or Amount of Recovery

In an action against a garage keeper for conversion of a stored motor vehicle, the full value of the vehicle at the time of the conversion is recoverable; but, in an action for damage to the vehicle, the measure of damages is the difference between the value of the vehicle before and after it was damaged.

In an action against a garage keeper for damage to a motor vehicle resulting from negligence, the measure of damages is the difference between the value of the vehicle before and after its injury,⁸⁰ and in estimating this difference it is proper for the jury to consider the cost and expense of repairs;⁸¹ but the damages, if any, recoverable do not include deterioration resulting from long usage or lack of use.⁸² In an action for conversion, the full value of the vehicle at the time of the conversion is recoverable.⁸³ A garage keeper's recovery of compensation for storage is subject to deduction of the amount of his recognized liability for a gas tank stolen from the vehicle while it was in storage.⁸⁴

C. REPAIRS, SERVICES, AND SUPPLIES

§ 728. Agreements in General

A person may not recover for services rendered or materials furnished in repairing a motor vehicle unless there is an express or implied agreement with the person from whom he seeks compensation; and like rules obtain as to recovery for towing the vehicle or furnishing oil and gasoline therefor.

A person may not recover for services rendered or materials furnished in repairing a motor vehicle unless there is an express or implied agreement with the person from whom he seeks com-

penensation that he is to be compensated for such services or materials.⁸⁵ Where a vehicle is left for the making of specified repairs with instructions not to do any other work or furnish any other material, compensation may not be recovered for additional repairs;⁸⁶ but where the vehicle is left for whatever repairs are needed, without limitation of the amount of repairs to be made, recovery may be had for all work done and materials furnished.⁸⁷

74. Minn.—Newman v. Flour City Fuel, etc., Co., 175 N.W. 682, 144 Minn. 473.

75. N.Y.—Smith v. Economical Garage, Inc., 176 N.Y.S. 479, 107 Misc. 430.

38 C.J. p 91 note 33.

76. N.C.—Potts v. Carter-Cobb Motor Co., 131 S.E. 739, 191 N.C. 821.

77. Colo.—Parris v. Jaquith, 197 P. 750, 70 Colo. 63.

38 C.J. p 91 note 35.

78. Iowa.—Reimers v. Petersen, 22 N.W.2d 817, 237 Iowa 550.

38 C.J. p 91 note 33 [a].

79. Ind.—Del-Mar Garage v. Boden, 179 N.E. 729, 95 Ind.App. 317.

80. Del.—Morgan Millwork Co. v. Dover Garage Co., 108 A. 62, 30 Del. 383.

N.C.—Farrell v. Universal Garage Co., 102 S.E. 617, 179 N.C. 389.

Value when delivered to defendant and value when returned to plaintiff.

N.Y.—Bluhm v. Coloma, 62 N.Y.S.2d 643.

81. N.C.—Farrell v. Universal Garage Co., 102 S.E. 617, 179 N.C. 389.

82. La.—Prendergast v. Parcel Transfer Co., 5 La.App. 128.

83. Mich.—Crowley v. Detroit Garages, 243 N.W. 2, 259 Mich. 170.

38 C.J. p 91 note 41.

84. N.Y.—University Garage v. Heiser, 142 N.Y.S. 315.

38 C.J. p 77 note 67 [a] (2).

85. La.—Weinberger Sales Co. v. Truett, App., 2 So.2d 699—Darce v. One Ford Automobile, 2 La.App. 185.

42 C.J. p 813 note 91.

Request and compliance therewith

(1) Where plaintiff automobile repairman at request of defendant owner repaired and furnished materials for defendant's automobile, there was an implied promise to pay, and in the absence of a contract for payment at a later date the debt was due when the work was performed.—Shirley-Self Motor Co. v. Simpson, Tex.Civ.App., 195 S.W.2d 951.

(2) However, where repairs were made at the request of a thief of the vehicle, no recovery therefor may be had from the owner of the vehicle.—Darce v. One Ford Automobile, 2 La.App. 185.

Promise implied in law

Where automobile agency contract provided that agent was to be repaid for repairing used automobiles only from excess of sale price of such automobiles over trade-in price but the dealer breached the contract by wrongfully taking possession of repaired and reconditioned cars, thereby preventing the agent from selling them, the dealer, having reaped the benefit of the repairs and replacements, is obligated, under a promise arising by implication of law, to pay the value thereof.—Rountree Motor Co. v. Smith Motor Co., Tex.Civ.App., 109 S.W.2d 296, error dismissed.

86. La.—Wheless Auto Supply Co. v. Herold, 8 La.App. 516.

87. La.—Wheless Auto Supply Co. v. Steinau, 127 So. 451, 13 La.App. 190.

A conditional seller of a motor vehicle is not personally liable for repairs ordered by the buyer or his assignee;⁸⁸ but where a fire loss on a truck, sold under a conditional contract reserving title in the seller, and insured by the buyer, is settled by an agreement between insurer, the seller, and the buyer, whereby the seller undertakes to make repairs, the cost to be paid by insurer, the buyer, being a party to the contract, may set up a breach by the seller in an action by the seller against him to recover the truck.⁸⁹

Written authorization. Under a statute providing that repairmen may collect only up to a stated sum for repairs where there has been no written authorization, the written authorization may be given either when the statutory limit is reached, or before the repairs are begun, or at any time the repairs up to the statutory amount are being made;⁹⁰ and it may include the items of repair, together with their cost or estimated cost, or it may include only the items of repair, or it may be an authorization to overhaul completely and provide everything new that is needed.⁹¹ The statute applies only when demand for payment is made by a repairman or automobile mechanic, and not where demand for reimbursement from the conditional buyer is made by the holder of the legal title.⁹² Where the holder of the legal title paid the full repair bill, it will be presumed that he waived the statutory requirement.⁹³

Wrecker service. It has been held that a police

officer is without legal authority to employ wrecker service to pull another person's disabled automobile, standing on the side of a highway and unable to run because of defective brakes, to a private garage,⁹⁴ and that, where the automobile owner protests, the owner of the wrecker is without legal right or authority to pull such automobile to a garage.⁹⁵

Supplies. Where the loan of an automobile creates a bailment for the benefit of the bailee, the bailee may not pledge the bailor's credit or make him responsible for the payment of a bill for oil and gasoline.⁹⁶

§ 729. Nature of Bailment

A bailment is created when a motor vehicle is delivered by its owner or custodian to, and is accepted by, another person for repairs or servicing; and ordinarily the bailment is one for hire or for mutual benefit.

A bailment is created when a motor vehicle is delivered by its owner or custodian to, and is accepted by, another person for repairs⁹⁷ or servicing;⁹⁸ and, as bailee, the person with whom the vehicle is left occupies the position of an independent contractor⁹⁹ whose negligence is not imputable to the bailor.¹ While, where one receives a motor vehicle from the owner to repair it gratuitously, the bailment is one for the sole benefit of the bailor,² a repairman to whom a motor vehicle is intrusted for repairs is ordinarily a bailee for hire³ or for mutual benefit,⁴ as is a manufacturer

88. Miss.—*De Van Motor Co. v. Bailey*, 171 So. 342, 177 Miss. 441.
42 C.J. p 813 note 96.

89. Minn.—*Satterlee v. Lawler*, 193 N.W. 118, 155 Minn. 181.

90. Conn.—*Di Blase v. Garnsey*, 133 A. 669, 104 Conn. 447.

91. Conn.—*Di Blase v. Garnsey*, *supra*.

92. Conn.—*Bridgeport L. A. W. Corporation v. Levy*, 147 A. 841, 110 Conn. 255.

93. Conn.—*Bridgeport L. A. W. Corporation v. Levy*, *supra*.

94. Ala.—*Brown v. Ace Motor Co.*, 8 So.2d 585, 30 Ala.App. 479, certiorari denied 8 So.2d 588, 243 Ala. 92.

95. Ala.—*Brown v. Ace Motor Co.*, *supra*.

96. N.J.—*Post v. Lloyd*, 177 A. 560, 13 N.J.Misc. 241.

97. Cal.—*Guidici v. Pacific Auto Ins. Co.*, 179 P.2d 337, 79 Cal.App.2d 562.

Md.—*General Refining Co. v. International Harvester Co.*, 196 A. 181, 173 Md. 404.

Mass.—*Rourke v. Cadillac Automobile Co. of Boston*, 167 N.E. 231, 268 Mass. 7.

Neb.—*Curry v. Bruns*, 285 N.W. 88, 136 Neb. 74.

N.Y.—*Blake v. Salmonson*, 67 N.Y.S. 2d 607, 188 Misc. 97.

Pa.—*Brower, to Use of Brower v. Employers' Liability Assur. Co., Limited, of London, England*, 177 A. 826, 318 Pa. 440—*Brown v. Crescent Nut & Chocolate Co.*, 165 A. 743, 310 Pa. 489.

S.C.—*Powell v. A. K. Brown Motor Co.*, 20 S.E.2d 636, 200 S.C. 75.

Any acts within special purpose of bailment are within the scope of the bailment.—*Brower, to Use of Brower v. Employers' Liability Assur. Co., Limited, of London, England*, 177 A. 826, 318 Pa. 440.

98. Me.—*Daigle v. Pelletier*, 31 A.2d 345, 139 Me. 382.

Lubrication

Me.—*Frost v. Chaplin Motor Co.*, 25 A.2d 225, 138 Me. 274, 138 A.L.R. 1144.

99. Me.—*Daigle v. Pelletier*, 31 A.2d 345, 139 Me. 382.

Neb.—*Curry v. Bruns*, 285 N.W. 88, 136 Neb. 74.

N.Y.—*Blake v. Salmonson*, 67 N.Y.S. 2d 607, 188 Misc. 97.

1. Me.—*Daigle v. Pelletier*, 31 A.2d 345, 139 Me. 382.

Nonliability of owner of vehicle for repairman's negligent operation of vehicle see *supra* § 438.

2. Ala.—*Thomas v. Hackney*, 68 So. 296, 192 Ala. 27.

3. Minn.—*Phoenix Assur. Co. v. Pratt*, 250 N.W. 455, 189 Minn. 586. Neb.—*Nagaki v. Stockfleth*, 4 N.W.2d 766, 141 Neb. 676.

Tenn.—*Andrew Jackson Hotel v. Platt*, 89 S.W.2d 179, 19 Tenn.App. 360.

38 C.J. p 85 note 29 [a]—42 C.J. p 813 note 5.

4. Neb.—*Nagaki v. Stockfleth*, 4 N.W.2d 766, 141 Neb. 676.

Ohio.—*Blackburn v. Norris*, 189 N.E. 262, 46 Ohio App. 469.

Pa.—*Brower, to Use of Brower v. Employers' Liability Assur. Co., Limited, of London, England*, 177 A. 826, 318 Pa. 440.

S.C.—*Kelley v. Capital Motors*, 28 S.E.2d 886, 204 S.C. 304.

to whom the vehicle is returned for repairs;⁵ and where the repairs have been completed and the property is being held until the owner can call for it the bailment remains simply one for mutual benefit.⁶

§ 730. Care as to Repairs, Services, or Supplies

Ordinarily a bailee of a motor vehicle intrusted to him for repairs may have the work done by another person; but he is bound to have the work done with ordinary care and skill, and he is liable for damages to the vehicle caused by carelessness and negligence in making the repairs.

A bailee of a motor vehicle intrusted to him for repairs is required to do the work contracted for, or to have it done, with ordinary care, skill, and judgment⁷ and with the use of a degree of diligence, attention, and skill adequate to the performance of his undertaking.⁸ He may use the usual means of executing the bailment,⁹ and, unless the contract requires his personal services, he may have the work completed by third persons;¹⁰ but where he takes a repair job involving some work which he does not have facilities to perform, his undertaking covers the entire job so far as the customer is concerned;¹¹ and his duty is not limited to the selection of competent employees¹² or to the employment of a competent person to do work which is outside the capacity of his shop.¹³ He is liable for damage to the vehicle caused by the carelessness and negligence of himself or his employee in making the repairs.¹⁴ How-

ever, there is no liability for an explosion resulting from the application of a welding torch to the outside of a tank trailer used in transporting gasoline where the repairs to be made require welding and the employees are informed by a representative of the owner of the vehicle that the tank has been steamed.¹⁵

Services and supplies. A person receiving a motor vehicle for washing assumes, as a bailee for hire, the obligation to use due care in the performance of the services required.¹⁶ The failure of a person to put alcohol in the radiator of a motor vehicle as he has agreed to do is negligence rendering him liable for the damages resulting from the subsequent freezing of water in the radiator.¹⁷

§ 731. Care and Custody of Vehicle

A repairman with whom a motor vehicle is left for repairs under a bailment for mutual benefit or for hire is not an insurer of the safety of the vehicle, but is required to use ordinary and reasonable care in safeguarding it, and is liable to the owner for loss of, or damage to, the vehicle resulting from his negligent acts or omissions.

As a bailee, a repairman with whom a motor vehicle is left for repairs has not only the possession and control, but also the exclusive right of possession, of the vehicle.¹⁸ Where the bailment is one for mutual benefit or for hire, the repairman is, in the absence of a contractual limitation of liability,¹⁹ required to use ordinary care and diligence in safeguarding the vehicle,²⁰ that is, such

Tenn.—Farrell-Calhoun Co., for Use of Automobile Ins. Co. of Hartford, Conn., v. Union Chevrolet Co., 113 S.W.2d 419, 21 Tenn.App. 554.

5. Ill.—Ford Motor Co. v. Osburn, 140 Ill.App. 633.

6. Ga.—Renfroe v. Fouche, 106 S.E. 303, 26 Ga.App. 340.

7. Conn.—Russell's Express, Inc. v. Bray's Garage, Inc., 109 A. 722, 94 Conn. 520.

42 C.J. p 813 note 9.

8. Iowa.—Burrichter v. Bell, 194 N. W. 947, 196 Iowa 529.

38 C.J. p 77 note 71.

9. Conn.—Russell's Express, Inc. v. Bray's Garage, Inc., 109 A. 722, 94 Conn. 520.

10. Conn.—Russell's Express, Inc. v. Bray's Garage, Inc., *supra*.

11. Conn.—Russell's Express, Inc. v. Bray's Garage, Inc., *supra*.

42 C.J. p 813 note 12.

12. Conn.—Russell's Express, Inc. v. Bray's Garage, Inc., *supra*.

42 C.J. p 813 note 9.

13. Conn.—Russell's Express, Inc. v. Bray's Garage, Inc., *supra*.

42 C.J. p 814 note 13.

14. La.—Wood v. Becker Welding Shop, App., 34 So.2d 924—Marine & Motor Ins. Co. v. Cathey, 8 La.App. 240.

15. La.—Transportation Equipment Co. v. Younger Bros., App., 34 So.2d 347.

Proximate cause of the explosion in such case is the failure of the owner of the tank trailer to see to it that the tank was properly steamed and rendered safe for the making of repairs before it was sent to the repairman.—Transportation Equipment Co. v. Younger Bros., *supra*.

16. Conn.—Maynard v. James, 146 A. 614, 109 Conn. 365, 65 A.L.R. 427.

17. Ark.—Whittaker v. Kirchman, 287 S.W. 168, 171 Ark. 1029, 49 A. L.R. 316.

18. Cal.—Guidici v. Pacific Auto. Ins. Co., 179 P.2d 337, 79 Cal.App. 2d 128.

Delivery at place other than repair shop

Delivery for repairs of a motor vehicle to the repairman's employee at a place other than the repair shop may, under the circumstances, be a delivery to the repairman.—Landry v. McNeil Hunter Motor Co., 123 So. 293, 11 La.App. 380.

19. Tex.—Langford v. Nevin, Civ. App., 293 S.W. 673, certified questions answered 298 S.W. 536, 117 Tex. 130.

Notice affecting liability see *infra* § 732.

20. Md.—General Refining Co. v. International Harvester Co., 196 A. 131, 173 Md. 404.

Neb.—*Corpus Juris* quoted in Nagaki v. Stockfleth, 4 N.W.2d 766, 767, 141 Neb. 676.

Ohio.—Blackburn v. Norris, 189 N. E. 262, 46 Ohio App. 469.

Tenn.—Farrell-Calhoun Co. for Use of Automobile Ins. Co. of Hartford, Conn. v. Union Chevrolet Co., 113 S.W.2d 419, 21 Tenn.App. 554.

38 C.J. p 86 note 50 [a] (2)—42 C.J. p 814 note 15.

care and diligence as a capable and reasonably prudent person engaged in the same business is accustomed to exercise,²¹ and is liable to the owner for loss of, or damage to, the vehicle resulting from his negligent acts or omissions²² or those of his agents or employees while acting within the scope of their employment.²³ Likewise, a person receiving a motor vehicle for washing or other servicing is required to exercise ordinary and reasonable care in safeguarding it.²⁴ A repairman is, however, required to use only ordinary and reasonable care for the safekeeping of the vehicle²⁵ and is not liable for loss or damage if such care has been exercised;²⁶ he is not an insurer of the safety of the vehicle.²⁷

Unless he is an ostensible principal,²⁸ a person not actually engaged in the business of repairing or servicing motor vehicles is not liable for damages to a motor vehicle resulting from the negligent operation thereof by a person who is not his employee, but to whom the vehicle was intrusted by the owner for repairs or services.²⁹

Theft or unauthorized use by employee. Where an automobile during the continuance of a bailment for repairs is stolen by a servant of the repairman, the repairman may be liable where he has failed to exercise due care in the selection of the servant;³⁰ and failure to protect a vehicle, left for repairs or service, from unauthorized use by

employees may impose liability for damage to the vehicle while being so used.³¹

Where the bailment is for the sole benefit of the bailor, as where one receives a motor vehicle from the owner to repair it gratuitously, he is required only to exercise slight care and is liable only for gross neglect or bad faith.³²

Conversion. No act of a repairman in dismantling a motor vehicle or making alterations therein is in any sense a conversion where everything he does while acting under the directions of the registered owner of the vehicle is lawful and within the terms of his contract of employment.³³ Even though repairs are made without the owner's consent, there is no conversion where the acts are done in subordination to the owner's title and without altering the structure, appearance, or usefulness of the vehicle.³⁴

§ 732. — Notice Affecting Liability

Posting or otherwise giving notice that he will not be liable does not relieve a repairman from liability for a loss occasioned by his lack of ordinary care.

The liability of one in whose custody an automobile was left for repairs as a bailee for hire is not affected by knowledge of the owner as to the manner in which or the place where the property was kept.³⁵ A repairman or serviceman cannot avoid liability for a loss occasioned by lack of or-

21. Tenn.—Farrell-Calhoun Co., for Use of Automobile Ins. Co. of Hartford, Conn., v. Union Chevrolet Co., *supra*.

22. Ky.—Kentucky Motors Co. v. Kelly, 3 S.W.2d 1092, 223 Ky. 482. La.—Marine & Motor Ins. Co. v. Cathey, 8 La App. 240.

Neb.—*Corpus Juris* quoted in Nagaki v. Stockfleth, 4 N.W.2d 766, 767, 141 Neb. 676.

Tenn.—Farrell-Calhoun Co., for Use of Automobile Ins. Co. of Hartford, Conn., v. Union Chevrolet Co., 113 S.W.2d 419, 21 Tenn.App. 554. 42 C.J. p 814 note 16.

23. La.—Royal Ins. Co., Limited, of Liverpool, England, v. Collard Motors, App., 179 So. 108.

Md.—General Refining Co. v. International Harvester Co., 196 A. 131, 173 Md. 404.

Neb.—*Corpus Juris* quoted in Nagaki v. Stockfleth, 4 N.W.2d 766, 767, 141 Neb. 676.

42 C.J. p 814 note 17.

24. Tenn.—Farrell-Calhoun Co., for Use of Automobile Ins. Co. of Hartford, Conn., v. Union Chevrolet Co., 113 S.W.2d 419, 21 Tenn.App. 554.

38 C.J. p 86 note 50 [a] (1).

25. N.C.—Swain v. Twin City Motor Co., 178 S.E. 560, 207 N.C. 755.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

42 C.J. p 814 note 18.

Precautions against fire

In one case the court refused to hold that a person operating a repair garage is guilty of negligence unless he employs a night watchman or installs a sprinkler system or fire extinguishing apparatus—Kelly v. Capital Motors, 28 S.E.2d 836, 204 S.C. 304.

26. N.C.—Swain v. Twin City Motor Co., 178 S.E. 560, 207 N.C. 755.

In absence of bad faith, repairman is liable only by reason of his negligence.—Blackburn v. Norris, 189 N.E. 262, 46 Ohio App. 469.

27. N.C.—Swain v. Twin City Motor Co., 178 S.E. 560, 207 N.C. 755.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

42 C.J. p 814 note 19.

28. Tex.—Burge v. Batson, Civ App., 13 S.W.2d 899.

29. La.—Herbert v. Langhoff, 168 So. 508, 185 La. 105.

30. Ga.—Renfro v. Fouché, 106 S. E. 303, 26 Ga App. 340.

31. Conn.—Maynard v. James, 146 A. 614, 109 Conn. 365, 65 A.L.R. 427.

La.—Wels v. Pan-American Petroleum Corporation, 126 So. 90, 12 La. App. 661.

42 C.J. p 814 note 22.

There is an implied contractual obligation that an automobile placed in hands of another for repairs, shall not be used in an unauthorized manner.—Powell v. A. K. Brown Motor Co., 20 S.E.2d 636, 200 S.C. 75.

Whether employer exercised proper care in selecting servant is immaterial.—Wels v. Pan-American Petroleum Corporation, 126 So. 90, 12 La. App. 661.

32. Ala.—Thomas v. Hackney, 68 So. 296, 192 Ala. 27.

33. Cal.—Lindsay v. Kleiber Motor Truck Co., 294 P. 454, 110 Cal.App. 479.

34. Wis.—Donovan v. Barkhausen Oil Co., 237 N.W. 940, 200 Wis. 194.

35. Mass.—Stevens v. Stewart-Warner Speedometer Corp., 111 N.E. 771, 223 Mass. 44.

dinary care on his part by having posted a notice,³⁶ or by having given notice to the owner,³⁷ that he will not be liable, as, for example, where the vehicle is destroyed by fire³⁸ or is stolen.³⁹

The duty of a repairman to care for articles in a vehicle left with him for repairs depends on notice to him of the presence of such articles.⁴⁰

§ 733. — Use of Vehicle in Testing Repairs

A repairman may be liable for destruction of, or damage to, a motor vehicle resulting from the negligence of his employee while driving the vehicle to ascertain whether the repairs have been successfully made.

The repairman may be liable for destruction of, or damage to, the vehicle resulting from the negligence of an employee while driving the vehicle for the purpose of ascertaining whether the repairs have been successfully made,⁴¹ even though the test is made at the request of the owner;⁴² and the fact that the test is not properly made or is unduly extended will not necessarily have the effect of taking the acts of the employee out of the scope of his employment.⁴³ However, recovery may not be had for damage to the vehicle in a collision while it is being tested if the collision is due to any other cause than the employee's negligence, such as the fault of the driver of the other vehicle;⁴⁴ and, obviously, where a vehicle, left

for greasing, is wrecked while being tested by an employee to ascertain whether squeaks have been removed, recovery may not be had on the ground that the employer has negligently permitted the vehicle to be stolen.⁴⁵ In the case of a bailment for the sole benefit of the bailor, as where one receives a motor vehicle from the owner to repair it gratuitously, he is required only to exercise slight care, and is liable only for gross neglect or bad faith where the vehicle is damaged while it is being operated for the purpose of ascertaining whether or not the repairs have been successfully made.⁴⁶

§ 734. — Redelivery to Owner

A person with whom a motor vehicle is left for repairs or services is obligated to return it to the bailor or his authorized representative or show a good excuse for failure to do so.

An essential element of every contract of bailment of a motor vehicle for repairs or services is the agreement of the bailee to return the vehicle to the bailor or his authorized representative;⁴⁷ and this is true where the motor vehicle is received for the purpose of making repairs if ordered by the owner after ascertainment of their nature and extent.⁴⁸ So, when called on for the return of the vehicle, it is the duty of the repairman or serviceman to deliver it to the owner or to excuse his failure to do so,⁴⁹ as by showing that it has been

Neb.—*Corpus Juris* quoted in Nagaki v. Stockfleth, 4 N.W.2d 766, 768, 141 Neb. 676.

36. Neb.—*Corpus Juris* quoted in Nagaki v. Stockfleth, 4 N.W.2d 766, 768, 141 Neb. 676.
42 C.J. p 814 note 25.

37. Neb.—*Corpus Juris* quoted in Nagaki v. Stockfleth, 4 N.W.2d 766, 768, 141 Neb. 676.

Okl.—Scott Auto, etc., Co. v. McQueen, 226 P. 372, 111 Okl. 107, 34 A.L.R. 162.

Notice in receipt handed to vehicle owner casually as token for identification—Maynard v. James, 146 A. 614, 109 Conn. 365, 65 A.L.R. 427.

38. Neb.—*Corpus Juris* quoted in Nagaki v. Stockfleth, 4 N.W.2d 766, 768, 141 Neb. 676.

Okl.—Scott Auto, etc., Co. v. McQueen, 226 P. 372, 111 Okl. 107, 34 A.L.R. 162.

Notice in repair order or invoice
La.—Pacific Fire Ins. Co. v. Eunice Motor Car Co., App., 30 So.2d 441.

39. Ga.—Renfroe v. Fouché, 106 S.E. 303, 26 Ga.App. 340.

Neb.—*Corpus Juris* quoted in Nagaki

v. Stockfleth, 4 N.W.2d 766, 768, 141 Neb. 676.

In Texas

(1) The text rule has been followed by the commission of appeals on the ground that the language of the posted sign is subject to a strict construction and, while it purports to exempt the bailee from liability for loss due to particular causes other than the negligence of the bailee, it does not in express terms provide for the exemption of the bailee from the obligation, inhering in the bailment contract, to exercise ordinary care to prevent the theft of the automobile—Langford v. Nevin, 298 S.W. 536, 117 Tex. 130.

(2) In an earlier case, it was held by the court of civil appeals that where the owner of the motor vehicle had actual knowledge of the sign and left the vehicle with the distinct understanding on his part that the repairman would not be liable for loss of the vehicle by theft, the repairman was not liable unless the theft was occasioned by his gross negligence—Munger Automobile Co. v. American Lloyds of Dallas, Tex. Civ.App., 267 S.W. 304.

40. Pa.—Moss v. Jannetti Body Co., 101 Pa.Super. 1.

Notice held lacking

Pa.—Moss v. Jannetti Body Co., supra.

41. Kan.—Roberts v. Kinley, 132 P. 1180, 89 Kan. 885, 45 L.R.A.N.S. 938.

42. Minn.—Phoenix Assur. Co. v. Pratt, 250 N.W. 455, 180 Minn. 586.

43. Kan.—Roberts v. Kinley, 132 P. 1180, 89 Kan. 885, 45 L.R.A.N.S. 938.

42 C.J. p 814 note 30.

44. Kan.—American Automobile Ins. Co. v. Clark, 252 P. 215, 122 Kan. 445.

45. Tenn.—Malone for Use and Benefit of Globe Rutgers Fire Ins. Co. of New York, v. Harth, 12 Tenn. App. 687.

46. Ala.—Thomas v. Hackney, 68 So. 296, 192 Ala. 27.

47. Me.—Daigle v. Pelletier, 31 A. 2d 345, 139 Me. 382—Frost v. Chaplin Motor Co., 25 A.2d 225, 138 Me. 274, 139 A.L.R. 1144.

Mass.—Doyle v. Peerless Motor Co., 116 N.E. 257, 226 Mass. 561.

48. Mass.—Doyle v. Peerless Motor Co., supra.

49. N.Y.—Allen v. Fulton Motor Car Co., 128 N.Y.S. 419, 71 Misc. 190.
42 C.J. p 815 note 35.

stolen without negligence on his part.⁵⁰

Time for return. The repairman is liable in damages where he fails to return the vehicle within the specified time agreed on, and refuses thereafter to return the vehicle notwithstanding repeated demands, and the owner is compelled to sue to obtain possession;⁵¹ but keeping an automobile overnight, instead of returning it the same day as he promised to do, does not render the repairman liable for the loss of the automobile by theft without negligence on his part.⁵²

Place of return. If the place of return is designated therein, the contract of bailment is not completely performed until a delivery at the designated place has been made.⁵³ If the contract of bailment does not, by its express or implied terms, fix the place of return, the vehicle must be kept ready for delivery, when called for, in the garage or shop where it was deposited or some other appropriate place,⁵⁴ and must be delivered at such place on demand.⁵⁵ The bailee is under no obligation to make delivery elsewhere;⁵⁶ in the absence of a custom or contract, he is under no obligation to redeliver the repaired or serviced motor vehicle to the owner at his residence or place of business.⁵⁷ However, a mere offer to return an automobile after it has been repaired or serviced does not effect a redelivery if the car is then so situated that it cannot be repossessed by the bailor and taken away by the exercise of reasonable driving ability and skill;⁵⁸ and, in such case, unless the bailor waives his right to a proper return, it is the duty of the bailee to move the car to a proper place or by other means make it ready for redelivery.⁵⁹

Attachment of vehicle at instance of serviceman on an old account is no excuse.—*Frost v. Chaplin Motor Co.*, 25 A.2d 225, 138 Me. 274, 139 A.L.R. 1144.

50. Cal.—*Emigh v. Wood*, 253 P. 947, 81 Cal.App. 347, 42 C.J. p 815 note 36.

51. La.—*Pitcher v. Sutter Motor Car Co.*, 6 La.App. 99.

52. Ky.—*Webb v. McDaniels*, 205 S.W.2d 511, 305 Ky. 739.

Not insurer

Mere promise to return vehicle did not make repairman insurer.—*Webb v. McDaniels*, supra.

Keeping vehicle overnight not proximate cause of loss

Ky.—*Webb v. McDaniels*, supra.

53. Me.—*Daigle v. Pelletier*, 31 A.2d 345, 139 Me. 382.

54. Conn.—*Maynard v. James*, 146

A. 614, 109 Conn. 365, 65 A.L.R. 427.

55. Me.—*Daigle v. Pelletier*, 31 A.2d 345, 139 Me. 382.—*Frost v. Chaplin Motor Co.*, 25 A.2d 225, 138 Me. 274, 139 A.L.R. 1144.

56. Me.—*Daigle v. Pelletier*, 31 A.2d 345, 139 Me. 382.

57. Conn.—*Marron v. Bohannon*, 133 A. 667, 104 Conn. 467, 46 A.L.R. 838.

Mo.—*Andres v. Cox*, 23 S.W.2d 1066, 223 Mo.App. 1139.

Neb.—*Curry v. Bruns*, 285 N.W. 88, 136 Neb. 74.

58. Me.—*Daigle v. Pelletier*, 31 A.2d 345, 139 Me. 382.

59. Me.—*Daigle v. Pelletier*, supra.

Bailor's lack of liability for injuries
Where at time charging of fire truck's battery was finished, custodian of truck was unable to drive it

§ 735. — Delivery of Vehicle to Person Not Authorized to Receive It

A repairman's delivery of a motor vehicle to a person not authorized to receive it constitutes a conversion.

A delivery of the motor vehicle by the repairman to one who is without authority to receive it constitutes a conversion.⁶⁰ However, where the repairman is without notice of the rights of others in the vehicle, he will be discharged from liability by a redelivery thereof to the person from whom he receives it,⁶¹ and this notwithstanding he has given such person a nonnegotiable receipt which is not surrendered on a redelivery of the vehicle.⁶² Also, where a universal custom is established that, in the absence of orders to the contrary from the owner, delivery of a motor vehicle to the owner's chauffeur constitutes delivery to the owner, it will be presumed that, on delivery of a car to a repairman, both parties know of such custom and contract accordingly.⁶³ It is not a breach of duty for the repairman to deliver the vehicle to his own employee where, under the circumstances, such employee is, for the purpose of delivery, not his agent, but is instead the agent of the owner or of a garageman whom the owner expressly made his agent for the purpose of having the repairs made.⁶⁴

§ 736. Compensation

In the absence of an agreement as to the amount of compensation, fair and reasonable compensation is recoverable for repairs to a motor vehicle; but, if the amount is fixed by contract, the contract price, less the cost of the labor necessary to complete the repairs where the defendant has prevented completion, may be recovered.

Where services are rendered and materials fur-

from repair shop of garage because repair shop was filled with automobiles, and asked repairman to take fire truck out, and repairman in driving truck out of garage injured third person, custodian of truck was not liable for injuries, since there was no redelivery of automobile to custodian and repairman was still acting as independent contractor.—*Daigle v. Pelletier*, supra.

60. Mass.—*Doyle v. Peerless Motor Co.*, 116 N.E. 257, 226 Mass. 561, 567, 42 C.J. p 815 note 38.

61. N.Y.—*Manny v. Wilson*, 122 N.Y. S. 16, 137 App.Div. 140.

62. N.Y.—*Manny v. Wilson*, supra, 42 C.J. p 815 note 40.

63. Mass.—*Doyle v. Peerless Motor Co.*, 116 N.E. 257, 226 Mass. 561.

64. N.J.—*Field v. Serpico*, 49 A.2d 21, 24 N.J.Misc. 289.

nished without agreement as to the amount of compensation therefor, the repairman or serviceman is entitled to recover such compensation as is fair and reasonable⁶⁵ in view of his skill and equipment.⁶⁶ In case the price of repairs is fixed by contract, the measure of recovery, where defendant takes the vehicle away when the repairs are partially made and refuses to return it for completion of the repairs, is the contract price less the cost of the labor necessary to complete the repairs.⁶⁷ Where the repairs are not satisfactorily made within a reasonable time, it is proper for the owner, in paying for the repairs, to deduct the loss in value of the vehicle.⁶⁸

Repairman's failure to notify owner of a fire which damaged owner's vehicle while it was in repairman's shop does not preclude recovery for the repairs necessary when the vehicle was brought to the shop where the fire damage has been wholly repaired without expense to the owner.⁶⁹

A tender of the amount due for automobile repairs does not discharge the debt.⁷⁰

Excessive payment. Where the repairman compels the owner to submit to an illegal exaction in order to recover possession of the vehicle, the doctrine of duress of goods applies,⁷¹ and as much of the payment as is excessive may be recovered,⁷² or if, in order to recover possession of the vehicle the owner has given a check for more than the repairman is entitled to, the repairman cannot re-

cover on such check,⁷³ without regard to whether his excessive demand was for the purpose of defrauding the owner⁷⁴ or whether or not it was made in good faith.⁷⁵

§ 737. — Set-Off and Counterclaim

A cross demand for damages may be made in an action to recover for repairs; and the plaintiff is not entitled to recover where the defendant's damages from the unskilled and unworkmanlike manner in which the repairs were made equal or exceed the amount claimed by the plaintiff.

In an action to recover a sum alleged to be due for repairs to a motor vehicle, made by plaintiff, there can be no recovery where, by reason of the unskilled and unworkmanlike manner in which the repairs were made, defendant has been damaged in an amount equal to, or greater than, the amount claimed by plaintiff.⁷⁶ Defendant is not estopped to set up a cross demand for damages in an action for work and labor by the fact that he has made partial payments for the repairs.⁷⁷

§ 738. — Pleading, Evidence, and Trial

In order to recover for work done and materials furnished in repairing a motor vehicle, the plaintiff must plead and prove a cause of action. The existence of facts as to which the evidence is conflicting, and which facts are not conclusively established is to be determined by the jury or other trier of facts.

In an action to recover for work done and materials furnished in repairing a motor vehicle, it is incumbent on plaintiff to plead⁷⁸ and prove⁷⁹ a

65. Mass.—Horton v. Phillips, 131 N.E. 324, 238 Mass. 7.
42 C.J. p 818 note 85.

66. Md.—Owings v. Dayhoff, 151 A. 240, 159 Md. 403.

67. La.—Gatlin-McDonald Chevrolet Co. v. Puckett, App., 172 So. 544.

Prices of parts specially ordered for defendant's vehicle are properly included in the recovery where such parts are not regularly kept in stock by repair garages and are rarely needed.—Gatlin-McDonald Chevrolet Co. v. Puckett, supra.

68. La.—Cadillac Service Garage v. Shushan, 123 So. 175, 10 La.App. 761.

69. Mass.—Burnett & Sherman v. Conroy, 156 N.E. 678, 259 Mass. 339.

70. N.Y.—Ledwell v. Entire Service Corporation, 231 N.Y.S. 365, 224 App.Div. 433, affirmed 170 N.E. 138, 252 N.Y. 548.

71. Tex.—Caldwell v. Auto Sales, etc., Co., Civ.App., 158 S.W. 1030.

72. N.J.—Berger v. Bonnell Motor Car Co., 133 A. 778, 4 Misc. 589.

73. Tex.—Caldwell v. Auto Sales, etc., Co., Civ.App., 158 S.W. 1030.

74. Tex.—Caldwell v. Auto Sales, etc., Co., supra.

75. Tex.—Caldwell v. Auto Sales, etc., Co., supra.

76. Iowa.—Burrichter v. Bell, 194 N. W. 947, 196 Iowa 529.

38 C.J. p 77 note 72—42 C.J. p 818 note 93.

77. Ala.—Thomas v. Hackney, 68 So. 296, 192 Ala. 27.

Petition held to state cause of action

Okl.—Home Ins. Co. of New York, N. Y., v. Voto-Jacobus Motor Co., 117 P.2d 779, 189 Okl. 426.

79. Cal.—MacIntosh v. Chicago Electric Motor Car Co., 186 P. 364, 44 Cal.App. 320.

38 C.J. p 77 note 68 [c]—42 C.J. p 818 note 85 [b].

Plaintiff's testimony held corroborated by facts of case

La.—Polinsky v. Michel Lumber & Brick Co., 6 La.App. 818.

Evidence held sufficient

(1) To sustain judgment for plain-

tiff—Self v. Whittler, Tex.Civ.App., 259 S.W. 628—38 C.J. p 77 notes 67 [c], 68 [a]—42 C.J. p 818 note 85 [c].

(2) To sustain, in replevin to recover a truck, verdict awarding defendant recovery on his counterclaim for repairs.—McCluskey v. De Long, Mo.App., 198 S.W.2d 673.

(3) To support judgment on the theory of an implied contract.—Home Ins Co of New York, N. Y., v. Voto-Jacobus Motor Co., 117 P.2d 779, 189 Okl. 426.

(4) To sustain finding that repairmen contracted to repair axle of trailer for a fixed price rather than on a quantum meruit basis.—Transportation Equipment Co. v. Younger Bros., La.App., 34 So.2d 347.

(5) To show that all work done was authorized.—Auto Electric Co. v. Wilkinson, 6 La.App. 636.

Evidence held insufficient

(1) To afford legal warrant for estimating the value of plaintiff's claim on a time or quantity basis.—Owings v. Dayhoff, 151 A. 240, 159 Md. 403.

cause of action. However, where a contract provides that plaintiff is to be paid for repairing used automobiles only from the excess of the sale price over the trade-in price, and defendant prevented sales by wrongfully taking repaired automobiles from plaintiff, plaintiff, when seeking recovery on the promise implied by law to pay the value of the benefits received from the repairs, instead of seeking recovery on the contract, need not allege and prove that the automobiles could have been sold for a price in excess of the trade-in price.⁸⁰ Competent and relevant evidence is admissible.⁸¹

Questions of law and fact. On conflicting evidence, questions as to what was the contract price⁸² and whether the repairs have been made in a satisfactory manner⁸³ are to be determined as questions of fact by the jury, or by the trial judge where the trial is before him without a jury. Also, it is for the jury to say what is a reasonable price where, although there was a contract price, recovery is sought on a quantum meruit.⁸⁴ An agreement to put a truck in first class condition is not so indefinite as to require the submission of its construction to the jury.⁸⁵

The evidence in the case may be sufficient to raise questions of fact for the jury and not be so conclusive as to warrant the direction of a verdict for plaintiff on his claim;⁸⁶ but in the absence of any evidence to substantiate defendant's counterclaim it is not error to direct a verdict for plaintiff on such counterclaim.⁸⁷

(2) To support judgment for plaintiff in the amount entered by the trial court—*MacIntosh v. Chicago Electric Motor Car Co.*, 186 P. 364, 44 Cal App 320—38 C.J. p 77 note 68 [b]—42 C.J. p 818 note 85 [d].

(3) To sustain judgment against father for repairs to truck owned by his son.—*Rhodes v. Austin*, 274 P. 271, 127 Kan. 518.

80. Tex.—*Rountree Motor Co. v. Smith Motor Co.*, Civ.App., 109 S.W.2d 296, error dismissed.

81. Evidence held admissible

(1) Evidence that defendant's wife brought the car to plaintiff's garage for repairs is properly admitted.—*Schroeder v. Stadley*, Mo.App., 261 S.W. 934—38 C.J. p 77 note 65 [a] (2).

(2) Where a written authorization

of repairs is obviously not a complete statement of the contract between the parties, all that was said and done between the parties relative to the making of the repairs and their costs not tending to contradict or vary the written authorization is admissible in evidence.—*Di Blase v. Garnsey*, 133 A. 669, 104 Conn. 447.

82. N.Y.—*Moylan v. Smith*, 189 N.Y. S. 200.

83. Mo.—*Kansas City Auto. School Co. v. Holcker-Elberg Mfg. Co.*, App., 182 S.W. 759, 42 C.J. p 818 note 90.

84. Mo.—*Kansas City Auto School Co. v. Holcker-Elberg Mfg. Co.*, supra.

85. Minn.—*Satterlee v. Lawler*, 193 N.W. 118, 155 Minn. 181.

86. Mo.—*Brookside Garage v. Witter*, App., 125 S.W.2d 947.

§ 739. Actions against Repairman or Serviceman for Conversion, Loss, or Damage; Personal Injuries

- a. Actions for loss or conversion of, or damage to, vehicle
- b. Personal injuries

a. Actions for Loss or Conversion of, or Damage to, Vehicle

- (1) In general
- (2) Pleading
- (3) Evidence
- (4) Trial, judgment, and appeal

(1) In General

In an action against him for loss or conversion of a motor vehicle, a repairman may not defend on the ground that title to the vehicle is in a third person or that the owner is insured. The circumstances may be such that a demand for return of the property is not essential to maintenance of the action.

It is no defense in an action against a repairman for the loss of a vehicle that the owner is insured,⁸⁸ and an insurer who has paid the loss occasioned to the owner may sue in his own right.⁸⁹ Also, in an action for conversion, he may not assert the title of a third person as a defense;⁹⁰ and under some statutes he may not assert a lien for repairs as a defense where he has not commenced an action to foreclose the lien.⁹¹ The contributory negligence of plaintiff's wife in remaining in the vehicle, and of plaintiff in permitting her to do so, is not a defense to an action for damage to the vehicle resulting from the falling of the vehicle from an elevating rack.⁹²

A demand for the return of the property is not

Tex.—*Octane Oil Refining Co. v. Blankenship-Antilley Implement Co.*, Civ.App., 117 S.W.2d 885.

87. Mo.—*Brookside Garage v. Witter*, App., 125 S.W.2d 947.

88. Ga.—*Renfroe v. Fouche*, 106 S.E. 303, 26 Ga App. 340.

89. Mass.—*Stevens v. Stewart-Warner Speedometer Corp.*, 111 N.E. 771, 223 Mass. 44, 42 C.J. p 815 note 44.

90. Okl.—*Norton Johnson Buick Co. v. Lindley*, 46 P.2d 525, 173 Okl. 93.

91. Minn.—*Hediger v. Zastrow*, 218 N.W. 172, 174 Minn. 11.

92. Tex.—*Nadel v. Alexander*, Civ. App., 113 S.W.2d 276, error dismissed.

essential to the maintenance of a suit in trover for a motor vehicle left with a garage keeper for repairs, where defendant denied having received the vehicle, claimed title thereto, and sold the property.⁹³

(2) Pleading

In an action against a repairman for loss of, or damage to, a motor vehicle in his custody, it is necessary for the plaintiff to allege facts constituting a cause of action and to support necessary allegations by proof; but he need not allege due care on his part.

In an action by the owner to recover for damage to a motor vehicle while it was in the custody of defendant repairman, there is no necessity for an allegation of due care on the part of plaintiff.⁹⁴ While it has been held that the owner of the vehicle must allege negligence,⁹⁵ there is some support for the view that an allegation of negligence, although made, is unnecessary where the vehicle was delivered in good condition to defendant for repairs or services and was returned in a damaged condition.⁹⁶ It is not necessary to allege a tender of charges where the pleading does not admit that charges are due.⁹⁷

Recoupment. In an action for conversion on the ground that the vehicle has been kept for an unreasonable time, an amendment to defendant's answer seeking to recoup an amount claimed to be due defendant for work and repairs made on the vehicle in question is properly rejected.⁹⁸

Issues and proof. Plaintiff is required,⁹⁹ or not required,¹ to prove negligence accordingly as it is considered necessary or unnecessary for him to

allege it. Where defendant does not plead that the action is not prosecuted by the real party in interest, it is proper to exclude evidence that plaintiff carried insurance on his vehicle and has been fully indemnified by insurer for damage to the vehicle.²

(3) Evidence

Proof that the plaintiff's motor vehicle was delivered in good condition to the defendant for repairs or services and was returned in a damaged condition, or was not returned on demand, establishes a prima facie case and casts on the defendant the burden of going forward with the evidence.

In an action to recover for loss of, or damage to, a motor vehicle left with defendant for repairs or services, the burden of proof as to negligence rests on plaintiff.³ Where proof is made that the vehicle was delivered in good condition to defendant and was returned in a damaged condition, or was not returned on demand, a presumption of liability arises⁴ and a prima facie case is established;⁵ and the burden of going forward with the evidence is then cast on defendant.⁶ A presumption of liability may be overcome by a showing that the loss was caused by accident;⁷ and it has been held that, where it is proved that the vehicle was destroyed by fire⁸ or lost by theft,⁹ plaintiff has the burden of proving that the fire or theft was the result of defendant's negligence or failure to exercise ordinary care; but it has also been held that proof of destruction of, or damage to, the vehicle by fire does not relieve defendant of the burden of going forward with evidence that he exercised proper care.¹⁰

93. Ga.—*Evans v. Grier*, 115 S.E. 921, 29 Ga.App. 426.

94. Ill.—*Welter v. Schell*, 252 Ill. App. 586.

95. Ohio—*Blackburn v. Norris*, 189 N.E. 262, 46 Ohio App. 469.

96. Ky.—*Threlkeld v. Breaux Ballard, Inc.*, 177 S.W.2d 157, 296 Ky. 344, 151 A.L.R. 708.

97. Tex.—*Killgore v. Whitaker*, Civ. App., 217 S.W. 445. 42 C.J. p 816 note 45.

98. Ga.—*Slisson v. Roberts*, 104 S.E. 910, 25 Ga.App. 725.

99. Ohio—*Blackburn v. Norris*, 189 N.E. 262, 46 Ohio App. 469.

1. Ky.—*McDonald v. Breaux Ballard, Inc.*, 183 S.W.2d 26, 298 Ky. 438.

2. S.C.—*Brown v. Smith*, 42 S.E.2d 883, 210 S.C. 405.

3. Ohio—*Blackburn v. Norris*, 189 N.E. 262, 46 Ohio App. 469. 42 C.J. p 816 note 49.

4. Ill.—*Lindor v. Burns*, 10 N.E.2d 686, 292 Ill.App. 201.

N.Y.—*Regan v. Burr*, 144 N.Y.S. 84, 159 App.Div. 131.

5. Idaho—*Burt v. Blackfoot Motor Supply Co.*, 186 P.2d 498, 67 Idaho 548.

Ky.—*McDonald v. Breaux Ballard, Inc.*, 183 S.W.2d 26, 298 Ky. 438—*Threlkeld v. Breaux Ballard, Inc.*, 177 S.W.2d 157, 296 Ky. 344, 151 A.L.R. 708.

Ohio—*Blackburn v. Norris*, 189 N.E. 262, 46 Ohio App. 469—*Bailey v. Pennese*, 15 Ohio Supp. 155. 42 C.J. p 816 note 51.

6. Idaho—*Burt v. Blackfoot Motor Supply Co.*, 186 P.2d 498, 67 Idaho 548.

Ill.—*Lindor v. Burns*, 10 N.E.2d 686, 292 Ill.App. 201.

Ky.—*Threlkeld v. Breaux Ballard, Inc.*, 177 S.W.2d 157, 296 Ky. 344, 151 A.L.R. 708.

Ohio—*Blackburn v. Norris*, 189 N.E. 262, 46 Ohio App. 469—*Bailey v. Pennese*, 15 Ohio Supp. 155. 42 C.J. p 816 notes 50, 51.

7. N.Y.—*Regan v. Burr*, 144 N.Y.S. 84, 159 App.Div. 131.

42 C.J. p 816 note 53.

8. Ohio—*Blackburn v. Norris*, 189 N.E. 262, 46 Ohio App. 469.

42 C.J. p 816 note 53 [a].

Fire does not create presumption of negligence

Ohio—*Blackburn v. Norris*, *supra*.

9. Tenn.—*Farrell-Calhoun Co., for Use of Automobile Ins. Co. of Hartford, Conn. v. Union Chevrolet Co.*, 113 S.W.2d 419, 21 Tenn. App. 554.

10. Idaho—*Burt v. Blackfoot Motor Supply Co.*, 186 P.2d 498, 67 Idaho 548.

Ky.—*McDonald v. Breaux Ballard, Inc.*, 183 S.W.2d 26, 298 Ky. 438. 42 C.J. p 816 note 51 [a].

In absence of other evidence, a concession that the vehicle was destroyed or damaged by fire does not preclude recovery.—*Threlkeld v. Breaux Ballard, Inc.*, 177 S.W.2d 157, 296 Ky. 344, 151 A.L.R. 708.

In a suit for breach of warranty of services and materials used in repairing an automobile, plaintiff has the burden of establishing the breach.¹¹

Res ipsa loquitur. Where the evidence showed that the repairman permitted an elevator to fall, whereby the vehicle was injured, and he introduced no evidence to explain the falling of the elevator, the doctrine of *res ipsa loquitur* applied;¹² but where an automobile intrusted to defendant for washing was, for that purpose, driven up an incline twenty feet long to a level surface forty inches above the ground, and afterward was found to be damaged, and there was no showing of negligence aside from accident except testimony that high motor speed could cause the damage, the doctrine of *res ipsa loquitur* was not applicable.¹³ Where the *res ipsa* doctrine is applicable in the case of damage by fire, defendant, although not required to show the cause of the fire,¹⁴ is obliged to produce all the evidence available in order to exculpate himself from the implication of negligence.¹⁵

Admissibility. The general rules as to the ad-

missibility of evidence in civil actions apply in determining the admissibility of evidence in actions against a repairman for loss of, or injury to, a motor vehicle left in his hands for repairs.¹⁶ A bailor may be permitted to give testimony that the vehicle bailed was complete and all right in every way as against an objection that it is a statement of a conclusion.¹⁷ On the other hand, a witness who has stated that a vulcanizer is the best made should not be allowed to state how it is generally regarded in the automobile business,¹⁸ or whether it is customary to leave a vulcanizer unattended,¹⁹ although he may be asked on cross-examination whether the placing of a vulcanizing department against an elevator shaft was placing it at the most dangerous point for the communication of fire.²⁰

Weight and sufficiency. General rules are applicable in determining the weight and sufficiency of the evidence in an action against a person with whom a motor vehicle was left for repairs or services to recover for loss of, or damage to, the vehicle²¹ or for loss of, or damage to, another vehicle

Where fire was of limited nature, rather than a general conflagration, as where it was confined to the vehicle in question while such vehicle was in the control and possession of defendant or his employees, the bailee must absolve himself from negligence causing the fire.—*Gulf Ins. Co. v. Temple*, La.App., 187 So. 814—*Royal Ins. Co., Limited, of Liverpool, England, v. Collard Motors*, La.App., 179 So. 108.

11. Ga.—*Hutchison v. Ball*, App., 47 S.E.2d 913.

12. Mo.—*Austin v. Simon*, App., 204 S.W. 193.

13. Cal.—*Scallars v. Universal Service Everywhere*, 228 P. 879, 68 Cal. App. 252.

14. La.—*Pacific Fire Ins. Co. v. Eunice Motor Car Co.*, App., 30 So. 2d 441.

15. La.—*Pacific Fire Ins. Co. v. Eunice Motor Car Co.*, supra.

16. Evidence held admissible

(1) On cross-examination.—*Stevens v. Stewart-Warner Speedometer Corp.*, 111 N.E. 771, 223 Mass. 44—42 C.J. p 816 note 57 [a].

(2) Evidence of a general custom in city of leaving ignition keys in automobiles while the automobiles were in the dealer's shop for repairs.—*Farrell-Calhoun Co., for Use of Automobile Ins. Co. of Hartford, Conn., v. Union Chevrolet Co.*, 113 S.W.2d 419, 21 Tenn.App. 554.

Evidence held inadmissible

Okl.—*Norton Johnson Buick Co. v. Lindley*, 46 P.2d 525, 173 Okl. 93.

Tex.—*Langford v. Nevin*, 298 S.W. 536, 117 Tex. 130.

42 C.J. p 816 note 57 [b].

17. Ga.—*Hight Accessory Place v. Lam*, 105 S.E. 872, 26 Ga.App. 163

18. Ga.—*Hight Accessory Place v. Lam*, supra

19. Ga.—*Hight Accessory Place v. Lam*, supra.

20. Ga.—*Hight Accessory Place v. Lam*, supra.

21. Evidence from which jury may only guess at the cause of the accident is insufficient to support a recovery because of the alleged negligence of a repairman in making repairs.—*Freedman v. Wager*, 73 Pa. Super. 180.

Custom among automobile dealers in city of leaving ignition keys in the automobiles which have been left in their shops for repairs was not controlling in determining dealer's liability for damages resulting from theft of automobile, but was only one fact to be considered.—*Farrell-Calhoun Co., for Use of Automobile Ins. Co. of Hartford, Conn., v. Union Chevrolet Co.*, 113 S.W.2d 419, 21 Tenn.App. 554.

Expert opinion inconsistent with physical facts

The alleged negligence of a repairman in placing a new wheel on a car is not established by expert evidence to the effect that the wheel came off, causing the accident, by reason of the fact that the bolts had not been properly tightened up, where the physical facts conceded are in-

consistent with such opinion.—*Lowenthal v. Backus Motor Co.*, 116 A. 834, 140 Md. 33.

Evidence held sufficient

(1) To warrant recovery.—*Thomson Motor Co. v. Story*, 1 S.E.2d 213, 59 Ga.App. 433—*A. C. Miller & Co. v. Cadillac Co. of Atlanta*, 136 S.E. 471, 36 Ga.App. 344.

(2) To establish that defendant or his employee was negligent or failed to exercise due care.

Ky.—*McDonald v. Breaux Ballard, Inc.*, 183 S.W.2d 26, 298 Ky. 438.

La.—*Wood v. Becker Welding Shop*, App., 34 So.2d 924.

Neb.—*Nagaki v. Stockfleth*, 4 N.W.2d 766, 141 Neb. 676.

(3) To establish that failure of plaintiff's automobile to function properly, after repair work thereon in defendant's garage, was due to failure to make proper repairs.—*Smith v. Slatten*, La.App., 18 So.2d 860.

(4) To show that automobile had been stolen from defendants without their negligence.—*Webb v. McDaniels*, 205 S.W.2d 511, 305 Ky. 739.

(5) To show other matters.—*World Fire & Marine Ins. Co. v. Henderson*, La.App., 10 So.2d 535—*Helmer v. Chotin*, La.App., 180 So. 454—42 C.J. p 816 note 63 [a].

Evidence held insufficient

(1) To charge defendant with liability for damages resulting from a fire.—*Dupuy v. Graeme Spring & Brake Service*, La.App., 19 So.2d 657.

with which it collided.²²

(4) Trial, Judgment, and Appeal

Where an action to recover for loss or conversion of, or damage to, a motor vehicle entrusted to the defendant for repairs or services is tried before a jury, controverted questions of fact should be submitted to, and determined by, the jury under appropriate instructions by the court. If special findings are made, a judgment for the plaintiff should not be rendered unless it is supported by such findings.

Controverted questions of fact are to be determined by the jury or trial court where the trial is without a jury,²³ as, for example, defendant's negligence,²⁴ the reasonableness of time for completion of repairs,²⁵ or the existence of a universal custom recognizing delivery to the owner's chauffeur as delivery to the owner,²⁶ or of a custom to send out for painting automobiles left for repair.²⁷ On the other hand, the case, or particular issues therein, should not be submitted to the jury where the evidence is not sufficient for that purpose;²⁸ and where the facts are undisputed the court may and should either direct a verdict for plaintiff²⁹ or hold as a matter of law that he has failed to establish a sufficient basis for recovery.³⁰

Instructions to the jury should define ordinary care, where defendant was obliged to exercise such care;³¹ and they may and should conform to, and be warranted by, the pleadings and evidence.³²

It is not error to refuse a requested instruction which is incorrect.³³

Findings and judgment. An affirmative finding on a special issue as to whether defendant repairman had promised to pay plaintiff the value of the automobile burned, and the finding as to the value of the car, has been held sufficient to sustain a judgment for such value against defendant, regardless of whether plaintiff had been prevented from removing the car before the fire by the dismantling of the car and making more extensive repairs than authorized;³⁴ but, in an action for the value of accessories in an automobile delivered to defendants for repairing, the affirmative answer of the jury to the question whether defendants or anyone else removed the accessories from the car does not sustain a judgment for plaintiff, since the finding does not establish that defendants, or anyone for whom they were responsible, removed the accessories.³⁵

On appeal and trial de novo in an action originating before a justice of the peace, an amendment of plaintiff's pleading may be allowed where the cause of action is not changed thereby.³⁶ It will not be presumed, in order to support a judgment for plaintiff on a special verdict in an action for the value of automobile accessories removed from

(2) To establish defendant's negligence.—*Blackburn v. Norris*, 189 N. E. 262, 46 Ohio App. 469—42 C.J. p 816 note 63 [b] (2).

(3) To show damage to automobile while it was in defendant's possession.—*Smith v. Slatten*, La.App. 18 So 2d 860.

(4) To sustain judgment for plaintiff in certain amount, in action for breach of warranty.—*Hutchison v. Ball*, Ga.App., 47 S.E.2d 913.

(5) To establish other matters.—*Wood v. Becker Welding Shop*, La App., 34 So.2d 924—*Pacific Fire Ins. Co. v. Eunice Motor Car Co.*, La.App., 30 So.2d 441.

22. Evidence held sufficient

To show that defendant was guilty of negligence which caused the accident.—*Blake v. Salmonson*, 67 N.Y.S. 2d 607, 188 Misc. 97.

23. Idaho.—*Burt v. Blackfoot Motor Supply Co.*, 186 P.2d 498, 67 Idaho 548.

Ky.—*Kentucky Motors Co. v. Kelly*, 3 S.W.2d 1092, 223 Ky. 482.

Ohio.—*Bailey v. Pennese*, 15 Ohio Supp. 155.

Facts held not to establish contributory negligence as matter of law Md.—*General Refining Co. v. International Harvester Co.*, 196 A. 131, 173 Md. 404.

24. Ala.—*Hammond Motor Co. v. Acker*, 122 So. 173, 219 Ala. 291.

Ohio.—*Bailey v. Pennese*, 15 Ohio Supp. 155.

38 C.J. p 90 note 29.

In retaining employee

Minn.—*Travelers' Indemnity Co. v. Fawkes*, 139 N.W. 703, 120 Minn. 353, 45 L.R.A., N.S., 331.

25. Ga.—*Slisson v. Roberts*, 104 S. E. 910, 25 Ga App. 725.

26. Mass.—*Doyle v. Peerless Motor Co.*, 116 N.E. 257, 226 Mass 561.

42 C.J. p 817 note 70.

27. Mass.—*Rourke v. Cadillac Automobile Co. of Boston*, 167 N.E. 231, 268 Mass. 7.

28. N.C.—*Swain v. Twin City Motor Co.*, 178 S.E. 560, 207 N.C. 755.

Different counts

The evidence may be sufficient for submission to the jury under a count for conversion, and insufficient under a count for negligence.—*Rourke v. Cadillac Automobile Co. of Boston*, 167 N.E. 231, 268 Mass. 7.

Evidence held sufficient for submission to jury

Iowa.—*Walter v. Sanders Motor Co.*, 294 N.W. 621, 229 Iowa 398.

Md.—*General Refining Co. v. International Harvester Co.*, 196 A. 131, 173 Md. 404.

SC.—*Powell v. A K Brown Motor Co.*, 20 S.E.2d 636, 200 S.C. 75.

Tex.—*Burge v. Batson*, Civ.App., 13 S.W.2d 899.

42 C.J. p 816 note 63 [c].

29. S.C.—*Brown v. Smith*, 42 S.E.2d 883, 210 S.C. 405.

30. Pa.—*Moss v. Jannetti Body Co.*, 101 Pa Super. 1.

31. Ky.—*Kentucky Motors Co. v. Kelly*, 3 S.W.2d 1092, 223 Ky. 482.

32. Ga.—*Thomson Motor Co. v. Story*, 1 S.E.2d 213, 59 Ga.App. 433.

42 C.J. p 817 note 71.

Evidence held sufficient to authorize instruction on measure of damages

Ky.—*McDonald v. Breaux Ballard, Inc.*, 183 S.W.2d 26, 298 Ky. 438.

33. Ohio.—*Bailey v. Pennese*, 15 Ohio Supp. 155.

34. N.C.—*Beck v. Wilkins-Ricks Co.*, 119 S.E. 235, 186 N.C. 210.

35. Tex.—*Killgore v. Whitaker*, Civ. App., 217 S.W. 445.

36. Mo.—*Austin v. Simon*, App., 294 S.W. 193.

42 C.J. p 815 note 46.

a car delivered to defendants for repairing, that the trial court found defendants removed the accessories, where the evidence only showed that they were removed while the car was in defendants' possession, and there was testimony denying removal by defendants or anyone in their employ.³⁷

b. Personal Injuries

Actionable negligence must be established to warrant a recovery against a repairman or serviceman for personal injuries.

Actionable negligence must be established to warrant a recovery against a repairman or serviceman for personal injuries sustained while a motor vehicle was being repaired or serviced.³⁸ Contributory negligence is a defense;³⁹ and, although the repairman or serviceman is bound to exercise ordinary care not to injure the owner of an automobile being repaired or serviced⁴⁰ while such owner retains the status of an invitee, which he had when he entered on the premises, by being in a part of the premises where he is expected to be,⁴¹ the repairman or serviceman or his employee has no duty to warn the owner of an obvious danger,⁴² and where the owner is standing in a place where he is

not an invitee, the only duty owing to him is to refrain from willful or reckless misconduct toward him.⁴³

Provided the evidence bearing thereon is sufficient for submission to the jury,⁴⁴ and is not so conclusive as to make the questions matters of law,⁴⁵ the questions of negligence⁴⁶ and contributory negligence⁴⁷ are to be determined by the jury under proper instructions by the court.⁴⁸

Injuries sustained after making of repairs. Recovery may be had against a repairman for personal injuries sustained after the making of repairs to a motor vehicle where the declaration, petition, or complaint states a cause of action⁴⁹ and it is established by the evidence that the repairman or his employee was negligent in making the repairs⁵⁰ and that such negligence was the proximate cause of the accident.⁵¹ Plaintiff has the burden of proving causal relationship between the alleged negligent repair and the subsequent accident,⁵² and this burden does not shift;⁵³ but it is not essential that the connection of cause and effect be established with absolute certainty.⁵⁴ Contributory negli-

37. Tex.—Killgore v. Whitaker, Civ. App., 217 S.W. 445.

38. N.Y.—Cordy v. Public Auto Delivery, 52 N.Y.S.2d 217, 268 App. Div. 1043.

Both negligence and causal connection between negligence and accident must be shown by plaintiff; and no recovery may be had where the evidence leaves the cause of the accident in the realm of speculation and conjecture.—Vardolos v. Phillips Petroleum Co., 246 N.W. 467, 188 Minn. 25.

Admissibility of evidence

In action for injuries sustained by automobile owner when automobile tipped over as owner was attempting to enter it at mechanic's request while it was in an unbalanced position upon a hydraulic hoist, evidence that owner, two or three weeks before, had at request of same mechanic safely entered automobile when it was at same elevation on same hoist was admissible; but evidence of garage rules directing mechanics to prohibit any one from entering an automobile elevated on hoist was properly excluded as not binding on owner, who had no knowledge of rules.—Bisping v. Kummer Auto Co., 277 N.W. 255, 202 Minn. 19.

39. Tenn.—Corder v. Lane, 72 S.W. 2d 570, 18 Tenn.App. 51.

Tex.—Nadel v. Alexander, Civ.App., 113 S.W.2d 276, error dismissed.

Evidence held sufficient to show contributory negligence

Tex.—Nadel v. Alexander, supra.

40. Cal.—Morton v. Hinds, 298 P. 160, 113 Cal.App. 437.

41. Tenn.—Corder v. Lane, 72 S.W. 2d 570, 18 Tenn.App. 51.

42. Cal.—Morton v. Hinds, 298 P. 160, 113 Cal.App. 437.

43. Tenn.—Corder v. Lane, 72 S.W. 2d 570, 18 Tenn.App. 51.

Rule of limited last clear chance or discovered peril does not apply in such case.—Corder v. Lane, 72 S.W. 2d 570, 18 Tenn.App. 51.

Evidence held not to show reckless, wanton, or willful misconduct

Tenn.—Corder v. Lane, supra.

44. Cal.—Morton v. Hinds, 298 P. 160, 113 Cal.App. 437.

45. Ga.—Ray v. Pan-American Petroleum Corporation, 148 S.E. 669, 40 Ga.App. 50.

46. Ga.—Ray v. Pan-American Petroleum Corporation, supra.
Minn.—Bisping v. Kummer Auto Co., 277 N.W. 255, 202 Minn. 19.

Or.—Allison v. Davidson, 141 P.2d 530, 173 Or. 244.

47. Tex.—Boggus Motor Co. v. Standridge, Civ.App., 138 S.W.2d 643, error dismissed, judgment correct.

48. Instruction held not erroneous
Or.—Allison v. Davidson, 141 P.2d 530, 173 Or. 244.

49. Ga.—Moody v. Martin Motor Co., 46 S.E.2d 197, 76 Ga.App. 456.

Miss.—Burkett v. Globe Indemnity Co., 181 So. 316, 182 Miss. 423.

N.Y.—Kalinowski v. Truck Equipment Co., 261 N.Y.S. 657, 237 App. Div. 472.

50. Minn.—Greenwood v. Jack, 220 N.W. 565, 175 Minn. 216.

N.Y.—Oliver v. Bereano, 48 N.Y.S.2d 142, 267 App.Div. 747, affirmed 60 N.E.2d 134, 293 N.Y. 931.

Lack of warning when instructing as to use

A finding of negligence is supported by evidence that defendant's employee, when delivering a repaired tractor to plaintiff, in effect instructed plaintiff to crank the motor without warning him that, while the tractor was in defendant's custody, the clutch lever had been changed from a safe to an unsafe position.—Johnson v. Land O'Lakes Motor Co., 16 N.W.2d 466, 218 Minn. 404.

51. Minn.—Greenwood v. Jack, 220 N.W. 565, 175 Minn. 216.

N.Y.—Oliver v. Bereano, 48 N.Y.S.2d 142, 267 App.Div. 747, affirmed 60 N.E.2d 134, 293 N.Y. 931.

52. N.Y.—De Dominici v. Moore, 41 N.Y.S.2d 484, 181 Misc. 449.

53. N.Y.—De Dominici v. Moore, supra.

54. Minn.—Greenwood v. Jack, 220 N.W. 565, 175 Minn. 216.

Circumstantial evidence may be sufficient to make prima facie case without invoking res ipsa loquitur

gence is a question for the jury.⁵⁵

§ 740. — Damages

The measure of damages for the loss or destruction of a motor vehicle while in the custody of a repairman is its value at the date of loss; and the measure of damages for making repairs improperly is the difference between the value of the vehicle if it had been repaired in compliance with the contract and its value in its defective condition, or the cost of putting it in the required condition if such cost is less than the difference in value.

Where a motor vehicle is lost or destroyed while in the hands of a repairman through his fault, the measure of damages is its value at the date of the loss;⁵⁶ but if the owner sues the one to whom the repairman misdelivers it and recovers for its conversion, and thereafter sues the repairman, the repairman is entitled to credit for the amount recovered, less the expenses of the litigation.⁵⁷ Where repairs are improperly made, although the work done is of some value, and the owner must of necessity retain it, the measure of damages is the difference between the value of the motor vehicle as it would have been if it had been repaired in compliance with the contract and its value in its defective condition,⁵⁸ unless the cost of putting it into the condition required by the contract is less than the difference in value, in which case such cost furnishes the measure of damages.⁵⁹

§ 741. Actions by Repairman for Conversion or Damage; Personal Injuries

A repairman who is liable to the owner for a misdelivery of a motor vehicle to a person not authorized to receive it may sue the person causing the misdelivery for the damages sustained; and where a repairman received personal injuries, due to the negligence of a customer, while repairing the customer's motor vehicle, he may, on adequate evidence, recover from the customer.

A repairman who has become liable to the owner

because of a misdelivery of the vehicle left in his charge to an unauthorized person may maintain an action against the person causing such misdelivery for the damages sustained by his wrongful act,⁶⁰ and, if he sues by agreement with the owner or bailor, he holds any amount recovered by him in excess of the special injury which he has sustained in trust for the owner or bailor.⁶¹ In such an action evidence is properly admitted to show the arrangement under which plaintiff had possession of the vehicle.⁶²

Personal injuries. Unless precluded by contributory negligence⁶³ or assumption of risk,⁶⁴ a repairman may, on adequate evidence, recover from a customer for personal injuries sustained while repairing the customer's motor vehicle and resulting from the negligence of the customer,⁶⁵ as where the customer knew of the defect causing the injury and failed to give warning thereof.⁶⁶ However, the owner of an automobile does not owe to a repairman the duty to make an expert examination, before delivering the automobile for repairs, to discover any defect in the mechanism which may render it unsafe or dangerous,⁶⁷ and he is not liable for injuries resulting from the negligence of another person assisting, and working under the control and direction of, the repairman.⁶⁸

§ 742. — Damages

Where, after its misdelivery by a repairman, a motor vehicle was wrecked, the repairman is entitled to recover from the person causing the misdelivery the fair market value of the vehicle at the time of the conversion, but not the expenses and disbursements incurred in defense of the owner's action against him.

Where, after its misdelivery, a car has been wrecked and the owner has sued the repairman for

rule—Hepp v. Quickel Auto & Supply Co., 25 P.2d 197, 37 N.M. 525.

55. Minn.—Johnson v. Land O'Lakes Motor Co., 16 N.W.2d 466, 218 Minn. 404—Greenwood v. Jack, 220 N.W. 565, 175 Minn. 216.

56. Tex.—Wagner v. Dunham, Civ. App., 245 S.W. 1044, 42 C.J. p 817 note 74.

57. Mass.—Beacon Motor Car Co. v. Shadman, 116 N.E. 559, 226 Mass. 570.

58. Mass.—Satterlee v. Lawler, 193 N.W. 118, 155 Minn. 181, 42 C.J. p 817 note 76.

59. Mass.—Satterlee v. Lawler, supra.

60. Mass.—Beacon Motor Car Co. v. Shadman, 116 N.E. 559, 226 Mass. 570.

42 C.J. p 817 note 79.

61. Mass.—Beacon Motor Car Co. v. Shadman, supra.

62. Mass.—Beacon Motor Car Co. v. Shadman, supra, 42 C.J. p 818 note 81.

63. Wash.—Jones v. Whidden, 259 P. 724, 145 Wash. 267, opinion adhered to 263 P. 960, 146 Wash. 698.

64. Wash.—Jones v. Whidden, supra.

65. Conn.—Rogoff v. Southern New England Contractors Supply Co., 31 A.2d 29, 129 Conn. 687.

Ind.—Blum v. Shrock, 10 N.E.2d 752, 104 Ind.App. 247.

Circumstantial evidence may support plaintiff's claim.—Boak v. Kuder, 9 A.2d 415, 336 Pa. 260.

66. Pa.—Boak v. Kuder, supra.

Duty

The owner of an automobile, delivering it to a repairman for repairs, owes to him the duty to disclose to him any defect in the mechanism which may render it unsafe or dangerous of which such owner has knowledge.—Varas v. James Stewart & Co., 17 S.W.2d 651, 223 Mo.App. 385.

Evidence tending to show defendant's knowledge of danger is admissible.—Rogoff v. Southern New England Contractors Supply Co., 31 A.2d 29, 129 Conn. 687.

67. Mo.—Varas v. James Stewart & Co., 17 S.W.2d 651, 223 Mo.App. 385.

68. N.Y.—Osborn v. Hoffman, 300 N.Y.S. 690, 252 App Div. 587, affirmed 19 N.E.2d 924, 280 N.Y. 523.

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the owner's action.⁷⁰ If defendant was not notified to take on himself the defense of the owner's suit against the repairman, he is not estopped to contest in the repairman's action against him the measure of damages recovered from the repairman by the owner.⁷¹

D. LIEN

§ 743. In General

A garage keeper's lien attaches as soon as any sum becomes due, that is, when the work is begun, not when the contract is made.

A lien in favor of a garage keeper may be created by the express agreement of the parties;⁷² but the lien has also been said to be not a matter of contract but of statute law,⁷³ and to be not of the right but of the remedy.⁷⁴ A claim in the nature of a garage keeper's lien has been said to give claimant a special property in the articles covered.⁷⁵

A garage keeper's lien had been held to attach as soon as any sum becomes due,⁷⁶ or when the work is begun, not when the contract is made.⁷⁷ It has been said of a particular statutory lien that it is effective immediately,⁷⁸ and, with respect to another, that the repairman's rights are governed as of the time possession is given to him.⁷⁹

§ 744. Statutory Provisions

Statutory provisions creating or governing garage

keeper's or repairman's liens on motor vehicles have been construed and applied in accordance with the general rules of statutory construction.

A garage keeper's statutory lien on a motor vehicle has been held only a right in rem against the property itself,⁸⁰ and, in effect, subjects the chattel to an encumbrance as security for the principal debt.⁸¹ A statute conferring a lien on the keepers of livery or boarding stables will not be construed to confer a lien in behalf of the keeper of a garage for motor vehicles.⁸² A corporation⁸³ or a firm⁸⁴ has been held entitled to the statutory lien, the same as a natural person.

Construction generally. A statute conferring a lien for work or repairs done by a garage keeper has been required to be strictly construed in determining to whom and for what a lien is given,⁸⁵ since it confers special privileges.⁸⁶ Likewise, provisions in derogation of the common law are required to be strictly construed;⁸⁷ but at the same time such an enactment, in its remedial aspect,

69. Mass.—Beacon Motor Car Co. v. Shadman, 116 NE 559, 226 Mass. 570.

70. Mass.—Beacon Motor Car Co. v. Shadman, *supra*.

71. Mass.—Beacon Motor Car Co. v. Shadman, *supra*.

72. Ariz.—Fishback v. Foster, 202 P. 806, 23 Ariz. 206.

Agreement or consent of owner see *infra* § 746.

73. Md.—Universal Credit Co. v. Marks, 163 A. 810, 815, 164 Md. 130.

"The lien . . . is of statutory creation under the law of the state where the contract with reference to the repair, replacements, accessories or storage of the automobile is made. The lien does not arise by agreement of the parties, but from the exercise of the will of the sovereign state whence it acquires its binding force."—Universal Credit Co. v. Marks, *supra*.

74. Md.—Universal Credit Co. v. Marks, *supra*.

75. N.Y.—New York Yellow Cab Co. Sales Agency, Inc., v. Courtlandt Garage & Realty Corporation, 227 N.Y.S. 315, 223 App.Div. 44.

76. N.Y.—Koroleff v. Schildkraut, 179 N.Y.S. 117.

38 C.J. p 80 note 26.

77. Ala.—Grace v. Wooley, 153 So. 659, 26 Ala.App. 83.

78. N.J.—Regan v. Metropolitan Haulage Co., 14 A.2d 257, 127 N.J. Eq. 487.

79. Pa.—Grose v. Paustenbach, 45 Pa. Dist. & Co. 28, 90 Pittsb. Leg. J. 321.

80. N.Y.—In re Diamond's Estate, 295 N.Y.S. 421, 162 Misc. 604.

Despite surrender of possession

The peculiar nature of the lien which permits its survival under certain specified circumstances in spite of a surrender of possession by the lienor in no way varies the fundamental character of the encumbrance as being one against the thing itself.—In re Diamond's Estate, *supra*.

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82. Ariz.—Fishback v. Foster, 202 P. 806, 23 Ariz. 206.

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83. Ala.—Henderson v. Alabama Auto Co., 96 So. 627, 209 Ala. 482.—Rogers v. C. E. Green Motor Co., 113 So. 641, 22 Ala.App. 168.

Ga.—Frost Motor Co. v. Pierce, 33 S. E.2d 910, 72 Ga.App. 447.

84. Ga.—Frost Motor Co. v. Pierce, *supra*.

85. Cal.—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal.App. 757.

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Oil company which delivered gasoline to bus company from its distributing station tanks was held not entitled to garage keeper's lien, because only those engaged in keeping garage or place for storage, maintenance, keeping, or repair of motor vehicles are entitled to such lien.—Tommy Elm Auto Supply & Service Station v. North Jersey Bus Co., 185 A. 915, 120 N.J. Eq. 465, affirmed 189 A. 380, 121 N.J. Eq. 273.

87. Cal.—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal.App. 757.

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has been required to be liberally construed in furtherance of the beneficial purpose intended.⁸⁸ Where the statute conferring a lien is declaratory of the common law, it is to be interpreted according to the common-law rules.⁸⁹ A statute giving a lien on a motor vehicle for repairs or supplies furnished must be read and construed in the light of the law in force when it was passed.⁹⁰

Effect of statutes on common-law lien. A common-law lien for repairs is not superseded or destroyed by a statute creating a new and additional remedy to enforce it;⁹¹ but, as discussed *infra* § 758, a statute which provides the manner in which the common-law lien may be enforced is repealed by a statute which creates a lien and prescribes the method for its enforcement.

Effect of special statutes upon general statutory lien. While it has been held that a statute specifically relating to liens on motor vehicles supercedes or controls a general statute which does not specifically refer to such vehicles, although it contains language broad enough to cover them,⁹² it has also been held that a statutory lien similar to a common-law lien for repairs dependent on possession may be had, notwithstanding provision is made by another statute for a lien on motor vehicles which is not dependent on possession but is to be preserved by the filing of a statement of claim with the proper officer.⁹³

Power to incur obligation. The lien conferred by statute is based on the legal obligation of the owner of the motor vehicle to pay;⁹⁴ hence, where an infant's contract for services involving his automobile is not binding on him, the garage keeper has no enforceable lien under statute.⁹⁵

§ 745. Right of Owner to Lien

In particular circumstances, the owner of a motor

vehicle has been held not to have a repairman's lien thereon.

The owner of a motor vehicle who has contracted to sell it, reserving title in himself until the purchase price is paid, cannot have a mechanic's lien on the motor vehicle for repairs made at the request of the purchaser who is in possession of the property;⁹⁶ and the owner's act in retaining possession of the vehicle, if equivocal, will be referred to the exercise of a right under the sale contract rather than a right by virtue of a common-law lien,⁹⁷ precluding him, after repossessing the property, from subjecting the purchaser to liability for the unpaid purchase price.⁹⁸ A dealer taking a motor vehicle with knowledge of an outstanding conditional sales contract requiring the buyer to keep it in repair acquires no lien against himself for repairs made by him.⁹⁹

§ 746. Agreement or Consent of Owner

- a. In general
- b. Conditional sales contracts

a. In General

The general rule is that for a garage keeper's or repairman's lien to arise on a motor vehicle the work must have been done, or the supplies or storage furnished, by contract with, or authority of, the owner.

While the existence of a valid common-law lien for the value of labor and material used in the repair of a motor vehicle cannot be denied by the person at whose instance the service was rendered, or on behalf of any interest for which he was then authorized to act,¹ in order to lay the foundation for a common-law lien for repairs, supplies, or storage, it must appear that the work was done, or the supplies or storage furnished, by contract with, or by authority of, the owner,² and the same is true

N.J.—Wallace v. Terpis Garage, 7 A.2d 795, 17 N.J.Misc. 183.

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90. Ky.—Indiana Truck Corporation of Kentucky v. Hurry Up Broadway Co., 1 S.W.2d 990, 222 Ky. 521.

91. Me.—Crosby v. Hill, 117 A. 585, 121 Me. 432.

Mo.—Bostic v. Workman, 31 S.W.2d 218, 224 Mo.App. 645—McCluskey v. De Long, App., 198 S.W.2d 673, disapproving Butterworth v. Soltz, 204 S.W. 50, 199 Mo.App. 507.

92. Ariz.—Cherry's Incorporated v.

Sharpensteen, 265 P. 90, 33 Ariz. 342.

Okl.—Norton Johnson Buick Co. v. Lindley, 46 P.2d 525, 173 Okl. 93—Greer v. Bird, 220 P. 579, 93 Okl. 246—Nettles v. Carson, 187 P. 799, 77 Okl. 219.

93. Minn.—Stebbins v. Balfour, 195 N.W. 773, 157 Minn. 135.

A statute conferring an artisan's lien dependent on possession is not superseded by a lien law applicable particularly to motor vehicles in which the right of a repair man to a lien is not lost by a surrender of possession.—Stebbins v. Balfour, *supra*.

94. N.J.—La Rose v. Nichols, 103 A. 390, 91 N.J.Law 355.

95. N.J.—La Rose v. Nichols, *supra*.

96. Ala.—Alexander v. Mobile Auto Co., 76 So. 944, 200 Ala. 586.

97. Ala.—Alexander v. Mobile Auto Co., *supra*.

98. Ala.—Alexander v. Mobile Auto Co., *supra*.

99. Miss.—Federal Credit Co. v. Holloman, 147 So. 485, 165 Miss. 211.

1. Md.—Meyers v. Neeley, etc., Auto. Co., 121 A. 916, 143 Md. 107, 30 A.L.R. 1224—Winton Co. v. Meister, 105 A. 301, 133 Md. 318.

2. Iowa.—Lewis v. Best-By-Test Garage, 205 N.W. 983, 200 Iowa 1051.

La.—Shepherd v. Louisiana Texas Motor Co., 130 So. 627, 15 La.App. 144.

Pa.—Conrad v. Hoch, 14 Pa.Dist. & Co. 172, 26 Luz.Log.Reg. 3, 44 York

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Mo.—Bostic v. Workman, 31 S.W.2d 218, 224 Mo.App. 645—McCluskey v. De Long, App., 198 S.W.2d 673, disapproving Butterworth v. Soltz, 204 S.W. 50, 199 Mo.App. 507.

92. Ariz.—Cherry's Incorporated v.

Sharpensteen, 265 P. 90, 33 Ariz. 342.

Okl.—Norton Johnson Buick Co. v. Lindley, 46 P.2d 525, 173 Okl. 93—Greer v. Bird, 220 P. 579, 93 Okl. 246—Nettles v. Carson, 187 P. 799, 77 Okl. 219.

93. Minn.—Stebbins v. Balfour, 195 N.W. 773, 157 Minn. 135.

A statute conferring an artisan's lien dependent on possession is not superseded by a lien law applicable particularly to motor vehicles in which the right of a repair man to a lien is not lost by a surrender of possession.—Stebbins v. Balfour, *supra*.

94. N.J.—La Rose v. Nichols, 103 A. 390, 91 N.J.Law 355.

95. N.J.—La Rose v. Nichols, *supra*.

96. Ala.—Alexander v. Mobile Auto Co., 78 So. 944, 200 Ala. 586.

97. Ala.—Alexander v. Mobile Auto Co., *supra*.

98. Ala.—Alexander v. Mobile Auto Co., *supra*.

99. Miss.—Federal Credit Co. v. Holloman, 147 So. 485, 165 Miss. 211.

1. Md.—Meyers v. Neeley, etc., Auto. Co., 121 A. 916, 143 Md. 107, 30 A.L.R. 1224—Winton Co. v. Meister, 105 A. 301, 133 Md. 318.

2. Iowa.—Lewis v. Best-By-Test Garage, 205 N.W. 983, 200 Iowa 1051.

La.—Shepherd v. Louisiana Texas Motor Co., 130 So. 627, 15 La.App. 144.

Pa.—Conrad v. Hoch, 14 Pa.Dist. & Co. 172, 26 Luz.Leg.Reg. 3, 44 York

with respect to a statutory lien, at least where the statute requires the work to be done at the request, or with the consent, of the owner,³ except where the statute permits one not the owner, but the legal possessor, to subject the property to a lien.⁴

A mere bailee⁵ or borrower,⁶ or a thief,⁷ or one merely having possession⁸ has no authority to create a lien for repairs, supplies, or storage of a motor vehicle. However, a statute referring to "the person owning the car" has been held to refer not to the legal owner, but to the person having the indicia of title and in the lawful possession of the automobile;⁹ and it has been held that whether the mechanic knew that title was in some person other than the one in possession when re-

pairs were made is immaterial in determining whether a lien was created.¹⁰

Express or implied consent. In the absence of a statute to the contrary, the consent or agreement of the owner may be either express or implied.¹¹ Proof of a written memorandum signed by the owner, however, is essential where the statute confers a lien on persons furnishing labor or material, who shall obtain from the owner of the vehicle a written memorandum thereof signed by him.¹² Where the statute provides that the labor or materials must be furnished "for" a person, it is not sufficient that they be furnished with his knowledge or consent.¹³

Lesse; sublessee. Under a statute requiring

Leg Rec. 132—Mertz Motor Co. v. Stankunas, Com.Pl., 13 Northumb. Lex.J. 251.

Tenn.—McDonald v. Cady, 9 Tenn. App. 354.

42 C.J. p 819 note 20—38 C.J. p 80 note 28.

Request by owner's wife held sufficient.—Wingfield Motor Co. v. Dupont, 134 So. 37, 24 Ala.App. 262.

Order or action of police

Garage owner storing, on order of policeman, automobile has no claim against owner or lien for towage and storage.

Ohio—Burns Motor Co. v. Briggs, 160 N.E. 728, 27 Ohio App. 80.

Utah—Bost v. Larsen Bros., 134 P. 2d 179, 103 Utah 142—Rickenberg v. Capitol Garage, 249 P. 121, 68 Utah 30, 50 A.L.R. 1303.

An owner's ratification of oral contract with another in possession of automobile for repair thereof is sufficient to establish contract, so as to entitle repairman to lien for work done and material furnished in repairing it; and owner's approval, adoption, or confirmation of such oral contract, at time when there is option to reject it, is sufficient to establish contract, and owner's subsequent attempted revocation of such ratification is immaterial to existence of contract.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.

Notice to owner

Under statute, lien for repairs on automobile in amount exceeding one hundred dollars was held valid, subject to objection of legal owner not notified; liens of claimants for towing, repairing, and storing automobile were each valid up to one hundred dollars without notice to legal owner, even though total claims exceeded one hundred dollars.—Hessel v. Pickwick Stages System, 280 P. 1016, 100 Cal.App. 682.

3. Ala.—Jordan v. J. E. Rotten & Co., 126 So. 893, 23 Ala.App. 465.

Ind.—Bowen v. Kokomo Omnibus Co., 161 N.E. 298, 87 Ind.App. 252.

La.—Darce v. One Ford Automobile, 2 La.App. 185.

Mich.—Joy Oil Co. v. Fruehauf Trailer Co., 29 N.W.2d 691, 319 Mich. 277.

Mo.—Perkins v. Bostic, 56 S.W.2d 155, 227 Mo.App. 352.

N.J.—Auto Security Co. v. Stewart, 135 A. 92, 103 N.J. Law 1.

Okl.—Holland v. Whiteside, 43 P.2d 57, 171 Okl. 397.

42 C.J. p 820 note 21.

Owner consenting but not contracting

Where automobile is repaired with owner's consent, repairman has lien and privilege thereon, notwithstanding person who contracted for repairs was not owner.—Wardlaw Bros. Garage v. Thomas, 140 So. 108, 19 La. App. 241.

Knowledge does not necessarily imply consent.—Pierce-Arrow Finance Corporation v. Mitten, 284 P. 998, 75 Utah 306—42 C.J. p 820 note 21 [b].

Where sheriff stored automobile without legal authority from owner, garage keeper could have no lien for storage.—Auto Dealers' Discount Corporation v. Budd, 272 N.Y.S. 893, 242 App.Div. 37.

Effect of seizure under judgment

An item representing work performed on judgment debtor's automobile after seizure caused to be made by judgment creditor was privileged, as against contention that after seizure automobile was in sheriff's custody and control though left with garage owner, and that therefore statute was not applicable; where judgment creditor caused seizure to be made, and garage owner filed petition of opposition averring that debtor was indebted to him for labor and services rendered and parts and materials furnished, a privilege on automobile for storage was correctly

recognized.—Milam Realty Co. v. Jones, La.App., 7 So.2d 405.

4. Cal.—General Exchange Ins. Corporation v. Pellissier Square Garage, 69 P.2d 236, 24 Cal.App.2d Supp. 768—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal.App. 757.

5. N.J.—Post v. Lloyd, 177 A. 560, 13 N.J. Misc. 241.

Pa.—Equitable Automobile Finance Co. v. Manuel, 16 Pa. Dist. & Co. 812.

42 C.J. p 819 note 20 [b]—38 C.J. p 80 note 29.

6. Okl.—Holland v. Whiteside, 43 P. 2d 57, 171 Okl. 397.

7. La.—Darce v. One Ford Automobile, 2 La.App. 185.

Owner's right to possession without paying charges

Owner of stolen automobile, held by garage company claiming lien thereon for repairs and storage under contract with thief, was entitled to judgment for possession thereof without paying such company's charges.—General Exchange Ins. Corporation v. Pellissier Square Garage, 69 P.2d 236, 24 Cal.App.2d Supp. 768.

8. Ala.—Jordan v. J. E. Rotten & Co., 126 So. 893, 23 Ala.App. 465.

Okl.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.

9. Ariz.—Cherry's Incorporated v. Sharpsteen, 265 P. 90, 33 Ariz. 342.

10. Miss.—De Van Motor Co. v. Bailey, 171 So. 342, 177 Miss. 441.

11. Iowa.—Lewis v. Best-by-Test Garage, 205 N.W. 983, 200 Iowa 1051.

42 C.J. p 820 note 24.

12. Mo.—Butterworth v. Soltz, 204 S.W. 50, 199 Mo.App. 507.

13. Okl.—De Groff v. Carhart, 223 P. 180, 97 Okl. 145.

the work to be done at the request or with the consent of the owner, whether the owner is a conditional buyer or a mortgagor remaining in possession or otherwise, a lessee or a sublessee cannot be regarded as included by the words "or otherwise;"¹⁴ and, under a statute requiring repairs or supplies to be furnished at the request or with the consent of the owner or his representative, no lien can be had for repairs furnished the lessee of an automobile in possession under the lease,¹⁵ particularly where the lease provides that no repairs shall be made without the consent of the lessor.¹⁶ In other circumstances repairs for a lessee have been held to create¹⁷ or not to create¹⁸ a lien. Although the statute in the jurisdiction wherein the repairs are made may confer a lien for repairs made at the request of the owner or his representative, whether such owner is a conditional buyer or a mortgagor remaining in possession or otherwise, the law of another state where a motor vehicle has been leased to the person obtaining the repairs will be followed in determining whether the lessee is the owner's representative.¹⁹

Mortgagor; mortgagee. A garageman appointed legal custodian of an automobile has been held not prevented from claiming his statutory lien for repairs thereto by the fact that they were made at the direction of one holding a chattel mortgage on the automobile;²⁰ and, under at least one statute, an agreement by the mortgagor in possession for the care or keeping of a vehicle is sufficient to support a lien in behalf of a garageman.²¹ Like-

wise, one storing a motor vehicle at the request of the mortgagee in possession has been held to have a lien for storage.²² On the other hand, a purported chattel mortgagee seizing an automobile under an invalid mortgage cannot create a valid lien by requesting repairs,²³ and a garageman to whom a chattel mortgagor delivers a truck for repairs and who thereafter holds it for prior repairs cannot assert a lien for storage as against the chattel mortgagee on the ground that it was stored at the request, and with the consent, of the mortgagor.²⁴

Effect of special agreement as to payment. A special agreement for a particular mode and time of payment may prevent the attaching of a lien.²⁵ Where, after completion of repairs, the owner allows the vehicle to remain with the repairman under an agreement to pay a reasonable storage until such time as he is able to pay for the repairs, no lien for storage arises.²⁶

b. Conditional Sales Contracts

The authorities differ as to whether the purchaser of a motor vehicle under a conditional sales contract, having possession thereof, has authority to order repairs, so as to give the repairman a lien.

According to some authorities, delivery of a motor vehicle to the purchaser under a conditional sales contract gives the purchaser implied authority to have it repaired if reasonably necessary to its operation, or preservation, so as to create a lien in the garage keeper or repairman;²⁷ but there is authority to the contrary.²⁸ A provision

14. N.Y.—Lloyd v. Kilpatrick, 127 N.Y.S. 1096, 71 Misc. 19.
42 C.J. p 820 note 22

Evidence held insufficient to show lessor's knowledge of, or consent to, repairs—Joy Oil Co. v. Fruehauf Trailer Co., 29 N.W.2d 691, 319 Mich. 277.

15. N.J.—Auto Security Co. v. Stewart, 135 A. 92, 103 N.J.Law 1.

16. N.J.—Stern v. Ward, 109 A. 566, 94 N.J.Law 279.
38 C.J. p 81 note 38.

17. **Lien as against lessor's vendee**
Where lease, which provided that lessee should keep motor truck in repair and that if lessee failed to pay for repairs lessor might pay for repairs and charge amount thereof against lessee as rent, was not canceled by lessor's vendee, garageman, who made repairs for lessee after being notified not to make repairs without work orders from vendee, and who retained possession of truck, had a mechanic's lien on truck.—Martin v. Broadhead, Miss., 32 So.2d 433.

18. Pa.—Conrad v. Hoch, 14 Pa. Dist. & Co 172, 26 Luz. Leg. Reg. 3, 44 York Leg Rec. 132.

19. N.J.—Stern v. Ward, 109 A. 566, 94 N.J.Law 279.

20. La.—Mahfouz v. Yawn, App., 31 So.2d 295.

21. N.Y.—Willys-Overland, Inc. v. Prudman Auto. Co., Inc., 196 N.Y. S. 487.

22. Ind.—Hoosier Finance Co. v. Campbell, 155 N.E. 836, 86 Ind.App. 62.

23. N.Y.—General Motors Acceptance Corporation v. Baker, 291 N. Y.S. 1015, 161 Misc. 238.

24. N.Y.—Goodrich Silvertown Stores of B. F. Goodrich Co. v. Valentine, 10 N.Y.S.2d 447.

25. N.Y.—Pewenik v. Greenberg, 157 N.Y.S. 1093, 94 Misc. 192.

26. Me.—Crosby v. Hill, 117 A. 585, 121 Me. 432.

27. Cal.—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal.App. 757.

Ind.—Yellow Mfg. Acceptance Cor-

poration v. Linsky, 192 N.E. 715, 99 Ind.App. 691

Miss.—De Van Motor Co. v. Bailey, 171 So. 342, 177 Misc. 441

N.Y.—Terminal, etc., Taxi Corp. v. O'Rourke, 193 N.Y.S. 238, 240, 117 Misc. 761.

38 C.J. p 80 note 33.

28. Ala.—Ellis Motor Co. v. Hibbler, 121 So. 47, 219 Ala. 53—Tallassee Motor Co. v. Gilliland Bros., 112 So. 758, 22 Ala.App. 21, certiorari denied 112 So. 759, 216 Ala. 257.

Del.—Universal Credit Co. v. Spinazolo, 197 A. 68, 9 W.W.Harr. 117.

Me.—Hartford Accident & Indemnity Co. v. Spofford, 138 A. 769, 126 Me. 392—Bath Motor Mart v. Miller, 118 A. 715, 122 Me. 29.

Neb.—General Motors Acceptance Corporation v. Sutherland, 241 N. W. 281, 122 Neb. 720.

R.I.—Goldstein v. Mack Motor Truck Co., 183 A. 136, 56 R.I. 1, 104 A.L. R. 281.

As against a conditional seller's assignee, a mechanic furnishing labor and material at the request of the conditional buyer only has no

in a conditional sales contract requiring the vendee to keep the motor vehicle free of encumbrances has been held to negative the existence of implied authority in him to have repairs made,²⁹ and a provision authorizing the vendee to have the car repaired merely indicates the vendor's approval of such repairs and not his obligation to pay the cost thereof;³⁰ but, on the ground that the law, and not the consent of the parties, creates the lien,³¹ similar provisions have been held not to prevent the creation of a lien,³² even though including a provision for the making of repairs at the expense of the buyer.³³

By express provision of statute, a conditional vendee may subject a motor vehicle to the lien of a garage man,³⁴ as he may under a statute permitting a lien for repairs to be made at the request of the legal possessor of the property,³⁵ and the same has been held under a statute permitting a lien where the charges were agreed to by the person owning the car,³⁶ or by an owner or any other person with his authority, express or implied.³⁷ On the other hand, a conditional vendee has been held not an owner within a statute authorizing a lien for repairs made by direction or consent of the owner;³⁸ and a lien statute under which the purchaser of a chattel under an agreement is to be deemed the lawful owner thereof or the authorized agent of the owner does not apply, so as to create a lien, where an automobile is transferred by the conditional buyer without the approval required by the conditional sales contract.³⁹ Under a statute providing that repairs can be made only at the request of the owner in or-

der to give a lien, no lien can be had for repairs made at the request of a conditional vendee in express violation of the sale contract and without authorization or ratification by the seller.⁴⁰

A garage keeper has been held unable to claim a lien on a motor vehicle for storage thereof at the request of the conditional vendee's judgment creditor or of a city marshal acting under a levy.⁴¹ The conditional vendee of a motor vehicle is without implied authority from the vendor to order gasoline therefor from a garage keeper so that the latter may have a statutory lien.⁴²

*The amount of a lien created by a conditional buyer may be limited by statute.*⁴³

§ 747. Possession

- a. Lien as dependent on possession
- b. Right to possession

a. Lien as Dependent on Possession

- (1) In general
- (2) Improper deprivation of possession;
bad or stopped check
- (3) Repossession of vehicle

(1) In General

While the authorities are not uniform, the general rule is that, except where statutes provide otherwise, a garage keeper's lien on a motor vehicle is dependent on his possession thereof, and is lost by his surrender of possession.

Possession of a motor vehicle is broadly held essential to the maintenance of a lien for repairs thereof.⁴⁴ More particularly, at common law the

lien on the automobile.—*Pierce-Arrow Finance Corporation v. Mitten*, 284 P. 998, 75 Utah 306.

Order or request

Mechanic repairing automobile cannot claim lien as against conditional vendor without showing on whose order, consent, or request repairs were made.—*Commercial Credit Trust v. Barbler*, 147 A. 861, 7 N.J.Misc. 1109.

29. Neb.—*General Motors Acceptance Corporation v. Sutherland*, 241 N.W. 281, 122 Neb. 720.

30. Ga.—*Chalker & Russell v. Savannah Motor Car Co., Inc.*, 140 S. E. 916, 37 Ga.App. 532.

31. Ind.—*Yellow Mfg. Acceptance Corporation v. Linsky*, 192 N.E. 715, 99 Ind.App. 691.

32. Ind.—*Yellow Mfg. Acceptance Corporation v. Linsky*, *supra*.

33. Ind.—*Yellow Mfg. Acceptance Corporation v. Linsky*, *supra*.

34. N.Y.—*Willys-Overland, Inc. v.*

Prudman Auto. Co., Inc., 196 N.Y. S. 487.

38 C.J. p 81 note 36.

35. Cal.—*Goodman v. Anglo-California Trust Co.*, 217 P. 1078, 62 Cal.App. 702.—*Davenport v. Grundy Motor Sales Co.*, 152 P. 932, 28 Cal. App. 409.

Transfer without approval

Where conditional buyer transferred automobile to another, who in turn transferred it to second transferee, and no approval of either transfer was obtained from conditional seller's assignee, as required by conditional sales contract, second transferee was not "lawful possessor" or "in lawful possession" so as to give lien to party who furnished and installed wheels, tires, and tubes at request of second transferee.—*Goodrich Silvertown Stores v. Collins*, 115 P.2d 332, 167 Or. 40.

36. Ariz.—*Cherry's Incorporated v. Sharpensteen*, 265 P. 90, 33 Ariz. 342.

37. Md.—*Universal Credit Co. v. Marks*, 163 A. 810, 164 Md. 130.

38. Me.—*Hartford Accident & Indemnity Co. v. Spofford*, 138 A. 769, 126 Me. 392.

39. Or.—*Goodrich Silvertown Stores v. Collins*, 115 P.2d 332, 167 Or. 40.

40. Idaho.—*Neitzel v. Lawrence*, 231 P. 423, 40 Idaho 26.

41. N.Y.—*General Motors Acceptance Corporation v. Barnett*, 254 N. Y.S. 166, 142 Misc. 192.

42. Ind.—*Partlow-Jenkins Motor Car Co. v. Stratton*, 124 N.E. 470, 71 Ind.App. 122.

43. Cal.—*Pacific States Finance Corporation v. Freitas*, 295 P. 804, 113 Cal.App. 757.—*Lindsay v. Kleiber Motor Truck Co.*, 294 P. 454, 110 Cal.App. 479.

44. Pa.—*Bernstein v. Hineman*, 86 Pa.Super. 198.

Action by owner to recover possession see *infra* § 757.

right of a mechanic or repairman to a lien on a motor vehicle repaired by him is dependent on his retention of possession of the vehicle,⁴⁵ and the same is true under statutes substantially declaratory of the common law or making a lien for repairs or storage dependent on possession.⁴⁶ Under

such rule or statutes, the lien is waived or lost by a surrender or loss of possession of the motor vehicle.⁴⁷ Thus, the keeper of a garage, in the absence of a statute or agreement providing otherwise,⁴⁸ has no lien for an amount due for repairs for an automobile kept in such garage, where the

45. Ala.—Grace v. Wooley, 153 So. 659, 26 Ala.App. 83—Jordan v. J. E. Rotten & Co., 126 So. 893, 23 Ala.App. 465.
N.C.—Reich v. Triplett, 155 S.E. 573, 199 N.C. 678.

Tenn.—Gem Motor Co. v. Securities Inv. Co., 65 S.W.2d 590, 16 Tenn. App. 608.

42 C.J. p 821 note 49—38 C.J. p 82 note 63.

Actual or constructive possession

Such possession may be actual or constructive; one furnishing materials and performing labor for repairing of automobile under oral contract with another than owner thereof, who acquiesced in such betterment of his property, was entitled to common-law lien, based on either actual or constructive possession, even though owner reclaimed automobile from subcontractor, rightfully in possession thereof, and refused to return it for completion of repairs.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.

Leaving a motor vehicle in the street in front of the repairman's place of business for the period of time necessary to replace old tires with new ones, during which time the owner is absent, confers on the repairman sufficient possession to support a lien.—Courts v. Clark, 164 P. 714, 84 Or. 179.

46. Cal.—C. I. T. Corporation v. Biltmore Garage, 36 P.2d 247, 3 Cal.App.2d Supp. 757—Covington v. Grant, 256 P. 213, 82 Cal App. 749.
N.Y.—General Motors Acceptance Corporation v. Barnett, 254 N.Y.S. 166, 142 Misc. 192—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514—Goodrich Silver-town Stores of B. F. Goodrich Co. v. Valentine, 10 N.Y.S.2d 447.
N.C.—Reich v. Triplett, 155 S.E. 573, 199 N.C. 678.

42 C.J. p 821 note 53, p 822 note 54—38 C.J. p 82 notes 64, 65.

Garageman as "legal possessor"

Where conditional buyer of automobile purported to execute chattel mortgage thereon, garageman who repaired automobile at instance of chattel mortgagee, who had seized it from conditional buyer, was held not "legal possessor," so as to be entitled to lien on automobile as against conditional seller.—General Motors Acceptance Corporation v. Baker, 291 N.Y.S. 1015, 161 Misc. 238.

47. Ala.—Andalusia Motor Co. v.

Mullins, 183 So. 456, 28 Ala.App. 201, certiorari denied 183 So. 460, 236 Ala. 474—Jordan v. J. E. Rotten & Co., 126 So. 893, 23 Ala.App. 465—Gober Motor Co. v. Valley Securities Co., 124 So. 395, 23 Ala. App. 290—Tallassee Motor Co. v. Gilliland Bros., 112 So. 758, 22 Ala. App. 21, certiorari denied 112 So. 759, 216 Ala. 257.

Cal.—C. I. T. Corporation v. Biltmore Garage, 36 P.2d 247, 3 Cal. App.2d 757—Lundblade v. Pierce, 272 P. 329, 95 Cal.App. 192.

Minn.—Sundin v. Swanson, 225 N.W. 15, 177 Minn. 217.

N.H.—Auto Owners Finance Co. v. Evers, 49 A.2d 507, 94 N.H. 180.

N.Y.—Smith v. Pierce-Arrow Sales Corporation, 230 N.Y.S. 194, 224 App Div. 769—General Motors Acceptance Corporation v. Barnett, 254 N.Y.S. 166, 142 Misc. 192.

N.C.—Reich v. Triplett, 155 S.E. 573, 199 N.C. 678.

Okl.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.

Pa.—Waldorf v. Brown, Com.Pl., 94 Pittsb. Leg. J. 457.

42 C.J. p 821 notes 49, 53, p 822 note 54—38 C.J. p 82 notes 63–65.

Waiver and loss of lien generally see *infra* § 750.

Removal and mortgage by owner

The statutory provisions giving garage keepers and repairmen a lien for services do not apply where the owner of the automobile is permitted to take it away and mortgage it to an innocent purchaser for value without notice.—Wolman v. Raphael, 278 Ill.App. 172.

Under the general possessory lien statute, the possessory lien for the repair of a chattel is lost if possession is unconditionally resumed by the owner, and, hence, garageman who surrendered possession of automobile several times to the owner after repairing the automobile had no lien under such statute for those repairs.—Bongard v. Nellen, 298 N.W. 569, 210 Minn. 392.

Reliance on insurance coverage

Where lessee took trailers to defendant for repairs, defendant waived any common-law lien for repairs he may have had when he returned the trailers to lessee after making repairs relying on being paid out of insurance coverage and without any reservation, or circumstances showing a reservation, that defendant retained a lien on the trailers if not paid out of insurance coverage.

—Joy Oil Co. v. Fruehauf Trailer Co., 29 N.W.2d 691, 319 Mich. 277.

Dealings with conditional purchaser

(1) Statute providing that voluntary restoration of personal property to its "owner" by holder of lien thereon dependent on possession extinguishes lien, unless parties otherwise agree, and that such agreement is ineffective as to owner's creditors and subsequent bona fide purchasers and encumbrancers, was held inapplicable to lien for storage charges on automobile surrendered daily to conditional purchaser agreeing that lien should not be extinguished by voluntary restoration of car to him.—C. I. T. Corporation v. Biltmore Garage, 36 P.2d 247, 3 Cal.App.2d Supp. 757—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal.App. 757—Davis v. Young, 242 P. 743, 75 Cal. App. 359.

(2) Under statute providing that mechanic forfeits lien if he consents to removal of vehicle, except as against person at whose request repairs are made, mechanic lost lien as against conditional seller under recorded conditional sales contract which required purchaser to keep truck free of encumbrances, by consenting that truck be removed by purchaser who, on default, gave seller right to repossess the truck, as against contention that under theory of agency conditional seller impliedly clothed purchaser with authority to order repairs; mechanic was charged with notice of recorded conditional sales contract notwithstanding he was without actual knowledge thereof.—Universal Credit Co. v. Printy, 119 P.2d 108, 45 N.M. 549.

(3) Agreement or consent of owner generally see *supra* § 746.

48. Statutory continuation of lien

(1) Purpose of act giving garagemen lien on articles repaired for a specified number of days from date of completion of repairs was to continue lien for limited period even after delivery of repaired articles to owners.—Hart Enterprise Electrical Co. v. Stewart, La.App., 168 So. 791.

(2) In conditional seller's action to foreclose lien on truck, denying recovery to mechanics for services was error, in view of fact that it did not appear that they voluntarily relinquished possession of truck more than statutory period subsequent to the accrual of their lien for services.—Yellow Mfg. Credit Corporation v.

owner exercises the right to use it at his pleasure,⁴⁹ and by the daily surrender of possession the garage keeper loses his lien for storage charges previously incurred,⁵⁰ and such lien is not revived by the daily return of the automobile to the garage.⁵¹

On the other hand, it has been held that a repairman does not lose his common-law lien by allowing the temporary removal of the car from his shop,⁵² particularly where it is returned and no rights of third or innocent persons intervene,⁵³ and that the mere temporary surrender of the car by the repairman may not under all circumstances be sufficient to terminate the lien.⁵⁴ Likewise, it has been held that in order to acquire a lien for storage, claimant is not necessarily required to have possession of the motor vehicle,⁵⁵ and that the lien exists, even where the owner is permitted to take the car from the garage daily.⁵⁶

By some statutes a lien for repairs is given which

is not dependent on possession,⁵⁷ and the delivery of the vehicle to the owner without collecting the charges does not deprive the garage owner of the lien except as against one deriving title or possession through the owner of the vehicle;⁵⁸ or the lienor, after parting with possession, may enforce the lien by obtaining condemnation and sale of the property for the payment of the repair charges.⁵⁹ Under a constitutional provision that artisans and materialmen of every class shall have a lien on articles made or repaired by them for the value of their labor done or material furnished, the lien provided for has been held not dependent on a retention of possession.⁶⁰ A statute which permits the lien of a repairman to be enforced after voluntary surrender to the owner will not, for that reason, be construed to permit its enforcement as against an innocent purchaser without notice,⁶¹ particularly where such a construction might render it unconstitutional.⁶²

Horowitz, 2 N.Y.S.2d 566, 166 Misc 261.

Constructive possession; agreement to return

(1) Constructive possession of the motor vehicle is sufficient to support the lien, as where it is permitted to leave the garage keeper's actual possession under an agreement for its return—*Maccar Trucks v. Gorenstein*, 248 N.Y.S. 231, 139 Misc. 681.

(2) The lien is not lost by permitting the owner to take the car for temporary use under an agreement to return it.—*In re Carter*, D.C.N.Y., 21 F.2d 587.

(3) However, mere constructive possession of automobile by garage keeper is insufficient to give lien, dependent on possession of automobile, for repair and storage charges; garage keeper did not have even constructive possession while car was in hands of conditional purchaser, to whom keeper daily surrendered possession thereof, since purchaser's agreement that such lien should not be extinguished by voluntary restoration of car to purchaser did not make keeper owner of car or make the purchaser the keeper's agent to hold it for keeper.—*C. I. T. Corporation v. Biltmore Garage*, 36 P.2d 247, 3 Cal.App.2d Supp. 757.

49. N.Y.—*Smith v. O'Brien*, 94 N.Y. S. 673, 46 Misc. 325.

42 C.J. p 821 note 50—38 C.J. p 77 note 77.

Conformity to general rule as to liens

(1) This is in conformity with the common-law rule that to have a lien on personal property the lienor must have an independent and exclusive possession, either actual or constructive.—*Smith v. O'Brien*, supra.

(2) Possession as essential to lien generally see Liens § 8.

50. Cal.—*C. I. T. Corporation v. Biltmore Garage*, 36 P.2d 247, 3 Cal.App.2d 757.

Contra *General Motors Acceptance Corporation v. Silva*, 295 P. 810, 113 Cal.App. 773—*Pacific States Finance Corporation v. Freitas*, 295 P. 804, 113 Cal.App. 757.

51. Cal.—*C. I. T. Corporation v. Biltmore Garage*, 36 P.2d 247, 3 Cal.App.2d 757.

52. Ill.—*Consumers Petroleum Co. v. Flagler*, 33 N.E.2d 751, 310 Ill. App. 241.

53. Md.—*Winton Co. v. Meister*, 105 A. 301, 133 Md 318.
42 C.J. p 822 note 57.

54. N.H.—*Commercial Acceptance Corporation v. Hislop Garage Co.*, 192 A. 627, 89 N.H. 45.

Permitting short trip

An automobile, which garageman, engaged by conditional purchaser to make repairs thereon, permitted such purchaser to take for short trip before work was finished on his agreement to return it to garage, remained in garageman's possession within statute.—*Commercial Acceptance Corporation v. Hislop Garage Co.*, supra.

Repair lien preserved as if for storage

A garageman, consenting to occasional use of automobile, left with him for repairs, by owner thereof during progress of work, under agreement for return thereof to garage, preserved his lien thereon for repair charges as effectually as if it were for storage and care.—*Com-*

mercial Acceptance Corporation v. Hislop Garage Co., supra.

55. N.J.—*Regan v. Metropolitan Haulage Co.*, 14 A.2d 257, 127 N.J. Eq. 487—*Fox v. Cardone*, 136 A. 923, 5 N.J. Misc 395.

Statute not requiring possession held constitutional

N.J.—*Crucible Steel Co. v. Polack Tyre, etc., Co.*, 104 A. 324, 92 N.J. Law 221.

56. Ill.—*Wolman v. Raphael*, 278 Ill App. 172.

57. La.—*Inter City Express Lines v. Guarisco*, App., 165 So. 727.

Minn.—*Stehbins v. Balfour*, 195 N.W. 773, 157 Minn 135.

N.J.—*Regan v. Metropolitan Haulage Co.*, 14 A.2d 257, 127 N.J. Eq. 487—*Fox v. Cardone*, 136 A. 923, 5 N.J. Misc. 395.

Or.—*Tulloch v. Cockrum*, 236 P. 1045, 115 Or. 601.

Tenn.—*Gem Motor Co. v. Securities Inv. Co.*, 65 S.W.2d 590, 16 Tenn. App. 608.

Statute held constitutional

N.J.—*Crucible Steel Co. v. Polack Tyre, etc., Co.*, 104 A. 324, 92 N.J. Law 221.

38 C.J. p 78 note 87 [c].

58. Miss.—*Watson v. Broadhead*, 33 So.2d 302.

59. Miss.—*Shoemaker v. Federal Credit Co.*, 192 So. 561, 188 Miss. 683.

60. Tex.—*Shirley-Self Motor Co. v. Simpson*, Civ.App., 195 S.W.2d 951.
42 C.J. p 821 note 51.

61. N.M.—*Abeytia v. Gibbons Garage*, 195 P. 515, 26 N.M. 622.

42 C.J. p 822 note 55.

62. N.M.—*Abeytia v. Gibbons Garage*, supra.

A statutory lien for materials or supplies has been held to depend on possession of the motor vehicle for which the supplies were furnished;⁶³ at least as against an innocent purchaser of the vehicle for value without notice;⁶⁴ and a provision giving a garage owner a lien for gasoline furnished motor vehicles has been held not to confer a lien where there is no possession of the vehicles.⁶⁵ Under other authority, in order to acquire a lien for materials furnished, under a particular statute, claimant is not necessarily required to have possession of the motor vehicle;⁶⁶ and, under a statute giving a seller a privilege, and a preference over other creditors of the purchaser if the property still remains in the purchaser's possession, a garage keeper's privilege on equipment sold by him and installed in a vehicle is not lost when the buyer loses possession of the vehicle by seizure thereof under an unsecured claim.⁶⁷

(2) Improper Deprivation of Possession; Bad or Stopped Check

A garage keeper does not lose his lien where possession is obtained from him by trick or device or by false representations.

A garage keeper does not lose his lien on a motor vehicle where possession is obtained from him by a trick or device,⁶⁸ or by false and fraudulent representations,⁶⁹ or by surrendering the vehicle on the strength of a check which is subsequently dishonored.⁷⁰ Likewise, an owner who has obtained possession by giving a check for repairs is, after having stopped payment of the check be-

cause of the unsatisfactory character of the repairs, estopped from denying the repairman's right to possession;⁷¹ nor is the repairman precluded from asserting his claim in such a case by the fact that the check was given, and the vehicle delivered to the owner, on Sunday, notwithstanding a statute forbids the pursuit of ordinary callings on Sunday;⁷² and the owner is likewise estopped where he gave the check with the intention of stopping payment thereon, or thereafter decided to stop payment without good cause and in bad faith.⁷³

(3) Repossession of Vehicle

Except where a statute provides otherwise, a garage keeper who has surrendered possession cannot, when the vehicle again comes into his possession for repairs, storage, or supplies, assert a lien on it for previous repairs, storage, or supplies.

If, after repairs have been made, the possession of the motor vehicle is surrendered, the repairman, if the vehicle comes into his possession a second time for repairs, cannot, unless authorized by statute, assert a lien on it for the previous repairs;⁷⁴ and the same has been held as to a claimed lien for storage and supplies.⁷⁵ Likewise, a repairman who sells the vehicle without complying with the statute, thereby losing possession, cannot revive his lien for repairs by subsequently securing possession of the vehicle from the person who purchased it from the original vendee.⁷⁶

By specific provision of the statute, a lienor may be allowed to recover property which he has voluntarily allowed to go out of his possession.⁷⁷

63. N.Y.—Smith v. Pierce-Arrow Sales Corporation, 230 N.Y.S. 194, 224 App. Div. 769—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.

Constructive possession, as where the vehicle is permitted to leave the garage keeper's actual possession under an agreement for its return, may be sufficient to support the lien.

Cal.—General Motors Acceptance Corporation v. Silva, 295 P. 810, 113 Cal. App. 773—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal. App. 757.

N.Y.—Maccar Trucks v. Gorenstein, 248 N.Y.S. 231, 139 Misc. 681.

64. Ill.—Wolman v. Raphael, 278 Ill. App. 172.

65. N.Y.—C. I. T. Corporation v. Pepe, 242 N.Y.S. 576, 137 Misc. 242.

66. N.J.—Frank v. Daily, 105 A. 9, 92 N.J. Law 118—Regan v. Metropolitan Haulage Co., 14 A.2d 257, 127 N.J. Eq. 487—Fox v. Cardone, 136 A. 923, 5 N.J. Misc. 395.

Renting tires

Tire company which rented tires to

bus company, mounting tires on rims furnished by company and delivering mounted tires to company, was held not entitled to garage keeper's lien, since such lien does not attach without detention of automobile by lien claimant.—Tommy Elm Auto Supply & Service Station v. North Jersey Bus Co., 185 A. 915, 120 N.J. Eq. 465, affirmed 189 A. 380, 121 N.J. Eq. 273.

67. La.—Milam Realty Co. v. Jones, App., 7 So 2d 405.

68. Cal.—Griffith v. Reddick, 182 P. 984, 41 Cal. App. 458.

69. N.C.—Reich v. Triplett, 155 S.E. 573, 199 N.C. 678.

70. N.Y.—Yellow Mfg. Credit Corporation v. Horowitz, 2 N.Y.S.2d 566, 166 Misc. 251.

N.C.—Reich v. Triplett, 155 S.E. 573, 199 N.C. 678.

71. N.C.—Maxton Auto Co. v. Rudd, 97 S.E. 477, 176 N.C. 497.

72. N.C.—Maxton Auto Co. v. Rudd, supra.

73. Ga.—Frost Motor Co. v. Pierce, 83 S.E.2d 910, 72 Ga. App. 447.

74. Ala.—Andalusia Motor Co. v. Mullins, 183 So 456, 28 Ala. App. 201, certiorari denied 183 So. 460, 236 Ala 474.

Minn.—Hongard v. Nellen, 298 N.W. 569, 210 Minn. 392.

N.Y.—Goodrich Silvertown Stores of B F Goodrich Co. v. Valentine, 10 N.Y.S.2d 447.

42 C.J. p 822 note 62.

75. N.Y.—Kamaron v. Sidney Garage, 244 N.Y.S. 337, 137 Misc. 744.

Tires placed on vehicle

The storage of a motor vehicle in a garage cannot operate to revive an alleged common-law lien for tires previously sold by the garageman and placed on the vehicle where he did not hold the vehicle at the time of such accession.—Diamond Service Station v. Broadway Motor Co., 12 S.W.2d 705, 158 Tenn. 258.

76. Pa.—Bernstein v. Hineman, 86 Pa. Super. 198.

77. N.J.—Crucible Steel Co. v. Polack Tyre, etc., Co., 104 A. 324, 92 N.J. Law 221.

b. Right to Possession

Ordinarily, a garage keeper who has a lien on a motor vehicle is entitled to retain possession thereof, until the lien is discharged or destroyed, unless the statute provides otherwise.

A garage keeper who has a lien on a motor vehicle has a corresponding right to possession.⁷⁸ Unless the statute provides otherwise, under a valid lien, claimant is entitled to retain possession of the motor vehicle until the lien is discharged⁷⁹ or destroyed,⁸⁰ as by payment or a valid tender or refusal thereof.⁸¹ A garage keeper's right to retain possession, under a statute, has been held to depend on the priority of his lien.⁸² Under a particular statute, the holder of a lien for repair of a motor vehicle has been held not entitled to possession until the commencement of an action to foreclose the lien.⁸³

§ 748. Charges for Which Lien May Be Had

- a. In general
- b. Repairs
- c. Supplies; replacements
- d. Storage
- e. Towing; bringing in car

78. N.Y.—*C. I. T. Corporation v. Schubert*, 243 N.Y.S. 748, 137 Misc. 514.

Right as against sheriff; replevin

In action to replevy automobile under conditional sales contract, repairman having lien thereon, who was made party defendant and who had brought attachment in ignorance of contract lien, was held entitled to possession as against sheriff having possession at time of replevin, where repairman was real party in interest and was before court having jurisdiction to consider him the real defendant.—*Securities Inv. Co. v. Armstrong*, 79 S.W.2d 570, 168 Tenn. 462.

Detention only against person ordering repairs

A statute giving persons who make repairs the right to "detain all motor vehicles in their possession on which work has been done by them" gives a power to detain only as against the person who delivers a motor vehicle and orders the repairs.—*Indiana Truck Corporation of Kentucky v. Hurry Up Broadway Co.*, 1 S.W.2d 990, 222 Ky. 521.

79. Mo.—*McCluskey v. De Long*, 198 S.W.2d 673, 239 Mo.App. 1026.

N.Y.—*C. I. T. Corporation v. Schubert*, 243 N.Y.S. 748, 137 Misc. 514. Waiver and loss of lien see *infra* § 750.

Liability for conversion

Repairman having lien on truck was not guilty of conversion, or lia-

ble in replevin, until lien for work thereon was discharged.—*Lindsay v. Kleiber Motor Truck Co.*, 294 P. 454, 110 Cal.App. 479.

80. N.Y.—*C. I. T. Corporation v. Schubert*, 243 N.Y.S. 748, 137 Misc. 514.

81. Mass.—*Doody v. Collins*, 111 N. F. 897, 223 Mass. 332.

Tenn.—*Diamond Service Station v. Broadway Motor Co.*, 12 S.W.2d 705, 158 Tenn. 258.

Exclusive right of possession

Cal.—*Guldici v. Pacific Auto. Ins. Co.*, 179 P.2d 337, 79 Cal.App.2d 128.

Replevin did not lie to recover automobile by owner from repairmen who properly claimed a lien on automobile for amount due for repairing it under contract with owner until payment or tender of amount of repairs.—*Smith v. Checker Cab Co.*, 184 S.W.2d 901, 208 Ark. 99.

82. S.D.—*C. I. T. Corporation v. Jorgensen*, 242 N.W. 594, 60 S.D. 7. Priorities generally see *infra* § 754.

Right inferior to conditional seller's
Where garage keeper's lien on automobile is inferior to conditional seller's lien, so, also, is his right to possession.—*C. I. T. Corporation v. Jorgensen*, *supra*.

83. Minn.—*Hediger v. Zastrow*, 218 N.W. 172, 174 Minn. 11.

84. Mo.—*Kansas City Auto. School Co. v. Holcker-Elberg Mfg. Co.*, App., 182 S.W. 759.

a. In General

A repairman, to have a lien, must generally bestow labor or expense on the specific thing left with him. His lien attaches whether the work is done by him or his agent, or entirely by his employees.

While, as a general rule, to support a lien on a motor vehicle the labor or expense must have been bestowed or performed on the specific thing left in the repairman's possession,⁸⁴ a lien may be had for the construction and placing of an automobile body on a chassis.⁸⁵ A repairman may have a lien whether the work is done by him or by his agent,⁸⁶ and although the work is done entirely by his employees.⁸⁷

b. Repairs

Liens for repairs to motor vehicles are recognized both under the common law and under statutes, both specific and general.

Under the common-law rule recognizing a specific lien on property in the hands of a tradesman or artisan for the price of work done on it, a repairman is regarded as having a lien at common law for the value of labor and materials used in the repair of a motor vehicle;⁸⁸ or he may have an artisan's

85. Mo.—*Kansas City Auto. School Co. v. Holcker-Elberg Mfg. Co.*, *supra*.

86. Cal.—*Goodman v. Anglo-California Trust Co.*, 217 P. 1078, 62 Cal. App. 702.

87. Ga.—*Fox v. Smith*, 85 S.E. 856, 143 Ga. 547.

88. Ind.—*Grusin v. Stutz Motor Car Co. of America*, 187 N.E. 382, 206 Ind. 296.

Ohio.—*Liberty Industrial Bank v. Kerland*, 31 Ohio N.P.N.S. 385.

Pa.—*Grose v. Paustenbach*, 45 Pa. Dist. & Co. 28, 90 Pittsb.Leg.J. 321.—*Moser v. Roughton*, 5 Pa. Dist. & Co. 520, 7 Northumb.Leg.J. 15.—*Waldorf v. Brown*, Com.Pl., 94 Pittsb.Leg.J. 457.

S.C.—*Corpus Juris* quoted in *Bouknight v. Headden*, 199 S.E. 315, 316, 188 S.C. 300.

42 C.J. p 818 note 96—38 C.J. p 80 note 21.

Lien of tradesman or artisan generally see *Bailments* § 35.

Enhancement of value as basis of lien

The common-law lien for repairs is based on the fact that the repairs enhanced the value of the damaged automobile.—*West Allis Industrial Loan Co. v. Stark*, 222 N.W. 310, 197 Wis. 363, 62 A.L.R. 1483.

Right to enforce lien held purely statutory

N.J.—*Wallace v. Terpis Garage*, 7 A. 2d 795, 17 N.J.Misc. 162.

statutory or constitutional lien for work or material used in the repair of personal property at the request of the owner or legal possessor,⁸⁹ or under a statute providing for liens for repairs on any vehicle,⁹⁰ or providing for a lien to wheelwrights.⁹¹ Any statutory requirements for the lien, such as the conducting of a business of this nature, must, of course, be met.⁹² An equitable lien for the reasonable value of repairs may be decreed in proper circumstances, notwithstanding no lien was created by express contract or by operation of statute.⁹³ Statutes specifically providing for liens for repairs to motor vehicles have been held valid;⁹⁴ such statutes have been held to be declaratory of the common law,⁹⁵ or in some respects declaratory of the common-law right of lien by an artisan,⁹⁶ or in substitution and amplification of the rule at common law.⁹⁷

"Repair" of an automobile, within a statute giving a lien therefor, includes the furnishing of necessary materials and parts, as well as the work done,⁹⁸ and the repairman acquires no vendor's lien for such materials and parts.⁹⁹ A lien for repairs, or for parts furnished therefor, cannot be made to include an old bill allegedly owed by the owner of

the automobile,¹ or an unrelated claim against the latter's wife.²

c. Supplies; Replacements

One who furnishes supplies for a motor vehicle is entitled to a lien only if a statute affords it.

In the absence of a statute conferring it, one who furnishes supplies for a motor vehicle is not entitled to a lien,³ as, for example, for gasoline,⁴ oil,⁵ or a nonfreezing mixture.⁶ However, such a lien may be afforded by statute.⁷

Replacing or selling tires, tubes, or wheels. Under a statute allowing wheelwrights a lien for labor done and material furnished,⁸ or a statute providing that any article constructed, manufactured, or repaired for any person and at his instance shall be liable for the price of the labor and material employed in constructing, manufacturing, or repairing it,⁹ a lien cannot be had for replacing tires; and under another statute a dealer selling tires, tubes, and rims and installing them gratis has been held not entitled to a lien on the vehicle for the price of the articles,¹⁰ since they are not material inci-

89. La.—Blanchard v. Donaldsonville Motors Co., App., 176 So. 669.
N.Y.—Burman v. Michaels, 184 N.Y.S. 474.
Okla.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.
38 C.J. p 80 note 22.

Creation and duration of lien

(1) Under the constitutional provision, there is no necessity for an agreement between the parties that the lien shall be created; the constitution creates it and it exists from its creation until discharged, waived, or released by the lienholder; there is nothing in the constitutional provision which limits the existence of the lien so as to secure only debts due when the work is completed.—Shirley-Self Motor Co. v. Simpson, Tex. Civ.App., 195 S.W.2d 951.

(2) Waiver of lien generally see *infra* § 750.

90. Ala.—Rogers v. C. E. Green Motor Co., 113 So. 641, 22 Ala.App. 168.
Ariz.—Fishback v. Foster, 202 P. 806, 23 Ariz. 206.
91. Ark.—Weber Impl., etc., Co. v. Pearson, 200 S.W. 273, 132 Ark. 101, L.R.A.1918D 327—Shelton v. Little Rock Auto Co., 146 S.W. 129, 103 Ark. 142.
92. Ky.—Neekamp v. Damron, 293 S.W. 1081, 219 Ky. 517.
93. Tex.—Rountree Motor Co. v. Smith Motor Co., Civ.App., 109 S.W.2d 296, error dismissed.

Wrongful taking of automobiles by dealer after repair by agent.

Rountree Motor Co. v. Smith Motor Co., *supra*.

94. N.H.—New Hampshire Finance Corporation v. Lamarche, 155 A. 697, 85 N.H. 205.
42 C.J. p 819 notes 5-8—38 C.J. p 78 note 87 [a]-[c]

95. Ind.—Grusin v. Stutz Motor Car Co. of America, 187 N.E. 382, 206 Ind. 296.

N.H.—Auto Owners Finance Co. v. Evers, 49 A.2d 507, 94 N.H. 180.
42 C.J. p 821 note 53—38 C.J. p 78 note 82.

96. N.J.—B. C. S. Corporation v. Frick, 18 A.2d 560, 19 N.J.Misc. 129.

97. Md.—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130.

98. La.—Thompson Chevrolet Co. v. Blanchard, 131 So. 630, 15 La.App. 254.

Oil

La.—Millam Realty Co. v. Jones, App., 7 So.2d 405.

99. La.—Thompson Chevrolet Co. v. Blanchard, 131 So. 630, 15 La.App. 254.

1. La.—Hoggatt v. Campbell, App., 187 So. 294.

2. Ala.—Wingfield Motor Co. v. Dupont, 134 So. 37, 24 Ala.App. 262.

3. N.Y.—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.
38 C.J. p 80 note 16.

Clutchplate not used in repair

S.D.—Richstein v. Roesch, 25 N.W. 2d 558.

Supplies furnished before statutory amendment

Charge for supplies furnished before statutory amendment authorizing lien for supplies was merely personal claim.—Pacific States Finance Corporation v. Freitas, 296 P. 804, 113 Cal.App. 757.

4. Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.

N.Y.—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.
S.D.—Richstein v. Roesch, 25 N.W.2d 558.

Tenn.—Diamond Service Station v. Broadway Motor Co., 12 S.W.2d 705, 158 Tenn. 258.

5. N.Y.—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.

S.D.—Richstein v. Roesch, 25 N.W.2d 558.

Oil incident to repair job see *supra* subdivision b of this section.

6. Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.

7. N.J.—Regan v. Metropolitan Haulage Co., 14 A.2d 257, 127 N.J. Eq. 487.

N.Y.—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.
38 C.J. p 80 notes 19, 20.

8. Ark.—Weber Impl., etc., Co. v. Pearson, 200 S.W. 273, 132 Ark. 101, L.R.A.1918D 327.
42 C.J. p 820 note 32.

9. Miss.—Hardy v. Watkins, 117 So. 255, 256, 150 Miss. 861.

10. Kan.—National Bond & Investment Co. v. Midwest Finance Co.,

dentially used in the performance of labor.¹¹ On the other hand, a lien has been allowed for replacing tires under a statute conferring a lien on every automobile repairman who has "expended labor, skill and materials at the request of the owner," etc.;¹² and the sale and installation of wheels and tires, requiring calculations by a skilled employee and supervision of the work incident to installation, have been held a combination of services and materials for which the seller is entitled to a statutory lien.¹³

d. Storage

Under most authorities a garage keeper has no lien for storage except where it is given by statute.

Except where such a lien is given by statute,¹⁴ or where a garage keeper is a warehouseman,¹⁵ a repairman or garage keeper, under most authorities, has no lien for storage.¹⁶ However, other authority recognizes a common-law lien therefor,¹⁷ analogous to that of a warehouseman for storage;¹⁸ and, where a vehicle is left with the garage keeper strictly for the purpose of storage, without any agreement either express or implied that the owner shall have the right of continuous use of the vehicle during such period, it seems that the garage keeper may then have a warehouseman's lien thereon for his proper charges.¹⁹

e. Towing; Bringing in Car

A statutory lien for repairs does not cover towing charges; and a repairman has no lien for going after and bringing in a car.

A statute giving a lien for repairs does not confer a lien for towing charges;²⁰ and a statute authorizing a garage man to have a lien for the storage, maintenance, and repair of a motor vehicle does not authorize a lien for a towage charge where the circumstances of the towage were not shown and it was not shown that it was repaired after having been towed to the garage.²¹ A repairman is not entitled to a lien for charges "for going after and bringing in the car."²²

§ 749. Property Subject to Lien

Unless the statute, provides otherwise, the lien extends only to the vehicle on which the work is done and for which materials are furnished.

In the absence of a contrary provision of the statute, a garage keeper's lien extends only to the motor vehicle on which the work is done and for which the materials are furnished.²³ A lien, limited by statute to the detached accessory, fitting, or part on which work is done, does not apply to repair parts after they have been attached to the automobile,²⁴

134 P.2d 639, 156 Kan. 531—Rouse v. Paramount Transit Co., 22 P.2d 429, 137 Kan. 858.

11. Kan.—Rouse v. Paramount Transit Co., supra.

12. Or.—Courts v. Clark, 164 P. 714, 84 Or. 179.

42 C.J. p 820 note 33.

13. Or.—Fletcher v. Southern Oregon Truck Co., 273 P. 329, 128 Or. 353.

14. Md.—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130. Mont.—Bethel v. Giebel, 55 P.2d 1287, 101 Mont. 410, 104 A.L.R. 1150.

N.J.—Regan v. Metropolitan Haulage Co., 14 A.2d 257, 127 N.J.Eq. 487.

N.Y.—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.

Or.—Williams v. International Harvester Co., 141 P.2d 837, 172 Or. 270.

Statutory requirement as to posting a card stating that the charge for storage must be complied with.—West Allis Industrial Loan Co. v. Stark, 222 N.W. 310, 197 Wis. 363, 62 A.L.R. 1483.

Landlord not entitled to lien

A statute giving a lien to one engaged in the business of keeping a place for the storage, maintenance, or keeping of a motor vehicle, "and (who) in connection therewith stores, maintains or keeps" such motor vehicle for pay, does not apply to one who, not as bailee of a car, but mere-

ly as landlord, rents space to the car owner in which the car owner, and not the landlord, stores or keeps the car.—Albert & Davidson Pipe Corporation v. Gibney Iron & Steel Co., 159 A. 676, 110 N.J.Eq. 285.

A statute conferring a lien for repairs does not confer a lien for storage charges.—Fishback v. Foster, 202 P. 806, 23 Ariz. 206—38 C.J. p 79 note 15.

15. Wis.—West Allis Industrial Loan Co. v. Stark, 222 N.W. 310, 197 Wis. 363, 62 A.L.R. 1483.

Held not warehouseman

On release of wrongful execution levied on truck, defendant, with whom bailiff stored property and who was a "garage man" and not a "warehouseman," was not entitled to lien as a warehouseman.—Lewis v. Best-By-Test Garage, 205 N.W. 983, 200 Iowa 1051.

16. N.Y.—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.

Ohio.—Burns Motor Co. v. Briggs, 160 N.E. 728, 27 Ohio App. 80—Midland Acceptance Corp. v. Kuderer, 27 Ohio N.P.N.S., 416.

Or.—**Corpus Juris** cited in Williams v. International Harvester Co., 141 P.2d 837, 845, 172 Or. 270.

Utah.—Bost v. Larsen Bros., 134 P.2d 179, 103 Utah 142—Rickenberg v. Capitol Garage, 249 P. 121, 68 Utah 30, 50 A.L.R. 1803.

42 C.J. p 820 note 34—38 C.J. p 79 notes 10 [a], 11.

Retaining possession for payment of bill

Garage keeper retaining possession of repaired automobile for payment of bill has no common-law lien for storage.—West Allis Industrial Loan Co. v. Stark, 222 N.W. 310, 197 Wis. 363, 62 A.L.R. 1483.

17. Tenn.—Diamond Service Station v. Broadway Motor Co., 12 S.W.2d 705, 158 Tenn. 258.

18. Tex.—Malcolm v. Sims-Thompson Motor Car Co., Civ.App., 164 S.W. 924.

38 C.J. p 79 note 12.

19. Ariz.—Fishback v. Foster, 202 P. 806, 23 Ariz. 206.

38 C.J. p 79 note 13.

20. Wis.—West Allis Industrial Loan Co. v. Stark, 222 N.W. 310, 197 Wis. 363, 62 A.L.R. 1483.

21. N.Y.—Willys-Overland, Inc. v. Prudman Auto. Co., Inc., 196 N.Y.S. 487.

22. Miss.—Orr v. Jackson Jitney Car Co., 75 So. 945, 115 Miss. 140.

Wis.—West Allis Industrial Loan Co. v. Stark, 222 N.W. 310, 197 Wis. 363, 62 A.L.R. 1483.

23. N.Y.—People v. Messineo, 59 N.Y.S.2d 776, 270 App.Div. 817.

42 C.J. p 821 note 37.

24. Wis.—West Allis Industrial

and does not extend to the whole automobile;²⁵ but one repairing a part of a vehicle has been held entitled to a lien on the entire vehicle, even though only that part was brought to him for repair.²⁶

Where the repairman makes but one price for all the work on two vehicles, and does not make any detailed price on each, he is entitled to a lien on one vehicle for the amount due for work on both;²⁷ and one repairing several vehicles at the same time, under one contract and for the same reputed owner, has been held entitled to a lien on all of them, and not required to segregate the repairs and material furnished for each, although some are owned by one owner and the others by another.²⁸ Where the repairman claims a lien for a lump sum, the lien is invalid if lienable and nonlienable items of account are mingled together to make up such sum.²⁹

§ 750. Waiver and Loss of Lien

- a. In general
- b. Effect of payment or tender

a. In General

A repairman's lien may be released by express agreement or waived by acts or conduct inconsistent therewith.

A repairman's lien may be released by an express agreement,³⁰ or it may be waived by acts or conduct inconsistent therewith.³¹ So, the repairman's reliance on the credit of one not the owner, but contracting for the repairs, for payment on a month-to-month plan is inconsistent with an intent to rely for security on a lien which would expire by limitation in ninety days,³² and an agreement under which the motor vehicle is retained by the repairman to be used for a specified period in payment of repair charges is a waiver of a claim to

hold the car under a lien,³³ but, where there is no express agreement waiving a lien for repairs on an automobile, the taking of the note of the owner's son on its delivery to him does not have that effect.³⁴ Where a statute confers a lien for a limited period after the repairs are made, the repairman has no lien after the expiration of such period.³⁵ The fact that a garageman is the legal custodian and keeper, appointed by a public officer to have possession of an automobile, does not prevent him from claiming a statutory lien for repairs made.³⁶ Where a repairman, after making necessary repairs without notice of an outstanding reserved title, buys the vehicle from the possessor, counting the repairs as part of the purchase price, he does not lose his right or lien for repairs as against the conditional vendor.³⁷

Waiver or loss of the lien by surrender of possession of the motor vehicle is discussed supra § 747.

Assertion of excessive claim. A lien claimant does not lose his lien by a refusal to deliver the property, unless paid a sum which is more than due, where the claim is made in good faith,³⁸ if there is no tender of the amount actually due.³⁹ However, a great disparity between the reasonable value of the services and the alleged value or contract price may afford a reason for disallowing a claim for a lien.⁴⁰ Where plaintiff who repaired an automobile demanded a greater price than that agreed on, withholding possession until he could compel the payment of such price, his possession was held unlawful.⁴¹

Assertion of claim for nonlienable charge. Where a repairman mingles his claim for repairs for which he is entitled to a lien with a claim for which he is not entitled to a lien, and refuses to release the ve-

Loan Co. v. Stark, 222 N.W. 310, 197 Wis. 363, 62 A.L.R. 1483.

25. Wis.—West Allis Industrial Loan Co. v. Stark, supra.

26. Or.—Coast Engine & Machine Works v. Barbee, 279 P. 264, 130 Or. 159.

27. Ill.—Consumers Petroleum Co. v. Flagler, 33 N.E.2d 751, 310 Ill. App. 241.

28. Or.—Coast Engine & Machine Works v. Barbee, 279 P. 264, 130 Or. 159.

29. Or.—Gyllenberg v. Heriza, 272 P. 674, 127 Or. 481.

30. Wash.—Sekor v. Anderson, 212 P. 578, 123 Wash. 472.

42 C.J. p 821 note 38—38 C.J. p 82 note 73.

31. Ala.—Andalusia Motor Co. v. Mullins, 183 So. 456, 28 Ala.App.

201, certiorari denied 183 So. 460, 236 Ala. 474.

La.—Wardlaw Bros. Garage v. Thomas, 140 So. 108, 19 La.App. 241.

Tex.—Shirley-Self Motor Co. v. Simpson, Civ.App., 195 S.W.2d 951.

Sale of vehicle

Pa.—Bernstein v. Hineman, 86 Pa. Super. 198.

Looking to third party for payment

Pa.—Wilson v. Malenock, 194 A. 508, 128 Pa.Super. 544.

32. La.—Wardlaw Bros. Garage v. Thomas, 140 So. 108, 19 La.App. 241.

33. N.J.—Ward v. Huff, 109 A. 287, 94 N.J.Law 81.

34. Tex.—McBride v. Beakley, Civ. App., 203 S.W. 1137.

35. La.—Thompson Chevrolet Co. v.

Blanchard, 131 So. 630, 15 La.App. 254.

36. La.—Mahfouz v. Yawn, App., 31 So.2d 295.

37. Miss.—Wingate v. Mississippi Securities Co., 120 So. 175, 152 Miss. 852.

38. N.Y.—Macumber v. Detroit Cadillac Motor Car Co., 159 N.Y.S. 890, 173 App.Div. 724.

42 C.J. p 821 note 42.

39. N.J.—Kiss v. Ambrose, 117 A. 397, 97 N.J.Law 442, affirmed 119 A. 925, 98 N.J.Law 566.

42 C.J. p 821 note 43.

40. N.Y.—C. I. T. Corporation v. Solomon, 273 N.Y.S. 563, 152 Misc. 833—Shaw Auto Sales Co., Inc. v. Tanzer, 194 N.Y.S. 861.

41. Tex.—Caldwell v. Auto Sales, etc., Co., Civ.App., 158 S.W. 1030.

hicle without payment of both, he destroys his right to retain the property,⁴² and relieves the owner of the necessity of offering to pay the claim for repairs, which is lienable.⁴³ Where a garage owner paid the freight on an automobile sent to him for repairs, and subsequently an amount was paid on account exceeding the freight charges, the payment could be applied on the freight bill, assuming that there was no lien therefor, and the lien enforced for the balance as covering the repairs.⁴⁴

b. Effect of Payment or Tender

A repairman's lien is discharged by the payment or tender of the amount due.

The lien of a repairman is discharged by a tender of the amount due,⁴⁵ although the debt may remain.⁴⁶ A fortiori, the lien of a repairman is discharged by the payment of the amount due.⁴⁷

§ 751. Reinstatement

Repossession of a motor vehicle as affecting the requirement of possession for the existence of a lien is discussed supra § 747 a (3).

Examine Pocket Parts for later cases.

§ 752. Preservation and Perfection of Lien

A garage keeper's statutory lien cannot be preserved without a strict compliance with the statute creating it.

Where the lien of a repairman or garage keeper

is based on statute, it cannot be preserved without a strict compliance with the statute creating it.⁴⁸ So, it may be essential to give notice of detention of the motor vehicle, or that there be some overt act to detain it and enforce the lien.⁴⁹ Registration of a lien or privilege is not essential where it is not required by statute.⁵⁰

Reduction of lien to judgment. A garage lienor has been held not required to reduce his claim to judgment, and have execution issued, and levy made, in order to perfect and establish the standing of his lien.⁵¹

§ 753. — Notice or Claim

Statutory requirements as to the notice or claim of a garage keeper's or repairman's lien must be fulfilled.

Where the statute so provides, a lien for repairs is lost unless a lien claim is filed in a proper office within a specified time;⁵² but it has been held unnecessary, in order to fix a constitutional lien, to comply with the legislative requirements as to giving notice, except as to rights of subsequent lienholders in good faith and without notice.⁵³ A statute requiring the filing of a repairman's lien, in order to permit its enforcement as a chattel mortgage, does not require such filing so as to enable him to retain possession until his claim is paid.⁵⁴ Further, where the statute provides for the filing of a statement within a specified time in order to preserve the lien, the filing of such a statement is not ma-

42. Me.—Crosby v. Hill, 117 A. 585, 121 Me. 432.

42 C.J. p 822 note 46.

43. Me.—Crosby v. Hill, supra.

38 C.J. p 83 note 90 [b].

44. Mich.—Gardner v. Le Fevre, 146 N.W. 653, 180 Mich. 219, Ann Cas 1916A 618.

45. N.Y.—Ledwell v. Entire Service Corporation, 231 N.Y.S. 365, 224 App.Div. 433, affirmed 170 N.E. 138, 252 N.Y. 548—Rush v. Wagner, 171 N.Y.S. 817, 184 App.Div. 502, 504—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514—C. I. T. Corporation v. Isham Park Garage, 235 N.Y.S. 163, 134 Misc. 501.

Sufficiency of tender

(1) Whether machine shop operator was acting in good faith in demanding more for repairing truck than was tendered by owner, so that such tender did not discharge operator's lien, was a question of fact for the jury.—Orr v. Mallon, 186 P.2d 83, 190 Okl. 598.

(2) Where truck repairer made but one price for all of repair work on two trucks, owner's tender of amount less than was owing for work done on both trucks was insufficient as

tender of amount due on one such truck—Consumers Petroleum Co. v. Flagler, 33 N.E.2d 751, 310 Ill.App. 241.

Deposit with sheriff in replevin

Cash deposit made by plaintiff with sheriff in replevin for possession of automobile from repairmen, to strengthen redelivery bond, could not be treated as an offer to pay defendants the charges for repairs for which defendants claimed a lien, so as to authorize judgment for plaintiff, where plaintiff had not paid or tendered, prior to bringing of action, amount found owing defendants from plaintiff—Smith v. Checker Cab Co., 184 S.W.2d 901, 208 Ark. 99.

46. N.Y.—Ledwell v. Entire Service Corporation, 231 N.Y.S. 365, 224 App.Div. 433, affirmed 170 N.E. 138, 252 N.Y. 548.

42 C.J. p 822 note 65.

47. Tenn.—Diamond Service Station v. Broadway Motor Co., 12 S.W.2d 705, 158 Tenn. 258.

Assignment as not payment

Assignment of truck sale contract to assignor's vendor was held not payment for work for which assignee claimed lien on another truck.—Lind-

say v. Kleiber Motor Truck Co., 294 P. 454, 110 Cal App. 479.

48. Or.—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213.

42 C.J. p 822 note 66.

49. U.S.—Siris v. Madden, C.C.A.N. J., 95 F.2d 625.

N.J.—Harris v. Walk, 148 A. 647, 106 N.J.Law 443.

50. La.—Inter City Express Lines v. Guarisco, App., 165 So. 727.

51. N.J.—Regan v. Metropolitan Haulage Co., 14 A.2d 257, 127 N.J. Eq. 487.

52. Minn.—Stebbins v. Balfour, 195 N.W. 773, 157 Minn. 135.

42 C.J. p 822 note 67.

Notice of sale see infra § 759.

Filing with license department not required

Assignee of lien, who filed notice of the lien in office of county auditor, as required by statute, had no duty to file notice of the lien with the department of licenses.—McLaughlin v. Zarbell, 190 P.2d 114, 29 Wash.2d 817.

53. Tex.—Lintner v. Neely, Civ.App., 97 S.W.2d 349, error dismissed.

54. Kan.—Willis-Overland Co. v. Evans, 180 P. 235, 104 Kan. 632.

terial where the action to enforce the lien is begun within the time for such filing and there is no intervening adverse claim;⁵⁵ and a statutory notice of lien has been held not essential to a garageman's right of lien where the motor vehicle on which the lien is claimed is in his possession.⁵⁶ A notice, provided by the statute conferring a lien, to be given to the owner or conditional vendee in case of enforcement of such lien is not a prerequisite to a re-taking of the property as against one who has taken it from the possession of the garage keeper by judicial process.⁵⁷

Record or filing as notice. The record of an unsatisfied and undischarged repairman's lien, which was filed, and on which foreclosure was commenced, within the time allowed by statute, is notice not only of the lien but also of the action to foreclose it.⁵⁸ Where the assignee of a lien timely files a notice of lien in the proper office, as required by statute, subsequent purchasers of the vehicle purchase with constructive notice of the lien and its assignment.⁵⁹

Contents; description of property. In determining whether the description of the motor vehicle in the lien notice is sufficient, the notice must be construed as a whole;⁶⁰ and the court will bear in mind that such notices ordinarily affect only those who are engaged in, or identified with, the trade or business out of which such liens arise.⁶¹ A lien is not invalidated by the fact that an innocent mistake is made in the lien notice in fixing the dates between which the work was done and the materials furnished.⁶² The lien notice has been held not required to allege that it was filed within the statutory period after delivery of the motor vehicle to the owner or reputed owner.⁶³

The amendment of a filed lien statement may be permitted, in furtherance of justice, where such amendment does not prejudice the rights of others.⁶⁴

§ 754. Priorities

- a. In general
- b. Priority as against conditional seller
- c. Priorities as against other persons or liens

a. In General

A garage keeper's statutory lien has been held not superior to a previously acquired lien in the absence of statutory provision to that effect; but a statute, providing that such lien shall have no effect against certain named claims, ranks it ahead of all preferred claims not so named.

A statutory lien for repairs or supplies furnished for a motor vehicle has been broadly held not superior to a previously acquired lien or title in the absence of statutory provision conferring such superiority;⁶⁵ but a statute giving a repairman a lien and providing that it shall have no effect against certain named classes of claims ranks the lien ahead of all preferred claims other than those named.⁶⁶ By express provision of the statute, the lien of a repairman on a motor vehicle may be made subject to all prior liens.⁶⁷

A garage keeper's right to retain possession of the vehicle as affected by the priority of his lien is discussed *supra* § 747 b.

b. Priority as against Conditional Seller

Priority of a garage keeper's lien is governed by statute in a number of jurisdictions but generally, in the absence of statute, a lien for repairs, storage, or supplies furnished by a garage keeper at the instance of the conditional buyer of the motor vehicle, without the express or implied consent of the conditional seller, is inferior to the lien or title of the conditional seller.

Generally, in the absence of statute, a lien for repairs, storage, or supplies furnished by a garage keeper at the instance of the conditional buyer of a motor vehicle, without the express or implied consent of the conditional seller, is inferior to the lien or title of the conditional seller,⁶⁸ even though

55. Okl.—De Groff v. Carhart, 223 P. 180, 97 Okl. 145.

42 C.J. p 823 note 69.

56. Ill.—Wolman v. Raphael, 278 Ill. App. 172.

57. D.C.—Barrett v. Commercial Credit Co., 296 F. 996, 54 App.D.C. 249.

58. Minn.—Conner v. Caldwell, 294 N.W. 650, 208 Minn. 502.

59. Wash.—McLaughlin v. Zarbell, 190 P.2d 114, 29 Wash.2d 817. Assignment or transfer generally see *infra* § 755.

60. Or.—Fletcher v. Southern Oregon Truck Co., 273 P. 329, 128 Or. 353.

Description by motor number held sufficient

Or.—Fletcher v. Southern Oregon Truck Co., *supra*.
42 C.J. p 822 note 67 [a] (2).

61. Or.—Fletcher v. Southern Oregon Truck Co., *supra*.

62. Or.—Gyllenberg v. Heriza, 272 P. 674, 127 Or. 481.

63. Or.—Gyllenberg v. Heriza, *supra*.

64. Kan.—National Bond & Investment Co. v. Midwest Finance Co., 134 P.2d 639, 156 Kan. 531.

Showing representative capacity in which employee of lien claimant signed and filed statement.—National

Bond & Investment Co. v. Midwest Finance Co., *supra*.

65. Ind.—Bowen v. Kokomo Omnibus Co., 161 N.E. 298, 87 Ind.App. 252.

66. La.—Mahfouz v. Yawn, App., 31 So.2d 295.

67. Okl.—De Groff v. Carhart, 223 P. 180, 97 Okl. 145.

68. Ala.—Wyatt v. Drennen Motor Co., 125 So. 649, 220 Ala. 413—Ellis Motor Co. v. Hubbler, 121 So. 47, 219 Ala. 53.

Del.—Universal Credit Co. v. Spinazolo, 197 A. 68, 9 W.W.Harr. 117.

Ill.—Motor Acceptance, Inc. v. Newton, 262 Ill.App. 335.

the garage keeper has no notice of the condition,⁶⁹ at least where the conditional seller derives no benefit from the transaction.⁷⁰ Priority is governed by statute in a number of jurisdictions, and, accordingly, the garage keeper's lien may be made superior⁷¹ or inferior⁷² to the lien or right of the conditional seller by express terms of the statute, or by terms of the statute from which the superiority or inferiority of the garage keeper's lien may be implied.

Statutory provisions respecting superiority as between a garageman's lien and a conditional sales contract must be read in association with other related statutory provisions⁷³ and then be given a plain and rational meaning in the promotion of the object of the legislation.⁷⁴ Priority of the garage keeper's lien has been denied where the statute limits the lien to repairs made at the request of the owner,⁷⁵ unless the term owner includes con-

ditional buyer in the statutory definition;⁷⁶ and priority has been granted where the statute confers a lien on the garage keeper for repairs made at the instance of the owner or possessor of the vehicle,⁷⁷ or made under a contract with the legal or equitable owner.⁷⁸

Where a garage keeper purchases a motor vehicle from the conditional buyer who was required by the terms of the conditional sales contract to keep the vehicle in repair, the garage keeper may not assert a prior lien for subsequent repairs against the conditional seller.⁷⁹

Authorization by conditional seller. The garage keeper's lien may be superior to that of the conditional seller where the seller has given the buyer express or implied authority to contract for the repairs or services,⁸⁰ but what constitutes implied authority to contract for repairs or services is frequently subject to a divergence of judicial opin-

Neb.—General Motors Acceptance Corporation v. Sutherland, 241 N.W. 281, 122 Neb. 720.

R.I.—Goldstein v. Mack Motor Truck Co., 183 A. 136, 56 R.I. 1, 104 A.L.R. 261.

Tenn.—Gem Motor Co. v. Securities Inv. Co., 65 S.W.2d 590, 16 Tenn. App. 608.

42 C.J. p 823 note 70.

Uniform Sales Act has no contrary effect.—Standard Motors Securities Corporation v. Yates Co., 257 Ill.App 394.

Uniform Conditional Sales Act has no contrary effect.—Commercial Credit Co. v. Oakley, 137 S.E. 13 103 W.Va. 270.

69. Ala.—Ellis Motor Co. v. Hibbler, 121 So. 47, 219 Ala. 53.

70. Tenn.—Diamond Service Station v. Broadway Motor Co., 12 S.W.2d 705, 158 Tenn. 258.

71. Cal.—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal.App. 757.

D.C.—Barrett v. Commercial Credit Co., 296 F. 996, 54 App.D.C. 249.

N.H.—Commercial Acceptance Corporation v. Hislop Garage Co., 192 A. 627, 89 N.H. 45.

N.Y.—Commercial Credit Corporation v. Moskowitz, 255 N.Y.S. 525, 142 Misc. 773, affirmed 262 N.Y.S. 973, 238 App.Div. 831, reargument denied 263 N.Y.S. 936, 239 App.Div. 770—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.

Statute held constitutional

N.Y.—Terminal, etc., Taxi Corp. v. O'Rourke, 193 N.Y.S. 238, 117 Misc. 761.

Statutory exceptions

Under some statutes exceptions are made and the garage keeper is deprived of his priority where the re-

pairs are made with actual notice of the earlier claim, or where the vehicle is delivered to the bailee by the conditional buyer or lessee after a breach of the condition of the sale or lease.—Cuneo v. Smith, 146 N.E. 674, 251 Mass. 399—Dunbar-Laporte Motor Co. v. Desrocher, 142 N.E. 57, 247 Mass. 292.

Surrender of possession

One furnishing labor and material in repair of automobile, at instance of conditional vendee in possession, has lien prior to right of conditional vendor under statute, but priority is lost by surrender of possession.—Sundin v. Swanson, 225 N.W. 15, 177 Minn. 217.

72. Ark.—Corning Motor Co. v. White, 293 S.W. 46, 173 Ark. 144. Md.—Goldenberg v. Federal Finance & Credit Co., 133 A. 59, 150 Md. 298.

Neb.—General Motor Acceptance Corporation v. Sutherland, 241 N.W. 281, 122 Neb. 720.

N.J.—Regan v. Metropolitan Haulage Co., 14 A.2d 257, 127 N.J.Eq. 487—B. C. S. Corporation v. Frick, 18 A. 2d 560, 19 N.J.Misc. 129—Commercial Credit Trust v. Barbier, 147 A. 861, 7 N.J.Misc. 1109.

Ruling repairman to file complaint

Conditional vendor did not, in writ of replevin, by ruling repairman to file complaint as required by garage keepers' lien act, debar itself from asserting superior legal title to vehicles.—Meiler v. Fageol Co., 152 A. 642, 9 N.J.Misc. 37.

Default by vendee; reception of property

Where conditional buyer was in default on sales contract, under express provision of statute creating garage keeper's lien, the right of sell-

er's assignee to possession was superior to that of garage keeper under lien for repairs made at buyer's request subsequent to execution and recording of sales contract.—B. C. S. Corporation v. Frick, 18 A.2d 560, 19 N.J.Misc. 129.

Prior statute

Under the New Jersey Garage Keepers' Lien Act of 1915, before its amendment in 1925, the garage keeper was given a lien superior to that of the conditional seller.—Harc & Chase v. Gassner & Ackerly Motors, 133 A. 429, 102 N.J.Law 499.

73. Md.—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130.

74. Md.—Universal Credit Co. v. Marks, supra.

75. Neb.—General Motors Acceptance Corporation v. Sutherland, 241 N.W. 281, 122 Neb. 720. 42 C.J. p 824 note 80.

76. Minn.—Sundin v. Swanson, 225 N.W. 15, 177 Minn. 217.

77. Cal.—Goodman v. Anglo-California Trust Co., 217 P. 1078, 62 Cal. App. 702—Davenport v. Grundy Motor Sales Co., 152 P. 932, 28 Cal. App. 409.

Where the buyer never had possession or use, a lien for work done by his procurement is inferior to the rights of the holder of the conditional sales contract.—Willis v. Taylor, 160 S.E. 487, 201 N.C. 467.

78. N.H.—New Hampshire Finance Corporation v. Lamarche, 155 A. 697, 85 N.H. 205.

79. Miss.—Federal Credit Co. v. Holoman, 147 So. 485, 165 Miss. 211.

80. Ind.—Yellow Mfg. Acceptance Corporation v. Linsky, 193 N.E. 715, 99 Ind.App. 691.

ion. In some jurisdictions the conditional seller of the vehicle, by allowing the buyer to have possession of it for use, is regarded as having impliedly consented to a bailment of the vehicle for reasonable repairs or storage charges, and the lien of a repairman for such repairs or storage charges is therefore held superior to the claim of the conditional seller,⁸¹ even though the garage keeper has knowledge of the seller's lien or claim, if the repairs are actually necessary to preserve the property and permit its ordinary operation;⁸² but in other jurisdictions the consent of the seller to the repairs has been held not to be implied from the mere fact of the permission of possession to the buyer.⁸³ The fact that the conditional sales contract requires the buyer to keep the vehicle in repair at his expense has been held not to authorize the buyer to subject the vehicle to a lien for repairs superior to the title of the conditional seller;⁸⁴ but there is also authority to the contrary.⁸⁵ A provision of the conditional sales contract that the buyer will keep the vehicle free of all liens or encumbrances has been held to negative the existence of implied authority to have repairs made on the credit of the vehicle so as to subject it to a lien superior to the title of the conditional seller;⁸⁶

but there is also authority to the contrary.⁸⁷ A covenant by the purchaser in a conditional sales agreement that he would give the seller forty-eight hours' notice before having work done on an automobile has been held to involve no agreement on the part of the seller that his lien should be subordinated to that of the repairman, if repairs were made without such notice.⁸⁸

Where the conditional seller knows that the buyer is having the vehicle repaired and makes no objection, an implication of authorization arises;⁸⁹ but a conditional seller does not authorize the buyer in possession to subject it to a superior lien for repairs by merely becoming aware that he did so, where such implication is contrary to the intent evidenced by the written contract between the parties.⁹⁰

Recording or filing sale contract or lien. Although it has been held that the repairman's lien is inferior to that of the conditional vendor whether or not the conditional sale is recorded,⁹¹ as a general rule, in order for a conditional vendor to have priority over a repairman's lien, the conditional sales contract has been required to be duly recorded⁹² prior to the furnishing of the repairs,⁹³

81. Miss.—Shoemaker v. Federal Credit Co., 191 So. 62, followed in 191 So. 64, and reversed on other grounds 192 So. 561, 188 Miss. 683, followed in 192 So. 565—*De Van Motor Co. v. Bailey*, 171 So. 342, 177 Miss. 441—*Wingate v. Mississippi Securities Co.*, 120 So. 175, 152 Miss. 852.
42 C.J. p 823 note 75—38 C.J. p 80 note 33.

Rule applied to seller's assignee

Miss.—General Motors Acceptance Corporation v. Shoemaker, 6 So.2d 309, 192 Miss. 446.

Buyer's administratrix as seller's agent

Where administratrix of conditional buyer of busses after default of buyer under sales contract authorized garageman to repair busses, garageman's common-law lien for repairs held superior to rights of seller, since administratrix was seller's agent and bound seller to pay for necessary repairs which added to value of busses.—*Yellow Mfg. Acceptance Corporation v. Linsky*, 192 N.E. 715, 99 Ind.App. 691.

82. Miss.—De Van Motor Co. v. Bailey, 171 So. 342, 177 Miss. 441, distinguishing *Hollis v. Isbell*, 87 So. 273, 124 Miss. 799, 20 A.L.R. 244.

83. Ala.—Wyatt v. Drennen Motor Co., 125 So. 649, 220 Ala. 413.

Del.—Universal Credit Co. v. Spinazzolo, 197 A. 68, 9 W.W.Harr. 117.

Neb.—General Motors Acceptance Corporation v. Sutherland, 241 N. W. 281, 122 Neb. 720.

R.I.—Goldstein v. Mack Motor Truck Co., 183 A. 136, 56 R.I. 1, 104 A.L.R. 261.

42 C.J. p 823 note 73.

Agreement or consent of owner generally see supra § 746.

84. R.I.—Goldstein v. Mack Motor Truck Co., supra.

42 C.J. p 824 note 84.

85. Ind.—Yellow Mfg. Acceptance Corporation v. Linsky, 192 N.E. 715, 99 Ind.App. 691.

86. Del.—Universal Credit Co. v. Spinazzolo, 197 A. 68, 9 W.W.Harr. 117.

Ill.—General Motors Acceptance Corporation v. Goldboges, 260 Ill.App. 474.

Md.—Goldenberg v. Federal Finance & Credit Co., 133 A. 59, 150 Md. 298.

Neb.—General Motors Acceptance Corporation v. Sutherland, 241 N. W. 281, 122 Neb. 720.

87. Cal.—Pacific States Finance Corporation v. Freitas, 295 P. 804, 113 Cal.App. 757.

88. N.H.—Barbault v. Robertson, 133 A. 21, 82 N.H. 297.

89. Kan.—Etchen v. Dennis, etc., Garage, 178 P. 408, 104 Kan. 241.

Miss.—Broom v. Dale, 67 So. 659, 109 Miss. 52, L.R.A.1915D 1146.

90. R.I.—Arnold v. Chandler Motors

of Rhode Island, 123 A. 85, 45 R.I. 469.

91. Ala.—Ellis Motor Co. v. Hibbler, 121 So. 47, 219 Ala. 53.

Repairman held not protected, as against seller taking notes and retaining and reserving title, by statute requiring recording of certain contracts for the protection of a bona fide purchaser, mortgagee landlord with a lien, or judgment creditor without notice—Tallassee Motor Co. v. Gilliland Bros., 112 So. 758, 22 Ala. App. 21, certiorari denied 112 So. 759, 216 Ala. 257.

92. Ariz.—Cherry's Incorporated v. Sharpensteen, 265 P. 90, 33 Ariz. 342.

W.Va.—Commercial Credit Co. v. Oakley, 137 S.E. 13, 103 W.Va. 270.

Recording according to local law is required—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130.

93. Okl.—Commercial Credit Co. v. Williams, 50 P.2d 141, 174 Okl. 160.

Filing as required by Uniform Conditional Sales Act

Where statute provided that garage keeper's lien should be prior to conditional sales contract, unless latter was "properly filed," but provided no criteria for determining proper filing, filing as required by Uniform Conditional Sales Act controlled; prior lien of nonresident under foreign conditional sales contract was held preserved as against local garage

or the failure to record it excused by the facts.⁹⁴ So, a conditional sales contract which has not been recorded as required by its terms⁹⁵ or by statute⁹⁶ cannot, it has been held, be upheld as a prior claim against a lienor for repairs; likewise, a common-law lien for repairs is superior to the unrecorded lien of a conditional vendor of which the lienor has neither actual nor constructive notice.⁹⁷ In this connection, the recording of a conditional sales contract in one state has been held not to affect a garage keeper in another state with constructive notice,⁹⁸ and his lien for repairs to the motor vehicle has been held superior to rights of the seller under a conditional sales contract made and recorded in another state,⁹⁹ but it has also been held that the lien of the garage keeper is inferior to the right of the seller under a conditional sales contract recorded in a foreign state where the vehicle was removed from the foreign state without the seller's knowledge or consent.¹

Subsequent default. The lien of the repairman against a conditional seller where otherwise recognized exists, even though the buyer thereafter defaults in payments to the seller.²

Storage by sheriff. A statutory lien for storage on an automobile taken by the sheriff from the conditional purchaser under an execution or attachment and stored by the sheriff, has been held superior to the conditional vendor's purchase-money lien.³

What law governs. The question whether a conditional sales contract between nonresidents was properly filed so as to defeat a local garage keeper's statutory lien must be determined by local law.⁴ Likewise, in determining whether a garageman's lien, arising under the law of the forum, is superior to the rights of the holder of a conditional sales contract recorded in another state, the intent of the legislature of the state of the forum controls;⁵ in these circumstances the law of the forum is prima facie the law to be applied,⁶ and, if the conditional seller or his assignee wishes the benefit of the law of another jurisdiction, the burden is on him to prove the foreign law.⁷

Where, under the law of the forum, an earlier lien will take precedence over the repairman's lien, precedence will be awarded to a valid conditional sales agreement made in a foreign state.⁸

c. Priorities as against Other Persons or Liens

Authorities differ as to whether a garage keeper's lien is superior to the title or claim of a bona fide purchaser of the vehicle.

A statutory lien for repairs and storage has been held superior to the title of a subsequent bona fide purchaser acquiring the vehicle without notice or knowledge of the lien and before the filing thereof.⁹ On the other hand, a lien for accessories and labor has been held inferior to the claim of a bona fide purchaser of the motor vehicle, on which the lien existed at the time of the sale,¹⁰ although

keeper's lien, where copy of contract was filed in proper district within statutory period.—C. I. T. Corporation v. Jorgensen, 242 N.W. 594, 60 S.D. 7.

Constructive notice; removal of vehicle from county

Under statute, repairman claiming lien was held charged with constructive knowledge of conditional seller's lien where repairs were completed before expiration of one hundred twenty days after automobile left county in which conditional sales contract was filed; lien of owner of conditional sales contract, filed of record, was held prior to lien for repairs furnished on automobile in another county within one hundred twenty days after automobile was removed from county in which contract was filed.—Commercial Credit Co. v. Williams, 50 P.2d 141, 174 Okl. 160.

94. Ariz.—Cherry's Incorporated v. Sharpsteen, 265 P. 90, 33 Ariz. 342.

95. Md.—Winton Co. v. Meister, 105 A. 301, 138 Md. 818.

96. Md.—Winton Co. v. Meister, supra.

97. Tenn.—Robinson Bros. Motor Co. v. Knight, 288 S.W. 725, 154 Tenn. 631—Gum Motor Co. v. Securities Inv. Co., 65 S.W.2d 590, 16 Tenn. App. 608.

98. Md.—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130.

99. Md.—Universal Credit Co. v. Marks, supra.

Statute construed

Statute conferring priority on conditional vendor over garagemen's lien did not refer to conditional sales contract of nonresident buyer while driving automobile in temporary use of highways of state.—Universal Credit Co. v. Marks, supra.

1. Iowa.—Northern Finance Corporation v. Meinhardt, 226 N.W. 168, 209 Iowa 895.

2. Cal.—Davenport v. Grundy Motor Sales Co., 152 P. 932, 28 Cal.App. 409.

3. Tenn.—McJunkin v. Chattanooga Garage, 63 S.W.2d 517, 166 Tenn. 457.

4. S.D.—C. I. T. Corporation v. Jorgensen, 242 N.W. 594, 60 S.D. 7.

5. Md.—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130.

If the laws of the two states differ, the law of the forum will prevail.—Universal Credit Co. v. Marks, supra.

6. Md.—Universal Credit Co. v. Marks, supra.

Comity

Giving garagemen's lien on automobile, repaired while temporarily within state, priority over conditional sales contract recorded in another state, was held not to violate established principles of comity.—Universal Credit Co. v. Marks, supra.

7. Md.—Universal Credit Co. v. Marks, supra.

In the absence of proof of the foreign law, the law of the forum must be enforced.—Universal Credit Co. v. Marks, supra.

8. N.H.—Baribault v. Robertson, 133 A. 21, 82 N.H. 297.
42 C.J. p 825 note 95.

9. Minn.—Pratt v. Armstrong, 255 N.W. 91, 192 Minn. 14.

10. La.—Campt Motor Co. v. Box, 136 So. 179, 17 La.App. 399.

the sale took place only a few hours before seizure under the lien;¹¹ and a lien for storage and supplies in favor of a garage keeper allowing the owner to remove the automobile from the garage for daily use has been held subordinate to the rights of an innocent purchaser for value without notice of the lien.¹²

Priority as between an attachment lien and a garage keeper's lien is discussed in Attachment § 272 b (1), and priority as between the lien of a mortgage on a motor vehicle and a repairman's lien is considered in Chattel Mortgages § 300, and between such mortgage and a garage keeper's lien for storage, services, and supplies, in Chattel Mortgages § 297.

§ 755. Assignment or Transfer

A lien on an automobile for repairs has been held transferable.

A repairer of an automobile having a lien for charges may transfer the lien and the possession of the automobile,¹³ except that the lien of a garage keeper cannot be assigned where such assignment would necessarily constitute a breach of contract between the parties to the bailment;¹⁴ and it has been held that a lien for storage cannot be transferred or assigned.¹⁵ Where a garage is sold, although the buyer comes into possession of a motor vehicle held by the seller to protect a lien for repair charges, he has no right to the lien on such vehicle, unless it has been assigned to him by the seller.¹⁶

The filing of a notice of lien by the assignee thereof is discussed supra § 753.

§ 756. Action by Lienor to Recover Possession

A repairman wrongfully deprived of possession of a motor vehicle may maintain an action for its return or for the amount of his lien claim.

Where possession of a motor vehicle has been wrongfully procured from the repairman, he may maintain an action for a return of possession or in the alternative for the amount of his lien claim,¹⁷ and by specific provision of statute a lienor may be allowed to recover a vehicle which he has voluntarily allowed to go out of his possession,¹⁸ although before exercising this right, as against a subsequent vendee of the vehicle, he must make demand on the vendee for payment of the debt secured by the lien.¹⁹ Where, however, he retakes a motor vehicle by replevin which had been taken from him at the suit of the owner and for which security had been given, he is not entitled to a lien for storage charges accruing after the retaking.²⁰

Where a garage keeper permitted an automobile owner to use the automobile during the day, and the owner's executors sold it without notice of the garage keeper's claim, the court cannot direct the executors to return the car to the possession of the garage keeper for the purpose of enabling him to satisfy his lien.²¹ Although the statute conferring a lien requires notice to be given to the owner or conditional buyer in case of enforcement of such lien, the notice is not a prerequisite to a retaking of the property as against one who has taken it from the possession of the garage or livery-stable keeper by judicial process.²²

Expenses. A lienholder who repossesses a motor vehicle for his own benefit has been held not entitled to expenses incurred in doing so, where the lien statute does not provide for a lien for such expenses.²³

§ 757. Action by Owner to Recover Possession or for Conversion

General principles governing civil actions have been applied to an action by the owner of a motor vehicle, on which a garage keeper has or claims a lien to recover possession thereof or for conversion.

11. La.—*Campti Motor Co. v. Box*, supra.

12. Cal.—*Hule v. Soo Hoo*, 22 P.2d 808, 132 Cal App. 787. Possession as essential to lien see supra § 747.

13. N.Y.—*Triple Action Spring Co. of New York v. Goyena*, 156 N.Y.S. 1064, 93 Misc. 171, 42 C.J. p 825 note 97.

14. N.Y.—*Koroleff v. Schildkraut*, 179 N.Y.S. 117, 38 C.J. p 81 note 58.

15. N.Y.—*General Motors Acceptance Corporation v. Barnett*, 254 N.Y.S. 166, 142 Misc. 192.

16. Tex.—*White v. Texas Motorcar, etc., Co.*, Civ.App., 203 S.W. 441.

17. Cal.—*Griffith v. Reddick*, 182 P. 984, 41 Cal.App. 458, 42 C.J. p 825 note 1.

Action against conditional seller

Lienor who repaired truck at request of conditional buyer was held entitled to return of truck or value thereof as against seller of truck who repossessed and resold it with knowledge of claimed lien.—*Ponsler v. Wilson*, 24 P.2d 26, 144 Or. 337.

Evidence in action to recover automobile, by virtue of lien, for repairs was held insufficient to show that defendants other than owner were bona fide purchasers for value without notice.—*Reich v. Triplett*, 155 S. E. 573, 199 N.C. 678.

18. N.J.—*Crucible Steel Co. v. Polack Tyre, etc., Co.*, 104 A. 324, 92 N.J.Law 221.

19. N.J.—*Ewart v. Willey*, 140 A. 301, 104 N.J.Law 303.

20. Tex.—*White v. Texas Motorcar, etc., Co.*, Civ.App., 203 S.W. 441.

21. N.Y.—*In re Diamond's Estate*, 295 N.Y.S. 421, 162 Misc. 604.

22. D.C.—*Barrett v. Commercial Credit Co.*, 296 F. 996, 54 App.D.C. 249.

Notice of sale see *infra* § 757.

23. Kan.—*National Bond & Investment Co. v. Midwest Finance Co.*, 134 P.2d 639, 156 Kan. 531.

On the refusal of a garage keeper to surrender the motor vehicle on which he has a lien on tender of the amount due, the owner of the vehicle may sue in replevin or in conversion, pay the amount claimed by the lienor and recover back the excess, or enjoin the sale and determine the proper amount of the lien;²⁴ and, where the seller of a motor vehicle retains title under a conditional sales contract and the buyer is in default under the contract, the seller has a general or special property in the vehicle, is entitled to its possession, and may maintain detinue against one claiming a lien for repairs made for the buyer,²⁵ or, where the lienor refuses to accept a tender and return the vehicle, may maintain an action for conversion.²⁶ Where a repairman refuses to deliver a motor vehicle until charges for which he has no lien and for which the owner is not liable are paid, the owner may maintain an action for conversion of the vehicle;²⁷ likewise, a conversion may be evidenced by the facts that the garage keeper received an automobile with the understanding that he would sell it and pay the owner a portion of the proceeds, applying the²⁸ balance on the repair bill, but that he refused to sell it and pay the owner anything therefor. Before commencing an action of replevin, plaintiff is bound to make a demand and pay or tender the amount of defendant's lien.²⁹

An action by the owner to recover possession of a motor vehicle retained by a garage keeper under a claim of lien for repairs or storage, or for conversion, will be defeated by the establishment of

a valid lien,³⁰ where there has been no tender of the amount of the lien claim;³¹ and sequestration will be dissolved where defendant proves that he has a lien on the motor vehicle for an unpaid repair bill.³² While it has been held that a counterclaim for repairs may be set up by the repairman as against replevin by the owner,³³ under a statute entitling the owner to recover possession regardless of the lien of a repairman, the lien cannot be set up by way of counterclaim in replevin.³⁴ In an action for wrongful detention, where defendant has no lien, plaintiff may recover such a sum as will reasonably compensate him for the deterioration, if any, of the vehicle, and the reasonable rental value thereof from the time of seizure until the time of trial, together with possession of the vehicle, or, in lieu thereof, its then reasonable market value;³⁵ in an action for conversion, where defendant has no lien, the value of the vehicle at the time when the repairman refused delivery has been held the proper measure of damages.³⁶

Where the replevisor of a motor vehicle ruled a garage keeper to file a claim for a garage keeper's lien, nonsuiting the replevisor on the ground that the court could not try his title is error,³⁷ as is nonsuiting him without affording either party opportunity to offer proofs, since the lienor had the affirmative.³⁸

In actions by the owner of a motor vehicle to recover possession or for conversion, general rules apply with respect to the issues, proof, and variance,³⁹ presumptions,⁴⁰ admissibility,⁴¹ and weight

24. N.Y.—*Dinny v. Reavis*, 165 N. Y.S. 97, 178 App.Div. 922, 100 Misc. 316—C. I. T. Corporation v. Schubert, 243 N.Y.S. 748, 137 Misc. 514.

25. Ala.—*Andalusia Motor Co. v. Mullins*, 183 So. 456, 28 Ala.App. 201, certiorari denied 183 So. 460, 236 Ala. 474.

26. Cal.—*Covington v. Grant*, 256 P. 213, 82 Cal.App. 749.

27. Ala.—*Wingfield Motor Co. v. Dupont*, 134 So. 37, 24 Ala.App. 262.

Possession and claim of ownership of automobile delivered for repairs were sufficient to entitle plaintiff to recover automobile against garage-man wrongfully refusing to deliver; refusing to permit defendant to prove that title to automobile was in one from whom plaintiff purchased was held not error, possession alone being sufficient to maintain action.—*Wingfield Motor Co. v. Dupont*, supra.

28. Ga.—*Cannon v. Mikell*, 24 S.E.2d 307, 69 Ga.App. 33.

29. Cal.—*Lindsay v. Kleiber Motor*

Truck Co., 294 P. 454, 110 Cal.App. 479.

30. Ark.—*Smith v. Checker Cab Co.*, 184 S.W.2d 901, 208 Ark. 99.

Ky.—*Perry Garage v. Combs*, 299 S. W. 196, 221 Ky. 576.

Mont.—*Bethel v. Giebel*, 55 P.2d 1287, 101 Mont. 410, 104 A.L.R. 1150, 42 C.J. p 825 note 3.

31. Ark.—*Smith v. Checker Cab Co.*, 184 S.W.2d 901, 208 Ark. 99.

Mich.—*Mamma v. Montey*, 18 N. W.2d 703, 311 Mich. 243.

42 C.J. p 825 note 4.

Absence of tender as barring damages

In the absence of tender, there is no wrongful detention, and plaintiff fails to lay any foundation for damages in replevin.—*Lindsay v. Kleiber Motor Truck Co.*, 294 P. 454, 110 Cal. App. 479.

32. La.—*Bennett v. Bijou Auto Repair Co.*, 5 La.App. 383.

33. N.Y.—*Owl Wet Wash Laundry Co., Inc. v. Karish*, 188 N.Y.S. 782.

42 C.J. p 825 note 6.

34. Ark.—*J. M. Lowe Auto Co. v. Winkler*, 191 S.W. 927, 127 Ark. 433.

35. Tex.—*Ford Motor Co. v. Freeman*, Civ.App., 168 S.W. 80.

36. Pa.—*Wilson v. Malenock*, 194 A. 508, 128 Pa.Super. 544.

37. N.J.—*Brown v. Mack International Motor Truck Corporation*, 162 A. 193, 10 N.J.Misc. 1035.

38. N.J.—*Brown v. Mack International Motor Truck Corporation*, supra.

39. Mont.—*Bethel v. Giebel*, 55 P.2d 1287, 101 Mont. 410, 104 A.L.R. 1150.

Variance held immaterial

Ala.—*Andalusia Motor Co. v. Mullins*, 183 So. 456, 28 Ala.App. 201, certiorari denied 183 So. 460, 236 Ala. 474.

40. N.Y.—*Herschenhart v. Mehlman*, 213 N.Y.S. 46, 125 Misc. 887.

41. N.Y.—*New York Yellow Cab Co. Sales Agency v. Laurel Garage*, 219 N.Y.S. 671, 219 App.Div. 329.

and sufficiency⁴² of the evidence, instructions,⁴³ questions of law and fact,⁴⁴ and findings.⁴⁵ A money judgment in favor of the owner in replevin must be conditioned on defendant's inability to restore possession to the owner,⁴⁶ and is unauthorized where there is no evidence as to the value of the motor vehicle.⁴⁷ In replevin against a repairman claiming a lien, a judgment for the latter for the "value" of the vehicles, as provided by statute, has been held limited to the amount of his equity therein, consisting of labor and materials furnished in the repair of the vehicles.⁴⁸

§ 758. Actions to Enforce Lien

An action to enforce a garage keeper's lien on a motor vehicle must conform to any special statutory requirements.

Under particular statutes, provision is made for the enforcement of a repairman's lien on a motor vehicle by a suit in equity⁴⁹ or by attachment,⁵⁰ and the whole proceeding is special and statutory.⁵¹ A statute providing the manner in which a common-law lien may be enforced is repealed by a statute creating a lien and prescribing a method for its enforcement.⁵² A lien for storage cannot be fore-

closed under a statute relating solely to other liens.⁵³

Where, under the statute conferring a lien, the repairman is not entitled to retain possession until the amount of his lien is paid, the assertion of the lien, by way of cross complaint in replevin by the owner, cannot be regarded as the commencement of an action to enforce the lien.⁵⁴ The giving of a replevy bond does not have the effect of converting a proceeding to foreclose a lien into mesne process.⁵⁵ The rights of a garage keeper asserting his statutory lien in a chattel mortgagee's replevin action are not affected by a prior judgment in his favor for foreclosure of his lien.⁵⁶ The record of an unsatisfied and undischarged repairman's lien, which was filed, and on which foreclosure was commenced, within the time allowed by statute, is notice not only of the lien but also of the action to foreclose it.⁵⁷ In a proceeding to enforce a repairman's lien on a motor vehicle, wherein the conditional seller thereof appeared and claimed it, the interest of both the repairman and the seller should be ascertained;⁵⁸ the conditional seller, retaining title, is not liable, in case of a deficiency, for repairs made at the instance of the conditional

42. Pa.—Commercial Credit Co. v. McDermott, 19 A.2d 622, 144 Pa. Super. 281.

Evidence held sufficient

(1) In general.

La.—Hoggatt v. Campbell, App., 187 So. 294.

Utah.—Pierce-Arrow Finance Corporation v. Mitten, 284 P. 998, 75 Utah 306.

(2) To show value of automobile at time of delivery to garage for repairs did not exceed four hundred dollars.—Perry Garage v. Combs, 299 S.W. 196, 221 Ky. 576.

(3) To justify judgment for defendant on reconventional demand for repairs.—Bennett v. Bijou Auto Repair Co., 5 La.App. 383.

Evidence held insufficient

Ind.—Hueseman v. Neaman, 187 N.E. 696, 97 Ind.App. 586.

N.M.—Citizens Finance Co. v. Cole, 134 P.2d 550, 47 N.M. 73.

Tex.—Blasengame v. McCoy, Civ. App., 62 S.W.2d 299.

43. Pa.—Commercial Credit Co. v. McDermott, 19 A.2d 622, 144 Pa. Super. 281.

44. Ala.—Andalusia Motor Co. v. Mullins, 183 So. 456, 28 Ala.App. 201, certiorari denied 183 So. 460, 236 Ala. 474.

Ind.—Hueseman v. Neaman, 6 N.E. 2d 723, 103 Ind.App. 238.

Mont.—Bethel v. Giebel, 55 P.2d 1287, 101 Mont. 410, 104 A.L.R. 1150.

Pa.—Commercial Credit Co. v. McDermott, 19 A.2d 622, 144 Pa. Super. 281.

Questions of ownership and authority of persons leaving taxicabs with garageman claiming lien as against conditional seller were held for jury.—New York Yellow Cab Co. Sales Agency v. Laurel Garage, 219 N.Y.S. 671, 219 App.Div. 329.

Question for court

Ala.—Andalusia Motor Co. v. Mullins, 183 So. 456, 28 Ala.App. 201, certiorari denied 183 So. 460, 236 Ala. 474.

45. Ind.—Hueseman v. Neaman, 6 N.E.2d 723, 103 Ind.App. 238.

Findings held nugatory

Findings that purchaser of truck from plaintiff in replevin, after completion of work for which defendant claimed lien, bought another truck from defendant, resold it, and assigned contract to defendant, were held nugatory.—Lindsay v. Kleiber Motor Truck Co., 294 P. 454, 110 Cal. App. 479.

46. N.Y.—Burman v. Michaelis, 184 N.Y.S. 474.

47. N.Y.—Goyena v. Berdoulay, 154 N.Y.S. 103.

48. Ind.—Yellow Mfg. Acceptance Corporation v. Linsky, 192 N.E. 715, 99 Ind.App. 691.

49. Or.—Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222—

McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213.

50. Ala.—Rogers v. C. E. Green Motor Co., 113 So. 641, 22 Ala.App. 168.

Giving of security required

Miss.—Universal Credit Co. v. Linn Motor Co., 15 So.2d 694, 195 Miss. 565.

51. N.J.—Ackerman v. Bloomingdale, 147 A. 444, 106 N.J. Law 9—Brown v. Mack-International Motor Truck Corporation, 158 A. 104, 10 N.J. Misc. 125.

52. Ark.—J. M. Lowe Auto Co. v. Winkler, 191 S.W. 927, 127 Ark. 433.

53. Okl.—Riggan v. Faulkner, 89 P. 2d 311, 184 Okl. 605.

54. Ark.—J. M. Lowe Auto Co. v. Winkler, 191 S.W. 927, 127 Ark. 433.

55. Ga.—Frost Motor Co. v. Pierce, 33 S.E.2d 910, 72 Ga.App. 447.

A counter-affidavit is essential to such conversion.—Frost Motor Co. v. Pierce, supra.

56. N.Y.—New York Yellow Cab Co. Sales Agency, Inc., v. Courtlandt Garage & Realty Corporation, 227 N.Y.S. 315, 223 App.Div. 44.

57. Minn.—Conner v. Caldwell, 294 N.W. 650, 208 Minn. 502.

58. Miss.—De Van Motor Co. v. Bailey, 171 So. 342, 177 Miss. 441.

buyer or his assignee, since such seller's liability extends no further than the property.⁵⁹

Where a particular court has the right to try an action based on the furnishing of repairs and accessories for a motor vehicle, whether such proceeding is regarded as an action at law or a suit in equity to foreclose a lien, it must be regarded as having jurisdiction of the subject of the action.⁶⁰ A statute giving justices of the peace jurisdiction to enforce statutory liens against motor vehicles has been held not unconstitutional,⁶¹ but a justice of the peace cannot declare a lien for an amount in excess of that over which he has jurisdiction.⁶² Where the statute provides that the lien claim may be foreclosed in any county in which the chattel may be found, foreclosure may be commenced in such a county, although the lien claim is filed in another county and although the foreclosure may, on demand, be transferred to such county for trial.⁶³ Where proceedings to foreclose a lien are instituted in one county, the forwarding of lien notices to the sheriffs of other counties is not an abandonment of the original proceedings, but a continuation thereof.⁶⁴

Time for commencing or completing proceedings. Proceedings to foreclose a garage keeper's lien on a motor vehicle must be commenced within the prescribed statutory period,⁶⁵ but they need not be brought to final adjudication within the period.⁶⁶

Parties. Where repairs are made at the request of the mortgagor who retains use and possession, no express notice to the mortgagee of proceedings to enforce the lien is necessary.⁶⁷ Where a lien and an assignment thereof are properly recorded, and a foreclosure proceeding is properly brought by the assignee against the original owner of the vehicle, one who buys it after commencement of the proceeding is not a necessary party thereto,⁶⁸ and is bound by the decree therein, although not a party.⁶⁹

Pleading. A complaint in a proceeding to foreclose a lien must disclose a substantial compliance with the essential requirements of the statute under which the lien is claimed,⁷⁰ although it may be aided by a notice of the lien which is made a part thereof,⁷¹ and in the absence of allegation and proof of such facts the lien cannot be enforced.⁷² So, complainant in a suit in equity to enforce a lien must state facts bringing him within the terms of the statute conferring the lien on which he relies,⁷³ although, if he fails to do so, but states facts sufficient to support a judgment in an action at law for goods sold and delivered, the proceeding may be retained as an action at law under a statute providing that no cause shall be dismissed for having been brought on the wrong side of the court.⁷⁴

Although a complaint may be too general in its statements to show the right to a lien, it is not sub-

59. Miss.—De Van Motor Co. v. Bailey, *supra*.

60. Or.—Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213.

61. Ark.—Paragould Motor Co. v. McDonald, 41 S.W.2d 976, 184 Ark. 52.

62. Ark.—Paragould Motor Co. v. McDonald, *supra*—Shelton v. Little Rock Auto Co., 146 S.W. 129, 103 Ark. 142.

63. Wash.—Barbour v. Hodge, 170 P. 115, 99 Wash. 578.

64. Or.—Fletcher Tire Co. v. Mahler, 24 P.2d 1028, 144 Or. 409.

65. Okl.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.

Wrongful sequestration

Sequestration under law granting privilege in favor of garage and automobile repair men after three months is wrongfully issued.—Dillon v. Burgin, 5 La.App. 243.

66. Minn.—Conner v. Caldwell, 294 N.W. 650, 208 Minn. 502.

Or.—Fletcher Tire Co. v. Mahler, 24 P.2d 1028, 144 Or. 409.

67. Mass.—Guaranty Security Corp.

v. Brophy, 137 N.E. 751, 243 Mass. 597.

42 C.J. p 826 note 18.

68. Wash.—McLaughlin v. Zarbell, 190 P.2d 114, 29 Wash.2d 817.

69. Wash.—McLaughlin v. Zarbell, *supra*.

70. Or.—Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222. 38 C.J. p 84 note 2.

71. Or.—Covey v. Kliks, 225 P. 1097, 111 Or. 394.

38 C.J. p 84 note 3.

72. Or.—Duby v. Hicks, 209 P. 156, 105 Or. 27.

Separation of items for particular vehicles

(1) The allocation of items to each vehicle involved must be established.—Fidelity & Casualty Co. of New York v. Peckett, 220 N.Y.S. 612, 220 App.Div. 118—New York Yellow Cab Co. Sales Agency v. Laurel Garage, 219 N.Y.S. 671, 219 App.Div. 329.

(2) Where several cars have been sold by the same seller to a buyer with knowledge that they are to be used in a livery business and that it will be necessary to make repairs on them from time to time, it is not necessary that claimant of a lien on all the cars should, as against the

seller, separate the items for repairs furnished to each car.—Weber Implement, etc., Co. v. Pearson, 200 S.W. 273, 132 Ark. 101, L.R.A. 1918D 327.

Owner's ratification of repair contract

An automobile owner viewing and approving or acquiescing in repair of automobile by permission of another in possession thereof, became indebted to person making repairs and was bound by judgment for amount of such debt and foreclosure of lien on automobile therefor, although his ratification of repair contract was not pleaded and express contract was not established.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.

73. Or.—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213. 42 C.J. p 826 note 19.

Description of chattels on which lien for repairs was claimed as two Holt caterpillar logging trailers and one Holt caterpillar tractor owned by defendant, was held sufficient.—Coast Engine & Machine Works v. Barbee, 279 P. 264, 130 Or. 159.

74. Or.—Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213.

ject to a general demurrer where it states facts showing a personal obligation on the part of defendant.⁷⁵ A recital in an affidavit to foreclose a lien that the repairman is in possession of the vehicle or has filed the claim of lien as required by law is not an express allegation that the lien has been recorded,⁷⁶ and a counter-affidavit denying that the repairman has a lien and alleging that the owner of the vehicle is indebted to him for only a part of the sum claimed is sufficient to make an issue.⁷⁷ Statutory requirements for the filing of a counter-affidavit must be complied with.⁷⁸

Evidence. One asserting a statutory lien for repairs must establish the facts essential to such a lien under the statute,⁷⁹ and the general rules as to the weight and sufficiency of evidence apply.⁸⁰

Questions for jury. In a proceeding to enforce the lien the question whether labor and material were furnished for defendant is on conflicting evidence, one of fact for the jury;⁸¹ and, where repairs were to be paid for in cash, the intention of the owner of the vehicle in obtaining it by giving a check, and whether his stopping payment thereon was with or without good cause and was in good or bad faith are, likewise, questions for the jury.⁸²

Judgment or decree. A judgment for a garage keeper should give defendant a choice between returning the chattel or paying the amount of the lien.⁸³ Under some circumstances a personal judgment in favor of a garageman has been held proper,⁸⁴ but, where a general statute as to the foreclosure of liens authorizes a personal judgment for the amount of the debt where a note or other personal obligation for its payment has been given by the lien debtor, there cannot, in a proceeding

to enforce a repairman's lien, in the absence of express statutory authorization, be a personal decree against the debtor where such personal obligation does not appear.⁸⁵ Where a counter-affidavit is required in order to convert a lien proceeding into mesne process, a judgment may be entered in the absence of such a counter-affidavit on a replevy bond against defendant and his surety.⁸⁶

Fees and expenses. A statutory provision, that the party for whom judgment is rendered in an action to enforce any lien may recover reasonable attorney's fees, is available for the protection of plaintiff's right in a suit to foreclose a lien for materials furnished and labor performed in repairing a motor vehicle;⁸⁷ such fee must be reasonable in amount.⁸⁸ A finding of the value of an attorney's services is not justified in the absence of any evidence on the subject.⁸⁹ A garage keeper employing a constable to seize a motor vehicle subject to his lien has been held not entitled to add the constable's fees⁹⁰ or the expenses of seizure⁹¹ to the amount due from the owner under the lien.

§ 759. Sale

A sale of a motor vehicle under a garage keeper's lien must be in accordance with statutory requirements, as with respect to notice.

Where a statute conferring a lien for storage does not authorize a sale of the motor vehicle to enforce such lien, the garage keeper has no right to sell it at public auction to satisfy his claim,⁹² but, where he has also a claim for repairs and accessories for which he has a right under the statute conferring a lien to sell the vehicle, he may sell it and subject the proceeds to his lien for storage.⁹³ A common-law lien in the

75. Or.—Covey v. Kliks, 225 P. 1097, 111 Or. 394.

76. Ga.—Frost Motor Co. v. Pierce, 33 S.E.2d 910, 72 Ga.App. 447.

77. Ga.—Frost Motor Co. v. Pierce, supra.

78. Ga.—Frost Motor Co. v. Pierce, supra.

Payment of amount admittedly due
Ga.—Frost Motor Co. v. Pierce, supra.

79. Ala.—Alexander v. Mobile Auto Co., 76 So. 944, 200 Ala. 586.

80. Ark.—Denton v. Berryville Auto Serv. Co., 227 S.W. 608, 741 Ark. 411.

42 C.J. p 826 note 24.

Evidence held sufficient

(1) In general.

Ark.—Smith v. Checker Cab Co., 184 S.W.2d 901, 208 Ark. 99.

Ga.—Rogers v. Hall, 18 S.E.2d 519, 66 Ga.App. 529.

(2) To show reasonable value of labor and materials—Gyllenberg v. Heriza, 272 P. 674, 127 Or. 481.

81. Okl.—De Groff v. Carhart, 223 P. 180, 97 Okl. 145.

82. Ga.—Frost Motor Co. v. Pierce, 33 S.E.2d 910, 72 Ga.App. 447.

83. N.Y.—Commercial Credit Corporation v. Podhorzer, 224 N.Y.S. 505, 221 App.Div. 644.

84. N.Y.—Yellow Mfg. Credit Corporation v. Horowitz, 13 N.Y.S.2d 59.

85. Or.—Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 223—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213.

86. Ga.—Tipton v. Conrad, 94 S.E. 815, 21 Ga.App. 593.

87. Okl.—Williamson v. Winningham, 186 P.2d 644, 199 Okl. 393.

88. Okl.—Williamson v. Winningham, supra.

89. Ind.—Legros v. Culberson, 134 NE 907, 78 Ind.App. 158.

90. N.J.—Wallace v. Terpis Garage, 7 A.2d 795, 17 N.J.Misc. 183—Keshen v. Olsen, 163 A. 280, 10 N.J. Misc. 1301.

91. N.J.—Wallace v. Terpis Garage, 7 A.2d 795, 17 N.J.Misc. 183.

92. Ky.—Willis v. La Fayette-Phoenix Garage Co., 260 S.W. 364, 203 Ky. 554.

93. Ky.—Willis v. La Fayette-Phoenix Garage Co., supra.

Implied assent to sale

One who leaves an automobile with a garage keeper for repairs must be deemed to have contracted to allow

nature of that of a warehouseman, if existent, confers on the garage man the right merely to retain the property as security for his debt, and does not confer on him the right to sell the property in satisfaction thereof.⁹⁴ A lien sale under inapplicable proceedings designated by statute for the enforcement of other liens constitutes a conversion.⁹⁵

A sale of a motor vehicle by a garage keeper claiming a lien thereon, without complying with statutory provisions, is a nullity,⁹⁶ and constitutes a conversion thereof,⁹⁷ as, for example, where the sale is made without notice to the owner.⁹⁸ However, a statute requiring notice of sale for storage charges to persons who have given notice of an interest in property has been held to apply only to persons giving actual notice to the lienor.⁹⁹ One claiming an interest in the vehicle, who, although notified of the foreclosure proceedings, fails to assert his rights in such proceedings as provided for by the statute conferring the lien, cannot thereafter assert his claim.¹

While the title conveyed by a sale of a motor

vehicle to pay for supplies furnished or repairs made may be only that of the person who ordered the supplies or repairs,² the rights of the purchaser of a motor vehicle at a lienor's sale have been held not affected by the reservation of title contained in a conditional sales contract.³ Thus, one repairing a truck without actual notice of an unrecorded conditional sales contract and regularly enforcing his statutory lien and becoming the purchaser at an execution sale has title as against the seller's assignee.⁴

Where the statute conferring a lien provides for a sale by the lienholder if the amount due is not paid within a specified time, a purchaser at a sale made before such time has elapsed acquires no title,⁵ and a purported sale before the repairs are completed, so that the claim is not due, is premature and void.⁶ Although the amount for which a lien is claimed is more than that to which claimant is entitled, the rights of an innocent purchaser from the buyer at the lien sale are not affected.⁷ The failure of purchasers at a lien sale to complete title of record as required by a motor vehicle law

him to sell the car, as provided by statute, on nonpayment of charges.—*Willis v. La Fayette-Phoenix Garage Co.*, *supra*.

94. *Ariz.*—*Fishback v. Foster*, 202 P. 806, 23 *Ariz.* 206.

95. *Okl.*—*Riggen v. Faulkner*, 89 P. 2d 311, 184 *Okl.* 605.

96. *N.J.*—*Harris v. Walk*, 148 A. 647, 106 *N.J.Law* 443.

Notice

(1) In general.—*Harris v. Walk*, *supra*.

(2) A sale of truck by garage owner on foreclosure of lien for storage after posting notices of time and place of sale, as prescribed in statute relating to liens not depending on possession, instead of giving notice required in cases of possessory liens, was void and ineffectual to pass title to truck.—*Williams v. International Harvester Co.*, 141 P.2d 837, 172 *Or.* 270.

97. *Miss.*—*Universal Credit Co. v. Linn Motor Co.*, 15 So.2d 694, 195 *Miss.* 565.

Pa.—*Bernstein v. Hineman*, 86 *Pa. Super.* 198.

Irregular sale on warrant for storage

An attempted sale, by automobile dealers, on a landlord's warrant for storage, of automobile which had been bought from dealers and returned to their possession because of certain alleged defects, was irregular and amounted to a wrongful conversion thereof.—*General Finance Co. of Philadelphia v. Prusky*, 195 A. 916, 129 *Pa.Super.* 355.

98. *N.Y.*—*Herschenhart v. Mehlman*, 213 N.Y.S. 48, 125 *Misc.* 887.

Purchasers of garage business held liable for conversion of automobile sold for lien without notice to owner.—*Herschenhart v. Mehlman*, *supra*.

99. *N.Y.*—*Commercial Credit Corporation v. Moskowitz*, 255 N.Y.S. 525, 142 *Misc.* 773, affirmed 262 N.Y.S. 973, 238 *App.Div.* 831, reargument denied 263 N.Y.S. 936, 239 *App.Div.* 770.

Conditional vendor

Sale of motor vehicle to satisfy storage lien was held valid without notice to conditional vendor, where garage keeper had no actual notice of filed conditional sales contract.—*Commercial Credit Corporation v. Moskowitz*, *supra*.

1. *Wash.*—*Everett v. McCulloch*, 172 P. 863, 102 *Wash.* 51.
42 C.J. p 827 note 31.

2. *Ky.*—*Indiana Truck Corporation of Kentucky v. Hurry Up Broadway Co.*, 1 S.W.2d 990, 222 *Ky.* 521. Priority of lien see *supra* § 754.

3. *N.Y.*—*Commercial Credit Corporation v. Moskowitz*, 255 N.Y.S. 525, 142 *Misc.* 773, affirmed 262 N.Y.S. 973, 238 *App.Div.* 831, reargument denied 263 N.Y.S. 936, 239 *App.Div.* 770.

Pa.—*Commercial Banking Corporation v. Berkowitz*, 159 A. 214, 104 *Pa.Super.* 523.

Reason for rule

Such reservation is effective only as against subsequent bona fide purchasers from the conditional vendee;

a purchaser of a motor vehicle at a lienor's public sale is obviously not a purchaser from the conditional vendee.—*Commercial Credit Corporation v. Moskowitz*, 255 N.Y.S. 525, 142 *Misc.* 773, affirmed 262 N.Y.S. 973, 238 *App.Div.* 831, reargument denied 263 N.Y.S. 936, 239 *App.Div.* 770.

4. *Ala.*—*Gober Motor Co. v. Valley Securities Co.*, 124 So. 395, 23 *Ala. App.* 290.

Merger of repairman's liens in judgment

A repairman who intervened in an action by other repairmen against the conditional buyer of a truck condemned to be sold to pay for all repairs, and who took an assignment of plaintiff repairmen's lien and of their interest in the judgment and then purchased the truck at the sale thereunder, thereby acquired the title of the buyer, and the two mechanic's liens of such repairman were not merged into the judgment, but remained in effect as against the seller's assignee, which was entitled to dispossess the repairman of the truck only when it paid him what the buyer owed him for repairs.—*General Motors Acceptance Corporation v. Shoemaker*, 6 So.2d 309, 192 *Miss.* 446.

5. *Cal.*—*Peerless Ins., etc., Co. v. Dwyer Equipment Co.*, 248 P. 303, 78 *Cal.App.* 141.

6. *Cal.*—*Lundblade v. Pierce*, 272 P. 329, 95 *Cal.App.* 192.

7. *Cal.*—*Goodman v. Anglo-California Trust Co.*, 217 P. 1078, 62 *Cal. App.* 702.

does not confer on third persons who have no claim to the property because of the fact that their rights have been cut off by the lien sale the right to deprive the purchasers of their possession.⁸

Where, in replevin by the mortgagee of a motor vehicle against its purchaser at a sale duly

made on enforcement of a lien for necessary repairs made at the request of the mortgagor, defendant has been deprived of the possession of the motor vehicle by virtue of the action, he is, on a finding in his favor, entitled to damages for the detention of the vehicle.⁹

E. RENTING VEHICLE BY LIVERYMAN

§ 760. In General

Where a motor vehicle is rented, the relation of bailor and bailee arises. The bailor has the duty of furnishing a vehicle reasonably fit and proper for the purpose intended; if he also furnishes a driver, he must furnish a skillful and careful one.

Where a motor vehicle is rented or hired, the relation of bailor and bailee arises;¹⁰ a contract for such rental or hiring has been held not to establish the relationship of principal and agent¹¹ or master and servant¹² between the owner and the hirer.

Furnishing fit and safe vehicle. Although he is

not an insurer¹³ or a guarantor of the absolute integrity of the vehicle,¹⁴ it is the duty of the bailor to furnish a vehicle which is reasonably fit and proper for the use intended,¹⁵ or reasonably safe.¹⁶ He has the affirmative duty to know that the vehicle rented is in fit condition for the contemplated use,¹⁷ and to exercise reasonable diligence,¹⁸ or ordinary care,¹⁹ by making such simple and available tests as the intended use would suggest to sensible and right-minded persons,²⁰ and to exercise ordinary care to avoid putting forth a machine with defects calculated to injure persons who come in contact with it;²¹ and he must exercise that de-

8. Cal.—Goodman v. Anglo-California Trust Co., *supra*.

9. Mass.—Guaranty Security Corp. v. Brophy, 137 N.E. 751, 243 Mass. 597.

10. La.—U-Drive-It-Car Co. v. Texas Pipe Line Co., 129 So. 565, 14 La.App. 524.

N.Y.—Fine v. Sedacca, 179 N.Y.S. 68. Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

At common law

Ohio.—Orose v. Hodge Drive-It-Yourself Co., 9 N.E.2d 671, 132 Ohio St. 607, 111 A.L.R. 954.

Bailment with control in bailee

D.C.—Charles System v. Juliano, 66 F.2d 931, 62 App.D.C. 283.

Taxicab company which leased automobile to be operated by lessee as a conveyance for himself, and which retained no control over lessee as to route selected or operation of automobile, was a bailor and not a carrier.—Dymond Cab Co. v. Branson, 131 P.2d 1007, 191 Okl. 604.

11. D.C.—Charles System v. Juliano, 66 F.2d 931, 62 App.D.C. 283.

Ga.—Cantrell v. Hertz Drivurself Stations, 151 S.E. 694, 40 Ga.App. 840.

12. D.C.—Charles System v. Juliano, 66 F.2d 931, 62 App.D.C. 283.

13. Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

14. Ala.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Tenn.—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

Wis.—Carroll v. Minneapolis Drive Yourself System, 239 N.W. 501, 206 Wis. 287, followed in Koch v. Minneapolis Drive Yourself System, 239 N.W. 503, 206 Wis. 292.

15. Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

Bailee's recovery of expenditure

Where the bailor let an automobile for hire for a long drive with defective tires, there was a breach of the contract of bailment and the bailee was entitled to recover the amount expended in replacing the tires after deducting the proper hire for the automobile.—Hilton v. Wagner, 10 Tenn.App. 173.

16. Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Pa.—Trusty v. Patterson, 149 A. 717, 299 Pa. 469.

Philippine.—Cerf v. Medel, 33 Philippine 37.

R.I.—Collette v. Page, 114 A. 136, 44 R.I. 26, 18 A.L.R. 74.

Undertaker

Md.—Dippel v. Juliano, 137 A. 514, 152 Md. 694.

Carriage of other persons

In the absence of showing to contrary, lessor impliedly agrees that automobile may safely be used by hirer to carry other persons.—Mitchell v. Lonergan, 189 N.E. 39, 285 Mass. 266.

17. Md.—Milestone System v. Gasior, 152 A. 810, 160 Md. 131.

18. Ala.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Tenn.—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

Wis.—Carroll v. Minneapolis Drive Yourself System, 239 N.W. 501, 206 Wis. 287, followed in Koch v. Minneapolis Drive Yourself System, 239 N.W. 503, 206 Wis. 292.

Duty to lessee's employees

Owner by whom trucks were leased to contractor pursuant to contract requiring owner to maintain trucks in good working order owed employees of contractor duty of exercising reasonable care in keeping trucks in repair.—Hudson v. Moonier, C.C.A.Mo., 102 F.2d 96, certiorari denied Hudson v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Fitch v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

19. Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Tenn.—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

20. Ala.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Wis.—Carroll v. Minneapolis Drive Yourself System, 239 N.W. 501, 206 Wis. 287, followed in Koch v. Minneapolis Drive Yourself System, 239 N.W. 503, 206 Wis. 292.

Minute inspection of practically new car before each hiring is not required, in the absence of anything to put the liveryman on notice of defects.—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

21. U.S.—Hudson v. Moonier, C.C.A.

gree of care in the selection of the vehicle furnished which a prudent person would exercise under like circumstances.²² This duty of diligence arises not entirely out of contract, but out of obligations imposed by law²³ and is in agreement with a legislative policy shown by a statute requiring every motor vehicle to be provided with adequate brakes.²⁴

Furnishing competent driver. A private carrier who lets an automobile for hire with a driver has the duty of furnishing a skillful and careful driver,²⁵ and, through such driver, of using due care in carrying the hirer²⁶ and any other passenger who may be rightfully in the vehicle.²⁷

Liability for hirer's baggage. A liveryman letting a car with a driver for hire is liable for the loss of the baggage of the hirer intrusted to the care of the driver, where the presence of such baggage in the automobile was contemplated by the parties under the implied terms of the contract for hire.²⁸

Regulation; requirement of bond or permit. The business of leasing automobiles to be driven by the lessee upon the public streets is a use of the streets by the lessor for gain and not a use by him as a member of the public in the ordinary way.²⁹ A person letting passenger automobiles for hire without drivers has been held not a carrier within a regulatory statute;³⁰ and the terms "leasing" and "lessee," as used in an ordinance regulating the operation of taxicabs, has been held to refer to the leasing of automobiles to be operated as taxicabs

within the city by the lessees thereof, and not to the leasing of an automobile to an individual for his own use.³¹ A company engaged in leasing or renting automobiles without drivers has been held not an "auto transportation company" within a statute requiring such a company engaged in "for hire" operations to obtain a permit, post a bond or insurance policy, and pay a mileage tax.³² A statute requiring those renting out cars for compensation to file bonds covering damages from the negligent operation thereof has been held to have no extraterritorial effect.³³ The primary purpose of an ordinance requiring renters of drive-yourself automobiles to obtain licenses, pay an annual tax per automobile employed, submit automobiles for inspection, and deposit cash or file a bond or insurance policy for injury or damages from the fault of drivers, is not to render damages collectable, but to induce renters to refrain from renting automobiles to the irresponsible and negligent;³⁴ but under an ordinance making it unlawful to drive or operate a livery vehicle without having given a bond, the liveryman, or lessor, is not the driver or operator of the vehicle within the meaning of the ordinance.³⁵

§ 761. Compensation

It has been held that the rates for furnishing automobiles for hire cannot be regulated by a public service commission.

It has been held that the business of furnishing automobiles for hire to persons desiring them is

Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Fitch v. Moonlier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

Tenn.—Vaughn v. Millington Motor Co., 22 S.W.2d 226, 160 Tenn. 197—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

22. R.I.—Collette v. Page, 114 A. 136, 44 R.I. 26, 30, 18 A.L.R. 74, 38 C.J. p 92 note 45.

23. Ala.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

Tenn.—Vaughn v. Millington Motor Co., 22 S.W.2d 226, 160 Tenn. 197—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

Agreement to maintain

U.S.—Hudson v. Moonlier, C.C.A.Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.

Ed. 1520, and Fitch v. Moonlier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

24. Ala.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

25. Philippine.—Cerf v. Medel, 33 Philippine 37, 38 C.J. p 93 note 70.

Undertaker

Md.—Dippel v. Juliano, 137 A. 514, 152 Md. 694.

26. Minn.—Meyers v. Tri-State Auto Co., 140 N.W. 184, 121 Minn. 68, 44 L.R.A.N.S., 113, 38 C.J. p 93 note 71.

27. Ark.—Forbes v. Reinman, 166 S. W. 563, 112 Ark. 417, 51 L.R.A., N. S., 1164, 38 C.J. p 94 note 72.

28. N.Y.—Tracy v Grand Concourse Serv. Co., 192 N.Y.S. 88, 199 App. Div. 348, 351, affirmed 138 N.E. 383, 234 N.Y. 649, 38 C.J. p 96 note 14.

29. Ohio.—Hodge Drive-It-Yourself Co. v. City of Cincinnati, 175 N.E. 196, 123 Ohio St. 284, 77 A.L.R.

889, affirmed 52 S.Ct. 144, 284 U.S. 335, 76 L.Ed. 323.

30. N.M.—Roeske v. Lamb, 41 P.2d 522, 39 N.M. 111. Regulation of public service vehicles generally see supra §§ 44-57.

31. Okl.—Dymond Cab Co. v. Branson, 131 P.2d 1007, 191 Okl. 604.

32. Fla.—Lawrence v. Goddard, 168 So. 13, 124 Fla. 250.

33. Wis.—Carroll v. Minneapolis Drive Yourself System, 239 N.W. 501, 206 Wis. 287, followed in Koch v. Minneapolis Drive Yourself System, 239 N.W. 503, 206 Wis. 292.

Car rented in another state

Wis.—Carroll v. Minneapolis Drive Yourself System, 239 N.W. 501, 206 Wis. 287, followed in Koch v. Minneapolis Drive Yourself System, 239 N.W. 503, 206 Wis. 292.

34. Or.—Covey Drive Yourself & Garage v. City of Portland, 70 P. 2d 566, 157 Or. 117.

35. Wis.—City of Milwaukee v. Froelich, 219 N.W. 954, 196 Wis. 444.

not a public utility, and rates for such services cannot be regulated by a public service commission.³⁶ Automobiles are not included in a statute punishing refusal to pay for use of a "carriage," with intent to cheat or defraud the owner.³⁷

§ 762. Injuries to Person of Hirer

A liveryman may be liable to the hirer of a motor vehicle for injury resulting from a defect therein or from the negligence of a driver furnished therewith.

Except where the rental agreement provides against such liability,³⁸ a liveryman renting out a defective motor vehicle is liable to the hirer, who is injured as a result of the defect,³⁹ at least where the liveryman has knowledge of the defect or where his lack of knowledge results from his failure to examine the vehicle with care and skill;⁴⁰ and the hirer may sue either in tort or for breach of the contract.⁴¹

A liveryman supplying a motor vehicle with a driver may be liable to the hirer for injuries sustained by him as a result of the driver's negligence;⁴² and such liability may be predicated on the existence of the relation of master and servant between such owner and the driver, the test being whether the driver is under the control of the owner.⁴³ Where, however, the hirer directs the chauffeur to drive beyond the destination prescribed in the contract, he cannot recover for injuries sustained in the course of such extra driving,⁴⁴ and, if the driver with knowledge of the terms of the contract of hire acquiesces in the breach thereof, he cannot be said to be acting within the scope of his employment so as to impute

his negligence to the owner;⁴⁵ but, where the direction by the hirer to the driver is of a nature contemplated within the terms of the contract, the hirer is not barred from recovery.⁴⁶ A direction to drive by way of a street whose condition is obviously dangerous cannot be implied from a general direction given by the hirer as to the route to be taken.⁴⁷

Where one hires an automobile with a chauffeur, but permits his own employee to drive, he assumes risk of injury from such operation, as far as any liability of the liveryman or the driver is concerned.⁴⁸

§ 763. — Actions

General rules governing civil actions have been applied in actions by hirers of motor vehicles against liverymen for injuries.

General rules governing civil actions apply in actions by hirers of motor vehicles against liverymen for injuries.⁴⁹ In an action by the hirer of an automobile and chauffeur against the liveryman, a statement which avers in general terms that the injury was caused by reason of defects in defendant's automobile, and of the negligence of the chauffeur in carelessly driving against a tree, is sufficiently definite to charge defendant with culpable negligence.⁵⁰ It is for the jury to determine whether the sudden starting of an automobile was due to its being out of repair or to the negligence of the chauffeur in failing to adjust its mechanism, where the evidence did not clearly point to either conclusion.⁵¹

36. U.S.—Terminal Taxicab Co. v. Kutz, App.D.C., 36 S.Ct. 583, 241 U. S. 252, 60 L.Ed. 984, Ann Cas 1916D 765.

Public service vehicles subject to regulation generally see supra § 46.

37. Mass.—Commonwealth v. Goldman, 91 N.E. 392, 205 Mass. 400.

38. Mass.—Ortolano v U-Dryvit Auto Rental Co., 6 N.E.2d 346, 296 Mass. 439.

39. Pa.—Wallace v. Keystone Auto. Co., 86 A. 699, 239 Pa. 110.

40. Md.—Milestone System v. Gasior, 152 A. 810, 160 Md. 131.

41. Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

Claim against undertaker held to rest primarily on his breach of contract to provide safe vehicle and reasonably skillful and prudent driver.—Dippel v. Juliano, 137 A. 514, 152 Md. 694.

42. Cal.—Ewens v. Newman, 21 P. 2d 1007, 131 Cal App. 602.

Md.—Dippel v. Juliano, 137 A. 514, 152 Md. 694.

Pa.—Wallace v. Keystone Auto Co., 86 A. 699, 239 Pa. 110.

38 C.J. p 93 note 71 [a] (1).

43. Minn.—Meyers v. Tri-State Auto. Co., 140 N.W. 184, 121 Minn. 68, 78, 44 L.R.A., N.S., 113.

38 C.J. p 94 note 73.

44. Ariz.—Blue Bar Taxicab, etc., Co. v. Hudspeth, 216 P. 246, 25 Ariz. 287.

Ky.—Spradlin v. Wright Motor Car Co., 199 S.W. 1087, 178 Ky. 772, L.R.A.1918B 990.

45. Ariz.—Blue Bar Taxicab, etc., Co. v. Hudspeth, 216 P. 246, 25 Ariz. 287.

46. Pa.—Wallace v. Keystone Auto Co., 86 A. 699, 239 Pa. 110.

38 C.J. p 94 note 83.

47. Cal.—Hathaway v. Coleman, 169 P. 414, 35 Cal.App. 107.

38 C.J. p 95 note 85.

48. Cal.—Plumpe v. Tanner Motor Livery, 30 P.2d 1020, 137 Cal.App. 509.

49. Cause of action held stated NY.—Helmig v. Fanning, 7 N.Y.S.2d 514, 255 App Div. 766.

Evidence held to establish that driver of automobile went along as member of party of hirer of machine and not as agent of garage proprietors.—Steen v. Gleeson, 221 N.W. 374, 197 Wis. 68.

Evidence held insufficient to show negligence.—Rubio v. Garage, 23 Puerto Rico 565.

50. Pa.—Wallace v. Keystone Auto. Co., 86 A. 699, 239 Pa. 110.

38 C.J. p 95 note 90.

51. Pa.—Wallace v. Keystone Auto Co., supra.

§ 764. Liability of Hirer in General

The hirer of a motor vehicle is not liable for injuries to a third person caused by a defect to which he did not contribute, or by the negligence of a driver who is not his servant.

The hirer of a motor vehicle is not liable to a third person for injuries resulting from its defective condition, where the hirer did not contribute to such defect.⁵² Likewise, the hirer is not liable for such injuries resulting from the negligence of the driver furnished by the liveryman, where such driver is not the hirer's servant,⁵³ or where the hirer did not contribute to such negligence;⁵⁴ but, where a hirer authorizes another to drive for him, because of his own unfit condition, he becomes liable for injuries resulting from the driver's negligence.⁵⁵ An automobile rental agreement shifting to the hirer the entire burden of liability for injury to any person, including liability for a defective condition of the automobile, has been held not illegal on the ground that it protects the liveryman from liability for his own negligence.⁵⁶

Where a rented vehicle is involved in an accident and is attached, and the hirer makes no attempt to regain it, and does not return it, he is liable to the liveryman for its value.⁵⁷ The hirer of an automobile for a specified journey who uses it on another and longer journey is liable for the damages the garage keeper has sustained by reason of such illegal use.⁵⁸

Theft of vehicle. A hirer contracting with the liveryman that failure to lock the steering wheel makes him responsible in case of theft has been held not discharged from his responsibility by the fact that the key is broken off, so that the wheel cannot be locked.⁵⁹

§ 765. — Actions

General rules governing civil actions have been applied in actions against hirers of motor vehicles.

52. N.Y.—*Bohan v. Metropolitan Express Co.*, 107 N.Y.S. 530, 122 App. Div. 590.

38 C.J. p 97 note 24.

53. N.J.—*Worthington v. Clark*, 156 A. 314, 9 N.J.Misc. 1020.

54. N.Y.—*Bohan v. Metropolitan Express Co.*, 107 N.Y.S. 530, 122 App. Div. 590.

38 C.J. p 97 note 24.

55. N.J.—*Squier v. Barlow*, 149 A. 67, 8 N.J.Misc. 113.

56. Mass.—*Ortolano v. U-Dryvit Auto Rental Co.*, 6 N.E.2d 346, 296 Mass. 439.

57. Tenn.—*Hilton v. Wagner*, 10 Tenn.App. 173.

58. N.Y.—*Fine v. Sedacca*, 179 N.Y. S. 68.

38 C.J. p 97 note 30.

59. Kan.—*Geis v. Mathes*, 280 P. 759, 128 Kan. 753.

60. Evidence held sufficient to show liability.—*Squier v. Barlow*, 149 A. 67, 8 N.J.Misc. 113.

61. Tenn.—*John Denie's Sons Co. v. 638 Tire & Vulcanizing Co.*, 3 Tenn. App. 609.

62. Ohio.—*U-Drive-It-Co v. Monkiewicz*, Mun., 79 N.E.2d 567—*U-Drive-It Co. v. Gustin*, Mun., 79 N.E.2d 373.

63. Ohio.—*U-Drive-It-Co. v. Monkiewicz*, Mun., 79 N.E.2d 567—*U-Drive-It Co. v. Gustin*, Mun., 79 N.E.2d 373.

General rules apply in actions to enforce the liability of the hirer of a motor vehicle.⁶⁰ A bill in an action to recover damages caused by a hirer's failure to take out insurance on a rented motor vehicle has been held to allege with sufficient clearness the agreement on which complainant was relying.⁶¹

§ 766. Injuries to Vehicle

An automobile rental agreement may be such as to impose on the hirer liability for any damage to the rented vehicle.

Where the hirer agrees to assume all damage or loss to the rented vehicle whether caused by his negligence or otherwise, the hirer becomes the insurer of the vehicle,⁶² and the test of his liability is not ordinary care, but the degree of responsibility imposed by the contract.⁶³ Under such an agreement, a hirer who abandons the rented car after a collision is liable for the expense of returning it, the cost of repairs, and loss of use, all of such damages reasonably resulting from the breach of the contract.⁶⁴ An automobile rental agreement shifting to the hirer the entire burden of liability for any damage to the automobile, including liability for a defective condition thereof, has been held not illegal on the ground that it protects the liveryman from liability for his own negligence.⁶⁵ A provision of an automobile rental contract covering an indefinite period and providing that the hirer assumed liability for damage to the vehicle binds the hirer, despite the possible failure of the "trip slip" for the particular trip on which the damage took place to bind the hirer.⁶⁶

Where a truck owner rents out a truck with a driver, and the driver, although the owner's employee, becomes the temporary servant of the hirer, the hirer is liable for the destruction of the truck as a result of the driver's negligence.⁶⁷

wiez, Mun., 79 N.E.2d 567—*U-Drive-It Co. v. Gustin*, Mun., 79 N.E.2d 373.

64. Ohio.—*U-Drive-It-Co. v. Monkiewicz*, Mun., 79 N.E.2d 567.

65. Mass.—*Ortolano v. U-Dryvit Auto Rental*, 6 N.E.2d 346, 296 Mass. 439.

66. Ky.—*U-Drive-It Co. v. Archer*, 126 S.W.2d 837, 277 Ky. 356.

67. Wash.—*B. & B. Building Material Co. v. Winston Bros. Co.*, 290 P. 839, 158 Wash. 130.

Truck held subject to hirer's control Wash.—*B. & B. Building Material Co. v. Winston Bros. Co.*, *supra*.

§ 767. — Actions

General rules governing civil actions have been applied in actions by liverymen against hirers of motor vehicles for damages to the rented vehicles.

General rules apply in actions by liverymen against hirers of motor vehicles for damage to such vehicles.⁶⁸ Where the hirer, by the contract of hiring, assumes liability for all damages to the motor vehicle, whether or not caused by his negligence, the burden is on him to prove any circumstances relieving him of liability.⁶⁹

§ 768. Injuries to Third Person

- a. In general
- b. Renting out defective vehicle
- c. Renting vehicle to incompetent or intoxicated driver
- d. Renting out vehicle with driver

a. In General

Apart from statutes imposing liability, and except as

the liveryman may be liable for renting to an incompetent driver, a liveryman is not liable to third persons for the negligence of the hirer while he is driving the rented motor vehicle.

In the absence of a statute or ordinance providing for such liability,⁷⁰ it has been held that a liveryman, as bailor, is not liable to third persons for the tort or negligence of the bailee while he is driving the rented motor vehicle,⁷¹ in the absence of evidence of the bailee's incompetency to drive,⁷² or in the absence of anything to show that the rented automobile was being used in the liveryman's business.⁷³ A liveryman is not liable to a person injured by the negligence of a driver to whom the hirer turned over the car in violation of the rental agreement,⁷⁴ despite a statute making an owner liable for injuries resulting from the operation of his motor vehicle with the express or implied permission of the owner.⁷⁵ A garage keeper who merely permits the housing of a private car in his garage and is not a party to a contract for

68. Cause of action held not stated
La.—Baton Rouge Yellow Cab Co. v. Cox, 132 So. 665, 15 La.App. 626.

69. Ohio.—U-Drive-It Co. v. Monkiewicz, Mun., 79 N.E.2d 567—U-Drive-It Co. v. Gustin, Mun., 79 N.E.2d 373.

70. Iowa.—Robinson v. Bruce Rent-A-Ford Co., 215 N.W. 724, 205 Iowa 261, 61 A.L.R. 851.
N.Y.—Grimshaw v. Gnudl, 240 N.Y.S. 199, 136 Misc. 443.

Statutes held not invalid

Conn.—Connelly v. Deconinck, 155 A. 231, 113 Conn. 237—Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 163, 108 Conn. 333, 61 A.L.R. 846.

Iowa.—Robinson v. Bruce Rent-A-Ford Co., 215 N.W. 724, 205 Iowa 261, 61 A.L.R. 851.

Possession with authority of owner

Statute making lessor of automobile liable for damages caused by operation held not to make him liable for torts of one wrongfully acquiring possession and is inapplicable to vehicle, possession of which is surrendered under conditional sale.—Connelly v. Deconinck, 155 A. 231, 113 Conn. 237.

Lease not within ordinance

The leasing of automobile by taxicab company to private individual for his own use was not within regulatory provisions of ordinance regulating use of taxicabs, automobiles, and other vehicles carrying passengers and baggage for hire, so as to permit a recovery against lessor and insurance carrier, under liability policy required by such ordinance to be filed, for damages from negligent operation of automobile by lessee.—

Dymond Cab Co. v. Branson, 131 P. 2d 1007, 191 Okl. 604.

Part of contract

Statutory liability of owner renting automobile for damages resulting from its operation becomes part of contract of hiring, and action against renter for injuries, based on statute, is contractual.—Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 163, 108 Conn. 333, 61 A.L.R. 846.

71. Ky.—Corpus Juris quoted in Saunders Drive-It-Yourself Co. v. Walker, 284 S.W. 1088, 215 Ky. 267.
Ohio—Orose v. Hodge Drive-It-Yourself Co., 9 N.E.2d 671, 132 Ohio St. 607, 111 A.L.R. 954.
Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.
38 C.J. p 94 note 79.
Liability of hirer to third person see supra § 764.

At common law

Conn.—Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 163, 108 Conn. 333, 61 A.L.R. 846.
Iowa.—Robinson v. Bruce Rent-A-Ford Co., 215 N.W. 724, 205 Iowa 261, 61 A.L.R. 851.
N.Y.—Grimshaw v. Gnudl, 240 N.Y.S. 199, 136 Misc. 443.

Occupant

Neb.—McWilliams v. Griffin, 273 N.W. 209, 132 Neb. 753, 110 A.L.R. 1039.

No liability under bailment contract

U.S.—Hudson v. Moonier, C.C.A.Mo., 102 F.2d 96, certiorari denied Hudson v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Fitch v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.
Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

Statutory exemption held not invalid

Statute exempting from liability for negligent operation of automobiles, operated with owner's consent, corporations and others engaged in renting automobiles and carrying prescribed insurance was held not unconstitutional.—Atkins v. Hertz Drivurself Stations, 185 N.E. 408, 261 N.Y. 352, affirmed 54 S.Ct. 437, 291 U.S. 641, 78 L.Ed. 1039.

Liability for judgment against lessee

Persons securing judgments for injuries resulting from negligent operation of automobile, leased from company which did not deposit liability policy or give indemnity bond as required by ordinance, cannot recover amount of judgments from lessor.—McNess v. Bohannan's Rent-A-Car Co., 183 N.E. 90, 43 Ohio App. 393.

72. N.J.—Maurer v. Brown, 149 A. 336, 106 N.J.Law 284.
Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.
Renting vehicle to incompetent driver see infra subdivision c of this section.

Renting to twenty-three-year-old experienced driver not shown to be reckless, careless, or incompetent was held not negligence.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

73. N.J.—Maurer v. Brown, 149 A. 336, 106 N.J.Law 284.

74. N.Y.—Stapleton v. Hertz Drivurself Stations, 225 N.Y.S. 661, 131 Misc. 52.

75. N.Y.—Stapleton v. Hertz Drivurself Stations, supra.

hiring it is not liable for injuries resulting from its negligent operation.⁷⁶

An injured guest, in order to recover against the lessor of an automobile, must prove misconduct of the lessee driver satisfying the guest statute and the hiring of the automobile within the statute imposing liability on the lessor.⁷⁷

Municipal ordinances; claim. Failure to comply with a municipal ordinance does not impose liability on the liveryman for injuries from the operation of a rented vehicle, where no direct causal connection exists between the illegal operation of the vehicle and the injury.⁷⁸ Where an ordinance allows a person injured by a hired automobile additional time to file a claim if the accident renders him incapable of preparing such claim, absolute helplessness is not required, in order that the additional time may be available, but only a condition rendering him unable to perform all the substantial and material acts necessary to the prosecution of the case.⁷⁹

b. Renting Out Defective Vehicle

One renting out a defective vehicle either with knowledge of the defect or, because of lack of care or skill in examining the vehicle, without such knowledge, is liable to third persons for injuries resulting from his negligence in renting such a vehicle.

The owner of an automobile rented to another

may, in a proper case, be held in damages for injuries proximately resulting to third persons from his negligence in renting out a defective vehicle,⁸⁰ either with knowledge of the defect or where the absence of such knowledge results from a failure to examine the vehicle for defects with care and skill,⁸¹ or to exercise ordinary care and caution,⁸² unless he can show that the defect was not preventable by any care or skill on his part.⁸³ A liveryman renting a dangerously defective automobile is not exempted from liability to one injured in a collision therewith by the fact that the driver continued to operate it after having knowledge of the defects.⁸⁴ The contributory negligence of a person struck by a rented automobile is no defense to the liveryman if the driver's attempt to stop in time failed because of the liveryman's negligence as to brakes.⁸⁵

c. Renting Vehicle to Incompetent or Intoxicated Driver

A liveryman renting a motor vehicle to one whom he knows, or, in the exercise of due care, should know, to be an incompetent or intoxicated driver, is liable for resulting injuries to third persons.

While a garage keeper has been held not chargeable with knowledge of the hirer's incompetency,⁸⁶ and is not the insurer of the competency of the

76. Ky.—Spradlin v. Wright Motor Car Co., 199 S.W. 1087, 178 Ky. 772, 778, L.R.A.1918B 990.

38 C.J. p 92 note 47.

77. Conn.—Connelly v. Deconinck, 155 A. 231, 113 Conn. 237.

Care as to invited guests generally see supra § 399.

78. Ohio.—Orose v. Hodge Drive-It-Yourself Co., 9 N.E.2d 671, 132 Ohio St. 607, 111 A.L.R. 954.

Failure to require insurance or bond Ohio.—Orose v. Hodge Drive-It-Yourself Co., supra.

79. Ohio.—Nead v. Barrs Rent-A-Car Co., 36 N.E.2d 868, 67 Ohio App. 309.

80. Pa.—Wallace v. Keystone Auto Co., 86 A. 699, 239 Pa. 110.

Tenn.—Vaughan v. Millington Motor Co., 22 S.W.2d 226, 160 Tenn. 197.—Corpus Juris cited in Alexander v. Walker & Isaacs, 15 Tenn.App. 388, 393.

Tex.—City of Corpus Christi v. Texas Driverless Co., 190 S.W.2d 484, 144 Tex. 288.

Duty to furnish fit vehicle generally see supra § 760.

Defective brake or brakes

(1) Generally.

Mass.—Mitchell v. Lonergan, 189 N. E. 39, 285 Mass. 266.

Pa.—Trusty v. Patterson, 149 A. 717, 299 Pa. 469.

(2) Condition of brakes was held as matter of law not proximate cause of injury—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

(3) Owner of rented automobile with faulty foot brakes was held liable in action for injuries to pedestrian struck thereby, although hand brake was in reasonably good condition, where traffic regulations required both foot and hand brakes capable of meeting certain requirements.—Charles System v. Julian, 66 F.2d 931, 62 App.D.C. 283.

Defective steering gear

R.I.—Collette v. Page, 114 A. 136, 44 R.I. 26, 30, 18 A.L.R. 74.

38 C.J. p 93 note 67.

Liability to lessee's employees

Owner by whom trucks were leased to contractor pursuant to contract requiring owner to maintain trucks in good working order was liable to employee of contractor who sustained injuries when struck by truck which owner had negligently failed to equip with signaling device.—Hudson v. Moonier, C.C.A.Mo., 102 F.2d 98, certiorari denied Hudson v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Fitch v. Moonier,

59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

Guest; contributory negligence

(1) Lessor was liable to guest of hirer injured by reason of defects in brakes which might have been discovered by lessor by reasonable care in inspection before letting.—Mitchell v. Lonergan, 189 N.E. 39, 285 Mass. 266.

(2) Guest injured when falling through door was held not contributorily negligent because moving to edge of seat, making him more subject to loss of balance, since occupant of automobile in motion is permitted some freedom of movement and position in determining contributory negligence.—Milestone System v. Gasior, 152 A. 810, 160 Md. 131.

81. Md.—Milestone System v. Gasior, supra.

82. Tenn.—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

83. Md.—Milestone System v. Gasior, 152 A. 810, 160 Md. 131.

84. Minn.—Ferraro v. Taylor, 265 N. W. 829, 197 Minn. 5.

85. D.C.—Charles System v. Julian, 66 F.2d 931, 62 App.D.C. 283.

86. Ark.—Forbes v. Reinman, 166 S. W. 563, 112 Ark. 417, 51 L.R.A., N.S., 1164

driver to whom the car is hired,⁸⁷ he is liable to an injured third person if he knows, or should know, that the person hiring the motor vehicle is incompetent to drive it;⁸⁸ he must make a reasonable investigation to determine whether or not the renter is an ordinarily competent operator.⁸⁹

A liveryman renting a motor vehicle to a drunken driver or a driver approaching that condition is negligent and responsible in damages to one injured as a result of the driver's negligence.⁹⁰ The gist of a bailor's negligence in renting an automobile to a drunken driver whose negligence causes injury consists in putting a dangerous instrumentality in the hands of a drunken and irresponsible person for a palpably dangerous purpose,⁹¹ and actual or constructive knowledge of the driver's intoxication is an ingredient of the bailor's negligence.⁹² If the driver was actually intoxicated at the time of hiring, and his condition was apparent to a person of ordinary prudence, garage employees will be held to have had knowledge thereof,⁹³ even though assured by the driver that he had not been drinking.⁹⁴ Where an automobile

liveryman knowingly rents an automobile to a drunken driver and a pedestrian is killed because of the driver's negligent operation of the automobile, the negligent operation and the negligent renting are direct and proximate causes of the death.⁹⁵

d. Renting Out Vehicle with Driver

A liveryman letting a car with a driver for hire is liable to persons other than the hirer for injuries resulting from the driver's negligence if the relation of master and servant exists between the liveryman and the driver, and if the driver, as such servant, is acting within the scope of his employment.

Where a liveryman lets a motor vehicle with a driver for hire, his liability for injuries to a person other than the hirer is predicated on the existence of the relation of master and servant between the liveryman and the driver,⁹⁶ the test being whether the latter is under the control of the former,⁹⁷ and whether in the particular instance the driver was acting within the scope of his employment.⁹⁸ So, the liveryman is liable for injuries to third persons caused by the driver's negligence while under the liveryman's control,⁹⁹ but not while

87. Ky.—Saunders Drive-It-Yourself v. Walker, 284 S.W. 1088, 215 Ky. 267.

88. Ky.—Saunders Drive-It-Yourself Co. v. Walker, supra.

Intrusting vehicle to incompetent driver generally see supra § 431.

Temporary permit instead of driver's license

A liveryman's knowledge that one renting an automobile has no driver's license, but only a temporary permit allowing him to drive if accompanied by a licensed driver, is sufficient to put him on inquiry as to the renter's competency to drive.—Owens v. Carmichael U-Drive Autos, 2 P.2d 580, 116 Cal.App. 348.

89. La.—Anderson v. Driverless Cars, 124 So. 312, 11 La App. 515.

Requirement of driver's license

(1) The mere failure of the renter to require the production of a driver's license by the hirer does not render the renter liable for injuries to a third person, if he makes a reasonable investigation as to the hirer's competency.—Anderson v. Driverless Cars, supra.

(2) However, a corporation's rental of its automobile without inquiring as to the hirer's driver's license, as required by statute, has been held persuasive of carelessness or at least indifference to salutary municipal regulations in the public safety and affecting its business.—Baader v. Driverless Cars, 120 So. 515, 10 La. App. 310.

(3) The statute providing that no person shall rent an automobile to

any other person unless the latter is duly licensed as an operator or chauffeur does not give a civil cause of action for damages in favor of third persons against one who has violated such statute, a renting agency was not liable for injury sustained in the rented automobile on the ground that its act in renting the automobile to the driver who had no driver's license was the proximate cause of injuries, where the undisputed evidence showed that the driver was above the average in competency.—Hertz Drive-It-Yourself System of Colorado v. Hendrickson, 121 P.2d 483, 109 Colo. 1.

90. La.—Baader v. Driverless Cars, 120 So. 515, 10 La App. 310.

91. U.S.—Tolbert v. Jackson, C.C.A. Ga., 99 F.2d 513, rehearing denied 100 F.2d 909.

La.—Baader v. Driverless Cars, 120 So. 515, 10 La App. 310.

Dangerous character of motor vehicle generally see supra § 12. Intrusting vehicle to intoxicated driver generally see supra § 431.

92. U.S.—Tolbert v. Jackson, C.C.A. Ga., 99 F.2d 513, rehearing denied 100 F.2d 909.

93. Ky.—Owensboro Undertaking & Livery Ass'n v. Henderson, 115 S. W.2d 563, 273 Ky. 112.

94. Ky.—Owensboro Undertaking & Livery, supra.

95. U.S.—Tolbert v. Jackson, C.C.A. Ga., 99 F.2d 513, rehearing denied 100 F.2d 909.

96. N.J.—Worthington v. Clark, 156 A. 314, 9 N.J.Misc. 1020.

Pa.—Lang v. Hanlon, 157 A. 788, 305 Pa. 378, followed in 157 A. 790, two cases, 305 Pa. 385, and 157 A. 791, 305 Pa. 385.

38 C.J. p 94 note 73.

Duty to furnish competent driver generally see supra § 760.

97. Pa.—Lang v. Hanlon, supra. Va.—Beasley v. Whitehurst, 147 S. E. 194, 152 Va. 305.

38 C.J. p 94 note 73.

Operation with owner's permission

Where owner leased automobile and furnished driver whom owner unconditionally directed to follow instructions of lessee, driver was "legally operating automobile with owner's permission," within statute imposing liability on owner so permitting; but third person to whom hirer in turn surrendered complete control may also be liable.—Irwin v. Klein, 3 N.E.2d 601, 271 N.Y. 477.

Undertaker securing vehicle and driver from another undertaker was held liable for injury to passenger.—Sack v. A. R. Nunn & Son, 194 N.E. 1, 129 Ohio St. 128.

98. Ariz.—Blue Bar Taxicab, etc., Co. v. Hudspeth, 216 P. 246, 25 Ariz. 287.

Ky.—Spradlin v. Wright Motor Car Co., 199 S.W. 1087, 178 Ky. 772, L.R.A.1918B 990.

99. N.Y.—Irwin v. Klein, 3 N.E.2d 601, 271 N.Y. 477.

Pa.—Lang v. Hanlon, 153 A. 143, 302 Pa. 173.

Instructing driver where to park does not constitute exercise of control by hirer.—Independence Indem-

the driver is under the hirer's control.¹

The liveryman's liability is incurred in respect of a third person riding in the vehicle by reason of the implied consent of the owner that such person shall become a passenger in the vehicle,² or from the fact that such passenger was invited with the knowledge and assent of the driver acting in behalf of the owner.³ An undertaker supplying an automobile with a driver has been held not negligent in failing to assist a mourner to alight therefrom,⁴ or to warn the mourner of the danger of injury to her hand from the closing of the door by others.⁵

§ 769. — Actions

General rules governing civil actions have been applied in actions against liverymen for injuries, to persons

other than the hirers, resulting from the operation of rented motor vehicles.

In an action against a liveryman by one injured as a result of the operation of a rented car, the fact that the driver declined to give his name is immaterial.⁶ While general rules of pleading have been applied,⁷ only the most general allegations of negligence, little short of mere conclusions, have been required in order to state a cause of action against one letting a motor vehicle for hire for injuries to one struck while it was being operated by the hirer.⁸ The rules applicable in civil actions generally have been applied with respect to the evidence,⁹ including its admissibility¹⁰ and the weight and sufficiency thereof.¹¹ Where the evidence is such as to make an issue for the jury,¹² questions of fact ordinarily are for the jury,¹³ un-

nity Co. v. Carmical & Woodring, 127 So. 10, 13 La.App. 64.

Directing place in funeral procession and where to drive does not constitute exercise of control of driver by hirer.—Lang v. Hanlon, 153 A. 143, 302 Pa. 173.

1. Va.—Beasley v. Whitehurst, 147 S.E. 194, 152 Va. 305.
38 C.J. p 94 note 73.

2. Ill.—Dunne v. Boland, 199 Ill. App. 308, 309.
38 C.J. p 94 note 75.

3. Tenn.—Rowman v. Marler, 8 Tenn.Civ.App. 632.
38 C.J. p 94 note 76.

4. Mo.—Zink v. Bopp, 31 S.W.2d 563, 224 Mo.App. 1177.

5. Mo.—Zink v. Bopp, *supra*.

6. Ky.—Saunders Drive-It-Yourself Co. v. Walker, 284 S.W. 1088, 215 Ky. 267.

7. Cause of action held not stated
Ga.—Cantrell v. Hertz Driveurself Stations, 151 S.E. 694, 40 Ga.App. 840.

8. Ala.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

Cause of action held stated
Tenn.—Vaughn v. Millington Motor Co., 22 S.W.2d 226, 160 Tenn. 197.

Proximate cause

Allegation that plaintiff was injured as proximate consequence of defendant's negligence sufficiently alleged that such negligence proximately caused injuries.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

9. U.S.—Hudson v. Moonier, C.C.A. Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Fitch v. Moonier, 59 S.

Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

10. D.C.—Charles System v. Juliano, 66 F.2d 931, 62 App.D.C. 283.

11. Ky.—Owensboro Undertaking & Livery Ass'n v. Henderson, 115 S.W.2d 563, 273 Ky. 112.

Evidence held sufficient

(1) In general.

N.J.—McCashin v. Tanner, 145 A. 632, 7 N.J.Misc. 401.

Ohio.—Nead v. Barrs Rent-A-Car Co., 36 N.E.2d 868, 67 Ohio App. 309.

Pa.—Lang v. Hanlon, 157 A. 788, 305 Pa. 378, followed in 157 A. 790, two cases, 305 Pa. 385, and 157 A. 791, 305 Pa. 385.

(2) To warrant recovery.

N.J.—McCashin v. Tanner, *supra*.
N.Y.—O'Brien v. Hendrick Hudson Garage, 295 N.Y.S. 686, 250 App. Div. 650.

(3) To show proximate cause of injury.—Trusty v. Patterson, 149 A. 717, 299 Pa. 469.

Evidence held insufficient

(1) In general.

La.—Independence Indemnity Co. v. Carmical & Woodring, 127 So. 10, 13 La.App. 64.

Md.—Milestone System v. Gasior, 152 A. 810, 160 Md. 131.

Neb.—McWilliams v. Griffin, 273 N.W. 209, 132 Neb. 753, 110 A.L.R. 1039.

Tenn.—Alexander v. Walker & Isaacs, 15 Tenn.App. 388.

Wis.—Carroll v. Minneapolis Drive Yourself System, 239 N.W. 501, 206 Wis. 287, followed in Koch v. Minneapolis Drive Yourself System, 239 N.W. 503, 206 Wis. 292.

(2) To show knowledge of incompetency of driver.—Saunders Drive-It-Yourself Co. v. Walker, 284 S.W. 1088, 215 Ky. 267.

(3) To show contributory negligence.—Baader v. Driverless Cars, 120 So. 515, 10 La.App. 310.

12. Where there is no conflicting evidence as to the competency of the hirer as a driver, the question of proximate cause of an injury resulting from the operation of a rented car is for the court.—Hertz Drive-It-Yourself System of Colorado v. Hendrickson, 121 P.2d 483, 109 Colo. 1.

Evidence held insufficient to take question to jury

Or.—Eklof v. Waterston, 285 P. 201, 132 Or. 479, 68 A.L.R. 1002.

Evidence held sufficient to take question to jury

Ky.—Owensboro Undertaking & Livery Ass'n v. Henderson, 115 S.W.2d 563, 273 Ky. 112.

Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Tex.—McCarthy v. Fifty-Fifty Auto Livery, Civ.App., 16 S.W.2d 349.

13. U.S.—Hudson v. Moonier, C.C.A. Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Fitch v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

Cal.—Owens v. Carmichael's U-Drive Autos, 2 P.2d 580, 116 Cal.App. 348.

D.C.—Charles System v. Juliano, 66 F.2d 931, 62 App.D.C. 283.

La.—Anderson v. Driverless Cars, 124 So. 312, 11 La.App. 515.

Va.—U-Run-It Co. v. Merryman, 153 S.E. 664, 154 Va. 467.

Questions held for jury

(1) Whether one letting a vehicle for hire made such simple and available tests of its condition as its intended use would suggest to sensible and right-minded persons.

Ala.—Saunders System Birmingham Co. v. Adams, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

Mo.—Spelky v. Kissel-Skiles Co., App., 54 S.W.2d 761.

Wis.—Carroll v. Minneapolis Drive Yourself System, 239 N.W. 501, 206

der proper instructions from the court.¹⁴ In actions by third persons for injuries, according to the decisions on the question, general rules apply with respect to verdicts and findings.¹⁵

F. FILLING STATIONS

§ 770. In General

The business of conducting a gasoline filling and service station is subject to regulation by the state under its police powers even though the business of selling gasoline is not affected with the public interest.

While the conduct of a gasoline filling and service station is a lawful business, as discussed infra § 771, the state may, under its police power, regulate such business.¹⁶ However, the selling of gaso-

line is not a business affected with a public interest, in the legal sense,¹⁷ and a statute purporting to regulate such business cannot be supported as an exercise of the police power unless some reasonable connection with health, safety, morals, or the general welfare can be made to appear.¹⁸ In construing statutes enacted in pursuance of such power, general rules and principles of statutory

Wis. 287, followed in *Koch v. Minneapolis Drive Yourself System*, 239 N.W. 503, 206 Wis. 292.

(2) Whether a driver furnished to the hirer of a vehicle was acting within the scope of his employment at the time of the injury.—*Rowman v. Marler*, 8 Tenn.Civ.App. 632.

(3) Proximate cause of the injury. U.S.—*Hudson v. Moonier*, C.C.A.Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and *Fitch v. Moonier*, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

D.C.—*Charles System v. Julian*, 66 F.2d 931, 62 App.D.C. 283. Mass.—*Mitchell v. Lonergan*, 189 N.E. 39, 285 Mass. 266.

(4) Contributory negligence. U.S.—*Hudson v. Moonier*, C.C.A.Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and *Fitch v. Moonier*, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520. Md.—*Milestone System v. Gasior*, 152 A. 810, 160 Md. 131.

(5) Weight of particular testimony.—*Charles System v. Julian*, 66 F.2d 931, 62 App.Div. 283.

14. Ala.—*Saunders System Birmingham Co. v. Adams*, 117 So. 72, 217 Ala. 621, 61 A.L.R. 1333.

Evidence held to warrant instruction Mo.—*Spelky v. Kissel-Skiles Co.*, App., 54 S.W.2d 761.

Instruction held not misleading Mo.—*Smyth v. Hertz Drive-Yourself Stations*, App., 93 S.W.2d 56.

15. Minn.—*Ferraro v. Taylor*, 265 N.W. 829, 197 Minn. 5.

Tex.—*Crysel v. A. W. Fabra Auto Supply Co.*, Civ.App., 145 S.W.2d 293.

16. Mass.—*Slome v. Godley*, 23 N.E.2d 133, 304 Mass. 187.

N.C.—*Town of Wake Forest v. Medina*, 154 S.E. 29, 199 N.C. 83.

Power of state to declare filling station nuisance see infra § 772.

Statutes requiring license or permit to construct or operate filling station see infra § 776.

State fire marshal was held authorized to make exceptions to his rules regulating bulk gasoline storage stations within city fire zone—*City of Evansville, Ind. v. Gaseteria, Inc.*, C.C.A.Ind., 51 F.2d 232.

17. U.S.—*Williams v. Standard Oil Co. of Louisiana*, Tenn., 49 S.Ct. 115, 278 U.S. 235, 73 L.Ed. 287, 60 A.L.R. 596.

Conn.—*State v. Miller*, 12 A.2d 192, 126 Conn. 373.

18. Conn.—*State v. Miller*, supra.

Statutes regulating price signs

(1) A statute prohibiting a gasoline station owner from displaying signs showing the sale price of gasoline at any place other than on the face of the pumps has been held not to be a reasonable exercise of the police power.

Conn.—*State v. Miller*, supra. N.J.—*Regal Oil Co. v. State*, 10 A.2d 495, 123 N.J.Law 456.

N.Y.—*People ex rel. Jones v. Mestichelli, Magistrates' Court*, 18 N.Y.S.2d 406.

(2) It has been held that such statute could not be sustained on the theory that it prevented ruinous price wars between dealers and prevented fraud, since there was nothing which would make dealers in the sale of motor fuels any more immune from tense competition than other merchantmen, nor could it be sustained as preventing fraud and misrepresentation in industry.—*Regal Oil Co. v. State*, supra.

(3) However, it has also been held that such statute was not so lacking in support on any rational basis of fact that might reasonably be conceived to sustain it that it might be declared invalid.—*Merit Oil Co. v. Director of Division of Necessaries of Life*, 65 N.E.2d 529, 319 Mass. 301—*Slome v. Godley*, 23 N.E.2d 133, 304 Mass. 187.

(4) A similar statute making all price placards subject to the approval of a state official and prohibiting the posting of placards not approved by such official, and containing a further provision prohibiting the changing of the price placard until it has been posted for a period of twenty-four hours except to meet a posted competitive price in that community, has been held valid.—*State v. Woitha*, 287 N.W. 99, 227 Iowa 1, 123 A.L.R. 884.

(5) However, a provision prohibiting the changing of a price placard for a period of twenty-four hours after posting, without exception, has been held to be invalid as an arbitrary interference with business.—*Sperry & Hutchinson Co. v. McBride*, 30 N.E.2d 269, 307 Mass. 408, 131 A.L.R. 1254.

(6) Validity of municipal ordinances regulating price signs see infra § 775.

Rebates and discounts

(1) A statutory provision that no premiums, rebates, allowances, concessions, prizes or other benefits should be given directly or indirectly by any retail dealer so as to permit any purchaser to obtain motor fuel from such retail dealer at a net price lower than posted price applicable at time of sale has been held invalid as an arbitrary interference with business and an irrational and unnecessary restriction.—*Sperry & Hutchinson Co. v. McBride*, supra.

(2) However, a statute regulating the posting of price placard and containing a provision that if any rebate, discount, commission, or other concession is granted by distributors or persons engaged in the sale of motor fuel as will reduce the cost or price to any purchaser, the conditions, quantity, and amount of such rebate, discount, commission, or other concession must be posted as part of the posted price, has been upheld as a whole without special reference to such provision.—*State v. Woitha*, 287 N.W. 99, 227 Iowa 1, 123 A.L.R. 884.

construction are applicable.¹⁹ The fact that the particular phase of the business regulated is subject to other provisions of the law does not affect the operation of the statute.²⁰

Contract between state agency and owner. A filling station owner may, by a valid contract entered into with a state agency, bind himself to perform certain acts with respect to the filling station.²¹

Definitions. A "public service gasoline filling station" has been defined as a place at which gasoline, and usually oils, are stored and supplied, for a price, to the public in general,²² notwithstanding tires and other accessories are not there sold or repairs to motor vehicles made,²³ and a "service station" has been said to mean in modern parlance a building from which gasoline and auto supplies are sold.²⁴ The term "motor vehicle service station" has been held to include a filling station, the business of which is confined to the selling of gas-

oline, oil, and motor vehicle accessories,²⁵ and not to be limited to a garage or station where repairs on motor vehicles are made.²⁶ A filling station includes not only the house or building provided for storage of supplies for use and shelter of its operatives, but also includes the tanks, pumps, and other structures used in connection therewith, and the approaches and exits.²⁷ In ordinary speech a filling station is not referred to as a store or mercantile establishment where goods, wares, or merchandise are sold or offered for sale at retail.²⁸

§ 771. As Lawful Business

The conduct of a gasoline filling and service station is a lawful business, and such station is not a nuisance per se, in either a business or a residential district, although it must be erected and conducted with due regard for the rights of others.

The conduct of a gasoline filling and service station is a lawful business,²⁹ and such station is not a nuisance per se,³⁰ in either a business or a resi-

19. Fraudulent sales

(1) In determining the purpose of a statute the title thereof may be considered, and the purpose of a statute entitled an act to prevent fraud or misrepresentation in the sale of gasoline and providing that no person shall sell or advertise for sale any gasoline through any dispensing apparatus unless there is displayed on such dispensing apparatus a sign showing the actual total price per gallon has been declared to be for the prevention of fraudulent sales of petroleum products and the protection of purchasers, and such statute has been held not to manifest a legislative intent to make the act of selling a genuine or advertised brand or grade of gasoline for less than the price posted on dispensing apparatus a crime, since the act is not a price-fixing statute, nor does it interfere with the right of a gasoline dealer to charge a different price for each successive sale of gasoline, or a price based on quantity of gasoline purchased—*Ex parte La Belle*, 98 P.2d 778, 37 Cal.App.2d 32.

(2) So a similar statute regulating use by retail dealers in motor fuel of signs relating to price of such fuel has been construed as neither a price-fixing law nor a fair trade law, but rather as one designed to prevent fraud on purchasers in retail sale of gasoline as ordinarily carried on in filling stations.—*Sperry & Hutchinson Co. v. McBride*, 30 N.E.2d 269, 307 Mass. 408, 131 A.L.R. 1254.

20. Operation of statute regulating signs designating the price of motor fuel was not prevented by fact that maintenance of dealer's advertising

signs was subject to other provisions of law—*Slome v. Godley*, 23 N.E.2d 133, 304 Mass. 187.

21. Owner not entitled to question agency's authority

Filling station owner could not question authority of state agency to make contract requiring removal of pumps and related equipment of station from position near highway where he agreed to do so and accepted and retained consideration therefor.—*State Highway Commission of Kansas v. Ames*, 57 P.2d 17, 143 Kan. 847.

22. Pa.—*Carney v. Penn Oil Co.*, 140 A. 133, 291 Pa. 371.

23. Pa.—*Carney v. Penn Oil Co.*, supra.

24. Cal.—*People v. Pettinger*, 271 P. 132, 94 Cal.App. 227.

25. N.J.—*Bauer v. Paterson Fire, etc., Comrs.*, 132 A. 515, 102 N.J. Law 235.

"Drive-in service station" held in effect "motor vehicle service station."—*Bauer v. Paterson Fire etc. Comrs.*, supra.

26. N.J.—*Bauer v. Paterson Fire, etc., Comrs.*, supra.
42 C.J. p 1307 note 34.

27. Conn.—*City of New Britain v. Kilbourne*, 147 A. 124, 125, 109 Conn. 422.

28. Wis.—*Wadhams Oil Co. v. State*, 245 N.W. 646, 210 Wis. 448, rehearing denied 246 N.W. 687, 210 Wis. 448.

29. Ala.—*Milton v. Maples*, 179 So. 519, 235 Ala. 446—*Maples v. Milton*, 168 So. 868, 232 Ala. 483.

Ga.—*Wilson v. Evans Hotel Co.*, 4

S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

NC—*Shuford v. Town of Waynesville*, 198 S.E. 585, 214 N.C. 135

Okl.—*Magnolia Petroleum Co. v. City of Tonkawa*, 114 P.2d 474, 189 Okl. 125.

Pa.—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400.

42 C.J. p 1304 note 66.

Conducting a filling station, in either a business or a residence district, is a lawful business.

Idaho.—*Corpus Juris* cited in *Continental Oil Co. v. City of Twin Falls*, 286 P. 353, 358, 49 Idaho 89, followed in *Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co.*, 286 P. 360, 49 Idaho 109.

N.Y.—*Sherman v. Livingston*, 128 N.Y.S. 581.

Selling gasoline is a lawful business.—*State v. Miller*, 12 A.2d 192, 126 Conn. 373.

30. U.S.—*Hensley v. Cities Service Oil Co.*, D.C.Okl., 58 F.2d 347—*Hazlett v. Marland Refining Co. of Ponca City*, C.C.A.Kan., 30 F.2d 808.

Ala.—*Milton v. Maples*, 179 So. 519, 235 Ala. 446—*Maples v. Milton*, 168 So. 868, 232 Ala. 483—*Leary v. Adams*, 147 So. 391, 226 Ala. 472—*Bloch v. McCown*, 135 So. 633, 223 Ala. 348—*Fletcher v. Barnard*, 133 So. 29, 222 Ala. 380—*City of Tuscaloosa v. Standard Oil Co. of Kentucky*, 130 So. 186, 221 Ala. 670—*Bloch v. McCown*, 123 So. 213, 219 Ala. 656—*Gillette v. Tyson*, 123 So. 830, 219 Ala. 511, followed in *Gillette v. Firestone Tire & Rubber Co.*, 122 So. 831, 219 Ala. 513.

Ark.—*Clark v. Hunt*, 95 S.W.2d 558.

dential district.³¹ It must be erected and conducted, | according to the judicial decisions on the question,

192 Ark. 865—*Moore v. Wallis*, 86 S.W.2d 1111, 191 Ark. 551.

Cal.—*Nagel v. Dorrington*, 262 P. 718, 202 Cal. 698.

Fla.—*Mercer v. Keynton*, 163 So. 411, 121 Fla. 37.

Ga.—*Rushing v. Thigpen*, 37 S.E.2d 180, 200 Ga. 313—*Cooley v. Enzor*, 9 S.E.2d 277, 190 Ga. 290—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373—*City of Hawkinsville v. Williams*, 195 S.E. 162, 185 Ga. 396—*Wofford Oil Co. of Georgia v. David*, 183 S.E. 808, 181 Ga. 639—*Atlantic Refining Co. v. Farrar*, 155 S.E. 327, 171 Ga. 371—*Howell v. Board of Com'rs for City of Quitman*, 149 S.E. 779, 169 Ga. 74—*Wooten v. Smith*, 145 S.E. 446, 167 Ga. 256—*Thompson v. Texas Co.*, 143 S.E. 376, 166 Ga. 315—*Standard Oil Co. v. Kahn*, 141 S.E. 643, 165 Ga. 575.

Idaho—*Corpus Juris* cited in *Continental Oil Co. v. City of Twin Falls*, 286 P. 353, 358, 49 Idaho 89, followed in *Independent School Dist No. 1 of Twin Falls County v. Continental Oil Co.*, 286 P. 360, 49 Idaho 109.

Ill.—*People ex rel. Terp v. Washington Home of Chicago*, 198 N.E. 721, 361 Ill. 522—*Irving-Austin Bldg Corporation v. Village Homebuilders*, 37 N.E.2d 927, 312 Ill. App. 179—*Mitchell v. Wengielewski*, 259 Ill. App. 438—*Continental Illinois Bank & Trust Co. v. Standard Oil Co. of Indiana*, 257 Ill. App. 425.

Ind.—*Griffin v. Hubbell*, 11 N.E.2d 136, 212 Ind. 684.

Iowa—*Yeamos v. Skelly Oil Co.*, 263 N.W. 834, 220 Iowa 1317.

Kan.—*Julian v. Golden Rule Oil Co.*, 212 P. 884, 112 Kan. 671.

Ky.—*Glenmore Distilleries Co. v. Fiorella*, 117 S.W.2d 173, 273 Ky. 549—*Standard Oil Co. v. City of Bowling Green*, 50 S.W.2d 960, 244 Ky. 362, 86 A.L.R. 648—*Kirkwood Bros. v. City of Madisonville*, 18 S.W.2d 951, 230 Ky. 104—*Indian Refining Co. v. Berry*, 10 S.W.2d 630, 226 Ky. 123—*Slaughter v. Post*, 282 S.W. 1091, 214 Ky. 175.

Md.—*Mayor and Council of Pocomoke City v. Standard Oil Co. of New Jersey*, 159 A. 902, 162 Md. 368—*Smith v. Standard Oil Co. of New Jersey*, 130 A. 181, 149 Md. 61.

Mich.—*Sandenburgh v. Michigamme Oil Co.*, 228 N.W. 707, 249 Mich. 372.

Miss.—*Gulf Refining Co. v. City of Laurel*, 192 So. 1, 187 Miss. 119.

Mo.—*Greene v. Spinning, App.*, 48 S.W.2d 51.

N.Y.—*Coley v. Campbell*, 215 N.Y.S. 679, 126 Misc. 869.

N.C.—*Shuford v. Town of Waynesville*, 198 S.E. 585, 214 N.C. 135—*Holton v. Northwestern Oil Co.*, 161

S.E. 391, 201 N.C. 744—*State v. Moyer*, 156 S.E. 130, 200 N.C. 11, appeal dismissed *Moyer v. State of North Carolina*, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428—*MacRae v. City of Fayetteville*, 150 S.E. 810, 198 N.C. 51.

Ohio.—*Powell v. Craig*, 148 N.E. 607, 113 Ohio 245.

Okl.—*Bell v. Brockman*, 126 P.2d 78, 190 Okl. 583—*Magnolia Petroleum Co. v. City of Tonkawa*, 114 P.2d 474, 189 Okl. 125—*Weaver v. Bishop*, 52 P.2d 853, 174 Okl. 492—*Magnolia Petroleum Co. v. Wright*, 254 P. 41, 124 Okl. 55.

Pa.—*Thomas v. Dougherty*, 190 A. 886, 325 Pa. 525—*Calvary Presbyterian Church of Highland Park v. Jones*, 185 A. 267, 322 Pa. 77—*Franklin St. M. E. Church of Johnstown v. Crystal Oil & Gas Co.*, 163 A. 910, 309 Pa. 357—*Carney v. Penn Oil Co.*, 140 A. 133, 291 Pa. 371—*Hunter v. Zug, Com. Pl.*, 44 Dauph. Co. 132—*Glas v. Baldwin*, *Com. Pl.*, 19 Erie Co. 411—*Zion Bethel of Church of God v. Atlantic Refining Co.*, *Com. Pl.*, 45 Lanc. L. Rev. 621—*Ellenberger v. Mikels*, *Com. Pl.*, 2 Monroe L.R. 45, 33 Mun. L.R. 75.

Tenn.—*White v. Gulf Refining Co.*, 2 S.W.2d 414, 156 Tenn. 474.

Tex.—*Lombardo v. City of Dallas*, 73 S.W.2d 475, 124 Tex. 1—*City of Texarkana v. Mabry*, *Civ. App.*, 94 S.W.2d 871, error dismissed—*City of Austin v. Nelson*, *Civ. App.*, 45 S.W.2d 692—*Scott v. Champlon Bldg. Co.*, *Civ. App.*, 28 S.W.2d 178—*City of San Antonio v. Robert Thompson & Co.*, *Civ. App.*, 23 S.W.2d 796, case dismissed as moot—*Robert Thompson & Co. v. City of San Antonio*, *Com. App.*, 38 S.W.2d 784—*Gulf Refining Co. v. Dishroon*, *Civ. App.*, 13 S.W.2d 230.

Utah.—*Smith v. Barrett*, 20 P.2d 864, 81 Utah 522.

Vt.—*Chamberlin v. Hatch*, 15 A.2d 586, 111 Vt. 317.

Va.—*Daniel v. Kosh*, 4 S.E.2d 381, 173 Va. 352.

W.Va.—*Corpus Juris* cited in *Central Nat. Bank of Buckhannon v. City of Buckhannon*, 188 S.E. 661, 662, 118 W.Va. 26.

Wis.—*State ex rel. City of Algoma v. Peterson*, 2 N.W.2d 253, 239 Wis. 599.

42 C.J. p 1304 note 68.

Properly constructed gasoline storage tanks to be used in wholesale or retail sale or distribution of gasoline are not nuisances per se.—*Glenmore Distilleries Co. v. Fiorella*, 117 S.W.2d 173, 273 Ky. 549.

31. Ala.—*Milton v. Maples*, 179 So. 519, 235 Ala. 446—*Maples v. Milton*, 168 So. 868, 232 Ala. 483—*Leary v. Adams*, 147 So. 391, 226

Ala. 472—*Fletcher v. Barnard*, 133 So. 29, 222 Ala. 380—*City of Tuscaloosa v. Standard Oil Co. of Kentucky*, 130 So. 186, 221 Ala. 670—*Gillette v. Tyson*, 122 So. 830, 219 Ala. 511, followed in *Gillette v. Firestone Tire & Rubber Co.*, 122 So. 831, 219 Ala. 513.

Ga.—*Rushing v. Thigpen*, 37 S.E.2d 180, 200 Ga. 313—*Cooley v. Enzor*, 9 S.E.2d 277, 190 Ga. 290—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

Mo.—*Green v. Spinning, App.*, 48 S.W.2d 51.

N.Y.—*Sherman v. Livingston*, 128 N.Y.S. 581.

N.C.—*MacRae v. City of Fayetteville*, 150 S.E. 810, 198 N.C. 51.

Tex.—*Continental Oil Co. v. City of Wichita Falls*, *Com. App.*, 42 S.W.2d 236, certified questions answered 1 S.W.2d 596, 117 Tex. 256—*City of Austin v. Nelson*, *Civ. App.*, 45 S.W.2d 692.

Vt.—*Chamberlin v. Hatch*, 15 A.2d 586, 111 Vt. 317.

In Pennsylvania

(1) A public gasoline filling station is not a nuisance per se if conducted in a commercial neighborhood.—*Bortz v. Troth*, 59 A.2d 93, 359 Pa. 326—*Franklin St. M. E. Church of Johnstown v. Crystal Oil & Gas Co.*, 163 A. 910, 309 Pa. 357—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400—*Staples v. Suburban Co.*, *Com. Pl.*, 54 Montg. Co. 174.

(2) Such a filling station, however, from the mere fact of operation, becomes a nuisance if conducted in a residential neighborhood.—*Bortz v. Troth*, supra—*Pennell v. Kennedy*, 12 A.2d 54, 338 Pa. 285—*Thomas v. Dougherty*, 190 A. 886, 325 Pa. 525—*Calvary Presbyterian Church of Highland Park v. Jones*, 185 A. 267, 322 Pa. 77—*Franklin St. M. E. Church of Johnstown v. Crystal Oil & Gas Co.*, 163 A. 910, 309 Pa. 357—*Appeal of Goodman*, 156 A. 309, 305 Pa. 55—*Appeal of Perrin*, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912—*Long v. Firestone Tire & Rubber Co.*, 154 A. 364, 303 Pa. 208—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400—*Burke v. Hollinger*, 146 A. 115, 296 Pa. 510—*Carney v. Penn Oil Co.*, 140 A. 133, 291 Pa. 371—*Hunter v. Zug, Com. Pl.*, 44 Dauph. Co. 132—*Glas v. Baldwin*, *Com. Pl.*, 19 Erie Co. 411—*Bortz v. Troth*, *Com. Pl.*, 10 Fay. L.J. 84—*Zion Bethel of Church of God v. Atlantic Refining Co.*, *Com. Pl.*, 45 Lanc. Rev. 621—*Ellenberger v. Mikels*, *Com. Pl.*, 2 Monroe L.R. 45, 33 Mun. L.R. 75.

(3) In determining whether the neighborhood is residential, the test to be applied is the location and surroundings of the immediate neighborhood and not remote districts.—*Thomas v. Dougherty*, 190 A. 886, 325

however, with due regard for the rights of others,³² although in the absence of restrictive covenants or statutes or ordinances it would seem that no objection can be made by any person or by a municipality to its erection or maintenance, as long as it is conducted in a proper and safe manner.³³ It has also been held that the storage of gasoline in reasonable quantities at a filling station is not such an unnatural gathering of a dangerous agency as to render the owner prima facie answerable for all damages which are the natural consequence of its escape, regardless of his negligence.³⁴

§ 772. As Nuisance

A filling station may be so erected, conducted, or operated as to be in fact or per accidens a public or private nuisance; whether or not it is a nuisance depends on the facts and circumstances of the case.

A filling station, although not a nuisance per se, as discussed supra § 771, may be so erected, conducted, or operated as to be, in fact or per accidens, a public or private nuisance.³⁵ Whether it is a nuisance per accidens depends on the facts and circumstances of the case,³⁶ including location and

Pa. 525—Calvary Presbyterian Church of Highland Park v. Jones, 185 A. 267, 322 Pa. 77—White v. Old York Road Country Club, 178 A. 3, 318 Pa. 346, remanded for rehearing on reargument 179 A. 434, 318 Pa. 569—Long v. Firestone Tire & Rubber Co., 154 A. 364, 303 Pa. 208—Burke v. Hollinger, 146 A. 115, 296 Pa. 510—Hunter v. Zug, Com.Pl., 44 Dauph.Co. 132—Glas v. Baldwin, Com.Pl., 19 Erie Co. 411—Bortz v. Troth, Com.Pl., 10 Fay.L.J. 84—Zion Bethel of Church of God v. Atlantic Refining Co., Com.Pl., 45 Lanc.L.Rev. 621—Ellenberger v. Mikels, Com.Pl., 2 Monroe L.R. 45, 33 Mun.L.R. 75.

(4) A neighborhood almost exclusively residential is not deprived of that character merely because there are a few community stores or other like buildings therein—Calvary Presbyterian Church of Highland Park v. Jones, 185 A. 267, 322 Pa. 77—Burke v. Hollinger, 146 A. 115, 296 Pa. 510—Atherholt v. De Muth, 14 Pa.Dist. & Co. 573—Ellenberger v. Mikels, supra.

(5) Conversely, a neighborhood almost exclusively commercial is not deprived of that character merely because there are a few residences or other noncommercial buildings therein—Franklin St. M. E. Church of Johnstown v. Crystal Oil & Gas Co., 163 A. 910, 309 Pa. 357.

(6) In small cities and boroughs the courts should take cognizance of the fact that business and residence closely interlock, and, in determining the residential character of a locality, should be especially careful to preserve home dwellers from unnecessary intrusion of business.—Richard v. Weiser, 198 A. 29, 329 Pa. 203—Burke v. Hollinger, supra.

(7) In determining whether the neighborhood is residential or commercial, a zoning ordinance is not, by itself, conclusive.—White v. Old York Road Country Club, 178 A. 3, 318 Pa. 346, remanded for rehearing 179 A. 434, 318 Pa. 569—Appeal of Goodman, 156 A. 309, 305 Pa. 55—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912.

(8) However, a zoning ordinance

placing the property in question in a commercial or business district and permitting the erection of a gasoline station thereon should be considered by the courts as an aid in determining the substantive question.—White v. Old York Road Country Club, 185 A. 316, 322 Pa. 147—Walker v. Delaware County Trust Co., 171 A. 458, 314 Pa. 257—Appeal of Perrin, supra.

(9) Such zoning ordinance together with the fact that property on which a proposed filling station is to be erected was already devoted to a commercial use of only slightly different character may require the conclusion that the proposed filling station is not an abatable nuisance, even though the property is in a neighborhood where the greater per cent of property is devoted to residential uses—Walker v. Delaware County Trust Co., supra.

32. Ill.—Mitchell v. Wengelewski, 259 Ill.App. 438.
Pa.—Sprout v. Levinson, 148 A. 511, 298 Pa. 400.

Ordinance requiring frontage consents

Failure to obtain consent of adjoining property owners to installation of gasoline tanks, as required by ordinance, has been held to afford ground for objection and for injunction against installation of tanks and removal of those installed.—Mitchell v. Wengelewski, 259 Ill.App. 438.

33. U.S.—Hensley v. Cities Service Oil Co., D.C.Okl., 58 F.2d 347.
Cal.—Nagel v. Dorrington, 262 P. 718, 202 Cal. 698.
Ill.—Continental Illinois Bank & Trust Co. v. Standard Oil Co. of Indiana, 257 Ill.App. 425.
Miss.—Morris v. City of Columbia, 186 So. 292, 184 Miss. 342.
Wis.—State ex rel. City of Algoma v. Peterson, 2 N.W.2d 253, 239 Wis. 599.
42 C.J. p 1304 note 70.

Character of occupant; location

Fact that intended occupant of proposed building and filling station was a bootlegger and syphilitic did not bar owner of lot from erecting building and filling station; nor did fact

that lot on which proposed filling station and café were to be erected was close to school building bar landowner.—Morris v. City of Columbia, 186 So. 292, 184 Miss. 342.

34. Mo.—Greene v. Spinning, App., 48 S.W.2d 51.

35. U.S.—Cities Service Oil Co. v. Roberts, C.C.A.Okl., 62 F.2d 579.
Ala.—Milton v. Maples, 179 So. 519, 235 Ala. 446—Maples v. Milton, 168 So. 868, 232 Ala. 483—Leary v. Adams, 147 So. 391, 226 Ala. 472—Fletcher v. Barnard, 133 So. 29, 222 Ala. 380—City of Tuscaloosa v. Standard Oil Co. of Kentucky, 130 So. 186, 221 Ala. 670—Bloch v. McCown, 123 So. 213, 219 Ala. 656.
Ark.—Clark v. Hunt, 95 S.W.2d 558, 192 Ark. 865—City of Ft. Smith v. Norris, 10 S.W.2d 861, 178 Ark. 399.

Ga.—Rushing v. Thigpen, 37 S.E.2d 180, 200 Ga. 313—Standard Oil Co. v. Kahn, 141 S.E. 643, 165 Ga. 575.
Ill.—Munie v. Millner, 245 Ill.App. 257.

Ky.—Indian Refining Co. v. Berry, 10 S.W.2d 630, 226 Ky. 123.

Miss.—National Refining Co. v. Battle, 100 So. 388, 135 Miss. 819.

Mo.—Greene v. Spinning, App., 48 S.W.2d 51.

N.C.—State v. Moye, 156 S.E. 130, 200 N.C. 11, appeal dismissed Moye v. State of North Carolina, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428—Town of Wake Forest v. Medlin, 154 S.E. 29, 199 N.C. 83.

Okl.—Bell v. Brockman, 126 P.2d 78, 190 Okl. 583—Weaver v. Bishop, 52 P.2d 853, 174 Okl. 492—Magnolia Petroleum Co. v. Wright, 254 P. 41, 124 Okl. 55.

Pa.—Sprout v. Levinson, 148 A. 511, 298 Pa. 400.

Tex.—City of Texarkana v. Mabry, Civ.App., 94 S.W.2d 871, error dismissed.

Utah.—Smith v. Barrett, 20 P.2d 864, 81 Utah 522.

36. U.S.—Cities Service Oil Co. v. Roberts, C.C.A.Okl., 62 F.2d 579.
Ala.—Bloch v. McCown, 123 So. 213, 219 Ala. 656.
Ga.—Standard Oil Co. v. Kahn, 141 S.E. 643, 165 Ga. 575.

surroundings of the filling station,³⁷ the manner in which it is constructed³⁸ or operated,³⁹ and whether it does in fact annoy, injure, or endanger the comfort, repose, health, or safety of others.⁴⁰ A filling station will not be considered a nuisance merely because it is so arranged that motorists entering or leaving it may or are required to drive their vehicles across the sidewalk⁴¹ or are tempted to violate traffic regulations,⁴² or because of in-

dependent violations of law occurring on the premises,⁴³ or because the owner is of bad moral character;⁴⁴ nor will it be considered a nuisance because it is conducted at night,⁴⁵ or because it constitutes, in a degree, a fire or explosion hazard,⁴⁶ or because of injuries and inconveniences to nearby residents, such as noises and odors, which result ordinarily and from necessity in the conduct of the business,⁴⁷ especially where it is in a predom-

Okl.—*McPherson v. First Presbyterian Church of Woodward*, 248 P. 561, 120 Okl. 40, 51 A.L.R. 1215.
Tex.—*Continental Oil Co. v. Berry*, Civ.App., 52 S.W.2d 953, error refused.

Wis.—*State ex rel. City of Algoma v. Peterson*, 2 N.W.2d 253, 239 Wis. 599.

37. Ala.—*McCraney v. City of Leeds*, 194 So. 151, 239 Ala. 143—*Milton v. Maples*, 179 So. 519, 235 Ala. 446—*Maples v. Milton*, 168 So. 868, 232 Ala. 483—*Leary v. Adams*, 147 So. 391, 226 Ala. 473—*Fletcher v. Barnard*, 133 So. 29, 222 Ala. 380—*Bloch v. McCown*, 123 So. 213, 219 Ala. 656.

Ky.—*Standard Oil Co. v. City of Bowling Green*, 50 S.W.2d 960, 244 Ky. 362, 86 A.L.R. 648.

Mo.—*Greene v. Spinning*, App., 48 S.W.2d 51.

N.C.—*State v. Moye*, 156 S.E. 130, 200 N.C. 11, appeal dismissed *Moye v. State of North Carolina*, 51 S. Ct. 653, 283 U.S. 810, 75 L.Ed. 1428—*Town of Wake Forest v. Medlin*, 154 S.E. 29, 199 N.C. 83.

Okl.—*Weaver v. Bishop*, 52 P.2d 853, 174 Okl. 492—*McPherson v. Woodward First Presb. Church*, 248 P. 561, 120 Okl. 40.

Wis.—*State ex rel. City of Algoma v. Peterson*, 2 N.W.2d 253, 239 Wis. 599.

Other stations in immediate locality

A filling station may not be said to be a nuisance when there are other such stations within a short distance of it and numerous others in the immediate locality.—*Coley v. Campbell*, 215 N.Y.S. 679, 126 Misc. 869.

At prohibited location

Gasoline station, when erected and maintained at place prohibited by reasonable regulatory ordinance, may be considered nuisance.—*Lombardo v. City of Dallas*, 73 S.W.2d 475, 124 Tex. 1—*Scott v. Champion Bldg. Co.*, Tex.Civ.App., 28 S.W.2d 178.

Station held not nuisance, in view of the character of the vicinity.—*Fletcher v. Barnard*, 133 So. 29, 222 Ala. 380.

Residential or commercial district

(1) "What might be regarded as a nuisance in a purely residential district might be looked upon as a necessary and useful convenience in a

district given over to commercial pursuits and places for public gatherings."—*Hazlett v. Marland Refining Co. of Ponca City*, C.C.A.Kan., 30 F.2d 808, 810.

(2) Erection of modern gasoline station in residential district was a nuisance.—*Cities Service Oil Co. v. Roberts*, C.C.A.Okl., 62 F.2d 579.

(3) On the other hand, it has been held that where property is zoned for commercial use, including operation of filling station, and permit is duly issued for construction of station, erection thereof may not be enjoined as nuisance, in absence of showing that filling station was being either improperly erected or that it would be negligently or improperly conducted, and fact that property owners improved part of area for residence purposes and desired that such area should so remain, erroneously assuming that district was restricted for residence purposes, did not entitle them to injunctive relief.—*Weaver v. Bishop*, 52 P.2d 853, 174 Okl. 492.

(4) Filling station in residential district as not constituting nuisance per se see supra § 771.

38. Okl.—*Bell v. Brockman*, 126 P.2d 78, 190 Okl. 583—*Weaver v. Bishop*, 52 P.2d 853, 174 Okl. 492.
Or.—*McGowan v. City of Burns*, 137 P.2d 994, 173 Or. 63.

39. Ark.—*City of Ft. Smith v. Norris*, 10 S.W.2d 861, 178 Ark. 399.
Ga.—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

Mo.—*Greene v. Spinning*, App., 48 S.W.2d 51.

N.C.—*Town of Wake Forest v. Medlin*, 154 S.E. 29, 199 N.C. 83.

Okl.—*Bell v. Brockman*, 126 P.2d 78, 190 Okl. 583—*Weaver v. Bishop*, 52 P.2d 853, 174 Okl. 492—*McPherson v. Woodward First Presb. Church*, 248 P. 561, 120 Okl. 40.

40. Okl.—*McPherson v. Woodward First Presb. Church*, supra.

41. Fla.—*Ficht v. McMullen*, 195 So. 610, 142 Fla. 638.

Ga.—*Howell v. Board of Com'rs for City of Quitman*, 149 S.E. 779, 169 Ga. 74.

42 C.J. p 1304 note 69.

42. Fla.—*Ficht v. McMullen*, 195 So. 610, 142 Fla. 638.

43. N.C.—*Holton v. Northwestern Oil Co.*, 161 S.E. 391, 201 N.C. 744.

44. Ga.—*Cooley v. Enzor*, 9 S.E.2d 277, 190 Ga. 290.

45. Ga.—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

Ill.—*Munie v. Millner*, 245 Ill.App. 257.

N.Y.—*Messina v. Scarlata*, 26 N.Y.S.2d 594, affirmed 26 N.Y.S.2d 597, 261 App.Div. 875.

Fact that lights at night on station interfered with enjoyment of adjoining dwelling house furnished no grounds for restraint of use—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400.

46. Mo.—*Greene v. Spinning*, App., 48 S.W.2d 51.

47. Ga.—*Cooley v. Enzor*, 9 S.E.2d 277, 190 Ga. 290—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373—*Thompson v. Texas Co.*, 143 S.E. 376, 166 Ga. 315—*Standard Oil Co. v. Kahn*, 141 S.E. 643, 165 Ga. 575.

Ill.—*Continental Illinois Bank & Trust Co. v. Standard Oil Co. of Indiana*, 257 Ill.App. 425.

Iowa.—*Yeanos v. Skelly Oil Co.*, 263 N.W. 834, 220 Iowa 1317.

Ky.—*Indian Refining Co. v. Berry*, 10 S.W.2d 630, 226 Ky. 123.

Mo.—*Greene v. Spinning*, App., 48 S.W.2d 51.

N.Y.—*Messina v. Scarlata*, 26 N.Y.S.2d 594, affirmed 26 N.Y.S.2d 597, 261 App.Div. 875.

N.C.—*Holton v. Northwestern Oil Co.*, 161 S.E. 391, 201 N.C. 744.

Ohio.—*Powell v. Craig*, 148 N.E. 607, 113 Ohio 245.

Tex.—*Continental Oil Co. v. City of Wichita Falls*, Com.App., 42 S.W.2d 236, certified questions answered, Com.App., 1 S.W.2d 596, 117 Tex. 256.

Va.—*Daniel v. Kosh*, 4 S.E.2d 381, 173 Va. 352.

42 C.J. p 1305 note 74.

Depreciation in value of property

(1) The mere fact of the depreciation in the value of the surrounding property does not operate to make the filling station a nuisance.

Ala.—*Milton v. Maples*, 179 So. 519, 235 Ala. 446.

Mo.—*Greene v. Spinning*, App., 48 S.W.2d 51.

42 C.J. p 1305 note 74 [a].

inately business or commercial district,⁴⁸ or one that is not exclusively residential,⁴⁹ or where the business is licensed by the proper authorities.⁵⁰ However, it has been held that the operation of a filling station in a strictly residential section,⁵¹ or near to a church,⁵² where unusual noise created by the starting and stopping of motor vehicles causes disturbance and annoyance, and where there is no public necessity for such a station, is a nuisance, as is a station so arranged as to cause the headlights of motor vehicles using it to shine into and upon the dwelling of another person.⁵³ The use of a motor vehicle emitting sparks and flames in a building in which are stored gasoline and oil, the floor of which is saturated therewith, and near tanks containing large quantities of gasoline, has been held to be a nuisance,⁵⁴ but the storage of a large quantity of gasoline at a filling station is not a nuisance where it is properly protected against danger of ignition and it is reasonably isolated from places frequented by human beings.⁵⁵

Power of state or municipality to declare nuisance. It is within the power of the state,⁵⁶ and of municipalities under appropriate grants of power,⁵⁷ to declare that, under particular circumstances and in particular localities, it shall be a nuisance in law and in fact to operate a filling station, pro-

vided such power is not exercised arbitrarily or with unjust discrimination.

§ 773. — Relief

- a. Persons entitled to relief
- b. Remedies

a. Persons Entitled to Relief

The state or a subdivision thereof may, through its duly authorized agent or official, proceed in equity on behalf of the public to abate or enjoin the construction or operation of a gasoline filling station as a public nuisance, and a private individual who suffers damage separate and apart from that suffered by the general public has the right to sue for the abatement of a filling station as a private nuisance.

The state or a subdivision thereof may, through its duly authorized agent or official, proceed in equity in behalf of the public to abate or enjoin the construction or operation of a gasoline filling station as a public nuisance,⁵⁸ but not as a private nuisance.⁵⁹ A private individual, on the other hand, may not as a member of the general public, and without showing special facts which are not equally applicable to other property owners of the district or the public generally, secure equitable relief against the owner or operator of a gasoline filling station.⁶⁰ One who suffers damage separate and apart from that suffered by the general public

(2) So, the fact that the surrounding property is made less valuable for residential purpose does not render filling station a nuisance.—*Continental Oil Co. v. City of Wichita Falls*, Com.App., 42 S.W.2d 236, certified questions answered, Com App., 1 S.W.2d 596, 117 Tex. 256.

48. U.S.—*Hazlett v. Marland Refining Co. of Ponca City*, C.C.A.Kan., 30 F.2d 808.

Okl.—*Weaver v. Bishop*, 52 P.2d 853, 174 Okl. 492.

Pa.—*Franklin St. M. E. Church of Johnstown v. Crystal Oil & Gas Co.*, 163 A. 910, 309 Pa. 357—*Sprout v. Levinson*, 148 A. 511, 298 Pa. 400.

49. Ala.—*Milton v. Maples*, 179 So. 519, 235 Ala. 446.

Okl.—*Bell v. Brockman*, 126 P.2d 78, 190 Okl. 583.

50. Ala.—*Milton v. Maples*, 179 So. 519, 235 Ala. 446.

Mass.—*Czapski v. Sun Oil Co.*, 21 N.E.2d 230, 303 Mass. 186.

N.C.—*Holton v. Northwestern Oil Co.*, 161 S.E. 391, 201 N.C. 744.

51. Ark.—*Huddleston v. Burnett*, 287 S.W. 1013, 172 Ark. 216.

Erection or operation of filling station in residential section as not constituting nuisance per se see *supra* § 771.

52. Okl.—*McPherson v. First Pres-*

byterian Church of Woodward, 248 P. 561, 120 Okl. 40, 51 A.L.R. 1215.

53. Miss.—*National Refining Co. v. Batte*, 100 So. 388, 135 Miss. 819.

Mo.—*Greene v. Spinning*, App., 48 S.W.2d 51.

54. Mo.—*Buchholz v. Standard Oil Co.*, 244 S.W. 973, 211 Mo.App. 397.

55. Mo.—*Buchholz v. Standard Oil Co.*, *supra*.

56. U.S.—*Texas Co. v. City of Tampa*, C.C.A.Fla., 100 F.2d 347.

N.C.—*Wake Forest v. Medlin*, 154 S.E. 29, 199 N.C. 83.

57. Miss.—*Gulf Refining Co. v. City of Laurel*, 192 So. 1, 187 Miss. 119.

58. Ga.—*Webb v. Alexander*, 43 S.E. 2d 668, 202 Ga. 436.

Right of municipality

Under statute providing that an action may be commenced to enjoin a public nuisance in the name of the state by the attorney general upon his own information or on the relation of a private individual who first obtains leave therefor from the court, it has been held that a municipality is not a private individual, and a municipality failing to bring action in the name of the state or first procuring leave of court to bring action, could not maintain an action under such statute to enjoin the erection of a gasoline filling station, nor could

the municipality maintain such action under a statute providing that any person may maintain an action to abate a private nuisance or a public nuisance from which he suffers injury peculiar to himself where the municipality was without property which could be affected by the erection of the filling station.—*City of Algoma v. Peterson*, 288 N.W. 809, 233 Wis. 82.

59. Ga.—*Webb v. Alexander*, 43 S.E. 2d 668, 202 Ga. 436.

60. Md.—*Bauernschmidt v. Standard Oil Co. of New Jersey*, 139 A. 531, 153 Md. 647.

Mass.—*Polish Political Club v. Clopper*, 157 N.E. 705, 260 Mass. 559.

N.Y.—*Coley v. Campbell*, 215 N.Y.S. 879, 126 Misc. 869.

Invalidity of permit for gasoline filling station has been held not to authorize injunction suit by private citizen, without proof of special damage.—*Bauernschmidt v. Standard Oil Co. of New Jersey*, 139 A. 531, 153 Md. 647.

Landowner, seeking to enjoin installation of gas tanks in filling station on adjoining property, can recover only on ground of special damages.—*Mitchell v. Wengelewski*, 259 Ill.App. 438—*Continental Illinois Bank & Trust Co. v. Standard Oil Co. of Indiana*, 257 Ill.App. 425.

has the right to sue for the abatement of the nuisance,⁶¹ as where a filling station is so constructed and arranged that the headlights of motor vehicles making use of it shine into and upon his dwelling house;⁶² and it has been held that the owner of property abutting upon a highway has a sufficient special interest to entitle him to maintain an action to enjoin a municipality from leasing a portion of the highway directly in front of his property for the purpose of the erection and maintenance of a filling station.⁶³

b. Remedies

In a proper case the construction or operation of a gasoline filling station constituting a nuisance may be enjoined or the objectionable features abated by a suit brought therefor, and the general rules and principles of equity, especially as they are applied to injunctive relief, are applicable in such suits.

In a proper case the construction or operation of a gasoline filling station constituting a nuisance may be enjoined or the objectionable features abated by a suit brought therefor.⁶⁴ Although it has been declared that restrictions on the location of

such stations should ordinarily be by zoning regulations, and not by injunctive decree,⁶⁵ the courts have jurisdiction to entertain such suits.⁶⁶

The general rules and principles of equity, especially as they are applied to injunctive relief, are applicable in such suits.⁶⁷ Thus, while a threatened injury affords a sufficient basis for maintaining a suit and complainant need not wait until the filling station is actually in operation,⁶⁸ in order to warrant enjoining an anticipated nuisance, the threatened injury must be certain and not merely possible or probable.⁶⁹ The right to maintain a bill to enjoin the erection or operation of a filling station as a nuisance may be lost by pursuing a statutory remedy⁷⁰ or by laches.⁷¹ The complaint must show all matters requisite to complainant's right to the relief asked,⁷² and all proper matters of defense may be urged in answer thereto.⁷³ The issues properly determinable by the court are those presented by the pleadings,⁷⁴ and the burden of proof rests on plaintiff to establish his essential allegations.⁷⁵ There is no presumption that the station

61. Miss.—National Refining Co v Batte, 100 So. 388, 135 Miss 819 Mo.—Greene v Spinning, App, 48 S W.2d 51.

62. Miss.—National Refining Co. v. Batte, 100 So. 388, 135 Miss. 819. Mo.—Greene v Spinning, App, 48 S. W.2d 51.

63. Wash.—Reed v. Seattle, 213 P. 923, 124 Wash. 185, 29 A.L.R. 446.

64. Ark.—Clark v. Hunt, 95 S.W.2d 558, 192 Ark. 865—City of Ft Smith v. Norris, 10 S.W.2d 861, 178 Ark. 399

Ga.—Rushing v. Thigpen, 37 S.E.2d 180, 200 Ga. 313.

Ill.—Munle v. Millner, 245 Ill.App. 257.

Tex.—City of Texarkana v. Mahry, Civ.App., 94 S.W.2d 871, error dismissed. 42 C.J. p 1304 note 73.

65. U.S.—Hazlett v. Marland Refining Co. of Ponca City, C.C.A.Kan., 30 F.2d 808.

N.Y.—Coley v. Campbell, 215 N.Y.S. 679, 126 Misc. 869.

Va.—Daniel v. Kosh, 4 S.E.2d 381, 173 Va. 352.

66. U.S.—Cities Service Oil Co. v. Roberts, C.C.A.Okl., 62 F.2d 579—Hazlett v. Marlands Refining Co. of Ponca City, C.C.A.Kan., 30 F.2d 808 Va.—Daniel v. Kosh, 4 S.E.2d 381, 173 Va. 352.

67. Discretion

Issuance of injunction rests in trial court's sound discretion, the exercise of which will not be interfered with except for manifest abuse.—

Richard v. Weiser, 198 A. 29, 329 Pa 203.

68. Ala.—Maples v Milton, 168 So 368, 232 Ala. 483—Bloch v. McCown, 123 So. 213, 219 Ala 656.

Pa.—Bortz v. Troth, Com Pl., 10 Fay L.J. 84.

69. Ark.—Moore v. Wallis, 86 S.W. 2d 1111, 191 Ark. 551.

Pa.—White v. Old York Road Country Club, 185 A. 316, 322 Pa. 147—Staples v Suburban Co., Com.Pl., 54 Montg.Co. 174

Tenn.—White v. Gulf Refining Co., 2 S.W.2d 414, 156 Tenn. 471.

Va.—Daniel v. Kosh, 4 S.E.2d 381, 173 Va. 352.

70. Unconditional intervention by person not party to the proceeding, invoking the statutory remedy, was held to preclude dismissal of bill originally brought by persons who had no standing in equity to maintain the bill by reason of having pursued statutory remedy—White v. Old York Road Country Club, 178 A. 3, 318 Pa. 346, remanded for rehearing on reargument 179 A. 434, 318 Pa. 569.

71. Complainants held not barred by laches

Pa.—Pennell v. Kennedy, 12 A.2d 54, 338 Pa. 285.

72. Cal.—Nagel v. Dorrington, 262 P. 718, 202 Cal. 698.

Ga.—Webb v. Alexander, 43 S.E.2d 668, 202 Ga. 436—Atlantic Refining Co. v. Farrar, 155 S.E. 327, 171 Ga. 371—Thompson v. Texas Co., 14 S.E. 376, 166 Ga. 315—Standard Oil

Co v. Kahn, 141 S.E. 643, 166 Ga. 575.

It is necessary to set forth facts showing the existence of the alleged nuisance, and mere conclusions are insufficient.—Webb v Alexander, 43 S.E.2d 668, 202 Ga. 436.

Bill held not to show special damages

Md.—Bauernschmidt v. Standard Oil Co. of New Jersey, 139 A. 531, 153 Md 647.

Bills held sufficient

Ala.—Maples v. Milton, 168 So. 368, 232 Ala. 483.

Ga.—Wilson v. Evans Hotel Co., 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

73. Prior annoyances

Imposition of annoyances and dangers attendant on construction and operation of gasoline service station cannot be justified by asserting a possible previous annoyance, especially where neighborhood continued in fact exclusively residential throughout entire period of asserted prior annoyance.—Bortz v. Troth, 59 A.2d 93, 359 Pa. 326.

74. Ala.—Fletcher v. Barnard, 133 So. 29, 222 Ala. 380.

Evidence as to matter not pleaded was inadmissible.—Indian Refining Co. v. Berry, 10 S.W.2d 630, 226 Ky. 123.

75. Ala.—City of Tuscaloosa v. Standard Oil Co. of Kentucky, 130 So. 186, 221 Ala 670.

Ind.—Griffin v. Hubbell, 11 N.E.2d 136, 212 Ind. 684.

will be conducted improperly.⁷⁶ General rules as to the admissibility⁷⁷ and the weight and sufficiency⁷⁸ of evidence are applicable, as are general rules as to questions of law or fact.⁷⁹ The relief granted should in general conform to the prayers of the bill.⁸⁰ Where the filling station can be operated in such manner as not to constitute a nuisance, defendant should not be restrained from operating it,⁸¹ but the injunction should go merely against carrying it on so as to prove injurious or offensive.⁸² In a proper case damages may be recovered.⁸³

Notice. A person who actively maintains a filling station constructed by another in such manner as to constitute a nuisance has been held not to be entitled to notice before suit is filed.⁸⁴

76. Tex.—Gulf Refining Co. v. Dishroon, Civ.App., 13 S.W.2d 230.

77. Tex.—Continental Oil v. Berry, Civ.App., 52 S.W.2d 953, error refused.

78. Evidence held sufficient

(1) To establish right to relief.—Magnolia Petroleum Co. v. Wright, 254 P. 41, 124 Okl. 55.

(2) To establish nuisance.

Ala.—City of Tuscaloosa v. Standard Oil Co. of Kentucky, 130 So. 186, 221 Ala. 670.

Pa.—White v. Old York Road Country Club, 178 A. 3, 318 Pa. 346, remanded for rehearing on reargument 179 A. 434, 318 Pa. 569.

(3) To show special damage.—Mitchell v. Wengelowski, 259 Ill.App. 438.

(4) To support finding as to residential or semiresidential character of neighborhood.

Ala.—City of Tuscaloosa v. Standard Oil Co. of Kentucky, supra.

Pa.—Bortz v. Troth, 59 A.2d 93, 359 Pa. 326—Pennell v. Kennedy, 12 A. 2d 54, 338 Pa. 285.

(5) To support finding that filling station would not constitute a nuisance.—City of Ft. Smith v. Norris, 10 S.W.2d 861, 178 Ark. 399.

Evidence held insufficient

(1) To establish nuisance.

U.S.—Hensley v. Cities Service Oil Co., D.C.Okl., 58 F.2d 347.

Ala.—Bloch v. McCown, 135 So. 633, 223 Ala. 348.

Ark.—Moore v. Wallis, 86 S.W.2d 1111, 191 Ark. 551.

Iowa.—Yeanos v. Skelly Oil Co., 263 N.W. 834, 220 Iowa 1317.

N.Y.—Messina v. Scarlata, 26 N.Y.S. 2d 594, affirmed 26 N.Y.S.2d 597, 261 App.Div. 875.

Pa.—Franklin St. M. E. Church of Johnstown v. Crystal Oil & Gas Co., 163 A. 910, 309 Pa. 357.

(2) To support finding that station would constitute a nuisance.—Woo-

ten v. Smith, 145 S.E. 446, 167 Ga. 256.

79. Ky.—Indian Refining Co. v. Berry, 10 S.W.2d 630, 226 Ky. 123.

80. Damages

Complaint containing prayer for general and special relief, but not for compensation, was sufficient to warrant award of damages shown to be incidental to equitable relief prayed for.—Mercer v. Keynton, 163 So. 411, 121 Fla. 87.

81. Mo.—Greene v. Spinning, App., 48 S.W.2d 51.

82. Mo.—Greene v. Spinning, supra.

83. Fla.—Mercer v. Keynton, 163 So. 411, 121 Fla. 87.

Ky.—Indian Refining Co. v. Berry, 10 S.W.2d 630, 226 Ky. 123.

The proper measure of damages is not the depreciation in the market value of the property, but the diminution in the value of the use of the property during the continuance of the nuisance, directly caused thereby, and, in cases where the property is rented, the measure of damages is the reduction of the rental value.—Indian Refining Co. v. Berry, supra.

Damages prior to acquisition

One acquiring a filling station is not liable for damage done to owners of adjoining land by previous operation thereof.—Greene v. Spinning, Mo.App., 48 S.W.2d 51.

84. Mo.—Greene v. Spinning, supra.

85. Ga.—Buffington v. Crowe, 15 S. E.2d 811, 65 Ga.App. 417.

Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461.

Okl.—State ex rel. King v. McCurdy, 43 P.2d 124, 171 Okl. 445—State ex rel. King v. Friar, 25 P.2d 620, 165 Okl. 145.

86. Ark.—Sander v. Blytheville, 262 S.W. 23, 164 Ark. 434.

"Purpresture" defined see 51 C.J. p 105 note 90—p 105 note 99.

87. Okl.—State ex rel. King v. Mc-

§ 774. Use of Street or Highway

A filling station or gasoline pump may not be constructed in such manner as to constitute a permanent material encroachment on the street or highway, and generally a municipality has the right and power to regulate or prohibit the use of streets, parkways, or parking for gasoline filling stations or equipment, and has no power, in the absence of statute, to grant authority for the permanent operation and maintenance of a filling station in the street.

A filling station or gasoline pump may not be constructed or located in such manner as to constitute a permanent material encroachment on the street or highway,⁸⁵ and if it does so it is a purpresture,⁸⁶ and may constitute a public nuisance,⁸⁷ even though it is not in the portion of the street or highway used for the passage of vehicles.⁸⁸ It has been held, however, that the occupation of a

Curdy, 43 P.2d 124, 171 Okl. 445—State ex rel. King v. Friar, 25 P.2d 620, 165 Okl. 145.

88. Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461.

42 C.J. p 1305 note 89.

Violation of constitutional provision as to use of streets

Operation of private business in city street, without consent of city, by placing gasoline pumps and air appliances in parkway between sidewalk and curb, and using them in servicing automobiles parked on street parallel to curb, has been held to constitute a public nuisance as violative of constitutional provision prohibiting use of streets for operation of private enterprise without consent of municipal authorities.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Curb pumps near fire hydrant and school

Ala.—McCraney v. City of Leeds, 1 So 2d 894, 241 Ala. 198.

Apron approaches declared nuisances by ordinance

Apron approaches to a filling station, retaining the curbstone and passing traffic over it, have been held to constitute nuisances as unreasonable obstructions to public travel and an ordinance ordering their abatement is in the interest of public health, safety and welfare and valid, notwithstanding it is in the form of a resolution.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.

The fact that pumps are installed under revocable permit does not bring them within the rule permitting merely temporary obstructions and encroachments on the street.—People v. Wolper, 183 N.E. 451, 350 Ill. 461.

Convenience resulting to owners of motor vehicles from curb gasoline pumps does not bring operation of such pumps within bounds of public

parkway between the sidewalk and the traveled street by a filling station is not illegal, in the absence of proper action on the part of the municipality prohibiting such use.⁸⁹

A municipality has the right and power to regulate or prohibit the use of streets, parkways, or parking for gasoline filling stations or equipment,⁹⁰ and such power exists under statutes giving it general police power and control over structures and projections on and over streets.⁹¹ Further, under its general police power a municipality has the power to compel the abatement and removal of such structures already existing when the city's welfare demands it;⁹² and unless such power is exercised in an arbitrary, discriminatory, or unreasonable manner,⁹³ or invades constitutional rights of property,⁹⁴ it will not be interfered with by the courts.

Power to permit and exercise thereof. A municipality has no power, in the absence of statute, to grant authority for the permanent operation and maintenance of a filling station materially encroaching on or in the street,⁹⁵ and such permission, if granted, confers no vested or irrevocable rights on the grantee.⁹⁶ However, under the rule that the legislature may authorize an encroachment on the public highway as long as the public use

is not unreasonably interfered with, statutory authority to a municipality to permit the storage of gasoline or oil within the bounds of the highway beneath the surface and to allow on the curb arrangements for drawing therefrom is not invalid,⁹⁷ and a license permitting the erection of a curb pump is a proper exercise of such authority.⁹⁸ The grant or refusal of a permit to install curb pumps is discretionary.⁹⁹ A municipality in granting or refusing such permit must deal fairly with its citizens, and ordinarily cannot make distinctions between different classes of its citizens,¹ but not every classification is invalid,² and a classification based on time and existing conditions has been upheld.³ Notwithstanding the issuance of such permit, a municipality, possessing the requisite power, may cause a curb pump to be removed when in the judgment of the proper officials it obstructs the public highway or causes it to be unsafe to public travel.⁴

Remedies. Under some statutes it has been held that the state attorney general is entitled to maintain an action to enjoin the construction of a filling station upon a portion of the state highway within a city or town notwithstanding the statutory duty of local maintenance.⁵ Where a filling station invades the public right in municipal streets,

use, but such operation is nonessential private use for private profit.—*People v. Wolper*, supra.

89. Okl.—*Herrington v. City of Pryor Creek*, 110 P.2d 906, 188 Okl. 483.

General ordinance not prohibiting

A general ordinance prohibiting obstruction of streets, alleys or sidewalks, has been held to be a general regulatory measure for prevention of obstructions, and not intended to regulate or prohibit the placing of gasoline pumps in parkways.—*Herrington v. City of Pryor Creek*, supra.

90. Okl.—*Herrington v. City of Pryor Creek*, supra.

91. N.J.—*Bozza v. Board of Com'rs of City of Perth Amboy*, 145 A. 233, 7 N.J.Misc. 287.

42 C.J. p 1306 note 20.

Crossing of sidewalks

(1) An ordinance prohibiting filling station on street, where automobiles might be driven across sidewalks, was an exercise of police power for safety of persons and property.—*Howell v. Board of Com'rs for City of Quitman*, 149 S.E. 779, 169 Ga. 74.

(2) Refusal of permit on ground that motorists would drive over sidewalks see *infra* § 776 b.

92. N.Y.—*McCoy v. Apgar*, 148 N.E. 793, 241 N.Y. 71, 42 A.L.R. 973. 42 C.J. p 1306 note 22.

93. Ark.—*Sander v. Blytheville*, 262 S.W. 23, 164 Ark. 434.

42 C.J. p 1306 note 23.

Little-used street

Such an ordinance is not unreasonable or arbitrary merely because it prohibits the installation or maintenance of pumps or filling stations upon a little-used street as completely as upon a busy street.—*Slocum v. Wichita*, 217 P. 297, 114 Kan. 260.

Penalty held not so indefinite as to destroy validity of ordinance prohibiting service stations on sidewalks.—*Bozza v. Board of Com'rs of City of Perth Amboy*, 145 A. 233, 7 N.J.Misc. 287.

94. Ark.—*Sander v. Blytheville*, 262 S.W. 23, 164 Ark. 434.

95. Ark.—*Sander v. Blytheville*, supra.

Ill.—*People v. Wolper*, 183 N.E. 451, 350 Ill. 451.

N.Y.—*Orrin Realty Corporation v. Addyman*, 255 N.Y.S. 714, 235 App. Div. 732.

Lease

The fact that a filling station is a convenience to the public traveling in automobiles does not authorize the leasing of a part of the public highway in a city for the purpose of the erection and maintenance of such stations.—*Reed v. Seattle*, 213 P. 923,

124 Wash. 185, 191, 29 A.L.R. 446—42 C.J. p 1305 note 91.

96. Ill.—*People v. Wolper*, 183 N.E. 451, 350 Ill. 451.

42 C.J. p 1305 note 95.

97. N.J.—*Bozza v. Board of Com'rs of City of Perth Amboy*, 145 A. 233, 7 N.J.Misc. 287.

N.Y.—*McCoy v. Apgar*, 148 N.E. 793, 241 N.Y. 71, 42 A.L.R. 973.

98. N.Y.—*McCoy v. Apgar*, supra. 42 C.J. p 1305 note 93.

Permit as barring injunction

Where permit issued by city to operate gasoline pumps on parking in front of lots was not shown to have been canceled, and city had not stated by ordinance or otherwise that use of parkway for pumps was unreasonable, city could not enjoin such use.—*Herrington v. City of Pryor Creek*, 110 P.2d 906, 188 Okl. 483.

99. N.J.—*Silvester v. Mayor and Council of Borough of Princeton*, 139 A. 517, 104 N.J.Law 18.

1. Ky.—*Hines v. Jenkins*, 36 S.W.2d 387, 237 Ky. 676.

2. Ky.—*Hines v. Jenkins*, supra.

3. Ky.—*Hines v. Jenkins*, supra.

4. N.J.—*Bozza v. Board of Com'rs of City of Perth Amboy*, 145 A. 233, 7 N.J.Misc. 287.

5. Okl.—*State ex rel. King v. McCurdy*, 43 P.2d 124, 171 Okl. 445—

a bill in equity by the municipality to abate it is a proper remedy.⁶ In order to obtain relief in such suit, it is not necessary for the city to undertake simultaneous and similar action as to all other filling stations in some respects invading the public right in the streets.⁷

§ 775. Municipal Regulations and Restrictions

The power of cities and towns to regulate and restrict gasoline filling stations must rest on valid statutory or charter provisions and must be exercised reasonably and without discrimination, although the burden of showing the invalidity of a regulatory ordinance is on the person who attacks it.

While the power of cities and towns to regulate

and restrict gasoline filling stations by ordinance has in some cases gone unquestioned,⁸ such power must undoubtedly rest on valid statutory or charter provisions.⁹ The power to regulate and restrict gasoline filling stations by ordinance has been held to exist under various statutory provisions.¹⁰ The power has frequently been held to be included within the powers conferred by the general welfare provisions of statutes and charters,¹¹ and thereunder cities and towns have the power to define where¹² and how¹³ filling stations may be constructed and operated, and to regulate the use of driveways across sidewalks to such stations;¹⁴ and a vested right cannot be asserted against the proper exercise of such police power.¹⁵

State ex rel. King v. Friar, 25 P.2d 620, 165 Okl. 145.

6. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Mandamus as proper remedy to compel city or its officers to remove gasoline pumps from its streets and sidewalks see Mandamus § 179 d.

Evidence held to sustain finding for city

Ala.—McCraney v. City of Leeds, 1 So 2d 894, 241 Ala. 198.

7. Ala.—McCraney v. City of Leeds, supra.

8. Colo.—City of Idaho Springs v. Coleman, 30 P.2d 861, 94 Colo. 418.
Ky.—Slaughter v. Post, 282 S.W. 1091, 214 Ky. 175.

9. U.S.—City of Vincennes, Ind., v. Marland Refining Co., C.C.A.Ind., 33 F.2d 427.

Tex.—City of Texarkana v. Mabry, Civ.App., 94 S.W.2d 871, error dismissed.

10. Idaho—Continental Oil Co. v. City of Twin Falls, 286 P. 353, 49 Idaho 89, followed in Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.

Md.—Berner v. Tribbitt, 57 A.2d 346.
Mich.—Fletcher Oil Co. v. Bay City, 226 N.W. 248, 247 Mich. 572.

Miss.—Gulf Refining Co. v. City of Laurel, 192 So. 1, 187 Miss. 119.
N.J.—Hirschorn v. Castles, 174 A. 211, 113 N.J.Law 277.

Va.—Martin v. City of Danville, 138 S.E. 629, 148 Va. 247.

Power of municipality to declare filling station a nuisance see supra § 772.

Power to regulate storage of dangerous materials

Statute granting power to regulate storage of gunpowder and other dangerous materials authorized ordinance prohibiting gasoline filling station within five hundred feet of residence or existing filling station.—

State ex rel. Newman v. Pagels, 250 N.W. 430, 212 Wis. 475.

11. Ark.—Van Hovenberg v. Holman, 144 S.W.2d 718, 201 Ark. 370.
—Herring v. Stannus, 275 S.W. 321, 169 Ark. 244.

Fla.—City of Miami v. Direct Distributors, 183 So. 841, 134 Fla. 430.
—Harz v. Paxton, 120 So. 3, 97 Fla. 154.

Idaho—Continental Oil Co. v. City of Twin Falls, 286 P. 353, 49 Idaho 89, followed in Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.

Iowa—Yeanos v. Skelly Oil Co., 263 N.W. 834, 220 Iowa 1317—Cecil v. Toenjes, 228 N.W. 874, 210 Iowa 407.

Md.—Benner v. Tribbitt, 57 A.2d 346.
N.J.—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135—Wake Forest v. Medlin, 154 S.E. 29, 199 N.C. 83.

Tex.—City of Fort Worth v. Gulf Refining Co., Com.App., 55 S.W.2d 792, reversed on other grounds City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512—City of San Antonio v. Humble Oil & Refining Co., Civ.App., 27 S.W.2d 868, error dismissed—City of San Antonio v. Robert Thompson & Co., Civ.App., 23 S.W.2d 796, case dismissed on other grounds Robert Thompson & Co. v. City of San Antonio, Com.App., 38 S.W.2d 784.

Wis.—Wadhams Oil Co. v. City of Delavan, 243 N.W. 224, 208 Wis. 578.

42 C.J. p 1306 note 2.

12. Ark.—Van Hovenberg v. Holman, 144 S.W.2d 718, 201 Ark. 370.
—Herring v. Stannus, 275 S.W. 321, 169 Ark. 244.

Fla.—State ex rel. Dallas Inv. Co. v. Peace, 190 So. 607, 139 Fla. 394.
Idaho—Continental Oil Co. v. City of Twin Falls, 286 P. 353, 49 Idaho

89, followed in Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.

Iowa—Yeanos v. Skelly Oil Co., 263 N.W. 834, 220 Iowa 1317.

Ky.—Cayce v. City of Hopkinsville, 289 S.W. 223, 217 Ky. 135.

Md.—Mayor and Council of Pocomoke City v. Standard Oil Co. of New Jersey, 159 A. 902, 162 Md. 368.

N.J.—Interstate Oil Co. v. City of Orange, 165 A. 99, 11 N.J. Misc. 89.

Tenn.—McKelley v. City of Murfreesboro, 36 S.W.2d 99, 162 Tenn. 304.

Tex.—Lombardo v. City of Dallas, 73 S.W.2d 475, 124 Tex. 1.

Wis.—State ex rel. City of Algoma v. Peterson, 2 N.W.2d 253, 239 Wis. 599—Wadhams Oil Co. v. City of Delavan, 243 N.W. 224, 208 Wis. 578.

42 C.J. p 1306 note 3.

Filling stations within building and zoning regulations see Municipal Corporations §§ 224-228.

13. Va.—City of Alexandria v. Texas Co., 1 S.E.2d 296, 172 Va. 209.

42 C.J. p 1306 note 3.

14. D.C.—Brownlow v. O'Donoghue, 276 F. 636, 51 App.D.C. 114, 22 A.L.R. 939.

42 C.J. p 1306 note 4.

15. Wash.—State v. Fleming, 225 P. 647, 129 Wash. 646.

42 C.J. p 1306 note 5.

Fact that ordinance will injure certain persons affected thereby is not a valid objection to the proper exercise of power.—State v. Moye, 156 S.E. 130, 200 N.C. 11, appeal dismissed Moye v. State of North Carolina, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428.

Interference for aesthetic reasons

A municipal ordinance which seeks to prevent the erection of a gasoline service station for merely aesthetic reasons must have undoubted authority for its passage before it can be held to interfere with vested

Such power must be exercised reasonably;¹⁶ the exercise of such power must not be arbitrary¹⁷ or discriminatory,¹⁸ and the regulation or restriction, in order to be valid under a general welfare

rights.—*City of Little Falls v. Fisk*, 24 N.Y.S.2d 460.

16. N.J.—*Atlantic Refining Co. v. Township Committee of Haddon Tp.*, 14 A.2d 786, 125 N.J.Law 202.
N.C.—*MacRae v. City of Fayetteville*, 150 S.E. 810, 198 N.C. 51.
Okl.—*City of Muskogee v. Morton*, 261 P. 183, 128 Okl. 17.
42 C.J. p 1306 note 6.

Price signs

(1) A local law providing that it shall be unlawful to sell gasoline unless the seller posts a sign of certain dimensions on each dispensing device stating the selling price per gallon, the name, grade, or quality of gasoline, and the amount of taxes, and prohibiting the posting of any other price signs, has been held to be a reasonable exercise of the police power.—*People v. Arlen Service Stations*, 31 N.E.2d 184, 284 N.Y. 340, followed in *People v. Bluestein*, 31 N.E.2d 924, 284 N.Y. 800.

(2) Validity of similar statutes see *supra* § 770.

Station without attendant

An ordinance prohibiting the installation and operation of coin-operated pumps without an attendant has been held to be valid.
Colo.—*Starkey v. City of Longmont*, 15 P.2d 620, 91 Colo. 387.

Neb.—*Hawkins v. City of Red Cloud*, 243 N.W. 431, 123 Neb. 487, appeal dismissed *Hawkins v. City of Red Cloud*, Neb., 53 S.Ct. 660, 289 U.S. 704, 77 L.Ed. 1461, followed in *Hawkins v. City of Red Cloud*, 243 N.W. 432, 123 Neb. 490.

Location

(1) An ordinance prohibiting erecting of filling stations within certain area of business district has been held to be reasonable.—*Mayor and Council of Pocomoke City v. Standard Oil Co. of New Jersey*, 159 A. 902, 162 Md. 368.

(2) So, ordinances prohibiting filling stations within a specified distance of certain buildings or grounds have been held not to be unreasonable.

Fla.—*State ex rel. Dallas Inv. Co. v. Peace*, 190 So. 607, 139 Fla. 394.
Ky.—*Cayce v. City of Hopkinsville*, 289 S.W. 223, 217 Ky. 135.

N.J.—*Vine v. Board of Adjustment of Village of Ridgewood*, 56 A.2d 122, 136 N.J.Law 416—*Interstate Oil Co. v. City of Orange*, 165 A. 99, 11 N.J.Misc. 89.

N.Y.—*In re Peck*, 246 N.Y.S. 280, 231 App.Div. 99, affirmed 177 N.E. 186, 256 N.Y. 669.

Pa.—*Sun Oil Co. v. City of York*, 38 Pa.Di. & Co. 678, 54 York Leg. Rec. 26.

Tenn.—*Higgs v. City of Martin*, 51 S.W.2d 237, 164 Tenn. 465—*McKelley v. City of Murfreesboro*, 36 S.W.2d 99, 162 Tenn. 304.

Tex.—*City of San Antonio v. Humble Oil & Refining Co., Civ.App.*, 27 S.W.2d 868, error dismissed.

Wis.—*State ex rel. Newman v. Pagels*, 250 N.W. 430, 212 Wis. 475.
42 C.J. p 1306 note 3 [a] (1), (2).

(3) Such ordinance has been held to be not only intended to avoid traffic hazards in area where pedestrians converge on place of assemblage, but also risk of fire, and, where ordinance mentions church, it is intended to avoid noises and interruptions that would interfere with worship and comfort and quiet of worshippers.—*Vine v. Board of Adjustment of Village of Ridgewood*, 56 A.2d 122, 136 N.J.Law 416.

(4) Fact that such ordinance prescribes distance from curtilage rather than from edifice, has been held not to be unreasonable and void in toto, although such ordinance may operate unreasonably in some circumstances.—*Vine v. Board of Adjustment of Village of Ridgewood*, *supra*.

(5) On the other hand, an ordinance prohibiting erection of drive-in gasoline filling station within a specified distance of school grounds has been held to be unreasonable.—*Continental Oil Co. v. City of Twin Falls*, 286 P. 353, 49 Idaho 89, followed in *Independent School Dist. No 1 of Twin Falls County v. Continental Oil Co.*, 286 P. 360, 49 Idaho 109.

(6) An ordinance prohibiting the keeping or storage of gasoline in quantities in excess of one thousand gallons except at a place one thousand feet from any dwelling house has been held to be unreasonable.—*Lees v. Cohoes Motor Co.*, 203 N.Y.S. 65, 122 Misc. 373.

(7) An ordinance which, in addition to prohibiting gasoline stations within a certain distance of certain buildings, prohibits such stations within a certain distance of another station has been held not to be unreasonable.

Fla.—*State ex rel. Dallas Inv. Co. v. Peace*, 190 So. 607, 139 Fla. 394.

Tex.—*City of San Antonio v. Humble Oil & Refining Co., Civ.App.*, 27 S.W.2d 868, error dismissed.

Wis.—*State ex rel. Newman v. Pagels*, 250 N.W. 430, 212 Wis. 475.

(8) However, it has also been held that an ordinance prohibiting erection of gasoline service station within a specified distance of another station is invalid as unreasonable.—*Atlantic Refining Co. v. Township*

Committee of Haddon Tp., 14 A.2d 786, 125 N.J.Law 202.

17. Fla.—*State ex rel. Dallas Inv. Co. v. Peace*, 190 So. 607, 139 Fla. 394.

Ky.—*Slaughter v. Post*, 282 S.W. 1091, 214 Ky. 175

N.C.—*Shuford v. Town of Waynesville*, 198 S.E. 585, 214 N.C. 135—*Wake Forest v. Medlin*, 154 S.E. 29, 199 N.C. 83.

Okl.—*City of Muskogee v. Morton*, 261 P. 183, 128 Okl. 17.
42 C.J. p 1306 note 7.

Near school

Ordinance prohibiting erection or maintenance of gasoline filling station within certain distance of school property has been held not to be arbitrary.—*State v. Moye*, 156 S.E. 130, 200 N.C. 11, appeal dismissed *Moye v. State of North Carolina*, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428.

In residential districts

An ordinance making it unlawful to operate a filling station in a residential district has been held not to be invalid as arbitrary.—*Town of Wake Forest v. Medlin*, 154 S.E. 29, 199 N.C. 83.

18. La.—*State ex rel. National Oil Works of Louisiana v. McShane*, 106 So. 252, 159 La. 723.

N.C.—*Shuford v. Town of Waynesville*, 198 S.E. 585, 214 N.C. 135—*Wake Forest v. Medlin*, 154 S.E. 29, 199 N.C. 83.

Okl.—*City of Muskogee v. Morton*, 261 P. 183, 128 Okl. 17.
42 C.J. p 1306 note 8.

Discrimination in favor of curb stations

Ordinance prohibiting drive-in gasoline stations within certain distance of certain buildings was held invalid as discriminating in favor of curb stations.

U.S.—*City of Vincennes, Ind., v. Marland Refining Co., C.C.A.Ind.*, 33 F. 2d 427.

Idaho—*Continental Oil Co. v. City of Twin Falls*, 286 P. 353, 49 Idaho 89, followed in *Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co.*, 286 P. 360, 49 Idaho 109.

Discrimination in favor of existing stations

(1) Ordinance prohibiting erection of more filling stations in district has been held void as discriminatory and giving monopoly to existing stations.—*Town of Clinton v. Standard Oil Co.*, 137 S.E. 183, 193 N.C. 432, 55 A.L.R. 252.

(2) On like principle, ordinance prohibiting erection of gasoline service stations within a specified distance of certain buildings, being in-

provision, must have some substantial tendency to promote and protect the public health, safety, or general welfare.¹⁹ In determining the validity of an ordinance, the judiciary will not inquire into the motives or reasons of the legislature or the members thereof.²⁰ Lapse of time, however long, will not validate an invalid ordinance.²¹

The burden of showing the invalidity of the ordinance is on the attacker,²² and in the absence of a contrary showing the action of the municipal legislative body in enacting the ordinance is presumed to be well founded,²³ and will not be disturbed if it has any reasonable basis in the facts.²⁴ Neither individual citizens directly affected by the

violation of an ordinance nor public officials acting as individuals can by their conduct prejudice or destroy the rights of the public to require enforcement of valid ordinances.²⁵

Construction and operation of ordinances. Generally speaking, the scope of an ordinance regulating gasoline filling stations and restricting the use of property for such purposes should not be extended, but should be restricted, by construction and interpretation.²⁶ A regulation prohibiting a filling or service station within a specified distance of certain buildings or of the entrances thereto, has been held to contemplate measurement from the nearest boundaries,²⁷ and a regulation prohibiting

applicable to service stations already established, has been held invalid as discriminatory.—*MacRae v. City of Fayetteville*, 150 S.E. 810, 198 N.C. 61—*Burden v. Town of Ahoskie*, 150 S.E. 808, 198 N.C. 92.

Near school

An ordinance prohibiting the erection or maintenance of a gasoline filling station within a certain distance of school property has been held not to be discriminatory.—*State v. Moye*, 156 S.E. 130, 200 N.C. 11, appeal dismissed *Moye v. State of North Carolina*, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428.

In residential districts

An ordinance making it unlawful to operate a filling station in a residential district has been held not to be invalid as discriminatory.—*Town of Wake Forest v. Medlin*, 154 S.E. 29, 199 N.C. 83.

In business district

Ordinance preserving business area from intrusion of filling stations has been held not to be discriminatory because filling stations exist near restricted territory.—*Mayor and Council of Pocomoke City v. Standard Oil Co. of New Jersey*, 159 A. 902, 162 Md. 368.

19. Va.—*City of Alexandria v. Texas Co.*, 1 S.E.2d 296, 172 Va. 209. 42 C.J. p 1306 note 9.

Use of floodlights

An attempted restriction by city prohibiting installation of floodlights on filling station property has been held not enforceable under city's police power, where there was no evidence that restriction bore any relation to public health, safety, morals, or general welfare.—*City of Alexandria v. Texas Co.*, supra.

20. N.Y.—*In re Peck*, 246 N.Y.S. 280, 231 App.Div. 99, affirmed 177 N.E. 186, 256 N.Y. 669.

21. Idaho.—*Continental Oil Co. v. City of Twin Falls*, 286 P. 353, 49 Idaho 89, followed in *Independent School Dist. No. 1 of Twin Falls*

County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.

22. N.C.—*State v. Moye*, 156 S.E. 130, 200 N.C. 11, appeal dismissed *Moye v. State of North Carolina*, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428.

23. N.C.—*State v. Moye*, 156 S.E. 130, 200 N.C. 11, appeal dismissed *Moye v. State of North Carolina*, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428.

24. D.C.—*Brownlow v. O'Donoghue*, 276 F. 636, 51 App.D.C. 114, 22 A.L.R. 939.

Fla.—*State ex rel Dallas Inv. Co. v. Peace*, 190 So. 607, 139 Fla. 394. Pa.—*Sun Oil Co. v. City of York*, 38 Pa.Dist. & Co. 678, 54 York Leg. Rec. 26.

Va.—*Martin v. City of Danville*, 138 S.E. 629, 148 Va. 247.

Court cannot pass on wisdom or sound judgment or lack thereof on the part of the legislative body in enacting the ordinance—*Yeanos v. Skelly Oil Co.*, 263 N.W. 834, 220 Iowa 1317.

25. Tex.—*City of San Antonio v. Humble Oil & Refining Co.*, Civ. App., 27 S.W.2d 868, error dismissed.

Property owners who have conditionally sold lot for use as filling station in restricted area have no greater right to their bargain than purchaser has to violate valid ordinance.—*Mayor and Council of Pocomoke City v. Standard Oil Co. of New Jersey*, 159 A. 902, 162 Md. 368.

26. Colo.—*Chamberlain v. Roberts*, 253 P. 27, 81 Colo. 23, followed in *Roberts v. Gross*, 275 P. 1118, 85 Colo. 333.

N.Y.—*People v. Pearl*, N.Y.Sp.Sess., 17 N.Y.S.2d 825, 173 Misc. 467.

Station prohibited on certain "blocks"

Where store was on opposite side of street, filling station on side used for dwellings was not forbidden by ordinance prohibiting filling station on "block" used exclusively for

dwellings, "block" being used in sense of both sides of street.—*Chamberlain v. Roberts*, 253 P. 27, 81 Colo. 23, followed in *Roberts v. Gross*, 275 P. 1118, 85 Colo. 333.

Lots "now used" for residence property

Under ordinance prohibiting filling stations in blocks where certain percent of the lots are "now used" for residence purposes, vacant lots cannot be considered as "now used" for residence purposes even though their owners intend so to use them in future.—*Kirkwood Bros. v. City of Madisonville*, 18 S.W.2d 951, 230 Ky. 104.

Evidence held not to show violation of ordinance—*Gulf Refining Co. v. City of Dallas*, Tex.Civ.App., 10 S.W.2d 151, error dismissed.

27. Ill.—*People ex rel. Love v. McDonnell*, 238 Ill.App. 234.

Straight-line measurements

Under ordinance providing that no part of filling station shall be within specified distance of lot line of plot on which is located certain buildings, restricted area is measurable by a straight line from one point to the other but not by line running along nearest sidewalk route between the two points, in absence of a clear expression to the contrary.—*Vine v. Board of Adjustment of Village of Ridgewood*, 56 A.2d 122, 136 N.J.Law 416.

An "entrance" within the meaning of an ordinance prohibiting a filling station within a specified distance from "any entrance" to certain buildings or grounds has been held not to be limited to front entrances, but to include side and rear entrances as well, but the entrance must be such as to afford a means of ingress accessible to anybody desiring to pass from the street or other point outside the building or grounds into the latter by a well-defined existing route.—*In re White*, 180 N.E. 873, 95 Ind.App. 579.

a filling or service station within a specified distance of property on which there is a building used for a church prohibits the construction of such a station within such distance of a building, any part of which is regularly and exclusively used for religious services.²⁸

Retrospective effect. In general, unless it clearly appears from the terms of an ordinance or regulation restricting the erection or maintenance of filling and service stations that it is intended to relate to existing structures, it will be construed to operate prospectively only, where to do otherwise would materially change existing rights.²⁹ The erection of a new filling station in the place of an old one after demolition of the latter has been held not subject to the provisions of restrictive regulations which were not applicable to the station replaced because they took effect after its construction.³⁰

Offenses. The violation of municipal regulations and restrictions with respect to gasoline filling stations is sometimes made a criminal offense.³¹ On finding a person guilty of violating such ordinance, it is the duty of the trial court to fix the fine or punishment within the limits fixed by the ordinance.³²

Restraining violation of regulation. The fact that an ordinance regulating or restricting gasoline

filling stations fixes a penalty for violations does not deprive a court of equity of jurisdiction to issue an injunction to enjoin the prohibited conduct.³³ It has been held, however, that equity will not restrain the violation of an ordinance regulating filling stations unless the act which constitutes the violation is a nuisance or operates to cause an irreparable injury to property or rights of a pecuniary nature.³⁴

§ 776. — Permit or License

- a. In general
- b. Procurement, requisites, and operation and effect
- c. Remedies of persons adversely affected by grant or refusal

a. In General

Statutes and ordinances frequently require a municipal permit or license in order to construct or operate a gasoline filling station, and such requirement has been held to be within the powers of cities or towns; but the power to impose a license fee as a tax must rest on the municipality's taxing powers and not its regulatory powers.

In the absence of a statute or ordinance otherwise providing, no municipal permit or license is required in order to construct or operate a gasoline filling station,³⁵ but, where an ordinance so provides, such a permit or license is necessary.³⁶ The requirement of a permit or license has been

28. Ill.—People v. McDonnell, 238 Ill App 224.

42 C.J. p 1307 note 36.

29. Tex.—Invader Oil, etc., Co. v. Ft Worth, Civ.App., 229 S.W. 616, reversed on other grounds, Com.App., 238 S.W. 206.

42 C.J. p 1307 note 37

Regulations held applicable to existing stations

N.Y.—Hilzington v. Eldred Refining Co. of New York, 257 N.Y.S. 464, 235 App.Div. 486.

30. Ohio—State v. Dauben, 124 N.E. 232, 99 Ohio St. 406.

31. Colo.—City of Idaho Springs v. Coleman, 30 P.2d 861, 94 Colo. 418. Ill.—City of Ottawa v. Brown, 24 N.E.2d 363, 372 Ill. 468.

Misdemeanor

N.C.—State v. Moye, 156 S.E. 180, 200 N.C. 11, appeal dismissed Moye v. State of North Carolina, 51 S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428.

Sign off premises

Gasoline filling station operator was not guilty of violating local law relating to signs used in connection with sale of gasoline that are "posted or maintained on the premises on which said gasoline is sold or offered for sale," where sign maintained by

operator was maintained on adjoining realty not owned by him or used by him in storing or selling his products—People v. Pearl, 17 N.Y.S.2d 825, 173 Misc. 467.

32. Ill.—City of Ottawa v. Brown, 24 N.E.2d 363, 372 Ill. 468.

33. Ark.—Van Hovenberg v. Holeman, 144 S.W.2d 718, 201 Ark. 370

34. Okl.—Texas Co. v. Brandt, 191 P. 166, 79 Okl. 97.

35. N.Y.—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Letter held not to constitute permit
City attorney's letter to owner of realty that the city had no ordinance governing the storage of gasoline or oil as far as the city attorney could determine did not amount to a "permit" to the owner of the realty to build a gasoline service station.—City of Little Falls v. Fisk, supra.

City held without power to refuse permit

Tex.—Marshall v. Dallas, Civ.App., 253 S.W. 887.

36. U.S.—City of San Antonio v. Rubin, C.C.A.Tex., 42 F.2d 107.

Ark.—Van Hovenberg v. Holeman, 144 S.W.2d 718, 201 Ark. 370.

Colo.—Starkey v. City of Longmont, 15 P.2d 620, 91 Colo. 387.

Ill.—Filgelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294.

Minn.—Crescent Oil Co. v. City of Minneapolis, 221 N.W. 6, 175 Minn. 276.

Neb.—State v. City of North Platte, 233 N.W. 4, 130 Neb. 413.

Tex.—City of San Antonio v. Zogheib, 101 S.W.2d 539, 129 Tex. 141.

Ordinances requiring building permits for gasoline stations under building and zoning regulations see the C.J.S. title Municipal Corporations § 227.

Requirement of license or permit by state authorities see supra § 718.

Ordinance held properly enacted

N.J.—Mills v. Mosher, 27 A.2d 194, 128 N.J.Law 546.

In Connection

The statutes provide in substance that any person desiring to obtain a license to sell gasoline from the state commissioner of motor vehicles must first obtain and present to the commissioner a certificate of approval of the location for which such license is desired from a specified local authority, which in New Haven is not the zoning commission and board of appeals, the general statute designating such board as the proper local authority not being ap-

held to be within general police or welfare powers of cities or towns, or other more specific powers vested in cities or towns by their charters or statutes.³⁷ The power to license is not, however, a power to tax,³⁸ and a license fee imposed for the purpose of raising general revenue cannot be sus-

tained under a municipality's regulatory or police powers,³⁹ but is valid if, and only if, the municipality possesses the requisite taxing power.⁴⁰ In this connection a reasonable license fee is not a tax;⁴¹ but, according to the judicial decisions on

plicable to New Haven.—Connecticut Baptist Convention v. Murphy, 22 A. 2d 13, 128 Conn. 261.

37. U.S.—City of San Antonio v. Rubin, C.C.A.Tex., 42 F.2d 107.

Ark.—Van Hovenberg v. Holeman, 144 S.W.2d 718, 201 Ark. 370.

Colo.—Starkey v. City of Longmont, 15 P.2d 620, 91 Colo. 387.

Ill.—Fligelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294.

Md.—Benner v. Tribbitt, 57 A.2d 346.

Minn.—Crescent Oil Co. v. City of Minneapolis, 221 N.W. 6, 175 Minn. 276.

Neb.—State v. City of North Platte, 233 N.W. 4, 120 Neb. 413.

Tex.—City of San Antonio v. Zogheib, 101 S.W.2d 539, 129 Tex. 141.

—City of San Antonio v. Humble Oil & Refining Co., Civ.App., 27 S.W.2d 868, error dismissed.

Wash.—State v. Fleming, 225 P. 647, 129 Wash. 646.

Wis.—City of Juneau v. Badger Co-op. Oil Co., 279 N.W. 666, 227 Wis. 620.

—State v. Common Council of City of Racine, 230 N.W. 70, 201 Wis. 435.

Effect of other licensing ordinances

The power of a city to enact an ordinance requiring gasoline filling stations to obtain a license or permit does not depend on the absence of other licensing ordinances which cover a different ground, such as ordinances requiring the payment of inspection fees for washing racks, steam boilers, air pumps, and electric signs maintained by a filling station.—Fligelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294.

38. Mich.—Fletcher Oil Co. v. Bay City, 226 N.W. 248, 247 Mich. 572.

Minn.—Crescent Oil Co. of Minnesota v. City of Minneapolis, 225 N.W. 904, 177 Minn. 539.

Tex.—City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512.

39. Ala.—Hawkins v. City of Prichard, 80 So.2d 659, 249 Ala. 234.

Occupation tax

A municipality having power to license gasoline filling stations cannot by virtue of such power impose an occupation tax on gasoline filling stations for the purpose of raising revenue.—McKay v. City of Wichita, 11 P.2d 733, 135 Kan. 678.

Regulatory ordinances

(1) Licensing ordinance, requiring observance of wide variety of details in conducting filling station and two

inspections annually has been held not invalid as containing no regulatory provisions except for preliminary inspection.—Fligelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294.

(2) City ordinance levying annual license tax against gasoline filling stations making use of sidewalks as means of ingress or egress has been held within police power of city and not invalid as attempt to levy tax against property owner for exercise of right of ingress and egress to property.—City of Fort Worth v. Gulf Refining Co., Com.App., 55 S.W.2d 792, reversed on other grounds City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512.

(3) In determining whether an ordinance imposing a license fee is a regulatory measure or a tax, such ordinance should be considered together with regulatory ordinances in pari materia.—City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512.

40. Colo.—Hollenbeck v. City and County of Denver, 49 P.2d 435, 97 Colo. 370.—City of Idaho Springs v. Coleman, 30 P.2d 861, 94 Colo. 418.

Power of municipality to impose license tax on sale or storage of gasoline see Licenses § 30 d (3) (b).

Occupation tax

A municipality having the requisite power may impose an occupation tax on gasoline filling stations and a license tax on each discharge standard used by the operator of a gasoline filling station has been held to be an occupation tax and not a tax on the implements used in the conduct of a mercantile business.—McKenney v. City Council of Alexandria, 136 S.E. 588, 147 Va. 157.

State presumption of field

(1) Where the state has already imposed an excise or occupational tax on the owners of gasoline filling stations, it has been held that a municipality cannot impose a like tax, and a state gasoline tax is an excise or occupational tax within this rule.—City of Cincinnati v. Cincinnati Oil Works Co., 175 N.E. 699, 123 Ohio St. 448.

(2) So, state gasoline tax statute providing that the tax levied is in lieu, place, or stead and covers the field, of any excise, privilege, or oc-

cupational tax on the business of selling or distributing motor vehicle fuel and that no city shall invade such field of taxation and levy or collect any excise tax on, or measured by the sale, receipt, distribution, or use of, motor vehicle fuel has been held to preclude a municipality within the state from imposing a gasoline station license fee, such license fee being an "excise" under the generally accepted definition of the term, and an ordinance imposing such fee is void.—Vinup v. City of Seattle, 120 P.2d 464, 11 Wash.2d 630.

(3) Where a municipality has the power to levy an occupational tax on gasoline filling stations only if the state has not already imposed such taxes, it has been held that an annual state corporation franchise tax constitutes an entry by the state into the field of occupational taxation of domestic corporations, precluding a municipal occupational tax on the operation of gasoline filling stations as applied to domestic corporations operating filling stations within the municipality.—Cincinnati Oil Works Co. v. City of Cincinnati, 177 N.E. 768, 40 Ohio App. 8, affirmed City of Cincinnati v. Cincinnati Oil Works Co., 175 N.E. 699, 123 Ohio St. 448.

Stations within and outside city

(1) Under constitutional and statutory provisions in effect so providing, filling stations in a city are subject to a license fee to cover general purposes, but filling stations not in the city but in the police jurisdiction are not subject to license fee for general revenue.—Hawkins v. City of Prichard, 80 So.2d 659, 249 Ala. 234.

(2) Where statute provided that police jurisdiction of certain cities should cover territory within three miles of their corporate limits, levy by city of privilege tax for operation of filling stations within its police jurisdiction precluded another city from subsequently collecting similar tax from same filling stations which were also located within its three-mile limit, since police jurisdiction of two cities could not cover same area.—City of Homewood v. Wofford Oil Co., 169 So. 288, 282 Ala. 634.

41. Mich.—Fletcher Oil Co. v. Bay City, 226 N.W. 248, 247 Mich. 572.

Minn.—Crescent Oil Co. of Minne-

the question, an unreasonable one is.⁴²

In determining the validity of an ordinance imposing a license fee, when challenged on the ground of the municipality's lack of power to impose a tax, the presumption is that the city authorities intended to adopt a valid ordinance and the amount of the license fee imposed will be considered prima facie reasonable,⁴³ and the persons attacking the license tax imposed have the burden of proving that the exaction bears no reasonable relationship to the duties to be performed by the city and its officers with reference to the gasoline filling station business.⁴⁴ In determining the reasonableness of the amount of the fee, it is proper to consider the cost of inspection and regulation of gasoline filling stations,⁴⁵ and the expense of municipal supervision includes services of the police and fire departments, including standby facilities, sanitary inspectors, and such other employees as may be necessary to see that reasonable requirements with respect to such businesses are observed.⁴⁶

Where the requisite power to enact ordinances requiring a permit or license to construct or operate a gasoline filling station exists, it must be exercised reasonably,⁴⁷ without unreasonable discrimination,⁴⁸ and in such manner as not to subject the owner to double taxation in the objectionable or prohibited sense.⁴⁹ Although an ordinance vesting unlimited discretion in the municipal authorities to grant or refuse a permit or license has been held to be valid,⁵⁰ it has also been held that arbitrary power cannot be conferred to allow a filling station at one place and disallow it at another, without any definite or uniform rule applicable to all alike,⁵¹ and an ordinance purporting to grant such authority is void.⁵² However, the mere fact that an ordinance does not expressly prescribe any definite standards to guide the licensing authority's discretion has been held not to leave it open to the arbitrary discretion of the licensing authority to grant or refuse a permit on any grounds which occur to it;⁵³ but such an ordinance

sota v. City of Minneapolis, 225 N. W. 904, 177 Minn. 539.

Tex.—City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512.

42. Ala.—Hawkins v. City of Prichard, 30 So.2d 659, 249 Ala. 234.

Minn.—Crescent Oil Co. of Minnesota v. City of Minneapolis, 225 N. W. 904, 177 Minn. 539.

Fee held unreasonable

Minn.—Crescent Oil Co. of Minnesota v. City of Minneapolis, supra.

43. Mich.—Fletcher Oil Co. v. Bay City, 226 N.W. 248, 247 Mich. 572.

Tex.—City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512.

44. Ill.—Fligelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294.

Tex.—City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512.

45. Ill.—Fligelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294.

Mich.—Fletcher Oil Co. v. Bay City, 226 N.W. 248, 247 Mich. 572.

Wash.—Vinup v. City of Seattle, 120 P.2d 464, 11 Wash.2d 630.

Where the fees greatly exceed the cost of inspection and regulation, an ordinance imposing a license fee cannot be sustained as a regulatory measure.—Vinup v. City of Seattle, supra.

46. Ala.—Hawkins v. City of Prichard, 30 So.2d 659, 249 Ala. 234.

Number of calls for city services does not control reasonableness of fee exacted.—Hawkins v. City of Prichard, supra.

47. Wis.—City of Juneau v. Badger

Co-op. Oil Co., 279 N.W. 666, 227 Wis. 620.

Graduated license tax held not void as unreasonable and arbitrary—Wright v. City of Atlanta, 177 S. E. 753, 50 Ga.App. 244.

48. Tax different from that on merchants

Determination of whether owner of gasoline filling station may be licensed separately from merchants depends on distinction warranting separate classification, and it has been held that such distinction exists, so that ordinance imposing license tax on gasoline filling station different from that imposed on merchants is not invalid as unreasonably discriminatory.—McKenney v. City Council of Alexandria, 136 S.E. 588, 147 Va. 157.

Graduated license tax held not invalid as discriminatory—Wright v. City of Atlanta, 177 S.E. 753, 50 Ga. App. 244.

License tax exempting garages

An ordinance imposing license tax on gasoline filling stations and exempting gasoline dispensers in connection with garages has been held to be valid as based on reasonable classification and as affecting each class alike.—Hollenbeck v. City and County of Denver, 49 P.2d 435, 97 Colo. 370.

Failure to take into consideration the volume and location of the business has been held not to render objectionable an occupation tax on all persons engaged in the operation of a filling station.—McKenney v. City Council of Alexandria, 136 S.E. 588, 147 Va. 157.

49. Va.—McKenney v. City Council of Alexandria, supra.

Double taxation in general see the C.J.S. title Taxation § 39, also 61 C.J. p 137 notes 10-18.

Right of municipality to levy license tax on gasoline dealer subject to other license taxes see supra § 718.

Taxes held not objectionable

Colo.—Hollenbeck v. City and County of Denver, 49 P.2d 435, 97 Colo. 370.

Tex.—City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512.

Va.—McKenney v. City Council of Alexandria, 136 S.E. 588, 147 Va. 157.

50. Colo.—Starkey v. City of Longmont, 15 P.2d 620, 91 Colo. 387.

51. Idaho—Corpus Juris cited in Continental Oil Co. v. City of Twin Falls, 286 P. 353, 359, 49 Idaho 89.

Kan.—Julian v. Golden Rule Oil Co., 212 P. 884, 112 Kan. 671.

N.J.—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271.

N.C.—Bizzell v. Goldsboro, 135 S.E. 58, 192 N.C. 364.

Wis.—City of Juneau v. Badger Co-op. Oil Co., 279 N.W. 666, 227 Wis. 620.

42 C.J. p 1306 note 11.

52. Idaho—Corpus Juris cited in Continental Oil Co. v. City of Twin Falls, 286 P. 353, 359, 49 Idaho 89.

Kan.—Julian v. Golden Rule Oil Co., 212 P. 884, 112 Kan. 671.

Wis.—City of Juneau v. Badger Co-op. Oil Co., 279 N.W. 666, 227 Wis. 620.

42 C.J. p 1306 note 14.

53. Wis.—Wadhams Oil Co. v. City

will be construed as imposing on the licensing authority the duty to consider and exercise a sound discretion with reference to those matters which have made the gasoline filling station business a proper subject of special legislation, and, therefore, as valid.⁵⁴ It follows that an ordinance which, while vesting a measure of discretion in the licensing authority, prescribes a sufficient test or standard for such authority's guidance is valid.⁵⁵ Thus, an ordinance forbidding the granting of a permit or license for a station if in the opinion of the proper authorities the location, plans, and specifications do not conform to valid legal requirements therefor,⁵⁶ or forbidding the granting of a permit or license for such a station in any location where, by reason of traffic conditions or fire hazards, it would imperil the public safety,⁵⁷ or authorizing the denial thereof if the safety, health, comfort, convenience, order, or good government of the municipality would be adversely affected,⁵⁸ has been held to be valid, and not to leave the grant or refusal of the permit to the arbitrary will of the municipal officials charged with the issuance thereof.⁵⁹

Land beyond municipal control. If the land on which it is proposed to erect a filling station is beyond the control of the municipality, the municipality cannot require a permit for the erection of

a filling station thereon.⁶⁰

Criminal prosecution for failure to pay license tax. Failure to pay a license tax imposed on gasoline filling stations or gasoline dispensers is sometimes made a criminal offense,⁶¹ and rules of practice and procedure governing criminal prosecutions generally have been applied in prosecutions for such offense.⁶² A filling station operator who, through ignorance or mistake in law, does not avail himself of a remedy by appeal from a judgment adverse to him in a criminal prosecution has been held not entitled to relief in equity.⁶³

b. Procurement, Requisites, and Operation and Effect

- (1) In general
- (2) Consent of adjoining property owners
- (3) Revocation

(1) In General

Where a permit or license is required, the authority to grant or refuse it must be exercised reasonably, and without unreasonable discrimination, and a permit should not be denied without some substantial reason.

Where a permit or license is required, the authority to grant or refuse it must be exercised reasonably and not arbitrarily,⁶⁴ and without unrea-

of Delavan, 243 N.W. 224, 208 Wis. 578.

54. Wis.—Wadhams Oil Co. v. City of Delavan, *supra*.

55. Mich.—Hyma v. Seeger, 207 N.W. 834, 233 Mich. 659.

Power vested in law-making body of city held not open to objection that it permitted issuance of permit to one man and disallowing it to another without any definite rule.—Yeanos v. Skelly Oil Co., 263 N.W. 834, 220 Iowa 1317.

56. Tex.—City of San Antonio v. Zogheib, 101 S.W.2d 539, 129 Tex. 141.

57. Mich.—Hyma v. Seeger, 207 N.W. 834, 233 Mich. 659.

58. U.S.—City of San Antonio v. Rubin, C.C.A.Tex., 42 F.2d 107.

Tex.—City of San Antonio v. Zogheib, 101 S.W.2d 539, 129 Tex. 141.—City of San Antonio v. Humble Oil & Refining Co., Civ.App., 27 S.W.2d 868, error dismissed.—City of San Antonio v. Robert Thompson & Co., Civ.App., 23 S.W.2d 796, case dismissed as moot Robert Thompson & Co. v. City of San Antonio, Com.App., 38 S.W.2d 784.

Wash.—State v. Fleming, 225 P. 647, 129 Wash. 646.

Traffic conditions

An ordinance authorizing the refusal of a permit in any location where, by reason of traffic conditions, a filling station would imperil the public safety has been held not to leave the granting of a permit to the arbitrary will of the officer in charge.—Hyma v. Seeger, 207 N.W. 834, 233 Mich. 659.

59. Mich.—Hyma v. Seeger, *supra*.
Tex.—City of San Antonio v. Zogheib, 101 S.W.2d 539, 129 Tex. 141.—City of San Antonio v. Humble Oil & Refining Co., Civ.App., 27 S.W.2d 868, error dismissed.

60. **If railroad right of way through city was granted by acts of congress and state legislature, and land belonged to government and right of way and operation of any business thereon was beyond control of city, it could not interfere with plaintiff in erection of filling station thereon.**—Edwards v. City of Hammond, La. App., 4 So.2d 97.

61. Colo.—Hollenbeck v. City and County of Denver, 49 P.2d 435, 97 Colo. 370.—City of Idaho Springs v. Coleman, 30 P.2d 861, 94 Colo. 418.

62. **Evidence as to protection of filling stations**

In prosecution for violation of city ordinance requiring payment of

specified license fee on gasoline dispenser in gasoline filling station, evidence relating to time spent by fire and police departments of city in protection of filling stations was admissible as bearing on cost to city necessitated by existence and operation of gasoline filling stations within city limits.—Hollenbeck v. City and County of Denver, 49 P.2d 435, 97 Colo. 370.

63. Colo.—City of Idaho Springs v. Coleman, 30 P.2d 861, 94 Colo. 418.

64. Ga.—Reynolds v. Brosnan, 154 S.E. 264, 170 Ga. 773.—Howell v. Board of Com'rs for City of Quitman, 149 S.E. 779, 169 Ga. 74.

Md.—Benner v. Tribbitt, 57 A.2d 346.
Neb.—State v. City of North Platte, 233 N.W. 4, 120 Neb. 413.

N.J.—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271.—Spur Distributing Co. v. City Council of City of Bridgeton, 6 A.2d 192, 122 N.J.Law 460.—Hirschorn v. Castles, 174 A. 211, 113 N.J.Law 277.—Meslar v. Township Committee of Denville Tp., 186 A. 55, 14 N.J.Misc. 497.—Keller v. Board of Com'rs of Town of Irvington, 147 A. 646, 7 N.J.Misc. 977.

R.I.—Aldee Corp. v. Flynn, 49 A.2d 469, 72 R.I. 199.

Tex.—City of Austin v. Nelson, Civ.

sonable or unlawful discrimination,⁶⁵ by the proper official⁶⁶ on the basis of the situation as it exists when the permit is sought.⁶⁷ Permission to erect a filling station should not be denied without some substantial reason,⁶⁸ and, in general, can be refused if, and only if, applicant or his station does not comply with duly enacted requirements and reg-

ulations,⁶⁹ or if the erection of a filling station would endanger public health, safety, or general welfare, or the development of the community.⁷⁰ Where the refusal of a permit would be unlawful, the municipal authorities cannot condition its grant of a permit on the property owner's agreement to surrender a constitutional right,⁷¹ and such agree-

App., 45 S.W.2d 692—City of Austin v. Deats, Civ.App., 32 S.W.2d 685, rehearing denied 34 S.W.2d 917.

Wis.—State v. Common Council of City of Racine, 230 N.W. 70, 201 Wis. 435.

Denial held not arbitrary or unreasonable

U.S.—City of San Antonio v. Rubin, C.C.A.Tex., 42 F.2d 107.

Iowa.—Cecil v. Toenjes, 228 N.W. 874, 210 Iowa 407.

N.Y.—Application of Perryman, 25 N.Y.S.2d 983, 261 App.Div. 1038.

Wis.—Wadhams Oil Co. v. City of Delavan, 243 N.W. 224, 208 Wis. 578.

65. Minn.—Standard Oil Co. v. Minneapolis, 204 N.W. 165, 163 Minn. 418.

Neb.—State v. City of North Platte, 233 N.W. 4, 120 Neb 413

Tex.—City of Austin v. Nelson, Civ. App., 45 S.W.2d 692—City of Austin v. Deats, Civ.App., 32 S.W.2d 685, rehearing denied 34 S.W.2d 917.

Granting of permits to others

(1) The mere fact that a filling station is permitted within a short distance of a site upon which permission to construct another station is denied has been held not to indicate discrimination—Standard Oil Co. v. Minneapolis, 204 N.W. 165, 163 Minn. 418.

(2) However, the granting of permits to others has been held to be material on the question whether the municipal authorities unfairly discriminated in refusing a permit.—City of Austin v. Nelson, Tex.Civ. App., 45 S.W.2d 692—City of Austin v. Deats, Tex.Civ.App., 32 S.W.2d 685, rehearing denied 34 S.W.2d 917.

(3) There must be some substantial difference to justify granting a permit to one person and refusing it to another, and the fact that the streets at the location where a permit is refused approach each other irregularly and the fact that the ground slopes slightly has been held not to afford a basis for distinction or classification.—City of Austin v. Nelson, supra.

Disqualification of councilman through interest

A councilman who without permit erected a station and thereafter leased it to another and moved the council for issuance of permit was in-

competent to vote for the motion, and permit granted was invalid where without such councilman's vote majority of elected members to council did not vote for issuance of the permit.—Van Hovenberg v. Holman, 144 S.W.2d 718, 201 Ark. 370.

66. N.Y.—New York State Investing Co. v. Brady, 212 N.Y.S. 605, 214 App.Div. 592.

67. La.—Edwards v. City of Hammond, App., 4 So 2d 97.

Preliminary negotiations not binding

Negotiations between applicant for permit for filling station and municipal authorities preliminary to official determination could create no binding obligation on authorities to issue permit—Benner v. Tribbitt, Md., 57 A 2d 346.

Ordinance enacted after application held not to affect right to permit.—Penn Oil Co. v. City of Erie, 5 Pa.Dist. & Co. 203, 4 Erie Co. 66.

68. Minn.—Standard Oil Co. v. Minneapolis, 204 N.W. 165, 163 Minn. 418.

N.J.—Hirschorn v. Castles, 174 A. 211, 113 N.J.Law 277—Mesler v. Township Committee of Denville Tp., 186 A. 55, 14 N.J.Misc. 497.

69. Ga.—Reynolds v. Brosnan, 154 S.E. 264, 170 Ga. 773.

Ky.—Kirkwood Bros. v. City of Madisonville, 18 S.W.2d 951, 230 Ky. 104

La.—Edwards v. City of Hammond, App., 4 So.2d 97.

Neb.—State v. City of North Platte, 233 N.W. 4, 120 Neb 413.

N.J.—Keller v. Board of Com'rs of Town of Irvington, 147 A. 646, 7 N.J.Misc. 977.

N.Y.—Harrison-Warren Realty Co. v. Spencer, 209 N.Y.S. 355, 124 Misc. 783.

R.I.—Aldee Corp. v. Flynn, 49 A.2d 469, 72 R.I. 199.

Tex.—City of San Antonio v. Humble Oil & Refining Co., Civ.App., 27 S.W.2d 868, error dismissed.

Zoning regulations as affecting grant or refusal of permit see the C.J.S. title Municipal Corporations § 227, also 42 C.J. p 1308 notes 48-50.

Prevention of fraud

Whether the fraudulent practices of applicant may form the basis of the discretion of the dispensing body depends on whether it can be said that the ordinance was adopted for the purpose of preventing fraud, and that the discretion of the dispensing

body goes to the extent of inquiring into the honesty and good faith of applicant in his business dealings with his patrons, and the mere fact that an ordinance prohibits the transfer of a license is insufficient by itself to justify the dispensing body's investigation of the character and business integrity of applicant—State v. Common Council of City of Racine, 230 N.W. 70, 201 Wis. 435.

Absolute duty to issue

City's duty to grant license for gasoline filling station is absolute whenever applicant complies with provisions of ordinance—State v. City of North Platte, 233 N.W. 4, 120 Neb. 413.

Prohibited location

A permit to construct a filling station at a location prohibited by a valid ordinance is illegal.—City of San Antonio v. Humble Oil & Refining Co., Tex.Civ.App., 27 S.W.2d 868, error dismissed.

Order of Office of Production Management

City officials could not refuse filling station construction permit because order of Office of Production Management prohibited building of filling stations unless construction was begun prior to effective date of the order since alleged failure to comply with order was a matter between Office of Production Management and builder—Short v. Oriental Refining Co., 149 P.2d 245, 112 Colo. 297.

70. Conn.—Appeal of Holley, 147 A. 300, 110 Conn. 80—De Flumeri v. Sunderland, 145 A. 48, 109 Conn. 583.

Promotion of general welfare not essential

The fact that the proposed station will not promote the general welfare is immaterial on an application for a permit, the controlling question being whether or not it will adversely affect the general welfare.—Benner v. Tribbitt, Md., 57 A.2d 346.

Permit held improperly refused where evidence did not disclose that proposed use of premises would endanger public health, safety or general welfare, or development of municipality.—Spur Distributing Co. v. City Council of City of Bridgeton, 6 A.2d 192, 122 N.J.Law 460.

71. Va.—City of Alexandria v. Texas Co., 1 S.E.2d 296, 172 Va. 209.

ment, if entered into, is not binding on the property owner.⁷²

While it is proper to deny a permit where the filling station would constitute a nuisance,⁷³ it is unnecessary to sustain a denial of a permit to show that the filling station would constitute a nuisance.⁷⁴ In passing on an application, the municipal authorities may consider the effect on traffic,⁷⁵ but they are not limited thereto,⁷⁶ and may also consider the fact that the fire hazard involved in the storage and dispensing of oil and gasoline is high.⁷⁷ It has been held that a permit to erect a filling station may be refused because persons using it would be required to drive over the sidewalks thereby adding to the peril of pedestrians.⁷⁸ However, it has also been held that this may not be done without affording applicant just and adequate compensation for the loss of his constitutional right to have reasonable means of access and egress for motor vehicles over the sidewalks.⁷⁹ The municipal

authorities are not required to call witnesses to establish facts which they already know.⁸⁰

Form of application. The application for a permit to construct a filling station should be in the form prescribed therefor by ordinance,⁸¹ but, where the application is denied on substantive grounds, the fact that it was not made in the proper form is immaterial.⁸²

Operation and effect. A grant by a municipality of permission to construct and maintain a gasoline filling station carries with it the right to perform all acts necessarily implied from the privilege conferred,⁸³ and includes the right to use the sidewalks for ingress to, and egress from, the station.⁸⁴ Such grant or a grant of permission to install gasoline storage tanks is not, however, a grant of the right to be free from competition therein,⁸⁵ especially where the grant is temporary and is revocable at the discretion of the city council.⁸⁶ The approval of a gasoline filling station

72. Agreement not to use floodlights held not binding on property owner.—City of Alexandria v. Texas Co., supra.

73. Ala.—Boatwright v. Town of Leighton, 166 So. 418, 231 Ala. 607. **Miss.**—Gulf Refining Co. v. City of Laurel, 192 So. 1, 187 Miss. 119.

Landowners cannot compel issuance of permit to build filling station which would constitute a nuisance.—City of Tuscaloosa v. Standard Oil Co. of Kentucky, 130 So. 186, 221 Ala. 670—Gillette v. Tyson, 122 So. 830, 219 Ala. 511, followed in Gillette v. Firestone Tire & Rubber Co., 122 So. 831, 219 Ala. 513.

The municipal authorities cannot arbitrarily decide that the station would constitute a nuisance and refuse a permit on that ground; it must be an anticipated nuisance in fact.—City of Austin v. Nelson, Tex. Civ.App., 45 S.W.2d 692.

74. Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.

75. Conn.—Connecticut Baptist Convention v. Murphy, 22 A.2d 13, 128 Conn. 261—Appeal of Holley, 147 A. 300, 110 Conn. 80.

Iowa.—Cecil v. Toenjes, 228 N.W. 874, 210 Iowa 407.

Minn.—Standard Oil Co. v. Minneapolis, 204 N.W. 165, 163 Minn. 418. **Wis.**—Wadhams Oil Co. v. City of Delavan, 243 N.W. 224, 208 Wis. 578.

76. Conn.—Connecticut Baptist Convention v. Murphy, 22 A.2d 13, 128 Conn. 261.

77. Iowa.—Cecil v. Toenjes, 228 N.W. 874, 210 Iowa 407.

Minn.—Standard Oil Co. v. Minneapolis, 204 N.W. 165, 163 Minn. 418.

In New Jersey

(1) The view has been taken that filling stations by themselves do not involve such an increase in the fire hazard as to justify the refusal of a permit on that ground alone.—Meslar v. Township Committee of Denville Tp., 186 A. 55, 14 N.J.Misc. 497—Finkel v. Kaltenbach, 132 A. 197, 4 N.J.Misc. 135—Williams v. Gage, 130 A. 721, 3 N.J.Misc. 1095—Sarg v. Hooper, 128 A. 393, 3 N.J.Misc. 335, affirmed 130 A. 721, 102 N.J.Law 218.

(2) However, in a case where there were other grounds justifying a refusal of the permit, the increased fire hazard resulting from the storage of a large amount of gasoline in a neighborhood where there were a great number of tenement houses and factories was considered an additional circumstance warranting refusal of a permit.—Hall v. Mayor and Aldermen of Jersey City, 142 A. 344, 6 N.J.Misc. 558.

78. N.J.—Hall v. Mayor and Aldermen of Jersey City, supra.

79. Ga.—Howell v. Board of Com'rs for City of Quitman, 149 S.E. 779, 169 Ga. 74.

City has right to regulate amount of sidewalk space to be used for ingress to, and egress from, a proposed filling station, but existence of such right did not authorize municipal authorities to refuse to grant a permit for construction of station where use of streets and sidewalks for passageways would not amount to an actual occupancy and obstruction of streets and sidewalks.—Buffington v. Crowe, 15 S.E.2d 811, 65 Ga.App. 417.

80. N.Y.—Application of Perryman, 25 N.Y.S.2d 983, 261 App.Div. 1038.

81. La.—State ex rel. Fitzmaurice v. Clay, 23 So.2d 177, 208 La. 443.

Custom of disregarding

Although no formal application for permit to erect filling station was made as required by ordinance, where evidence showed that permits were granted in most cases without formal application, official was justified in issuing permit.—Edwards v. City of Hammond, La.App., 4 So.2d 97.

82. La.—State ex rel. Fitzmaurice v. Clay, 23 So.2d 177, 208 La. 443.

83. Conn.—City of New Britain v. Kilbourne, 147 A. 124, 109 Conn. 422.

Quantity of gasoline allowed to be stored

Where the consent to the installation and operation of the filling station also contained a consent to the use of the street and alley adjoining the proposed site for the purpose of piping gasoline from tank cars on a nearby railroad siding, the latter fact was held to contemplate quantity transfers, and gave licensee privilege of keeping more than the small quantity of gasoline permitted to be kept under a general ordinance without municipal consent, even though the permit granted did not specifically mention the quantity of gasoline allowed to be stored.—Phillips v. Allingham, 33 P.2d 910, 38 N. M. 361.

84. Tex.—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

85. U.S.—Mutual Oil Co. v. Zehrung, D.C.Neb., 11 F.2d 887.

86. U.S.—Mutual Oil Co. v. Zehrung, supra.

permit by municipal authorities has been held to be a recognition of its propriety, precluding a subsequent assertion that a state official had no authority to waive regulations prohibiting a station at the particular location.⁸⁷

(2) Consent of Adjoining Property Owners

An ordinance requiring the owners of a specified per cent of property within a certain distance of the proposed location of a filling or service station to consent to the erection or maintenance of such a station as a prerequisite to the issuance of a license or permit therefor has been held to be proper.

A municipal ordinance requiring the owners of a specified per cent of the property within a certain distance of the proposed location of a filling or service station to consent to the erection or maintenance of such station as a prerequisite to the issuance of a license or permit therefor has been held to be proper,⁸⁸ although the delegation of such power to adjoining landowners, where not specifically conferred by the legislature or subsequently ratified by it, has been criticized.⁸⁹ Such ordinances, in order to be valid, must be reasonable and not arbitrary

or oppressive,⁹⁰ and an ordinance basing the consent on the number of buildings within the area regardless of their character or size, or the size of the lot on which they are located, has been held to be invalid as unfair and unreasonable,⁹¹ as has an ordinance under which the owner of a very few feet of frontage would possess the absolute power to prevent the erection of a filling station, even though the entire neighborhood, except him, might consent.⁹² Where the required consents are not obtained the permit is properly refused,⁹³ and a permit granted without the required consents has been held to be invalid.⁹⁴

In computing distances under such an ordinance, it has been held that the boundary lines of the lot on which the filling station is to be erected,⁹⁵ and not the location of the storage tanks thereon,⁹⁶ constitute the proper basis for measurement. In computing frontage of adjacent property under such an ordinance, the total frontage of a lot which abuts upon two or more streets should be included, and not merely the frontage along one street.⁹⁷

87. U.S.—City of Evansville, Ind., v. Gaseteria, Inc., C.C.A.Ind., 51 F. 2d 232.

88. Ohio.—State v. Dauben, 8 Ohio App. 226, 28 O.C.A. 281, reversed on other grounds 124 N.E. 232, 99 Ohio St. 406.

Okl.—City of Muskogee v. Morton, 261 P. 183, 128 Okl. 17.

Va.—Martin v. City of Danville, 138 S.E. 629, 148 Va. 247.

Power to confer privilege

An ordinance prohibiting the erection of a filling station in a certain locality without the consent of a specified number of the adjoining property owners does not authorize the adjoining owners to curtail any right of a person seeking to make use of his property for a filling station, but merely gives them the power to bestow on him a privilege which he does not otherwise enjoy.—City of Muskogee v. Morton, 261 P. 183, 128 Okl. 17.

In residential district

City ordinance prohibiting installation of gasoline filling stations without consent of property owners within certain radius was valid exercise of police power as to person seeking to locate filling station in residence district.—State ex rel. Standard Oil Co. v. Combs, 194 N.E. 875, 129 Ohio St. 251.

89. N.Y.—Coley v. Campbell, 215 N.Y.S. 679, 126 Misc. 869.

Utah.—Smith v. Barrett, 20 P.2d 864, 81 Utah 522.

Ordinance held ultra vires

N.Y.—Coley v. Campbell, 215 N.Y.S. 679, 126 Misc. 869.

90. Ill.—Koo v. Saunders, 182 N.E. 415, 349 Ill. 442.

Ordinance unreasonable as applied

Where it appeared that the land on which a gasoline station was proposed to be built was within a business district and was practically surrounded by public garages, automobile salesrooms, and other gasoline stations, and that one of owners of another gasoline station gave as his reason for refusing to give his consent the fact that it would be detrimental to his business, it was held that an ordinance requiring the consent of adjacent owners, as applied to the facts of the case at bar, was arbitrary, unreasonable, and void.—Koo v. Saunders, supra.

91. Ill.—People v. Andrews, 171 N.E. 137, 339 Ill. 157.

92. Ordinance construed

An ordinance requiring the owner of a corner lot, before a permit will issue, to present to the issuing official the written consent of the owners of sixty per cent of all frontage extending four hundred feet from and along both sides of each street intersecting at said corner and the full consent of the owners of the seventy-five feet of frontage immediately adjoining on either side has been held to allow the owner of one, two, or a very few feet of frontage absolute power to prevent the erection of a filling station, and, in the absence of a statute or other ordi-

nance absolutely prohibiting the erection of a filling station in the area, such ordinance has been held to be invalid.—Smith v. Barrett, 20 P.2d 864, 81 Utah 522.

93. Ill.—Jennings v. Calumet Nat. Bank, 180 N.E. 811, 348 Ill. 108.

94. N.Y.—Atkins v. West, 226 N.Y.S. 335, 222 App Div. 308.

95. Ill.—Jennings v. Calumet Nat. Bank, 180 N.E. 811, 348 Ill. 108.

Division of lot

(1) Under an ordinance making it unlawful to install a gasoline tank without obtaining the consent of a certain per cent of the property owners within a specified distance of the "lot or plot of ground" in question, it has been held that a lot owner applying for a permit cannot designate such small portion of his holdings as he chooses, it being more reasonable to assume that, when the municipal legislature used the term "plot," it meant to designate a ground area which might be larger than ordinary single platted lots rather than that it intended to refer to a mere small portion of a single lot.—Jennings v. Calumet National Bank, supra.

(2) However, with reference to such ordinance it has been stated that "there appears to be no reason preventing the owner of a lot from dividing it as he sees fit."—Continental Illinois Bank & Trust Co. v. Standard Oil Co. of Indiana, 257 Ill. App. 425, 429.

96. Ill.—Jennings v. Calumet Nat. Bank, 180 N.E. 811, 348 Ill. 108.

97. Ill.—Fish v. Walsh, 154 N.E.

Consent by corporation. Where one of the adjacent owners is a corporation, its consent must be granted by an officer or agent of the corporation who is authorized to do so.⁹⁸ It has been held that a foreign corporation admitted to do business within the state and having the same interest in adjacent property as other owners has the same right as other owners to grant its consent.⁹⁹

(3) Revocation

A gasoline filling station permit is subject to revocation by the proper exercise of the police power vested in the municipality, but such power must be exercised in a lawful manner, and should not be exercised arbitrarily or without good legal cause.

A permit obtained from a municipality to install gasoline tanks and pumps and to erect a gasoline filling station is subject to revocation by the proper exercise of the police power vested in the municipality.¹ The power of revocation must be exercised in a lawful manner,² and should not be exercised without notice or an opportunity to be heard,³ nor should it be exercised arbitrarily or without good and sufficient cause in law.⁴ In the absence of concealment of material facts, or material misrepresentations, or fraud,⁵ it has been held that a municipality may not revoke or cancel a license or permit to erect or maintain a filling station after

the permit has been accepted and money has been expended or obligations incurred in reliance thereon.⁶ Municipal authorities have been held to be precluded from asserting grounds for the revocation of the permit other than those asserted in the revocation itself.⁷ Where a permit or license has been improperly revoked the permittee or licensee is entitled to have it reinstated.⁸

c. Remedies of Persons Adversely Affected by Grant or Refusal

Any person aggrieved by the decision of a municipal body or officer on an application for a permit for the construction of a gasoline filling station may obtain a judicial review of the decision by a court of competent jurisdiction, but such review is merely a process to determine whether the body or official has acted beyond its or his statutory powers or jurisdiction, or has acted arbitrarily, or so unreasonably as to constitute an abuse of discretion.

Any person aggrieved by the decision of a municipal body or officer on an application for a permit for the construction of a gasoline filling station may, sometimes by virtue of express statutory provisions, obtain a judicial review of the decision by a court of competent jurisdiction,⁹ certiorari being an appropriate common-law remedy.¹⁰ Such appeal or review has been held not to be governed by the ordinary rules governing appeals in judicial proceedings.¹¹ It does not involve a transfer of

148, 323 Ill. 359—Standard Oil Co. v. Kamradt, 149 N.E. 538, 319 Ill. 51.

98. Proof of denial of agency

Complainant seeking to enjoin installation of gas tanks for filling station must prove allegation, denied by defendant, that person signing frontage consent for corporation was not its agent.—Continental Illinois Bank & Trust Co. v. Standard Oil Co. of Indiana, 267 Ill.App. 425.

99. Ill.—Continental Illinois Bank & Trust Co. v. Standard Oil Co. of Indiana, supra.

1. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Tex.—City of San Antonio v. Humble Oil & Refining Co., Civ.App., 27 S.W.2d 868, error dismissed.

42 C.J. p 1308 notes 56, 57.

zoning change effecting revocation

Amended zoning ordinance whereby property was transferred from commercial to residential district has been held in effect to revoke permits previously granted to landowner to install gasoline tanks and pumps and to erect filling station.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

2. Tex.—Gulf Refining Co. v. City of

Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

3. Tex.—Gulf Refining Co. v. City of Dallas, supra.

4. La.—Edwards v. City of Hammond, App., 4 So.2d 97.

Arbitrary power will not be inferred, except on clearest authority.—Keller v. Board of Com'rs of Town of Irvington, 147 A. 646, 7 N.J.Misc. 977.

An attempted revocation based on an invalid ordinance is void and of no effect.—Standard Oil Co. of New Jersey v. City of Charlottesville, C.C.A.Va., 42 F.2d 88.

5. Tex.—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

6. N.J.—Peerless Oil Co. v. Hague, 132 A. 332, 4 N.J.Misc. 148.

N.Y.—New York State Investing Co. v. Brady, 212 N.Y.S. 605, 214 App. Div. 592.

Tex.—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

7. U.S.—City of Evansville, Ind., v. Gaseteria, Inc., C.C.A.Ind., 51 F.2d 232.

8. La.—Edwards v. City of Hammond, App., 4 So.2d 97.

9. Conn.—Lazarevich v. Stoekel, 167 A. 823, 117 Conn. 260—De Flumeri

v. Sunderland, 145 A. 48, 109 Conn. 583

Tex.—City of Austin v. Nelson, Civ. App., 45 S.W.2d 692.

Mandamus as appropriate remedy to compel issuance of license to operate gasoline station see Mandamus § 156 c.

Particular court held without jurisdiction

Conn.—Berigow v. Davis, 165 A. 790, 116 Conn. 553.

10. R.I.—Aldee Corp. v. Flynn, 49 A.2d 469, 72 R.I. 199.

11. Jurisdictional amendment

Amendment of appeal from denial of certificate of approval of land as location for gasoline filling station after hearing was within discretion of court, as against the contention that no jurisdictional fact was alleged in the original appeal.—De Flumeri v. Sunderland, 145 A. 48, 109 Conn. 583.

Parties

In absence of controlling statutory or charter provision, proper procedure in bringing appeal from decision of public officer charged with duty of determining whether proposed location of gasoline filling station is a proper one is a citation to the officer as such to appear and answer the complaint, and other persons having direct interest adverse to interest of

jurisdiction from the administrative body or official to a court,¹² and does not require the court on appeal to try the case de novo, for the purpose of determining whether it shall substitute its findings and conclusions for those of the administrative body or official,¹³ but is merely a process to determine whether the body or official has acted beyond its or his statutory powers or jurisdiction, or has acted arbitrarily, as without notice and due hearing, or so unreasonably as to constitute an abuse of discretion.¹⁴ In order to make such determination, the court must necessarily hear the relevant and material facts under the application and the pleadings thereto, except in so far as the determination may be aided by presumptions.¹⁵ The presumption is that the municipal authorities acted reasonably and not arbitrarily,¹⁶ and neither the findings of fact made by the municipal authorities¹⁷ nor the decision granting or refusing the permit¹⁸ will be disturbed by the courts unless manifestly wrong. However, the presumption of regularity does not persist after it appears that the discretion of the municipal authorities was influenced by a consideration of matters concerning which no discretion was lodged with the licensing authorities.¹⁹ In a common-law proceeding in certiorari, the reviewing court cannot order that a license or permit be issued,²⁰ but can merely quash the action taken by the licensing authorities if it finds error of law therein.²¹

Recovery of license money paid. An action for money had and received is an appropriate remedy to recover money paid for a license of a gasoline filling station under a mistake of law or fact on an illegal assessment made under color of a municipal ordinance,²² and, under a statute so providing, the fact that such payment was not made under protest or compulsion is immaterial.²³ Rules governing the trial of civil actions generally apply in such action.²⁴

Adjoining property owners' right to injunctive relief. Where the requisite consents are not obtained, under a municipal ordinance requiring the owners of a specified per cent of the property within a certain distance of the station to consent to its erection or maintenance as a prerequisite to the issue of a license or permit therefor, as discussed supra subsection b (2) of this section, in a proper case a property owner within the prescribed area may obtain injunctive relief.²⁵

Damages arising from invalid ordinance. A municipal legislative body cannot be held liable in damages for enacting or enforcing an invalid ordinance requiring a permit for the construction or operation of a gasoline filling station.²⁶

§ 777. Negligent Maintenance or Operation

While the operator of a filling station is not an insurer of the safety of persons using the premises, he owes to

plaintiff should also be summoned either at time appeal is taken or subsequently.—*Rommell v. Walsh*, 15 A. 2d 6, 127 Conn. 16.

12. Conn.—Appeal of Holley, 147 A. 300, 110 Conn. 80—*De Flumeri v. Sunderland*, 145 A. 48, 109 Conn. 583.

13. Conn.—Connecticut Baptist Convention v. Murphy, 22 A.2d 13, 128 Conn. 261—*Lazarevich v. Stoeckel*, 167 A. 823, 117 Conn. 260—Appeal of Holley, 147 A. 300, 110 Conn. 80—*De Flumeri v. Sunderland*, 145 A. 48, 109 Conn. 583.

14. Conn.—Appeal of Holley, 147 A. 300, 110 Conn. 80—*De Flumeri v. Sunderland*, 145 A. 48, 109 Conn. 583.

Tex.—City of Austin v. Nelson, Civ. App., 45 S.W.2d 692.

15. Ala.—*Gillette v. Tyson*, 122 So. 830, 219 Ala. 511, followed in *Gillette v. Firestone Tire & Rubber Co.*, 122 So. 831, 219 Ala. 513.

Conn.—Appeal of Holley, 147 A. 300, 110 Conn. 80.

16. U.S.—City of San Antonio v. Rubin, C.C.A.Tex., 42 F.2d 107.

Wis.—State v. Common Council of City of Racine, 230 N.W. 70, 201 Wis. 435.

The wisdom or sound judgment of the city council, or the lack thereof, in exercising the power vested in it to grant or refuse a permit, cannot be passed on by the courts.—*Yeanos v. Skelly Oil Co.*, 263 N.W. 834, 220 Iowa 1317.

17. Conn.—Appeal of Holley, 147 A. 300, 110 Conn. 80.

Miss.—*Gulf Refining Co. v. City of Laurel*, 192 So. 1, 187 Miss. 119.

18. Conn.—Connecticut Baptist Convention v. Murphy, 22 A.2d 13, 128 Conn. 261.

Iowa.—*Cecil v. Toenjes*, 228 N.W. 874, 210 Iowa 407.

Minn.—*Standard Oil Co. v. Minneapolis*, 204 N.W. 165, 163 Minn. 418.

Tex.—City of Austin v. Nelson, Civ. App., 45 S.W.2d 692.

19. Wis.—State v. Common Council of City of Racine, 230 N.W. 70, 201 Wis. 435.

20. R.I.—*Aldee Corp. v. Flynn*, 49 A.2d 469, 72 R.I. 199.

21. R.I.—*Aldee Corp. v. Flynn*, supra.

22. Ala.—*Hawkins v. City of Prichard*, 30 So.2d 659, 249 Ala. 234.

23. Ala.—*Hawkins v. City of Prichard*, supra.

24. Questions of law

In such action the court should decide all questions of law, including the question whether the ordinance is reasonable as applied to plaintiff.—*Hawkins v. City of Prichard*, supra.

25. Evidence of special damage

(1) Where gasoline storage tank is to be used by filling station, prospective special damage to nearby property owner must be determined, not from proximity of tank alone, but from proximity of tank used by filling station.—*Jennings v. Calumet Nat. Bank*, 180 N.E. 811, 348 Ill. 108.

(2) In suit by adjoining owner for injunctive relief evidence of depreciation of complainant's property was properly admitted.—*Jennings v. Calumet National Bank*, 262 Ill.App. 189, affirmed 180 N.E. 811, 348 Ill. 108.

Evidence held not to show owner guilty of laches in institution of suit for injunctive relief.—*Jennings v. Calumet National Bank*, 180 N.E. 811, 348 Ill. 108.

26. Tex.—*Ross v. Gonzales*, Civ. App., 29 S.W.2d 437, error dismissed.

invitees the duty of exercising reasonable care for their safety, but his only obligation to trespassers or licensees is to abstain from the infliction of an intentional, wanton, or willful injury. The operator of a filling station is responsible for the negligent acts of his agent or servant acting within the scope of his employment proximately causing an injury.

While the operator of a filling station is not an insurer of the safety of persons using the premises,²⁷ he owes to invitees, or persons expressly or impliedly invited to use the premises,²⁸ the duty of exercising reasonable or ordinary care for their safety,²⁹ and to keep the premises in a reasonably safe condition³⁰ for use according to the invitation,³¹ or at least to warn them against any dangers attendant on this use which are not known to them or not obvious to any ordinarily intelligent person and which either were known, or, in the exercise of reasonable care, ought to have been known, to the operator of the station,³² and the filling station operator is liable for injuries which are the natural and probable consequences of his

negligence.³³ The invitee, in turn, has a corresponding duty to exercise reasonable or ordinary care for his own safety.³⁴

The duty which the operator of a filling station owes to invitees does not extend to trespassers or licensees.³⁵ He owes no duty to a trespasser to maintain the property in a safe condition,³⁶ his only obligation to a trespasser being to abstain from the infliction of an intentional, wanton, or willful injury,³⁷ and not to maintain some hidden engine of destruction.³⁸ In this respect, the duty owed to a licensee is no greater than that owed to a trespasser.³⁹

As to persons not on his premises, that is, persons who are neither invitees, licensees, or trespassers, but simply members of the general public, such as pedestrians using the sidewalks adjacent to the station, the operator owes them the duty of exercising reasonable care for their safety.⁴⁰

27. U.S.—Champlin Refining Co. v. Walker, C.C.A.Minn., 113 F.2d 844.
Ala.—Standard Oil Co. v. Gentry, 1 So.2d 29, 241 Ala. 62.
D.C.—Lord Baltimore Filling Stations v. Miller, 110 F.2d 698, 71 App.D.C. 376.

Hydraulic lift

Petition alleging that plaintiff drove automobile onto hydraulic lift of filling station to have oil drained, and that, while plaintiff stood on frame of lift and was cleaning windshield, defendant's noiselessly hoisted lift to height of six feet, and that plaintiff stepped off and fell to cement floor, was held not to show actionable negligence of station operator or owner.—Davis v. Phillips Petroleum Co., Tex.Civ.App., 72 S.W.2d 673.

28. Conn.—Dym v. Merit Oil Corporation, 36 A.2d 276, 130 Conn. 585.
Mass.—Flynn v. Cities Service Refining Co., 28 N.E.2d 453, 306 Mass. 302.

Persons held invitees

(1) Customers.

U.S.—Standard Oil Co. v. Burleson, C.C.A.Fla., 117 F.2d 412.
Ala.—Standard Oil Co. v. Gentry, 1 So.2d 29, 241 Ala. 62.

(2) A motorist who drove into service station to procure rental battery, and who was permitted to telephone a garage which was equipped to render such service, and who was permitted to wait at station for garage employee to come with battery, has been held to be an invitee.—Vanderdoes v. Rumore, La.App., 2 So.2d 284.

Status of driver and passengers the same

If the driver of a vehicle entering

a station can be considered an invitee, his passengers are likewise invitees.—Dym v. Merit Oil Corporation, 36 A.2d 276, 130 Conn. 585.

Station closed

(1) A person entering a gasoline station when it is closed has been held to be a trespasser, and not an invitee, notwithstanding the owner had in the past tolerated similar trespasses.—Nimetz v. Shell Oil Co., D.C.D.C., 74 F.Supp. 1.

(2) On the other hand, it has been held that the mere fact that the station is closed does not deprive a motorist entering it of the status of an invitee.—Dym v. Merit Oil Corporation, 36 A.2d 276, 130 Conn. 585.

29. U.S.—Champlin Refining Co. v. Walker, C.C.A.Minn., 113 F.2d 844.
La.—Vanderdoes v. Rumore, App., 2 So.2d 284.

The movement of a vehicle from a place of safety to a place of danger may constitute a breach of the duty owed to an invitee.—Vanderdoes v. Rumore, supra.

30. U.S.—Standard Oil Co. v. Burleson, C.C.A.Fla., 117 F.2d 412.
Ala.—Standard Oil Co. v. Gentry, 1 So.2d 29, 241 Ala. 62.
Conn.—Dym v. Merit Oil Corporation, 36 A.2d 276, 130 Conn. 585.

D.C.—Lord Baltimore Filling Stations v. Miller, 110 F.2d 698, 71 App.D.C. 376.

Mass.—Flynn v. Cities Service Refining Co., 28 N.E.2d 453, 306 Mass. 302.

Pa.—Cronin v. Fillipone, Com.Pl., 57 Montg.Co. 24.

Vt.—Standard Oil Co. of New York v. Flint, 183 A. 336, 108 Vt. 157.

31. Mass.—Flynn v. Cities Service

Refining Co., 28 N.E.2d 453, 306 Mass. 302.

32. Mass.—Flynn v. Cities Service Refining Co., supra.

33. Mass.—Teasdale v. Beacon Oil Co., 164 N.E. 612, 266 Mass. 25.
Storage of gasoline as not such gathering of dangerous agency as to render owner liable for damages which are natural consequence of its escape, regardless of his negligence, see supra § 771.

Intervening negligence

Filling station owner was liable for injuries suffered by occupant of automobile from burns, if proximate cause was negligence in spilling gasoline, as well as intervening negligence of driver.—Teasdale v. Beacon Oil Co., supra.

34. D.C.—Lord Baltimore Filling Stations v. Miller, 110 F.2d 698, 71 App.D.C. 376.

Tex.—Davis v. Phillips Petroleum Co., Civ.App., 72 S.W.2d 673.

35. Conn.—Dym v. Merit Oil Corporation, 36 A.2d 276, 130 Conn. 585.

36. D.C.—Nimetz v. Shell Oil Co., D.C.D.C., 74 F.Supp. 1.

37. D.C.—Nimetz v. Shell Oil Co., supra.

38. D.C.—Nimetz v. Shell Oil Co., supra.

39. Person falling into grease pit
Station owner held not liable for injuries sustained by licensee when he fell into grease pit.—Nimetz v. Shell Oil Co., supra.

40. Tex.—Wheat v. Texas Co., Civ. App., 159 S.W.2d 238, reversed on other grounds Texas Co. v. Wheat, 168 S.W.2d 632, 140 Tex. 468.

42 C.J. p 1308 note 64.

Duty to customer in servicing vehicle. The operator of a filling station may be held liable in damages for negligence in servicing a customer's motor vehicle.⁴¹

Liability of owner or operator for acts of others. The owner or operator of a gasoline filling station is responsible for the negligent acts of his agent or servant acting within the scope of his employment proximately causing injury,⁴² but, as a general rule, the owner cannot be held liable for the negligent acts of an independent contractor.⁴³ It has been held, however, that even though the station is operated by an independent contractor, if it is operated in such manner as to constitute a nuisance, and the owner has actual or constructive notice of the manner in which it is operated, the owner may be held liable to third persons injured thereby.⁴⁴ In determining the nature of the relationship between the owner of the station and the persons operating it, a person injured is not necessarily bound by the apparent relationship created by the written instruments executed by the owner and those operating it.⁴⁵ So, even though a contract

as originally entered into nominally created the relationship of employer and independent contractor, if such contract was a subterfuge,⁴⁶ or if the employer thereafter assumed and actually exercised control over the means and methods by which the work was to be performed,⁴⁷ the relationship would be that of master and servant or principal and agent and the master or principal would not be relieved of liability for the negligence of such servant or agent.

§ 778. — Actions

In actions for injuries resulting from the negligent operation or maintenance of a gasoline filling station, the general rules of practice and procedure governing the trial of civil actions are applicable.

In actions for injuries resulting from the negligent operation or maintenance of a gasoline filling station, the general rules of practice and procedure governing the trial of civil actions are applicable,⁴⁸ and this is true as to such matters as the issues, proof, and variance,⁴⁹ the burden of proof,⁵⁰ the weight and sufficiency of the evidence,⁵¹ and questions of law or fact.⁵²

41. Failure to refill crankcase with oil

Ala.—Powell v. Pate, 1 So.2d 36, 30 Ala.App. 10.

42. Ark.—Arkansas Fuel Oil Co. v. Scaletta, 140 S.W.2d 684, 200 Ark. 645.

Mass.—Teasdale v. Beacon Oil Co., 164 N.E. 612, 266 Mass. 25.

Mo.—Brenner v. Socony Vacuum Oil Co., 158 S.W.2d 171, 236 Mo.App. 524.

N.C.—Hudson v. Gulf Oil Co., 2 S.E. 2d 26, 215 N.C. 422.

42 C.J. p 1308 note 65.

Liability for acts of employees of agent

Where owner voluntarily chooses to operate station through an agent, and contract and facts show an anticipation that others will be necessary to carry out work for which agent is employed, then for acts of those others done in scope of their respective employments, owner is liable.—Monetti v. Standard Oil Co., La. App., 195 So. 89.

43. Ark.—Arkansas Fuel Oil Co. v. Scaletta, 140 S.W.2d 684, 200 Ark. 645.

La.—Monetti v. Standard Oil Co., App., 195 So. 89.

Tex.—Texas Co. v. Wheat, 168 S.W. 2d 632, 140 Tex. 468.

44. Mo.—Buchholz v. Standard Oil Co., 244 S.W. 973, 211 Mo.App. 397.

If station when operated in ordinary manner would constitute a nuisance, the owner of the station remains liable when it is so operated

by an independent contractor.—Greene v. Spinning, Mo.App., 48 S.W.2d 51.

45. Mo.—Brenner v. Socony Vacuum Oil Co., 158 S.W.2d 171, 236 Mo.App. 524.

Tex.—Wheat v. Texas Co., Civ.App., 159 S.W.2d 238, reversed on other grounds Texas Co. v. Wheat, 168 S.W.2d 632, 140 Tex. 468—Gulf Refining Co. v. Rogers, Civ.App., 57 S.W.2d 183, error refused.

46. Mo.—Brenner v. Socony Vacuum Oil Co., 158 S.W.2d 171, 236 Mo.App. 524.

Tex.—Gulf Refining Co. v. Rogers, Civ.App., 57 S.W.2d 183, error dismissed.

47. Mo.—Brenner v. Socony Vacuum Oil Co., 158 S.W.2d 171, 236 Mo.App. 524.

Tex.—Gulf Refining Co. v. Rogers, Civ.App., 57 S.W.2d 183, error dismissed.

48. Ala.—Gulf Refining Co. v. McNeel, 153 So. 231, 228 Ala. 302.

49. Allegation of specific acts of negligence

One suing for injuries resulting from the operation or maintenance of a filling station who alleges specific acts of negligence must prove such acts in order to make a prima facie case, and is not entitled to rely on the presumption resulting from the rule of res ipsa loquitur.—Motsch v. Standard Oil Co., Mo.App., 223 S.W. 677.

50. Ala.—Gulf Refining Co. v. McNeel, 153 So. 231, 228 Ala. 302.

51. Evidence held sufficient

(1) To show master and servant relationship.—Brenner v. Socony Vacuum Oil Co., 158 S.W.2d 171, 236 Mo.App. 524.

(2) In an action for destruction of a motor vehicle by fire while it was being filled with gasoline, evidence that defendant permitted the nozzle of the pump to slip to the concrete floor and that immediately thereafter the fire started is sufficient to support a finding that the fire originated from a spark when the nozzle struck the floor, and that defendant was negligent in permitting it to slip.—Morris v. Texas Co., R.I., 115 A. 643.

Evidence held insufficient

(1) Mere fact that while vehicle was being served with gasoline some of liquid ran upon motor and ignited has been held insufficient to show negligence on part of operator of gasoline pump.—Pinter v. Wenzel, 180 N.W. 120, 173 Wis. 84.

(2) Fact that merchandise advertised under trade name of owner of land on which filling station was built was sold at retail on the property was not alone sufficient to establish agency as between owner of realty and tenant who operated station thereon so as to render owner liable for tortious acts of station attendant.—Greiving v. La Plante, 131 P.2d 898, 156 Kan. 196.

52. Leaving parked car in gear held not negligence as a matter of law.—Kaysor v. Jungbauer, 14 N.W.2d 337, 217 Minn. 140.

MOULD. See 58 C.J.S. p 842 notes 61, 62.

MOULDER. See 58 C.J.S. p 843 note 64.

MOUNT.

As a noun, that upon which anything is mounted or fixed for use, and by which it is supported and held in place.¹

As a verb, to put or fasten upon anything that sustains and fits for use; to prepare for use by placing in proper position or arrangement.²

In bookbinding, to glue or paste, as a sheet of paper, upon a reinforcing ground.³

Mounting

Embellishment;⁴ equipment;⁵ setting;⁶ something that serves as a mount, support, or setting to anything;⁷ that by which anything is prepared for use, preservation, examination, exhibition, or ornament;⁸ that upon which anything is mounted or fixed for use, and by which it is supported and held in place;⁹ that which serves as a mount or by which anything is prepared or equipped for use, or set off to advantage;¹⁰ that which is or may be mounted for use or ornament.¹¹

In engineering, the surveyor's transit; a surveying instrument resembling a theodolite, for measuring angles; consisting of a horizontal graduated cir-

cle, with leveling devices, a compass, a telescope, etc.¹²

Mounted

Adjusted or prepared for use; placed on a suitable support, fixed in a setting, etc.; furnished; equipped; attached to a backing.¹³

MOUNTAIN. In Ireland, a term which applies to and includes uncultivated land,¹⁴ used to denote the situation and not the quality of the land.¹⁵

MOUNTEBANKERY. Acts which may consist of boastful and vain pretensions, appearing in the character of certain persons, imitating their traits, language and actions, and performing pretended feats.¹⁶

MOUSE. A small rodent quadruped.¹⁷

Mouse-colored mule. A mule whose color is that of a mouse.¹⁸

MOUSSE. A frozen dessert of sweetened and flavored whipped cream or thin cream and gelatin, frozen without stirring; a similar unsweetened product, often containing cheese or vegetables, and used for salad.¹⁹

"Mousse" has been distinguished from "ice cream" see 42 C.J.S. p 372 note 30.

MOUTH ORGAN. The Panpipe; a harmonicon.²⁰

Evidence held sufficient to go to jury

(1) In general.

Ala.—Powell v Pate, 1 So.2d 36, 30 Ala.App. 10.

S.C.—Mack v. Barnett Tire & Battery Co., 34 S.E.2d 472, 207 S.C. 70.

(2) As to attendant's apparent authority to bind station owner.—Weisbrode v. Thomas, 33 A.2d 528, 153 Pa.Super. 127.

(3) As to whether attendant was acting within scope of his employment.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.

Evidence held insufficient to go to jury

(1) As to whether servant causing injury was acting within scope of employment.

Ala.—Gulf Refining Co. v. McNeel, 153 So. 231, 228 Ala. 302.

S.C.—Mack v. Barnett Tire & Battery Co., 34 S.E.2d 472, 207 S.C. 70.

(2) As to whether defendant was guilty of negligence proximately causing injury.—Makiel v. Sears, Roebuck & Co., 71 N.E.2d 809, 330 Ill.App. 619.

1. U.S.—U. S. v. International Forwarding Co., 9 Ct.Cust.App. 156, 159.

2. U.S.—U. S. v. Thorens, Inc., 32 C.C.P.A., Customs, 137, 140.

3. U.S.—U. S. v. Thorens, Inc., supra.

4. U.S.—U. S. v. Bell & Howell Co., 19 C.C.P.A., Customs, 151, 155—Lietz Co. v. U. S., 11 Ct.Cust.App. 426, 428.

42 C.J. p 1410 note 12.
As used in tariff acts see Customs Duties §§ 19, 33.

5. U.S.—U. S. v. Bell & Howell Co., 19 C.C.P.A., Customs, 151, 155—Lietz Co. v. U. S., 11 Ct.Cust.App. 426, 428.

42 C.J. p 1410 note 13.

6. U.S.—U. S. v. Bell & Howell Co., 19 C.C.P.A., Customs, 151, 155—Lietz Co. v. U. S., 11 Ct.Cust.App. 426, 428.

42 C.J. p 1410 note 14.

7. U.S.—U. S. v. Bell & Howell Co., 19 C.C.P.A., Customs, 151, 155—U. S. v. Sheldon, 9 Ct.Cust.App. 153, 154.

8. U.S.—Lietz Co. v. U. S., 11 Ct.Cust.App. 426, 428—U. S. v. Sheldon, 9 Ct.Cust.App. 153, 154.

9. U.S.—U. S. v. International Forwarding Co., 9 Ct.Cust.App. 156, 159.

10. U.S.—U. S. v. Bell & Howell Co., 19 C.C.P.A., Customs, 151, 155—

Lietz Co. v. U. S., 11 Ct.Cust.App. 426, 428.

42 C.J. p 1410 note 18.

11. U.S.—Lietz Co. v. U. S., supra.

12. U.S.—Lietz Co. v. U. S., supra.

13. U.S.—U. S. v. Thorens, Inc., 32 C.C.P.A., Customs, 137, 140.

Phrases employing "mounted"

(1) "Mounted pay" and "mounted officer" see Army and Navy § 20 a (10).

(2) "Mounted upon."—Re Duncan, 28 App.D.C. 457, 460—42 C.J. p 1410 note 4 [a].

14. Eng.—Waterpark v. Fennell, 7 H.L.Cas. 650, 658, 11 Reprint 259.

15. Eng.—Kildare v. Fisher, Str. 71, 72, 93 Reprint 391. But see Cottingham v. Rex, 1 Burr. 623, 629, 97 Reprint 479.

16. N.Y.—Thurber v. Sharp, 13 Barb. 627, 628.

17. Mo.—Sparks v. Brown, 46 Mo. App. 529, 536.

18. Mo.—Sparks v. Brown, supra.

19. Webster New Int.D.

20. Webster New Int.D.

U.S.—See Borgfeldt v. U. S., C.C.N.Y., 124 F. 473, 474.

MOVABLE. Capable of being moved, lifted, carried, drawn, turned, or conveyed, or in any way made to change place or posture; susceptible of motion; not fixed.²¹

MOVABLES. Defined see the C.J.S. title Property § 4, also 50 C.J. p 744 note 31 [a].

MOVE. A generic word,²² meaning to begin to act; to actuate; to cause to act; to concern; to impel; to incite to an action, as by persuasion or representation; to influence; to prompt;²³ also to carry, convey, or draw from one place to another; to cause to change place or posture in any manner or by any means;²⁴ to change the place or position of in any manner;²⁵ to propel;²⁶ to remove;²⁷ to set in motion; to take action;²⁸ specifically, as in chess and similar games, to change the position of (a piece) according to the rules of the game.²⁹

In practice, to make an application to a court for a rule or order.³⁰ It has been said that there is little or no difference in meaning of the words "moves" and "asks" see 6 C.J.S. p 790 note 66.

"Move" has been held synonymous with "affect" see 2 C.J.S. p 918 note 67.1, and the equivalent of "remove,"³¹ and has been compared with, or distinguished from, "carry" see 13 C.J.S. p 1764 note 17, "convey" see 18 C.J.S. p 87 note 42, "erect" see 30 C.J.S. p 1134 note 47, "shove,"³² and "transport."³³

Moving. Causing to move; impelling to act; influencing; instigating; persuading;³⁴ propelling.³⁵

Moved. The word "moved," as applied to a person, is somewhat indefinite and may or may not, according to circumstances, warrant the inference of a permanent change of residence.³⁶

MOVEMENT. Act of moving; change of place, position, or posture.³⁷

MOVEOVERS. See Monopolies § 82 a (2).

MOVE—SLOW SIGNAL. See the C.J.S. title Railroads § 1, also 42 C.J. p 1411 note 44.

MR. and MRS. As abbreviations see 1 C.J.S. p 276 note 5. As not constituting a part of a name see the C.J.S. title Names § 5, also 45 C.J. p 371 notes 54-60.

MUCH. A term sometimes used as synonymous with "many."³⁸

MUCK. A term which implies foulness, dirtiness, dampness, and slime.³⁹

As a mining term, "muck" is defined in Mines and Minerals § 3 h.

MUCKER. See Mines and Minerals § 3 h.

MUD. A slimy or pasty mixture of earth and water, or of volcanic ashes and water; mire; also, any slimy deposit resembling it.⁴⁰

21. Wis.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 49, 212 Wis. 104, 91 A.L.R. 536. 42 C.J. p 1410 note 23.

Phrases

(1) "Movable estate" see the C.J.S. title Property § 8, also 42 C.J. p 1410 note 24.

(2) "Movable freehold" see the C.J.S. title Navigable Waters § 81, also 42 C.J. p 1410 note 25.

22. U.S.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 630.

23. Mo.—English v. Page, App., 236 S.W. 392, 393.

Phrase

"Move out."—Polich v. Severson, 216 P. 785, 787, 68 Mont. 225.

24. Mo.—English v. Page, App., 236 S.W. 392, 393.

25. Iowa.—Struble v. Square Deal Ins. Co., 24 N.W.2d 441, 442, 237 Iowa 1155.

26. Ont.—Hamilton v. Groesbeck, 19 Ont. 76, 81.

27. Ala.—Davis v. State, 68 Ala. 58, 60, 44 Am.R. 128.

28. Mo.—English v. Page, App., 236 S.W. 392, 393.

29. Mo.—English v. Page, supra.

30. Black L.D. 42 C.J. p 1410 note 33.

31. Ala.—Davis v. State, 68 Ala. 58, 65, 44 Am.R. 128.

32. U.S.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 630. 58 C.J. p 702 note 82 [b].

33. U.S.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 630.

34. Mo.—English v. Page, App., 236 S.W. 392, 393.

Phrases

(1) "Moving party."—Dunn v. Wilson & Co., D.C.Del., 51 F.Supp. 655, 667.

(2) "Moving pictures" defined see the C.J.S. title Theaters and Shows § 1, also 42 C.J. p 1411 note 46.

(3) Other phrases employing the word "moving" as to which more recent adjudications have not been found see 42 C.J. p 1411 notes 38, 39-41.

35. Ont.—Hamilton v. Groesbeck, 19 Ont. 76, 81.

36. Iowa.—Struble v. Square Deal Ins. Co., 24 N.W.2d 441, 442, 237 Iowa 1155. N.J.—Cook v. Cook, 28 A.2d 178, 179, 132 N.J.Eq. 352.

Phrase

"Moved or worked by hand or by foot."—Steiner v. Marshall, Md., 140 F. 710, 712, 72 C.C.A. 103.

37. Webster New Int.D. 42 C.J. p 1411 note 42.

38. U.S.—City of Washington v. Pratt, D.C., 8 Wheat. 681, 687, 5 L.Ed. 714.

Ga.—Smith v. Atlanta, 51 S.E. 741, 742, 123 Ga. 877.

39. Ky.—Burk Hollow Coal Co. v. McCulley's Adm'r, 161 S.W.2d 622, 623, 290 Ky. 435.

"Muck bars" see 9 C.J.S. p 1537 note 43.

40. Webster New Int.D.

Water and mud

U.S.—Inman & Co. v. Seaboard Air Line R. Co., C.C.A.Ga., 169 F. 960, 971.

MUEBLES. In Spanish law, movables; all sorts of personal property.⁴¹

MUFFLER. Anything used to muffle or wrap up.⁴² Also, any of various devices to deaden the noise of escaping gases or vapors, as a tube filled with obstructions, through which the exhaust gases of an internal combustion engine, as an automobile, are passed, called also a silencer; or an attachment usually consisting of a series of perforated baffles for a locomotive pop safety valve.⁴³

MUGGLES. A name popular among the criminal element for a drug,⁴⁴ which is commonly known as "cannabis sativa indica," see 12 C.J.S. p 1112 notes 50, 51, "Indian hemp," see 39 C.J.S. p 888 note 1, and "marijuana" or "marihuana," see 55 C.J.S. p 708 note 62—p 709 note 65. Addicts to the drug are commonly called "muggle heads."⁴⁵

MULATTO. A word, derived from the Latin word "mulus,"⁴⁶ defined as a person begotten between a white and a black;⁴⁷ the offspring of a negress by a white man, or of a white woman by a negro;⁴⁸ the middle term between the extremes, or the offspring of a white and a black.⁴⁹ The term has been held to include a person having one fourth or more of negro blood in his veins;⁵⁰ every one who is not of white blood.⁵¹

The term "mulatto" has been used interchangeably with "negro,"⁵² and has been compared with "colored" see 15 C.J.S. p 237 note 78.

MULOT. As a noun, a fine imposed for an offense; a penalty.⁵³

As a verb, to sentence to a pecuniary penalty or forfeiture as a punishment; fine; to punish.⁵⁴

"Mulet" has been held synonymous with "forfeit" see 37 C.J.S. p 1 note 49.

"Mulet taxes" are treated and discussed in the C. J.S. titles Intoxicating Liquors § 424 a, Licenses § 3, and Penalties § 1.

MULOTA DAMNUM FAME NON IRROGAT. See 42 C.J. p 1412 note 69.

MULE. A hybrid between the horse and the ass; especially the offspring of a male ass and a mare, that produced by a stallion and a she-ass being usually called a "hinny."⁵⁵

A mule may or may not be included within the meaning of the terms "cattle" see 14 C.J.S. p 37 note 93, and "horse" see 41 C.J.S. p 328 note 20. A female mule ordinarily is not included within the meaning of the term "mare" see 56 C.J.S. p 708 note 53. "Mule" has been held synonymous with "horse" see 41 C.J.S. p 328 note 25, and has been distinguished from "gelding" see 38 C.J.S. p 761 note 56.

White mule. The term "white mule" as applied to corn whisky is considered in Intoxicating Liquors § 13 p 146 note 29, and as an appellation meaning contraband liquor in § 13 p 147 note 38.

MULIER; MULIERES. As the first words of maxims as to which there have been no recent applications see 42 C.J.S. p 1412 notes 71, 72.

MULL. To powder, to crush, to pulverize.⁵⁶

MULTA. As the first word of maxims as to which there have been no recent applications see 42 C.J. p 1412 notes 73—80.

MULTIFARIOUS or MULTIFARIOUSNESS. See the C.J.S. titles Equity §§ 233—257, Indictments and Informations §§ 191, 222, and Pleading § 89, also 49 C.J. p 161 note 61—p 162 note 68; and see the index to the title Appeal and Error. For other references consult the Descriptive-Word Index.

MULTI MULTA, NEMO OMNIA NOVIT. See 42 C.J. p 1412 note 82.

MULTIPHASE SYSTEM. See Electricity § 1 b.

41. Black L.D.

42. U.S.—Hygienic Fleeced Underwear Co. v. Way, Pa., 137 F. 592, 595, 70 C.C.A. 553.

43. Tex.—Hines v. Foreman, Com. App., 243 S.W. 479, 484.

Similarly stated

A muffler is a device attached to the exhaust pipe, through which the exhaust passes, and is intended to muffle the sound of the exhaust.—Wolf v. Des Moines Elevator Co., 98 N.W. 301, 302, 126 Iowa 659.

44. Utah.—State v. Navaro, 26 P.2d 955, 959, 83 Utah 6.

45. Utah.—State v. Navaro, supra.

46. Ky.—McGoodwin v. Shelby, 206 S.W. 625, 627, 182 Ky. 377.

47. Ala.—Thurman v. State, 18 Ala. App. 276, 278.

42 C.J. p 1411 note 62.

48. Ky.—McGoodwin v. Shelby, 206 S.W. 625, 627, 182 Ky. 377.

49. Ohio.—Williams v. Whitewater Tp. School Dist. No. 6, Wright 578, 579.

42 C.J. p 1411 note 64.

50. Va.—Scott v. Raub, 14 S.E. 178, 180, 88 Va. 721.

42 C.J. p 1412 note 65.

51. Cal.—People v. Hall, 4 Cal. 399, 403.

42 C.J. p 1412 note 66.

52. Ala.—Linton v. State, 7 So. 261, 262, 88 Ala. 216.

53. Iowa.—Cook v. Marshall County, 93 N.W. 372, 378, 119 Iowa 384, 104 Am.S.R. 283.

42 C.J. p 1412 note 68.

54. Idaho.—Gorton v. Doty, 69 P.2d 136, 142, 57 Idaho 792.

55. Webster New Int.D.

56. U.S.—Durand v. Bethlehem Steel Co., C.C.A.Del., 122 F.2d 321, 323.

MULTIPLE. Manifold; having many parts or relations.⁵⁷ As an electrical term see Electricity § 1 b.

Phrases employing the word are set out in the note.⁵⁸

MULTIPLEX; MULTIPLICATA. As the first words of maxims as to which there have been no recent applications see 42 C.J. p 1412 notes 87, 88.

MULTIPLICITY. A state of being many.⁵⁹ "Multiplicity" has been distinguished from "multitude."⁶⁰

Multiplicity of actions or suits occurs where there are numerous and unnecessary attempts to litigate the same right, and where several different suits or actions are brought on the same issue.⁶¹ This subject is treated in Actions §§ 102 c, 108, 110, and in Equity § 42. See also the title index to Equity and consult the Descriptive-Word Index.

MULTITUDE. An assemblage of many people.⁶² It has been held that three or more persons constitute a multitude.⁶³

"Multitude" has been distinguished from "multiplicity" see ante note 60.

MULTITUDINEM; MULTITUDO; MULTO. As the first words of maxims as to which there have been no recent applications see 42 C.J. p 1413 notes 98-2.

MULUS. A Latin word meaning mule.⁶⁴

MUM. The term is defined as meaning silent; not speaking; and it is commonly so understood.⁶⁵

MUNGO. The waste produced in a woolen mill from hard-spun or felted cloth and used in connection with wool, cotton, or better grades of waste in the manufacture of back-yarns or cheap cloth.⁶⁶

MUNICIPAL. An adjective,⁶⁷ derived from the Latin "municipalis"⁶⁸ or "municipium,"⁶⁹ the meaning of these terms being discussed in Municipal Corporations § 2.

The word "municipal" is variously defined as, belonging to a city, town, or place having the right of local government;⁷⁰ belonging to or affecting a particular state or separate community;⁷¹ pertaining to a city or a community within a state, possessing rights of self-government;⁷² of or pertaining to a city or corporation having the right of administering local government;⁷³ pertaining to a municipality;⁷⁴ pertaining to corporate or local self-government;⁷⁵ pertaining to local self-government;⁷⁶ self-governing;⁷⁷ that which belongs to a corporation or a city.⁷⁸

While the term "municipal" is frequently used in referring to a self-governing city or town and in this sense is defined in Municipal Corporations § 1, it is not always used in the limited sense of applying to cities, towns, or villages.⁷⁹ It has a broader meaning,⁸⁰ a more extensive or extended meaning.⁸¹

57. Century D.
42 C.J. p 1412 note 84.

58. *Phrases*

(1) "Multiple damages" see the index to the title Damages.

(2) "Multiple dwelling house" see 28 C.J.S. p 605 note 57.1.

(3) "Multiple evidence" see Evidence § 2.

59. Black L.D.

60. Del.—Murphy v. Wilmington, 11 Del. 108, 138, 22 Am.S.R. 345.

61. Black L.D.
42 C.J. p 1412 note 91.

62. Black L.D.

63. N.C.—State v. Earp, 145 S.E. 23, 25, 196 N.C. 164.
42 C.J. p 1413 note 97.

64. Ky.—McGoodwin v. Shelby, 206 S.W. 625, 627, 182 Ky. 377.

65. Tex.—Thompson v. State, 19 S. W.2d 316, 317, 13 Tex.Cr. 45.

66. U.S.—U. S. v. Castle & Overton, Inc., 18 C.C.P.A., Customs, 21, 22.

67. N.Y.—Corpus Juris cited in People ex rel. Ray v. Martin, 47 N.Y. S.2d 883, 892, 181 Misc. 925.
42 C.J. p 1413 note 4.

68. Mont.—Hersey v. Nelson, 131 P. 30, 31, 47 Mont. 132, Ann.Cas.1914C 963.

69. Md.—Neuenschwander v. Washington Suburban Sanitary Commission, 48 A.2d 593, 597, 187 Md. 67.

70. N.Y.—Corpus Juris quoted in People ex rel. Ray v. Martin, 47 N.Y.S.2d 883, 892, 181 Misc. 925.

Or.—Cook v. Port of Portland, 27 P. 263, 264, 20 Or. 580, 13 L.R.A. 533.

71. N.Y.—Corpus Juris quoted in People ex rel. Ray v. Martin, 47 N.Y.S.2d 883, 892, 181 Misc. 925.

Or.—Cook v. Port of Portland, 27 P. 263, 264, 20 Or. 580, 13 L.R.A. 533.

72. Ill.—People v. Bergman, 97 N.E. 695, 696, 253 Ill. 469.

Mont.—Hersey v. Nelson, 131 P. 30, 31, 47 Mont. 132, Ann.Cas.1914C 963.

73. Cal.—In re Werner, 62 P. 97, 99, 129 Cal. 567.

Ill.—Miller v. People, 82 N.E. 521, 523, 230 Ill. 65.

74. La.—State v. Orleans Levee Dist. Comrs., 33 So. 385, 399, 109 La. 403.

75. Ga.—Sessions v. State, 41 S.E. 259, 261, 115 Ga. 18.

76. Ill.—In re Werner, 62 P. 97, 99, 129 Cal. 567.
42 C.J. p 1413 note 16.

77. N.R.—Charlotte v. St. Stephen, 32 N.B. 292, 297.

78. Ala.—Horton v. Mobile School Comrs., 43 Ala. 598, 607.

42 C.J. p 1413 note 18.

79. Md.—Neuenschwander v. Washington Suburban Sanitary Commission, 48 A.2d 593, 597, 187 Md. 67.

S.C.—Ellerbe v. David, 8 S.E.2d 518, 521, 193 S.C. 332.

42 C.J. p 1413 note 23.

80. N.Y.—Corpus Juris quoted in People ex rel. Ray v. Martin, 47 N.Y.S.2d 883, 892, 181 Misc. 925.

42 C.J. p 1413 note 24.

81. N.Y.—Corpus Juris quoted in People ex rel. Ray v. Martin, 47 N.Y.S.2d 883, 892, 181 Misc. 925.

N.C.—Wells v. Housing Authority of City of Wilmington, 197 S.E. 693, 213 N.C. 744.

S.C.—Ellerbe v. David, 8 S.E.2d 518, 521, 193 S.C. 332.

42 C.J. p 1413 note 25.

Its application has been extended to include the internal government of the state;⁸² and it is in legal effect the same as public or governmental as distinguished from private.⁸³ It is sometimes construed as intending to distinguish public political bodies from corporations of a quasi-public nature.⁸⁴ It may also mean independent; local; particular.⁸⁵

The word "municipal" has been used as the equivalent of "governmental" see 38 C.J.S. p 969 note 77, and has been used in contradistinction to "international" see 47 C.J.S. p 1275 note 2. "Municipal" has been compared with, or distinguished from, the

terms "municipal corporation," and "municipality" see Municipal Corporations § 1.

Municipal purpose. It has been said that the term "municipal purpose" is without any technical import.⁸⁶ It is defined as a public or governmental purpose, as distinguished from a private purpose;⁸⁷ a purpose intended to embrace some of the functions of government, local or general.⁸⁸

Other phrases employing the word are set out in the note,⁸⁹ and for additional phrases as to which more recent adjudications have not been found see 42 C.J. p 1415 note 58—p 1416 note 84.

82. Md.—*Neuenschwander v. Washington Suburban Sanitary Commission*, 48 A.2d 593, 597, 187 Md. 67.

83. N.Y.—*Corpus Juris* quoted in *People ex rel. Ray v. Martin*, 47 N.Y.S.2d 883, 892, 181 Misc. 925.
Or.—*Cook v. Port of Portland*, 27 P. 263, 264, 20 Or. 580, 13 L.R.A. 533.
42 C.J. p 1413 note 26.

84. Wash.—*Great Northern R. Co. v. State*, 173 P. 40, 43, 102 Wash. 348, L.R.A.1918E 987.
42 C.J. p 1413 note 27.

85. Ala.—*Horton v. Mobile School Comrs.*, 43 Ala. 598, 607.
Or.—*Cook v. Port of Portland*, 27 P. 263, 264, 20 Or. 580, 13 L.R.A. 533.

86. Ala.—*Horton v. Mobile School Com'rs*, 43 Ala. 598, 607.
42 C.J. p 1414 note 52.

87. S.C.—*Corpus Juris* quoted in *Ellerbe v. David*, 8 S.E.2d 518, 521, 193 S.C. 332.
42 C.J. p 1414 note 53.

88. S.C.—*Corpus Juris* quoted in *Ellerbe v. David*, 8 S.E.2d 518, 521, 193 S.C. 332.
42 C.J. p 1415 note 54.

89. Phrases

(1) "Municipal aid" see Municipal Corporations § 1870.

(2) "Municipal bonds" see Municipal Corporations § 1902.

(3) "Municipal claim" see 14 C.J.S. p 1188 note 68.

(4) "Municipal courts" see Courts §§ 11, 249–297.

(5) "Municipal expenses" see Municipal Corporations § 1027.

(6) "Municipal fine" see Municipal Corporations § 179.

(7) "Municipal function" see Municipal Corporations § 110.

(8) "Municipal jurisdiction" see Municipal Corporations § 153.

(9) "Municipal law" discussed generally see 52 C.J.S. p 1027 note 66—p 1028 note 91; distinguished from "international law" see International Law § 2.

(10) "Municipal lien" see Municipal Corporations § 1564.

(11) "Municipal offense;" an offense against a particular state or separate community.—*Cook v. Port of Portland*, 27 P. 263, 264, 20 Or. 580, 13 L.R.A. 533.

(12) "Municipal officer" see Municipal Corporations § 462.

(13) "Municipal ordinance" see Municipal Corporations § 411.

(14) "Municipal regulation" see Municipal Corporations § 411.

(15) "Municipal securities;" the evidence of indebtedness issued by cities, towns, counties, townships, school districts, and other territorial divisions of a state.—*Black L.D.*

For particular securities which may properly come within such designation see the C.J.S. titles Counties §§ 222–278, Drains § 12, Highways § 158, Municipal Corporations §§ 1902–1904, Schools and School Districts §§ 323–375, also 56 C.J. p 531 note 27—p 634 note 96, and Towns §§ 129–154, also 63 C.J. p 185 note 6—p 196 note 92.

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END OF VOLUME

